REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
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Unit 7: The nexus requirement

I.N.S. v. Elias-Zacarias, 502 U.S. 478 (1992)
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112 S.Ct. 812
Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE, Petitioner,
v.
Jairo Jonathan ELIAS-ZACARIAS.

No. 90-1342.
Argued Nov. 4, 1991.
Decided Jan. 22, 1992.

Guatemalan native petitioned for review of denial of application for political asylum and withholding of deportation. The Court of Appeals, 921 F.2d 844, determined that native had well-founded fear of persecution on account of political opinion. Certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) guerrilla organization's attempt to conscript Guatemalan native into its military forces did not necessarily constitute "persecution on account of political opinion" within meaning of statute permitting asylum if alien is unable or unwilling to return to home country because of persecution or well-founded fear of persecution on account of political opinion, and (2) alien who testified that he refused to join guerrillas because he was afraid that government would retaliate against him and his family failed to show eligibility for asylum.

Reversed.

Justice Stevens, with whom Justices Blackmun and O'Connor joined, dissented and filed opinion.

....

Opinion

Justice SCALIA delivered the opinion of the Court.

The principal question presented by this case is whether a guerrilla organization's attempt to coerce a person into performing military service *necessarily* constitutes "persecution on account of ... political opinion" under § 101(a)(42) of the Immigration and Nationality Act, as added, 94 Stat. 102, 8 U.S.C. § 1101(a)(42).

I

Respondent Elias-Zacarias, a native of Guatemala, was apprehended in July 1987 for entering the United States without inspection. In deportation proceedings brought by petitioner Immigration and Naturalization Service (INS), Elias-Zacarias conceded his deportability but requested asylum and withholding of deportation.

The Immigration Judge summarized Elias-Zacarias' testimony as follows:
"[A]round the end of January in 1987 [when Elias-Zacarias was 18], two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there.... [T]he guerrillas asked his parents and himself to join with them, but they all refused. The guerrillas asked them why and told them that they would be back, and that they should think it over about joining them.

*480 "[Elias-Zacarias] did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. [H]e left Guatemala at the **815 end of March [1987] ... because he was afraid that the guerrillas would return." App. to Pet. for Cert. 40a-41a.

The Immigration Judge understood from this testimony that Elias-Zacarias' request for asylum and for withholding of deportation was "based on this one attempted recruitment by the guerrillas." *Id.*, at 41a. She concluded that Elias-Zacarias had failed to demonstrate persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, and was not eligible for asylum. See 8 U.S.C. §§ 1101(a)(42), 1158(a). She further concluded that he did not qualify for withholding of deportation.

The Board of Immigration Appeals (BIA) summarily

dismissed Elias-Zacarias' appeal on procedural grounds. Elias-Zacarias then moved the BIA to reopen his deportation hearing so that he could submit new evidence that, following his departure from Guatemala, the guerrillas had twice returned to his family's home in continued efforts to recruit him. The BIA denied reopening on the ground that even with this new evidence Elias-Zacarias had failed to make a prima facie showing of eligibility for asylum and had failed to show that the results of his deportation hearing would be changed.

The Court of Appeals for the Ninth Circuit, treating the BIA's denial of the motion to reopen as an affirmance on the merits of the Immigration Judge's ruling, reversed. 921 F.2d 844 (1990). The court ruled that acts of conscription by a nongovernmental group constitute persecution on account of political opinion, and determined that Elias-Zacarias had a "well-founded fear" of such conscription. *Id.*, at 850-852. We granted certiorari. ....

*481 II

[1] [2] Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), authorizes the Attorney General, in his discretion, to grant asylum to an alien who is a "refugee" as defined in the Act, *i.e.*, an alien who is unable or unwilling to return to his home 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." § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). See *INS v. Cardoza-Fonseca,* 480 U.S. 421, 423, 428, n. 5, 107 S.Ct. 1207, 1209, 1211, n. 5, 94 L.Ed.2d 434 (1987). The BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4). It can be reversed only if the evidence presented by Elias-Zacarias was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed. *NLRB v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939).[1]

[3] The Court of Appeals found reversal warranted. In its view, a guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes "persecution on account of ... political opinion," because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." 921 F.2d, at 850. The first half of this seems to us untrue, and the second half irrelevant.

