REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
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Unit 8: Protected Grounds of Religion, Race, and Nationality

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GUIDELINES ON INTERNATIONAL PROTECTION:
Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of its *1967 Protocol.* These Guidelines complement the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, re-edited, Geneva, January 1992). They are informed, *inter alia*, by a roundtable organised by UNHCR and the Church World Service in Baltimore, Maryland, United States, in October 2002, as well as by an analysis of relevant State practice and international law.

These Guidelines are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

GUIDELINES ON INTERNATIONAL PROTECTION
Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees

I. INTRODUCTION

1. Claims to refugee status based on religion can be among the most complex. Decision-makers have not always taken a consistent approach, especially when applying the term "religion" contained in the refugee definition of the 1951 Convention relating to the Status of Refugees and when determining what constitutes "persecution" in this context. Religion-based refugee claims may overlap with one or more of the other grounds in the refugee definition or, as can often happen, they may involve post-departure conversions, that is, *sur place* claims. While these Guidelines do not purport to offer a definitive definition of "religion", they provide decision-makers with guiding parameters to facilitate refugee status determination in such cases.

2. The right to freedom of thought, conscience and religion is one of the fundamental rights and freedoms in international human rights law. In determining religion-based claims, it is therefore useful, *inter alia*, to draw on Article 18 of the 1948 Universal Declaration of Human Rights (the "Universal Declaration") and Articles 18 and 27 of the 1966 International Covenant on Civil and Political Rights (the "International Covenant"). Also relevant are the General Comments issued by the Human Rights Committee,[1] the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, the 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities and the body of reports of the Special Rapporteur on Religious Intolerance.[2] These international human rights standards provide guidance in defining the term "religion" also in the context of international refugee law, against which action taken by States to restrict or prohibit certain practices can be examined.

II. SUBSTANTIVE ANALYSIS

A. Defining "religion"

3. The refugee definition contained in Article 1A(2) of the 1951 Convention states:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: ...
>
> (2) ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former

[1] See, in particular, Human Rights Committee, General Comment No. 22, adopted 20 July 1993, UN doc. CCPR/C/21/Rev.1/ADD.4, 27 September 1993.

[2] The latter can be found at http://www.unhchr.ch/huridocda/huridoca.nsf/FramePage/intolerance+En?OpenDocument. Relevant regional instruments include Article 9 of the 1950 European Convention on Human Rights; Article 12 of the 1969 American Convention on Human Rights; Article 8 of the 1981 African Charter on Human and Peoples' Rights.

habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

4. The *travaux préparatoires* of the 1951 Convention show that religion-based persecution formed an integral and accepted part of the refugee definition throughout the drafting process. There was, however, no attempt to define the term as such.[3] No universally accepted definition of "religion" exists, but the instruments mentioned in paragraph 2 above certainly inform the interpretation of the term "religion" in the international refugee law context. Its use in the 1951 Convention can therefore be taken to encompass freedom of thought, conscience or belief.[4] As the Human Rights Committee notes, "religion" is "not limited ... to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions".[5] It also broadly covers acts of failing or refusing to observe a religion or to hold any particular religious belief. The term is not, however, without limits and international human rights law foresees a number of legitimate boundaries on the exercise of religious freedom as outlined in greater detail in paragraphs 15–16 below.

5. Claims based on "religion" may involve one or more of the following elements:
   a) religion as belief (including non-belief);
   b) religion as identity;
   c) religion as a way of life.

6. "Belief", in this context, should be interpreted so as to include theistic, non-theistic and atheistic beliefs. Beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason.

7. "Identity" is less a matter of theological beliefs than membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry. A claimant may identify with, or have a sense of belonging to, or be identified by others as belonging to, a particular group or community. In many cases, persecutors are likely to target religious groups that are different from their own because they see that religious identity as part of a threat to their own identity or legitimacy.

8. For some individuals, "religion" is a vital aspect of their "way of life" and how they relate, either completely or partially, to the world. Their religion may manifest itself in such activities as the wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary

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[3] A key source in States' deliberations was the refugee definition set out in the 1946 Constitution of the International Refugee Organisation (IRO). This included those expressing valid objections to return because of a fear of persecution on grounds of "race, religion, nationality or political opinions". (A fifth ground, membership of a particular social group, was approved later in the negotiating process for the 1951 Convention.)

[4] See, also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee* Status, 1979, Geneva, re-edited 1992 (hereafter "UNHCR Handbook"), paragraph 71.

[5] Human Rights Committee, General Comment No. 22, above note 1, paragraph 2.

requirements. Such practices may seem trivial to non-adherents, but may be at the core of the religion for the adherent concerned.

9. Establishing sincerity of belief, identity and/or a certain way of life may not necessarily be relevant in every case.[6] It may not be necessary, for instance, for an individual (or a group) to declare that he or she belongs to a religion, is of a particular religious faith, or adheres to religious practices, where the persecutor imputes or attributes this religion, faith or practice to the individual or group. As is discussed further below in paragraph 31, it may also not be necessary for the claimant to know or understand anything about the religion, if he or she has been identified by others as belonging to that group and fears persecution as a result. An individual (or group) may be persecuted on the basis of religion, even if the individual or other members of the group adamantly deny that their belief, identity and/or way of life constitute a "religion".

10. Similarly, birth into a particular religious community, or a close correlation between race and/or ethnicity on the one hand and religion on the other could preclude the need to enquire into the adherence of an individual to a particular faith or the bona fides of a claim to membership of that community, if adherence to that religion is attributed to the individual.

B. Well-founded fear of persecution

a) General

11. The right to freedom of religion includes the freedom to manifest one's religion or belief, either individually or in community with others and in public or private in worship, observance, practice and teaching.[7] The only circumstances under which this freedom may be restricted are set out in Article 18(3) of the International Covenant, as described in paragraphs 15–16 below.

12. Persecution for reasons of religion may therefore take various forms. Depending on the particular circumstances of the case, including the effect on the individual concerned, examples could include prohibition of membership of a religious community, of worship in community with others in public or in private, of religious instruction, or serious measures of discrimination imposed on individuals because they practise their religion, belong to or are identified with a particular religious community, or have changed their faith.[8] Equally, in communities in which a dominant religion exists or where there is a close correlation between the State and religious institutions, discrimination on account of one's failure to adopt the dominant religion or to adhere to its practices, could amount to persecution in a particular case.[9] Persecution may be inter-religious (directed against adherents or communities of different faiths), intra-religious (within the same religion, but between different sects,

[6] For further analysis of credibility issues, see paragraphs 28–33 below.
[7] See Universal Declaration, Article 18 and International Covenant, Article 18(1).
[8] UNHCR Handbook, above note 4, paragraph 72.
[9] In this context, Article 27 of the International Covenant reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

or among members of the same sect), or a combination of both.[10] The claimant may belong to a religious minority or majority. Religion-based claims may also be made by individuals in marriages of mixed religions.

13. Applying the same standard as for other Convention grounds, religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution.[11] Indeed, the Convention would give no protection from persecution for reasons of religion if it was a condition that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Bearing witness in words and deeds is often bound up with the existence of religious convictions.

14. Each claim requires examination on its merits on the basis of the individual's situation. Relevant areas of enquiry include the individual profile and personal experiences of the claimant, his or her religious belief, identity and/or way of life, how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution. In this context, the well-founded fear "need not necessarily be based on the applicant's own personal experience". What, for example, happened to the claimant's friends and relatives, other members of the same religious group, that is to say to other similarly situated individuals, "may well show that his [or her] fear that sooner or later he [or she] also will become a victim of persecution is well-founded".[12] Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. As the UNHCR Handbook notes, there may, however, be special circumstances where mere membership suffices, particularly when taking account of the overall political and religious situation in the country of origin, which may indicate a climate of genuine insecurity for the members of the religious community concerned.[13]

b) Restrictions or limitations on the exercise of religious freedom

15. Article 18(3) of the International Covenant permits restrictions on the "freedom to manifest one's religion or beliefs" if these limits "are prescribed by law and are

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[10] Interim Report of the Special Rapporteur on Religious Intolerance, "Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief", UN doc. A/53/279, 24 August 1998, paragraph 129.

[11] See also, UNHCR, "Guidelines on International Protection: 'Membership of a particular social group' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", HCR/GIP/02/02, 7 May 2002, paragraph 6. Similarly, in internal flight or relocation cases, the claimant should not be expected or required to suppress his or her religious views to avoid persecution in the internal flight or relocation area. See UNHCR, "Guidelines on International Protection: 'Internal Flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees", HCR/GIP/03/04, 23 July 2003, paragraphs 19, 25.

[12] UNHCR Handbook, above note 4, paragraph 43.

[13] UNHCR Handbook, above note 4, paragraph 73.

necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". As the Human Rights Committee notes: "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner."[14] In assessing the legitimacy of the restriction or limitation at issue, it is therefore necessary to analyse carefully why and how it was imposed. Permissible restrictions or limitations could include measures to prevent criminal activities (for example, ritual killings), or harmful traditional practices and/or limitations on religious practices injurious to the best interests of the child, as judged by international law standards. Another justifiable, even necessary, restriction could involve the criminalisation of hate speech, including when committed in the name of religion. The fact that a restriction on the exercise of a religious freedom finds the support of the majority of the population in the claimant's country of origin and/or is limited to the manifestation of the religion in public is irrelevant.

16. In determining whether restrictions or limitations rise to the level of persecution, the decision-maker must not only take into account international human rights standards, including lawful limitations on the exercise of religious freedom, but also evaluate the breadth of the restriction and the severity of any punishment for non-compliance. The importance or centrality of the practice within the religion and/or to the individual personally is also relevant. The decision-maker should proceed cautiously with such inquiries, taking into account the fact that what may seem trivial to an outsider may be central to the claimant's beliefs. Where the restricted practice is not important to the individual, but important to the religion, then it is unlikely to rise to the level of persecution without additional factors. By contrast, the restricted religious practice may not be so significant to the religion, but may be particularly important to the individual, and could therefore still constitute persecution on the basis of his or her conscience or belief.

c) Discrimination

17. Religion-based claims often involve discrimination.[15] Even though discrimination for reasons of religion is prohibited under international human rights law, all discrimination does not necessarily rise to the level required for recognition of refugee status. For the purposes of analysing an asylum claim, a distinction should be made between discrimination resulting merely in preferential treatment and discrimination amounting to persecution because, in aggregate or of itself, it seriously restricts the claimant's enjoyment of fundamental human rights. Examples of discrimination amounting to persecution would include, but are not limited to, discrimination with consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on the right to earn a livelihood, or to access normally available educational institutions and/or health services. This may also be so where economic measures imposed "destroy the economic existence" of a particular religious group.[16]

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[14] See Human Rights Committee, General Comment No. 22, above note 1, paragraph 8.
[15] See generally, UNHCR Handbook, above note 4, paragraphs 54–55.
[16] UNHCR Handbook, above note 4, paragraphs 54 and 63.

18. The existence of discriminatory laws will not normally in itself constitute persecution, although they can be an important, even indicative, factor which therefore needs to be taken into account. An assessment of the implementation of such laws and their effect is in any case crucial to establishing persecution. Similarly, the existence of legislation on religious freedom does not of itself mean individuals are protected. In many cases, such legislation may not be implemented in practice or custom or tradition may, for instance, in practice override this.

19. Discrimination may also take the form of restrictions or limitations on religious belief or practice. Restrictions have, for instance, included penalties for converting to a different faith (apostasy) or for proselytising, or for celebrating religious festivals particular to the religion concerned. The compulsory registration of religious groups and the imposition of specific regulations governing them to restrict the exercise of freedom of religion or belief can also have a discriminatory aim or results. Such actions are legitimate only if they are "specified by law, objective, reasonable and transparent and, consequently, if they do not have the aim or the result of creating discrimination".[17]

d) Forced conversion

20. Forced conversion to a religion is a serious violation of the fundamental human right to freedom of thought, conscience and religion and would often satisfy the objective component of persecution. The claimant would still need to demonstrate a subjective fear that the conversion would be persecutory to him or her personally. Generally, this would be satisfied if the individual held convictions or faith or had a clear identity or way of life in relation to a different religion, or if he or she had chosen to be disassociated from any religious denomination or community. Where a claimant held no particular religious conviction (including one of atheism) nor a clear identification with a particular religion or religious community before the conversion or threat of conversion, it would be necessary to assess the impact of such a conversion on the individual (for example, it may be an act without correlative personal effects).

e) Forced compliance or conformity with religious practices

21. Forced compliance with religious practices might, for example, take the form of mandated religious education that is incompatible with the religious convictions, identity or way of life of the child or the child's parents.[18] It might also involve an obligation to attend religious ceremonies or swear an oath of allegiance to a particular religious symbol. In determining whether such forced compliance constitutes persecution, the policies or acts with which the person or group is required to comply, the extent to which they are contrary to the person's belief, identity or way of life and the punishment for non-compliance should be examined. Such forced compliance could rise to the level of persecution if it becomes an intolerable interference with the

[17] Special Rapporteur on freedom of religion or belief, interim report annexed to Note by the Secretary-General, "Elimination of All Forms of Religious Intolerance", UN doc. A/58/296, 19 August 2003, paragraphs 134–35.

[18] This would be likely also to interfere with the undertaking of States to respect the liberty of parents or legal guardians to ensure the religious and moral education of their children in conformity with their own convictions under Article 18(4) of the International Covenant.

individual's own religious belief, identity or way of life and/or if non-compliance would result in disproportionate punishment.

22. Forced compliance may also involve the imposition of a particular criminal or civil legal code purported to be based on a religious doctrine to which non-observers might object. Where such a code contains discriminatory substantive or procedural safeguards and especially where it imposes different levels of punishment upon adherents and non-adherents, it could well be regarded as persecutory. Where the law imposes disproportionate punishment for breaches of the law (for example, imprisonment for blasphemy or practising an alternative religion, or death for adultery), whether or not for adherents of the same religion, it would constitute persecution. Such cases are more common where there is limited or no separation between the State and the religion.

23. A specific religious code may be persecutory not just when enforced against non-observers, but also when applied to dissidents within or members of the same faith. The enforcement of anti-blasphemy laws, for example, can often be used to stifle political debate among co-religionists and could constitute persecution on religious and/or political grounds even when enforced against members of the same religion.

C. Special considerations

a) Gender

24. Particular attention should be paid to the impact of gender on religion-based refugee claims, as women and men may fear or suffer persecution for reasons of religion in different ways to each other. Clothing requirements, restrictions on movement, harmful traditional practices, or unequal or discriminatory treatment, including subjection to discriminatory laws and/or punishment, may all be relevant.[19] In some countries, young girls are pledged in the name of religion to perform traditional slave duties or to provide sexual services to the clergy or other men. They may also be forced into underage marriages, punished for honour crimes in the name of religion, or subjected to forced genital mutilation for religious reasons. Others are offered to deities and subsequently bought by individuals believing that they will be granted certain wishes. Women are still identified as "witches" in some communities and burned or stoned to death.[20] These practices may be culturally condoned in the

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[19] For more information, see UNHCR, "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", HCR/GIP/02/01, 7 May 2002, especially paragraphs 25–26.

