Overview of Asylum Standard & Case Law

“The Congressional intent of the 1980 Refugee Act was to establish a politically and geographically neutral adjudication standard for both asylum status and refugee status, a standard to be applied equally to all applicants regardless of country of origin.”

Modern asylum laws were established in 1980 when Congress enacted the Refugee Act in order to bring the United States into compliance with its international obligations. The legal standards for asylum are set forth in the Immigration and Nationality Act and its Code of Federal Regulations. The following is an overview of the most common areas of asylum law. The pro bono is also urged to seek out additional information on the topic.

2.1 Definitions and Case Law

Definition of Refugee: A person seeking asylum has the burden to prove that he/she meets the definition of refugee.

INA § 101(a)(42)(a); 8 U.S.C.A. § 1101(42)(a), defines ‘refugee’ as:

“[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

Asylum Standard:

Under this standard, the asylum applicant must show:

- Past persecution or a well-founded fear of future persecution on account of:
  - Race
  - Religion
  - Nationality
  - Membership in a particular Social Group
  - and/or Political Opinion.

See 8 CFR §[1]208.13(b)(1) and (2)

An applicant must show by clear and convincing evidence that he/she has filed for asylum within one year of entering the U.S. See INA § 208(a)(2)(B)

Definition of Persecution

Neither the INA nor its Code of Federal Regulations defines persecution. Case law has defined persecution as the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g. race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. *Matter of Laipenieks*, 18 I & N Dec. 433, 456-457 (BIA 1983) *See Matter of Acosta* 19 I&N Dec. 211 and *Mikhael v. INS*, 115 F. 3d 299, 303 (5th Cir. 1997).

Examples of Persecution

While persecution is not defined in the INA, courts have made clear that it includes threats to life, including confinement, and torture. *See, Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997). Persecution may also include rape, sexual assault, harm to a person’s family, prolonged detention, restrictions on the right to earn a living, interference with privacy and more. In some situations, deliberate imposition of severe economic deprivation may also constitute persecution. *See Berdo v. INS*, 432 F.2d 824, 847 (6th Cir. 1970).

Well-Founded Fear

To qualify for asylum, an applicant must demonstrate a well-founded fear of future persecution. This requirement has objective and subjective components. To satisfy the objective component, the applicant must show that a reasonable person in the same circumstances would fear persecution. *See Mikhael v. INS*, 115 F.3d 299, 304 (5th Cir. 1997); *Kratchmarov v. Heston*, 172 F.3d 551, 553 (8th Cir. 1999). The subjective component requires a showing that the applicant’s fear is genuine. *See Bhatt v. Reno*, 172 F.3d 978, 981 (7th Cir. 1999).

The Supreme Court has noted that fear may be well-founded if there is only a 10% chance (or even less) of the events occurring. *See INS v. Cardoza-Fonseca*, 480 US 421, 440 (1987).³

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³ *Id.* at 28-29.
Past Persecution

Past persecution, in itself, can establish eligibility for asylum. 8 CFR §208.13(b). See Rivera-Cruz v. INS, 948 F.2d 962, 969 (5th Cir. 1991).

The Rivera court noted that under Matter of Chen Int. Dec. 3104 (BIA 1989), asylum may be granted under certain circumstances even if there is no reasonable likelihood of present persecution. Discretionary asylum may be granted if past persecution was so severe that repatriation of the applicant would be inhumane. Id. at 969. This standard is exceedingly difficult to meet.4

Established past persecution creates the presumption that an applicant has a well-founded fear of persecution. See Marcu v. INS, 147 F.3d 1078, 1081 (9th Cir.1998); 8 CFR §208.13(b)(1). The INS has the burden to rebut the presumption. Matter of H-, Int. Dec. 3276 (BIA 1996) at 16.

If a preponderance of the evidence establishes that conditions in the applicant’s home country have changed to such an extent that the applicant no longer has a well-founded fear of persecution, the request for asylum will be denied. 8 CFR § [1]208.13(b)(1)(i).5

Persecution “On Account Of” One of the Five Enumerated Grounds

An asylum applicant must demonstrate that the persecution suffered or feared is/was “on account of” his/her race, religion, nationality, membership in a particular social group, and/or political opinion. Applicants who filed new applications after May 11, 2005, must show that one of the five grounds was or will be at least one central reason for their persecution. INA 208(b)(1)(B)(i).

Five Enumerated Grounds: Race, Religion, National Origin, Membership in a Particular Social Group, and Political Opinion

1. Race

Definition: Race in the asylum law context is understood in its widest sense, including “all kinds of ethnic groups that are referred to as ‘races’ in common usage.” UNHCR Handbook on Procedures and Criteria for Determining Refugee Status6 notes Apartheid in South Africa, the Holocaust, and slavery as examples of persecution on the basis of race.7

Case Law - Race

Singh v. INS, 94 F. 3d 1353 (9th Cir. 1996). Claim of Indo-Fijian analyzed as on account of race.