*482 [4] Even a person who supports a guerrilla movement might resist recruitment **816 for a variety of reasons-fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias-Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo,* it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal was politically based.

[5] [6] As for the Court of Appeals' conclusion that the guerrillas' "motive in carrying out the kidnapping is political": It apparently meant by this that the guerrillas seek to fill their ranks in order to carry on their war against the government and pursue their political goals. See 921 F.2d, at 850 (citing *Arteaga v. INS,* 836 F.2d 1227, 1232, n. 8 (CA9 1988)); 921 F.2d, at 852. But that does not render the forced recruitment "persecution on account of ... political opinion." In construing statutes, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States,* 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962); see *Cardoza-Fonseca, supra,* 480 U.S., at 431, 107 S.Ct., at 1213; *INS v. Phinpathya,* 464 U.S. 183, 189, 104 S.Ct. 584, 589, 78 L.Ed.2d 401 (1984). The ordinary meaning of the phrase "persecution on account of ... political opinion" in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion, as § 101(a)(42) requires.

*483 Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative

expression of a political opinion. That seems to us not ordinarily so, since we do not agree with the dissent that only a "narrow, grudging construction of the concept of 'political opinion,' " *post,* at 818, would distinguish it from such quite different concepts as indifference, indecisiveness, and risk averseness. But we need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion. Even if it does, Elias-Zacarias still has to establish that the record also compels the conclusion that he has a "well-founded fear" that the guerrillas will persecute him *because of* that political opinion, rather than because of his refusal to fight with them. He has not done so with the degree of clarity necessary to permit reversal of a BIA finding to the contrary; indeed, he has not done so at all.[2]

[7] Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require **817 that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial. And if he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was *484 so compelling that no reasonable factfinder could fail to find the requisite fear of persecution. That he has not done.

The BIA's determination should therefore have been upheld in all respects, and we reverse the Court of Appeals' judgment to the contrary.

It is so ordered.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join, dissenting.

Respondent refused to join a guerrilla organization that engaged in forced recruitment in Guatemala. He fled the country because he was afraid the guerrillas would return and "take me and kill me."[1] After his departure, armed guerrillas visited his family on two occasions searching for him. In testimony that the hearing officer credited, he stated that he is still afraid to return to Guatemala because "these people" can come back to "take me or kill me."[2]

It is undisputed that respondent has a well-founded fear that he will be harmed, if not killed, if he returns to Guatemala. It is also undisputed that the cause of that harm, if it should occur, is the guerrilla organization's displeasure with his refusal to join them in their armed insurrection against the government. The question of law that the case presents is whether respondent's well-founded fear is a "fear of persecution on account of ... political opinion" within the meaning of § 101(a)(42) of the Immigration and Nationality Act.[3]

*485 If respondent were to prevail, as he did in the Court of Appeals, 921 F.2d 844 (CA9 1990), he would be classified as a "refugee" and therefore be eligible for a grant of asylum. He would not be automatically entitled to that relief, however, because "the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 428, n. 5, 107 S.Ct. 1207, 1209, n. 5, 94 L.Ed.2d 434 (1987) (emphasis in original). Instead, § 208 of the Act provides that the Attorney General may, "in [his] discretion," grant asylum to refugees.[4]

**818 *486 Today the Court holds that respondent's fear of persecution is not "on account of ... political opinion" for two reasons. First, he failed to prove that his refusal to join the guerrillas was politically motivated; indeed, he testified that he was at least in part motivated by a fear that government forces would retaliate against him or his family if he joined the guerrillas. See *ante,* at 816. Second, he failed to prove that his persecutors' motives were political. In particular, the Court holds that the persecutors' implicit threat to retaliate against respondent "because of his refusal to fight with them," *ante,* at 816, is not persecution on account of political opinion. I disagree with both parts of the Court's reasoning.

I

A political opinion can be expressed negatively as well as affirmatively. A refusal to support a cause-by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center-can express a political opinion as effectively as an affirmative statement or affirmative conduct. Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect.

As the Court of Appeals explained in *Bolanos-Hernandez*

v. INS, 767 F.2d 1277 (CA9 1985):
"Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction. Just as a nation's decision to remain neutral is a political one, *see, e.g.,* Neutrality Act of 1939, 22 U.S.C. §§ 441-465 (1982), so is an individual's. When a person is aware of contending political forces and affirmatively ***487** chooses not to join any faction, that choice *is* a political one. A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980-to provide protection to all victims of persecution regardless of ideology. Moreover, construing 'political opinion' in so short-sighted and grudging a manner could result in limiting the benefits under the ameliorative provisions of our immigration laws to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify." *Id.,* at 1286 (emphasis in original; footnote omitted).