[20] For description of these practices, see "Integration of the Human Rights of Women and the Gender Perspective Violence against Women, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49, Cultural practices in the family that are violent towards women", E/CN.4/2002/83, 31 January 2002, available at http://www.unhchr.ch/huridocda/huridoca.nsf/0/42E7191FAE543562C1256BA7004E963C/$File/G0210428.doc?OpenElement; "Droits Civils et Politiques et, Notamment: Intolérance Religieuse", Rapport soumis par M. Abdelfattah Amor, Rapporteur spécial, conformément à la résolution 2001/42 de la Commission des droits de l'homme, Additif: "Étude sur la liberté

claimant's community of origin but still amount to persecution. In addition, individuals may be persecuted because of their marriage or relationship to someone of a different religion than their own. When, due to the claimant's gender, State actors are unwilling or unable to protect the claimant from such treatment, it should not be mistaken as a private conflict, but should be considered as valid grounds for refugee status.

b) Conscientious objection

25. A number of religions or sects within particular religions have abstention from military service as a central tenet and a significant number of religion-based claimants seek protection on the basis of refusal to serve in the military. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably a criminal offence.[21]

26. Where military service is compulsory, refugee status may be established if the refusal to serve is based on genuine political, religious, or moral convictions, or valid reasons of conscience.[22] Such claims raise the distinction between prosecution and persecution. Prosecution and punishment pursuant to a law of general application is not generally considered to constitute persecution,[23] although there are some notable exceptions. In conscientious objector cases, a law purporting to be of general application may, depending on the circumstances, nonetheless be persecutory where, for instance, it impacts differently on particular groups, where it is applied or enforced in a discriminatory manner, where the punishment itself is excessive or disproportionately severe, or where the military service cannot reasonably be expected to be performed by the individual because of his or her genuine beliefs or religious convictions. Where alternatives to military service, such as community service, are imposed there would not usually be a basis for a claim. Having said this, some forms of community service may be so excessively burdensome as to constitute a form of punishment, or the community service might require the carrying out of acts which clearly also defy the claimant's religious beliefs. In addition, the claimant may be able to establish a claim to refugee status where the refusal to serve in the military is not occasioned by any harsh penalties, but the individual has a well-founded fear of serious harassment, discrimination or violence by other individuals (for example, soldiers, local authorities, or neighbours) for his or her refusal to serve.

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de religion ou de conviction et la condition de la femme au regard de la religion et des traditions", E/CN.4/2002/73/Add.2, 5 avril 2002, available (only in French) at http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/9fa99a4d3f9eade5c1256b9e00510d71?OpenDocument&Highlight=2,E%2FCN.4%2F2002%2F73%2FAdd.2 .

[21] See generally, UNHCR Handbook, above note 4, paragraphs 167–74.

[22] UNHCR Handbook, above note 4, paragraph 170.

[23] UNHCR Handbook, above note 4, paragraph 55–60.

III. PROCEDURAL ISSUES

a) General

27. The following are some general points of particular relevance to examining religion-based refuge claims:

a) Religious practices, traditions or beliefs can be complex and may vary from one branch or sect of a religion to another or from one country or region to another. For this reason, there is a need for reliable, accurate, up-to-date, and country- or region-specific as well as branch- or sect-specific information.

b) Refugee status determinations based on religion could also benefit from the assistance of independent experts with *particularised* knowledge of the country, region and context of the particular claim and/or the use of corroborating testimony from other adherents of the same faith.

c) Decision-makers need to be objective and not arrive at conclusions based solely upon their own experiences, even where they may belong to the same religion as the claimant. General assumptions about a particular religion or its adherents should be avoided.

d) In assessing religion-based claims, decision-makers need to appreciate the frequent interplay between religion and gender, race, ethnicity, cultural norms, identity, way of life and other factors.

e) In the selection of interviewers and interpreters, there should be sensitivity regarding any cultural, religious or gender aspects that could hinder open communication.[24]

f) Interviewers should also be aware of the potential for hostile biases toward the claimant by an interpreter, either because he or she shares the same religion or is not of the same religion, or of any potential fear of the same by the claimant, which could adversely affect his or her testimony. As with all refugee claims, it can be critical that interpreters are well-versed in the relevant terminology.

b) Credibility

28. Credibility is a central issue in religion-based refugee claims. While decision-makers will often find it helpful during research and preparation to list certain issues to cover during an interview, extensive examination or testing of the tenets or knowledge of the claimant's religion may not always be necessary or useful. In any case, knowledge tests need to take account of individual circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex.

29. Experience has shown that it is useful to resort to a narrative form of questioning, including through open-ended questions allowing the claimant to explain the personal significance of the religion to him or her, the practices he or she has engaged in (or has avoided engaging in out of a fear of persecution), or any other factors relevant to the reasons for his or her fear of being persecuted. Information may be elicited about the individual's religious experiences, such as asking him or her to describe in detail how he or she adopted the religion, the place and manner of

[24] See also, UNHCR, "Guidelines on Gender-Related Persecution", above note 19.

worship, or the rituals engaged in, the significance of the religion to the person, or the values he or she believes the religion espouses. For example, the individual may not be able to list the Ten Commandments or name the Twelve Imams, but may be able to indicate an understanding of the religion's basic tenets more generally. Eliciting information regarding the individual's religious identity or way of life will often be more appropriate and useful and may even be necessary. It should also be noted that a claimant's detailed knowledge of his or her religion does not necessarily correlate with sincerity of belief.

30. As indicated in paragraph 9 above, individuals may be persecuted on the basis of their religion even though they have little or no substantive knowledge of its tenets or practices. A lack of knowledge may be explained by further research into the particular practices of that religion in the area in question or by an understanding of the subjective and personal aspects of the claimant's case. For instance, the level of repression against a religious group in a society may severely restrict the ability of an individual to study or practise his or her religion. Even when the individual is able to receive religious education in a repressive environment, it may not be from qualified leaders. Women, in particular, are often denied access to religious education. Individuals in geographically remote communities may espouse adherence to a particular religion and face persecution as a result, yet have little knowledge of its formal practices. Over time, communities may adapt particular religious practices or faith to serve their own needs, or combine them with their more traditional practices and beliefs, especially where the religion has been introduced into a community with long-established traditions. For example, the claimant may not be able to distinguish between those practices which are Christian and those which are animist.

31. Less formal knowledge may also be required of someone who obtained a particular religion by birth and who has not widely practised it. No knowledge is required where a particular religious belief or adherence is imputed or attributed to a claimant.

32. Greater knowledge may be expected, however, of individuals asserting they are religious leaders or who have undergone substantial religious instruction. It is not necessary for such teaching or training to conform fully to objectively tested standards, as these may vary from region to region and country to country, but some clarification of their role and the significance of certain practices or rites to the religion would be relevant. Even claimants with a high level of education or schooling in their religion may not have knowledge of teachings and practices of a more complex, formal or obscure nature.

33. Subsequent and additional interviews may be required where certain statements or claims made by the claimant are incompatible with earlier statements or with general understandings of the religious practices of other members of that religion in the area or region in question. Claimants must be given an opportunity to explain any inconsistencies or discrepancies in their story.

c) Conversion post departure

34. Where individuals convert after their departure from the country of origin, this may have the effect of creating a *sur place* claim.[25] In such situations, particular credibility concerns tend to arise and a rigorous and in depth examination of the circumstances and genuineness of the conversion will be necessary. Issues which the decision-maker will need to assess include the nature of and connection between any religious convictions held in the country of origin and those now held, any disaffection with the religion held in the country of origin, for instance, because of its position on gender issues or sexual orientation, how the claimant came to know about the new religion in the country of asylum, his or her experience of this religion, his or her mental state and the existence of corroborating evidence regarding involvement in and membership of the new religion.

35. Both the specific circumstances in the country of asylum and the individual case may justify additional probing into particular claims. Where, for example, systematic and organised conversions are carried out by local religious groups in the country of asylum for the purposes of accessing resettlement options, and/or where "coaching" or "mentoring" of claimants is commonplace, testing of knowledge is of limited value. Rather, the interviewer needs to ask open questions and try to elicit the motivations for conversion and what effect the conversion has had on the claimant's life. The test remains, however, whether he or she would have a well-founded fear of persecution on a Convention ground if returned. Regard should therefore be had as to whether the conversion may come to the notice of the authorities of the person's country of origin and how this is likely to be viewed by those authorities.[26] Detailed country of origin information is required to determine whether a fear of persecution is objectively well-founded.

36. So-called "self-serving" activities do not create a well-founded fear of persecution on a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned. Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status or a complementary form of protection. In the event that the claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required. Where the opportunistic nature of the action is clearly apparent, however, this could weigh heavily in the balance when considering potential durable solutions that may be available in such cases, as well as, for example, the type of residency status.

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[25] Such a claim may also arise if a claimant marries someone of another religion in the country of asylum or educates his or her children in that other religion there and the country of origin would use this as the basis for persecution.

[26] See UNHCR Handbook, above note 4, paragraph 96.

222 F.3d 1066
United States Court of Appeals,
Ninth Circuit.

Ashok CHAND; Premila Mudaliar Chand,
Petitioners,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 98–70541.
|
Filed Aug. 2, 2000

Before: POLITZ,[1]REINHARDT, and HAWKINS, Circuit Judges.

Opinion

REINHARDT, Circuit Judge:

Petitioner Ashok Chand seeks review of the BIA's decision denying his claim for asylum and withholding of deportation. We grant Chand's petition for review and hold that he is eligible for asylum.[2]

I.

Chand is a Hindu Indian from Fiji who worked as a foreman in a shop of cabinet makers; he was not politically active. He lived in a small village on the island of Latouka. Two-thirds of the people in the village were ethnic Fijians while the other one-third were Indian Fijians. The village was run by a chief who was a good friend of Chand's father. The chief afforded Chand's family a measure of security in the village. Chand stated that there were no problems between the Indian Fijians and ethnic Fijians prior to 1987, but that the situation changed dramatically following the coups.[3] During the period immediately ***1070** after the military takeover, the Fijian army raided and robbed the homes and businesses of Indians in the village, and also burned the temple which Chand and other Indians used.

However, Chand's problems were not limited to the months following the coups. He continued to suffer acts of persecution on account of his race and religion in the years between 1987 and his departure from Fiji in February of 1993. Chand was the victim of violent attacks on several occasions. One day (in 1988) Chand was playing soccer on a Sunday. A group of soldiers approached the players and broke up the game, forcing the players to run barefoot on a hot coal tar highway. The soldiers also beat Chand on his left leg with the butt of a rifle.

[1] [2] Chand was attacked by Fijian soldiers again, in 1991. On that occasion, Chand was cutting firewood with his father in preparation for Chand's wedding. Soldiers approached them and asked Chand's father if they had paid the royalty for the wood. His father responded by noting that the soldiers asked only Indians, and not ethnic Fijians, about the royalty. In response, the soldiers started beating both Chand and his father.[4]

Soldiers attacked Chand on still another occasion, in 1992. At that time, Chand was the secretary of a charitable youth club that was running a bazaar during Easter—Chand was organizing the club's stand, which was run by teenagers. Soldiers attacked the stand, beat both Chand and the teenagers, and took the group's money as well as the sweets and coffee they were purveying.

On another occasion, ethnic Fijians assaulted Chand's father while he was harvesting sugar cane. His father died waiting for the bus to take him to the hospital. Chand did not say where he was when his father was killed.

In addition to being the victim of direct physical attacks, Chand suffered several incidents of economic persecution. Chand was robbed by ethnic Fijians while going to or coming from work on three different occasions in 1990. When he complained to the police about these robberies, they took his statement but never took any other action, saying that he should talk to his village chief about his problems. In 1991, while Chand was on a longer trip involving work, ethnic Fijians robbed him and a group of his co-workers of their equipment. Finally, in early 1992, while his wife was alone at home, soldiers came to the family's house and asked his wife for money. When she replied that she did not have any, they vandalized the outside of the house, damaging the walls.

The final acts which led to Chand's decision to flee Fiji came at the end of 1992. Despite problems that many Indians had experienced throughout the islands, Chand had remained relatively safe while in his home village because the village's chief had been a good friend of his father, and had provided the family with a measure of protection. However, after the chief died, Chand's protection evaporated. The Fijians who owned the land he had lived on ***1071** "raised his rent" from $100 per month to $3,000 per month. Chand was forced to leave the land. After forcing him to leave, the Fijian landlords also took his furniture and possession of the house, which belonged to him.[5] Chand and his wife took shelter with friends for roughly one month after being displaced, and then came to the United States.

*** The State Department's 1994 "Profile for Asylum Claims and Country Conditions" for Fiji noted that the Fijian Constitution assured the political dominance of ethnic Fijians through a system of racially divided voting. The profile also contained the following passage regarding racial crime in Fiji:

> Neither the Amnesty International 1992 annual report nor the Department of State's annual country report on Fiji has found evidence of widespread human rights violations in Fiji. Ethnic and communal differences, however, do cause significant social tension in Fiji. In some instances, this tension results in the harassment and intimidation of ethnic Indians by ethnic Fijians. The police are sometimes either unable or unwilling to prevent such harassment, which is frequently at a personal level difficult for the authorities to control or prevent. Indo–Fijians are also sometimes the victims of crime based on race. Inadequate police protection contributes to the frequency and seriousness of these incidents.

The Profile also stated that the government effectively upholds basic human rights, that there were no reports of political killings, and that, "despite the flawed nature of the Fijian political structure, we are not aware of any evidence that the Government of Fiji takes action against or fails to protect individuals solely because they are members of the Indo–Fijian community." It concludes with the following statement:

> There are acknowledged racial tensions in Fiji. Residents of that country from both ethnic communities, however, are leading tranquil and productive lives throughout Fiji. Indo–Fijians of Moslem, Hindu, Sikh and Christian faiths are economically active and engage in business and professional activities.

The record also contains a letter from a desk officer sent to the Immigration Judge at the INS's request. The letter stated that, although there was considerable racial tension in Fiji and "isolated incidents do occur," "there is no evidence that members of the Indian community have been consistently mistreated in the manner claimed by this applicant." The letter acknowledged the problems in Fiji that occurred around the time of the coup, stating that "political developments in Fiji in 1987 did result in some mistreatment but this was of short duration and has not been repeated." It added that emigration from Fiji "is prompted by economic considerations, not by human rights abuses." The letter's analysis concluded with a legal assessment. It stated that while the incidents described by Chand "are unfortunate and show a high level of prejudice, they do not appear to be the kind of mistreatment normally associated with asylum."

In addition to the documents from the State Department, the record contained a few articles from newspapers in Fiji. One, from 1994, prophetically described how the Prime Minister (who, as a military official, had led the coup in 1987) had subtly threatened the Indian community by referring to the possibility of another coup, "probably a bloody one." The Prime Minister also stated that it was wrong, according ***1072** to Fijian custom, to imprison young men for crimes (other than crimes involving battle). Another article described the Prime Minister's statement that Fiji would be better off if the Indians just went back to India.

II.

Chand and his wife entered the United States on temporary visitor visas, but overstayed their time and then applied for asylum and withholding of deportation.

....

[The IJ denied the claim, and Chand appealed to the BIA. After the BIA affirmed the IJ's decision, Chand petitioned for review.]

III.

....

"In order to establish eligibility for asylum on the basis of past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either 'unable or unwilling' to control." *Navas,* 217 F.3d at 655–56. For purposes of this appeal, the central questions are whether Chand has shown that the harm he suffered rises to the level of persecution, and whether he has shown that he was persecuted on account of a protected ground. If the answer to both these questions is "yes", we must also consider whether the INS has established a change in country conditions sufficient to rebut the presumption that arises of a well-founded fear of future persecution. That presumption can be overcome only by an individualized showing that because of the change that has occurred, the particular individual no longer has reason to fear that he would be subjected to persecution if he returned to the country he fled.

IV.

[11] [12] Despite the BIA's ruling, we think it evident that the harm Chand suffered rises to the level of persecution, and conclude that no reasonable fact-finder could have found otherwise. Chand was the victim of violence on three occasions, on all of which he was physically attacked by soldiers from the Fijian military. Physical harm has consistently been treated as persecution. *See de Guinac v. INS,* 179 F.3d 1156, 1161 (9th Cir.1999). Where ***1074** an applicant suffers such harm on more than one occasion, and as in this case is victimized at different times over a period of years, the harm is severe enough that no reasonable fact-finder could conclude that it did not rise to the level of persecution, particularly when the incidents are considered along with the other acts to which Chand was subjected. *See Korablina v. INS,* 158 F.3d 1038, 1044 (9th Cir.1998) (cumulative effect of several instances of violence and harassment compel finding of persecution).[14]

Chand was also robbed repeatedly, and testified that the police were not interested in dealing with this continuing problem. In addition, Chand's house was attacked by Fijian soldiers when his wife was at home alone, resulting in the destruction of his property (and great terror for his wife). We have treated persistent robbery under threatening conditions as persecution in another case involving an Indian Fijian asylum applicant, where there was evidence that the Fijian government was unable or unwilling to control such crime. *See Surita v. INS,* 95 F.3d 814, 817–18 (9th Cir.1996). Such evidence exists here as well.