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4 Id. at 28-29.
5 Id. at 33.
6 http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PUBL&id=3d58e13b4 at ¶ 68.
7 Germain at 36.
Duarte de Guinac v. INS, 179 F. 3d 1156, 1159 n.5 (9th Cir. 1999). Persecution based on ethnicity, “a category that falls somewhere between ‘race’ and ‘nationality’,” can amount to persecution on account of race.

Andriasian v. INS, 180 F. 3d 1033, 1042 n.15 (9th Cir. 1999). Persecution based on Armenian ethnicity treated as on account of race.

2. Religion

Definition: Religion should be interpreted broadly to encompass all manner of religious beliefs and practices that might give rise to persecution.

Persecution on account of religion may assume various forms, including the prohibition of membership in a religious community, of worship in private or in public, of religious instruction, or serious discriminatory measures imposed on persons because they practice their religion or belong to a particular religious community. UNHCR Handbook at ¶72.8

The International Religious Freedom Act of 1998. The International Religious Freedom Act of 1998 (Pub. L. No. 105-292) established within the State Department an Office of International Religious Freedom, whose mission is to promote religious freedom as a core objective of U.S. foreign policy. The Office monitors religious persecution and discrimination worldwide, recommends and implements policies in respective regions or countries, and develops programs to promote religious freedom.9

The Secretary of State, with the assistance of the Office of International Religious Freedom, prepares an annual report on religious freedom on September 1 of each year. The report describes the nature and extent of violations of religious freedom committed or tolerated by foreign governments.

However, 22 USC §6471 states that while the report, “together with other relevant documentation, shall serve as a resource for immigrations judges” and other officials in asylum claims, “[a]bsence of reference by the Annual Report to conditions described by the alien shall not constitute the sole grounds for a denial of the alien’s claim.”10

Case Law – Religion

Ahmad v. INS, 163 F.3d 457, 463 (7th Cir. 1999). Mere assertion that one is aligned with a minority religion is not sufficient to establish a prima facie case of religious persecution. See also UNHCR Handbook at ¶73.

Kojevnikova v. Reno, 173 F.3d 844 (2d Cir. 1999). Applicant detained for some months at a “psychiatric” institution because of her Jewish ethnicity and her involvement with a Jewish dissident group suffered past persecution.

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8 Id. at 33.
9 See http://www.state.gov/g/drl/irf/.
10 Germain at 35-38.
Abdel-Masieh v. INS, 73 F.3d 579 (5th Cir. 1996). Sudanese Christian who demonstrated that his government persecutes Christians was not required to demonstrate countrywide persecution.\textsuperscript{11}

3. National Origin

“Nationality” refers to both citizenship and membership in an ethnic or linguistic group and may overlap with “race.” UNHCR Handbook at ¶74. See, e.g., Perkovic v. INS, 33 F.3d 615 (6th Cir. 1994) (granting asylum to an ethnic Albanian from Yugoslavia).

Persecution on the basis of nationality may also overlap significantly with that based on political opinion, particularly where a political movement is identified with a specific “nationality.” Handbook at ¶75. Also, it is quite possible for members of a majority group to face persecution by a dominant minority. Id. at ¶76. \textsuperscript{12}

4. Membership in a Particular Social Group

The BIA, in Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985), interpreted the phrase “persecution on account of membership in a particular social group” to mean:

“Persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”

The First, Third, and Seventh Circuit Courts of Appeals have endorsed this approach. The Ninth Circuit set forth a four-part test for determining a particular social group in Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986), which was specifically rejected by the Seventh Circuit in Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998), in favor of the BIA’s Acosta approach.\textsuperscript{13}

Case Law - Membership in a Particular Social Group

- Mgoian v. INS, 184 F.3d 1029, 1036 (9th Cir. 1999). A family that plays a prominent role in a minority group that is the object of widespread hostile treatment.


- Persecution related to gender:

\textsuperscript{11} Id. at 36.

\textsuperscript{12} Id. at 38.

\textsuperscript{13} Id. at 39-40.
Matter of Kisinga, Int. Dec. 3278 (BIA 1996). Female member of the Tchamba-Kunsuntu tribe who had not been subjected to female genital mutilation and who was opposed to the practice.

Matter of R-A-, 22 I&N Dec. 906 (BIA 1999). Guatemalan woman married to a government soldier who abused her for 10 years. The Attorney General recently remanded the case back to the BIA. The case is pending final regulations.


5. Political Opinion.

Asylum claims based on political opinion can arise from actual political opinions expressed through words or actions. See, e.g., Chang v. INS, 119 F.3d 1055, 1063 (3d Cir. 1997); Tarabac v. INS, 182 F.3d 1114, 1119 (9th Cir. 1999). Persecution on account of political opinion means “persecution on account of the victim's political opinion, not the persecutor's.” Elias-Zacarias v. INS, 502 US 478, 482 (1992) (emphasis in original).