The narrow, grudging construction of the concept of "political opinion" that the Court adopts today is inconsistent with the basic approach to this statute that the Court endorsed in *INS v. Cardoza-Fonseca, supra.* In that case, relying heavily on the fact that an alien's status as a "refugee" merely makes him eligible for a discretionary grant of asylum-as contrasted with the entitlement to a withholding of deportation authorized by § 243(h) of the Act-the Court held that the alien's burden of proving a well-founded fear of persecution did not require proof that persecution was more likely than not to occur. We explained:
"Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a 'well-founded fear of persecution,' an alien need not prove that it is ****819** more likely than not that he or she will be persecuted in his or her home country. We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien. See ***488** *INS v. Errico,* 385 U. S. 214, 225, 87 S.Ct. 473, 480, 17 L.Ed.2d 318 (1966); *Costello v. INS,* 376 U. S. 120, 128, 84 S.Ct. 580, 585, 11 L.Ed.2d 559 (1964); *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433 (1948).
"Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.' H. R. Rep. [96-608, p. 9 (1979)]. Our holding today increases that flexibility by rejecting the Government's contention that the Attorney General may not even consider granting asylum to one who fails to satisfy the strict § 243(h) standard. Whether or not a 'refugee' is eventually granted asylum is a matter which Congress has left for the Attorney General to decide. But it is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported." 480 U. S., at 449-450, 107 S.Ct., at 1222-1223.

Similar reasoning should resolve any doubts concerning the political character of an alien's refusal to take arms against a legitimate government in favor of the alien. In my opinion, the record in this case is more than adequate to support the conclusion that this respondent's refusal was a form of expressive conduct that constituted the statement of a "political opinion" within the meaning of § 208(a).[5]

***489** II

It follows as night follows day that the guerrillas' implied threat to "take" him or to "kill" him if he did not change his position constituted threatened persecution "on account of" that political opinion. As the Court of Appeals explained in *Bolanos-Hernandez:*
"It does not matter to the persecutors what the individual's motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion." 767 F.2d, at 1287.[6]

****820** It is important to emphasize that the statute does not require that an applicant for asylum prove exactly

why his persecutors would act against him; it only requires him to show that he has a "well-founded fear of persecution on account of ... political opinion." As we recognized in *INS v. Cardoza-Fonseca,* the applicant meets this burden if he shows that there is a " 'reasonable possibility' " that he will be persecuted *490 on account of his political opinion. 480 U.S., at 440, 107 S.Ct., at 1217-1218 (quoting *I.N.S. v. Stevic,* 467 U.S. 407, 425, 104 S.Ct. 2489, 2498, 81 L.Ed.2d 321 (1984)). Because respondent expressed a political opinion by refusing to join the guerrillas, and they responded by threatening to "take" or to "kill" him if he did not change his mind, his fear that the guerrillas will persecute him on account of his political opinion is well founded.[7]

Accordingly, I would affirm the judgment of the Court of Appeals.

All Citations

502 U.S. 478, 112 S.Ct. 812, 117 L.Ed.2d 38, 60 USLW 4130

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Quite beside the point, therefore, is the dissent's assertion that "the record in this case is more than adequate to *support the conclusion* that this respondent's refusal [to join the guerrillas] was a form of expressive conduct that constituted the statement of a 'political opinion,' " *post,* at 819 (emphasis added). To reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it-and also compels the further conclusion that Elias-Zacarias had a well-founded fear that the guerrillas would persecute him *because of* that political opinion.