[13] Chand ultimately fled Fiji after his house and all the furniture in it were taken from him when he and his wife were forced to vacate their home by their ethnic Fijian landlords. Upon being displaced, they were forced to stay with friends because they had become, literally, homeless. We have recognized that purely economic harm can rise to the level of persecution where there is "a probability of deliberate imposition of substantial economic disadvantage" upon the applicant on account of a protected ground. *Kovac v. INS,* 407 F.2d 102, 107 (9th Cir.1969); *Gonzalez v. INS,* 82 F.3d 903, 910 (9th Cir.1996). Economic persecution has been credited as an important part of asylum claims on numerous occasions. *See, e.g., Korablina,* 158 F.3d at 1045 (loss of job and substantial career obstacles because of anti-Semitism); *Gonzalez,* 82 F.3d at 910 (loss of ration card and business's inability to buy inventory constitute economic persecution); *Desir v. Ilchert,* 840 F.2d 723, 727–28 (9th Cir.1988) (finding persecution in part because of petitioner's inability to earn livelihood because of refusal to comply with corrupt government practices); *cf. Samimi v. INS,* 714 F.2d 992, 995 (9th Cir.1983) (holding that seizure of petitioner's father's land and livelihood could contribute to a finding of persecution).

[14] When considering an asylum claim, we consider cumulatively the harm an applicant has suffered. An applicant may suffer persecution because of the cumulative effect of several incidents, no one of which

rises to the level of persecution. *See Shirazi–Parsa v. INS,* 14 F.3d 1424, 1428 (9th Cir.1994), *overruled on other grounds by Fisher v. INS,* 79 F.3d 955 (9th Cir.1996).[15] Here, the harm Chand suffered, including the economic injury, when considered cumulatively, clearly rises to the level of persecution.

[15] It is difficult to know on what basis the BIA concluded that Chand's suffering did not rise to the level of persecution, because the BIA made no attempt to assess Chand's claim cumulatively. Nonetheless, we discern two strands of argument that the BIA appears to have relied upon. First, the decision below suggests that Chand's testimony was too general and vague to satisfy the burden of proof. Our review of the record reveals no such problem. Chand's testimony was clear, generally consistent, and sufficiently detailed. While it is true that certain events could have been described in greater detail, the absence of such detail is insignificant on the record before us, particularly given that the IJ made no attempt to elicit a more specific description from Chand. ***1075** The IJ had a duty, shared with Chand, to ascertain the information relevant to the asylum claim and to aid in the development of the record. *See Jacinto v. INS,* 208 F.3d 725, 732–33 (9th Cir.2000). Moreover, neither the IJ nor the BIA ever contended that Chand's testimony was generally lacking in credibility. Under such circumstances, any reasonable fact-finder would be compelled to conclude that the specificity of Chand's testimony was more than adequate to support his claim.

The BIA also appears to have believed that the result in Chand's case was foreclosed by our decision in *Prasad v. INS,* 47 F.3d 336 (9th Cir.1995) (*K. Prasad*). In *K. Prasad,* we denied an Indian Fijian asylum applicant's petition for review where the applicant had suffered a relatively mild beating in the immediate aftermath of the coups. We noted that he was detained for a short period, was not threatened, required no medical treatment, and presented no evidence that the Fijian government retained a continuing interest in him. *See id.* at 339–40.

Initially, we note that the BIA erred in its interpretation of *K. Prasad,* citing it for the proposition that the harm in that case did not constitute persecution, whereas we held only that the record did not *compel* the conclusion that the harm in the case constituted persecution. We made clear in *K. Prasad* that we would have upheld as reasonable a decision to grant asylum based on the single incident of violence in that case. *K. Prasad,* 47 F.3d at 340. Thus, the BIA was not bound by *K. Prasad* to reach the conclusion it did, regardless of whether or not the case, from our standpoint, is controlling.

In any event, *K. Prasad* is obviously distinguishable from this case. There we placed emphasis on the fact that the beating at issue was a single, non-serious incident, and that no one in Fiji had any "continuing interest" in persecuting Prasad beyond that one event. *Id.* at 339. Any other reading of *K. Prasad* would make it difficult to reconcile with our consistent practice of finding persecution where the petitioner was physically harmed. *See de Guinac v. INS,* 179 F.3d 1156, 1161 (9th Cir.1999) (citing *Borja v. INS,* 175 F.3d 732 (9th Cir.1999) (en banc) and *Korablina v. INS,* 158 F.3d 1038 (9th Cir.1998)); *cf. Lata v. INS,* 204 F.3d 1241, 1245 (9th Cir.2000) (finding no persecution where Indian Fijian woman was once chased by ethnic Fijian youths who threw stones at her and may have threatened her with assault).

Here, Chand suffered multiple incidents of physical harm, as well as other kinds of hardship. Moreover, unlike in *K. Prasad,* where the sole incident of persecution on account of a protected ground occurred in September of 1987, in the immediate wake of the coups in Fiji, Chand faced acts of persecution that occurred at various times during the period from 1987 until the time he left.[16]

When analyzed cumulatively, Chand's claim is stronger than the claim we considered in *Surita,* 95 F.3d at 819, where we granted an Indian Fijian's petition for review and found her eligible for asylum. In that case, the petitioner was repeatedly robbed during one week and then threatened by soldiers on one occasion. *Surita,* 95 F.3d at 817. Unlike Chand, Surita was never physically harmed, and did not suffer for any length of time, because she left Fiji a few weeks after these incidents, which was only six or seven weeks after the first coup. *Id.* at 818.

[16] [17] The BIA also appears to have concluded that the harm Chand suffered did not rise to the level of persecution because it was not different from the "general conditions of violence" in Fiji. However, ***1076** we have held, both in the context of Indian Fijian asylum applicants and in other cases, that where the petitioner establishes that many members of his or her group are targeted for persecution, *less* of an individualized showing is required to qualify for asylum, not more. *See Avetova–Elisseva v. INS,* 213 F.3d 1192, 1202 (9th Cir.2000); *Singh v. INS* (*R.J. Singh*), 94 F.3d 1353, 1359 (9th Cir.1996); *Kotasz v. INS,* 31 F.3d 847, 853 (9th

Cir.1994); *see also* 8 C.F.R. § 208.13(b)(2)(i). This does not mean that all Indian Fijians are eligible for asylum. On the contrary, an Indian Fijian who has suffered only a single isolated incident of harm, or very little cumulative harm, cannot prevail simply because many Indians face oppressive conditions. *See Lata,* 204 F.3d at 1243; *Kumar v. INS,* 204 F.3d 931 (9th Cir.2000); *Singh v. INS,* 134 F.3d 962 (9th Cir.1998) (*B. Singh*); *K. Prasad,* 47 F.3d at 336. Nevertheless, that other Indian Fijians have faced persecution similar to the persecution Chand suffered strengthens, rather than weakens, his claim. *See Avetova–Elisseva,* 213 F.3d at 1202 (holding that an applicant who is a member of a disfavored group, i.e. a group that is subject to systematic mistreatment, can establish eligibility for asylum without making the same showing he would have to make were he from a group that did not suffer such systematic mistreatment).

There is no doubt that Chand has made a sufficient showing of persecution. We hold that any reasonable fact-finder would have to conclude that Chand suffered "persecution" within the meaning of the asylum statute and governing regulations.

V.

[18] We think it equally clear that the BIA erred in concluding that the harm Chand suffered was not "on account of" a protected ground. At the outset, it appears that the incidents which were *unquestionably* on account of a protected ground, which the Board did not mention in its decision, may well be sufficient for Chand to establish eligibility for asylum. The BIA did not dispute that the attack on Chand that occurred at the bazaar during Easter was on account of race and religion, and (as we noted earlier) the Board said nothing at all about why it did not credit his testimony that he was displaced from his home on account of his race.[17] The violent Easter attack coupled with the displacement of Chand from his home was enough to satisfy the "on account of" requirement.

In addition, the BIA's analysis of other crucial incidents was misguided. The Board held that the soldiers' attack on Chand for playing soccer on a Sunday could not have been on account of a protected ground because he was playing with ethnic Fijians. However, it is apparent from Chand's testimony that the persecution was on account of religion, not race; the soldiers attacked the players for playing on a *Sunday,* which is a day of religious significance for Christian ethnic Fijians, but not for Hindus like Chand.[18]

[19] [20] [21] The INS does not defend the BIA's argument, but instead argues that there is no religious persecution in Fiji, citing a portion of the State Department ***1077** Profile, which suggests that communities of different faiths happily co-exist in Fiji. First, we will not infer that a petitioner's otherwise credible testimony is not believable merely because the events he relates are not described in a State Department document. Credible testimony by itself is sufficient to support an asylum claim. *See Ladha,* 215 F.3d at 898–901. Second, while we have recognized that a State Department's Country Report (and we do not have such a Report in the record before us) is "perhaps the best resource" for country conditions information, *Kazlauskas v. INS,* 46 F.3d 902, 906 (9th Cir.1995), we have never assumed that all potentially relevant incidents of persecution in a country are collected in the State Department's documentation. As the Seventh Circuit recently explained, State Department "reports are brief and general, and may fail to identify specific, perhaps local, dangers to particular, perhaps obscure, individuals." *Galina v. INS,* 213 F.3d 955, 958–59 (7th Cir.2000).[19]

The BIA also erred when it held that the beating Chand suffered at the hands of soldiers when he and his father were cutting firewood was not on account of a protected ground. The BIA stated that the attack occurred because Chand's father questioned the soldiers. It is true that Chand's father's question appears to have precipitated the beating. However, Chand's father asked the soldiers why only Indians, and not ethnic Fijians, were subjected to the royalty for wood collection—his question was an attempt to challenge the discriminatory enforcement of the royalty. Had Chand's father not been Indian he would not have challenged the discriminatory enforcement, and might not have been asked to pay the royalty in the first place. Thus, it is clear that the soldiers' attack on Chand and his father was motivated in part by the Chands' resistance to a racially discriminatory royalty, or at least by their assertion, as Indians, that they were the victims of discriminatory law enforcement. This constitutes persecution that was, at least in part, "on account of" race. *See Borja,* 175 F.3d at 735, 736 (holding that protected ground need only constitute *a* motive, not the *sole* motive, of persecution).

[22] We have held in other contexts that resistance to discriminatory government action that results in persecution is persecution on account of a protected

ground. For example, we found that the applicant had suffered persecution in *Desir,* 840 F.2d at 727–28, where he refused to pay money to corrupt quasi-governmental forces because he was opposed to the government, and then was punished as a result of his refusal to pay the money. Although having to pay the money might not have amounted to persecution, resisting the payment for political reasons and being beaten as a result was persecution on account of a political opinion. *Cf. Barraza Rivera v. INS,* 913 F.2d 1443, 1451 (9th Cir.1990) (finding cognizable persecution where applicant resisted conscription for religious and moral reasons, and therefore faced punishment). In the case before us, Chand and his father resisted racial discrimination, real or perceived, which in turn led to their persecution. This was persecution on account of a protected ground.

Finally, the BIA stated that the robberies Chand suffered could not support his claim because they were not on account of a protected ground. It is true that, according to Chand's testimony, the robbers ***1078** never made their motive for robbing him entirely clear, and furthermore that Chand never explicitly alleged that he was robbed because of his race, although he noted that the robbers were ethnic Fijians, and at other places in his testimony described the general racial tension and discrimination faced by Indians in Fiji. Similarly, Chand did not state in so many words that the police did not protect him because of his race.

[23] However, as the Supreme Court made clear in its seminal case on the subject, direct evidence of a persecutor's motives is not required to show persecution on account of a protected ground, only *some* evidence must be shown. *See INS v. Elias–Zacarias,* 502 U.S. 478, 483, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). Here, the record is replete with evidence that Indians are the victims of racially motivated assaults and other crimes committed against them by ethnic Fijians, and that the Fijian police are sometimes either unwilling or unable to control such crime. The State Department's Profile says almost exactly that:

> [Ethnic difference] results in the harassment and intimidation of ethnic Indians by ethnic Fijians. The police are sometimes either *unable or unwilling* to prevent such harassment ... Indo–Fijians are also sometimes the victims of crime based on race. Inadequate police protection contributes to the frequency and seriousness of these incidents.

(emphasis added). In addition, the articles Chand submitted strongly suggest that the government of Fiji and even the Prime Minister implicitly condone crime against Indians. This information is more than sufficient to constitute "some evidence" that the crimes against Chand were *at least in part* racially motivated. *See Borja,* 175 F.3d at 735–36.

In this case, the evidence that Chand suffered harm because of his race and religion is simply overwhelming. We conclude that no reasonable fact-finder could find that he was not persecuted on account of a protected ground.

VI.

As a result of Chand's having shown that he suffered past persecution, he is entitled to a presumption that he will be persecuted in the future. *See* 8 C.F.R. § 208.13(b)(1)(i). ***.

[24] The evidence in this case compels the conclusion that conditions have not changed sufficiently to rebut the presumption that arose with respect to Chand. While the evidence in the record suggests that, in general, conditions had improved in Fiji between the time of the 1987 coup and the time described in the State Department's Profile, they obviously did not improve enough to save Chand from several attacks by Fijian soldiers and ethnic Fijians or from his eviction from his land and the seizure of his home. Most important, the Profile quoted above makes clear that racially motivated crime of the type Chand faced remains a problem for some Indians, and that in some cases police are unable or unwilling to stop such crime.

***

[W]e have long held that the determination of whether or not a particular applicant's fear is rebutted by general country conditions information requires an individualized analysis that focuses on the specific harm suffered and the relationship to it of the particular information contained in the relevant country reports. As we stated in *Garrovillas v. INS,* 156 F.3d 1010, 1017 (9th Cir.1998), "our cases hold that 'individualized analysis' of how changed conditions will affect the specific petitioner's situation is

required. Information about general changes in the country is not sufficient." *Id.* (citing *Osorio v. INS,* 99 F.3d 928, 933 (9th Cir.1996); *Berroteran–Melendez v. INS,* 955 F.2d 1251, 1257 (9th Cir.1992) (stating that "blindly" applying country conditions information to deny claims would be error)).

The reason for the requirement of individualized analysis is clearly demonstrated by the differences between *Kumar* and the case before us. Whereas in that case the petitioner suffered no harm beyond that which "took place in the aftermath of the 1987 coups," *Kumar,* 204 F.3d at 934, here Chand suffered harm at the hands of the Fijian military and other Fijians that the government would not control in 1988, 1990, 1991, 1992, and immediately before he left in early 1993. Thus, regardless of what may or may not be true as a general proposition, the record before us clearly does not support the conclusion that the presumption with respect to the persecution Chand suffered has been rebutted because, "since [the coups], conditions have improved significantly in Fiji, and any lingering discrimination that may exist against Indo–Fijians certainly does not rise to the level of persecution." *Kumar,* 204 F.3d at 934. On the contrary, Chand suffered several incidents of persecution well after the coup, and the record contains substantial corroborating evidence, both in the form of articles from Fiji and in the State Department's Profile, that racially motivated crime in Fiji remains a problem for many individuals, and that in some cases the police are unable or unwilling to control that crime.

It is not surprising that while racial or religious conditions may have improved generally, a number of individuals may continue to be subjected to acts of persecution on a regular basis. It may be true that in some regions of the country conditions are better than in others, or even that there are some villages in which persecution reigns and others in which it is entirely absent. Conditions may also differ depending on the social class or the political views of particular Indians. The State Department's Profile itself states that Indians are "sometimes" subject to harassment and that police are "sometimes" unable or unwilling to control it. Because Chand has shown that he has continued to face significant problems in the years after the coup, even after the general conditions improved substantially, any reasonable fact-finder would be compelled to conclude that the country conditions information in the record is not sufficient to rebut the presumption of future persecution in this case. Thus, there is no basis for a remand on the country conditions question.