Political opinions are not always straightforward claims based on one’s expressed political opinion. Other types include:

- “Imputed” Political Opinion refers to a political opinion that is mistakenly attributed to a person. In Sangha v. INS, 103 F.3d 1482, 1489 (9th Cir. 1997), a 15-year old Indian boy was threatened by a terrorist group. The boy's father was a member of a political party called Akali Dal. The son did not know anything and was never a member of the party. The opposing terrorist group beat up the father and threatened to kill the Sangha family. Past persecution of family members is routinely considered as evidence of possible imputed political opinion.

- “Unexpressed Political Opinions” refer to political opinions where the applicant has yet to express a political opinion. However, due to the strength of his/her convictions it could be reasonable to assume such an opinion would eventually be expressed. At such time the applicant would come into conflict with the government’s authorities. See UNHCR’s Handbook ¶82.

- “Neutrality” refers to a situation where a conscious choice to remain neutral is considered to be a political opinion. See, e.g., Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990).

- “Coercive Population Control” can also be considered a political opinion. Pursuant to a 1996 amendment to the definition of refugee, persons who have suffered or fear persecution for resistance to coercive population control measures are deemed to have a well-founded fear of persecution based on their political opinion. 8 USC §1101(a)(42)(B).

- “Mixed Motives” applies to cases before May 11, 2005. It refers to a situation in which the persecutor has more than one motive to persecute a person. See, e.g., Matter of D-V-, Int. Dec. 3252 (BIA 1993). Passage of the REAL ID Act requires that race, religion, nationality, political opinion, or particular social group be at least one central reason for the persecution.
2.2 Exceptions to the Authority to Apply for Asylum under INA § 208(a)(2)

Under the following circumstances an asylum seeker does not have the authority to apply for asylum.

1. **Safe Third Country.** If the Attorney General determines that the asylum seeker may be safely removed to another country, he/she may not apply for asylum in the U.S. INA § 208(a)(2)(A) In Matter of Pula, 19 I & N Dec. 467 at 473 the BIA took the following factors into consideration:
   
   a. Whether the alien passed through any other countries or arrived in the United States directly from his/her country
   
   b. Whether orderly refugee procedures were in fact available to help him/her in any country he/she passed through
   
   c. Whether he/she made any attempts to seek asylum before coming to the United States
   
   d. The length of time [he/she] remained in a third country
   
   e. Taking into consideration his/her living conditions, safety, and potential for long-term residency in third country, the BIA grants applicants’ asylum as a matter of discretion, despite the use of false documents to gain passage to the United States.  

On December 29, 2004 the U.S and Canada Implemented a Safe Third Country Agreement on Asylum:

The agreement limits certain individuals from applying for refugee/asylum status at the U.S./Canadian border.  

2. **One-Year Filing Deadline.** Asylum applications filed on or after April 1, 1998 must be filed within one year from the date the applicant first entered the United States. If he/she cannot prove entry, the applicant is not eligible for asylum. See INA § 208(a)(2)(B) and 8 CFR 208.4(a)(2). Several exceptions apply:  

   a. Changed circumstances, such as change in country conditions or a change in the applicant’s personal circumstances.

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15 Federal Register: November 29, 2004 (Volume 69, Number 228)
http://a257.g.akamaitech.net/7/257/2422/06Jun20041800/edocket.access.gpo.gov/2004/04-26239.htm.

b. Extraordinary circumstances, such as serious illness or mental or physical disability that may be a result of torture.

c. Legal disability, such as unaccompanied minors or mental impairment.

d. Ineffective assistance of counsel.

e. Maintaining some type of legal status.

f. Timely Initial submission of application, such as an administrative closure or improper filing of I-589 application before the one-year deadline.

3. Prior Asylum Denial. An applicant cannot reapply for asylum if his/her application has been previously denied unless the applicant can demonstrate a change in circumstances. INA §208(a)(2)(C) and (D)

Judicial Review. INA § 208(a)(3) provides that “[n]o court shall have jurisdiction to review any determination of the Attorney General”. Other areas that cannot be appealed in Federal Court include issues related to safe third country, one-year filing deadline, previous asylum denials, and changed circumstances. See INA § 208(a)(2) for more information and exceptions.