2 The dissent misdescribes the record on this point in several respects. For example, it exaggerates the "well foundedness" of whatever fear Elias-Zacarias possesses, by progressively transforming his testimony that he was afraid the guerrillas would " 'take me or kill me,' " *post,* at 817, into, first, "the guerrillas' *implied threat* to 'take' him or to 'kill' him," *post,* at 819 (emphasis added), and, then, into the flat assertion that the guerrillas "*responded by threatening* to 'take' or to 'kill' him," *post,* at 820 (emphasis added). The dissent also erroneously describes it as "undisputed" that the cause of the harm Elias-Zacarias fears, if that harm should occur, will be "the guerrilla organization's displeasure with his refusal to join them in their armed insurrection against the government." *Post,* at 817 (emphasis added). The record shows no such concession by the INS, and all Elias-Zacarias said on the point was that he feared being taken or killed by the guerrillas. It is quite plausible, indeed likely, that the taking would be engaged in by the guerrillas in order to augment their troops rather than show their displeasure; and the killing he feared might well be a killing in the course of resisting being taken.

1 App. to Brief in Opposition 5a.

2 *Id.,* at 6a.

3 Section 101(a)(42), as codified in 8 U.S.C. § 1101(a)(42), provides:
"(a) As used in this chapter-
"(42) The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion,

nationality, membership in a particular social group, or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."

4 Section 208(a) of the Act, as codified at 8 U.S.C. § 1158(a), provides:

> "The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title."

As we recognized in *INS v. Cardoza-Fonseca,* 480 U.S. 421, 444-445, 107 S.Ct. 1207, 1219-1220, 94 L.Ed.2d 434 (1987):

" 'The [House] Committee carefully considered arguments that the new definition might expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, merely because an individual or group comes within the definition will not guarantee resettlement in the United States.' H.R. Rep. [96-608, p. 10 (1979)].

"... Congress has assigned to the Attorney General and his delegates the task of making these hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum."

5 Here, respondent not only engaged in expressive conduct by refusing to join the guerrilla organization but also explained that he did so "[b]ecause they see very well, that if you join the guerrillas ... then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family." App. to Brief in Opposition 5a. Respondent thus expressed the political view that he was for the government and against the guerrillas. The statute speaks simply in terms of a political opinion and does not require that the view be well developed or elegantly expressed.

6 The Government has argued that respondent's statement is analogous to that of a person who leaves a country to avoid being drafted into military service. The INS has long recognized, however, that the normal enforcement of Selective Service laws is not "persecution" within the meaning of the statute even if the draftee's motive is political. Thus, while holding that an Afghan soldier who refused to fight under Soviet command qualified as a political refugee, *Matter of Salim,* 18 I. & N.Dec. 311 (BIA 1982), the INS has adhered "to the long-accepted position that it is not persecution for a country to require military service of its citizens." *Matter of A-G-,* 19 I. & N.Dec. 502, 506 (BIA 1987); cf. United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 167 (1979) ("Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the [1967 United Nations Protocol Relating to the Status of Refugees]").

7 In response to this dissent, the Court suggests that respondent and I have exaggerated the "well foundedness" of his fear. See *ante,* at 817, n. 2. The Court's legal analysis, however, would produce precisely the same result no matter how unambiguous the guerrillas' threatened retaliation might have been. Moreover, any doubts concerning the sinister character of a suggestion to "think it over" delivered by two uniformed masked men carrying machine guns should be resolved in respondent's favor.

Kebede v. Ashcroft, 366 F.3d 808 (2004)
04 Cal. Daily Op. Serv. 3784, 2004 Daily Journal D.A.R. 5313

366 F.3d 808
United States Court of Appeals,
Ninth Circuit.

Seble KEBEDE, Petitioner,
v.
John ASHCROFT, Attorney General,* Respondent.

No. 02-73135.
|
Argued and Submitted April 1, 2004.
|
Filed May 3, 2004.

Before GOODWIN, PREGERSON, and TALLMAN, Circuit Judges.

Opinion

GOODWIN, Circuit Judge:

[1] Seble Kebede petitions for review of the Board of Immigration Appeal's ("BIA") final order denying her request for asylum and withholding of deportation. Because the BIA affirmed the Immigration Judge's ("IJ") decision without opinion, we review the IJ's decision as the final agency action. *Falcon Carriche v. Ashcroft,* 350 F.3d 845, 849 (9th Cir.2003). The IJ erred in making an adverse credibility determination and in finding that Kebede failed to support her claim of past persecution with substantial evidence.