VII.

[27] [28] For the foregoing reasons, we hold that Chand is eligible for asylum and remand for the Attorney General to exercise her discretion with respect to such relief. With respect to withholding of deportation, Chand must meet a higher burden. To qualify for withholding, Chand must "demonstrate that it is more likely than not that [he] would be subject to persecution in the country to which he would be returned." *I.N.S. v. Cardoza–* ***1080** *Fonseca,* 480 U.S. 421, 423, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (citation omitted). The reasons that compel our holding that Chand is eligible for asylum would also compel any reasonable fact-finder to conclude that Chand is entitled to withholding of deportation. We therefore hold that Chand has demonstrated his entitlement to withholding of deportation as well as his eligibility for asylum.

We GRANT Chand's petition for review and REMAND his case to the BIA for further action consistent with this opinion.

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438 F.3d 1249
United States Court of Appeals,
Tenth Circuit.

Yong Ting YAN, Petitioner,
v.
Alberto R. GONZALES, Attorney General, Respondent.

No. 05-9564.
|
March 2, 2006.

McCONNELL, Circuit Judge.

Pro se petitioner Yong Ting Yan seeks review of a final order of removal issued by the Bureau of Immigration Appeals (BIA), which summarily affirmed a determination by an Immigration Judge (IJ) *1251 denying Mr. Yan's application for asylum, restriction on removal,[1] and the Convention Against Torture (CAT). We reverse the decision of the BIA, and remand for further proceedings.[2]

Mr. Yan is a citizen and native of China who is subject to removal from this country but who seeks asylum, claiming that he was persecuted by government authorities in China for being a Christian. The IJ gave two basic reasons for disbelieving Mr. Yan's testimony concerning this persecution. First, the IJ stated that he had "concerns about [Mr. Yan's] commitment to Christianity" sufficient to give him "serious doubts about [Mr. Yan's] credibility." Admin. R. at 41. Second, the IJ stated that Mr. Yan had not shown "that it is likely that he would be or would have been targeted by the authorities in China on account of his religious activity." *Id.* at 43. As neither of these reasons was supported by substantial evidence, we reverse the BIA's order affirming the IJ's decision, and remand for further consideration.

LEGAL STANDARD

[1] To be eligible for asylum, an alien must first show that he is a "refugee." *Wiransane v. Ashcroft,* 366 F.3d 889, 893 (10th Cir.2004). To establish refugee status, the applicant must demonstrate that he has suffered past persecution or has "a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). "Aliens basing their asylum claims upon a well-founded fear of future persecution must show both a genuine, subjective fear of persecution, and an objective basis by credible, direct, and specific evidence in the record, of facts that would support a reasonable fear of persecution." *Wiransane,* 366 F.3d at 893 (quotation omitted).

[2] [3] To qualify for restriction on removal, an alien must show a "clear probability" of persecution in the proposed country of removal. *Niang v. Gonzales,* 422 F.3d 1187, 1195 (10th Cir.2005). The Convention Against Torture prohibits the return of an alien to a country where "it is more likely than not that he or she would be tortured." 8 C.F.R. § 1208.16(c)(2). "The alien must show, however, that the persecution would be so severe that it would rise to the level of torture." *Niang,* 422 F.3d at 1196.

*1252 ANALYSIS

1. Is Mr. Yan *Really* a Christian?

[5] As noted, the IJ stated that he had "concerns about [Mr. Yan's] commitment to Christianity." Admin. R. at 41. Among other things, Mr. Yan "seemed to have only rudimentary knowledge of [the] Christian religion." *Id.* at 40. As will be seen, however, the record does not support this finding.

On cross-examination in this case, counsel for the DHS administered a sort of mini-catechism to Mr. Yan. To the extent Mr. Yan was unable to answer the questions posed to him, some of which were phrased as "trick" questions, the IJ concluded that Mr. Yan was not really a Christian. To the extent he was able to answer the questions, the IJ concluded that Mr. Yan had been coached. The IJ placed very little weight on what would seem to be the most salient factor in determining the sincerity of Mr. Yan's beliefs: his highly personal and emotional testimony about his conversion to faith in Jesus Christ and his participation in Christian activities in China.

Mr. Yan testified that at the time he became a Christian,

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he was in the hospital after injuring his back on the job. Mr. Yan was very depressed as a result of his injuries. He stated that a co-worker named Shu Wei Gong came to visit and to talk with him about Christianity. The co-worker told Mr. Yan not to be depressed because "there's still good people around in this world." *Id.* at 73. Mr. Gong told him:

> in this world, there's a loving God and he send his beloved son to come to this world to be our Savior. He sent his beloved son in order to save us. He was nailed to a cross. He said who in this world will give their only beloved son to come and to save the world [from] sin. When I heard all this message, I was very touched.

Id. at 74.

After he was released from the hospital, Mr. Yan began attending meetings with other Chinese Christians. The first meeting was at the house of Mi You Min. There were four people present. They had a Sunday worship service where they read the Bible together and sang hymns. They also ate a meal together. Mr. Yan stated that these people were "very friendly and they are different from people who are outside so I decide to stay." *Id.* at 75.

Mr. Yan began attending weekly meetings with his newfound Christian friends. He supplied an intriguing detail about the members of this "house church." They would not come to his house, he said, because he had not yet been baptized. Mr. Yan remedied this defect on Christmas Day, December 25, 1998. He described his baptism as follows:

> Shu Wei Gong told me that today, we have a Pastor Li coming here to do a baptismal service on you and everybody clapped their hand and was very happy. And, after that, we all read our Bible and we all pray together. And then, after we sing the songs and Pastor Li said I will hold a baptismal service for Mr. Yan You Ting.
>
> [...]
>
> And I was standing there and the Pastor Li put his hand on my head. He said in the name of the Father, the Son, and the Holy Spirit, I baptize you, Mr. Yan You Ting that you will belong under the name of Christ. All of your sins are *1253 forgiven and your soul, your spirit will always go to heaven and then he take some water from the bowl and sprinkle it on my head and then I say, amen and everybody say amen.

Id. at 77.

When asked how the ceremony had made him feel, Mr. Yan stated, "I [felt] that I have gone through a rebirth experience that was I-that what I was belonged to my past. Now, I'm a new person." *Id.* at 78. He stated further that

> All my emotion, my whole being, my mental state that I have somebody to rely on. I have. Before, I didn't know that in this world, there's such a loving God that will have his son to die for me. I think he is a great God. I will attend all of the meetings. I will grow.

Id.

Mr. Yan was asked to sing a Christian hymn, and he did. The translation was "Jesus loves you. Jesus loves you in your life. The greatest blessing is Jesus love you." *Id.* at 113.

Notwithstanding these displays of evangelical piety, the agency attempted on cross-examination to trip Mr. Yan up on his knowledge of the Bible and Christian doctrine. The IJ's conclusion, that Mr. Yan knew very little about Christian doctrine, seems surprising in light of the actual testimony presented. As noted, Mr. Yan had already demonstrated in his testimony under questioning by his own attorney a very personalized notion of the doctrine of the Atonement and the concept of rebirth. His subsequent testimony under cross-examination showed that he also knew a thing or two about the Bible:

> Q. When you did your Bible study, which part did you study more, the Old or the New Testament?
>
> A. Usually, the New Testament more.
>
> Q. If I said, let's see, for they shall inherit the kingdom, what is the part that goes before that? It's in the Beatitudes?

A. Blessed are the meek for they shall be inheriting the kingdom of God. Blessed are those who are persecuted and those are the people that also inherit the kingdom of God.

Q. The meek inherit the earth. People who are persecuted in my name's sake are the ones who would be inheriting the kingdom.

[Interpreter] TO JUDGE

That is the interpreter's fault because meek and *shising,* they are two that are very close.

MR. YAN TO [DHS counsel]

A. Meek is the one that inherit the earth.

[Interpreter] TO JUDGE

It is the interpreter's fault, Your Honor.

[DHS counsel] TO MR. YAN

Q. Okay. Let me try something else. Where would you find the Book of Nefi [sic]?

A. Never heard of this book Nefi [sic].

Q. Where would you find the collection called the doctrines and covenants?

A. It is in the Old Testament in the Book of the Law.

Q. Which one's the Book of the Law?

A. The Book of Moses. The five Book of Moses.

Q. Which one of the five Books of Moses?

A. It is the Book of Genesis, the Book of Exodus, the Books of Leviticus, the Book of Deuteronomy, and the Book of the Law.

Q. Which one of those books is considered the Book of Laws? There's one that's considered the Book of Laws?

A. It's the Genesis and the Book of the Law.

[DHS counsel] TO JUDGE

***1254** For the record, the Book of Law is Deuteronomy. And also, for the record, Nefi [sic] is in the book of Mormon and doctrine and covenants is not in the Bible. It's a separate text in the Mormon church.

MR. YAN TO [DHS counsel]

A. I'm sorry, it should be Deuteronomy. It should not be the Genesis. My memory is failing bad on me.

[DHS counsel] TO MR. YAN

Q. What are the psalms? What type of writing is the Psalms?

A. Psalms is David's song of praise to God.

Q. That's correct.

A. My memory is not very good.

[...]

Q. Were you confirmed into the family church?

A. Yes.

Q. How were you confirmed?

A. What do you mean by confirmed?

Q. Well, you just answered yes. What did you understand it to mean?

A. How do you get-what you mean by confirm?

Q. You just answered yes to when I asked you.

A. Yeah. I don't understand what is getting confirmed into the church. I'm sorry because I really don't understand your question in the first place. Could you explain again the meaning to be confirmed?

Id. at 102-05.

Several observations may be made about this exchange. First, Mr. Yan's responses to the Bible questions were fairly accurate. He was able to complete the Beatitudes question, notwithstanding an error by the interpreter. He knew four of the first five books of the Bible, and referred to the first five books of Moses as the "Book of the Law," consistent with Jewish practice, which calls these five books as the Torah, or "law."[4] He had, unsurprisingly, never heard of the book of Nephi, which is found in the

Book of Mormon and not the Bible. He knew what the Psalms are. While he became confused about confirmation, that may be understandable if his particular group was Protestant and non-sacramental. Confirmation is a rite practiced primarily in Western Christianity among Catholic, Anglican and Lutheran churches.[5] Only Catholics, among Western denominations, continue to regard confirmation as a binding sacrament of the Church. It should also be noted that Mr. Yan only has a high school education, is the only Christian in his family, and at the time of the hearing had only been a Christian for five years.

Later, there followed an exchange that the IJ found particularly significant:

> Q. Did you celebrate Easter this year?
>
> A. Yes.
>
> Q. How did you do that?
>
> A. I celebrated Easter all by myself at home by myself.
>
> Q. What did you do?
>
> A. I make own Holy Communion and I pray.
>
> Q. Do you know when Easter is?
>
> A. Easter is April-April something. Christmas is December the 25th. Easter is-let me think. I cannot really remember. My memory's getting bad.
>
> Q. Do you know what Easter celebrates?
>
> [...]
>
> *1255 A. I cannot remember. I remember Christmas is the time that we celebrate Jesus coming.
>
> Q. You don't know what Easter [is]?
>
> A. It's the resurrection of Jesus.
>
> Q. Why didn't you remember that before?
>
> A. Cause-because see my mind reacts very slow. Sometimes, I just got lapses. Because I have had brain injuries twice already.

Id. at 111-12.

Mr. Yan's inability to remember the exact day of Easter is unsurprising. The exact date differs from year to year, and actually requires a set of extraordinarily complex calculations. As the U.S. Naval observatory explains, Easter can occur at various times each year, between March 22 and April 25. http://aa.usno.navy.mil/faq/docs/easter.html (visited Dec. 29, 2005).

Christmas, of course, occurs dependably each year on December 25th. Mr. Yan knew that. While it is true that it took Mr. Yan a moment or two to remember that Easter concerns "resurrection," this is a slender reed indeed on which to make an adverse credibility finding, particularly given the fact that the word "Easter" is itself an English word referring to a festival of pagan origin[6] and appears nowhere in the foundational document of Christianity, the Bible.

[6] We are troubled that while the IJ relied heavily on Mr. Yan's responses to the mini-catechism administered at the hearing, stressing his formal, doctrinal knowledge of Christianity, he barely addressed, and gave no good reason for rejecting, Mr. Yan's testimony about his personal experiences with Christianity. We agree with the Eighth Circuit that a detailed knowledge of Christian doctrine may be irrelevant to the sincerity of an applicant's belief; a recent convert may well lack detailed knowledge of religious custom. *Ahmadshah v. Ashcroft,* 396 F.3d 917, 920 n. 2 (8th Cir.2005). *Cf. also Mejia-Paiz v. INS,* 111 F.3d 720, 725-29 (9th Cir.1997) (Ferguson, J., dissenting) (stating that where alien's testimony that he belongs to a church is uncontroverted, court's opining on sincerity of alien's religious belief, based on his failure to adhere to particular religious customs, violates First Amendment). Or, as Mr. Yan's counsel before the BIA put it, Mr. Yan is "a believer and adherent of Christianity and not a seminary student." Admin. R. at 8.

The IJ also relied on alleged inconsistencies in Mr. Yan's record of church attendance in the United States. The IJ noted that Mr. Yan testified on direct examination that he attends church every week or every other week. Actually, what Mr. Yan said, in response to a question about how often he attends church *in the United States* (not specifically in Denver) was "Sometimes every week. Sometimes, every two weeks." *Id.* at 93. The IJ found this inconsistent with Mr. Yan's statement that he had attended church only twice since moving to Denver from Los Angeles, about five months before the hearing. Yet Mr. Yan did provide an explanation for his lack of regular

attendance *in Denver:*

> Q. What church do you attend?
>
> A. In Los Angeles, I attended two Chinese church. One is called Chinese Alliance Church. The other one is called the Glory Church but in here [Denver], I cannot find any Chinese church so I ***1256** attended American church. Only been there twice.

Id. at 108.

Mr. Yan further testified that all the services in the Denver church were in English, and he really couldn't understand anything. Mr. Yan also presented testimony from a witness, Mr. Chen, who knew Mr. Yan in Los Angeles, where he lived for two months immediately after arriving in the United States. Mr. Chen stated that he had seen Mr. Yan at Glory Church in El Hombre, California, three or four times, and had spoken to him there. Mr. Chen stated that Mr. Yan had asked him to testify at the IJ hearing to prove that he had attended the Glory Church, and that he had come to the hearing to do so, out of a sense of Christian duty. The IJ found Mr. Chen's testimony "relatively credible." *Id.* at 38.

The only reasonable conclusion to be drawn from this record was that Mr. Yan did attend Christian services in this country, beginning soon after his arrival here. Notwithstanding his stumbling over a few points of Christian doctrine, he presented a coherent, personal testimony of his conversion to faith in Jesus Christ in China and continued adherence to those beliefs since he arrived in the United States. The IJ's decision provides no valid reason for discounting Mr. Yan's claim to be a Christian.

2. Did the Authorities Really Persecute Mr. Yan?

[7] Mr. Yan testified that the authorities broke up his home church, confiscated his Bible, and threw him in jail, where he was beaten. Relying on the background material provided from the State Department, the IJ found that a "small and unobtrusive" house church like Mr. Yan's (which contained only six or seven members) would have been tolerated by authorities, if they knew about it at all. Admin. R. at 42. This conclusion finds at least some support in a State Department Country Religious Freedom Report in the record. *Id.* at 150 (stating smaller house churches made up of family and friends "were tolerated by the authorities as long as they remained small and unobtrusive"). What is troubling about this line of reasoning is that the IJ appears to have made an assumption that just because the authorities do not *ordinarily* attack home churches, they would not have done so in Mr. Yan's case.[7]

The IJ did not supply any other reason for disbelieving the particular facts that Mr. Yan related about the episode of persecution he endured in China. He mentioned only one specific inconsistency, in whether Mr. Yan actually signed any documents under interrogation. *Id.* at 39. His conclusion that "the respondent would appear to be the most recent new member of a very small group which this Court finds was very unlikely to have come to the attention of the authorities in China," *id.* at 43, is notably inconsistent with his earlier conclusion that Mr. Yan was not even a Christian. In sum, the IJ gave no reason, other than the minor inconsistency previously noted, to discount the particular facts Mr. Yan related concerning the persecution ***1257** he endured as a Christian from the Communist government of China.