2.3 Exceptions to Conditions for Granting Asylum under INA § 208(b)

1. Persecution of Others. Ordering, inciting, or assisting in the persecution of others on one of the five grounds. INA §§208(b)(2)(A)(i) and 241(b)(3)(B)(i)

2. Particularly Serious Crimes. Having been convicted of a particularly serious crime, constituting a danger to the community of the U.S. INA §§208(b)(2)(A)(ii) and 241(b)(3)(B)(ii), including aggravated felonies (INA 101(a)(43)

3. Serious Non-Political Crimes. Legitimate reasons for believing the applicant committed a serious non-political crime outside the U.S. INA §§208(b)(2)(A)(iii) and 241(b)(3)(B)(iii)

4. Danger to the Security of the U.S. Reasonable grounds for believing the applicant is a danger to the security of the U.S. INA §§208(b)(2)(A)(iv) and 241(b)(3)(B)(iv)


6. Firm Resettlement. The alien has firmly resettled in another country before coming to the U.S. INA §208(b)(2)(A)(vi). An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(a). That his or her entry into the country was a necessary consequence of his or her flight from persecution, that he or she remained in the country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country or

(b). That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. 8 C.F.R. 208.15
The Exercise of Discretion. The BIA recognizes that asylum is different from other immigration benefits. It has established exceptional limitations on the exercise of discretion in asylum cases. The BIA found that negative factors such as the use of false documents and transit through a safe third country should not be determinative (see In re Pula and In re Kasinga). Positive factors have included general humanitarian considerations such as age, health, and severity of persecution.

2.4 Withholding of Removal (INA §241(b)(3) & 8 CFR [1]208.16)

When the client submits his/her I-589 Application for Asylum he/she will also be considered for withholding of removal. An individual ineligible for asylum may be eligible for withholding of removal. Withholding of removal forbids an alien or refugee from being returned to any country where the alien’s life or freedom is threatened. See INS v. Cardoza-Fonseca, 480 US 421, 429 (1987).

In order to be eligible for withholding of removal, an applicant has the burden of establishing that it is more likely than not that he or she will be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion if returned to his/her country of origin. This requires the establishment of a "clear probability of persecution," which is a heavier burden than the establishment of a "well-founded fear of persecution" necessary for asylum. See INS v. Stevic, 467 U.S. 407 (1984).

For most clients, withholding of removal is less desirable because it does not allow them to bring their spouse and children to the United States. In addition, derivative status is not available for dependent family members included in the application. The status also does not allow the client to adjust to become a permanent resident. Although he/she is entitled to employment authorization\(^\text{17}\), he/she is not allowed to remain in the United States indefinitely like an asylee.\(^\text{18}\) Once the danger in the home country has ended and the threat of persecution has ceased, the individual is no longer qualified to remain under a withholding of removal order. Furthermore, the individual may be removed to a third country at any time. The order of withholding is not a permanent solution for the refugee. At some point in the future, that individual may have to return to the home country.\(^\text{19}\)

Withholding of removal is typically granted at the EOIR. Since the persecution standard is higher, a withholding of removal grant is rare. The most common grant is given to an individual who has failed to meet or evidence the one year filing deadline.

2.5 Withholding of Removal Under the Convention Against Torture (CAT) (8 CFR [1]208.16(c))

When the client submits his I-589 Application for Asylum he/she may also request relief under the Convention Against Torture by checking the box on the first page which states: “Please check the box if you also want to apply for withholding of removal under the Convention Against Torture.” There is also a checkbox on page 5, section B, question 1: “Torture Convention”.

\(^\text{17}\) 8 CFR § 274a.12(a)(10).

\(^\text{18}\) Under some circumstances an asylee’s status can be terminated pursuant to 8 CFR § 208.22.

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is a treaty to which the United States is a signatory. CAT prohibits the return of a person to a country where it is more likely than not that the person would be subjected to torture. Regulations require that the harm be “inflicted by or at the instigation or with the consent of or acquiescence of a public official or other person acting in an official capacity.” 8 CFR §1208.18(a). See, e.g., In re S-V, Int. Dec. 3430 (BIA 2000) (holding that Colombian authorities did not “acquiesce” to torture by guerrillas). Contrast with In re Opku, Int. Dec. ___ (BIA 2000) (holding that Ghanaian prison guards are “public officials” within the meaning of CAT). In order to be eligible for withholding of removal under CAT the client must:

a. Be a victim of torture as defined by 8 CFR 1208.18(a).

b. Prove he/she is more likely than not to be tortured if removed to the proposed country of removal. Assessment of likelihood of torture based on:

   i. Evidence of past torture

   ii. Ability to safely relocate to another portion of the country where he/she is not likely to be tortured

   iii. Evidence of gross human rights violations in the country

Withholding of removal under CAT is typically granted at the EOIR. However, due to the BIA’s narrow interpretation of the term “acquiescence” eligibility is more difficult. The BIA requires the government officials be “willfully accepting” of torture inflicted upon its citizens. The Ninth Circuit has found it is contrary to congressional intent to require only “awareness,” and not to require “actual knowledge” or “willful[ly] accept[ance].”[20] To date other courts have not accepted this interpretation.

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