***810** I. Background

Kebede, an Ethiopian citizen, comes from a family that was powerful during the rule of former Emperor Haile Selassie. After Emperor Selassie was deposed in 1974, Kebede's uncle, the former governor of Harar, was assassinated along with fifty-nine other officials by the Dergue revolutionary government. Her stepfather, the former minister of foreign affairs, was imprisoned, and died shortly after his release from illness and injuries resulting from beatings by prison officials. Dergue officials visited Kebede's house frequently, conducting searches and occasionally taking her mother, Shitaye Wolde Amanuel ("Amanuel"),[1] and brothers into custody for questioning. The family moved in 1979 in an attempt to avoid further harassment, but government officials continued the searches at their new home.

One evening in September 1988, Kebede was at her family's house alone when two Dergue soldiers arrived for a search. Accustomed to these searches, she allowed the soldiers to enter. After the soldiers finished the search, one moved to lock the door. Kebede testified that she tried to run, but that the soldiers held her while ripping off her clothes. The soldiers then beat her, and each took turns raping her while the other held her down. One said, "You had your time in the previous government and this is what you deserve." After the rape, Kebede began screaming hysterically. When attempts to quiet her by threatening her with a gun failed, one of the soldiers slammed her head against a wall, causing her to black out.

Amanuel came home to find Kebede naked and inert, with furniture strewn about the front room. After determining that Kebede was still alive, Amanuel took her to the hospital. Kebede remembered waking up in a taxi on the way to the hospital, Amanuel by her side. Kebede stayed one night in the hospital, during which doctors "have [*sic*] to cut and de-pressurize the excess fluid" from her head injury. At the hearing before the IJ, Amanuel confirmed Kebede's account of the incident, as well as the family's history of harassment and persecution by agents of the Dergue government. Their testimony differed only in that Amanuel believed that Kebede regained consciousness after they reached the hospital.

Kebede fled Ethiopia for the United States in 1990, and overstayed her non-immigrant visa. On March 1, 1996, the Immigration and Naturalization Service initiated deportation proceedings against her.

The IJ denied Kebede's asylum application, finding that Kebede was not credible, and that even if her testimony was believed, Kebede failed to carry her burden of establishing past persecution and fear of future persecution.

II. Analysis

A. Adverse Credibility Determination

[2] [3] The IJ rejected Kebede's claim for asylum on

credibility grounds. Although we review an adverse credibility finding under the deferential "substantial evidence" standard, *He v. Ashcroft,* 328 F.3d 593, 595 (9th Cir.2003); *Alvarez-Santos v. INS,* 332 F.3d 1245, 1254 (9th Cir.2003), such a finding "must be supported by a specific, cogent reason." *De Leon-Barrios v. INS,* 116 F.3d 391, 393 (9th Cir.1997) (quoting *Berroteran-Melendez v.* ***811** *INS,* 955 F.2d 1251, 1256 (9th Cir.1992)). The inconsistencies on which the IJ relied are not "significant and relevant" and do not support an adverse credibility determination. *Lata v. INS,* 204 F.3d 1241, 1245 (9th Cir.2000).

In making the adverse credibility finding, the IJ focused on the petitioner's reluctance to discuss the rape, or to report it in her asylum interview and application. We have previously rejected "the assumption that the timing of a victim's disclosure of sexual assault is a bellwether of truth." *Paramasamy v. Ashcroft,* 295 F.3d 1047, 1053 (9th Cir.2002) (finding that failure to report a sexual assault in an asylum interview does not support an adverse credibility finding). Kebede persuasively explained that she was ashamed of discussing rape with anyone. Amanuel testified that Kebede had refused, for about two weeks, to discuss the rape even with her. Kebede provided a "strong, unrebutted explanation for her reluctance" to discuss the assault. *Id.* A victim of sexual assault does not irredeemably compromise his or her credibility by failing to report the assault at the first opportunity.

To further support the adverse credibility determination, the IJ picked at minor memory lapses and inconsistencies on issues at the periphery of Kebede's asylum claim. The IJ erroneously found that the difference between when Kebede recalled regaining consciousness after the assault and when Amanuel believed Kebede awoke was significant. "[M]inor discrepancies ... [that] cannot be viewed as attempts by the applicant to enhance h[er] claims of persecution have no bearing on credibility." *Damaize-Job v. INS,* 787 F.2d 1332, 1337 (9th Cir.1986); *see also Wang v. Ashcroft,* 341 F.3d 1015, 1021-22 (9th Cir.2003) (finding that minor inconsistencies between a petitioner's and another witness's testimony that are not material to the persecution claim cannot support an adverse credibility finding). Kebede and Amanuel gave conflicting testimony on where Kebede's brother was residing at the time of the hearing, but the record indicates that the disagreement between Kebede's and Amanuel's testimony had more to do with Amanuel's difficulties with English than with prevarication. The IJ found that Kebede dissembled by claiming to have poor English, but Kebede's characterization of her own English skills as "not very good" does not make her testimony less believable.