3. Conclusion

The reasons the IJ gave for rejecting Mr. Yan's asylum, restriction on removal, and Convention Against Torture claims are not supported by substantial evidence in the record. We must therefore reverse and remand for further proceedings in this case.

The BIA's final order of removal is REVERSED and this case is REMANDED for further proceedings.

All Citations

438 F.3d 1249

KeyCite Yellow Flag - Negative Treatment
Distinguished by Gomez-Romero v. Holder, 6th Cir., April 13, 2012

22 I. & N. Dec. 1328 (BIA), Interim Decision 3433, 2000 WL 827754

United States Department of Justice

Board of Immigration Appeals

IN RE S-A-, Respondent

Decided as amended June 27, 2000[1]

Before: Board Panel: VACCA, HURWITZ, and MILLER, Board Members.

HURWITZ, Board Member:

In a decision dated May 21, 1998, an Immigration Judge found the respondent inadmissible and removable under sections 212(a)(6)(C)(i) and (7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(6)(C)(i) and (7)(A)(i)(I) (1994 & Supp. IV 1998). In addition, the Immigration Judge denied the respondent's application for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3) (Supp. IV 1998). The respondent filed a timely appeal. The appeal will be sustained. The request for oral argument is denied. 8 C.F.R. § 3.1(e) (2000).

***

I. BACKGROUND

The respondent is a native and citizen of Morocco, who is either 20 or 21 years old. She testified that she was schooled for 3 years and knows how to write her name, but she is otherwise illiterate.

The respondent claims that in Morocco she was a victim of her father's escalating physical and emotional abuse. According to the respondent, the abuse arose primarily out of religious differences between her and her father, i.e., the father's orthodox Muslim beliefs, particularly pertaining to women, and her liberal Muslim views. Her father beat her a minimum of once a week using his hands, his feet, or a belt. She notes that her father did not mistreat her two brothers.

The respondent related that when she was about 14 years old, her maternal aunt, who is a United States citizen and resides in this country, sent her a somewhat short skirt. On one occasion the respondent wore the skirt outside her home. Upon returning home, her father verbally reprimanded her, heated a straight razor, and burned those portions of her thighs that had been exposed while she was wearing the skirt. He told her that he was taking this action to scar her thighs so that, in the future, she would not be tempted to wear what he considered improper attire. The respondent stated that she and her mother were afraid to go to the hospital after the incident, so her mother went to the local pharmacy and procured an ointment to treat the burns.

**2 On another occasion, the respondent went to a pay phone to call her aunt in the United States. She explained that family members used a pay phone located near her parents' home because the family did not receive telephone service. On her way to the telephone, a young man stopped the respondent to ask for directions and she engaged in a short dialogue with the man. Upon observing this interchange, her father came into the street, shouted at her and the individual with whom she was conversing, and beat both of them. He used a ring he was wearing to beat the respondent in the face, particularly her forehead, the area between her eyebrows, and the bridge and top of her nose. She testified that she bled from the beating. Thereafter, the respondent's father compelled her to remain in the house in order to prevent subsequent casual conversations with strangers. She was forbidden to attend school and was prohibited from other activities physically located outside her

home. The respondent stated that her father believes that "a girl should stay at home and should be covered or veiled all the time."

*1330 One evening in 1997 the respondent sneaked out of the house to visit some girl friends. That night while she was asleep, her father entered her bedroom and asked whether she had gone out that day. Knowing that he had forbidden her to leave the house, the respondent lied about her outing. Her father showed her that, unbeknownst to her, he had been marking the soles of her shoes with chalk and was thereby monitoring her activities. He said that he knew she had left the house and had lied about it. He then slapped, punched, and kicked her and pulled her hair.

The respondent stated that she did not consider requesting police protection or seeking any other kind of governmental intervention because her mother's previous efforts in that regard had proven unproductive. According to the respondent, she twice attempted to commit suicide in Morocco, and on two other occasions she attempted to run away in an effort to escape her circumstances. After at least one of the suicide attempts, she had her stomach pumped in a hospital and was unconscious for 3 days.

The respondent testified that during one of her aunt's visits to Morocco, she took a picture of the respondent. Her aunt later showed the picture to a man in the United States. A long-distance relationship developed, culminating in an offer of marriage. Although the respondent's fiancé died prior to their planned marriage, her prospective brother-in-law forwarded documents to her in an effort to assist her entry to the United States. The respondent stated that she understood such documents to be a valid Social Security card and resident alien card. The respondent claimed that after she received her passport and the above documents, her mother sold some of her jewelry and bought the respondent an airline ticket to the United States.

The respondent's maternal aunt testified on her behalf at the hearing. The aunt stated that she has weekly telephonic contact with her sister, the respondent's mother, and that she visits Morocco once a year. She testified that the respondent's father is **3 very strict, he's Muslim . . . (and he) is very tough when it comes to the religion, so he wants (the respondent) to . . . wear . . . the long robe to cover her face with the veil and when she . . . doesn't listen to him, . . . he abuse her, he beat her up . . . because he said that his daughter, he want her to be Muslim girl, like to follow the Islam.

Claiming to have actually observed some of the beatings, the respondent's aunt stated that the respondent's father pull her hair, he kick her, sometime he punch her in the face, like for no excuse, just because she's like, she's putting lipstick or she's putting hair color in her hair or she's looking from the window or she's talking to any girls, he doesn't like her to talk to them or the way she dress.

According to the aunt, going to the police would have been futile, because under Muslim law, particularly in Morocco, a father's power over his daughter is unfettered. In conformity with his fundamentalist Muslim *1331 beliefs, the respondent's father severely limited her access to education and compelled her to stay in the home. Moreover, because the respondent left her country to come to the United States and traveled without the approval or supervision of a male family member, she violated the edicts of the father's orthodox Muslim beliefs and he would kill her if she were to be returned to Morocco.

The respondent's aunt testified that she had not known about the respondent's suicide attempts, which occurred in Morocco. The record contains documentation concerning two additional suicide attempts during the respondent's detention in the United States, one involving a medication overdose and the other the ingestion of laundry bleach.

II. CREDIBILITY

We consider the issue of credibility as a threshold matter, because the Immigration Judge made an adverse credibility finding. It is our general practice to defer to and adopt an Immigration Judge's determination regarding an alien's credibility. See, e.g., Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998); Matter of Burbano, 20 I&N Dec. 872 (BIA 1994); Matter of Kulle, 19 I&N Dec. 318 (BIA 1995), aff'd, 825 F.2d 1188 (7th Cir. 1987), cert. denied, 484 U.S. 1041 (1988). However, we find it appropriate to depart from that practice in this case.

We recently articulated a three-pronged approach to assessing an Immigration Judge's credibility findings. Matter of A-S-, supra. We held that we will generally defer to an adverse credibility determination based on inconsistencies and omissions regarding events central to an alien's asylum claim where a review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present in the record; (2) such discrepancies and omissions provide specific and cogent reasons to conclude that the alien provided incredible testimony; and (3) the alien has failed to provide a convincing explanation for the discrepancies and omissions. Id. at 1109.*** In applying the test articulated in *1332 Matter of A-S-, supra, we have found that the pertinent discrepancies most often exist either between an alien's testimony and his or her Application for Asylum and Withholding of Removal (Form I-589), or between the testimony offered during direct examination and that in cross-examination.

**4 We observe that the Immigration Judge's adverse credibility finding in this case did not specify any internal discrepancies in the respondent's testimony. The Immigration Judge also did not identify any discrepancies between the respondent's testimony and her Form I-589. Moreover, the Immigration Judge failed to point to any differences between the respondent's testimony and that offered by her aunt, except to note suspicion regarding the aunt's lack of awareness of the respondent's alleged suicide attempts. In her decision the Immigration Judge stated that she accorded "little weight" to the aunt's testimony, characterizing it as the respondent's attempt "to embellish her claim." Having reviewed the record, we find that the discrepancies identified by the Immigration Judge are not actually present.

Furthermore, we find that the Immigration Judge's credibility finding is not supported by specific and cogent reasons. See, e.g., Vilorio-Lopez v. INS, supra; Matter of A-S-, supra. We therefore decline to defer to the Immigration Judge's determination because we conclude that the respondent's claim is sufficiently detailed, believable, and consistent. For example, the accounts in the Form I-589 of the burning episode are corroborated by the respondent's testimony. Moreover, the respondent's testimony, the aunt's testimony, and the Form I-589 are all consistent regarding the fatal retribution that the respondent would suffer if she were returned to Morocco. See Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); Matter of B-, 21 I&N Dec. 66 (BIA 1995).

Unlike the Immigration Judge, we place a great deal of weight on the testimony of the respondent's aunt and disagree that such testimony constituted mere embellishment of the respondent's claim. We find that the aunt's testimony was introduced to bolster the respondent's account and that the inclusion of such testimony was legitimate. We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available. See Murphy v. INS, 54 F.3d 605, 611 (9th Cir. 1995) (holding that "(t)estimony should not be disregarded merely because it is . . . in the individual's own interest"); Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998); Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998); Matter of Dass, 20 I&N Dec. 120 (BIA 1989); see also Matter of Acosta, 19 I&N Dec. 211, 218 (BIA 1985) (disagreeing with the Immigration Judge's "conclusion that the respondent's testimony should be rejected solely because it is self-serving"), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

In addition, we find significant the aunt's testimony regarding the severity and frequency of the beatings suffered by the respondent and the futility of seeking governmental protection in such instances in light of *1333 societal religious mores. See Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women (1995) ("Breaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection."). Furthermore, we do not find the aunt's lack of awareness of the respondent's suicide attempts while in Morocco damaging to the respondent's own testimony regarding such attempts, particularly in light of subsequent evidence that documents the respondent's persistent suicidal tendencies.

**5 We find particularly significant the evidence of record regarding the respondent's fear of seeking governmental protection from her father's abuse. Both the respondent and her aunt testified that, in Moroccan society, such action would be not only unproductive but potentially dangerous. The report of the United States Department of State that is contained in the record confirms that "few women report abuse to authorities" because the judicial procedure is skewed against them, as even medical documentation is considered insufficient evidence of physical abuse, and women who do not prevail in court are returned to the abusive home. Committees on International Relations and Foreign Relations, 105th Cong., 2d Sess., Country

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Reports on Human Rights Practices for 1997 1538 (Joint Comm. Print 1998) (hereinafter 1997 Country Reports).

Finally, we find that, in addition to corroborating the respondent's testimony concerning the futility and perils of seeking governmental protection, the 1997 Country Reports corroborate other dimensions of the testimony offered by the respondent and her aunt. The report states that, in Morocco, domestic violence is commonplace and legal remedies are generally unavailable to women. Id. at 1538. The report also indicates that "(g)irls are much less likely to be sent to school than are boys" and notes that the illiteracy rate for women is 67 percent. Id. at 1539.

We conclude that the respondent presented credible testimony in support of her asylum claim. We must therefore decide whether the respondent merits the relief that she has requested. Although we have held that a respondent does not meet her burden of proof when she fails to establish a credible record, the obverse is not true. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998). In other words, "a finding of credible testimony is not necessarily dispositive." Matter of E-P-, 21 I&N Dec. 860, 862 (BIA 1997).

III. ASYLUM AND WITHHOLDING OF REMOVAL

We have reviewed the Immigration Judge's decision, the testimonial and documentary evidence of record, and the legal submissions of the parties. *1334 Based on the record before us and our analysis of the relevant law, we find the respondent statutorily eligible for asylum.

A. Generally

When adjudicating an alien's eligibility for relief, we are mindful of "the fundamental humanitarian concerns of asylum law." Matter of S-P-, 21 I&N Dec. 486, 492 (BIA 1996); see also Matter of Chen, 20 I&N Dec. 16 (BIA 1989); Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979). Even when abuse is severe and longstanding, an applicant for asylum "bears the burden of establishing that he or she meets the 'refugee' definition of section 101(a)(42)(A) of the Act." Matter of S-P-, supra, at 489; see also 8 C.F.R. § 208.13(a) (2000). To satisfy this burden, the alien must demonstrate past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See section 208(a) of the Act; see also section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1994).

B. Evidence

**6 Although it is well established that an applicant's asylum burden of proof can be met through testimony alone, corroborative documentary evidence is usually also required. See Matter of Mogharrabi, supra. We have held that, in most instances, "the introduction of supporting evidence is (not) purely an option with an asylum applicant." Matter of Dass, supra, at 124; see also Matter of M-D-, supra; Matter of Y-B-, supra; cf. Duarte de Guinac v. INS, 179 F.3d 1156 (9th Cir. 1999) (holding that country condition reports are not meant to corroborate specific acts of persecution but merely to provide information about the context in which alleged persecution occurred); Canjura-Flores v. INS, 784 F.2d 885 (9th Cir. 1985).

We find that the respondent, largely through her own consistent and credible testimony, has met her evidentiary burden in this case. See Matter of Mogharrabi, supra. However, we also note the importance of the corroborative evidence provided by testimony of the respondent's aunt and the 1997 Country Reports contained in the record. See Duarte de Guinac v. INS, supra; Matter of M-D-, supra; Matter of Y-B-, supra.

C. Past Persecution

We have recognized that past persecution can be a basis for granting asylum, even absent a showing of a well-founded fear of future persecution. *1335 See Matter of H-, 21 I&N Dec. 337, 339 (BIA 1996); see also Matter of D-V-, 21 I&N Dec. 77 (BIA 1995) (recognizing as persecution grievous harm suffered in Haiti in direct retaliation for activities on behalf of

Jean-Bertrand Aristide); Matter of B-, supra (recognizing that the arrest, interrogation, and severe physical abuse of a Mujahidin supporter in Afghanistan constituted persecution); Matter of Chen, supra (recognizing that the severe repression of the applicant during China's "Cultural Revolution" constituted persecution). Pursuant to federal regulations, an applicant who has established past persecution is presumed to have also demonstrated a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1)(i); see also Matter of Chen, supra, at 18 (stating that "a rebuttable presumption arises that an alien who has been persecuted in the past by his country's government has reason to fear similar persecution in the future"). The Immigration and Naturalization Service can rebut this presumption by showing that country conditions have changed to such an extent that the basis for the finding of past persecution no longer exists. See 8 C.F.R. § 208.13(b)(1)(i).

In the instant case, the source of the respondent's repeated physical assaults, imposed isolation, and deprivation of education was not the government, but her own father. Although she did not request protection from the government, the evidence convinces us that even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father's conduct. The respondent would have been compelled to return to her domestic situation and her circumstances may well have worsened. See, e.g., Matter of Chen, supra; Matter of D-V-, supra. In view of these facts, we conclude that the respondent established that she suffered past persecution in Morocco at the hands of her father and could not rely on the authorities to protect her. The Service has made no showing that conditions in Morocco have materially changed such that, upon her return, the respondent could reasonably expect governmental protection from her persecutor.

D. Well-Founded Fear

**7 An alien may also establish eligibility for asylum by demonstrating that a reasonable person in his or her circumstances would fear persecution in the future on account of a protected ground. See sections 101(a)(42)(A), 208(a) of the Act; Matter of Kasinga, supra, at 365 (citing Matter of Mogharrabi, supra); see also INS v. Elias-Zacarias, 502 U.S. 478 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); 8 C.F.R. § 208.13(b)(2). We find that the evidence of record convincingly establishes that, upon her return, the respondent would likely face severe, possibly fatal, persecution. See Matter of H-, supra; Matter of Chen, supra.

*1336 E. "On Account of"

An alien must also demonstrate that the persecution alleged was inflicted or would be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion. Sections 101(a)(42)(A), 208(a) of the Act. An asylum applicant is not obliged, however, to show conclusively why persecution has occurred or may occur. See, e.g., Matter of S-P-, supra.

The jurisprudence relevant to the respondent's allegations includes decisions granting relief to those persecuted on the basis of their religious beliefs. Both this Board and the federal circuit courts of appeals have found merit to the claims of aliens asserting that they were persecuted on account of their religion. See, e.g., Kossov v. INS, 132 F.3d 405, 409 (7th Cir. 1998) (finding past persecution where a woman applicant was beaten and taunted because of her religious beliefs and eventually suffered a miscarriage); Fisher v. INS, 79 F.3d 955 (9th Cir. 1996) (holding that dress and conduct rules pertaining to women may amount to persecution if a woman's refusal to comply is on account of her religious or political views); Matter of Chen, supra, at 19-20 (granting relief to the son of a Christian minister who was subjected to atrocious persecution, including burns to his body, house arrest, and a prohibition on school attendance).

We find that the persecution suffered by the respondent was on account of her religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society. The record clearly establishes that, because of his orthodox Muslim beliefs regarding women and his daughter's refusal to share or submit to his religion-inspired restrictions and demands, the respondent's father treated her differently from her brothers. See Fisher v. INS, supra, at 961 (stating that Board decisions "define 'persecution' generally as 'the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive'" (quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)); Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (finding that an alien was a refugee where she had endured "oppression . . . inflicted . . . because of a difference that the persecutor (would) not tolerate").

Because the persecution suffered by the respondent was on account of her religious beliefs, we find this case distinguishable on the facts from circuit court decisions holding that persecution on account of gender alone does not constitute persecution on account of membership in a particular social group. See, e.g., Gomez v. INS, 947 F.2d 660 (2d Cir. 1991). We also find that because of the religious element in this case, the domestic abuse suffered by the respondent is different from that described in Matter of R-A-, Interim Decision 3403 (BIA 1999).

*1337 F. Discretion

**8 A question of fraud has been raised by this record regarding the documents that the respondent presented when seeking to enter the United States. In view of our favorable credibility finding and the respondent's background, we accept her explanation that she understood the documents to be valid and that she did not intend to present fraudulent documents. As there are no other adverse factors of record, we find that the respondent merits a favorable exercise of discretion.

IV. CONCLUSION

We conclude that the respondent is statutorily eligible for asylum. We further find that a favorable exercise of discretion is warranted in this case. Accordingly, the respondent's appeal will be sustained and her asylum application will be granted. Because we have determined that the respondent's asylum application should be approved, we find it unnecessary to address her application for withholding of removal under section 241(b)(3) of the Act.

ORDER: The respondent's appeal from the denial of her asylum application is sustained. The respondent is granted asylum and is admitted to the United States as an asylee.

22 I. & N. Dec. 1328 (BIA), Interim Decision 3433, 2000 WL 827754

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367 F.3d 1067
United States Court of Appeals,
Ninth Circuit.

Abrahim BABALLAH; Ula Baballah; Ahmad Baballah, Petitioners,
v.
John ASHCROFT, Attorney General, Respondent.

No. 01-71407.
|
Filed July 11, 2003.
|
Amended May 6, 2004.

Before TASHIMA, THOMAS and PAEZ, Circuit Judges.

OPINION

PAEZ, Circuit Judge.

Abrahim Baballah, a native and citizen of Israel, and his wife and oldest child, petition for review of a decision of the Board of Immigration Appeals ("BIA") affirming the denial of their application for asylum and withholding of removal. Over a ten-year period, Israeli Marines repeatedly threatened and attacked Baballah on account of his ethnicity and religion. The violence that he experienced not only ***1071** caused him to fear serious bodily harm and death but also resulted in serious economic hardship. Although the immigration judge ("IJ") deemed Baballah credible, she found that his encounters with the Israeli Marines did not rise to the level of persecution required to qualify for asylum. We conclude that the credible evidence presented by Baballah compels a finding of past persecution, and that the Immigration and Naturalization Service ("INS") failed to rebut the presumption of future persecution. Accordingly, we grant the petition and hold that Baballah and his family are eligible for asylum and entitled to withholding of removal.

I.

Abrahim Baballah is an Israeli Arab.[1] Baballah's parents were the only Jew and Muslim to marry in his hometown of Aka, Israel, a town of approximately 11,000 people on the Mediterranean coast.[2] As a result of their mixed marriage Baballah suffered repeated instances of discrimination when seeking work as a young man. Although Baballah had studied to be an accountant, bank officials refused to hire him when they discovered his background. These officials told him that he would "follow in [his] father's footsteps" and called him a "goy," a word that means "non-Jew" in Hebrew and has derogatory connotations in Arabic, meaning "dirty," "bastard," or "born from nowhere." Unable to find employment as an accountant, he trained to be a lifeguard and diver. However, when Baballah sought such employment, he was called "goy" and turned away.

Despairing of finding other employment, Baballah went to work for his family as a fisherman. During the ten years that he worked as a fisherman, he was the victim of incessant threats and acts of violence by the Israeli Marines, who relentlessly harassed him. Although the Israeli Marines did not confront other fishermen, when they saw Baballah, they sped up to his fishing boat in their larger vessel and circled near him, causing his boat to rock precipitously and fill with water. At times, the Marines shot bullets in the air over Baballah's boat and threw eggs at Baballah and his crew. On other occasions, they turned six-inch water hoses on Baballah's boat, forcing Baballah and his crew to bail out the water from the boat so that it would not sink. During one such incident, when Baballah was fishing with one of his brothers, the Israeli Marines boarded their boat, tied his brother to a pole, and sprayed him with pressurized water in freezing weather. The brother was then accused of assault, arrested, and ultimately imprisoned for over a year. As a result of the imprisonment, Baballah's brother suffered a mental impairment and is now dependent upon the family for support.

These aggressive acts, which occurred on a daily basis, caused Baballah and his crew to fear for their lives. These encounters took place both at sea and in town, where the Marines followed Baballah and called him "goy," intending to intimidate him and to let him know that "[w]e're after you."

Not only were these events frightening and dangerous, they also made it impossible for Baballah to earn a living. The repeated threats and attacks made it very difficult for Baballah to retain a boat crew. ***1072** Moreover, the Israeli Marines deliberately targeted Baballah through economic means. When the Israeli Marines saw that Baballah was catching large quantities of fish, they would destroy his fishing nets by steering their vessel over them so that the vessel's propellers would damage the nets, forcing Baballah to "spend days and days just fixing the nets for the fish." Like the United States Coast Guard, the Israeli Marines are responsible for rendering aid to fishermen and others at sea, managing the waterways, and enforcing general maritime laws. However, rather than enforcing the laws impartially, the Israeli Marines singled Baballah out for unwarranted citations, which, with the payment of substantial fines, made it difficult for him to earn a living.[3]

After eight years of struggling to support his family as a fisherman, Baballah mortgaged his home to buy a $30,000 speedboat,[4] with which he intended to earn a living by offering pleasure trips. Three months after he bought the boat, however, it was destroyed by fire in the middle of the night. Although Baballah was convinced that the Israeli Marines were behind the loss of his boat, there was no evidence regarding who was responsible for the blaze.

Having lost his speedboat, Baballah was forced to return to fishing. To Baballah's misfortune, however, his fishing boat was destroyed by Israeli Marines when, after drifting into shallow waters, he accepted an offer of help from them. Despite Baballah's protests that the boat should be towed from the middle, the Marines tied a tow rope on the front end of the boat. When the Marines began to tow the boat, it split apart. As the boat broke apart, the Marines mocked Baballah and "laugh[ed] sarcastically."

Israeli authorities also harassed members of Baballah's family. They confiscated his father's land and livestock "because my father made my mother Muslim, they want revenge." One of Baballah's brothers was persistently called "goy" and refused employment in their hometown. He eventually moved to Tel Aviv and was forced to pass as Jewish in order to escape persecution. Another brother was denied a chance to compete in the Olympics because he would not convert to Judaism.

In 1990, Baballah and his family made a brief trip to the United States but returned to Israel when they received word that their home was going to be taken away. However, upon their return, Baballah realized that they could not stay in Israel because once again "I couldn't work.... I couldn't do anything." Thus, the Baballahs returned to the United States on July 27, 1992.

II.

At their exclusion hearing, Baballah and his wife and minor son admitted their excludability pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(7)(A)(i)(I).[5] They requested asylum under section 208 of the INA, 8 U.S.C. § 1158, and withholding of removal under section 243(h) of the INA, 8 U.S.C. § 1253(h).

***1073** The IJ found Baballah's testimony to be credible. She concluded, however, that neither alone nor cumulatively did the events described by Baballah rise to the level of persecution, stating that the evidence did not show that Baballah would be unable to support his family if required to return. Although she acknowledged the "severe hostility" and "serious tension" between Jews and Arabs in the Middle East, she questioned whether the violence and other acts directed at Baballah were based upon a protected ground. Additionally, the IJ dismissed Baballah's testimony that he was singled out to receive maritime citations, stating that "it is apparent that any country can have laws and it is allowed to enforce those laws. These [citations] appear to be in relation to the business and occupation of this applicant." The IJ also noted that the Baballahs returned to live in Israel for some time after their initial visit to the United States. As a result, the IJ denied Baballah and his family asylum and withholding of removal. She also found that Baballah and his family were likely to become public charges and thus were excludable under section 212(a)(4) of the INA, 8 U.S.C. § 1182(a)(4).

The BIA affirmed the IJ's determination that Baballah had not shown persecution, but reversed the finding that Baballah and his family were likely to become public charges. The BIA did not conduct a *de novo* review of the IJ's denial of asylum, stating conclusorily that the IJ properly evaluated Baballah's asylum claim and that Baballah's encounters with the Israeli Marines did not constitute persecution.

III.

[1] [2] [3] [4] [5] To the extent that the BIA incorporates the IJ's decision as its own, we treat the IJ's statement of reasons as the BIA's.[6] *Gonzalez v. INS,* 82 F.3d 903, 907 (9th Cir.1996). Where, as here, the IJ finds the applicant's testimony to be credible and the BIA makes no contrary finding, we accept as undisputed the testimony of the applicant. *Ranjit John Singh,* 94 F.3d at 1356. The BIA's determination of pure legal questions is reviewed *de novo. Id.* at 1358; *Fisher v. INS,* 79 F.3d 955, 961 (9th Cir.1996) (en banc). We must uphold the BIA's decision if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias-Zacarias,* 502 U.S. 478, 481, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). The BIA's determination can be overturned only if the evidence presented by the applicant was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed. *Id.*

IV.

To be eligible for a grant of asylum, Baballah must show that he is a refugee. 8 U.S.C. § 1158(b)(1). A refugee is one who is "unable or unwilling to avail himself or herself of the protection of [his or her native] 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." 8 U.S.C. § 1101(a)(42)(A).

***1074** [6] [7] [8] [9] To establish a well-founded fear of persecution, the applicant must establish both a genuine subjective fear of persecution and an objective basis for that fear. *Singh v. INS,* 134 F.3d 962, 966 (9th Cir.1998) (*B. Singh*). Here, as noted, the IJ found Baballah's testimony regarding his fear to be credible, thus establishing the subjective element of his claim. *Id.* The objective prong requires a showing of "some direct, credible evidence supporting the claim." *Sarvia-Quintanilla v. INS,* 767 F.2d 1387, 1394 (9th Cir.1985). Baballah can meet the objective prong of this test by showing that he suffered persecution in the past "because '[a]n alien who establishes past persecution is presumed to have a well-founded fear of future persecution.' " *B. Singh,* 134 F.3d at 967 (quoting *Gaya Prasad v. INS,* 101 F.3d 614, 617 (9th Cir.1996)) (alteration in original).

[10] In order to show past persecution, Baballah must demonstrate 1) that his encounters with the Israeli Marines rise to the level of persecution; 2) that the persecution was on account of one or more of the five protected grounds; and 3) that the persecution was committed either by the government or by forces that the government was unable or unwilling to control. *Chand v. INS,* 222 F.3d 1066, 1073 (9th Cir.2000).

A.

[11] [12] [13] As we have recognized, persecution is not defined in the INA. *B. Singh,* 134 F.3d at 967. However, we have defined persecution as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive." *Fisher,* 79 F.3d at 961 (internal quotation marks omitted); *see also Kovac v. INS,* 407 F.2d 102, 107 (9th Cir.1969). There is "no question that persistent death threats and assaults on one's life, family, and business rise to the level of persecution within the meaning of the Act." *R.J. Singh,* 94 F.3d at 1360. Because Israeli Marines assaulted Baballah, his crew, his brother, and his business, he has established past persecution.

Threats and Attacks

[14] Threats and attacks can constitute persecution even where an applicant has not been beaten or physically harmed. *See, e.g., Artiga Turcios v. INS,* 829 F.2d 720, 723-24 (9th Cir.1987) (holding that petitioner had established persecution although he had not been physically harmed and received only an indirect threat relayed by a neighbor); *Surita,* 95 F.3d at 819 (concluding that petitioner had established persecution when the evidence showed that she had been robbed numerous times in the course of a week or ten days but not physically harmed); *R.J. Singh,* 94 F.3d at 1360 (holding that the petitioner established persecution when verbal threats were followed by multiple other attacks, although the only actual injury sustained was bruising of the ribs).

The events described by Baballah-Israeli Marines circling rapidly around his boat causing it to fill with water and endangering Baballah and his crew, shooting bullets over the boat, spraying highly pressurized water at Baballah's boat and its occupants in freezing temperatures-were not simply threats, but actual attacks. These attacks occurred repeatedly over a period of ten years, were sufficiently threatening that Baballah's crew members were unwilling to continue in his employ, and were clearly intended to make Baballah fear that the Israeli Marines would kill or seriously harm him.

[15] The treatment of Baballah's brother demonstrated that these threats were not idle. Violence directed against an applicant's family members provides support for a claim of persecution and in some instances is sufficient to establish persecution because such evidence "may well show that [an applicant's] fear ... of persecution is well founded." U.N. HIGH COMM'R FOR REFUGEES, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* II(B)(2)(a), ¶ 43 (Geneva 1992); *see also Hernandez-Ortiz v. INS,* 777 F.2d 509, 515 (9th Cir.1985); *Rodriguez v. INS,* 841 F.2d 865, 870-71 (9th Cir.1987). Here, the Israeli Marines tied Baballah's brother to a pole and sprayed him with pressurized water in freezing weather. The brother was subsequently arrested and imprisoned for assault, and due to the imprisonment, he now suffers from a mental impairment. The physical abuse and imprisonment of Baballah's brother occurred as an extension of the threats and attacks regularly directed against Baballah, and adds additional strength to his claim of past persecution because it demonstrated that the danger threatened by the Marines' menacing behavior was real.

Economic Persecution

[16] In addition to the persecution noted above, the hostile encounters with the Israeli Marines made it virtually impossible for Baballah to earn a living. "We have recognized that purely economic harm can rise to the level of persecution where there is 'a probability of deliberate imposition of substantial economic disadvantage' upon the applicant on account of a protected ground." *Chand,* 222 F.3d at 1074 (quoting *Kovac v. INS,* 407 F.2d at 107, and *Gonzalez v. INS,* 82 F.3d 903, 910 (9th Cir.1996), and discussing a number of cases in which "[e]conomic persecution has been credited as an important part of asylum claims").[7] In *Kovac,* we noted that, by removing the word physical from the description of persecution, Congress provided that economic persecution alone could sustain an asylum claim. 407 F.2d at 105-06. We held that Kovac, a chef who was forced from several jobs and thereafter refused employment as a chef because of his refusal to cooperate with the Yugoslavian secret police, was eligible for asylum despite the fact that he was able to find work in the merchant marines. *Id.* at 107. In so holding, we concluded that Kovac was not required to show an absolute inability to support his family in order to be eligible for asylum. *Id.*

Here, after Baballah's attempts to obtain employment as an accountant and lifeguard were thwarted, Israeli Marines deliberately interfered with his attempts to maintain a fishing business through the dangerous intimidation tactics described above. The Marines targeted Baballah's livelihood by purposely destroying his fishing nets, which forced him to spend days repairing them, by frightening away his crew, and by singling him out to receive unwarranted citations that were costly to resolve.[8] The IJ dismissed the citations as legitimate law enforcement, ignoring Baballah's testimony that the citations involved discriminatory harassment because of his mixed background: "It's discrimination. It's not because I was doing something wrong. When they found out who I am, they will come and give me a ticket." Ultimately, Baballah's fishing boat was destroyed by the Israeli Marines when they ignored Baballah's directions for towing it.

[17] In light of this credible evidence, the IJ's finding that "[t]he[r]e is nothing to indicate that this applicant would be unable to continue to support his family if he was[sic] required to return to Israel" is without merit. The IJ erred as a matter of law by requiring that Baballah show an absolute inability to support his family. *Kovac,* 407 F.2d at 107. Moreover, the IJ ignored the fact that the Israeli Marines targeted Baballah and deliberately caused him economic suffering because of his ethnic and religious background, ultimately leading to the demise of his fishing business.

Cumulative Impact

[18] Although the IJ described the threats, attacks, and economic hardship inflicted on Baballah, she made no reference to them in concluding that Baballah had not suffered persecution. An applicant may suffer persecution because of the cumulative impact of several incidents even where no single incident would constitute persecution on its own. *Surita,* 95 F.3d at 819; *Chand,* 222 F.3d at 1074; *Shirazi-Parsa v. INS,* 14 F.3d 1424, 1428 (9th Cir.1994), *overruled on other grounds by Fisher,* 79 F.3d 955. When analyzed in the aggregate, the physical assaults and economic harassment endured by Baballah compel a finding of persecution.

In *Khourassany v. INS,* we found that an Arab Israeli had not suffered persecution when he was neither physically attacked nor threatened with harm, and where, despite being forced to close one restaurant, he continued to operate several other businesses. 208 F.3d 1096, 1100-01 (9th Cir.2000). In contrast, in *Surita,* we held an Indo-Fijian suffered persecution when she was robbed more than fifteen times going to and from work, and quit her job as a result. 95 F.3d at 819-20. Here, Baballah was the victim of terrifying attacks on a frequent basis over a ten-year period, was forced to change occupations, and risked his life in frustrated attempts to earn a livelihood. We have found that the severity of harm is compounded when incidents of persecution have occurred on more than one occasion, particularly where "an applicant ... is victimized at different times over a period of years." *Chand,* 222 F.3d at 1073-74. Taken together, the threats and violent assaults against Baballah and his business cannot be dismissed as mere discriminatory harassment.

In rejecting Baballah's persecution claim, the IJ noted the "severe hostility" and "serious tension" between Jews and Arabs in the Middle East, implying that Baballah's confrontations with the Marines were no different from those experienced by others due to "general conditions of violence," *Chand,* 222 F.3d at 1075, and plainly ignoring the numerous specific instances of persecution he recounted. We have held that "the Board of Immigration Appeals erred as a matter of law when it concluded that specific threats are insufficient to establish a threat of persecution if they are representative of a general level of violence in a foreign country." *Bolanos-Hernandez v. INS,* 767 F.2d 1277, 1288 (9th Cir.1984). In *Bolanos,* we emphasized that "[i]f anything, ... [the fact that the individual resides in a country where the lives and freedom of a large number of persons has been threatened] may make the threat *more* serious or credible." *Id.* at 1284-85 (emphasis added); *see also Chand,* 222 F.3d at 1076 (noting that where "many members of [a protected] group are targeted for persecution, *less* of an individualized showing is required to qualify for asylum, not more" (emphasis in original)); *R.J. Singh,* 94 F.3d at 1359. Baballah did not rely on the general threat of danger to individuals ***1077** with a mixed ethnic background; his testimony was replete with specific instances in which he was individually singled out for abuse by Israeli Marines. The IJ's suggestion that the threats and attacks experienced by Baballah and his family cannot be considered persecution because of generally dangerous conditions is at odds with our case law.

B.

[19] [20] Baballah testified that he was persecuted on account of his parents's intermarriage and because he and his mother converted to Islam.[9] Because it is difficult to conclusively prove motive, Baballah need only "provide *some* evidence of [motive], direct or circumstantial," *Elias-Zacarias,* 502 U.S. at 483, 112 S.Ct. 812, and demonstrate the connection between the government's actions and his membership in a protected group, *Fisher,* 79 F.3d at 962. "[U]ncontroverted and credible testimony is sufficient to establish that [an asylum applicant] was persecuted on account of ethnicity." *Shoafera v. INS,* 228 F.3d at 1075. We have established that persecution "for marrying between races, religions, nationalities, social group memberships, or ... political opinion is ... persecution on account of a protected ground." *Maini,* 212 F.3d at 1175 (finding persecution due to an interfaith marriage to be "on account of religion"). In *Maini,* we also held that persecution of children of an intermarriage due to their mixed parentage is on account of a protected ground. *Id.* at 1176.

These standards mean that in order for Baballah to meet the "on account of" prong, he only is required to provide some evidence that in persecuting him, the Israeli Marines were motivated by ethnicity,[10] religion, or the fact that Baballah was the child of a religious and ethnic intermarriage. In the course of persecuting Baballah, the Israeli Marines called him "goy," a word that means non-Jew and that is derogatory to Arabs. The use of this slur amply establishes the connection between the acts of persecution and Baballah's ethnicity and religion. *See, e.g., Duarte de Guinac,* 179 F.3d at 1162 (noting that

motivation was on account of ethnicity where persecution was "coupled with explicit expressions of ethnic hatred"); *Maini,* 212 F.3d at 1176 (same, in context of religion). Baballah has shown credible, nonspeculative insight into the motivation of his persecutors. *See Shoafera,* 228 F.3d at 1075. Both Baballah's belief and the use of the derogatory slur "goy" demonstrate that the Israeli Marines were motivated by Baballah's ethnicity and religion.

C.

The final factor that Baballah must establish is that the persecution he suffered ***1078** was committed by the government or by forces that the government was unable or unwilling to control. *Chand,* 222 F.3d at 1073. This factor is clearly met here because the Israeli Marines are governmental actors who were responsible for the deliberate life-threatening attacks against Baballah and his business.

[21] The INS argues that "Baballah never complained to the police about any of the claimed incidents of persecution, and therefore failed to show that Israel's civilian government was unwilling or unable to help him." However, when the government is responsible for persecution, the third prong of our asylum inquiry is satisfied without further analysis. As a result, no inquiry into whether a petitioner reported the persecution to police is necessary. *See Chanchavac v. INS,* 207 F.3d 584 (9th Cir.2000) (determining that attacks by military constituted persecution, without requiring a complaint to civilian authorities); *Navas v. INS,* 217 F.3d 646, 655-56 (9th Cir.2000) (holding that where military murdered petitioner's aunt and tried to kill him, there was no question that the third prong was met). Only where non-governmental actors are responsible for persecution do we consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors. *B. Singh,* 134 F.3d at 968; *Surita,* 95 F.3d at 819. In Baballah's case, there is no question that the perpetrators of the persecution were themselves government actors, conclusively establishing the third prong of the analysis by showing governmental involvement.

D.

[22] [23] Because any reasonable fact finder would be compelled to find that the destruction of Baballah's business and threats to his well-being constituted persecution, we hold that the IJ's decision was not supported by substantial evidence. This showing of past persecution presumptively demonstrates a well-founded fear of future persecution, unless "a preponderance of the evidence" establishes "a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution." 8 C.F.R. § 208.13(b)(1). The burden is on the INS to demonstrate that conditions have changed. *Duarte de Guinac,* 179 F.3d at 1163; 8 C.F.R. § 208.13(b)(1)(ii). Here, the INS has presented no evidence to rebut the presumption of a well-founded fear of persecution.[11]

***1079** Indeed, the State Department Advisory Opinion supports, rather than undermines, Baballah's application for asylum.[12] The INS has failed to rebut the presumption that Baballah has a well-founded fear of future persecution, and thus we conclude that Baballah and his family are statutorily eligible for asylum.

V.

[24] Because Baballah has established that he suffered past persecution such that his life and livelihood were threatened on account of his ethnicity and religion, a presumption arises that he is entitled to withholding of removal. *Salazar-Paucar v. INS,* 281 F.3d 1069, 1077 (9th Cir.), *as amended by* 290 F.3d 964 (2002); *see also Duarte de Guinac,* 179 F.3d at 1164; *Surita,* 95 F.3d at 821; 8 C.F.R. § 208.16(b)(1)(i) ("If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim."). Because the INS has failed to rebut this presumption, we conclude that it is "more likely than not that [Baballah] would be subject to persecution" upon returning to Israel. *INS v. Stevic,* 467 U.S. 407, 424, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984). Accordingly, Baballah is entitled to withholding of deportation.

VI.

We conclude that Baballah suffered past persecution and that he has shown a genuine and well-founded fear of future persecution should he return to Israel. Under these circumstances, he and his family are eligible for asylum. We also conclude that Baballah and his family are entitled to withholding of removal. We remand this case to the BIA for the Attorney General to exercise his discretion under 8 U.S.C. § 1158(b) as to whether to grant asylum, and for an appropriate order withholding removal of Baballah and his family.

Petition **GRANTED; REMANDED** for further proceedings.

All Citations

367 F.3d 1067, 04 Cal. Daily Op. Serv. 3877, 2004 Daily Journal D.A.R. 5439

Footnotes

1 Because Baballah was found credible and his testimony is thus accepted as undisputed, the facts recounted here are derived from his testimony. *See Singh v. INS,* 94 F.3d 1353, 1356 (9th Cir.1996) (*R.J. Singh*).

2 The parties refer to Baballah's hometown as "Aka," but it appears to be more commonly known as "Akko" or "Akka."

3 Baballah testified that he received anywhere from one to four citations a month, each of which had a fine of 250-500 shekels ($170-$180).

4 Baballah reported that, because Arabs were charged more than Jews, this mortgage bore an extremely high interest rate.

5 Baballah's wife and minor son, respectively, Ula Baballah and Ahmad Baballah, are included in his application for asylum and withholding of removal. Their eligibility is derivative of Baballah's. 8 C.F.R. § 208.21(a). Abrahim and Ula Baballah also have two children who are United States citizens.

6 We have jurisdiction under section 106 of the INA, codified at 8 U.S.C. § 1105a(a)(1) (1996), amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996). *Kalaw v. INS,* 133 F.3d 1147, 1150 (9th Cir.1997). Because the final order of deportation in this case was filed after October 30, 1996 and was pending on April 1, 1997, the BIA's decision is reviewed under the transitional rules of IIRIRA. *Id;* IIRIRA § 309(c), codified at 8 U.S.C. § 1101.

7 Economic persecution on account of a protected ground is distinct from persecution solely on account of an economic motive, for which our precedent precludes relief. *See Maini v. INS,* 212 F.3d 1167, 1176 n. 1 (9th Cir.2000).

8 Baballah argues that the IJ erred in not admitting into evidence photocopies of the citations. However, since the IJ credited Baballah's testimony regarding the citations, the documentary evidence, although corroborative of Baballah's testimony, would have no further probative value. *See Shoafera v. INS,* 228 F.3d 1070, 1075 (9th Cir.2000). Thus, any error that may have occurred was harmless.

9 The strong correlation between ethnicity and religion in the Middle East makes it difficult to determine whether it was one or both of these categories that was responsible for Baballah's persecution. We need not make this determination, since both categories are protected. *Cf. Gafoor v. INS,* 231 F.3d 645, 651 (9th Cir.2000) (finding that applicant was persecuted on account of race and political opinion). Baballah also claims that he was persecuted on account of membership in two social groups-children of intermarriages and Arab Israelis. We need not address these claims under our social group jurisprudence, because the "on account of" requirement is satisfied by the protected grounds of ethnicity and religion.

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10 We use "ethnicity" to designate one of the grounds for Baballah's persecution. Our precedent establishes that "the term ethnicity describes a category which falls somewhere between and within the protected grounds of race and nationality." *Shoafera,* 228 F.3d at 1074 n. 2 (quoting *Duarte de Guinac v. INS,* 179 F.3d 1156, 1159 n. 5 (9th Cir.1999)) (internal quotation marks omitted). Here, we use the more precise term "ethnicity" rather than "race."

11 There is no need to remand to the BIA under *INS v. Ventura,* 537 U.S. 12, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002), to consider whether changed country conditions rebut Baballah's presumptive fear of future persecution. Not only did the INS fail to present evidence of changed conditions for Arab Israelis, it did not argue before the IJ or the BIA that changed country conditions would eliminate Baballah's fear of future persecution. In its brief before the BIA, the INS represented that: "It appears to the service that all relevant issues of fact and law were fully presented to the immigration court during the course of the hearing." In these circumstances, to provide the INS with another opportunity to present evidence of changed country conditions, when it twice had the chance, but failed to do so, would be exceptionally unfair. We recently expressed concern "that constant remands to the BIA to consider the impact of changed country conditions occurring during the period of litigation of an asylum case would create a 'Zeno's Paradox' where final resolution [of the case] would never be reached." *Hoxha v. Ashcroft,* 319 F.3d 1179, 1185 n. 7 (9th Cir.2003) (quoting *Avetova-Elisseva v. INS,* 213 F.3d 1192, 1198 n. 9 (9th Cir.2000)). Nonetheless, because the ultimate decision to grant asylum is discretionary, we remand so that the Attorney general may determine whether to grant that relief. *See* 8 U.S.C. § 1158(b)(1).

12 The advisory opinion stated that "[t]here certainly can be tension, and worse, at the local level between Israeli Arabs and Israeli Jews" and suggested that the IJ's decision should hinge upon the credibility of Baballah's application.

End of Document

Chapter 8

Persecution Based on Race or Nationality

A. Introduction

This chapter will explore those claims to refugee status in which the feared persecution derives in whole or in part from the ethnicity of the asylum seeker. The individual's ethnicity may be expressed or defined either in terms of "race" or "nationality," depending upon the cultural, historical and political context from which he or she comes. Race and nationality constitute two of the five possible grounds underlying the requisite well-founded fear of persecution enumerated in both Article I of the 1951 Convention and INA § 101(a)(42)(A).

The phenomenon of persecution based on ethnicity was prevalent for many centuries prior to the Nazi campaign of genocide against the Jews and other minorities during the 1930s and 1940s. Nevertheless, it was in large part the international community's response to the Holocaust, World War II and the ensuing flight of refugees that was the catalyst for the creation of the United Nations, as well as the international refugee protection regime codified in the 1951 Convention relating to the Status of Refugees. Despite the growth of both customary and conventional international human rights law over the past five decades, ethnic persecution and genocide have continued in recent years on a massive scale, in such diverse cultural contexts as the former Yugoslavia, Rwanda and the Sudan.

Since the passage of the Refugee Act, U.S. Circuit Courts and the Board of Immigration Appeals have grappled with the asylum petitions of individuals making nationality- or race-based claims. Numerous ethnicity-related petitions have also been brought before administrative and judicial tribunals in other signatory states to the Refugee Convention, such as the United Kingdom and Australia. In most of these cases, the courts were asked to examine facts in which the petitioner's ethnicity was related to his or her politics, social status, gender and/or religion. In this chapter we will discuss excerpts from seven cases, five from the United States and two from other jurisdictions.

In *Makonnen*, the U.S. Court of Appeals for the Eighth Circuit in 1995 remanded to the BIA the case of an Ethiopian woman who was an active member of the Oromo Liberation Front, finding that the Board erred in requiring a showing that she had been singled out for persecution. To provide a comparative perspective, we will also consider a 2003 case in which the Court of Appeal of the United Kingdom denied the claim of a Roma mother and son from the Czech Republic, finding that the Czech authorities provide the Roma people with adequate protection from persecution. In another case of mixed public and private persecution against ethnic minorities, the U.S. Second Circuit in 2008 in *Aliyev* favorably considered the asylum claim of an ethnic Uyghur from Kazakhstan who

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founded a Uyghur youth organization. Then in *Shoafera*, a case that blended gender and ethnic animus, the U.S. Ninth Circuit in 2000 reversed the denial of asylum to an Ethiopian woman of Amhara ethnicity who was raped by a Tigrayan man.

Religious affiliation is a frequent attribute of ethnicity-based asylum claims. In 1998, the U.S. Board of Immigration Appeals affirmed a grant of asylum to a Jewish father and son of Russian nationality from the Ukraine, determining that repeated attacks and anti-Semitic comments and threats were more than "isolated acts of random violence" and, "[i]n the aggregate r[o]se to the level of persecution." Five years later in 2003 the U.S. Ninth Circuit in *Baballah* determined that an Arab Israeli fisherman of Moslem heritage was eligible for asylum based on his persecution by Israeli Marines over a ten-year period. In 2004, the Federal Court of Western Australia granted the appeal of an ethnic Hazara of Sh'ia Moslem faith on the basis of evidence of the ongoing victimization of the minority Hazara by members of the Pashtun Sunni Moslem majority in Afghanistan.

As you read Chapter 8, consider the following perspectives and questions:

• At first blush, the treatment of race and nationality-based asylum claims by U.S. courts does not seem to have generated the same degree of controversy as that surrounding the analysis of either social group claims (explored in Chapter 9) or gender-related claims (discussed in Chapter 10). Nevertheless, how might a focused analysis of ethnicity-based asylum claims help frame a number of issues that are relevant to a more complete understanding of the refugee definition as a whole, as well as its specific elements?

• One aspect of a full discussion of race and nationality persecution is a consideration of the extent to which ethnic categorizations may be used to rationalize the oppression of groups of individuals for political reasons. From this perspective, how might an exploration of ethnicity-related claims to refugee status help illustrate the basic linkages between ethnic affiliation and the remaining enumerated grounds for refugee status, namely political opinion, religion and social group?

• Refugee status, like the phenomenon of persecution at its core, stems in large part from the use of individuals, by a government or those it is unwilling or unable to control, as a means to an end rather than as ends in themselves.[1] Moreover, in focusing on race and nationality-based claims to refugee status, we may encounter some cases in which the ethnic and political labels assigned to refugees by their persecutors do not correspond to the terms by which they would choose to define themselves. In such cases, what is the appropriate perspective from which these ethnicity-based claims should be articulated: an external one or an internal one? Put somewhat differently, should such claims be set forth in terms of the ethnic-political identity that is imputed to the refugee, accurately or not, or in terms of the actual identity that the refugee would claim or even articulate for him or herself?

• We may gain important insight into the intent, spirit and potential of the Refugee Convention by analyzing cases from other signatories to the treaty. What common themes emerge in the asylum jurisprudence of U.S. and non-U.S. courts, particularly regarding the treatment of claims based on the fear of ethnicity-based persecution by non-state agents? As you read the cases and materials that follow, consider how the various tribunals are addressing these questions. From there, ask yourselves how these issues could be resolved most appropriately, drawing from relevant international and comparative legal frameworks.

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1. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46–47 (Liberal Arts Press, 1959) (originally published in 1785).

B. Basic Concepts

1. Race

According to a "traditional," pseudo-scientific concept of race, human beings were divided into three racial categories: i.e., "Negroids"/"blacks," "Mongoloids"/"Asians," and "Caucasians"/"whites." Most contemporary social scientists reject such racial breakdowns as both unworkable and unprincipled. On a practical level, in order to define each of the three categories broadly enough to encompass all purported members, the result is a potential range of variations in physical attributes between individual members of the same "race" which is greater than the very limited differences which define the three groups themselves. Moreover, the historical record reveals the strong tendency for racial categorizations to be used to justify theories of racial superiority and systems of human exploitation, whether U.S. slavery, Nazi genocide or South African apartheid.

Taking an alternate approach to racial identity, the UNHCR HANDBOOK ("HANDBOOK") states that: "[r]ace ... has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage." HANDBOOK, at ¶68. This more expansive concept of race clearly transcends the three classic racial categories mentioned above, and would appear to permit our use of the term in referring to a broad range of human communities of common descent, including "the Jewish race" or "the Ethiopian race."

Despite the modern rejection of the notion that race is a scientific or biological concept, it is clear that racial affiliations and the terms that describe them also have more subjective and dynamic attributes. Indeed, racial labels may serve as oppressive categorizations, positive expressions of group identity, or both. The range of terms used to describe Americans of African origin throughout U.S. history (from racial epithets to powerful expressions of racial pride), dramatically illustrates the extent to which descriptions of racial identity may empower as well as oppress, often depending on who is using the term.

To begin to explore the complex and evolving meaning of race in the twentieth century, it may be helpful to compare four different understandings of the concept developed and promoted by social scientists over the past sixty years. The first and third passages excerpted below come, respectively, from the writings of African historian Cheikh Anta Diop and cultural anthropologist Ashley Montagu. The second and fourth selections are portions of two "Statements on Race" promulgated by the United Nations Educational, Scientific and Cultural Association in 1950 and 1967, respectively. All four excerpts are provocative to varying degrees, and are intended to inspire creative dialogue on the concept of race.

Cheikh Anta Diop, Civilization or Barbarism, An Authentic Anthropology

16 (1991)

* * *

Thus, humanity was born in Africa and differentiated itself into several races in Europe, where the climate was sufficiently cold at the end of the Würmian glaciation.

If the human being had been born in Europe, it would have been first white and then it would have negrified (darkened) under the Equator, with the appearance of the formation

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United States Department of Justice

Board of Immigration Appeals

IN RE O-Z- & I-Z-, Respondents

Notprovided
Decided April 2, 1998

**1 *23 An alien who suffered repeated beatings and received multiple handwritten anti-Semitic threats, whose apartment was vandalized by anti-Semitic nationalists, and whose son was subjected to degradation and intimidation on account of his Jewish nationality established that he has suffered harm which, in the aggregate, rises to the level of persecution as contemplated by the Immigration and Nationality Act.

for respondent

Jon Landau, Esquire
Philadelphia, Pennsylvania

for the Immigration and Naturalization Service

Elizabeth J. Dobosiewicz
Deputy District Counsel

Before: Board Panel: SCHMIDT, Chairman; HURWITZ and ROSENBERG, Board Members.

HURWITZ, Board Member:

In a decision dated October 10, 1996, an Immigration Judge granted the respondents asylum under section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) (1994). The Immigration and Naturalization Service has appealed the grant of asylum. The appeal will be dismissed.

I. FACTUAL BACKGROUND

The respondents are a father and son who are natives of Russia and citizens of Ukraine. They entered the United States on March 19, 1994, and are seeking asylum on the basis of their Jewish nationality. The respondent[1] testified that he faced years of housing and employment discrimination on *24 account of his nationality before Ukraine obtained its independence from the former Soviet Union in 1991. However, his asylum claim is based primarily on events which occurred after 1991.

The respondent testified that before coming to the United States, he resided with his son and his Russian wife in the Ukrainian city of Kharkiv. On February 12, 1992, he attended a political rally at which he gave a short speech promoting democracy and unification with Russia. Immediately after he finished his speech, someone grabbed him and began to beat him. He recognized the insignia on the clothing of his attacker as a symbol of "Rukh," a nationalistic, pro-Ukrainian independence movement. The respondent required stitches on his lip and eyebrow from the beating. That evening, he

discovered a leaflet from Rukh in his pocket, with the message "Kikes, get away from Ukraine." He testified that he began to receive similar anti-Semitic leaflets at home in his mailbox or slipped under the door. The record contains one of the leaflets he received in 1993.

In March 1992, a month after the attack at the rally, the respondent's apartment was vandalized. The door had been broken down, furniture was ripped open, some of his possessions were stolen, others were smashed, and a half dozen leaflets from Rukh were left at the scene. The leaflets warned that "kikes" and "Moskali," a derogatory term for Russian nationals living in Ukraine, should leave Ukraine to the Ukrainians.

On January 3, 1993, the respondent was attacked on his way home from work. He heard a voice saying, "Sasha, we've been waiting for you for quite some time." He was thrown to the ground and kicked. During the beating, the attackers repeatedly warned him to take his "Moskal" wife and "mixed" son out of Ukraine. He sustained a rib injury from the attack.

**2 On July 3, 1993, the respondent and his son were physically assaulted at a bus stop near their home by four men who were calling them derogatory names and making anti-Semitic remarks. The respondent was pushed to the ground, and when his son tried to come to his aid, the assailants picked him up and dropped him on the pavement. The beating left bruises on the respondent's torso, and his son sustained an injury to his right knee, which required surgery.

The respondent also recounted the abuse his son endured at school on account of his Jewish background. In 1991, his class was required to read nationalist literature promulgated by Rukh. In December of that year, he was dragged into a corner by some classmates who made anti-Semitic comments and beat him. Also, in December 1993, he was cornered in the men's room by his classmates and forced to remove his pants to show that he had been circumcised. He did not return to school after this incident.

The respondent testified that he reported the burglary as well as the January 1993 and July 1993 assaults to the police. He testified that the police promised to "take care of (it)" on each occasion, but that no action was ever taken.

*25 II. IMMIGRATION JUDGE'S DECISION

The Immigration Judge found that the respondent had suffered past persecution in Ukraine on account of his Jewish nationality. Under the regulations, a finding of past persecution gives rise to a presumption of a well-founded fear of persecution unless a preponderance of the evidence establishes that, since the time the persecution occurred, conditions in the respondent's country have changed to such an extent that he no longer has a well-founded fear of being persecuted in that country. 62 Fed. Reg. 10,312, 10,342 (1997) (to be codified at 8 C.F.R. § 208.13(b)(1)(i)) (interim, effective Apr. 1, 1997); Matter of H-, Interim Decision 3276 (BIA 1996). Finding that the presumption of a well-founded fear had not been rebutted in this case, the Immigration Judge granted asylum to both respondents.

III. ARGUMENTS ON APPEAL

On appeal, the Service argues that the respondent failed to meet his burden of proof to establish that he suffered past persecution or that he has a well-founded fear of persecution. Specifically, the Service contends that the harm suffered by the respondent does not rise to the level of persecution and was not inflicted on account of any one of the five enumerated grounds in the Act. See section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1994). The Service asserts that the respondent experienced only "isolated acts of random violence perpetrated by unknown individuals. At most, the respondent was the victim of discrimination and harassment in an area that is growing increasingly dangerous." The Service further claims that the respondent has not shown that the persecution was "government-directed or condoned." Finally, the Service argues that the respondent no longer has a well-founded fear of persecution in Ukraine, citing to the background material on country conditions for the proposition that anti-Semitism has ceased to be a government policy.

IV. ANALYSIS

**3 With regard to the Service's contention that the harm suffered by the respondent and his son does not rise to level of persecution, we note that the respondent was physically attacked on three occasions. His son endured beatings at school and required surgery to treat an injury he incurred during the July 3, 1993, beating. Furthermore, the respondent's apartment was broken into, his furniture and possessions were destroyed, and valuables were stolen. The respondent repeatedly received anti-Semitic fliers and written threats at his home. Finally, the respondent's son suffered extreme humiliation *26 when he was forced to undress by his classmates. We find that these incidents constitute more than mere discrimination and harassment. In the aggregate, they rise to the level of persecution as contemplated by the Act.

Furthermore, the record reflects that in each instance, the persecutors were motivated by a desire to punish the respondent and his son on account of their Jewish nationality. The respondent's attacker at the demonstration bore a Rukh insignia, and the respondent found an anti-Semitic Rukh leaflet in his pocket that evening. He continued to receive anti-Semitic leaflets at his home, some of which contained handwritten, personalized threats. The January 1993 and July 1993 assaults were accompanied by anti-Semitic comments. The vandals who burglarized the respondent's apartment and destroyed his possessions left a half dozen anti-Semitic leaflets in the apartment, indicative of the identity of the perpetrators and the motive behind the incident. These incidents amount to more than "isolated acts of random violence," as characterized by the Service. The respondent and his son were directly targeted for persecution on account of their Jewish nationality. Therefore, we conclude that the multiple beatings, repeated and personalized threats delivered to the respondent's home, the vandalization and destruction of property, and the intimidation and humiliation of his son, inflicted on account of his Jewish nationality, constitute past persecution. Sections 101(a)(42)(A), 208 of the Act; Matter of H-, supra.

With regard to the Service's suggestion that the incidents of persecution were not "government-condoned," we note that the respondent reported at least three of the incidents to the police, who took no action beyond writing a report. It appears that the Ukrainian Government was unable or unwilling to control the respondent's attackers and protect him or his son from the anti-Semitic acts of violence. Singh v. INS, 94 F.3d 1353 (9th Cir. 1996); Matter of Villalta, 20 I&N Dec. 142, 147 (BIA 1990).

Furthermore, we agree with the Immigration Judge that the presumption of a well-founded fear of persecution has not been rebutted by a preponderance of the evidence in this case. The record does not establish that, since the time the persecution occurred, conditions in Ukraine have changed to such an extent that the respondent no longer has a well-founded fear of being persecuted in that country. Matter of H-, supra; 8 C.F.R. § 208.13(b)(1)(i); The record contains a Department of State profile of country conditions for Ukraine, dated June 1996, which the Service quotes as stating that "(a)nti-Semitism ceased to be a government policy" in that country. Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Ukraine-Profile of Asylum Claims & Country Conditions 6 (June 1996) (hereinafter Profile). This generalized statement, however, is insufficient to rebut the regulatory presumption of a well-founded fear. We take administrative notice of the 1996 Department of State country reports on human rights practices for Ukraine, which is incorporated by reference in the Profile. See Committees on Foreign Relations and International *27 Relations, 105th Cong., 1st Sess., Country Reports on Human Rights Practices for 1996 1180 (Joint Comm. Print 1997) (hereinafter Country Reports); see also Janusiak v. INS, 947 F.2d. 46, 47 (3d Cir. 1991) (acknowledging the Board's power to take administrative notice of country conditions); Matter of S-M-J-, Interim Decision 3303, at 9 n.2 (BIA 1997); Matter of R-R-, 20 I&N Dec. 547, 551 n.3 (BIA 1992), and cases cited therein (stating that it is well established that administrative agencies may take administrative notice of commonly known facts).

**4 While the 1996 country report states that the national government "speaks out against anti-Semitism," the report also acknowledges that "(s)ocietal anti-Semitism exists, and the Government has not prosecuted anti-Semitic acts under the law forbidding the sowing of interethnic hatred." Country Reports, supra, at 1187, 1189. It goes on to state that in western Ukraine, Jewish groups "credibly accuse some local Ukrainian ultranationalists of fostering ethnic hatred and printing anti-Semitic tracts" and "charge that local authorities have not taken action against those who foment ethnic hatred." Id. at 1189. The country report also notes that "death threats were made against Jews in Kharkiv," the respondent's hometown. Id. This not only lends support to the respondent's assertion that the local police refused to investigate the instances of violence perpetrated by ultranationalists against him and his son, but it also supports their well-founded fear of persecution in Ukraine despite the national expansion of Jewish rights. Thus, we agree with the Immigration Judge that the regulatory presumption

of a well-founded fear of persecution has not been rebutted. 8 C.F.R. § 208.13(b)(1)(i).

V. CONCLUSION

We concur with the findings of the Immigration Judge that the respondent has established that he suffered past persecution as defined by the Act on account of his Jewish nationality. Section 101(A)(42)(a) of the Act; 8 C.F.R § 208.13(b)(1). We further find that the Service has failed to show by a preponderance of the evidence that conditions in Ukraine have changed to such an extent that a reasonable person in the respondent's position would no longer have a well-founded fear of persecution. Matter of H-, supra; 8 C.F.R § 208.13(b)(1)(i). Accordingly, the respondent is entitled to the regulatory presumption of a well-founded fear of persecution in Ukraine.

ORDER: The appeal of the Immigration and Naturalization Service is dismissed.

Footnotes

1 Our use of the term "respondent" will refer only to the father unless otherwise indicated, although it is understood that both the father and son are respondents in this case. We note that only the father gave testimony at the deportation hearing.

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