None of the IJ's proffered reasons seriously call into question the fact and nature of Kebede's rape. Kebede gave a credible account of her rape, evidence that was corroborated by Amanuel's testimony. The petitioner's evidence was "so compelling that no reasonable factfinder could find that [s]he was not credible." *Farah v. Ashcroft,* 348 F.3d 1153, 1156 (9th Cir.2003) (quotation marks and citation omitted). We conclude that the IJ's adverse credibility determination was not supported by substantial evidence.

B. Asylum Claim

[4] [5] [6] A petitioner seeking asylum carries the burden of showing that he or she is unwilling to return to the country of origin "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." *Melkonian v. Ashcroft,* 320 F.3d 1061, 1064 (9th Cir.2003) (quoting 8 U.S.C. § 1101(a)(42)(A)). A showing of past persecution creates a rebuttable presumption that the petitioner has reason to fear future persecution. *Prasad v. INS,* 101 F.3d 614, 617 (9th Cir.1996). The burden shifts to the respondent to show, by a pre-ponderance of the evidence, that the petitioner no longer has a well-founded fear of persecution. ***812** *Singh v. Ilchert,* 69 F.3d 375, 378 (9th Cir.1995). If this presumption is not rebutted, the petitioner is statutorily eligible for asylum. *INS v. Ventura,* 537 U.S. 12, 16-17, 123 S.Ct. 353, 154 L.Ed.2d 272 (2002).

Rape "can support a finding of persecution," but "a petitioner alleging persecution must present some evidence, direct or circumstantial, of the persecutor's motive." *Lopez-Galarza v. INS,* 99 F.3d 954, 959 (9th Cir.1996). The motive requirement is satisfied by evidence that political opinion was imputed to the petitioner. *Id.* That the alleged persecutor acted because of a petitioner's family's political associations is sufficient. *Id.* at 960 (finding that a rape victim was eligible for asylum because evidence showed that "[h]er family's ties to the Somoza regime were well-known in her community").

[7] The IJ found that even if Kebede's testimony could be considered credible, Kebede failed to meet her burden of showing eligibility for asylum. The IJ determined that the Dergue soldiers did not rape Kebede "because of" her family background. The IJ erred in this regard, ignoring evidence that the soldiers linked their assault on Kebede with her family's authority and position in the Selassie regime. During the rape, one soldier stated that Kebede was getting her due because "You had your time in the previous government." The IJ also erred in finding that the rape was an isolated incident, failing to recognize that this visit to Kebede's home was a part of a regular program of searches to which Kebede's family was subject.

We reverse the IJ's holding that Kebede failed to establish that she suffered past persecution.

C. Disposition

The IJ ended the matter by noting that another regime change had occurred in Ethiopia in 1991, after Kebede had reached the United States, and therefore that Kebede no longer had reason to fear future persecution. Kebede does not contest this finding. She instead argues that the atrocity of the abuse by the Dergue soldiers qualifies her for discretionary relief on humanitarian grounds. *See Lopez-Galarza,* 99 F.3d at 960.

[8] A petitioner may be eligible for asylum on the basis of past persecution alone, "even where there is little likelihood of future persecution." *Acewicz v. INS,* 984 F.2d 1056, 1062 (9th Cir.1993). Asylum may be granted for humanitarian reasons where a petitioner has suffered " 'atrocious forms of persecution.' " *Lopez-Galarza,* 99 F.3d at 960-61 (quoting *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* at § 136 (1979), *revised by* U.N. Doc. HCR/IP/4/Eng/REV.1 (1992)); *accord Vongsakdy v. INS,* 171 F.3d 1203, 1206 (9th Cir.1999); *Acewicz,* 984 F.2d at 1062; *Kazlauskas v. INS,* 46 F.3d 902, 906-07 (9th Cir.1995); *Matter of Chen,* 20 I. & N. Dec. 16, 19 (BIA 1989).

[9] The IJ did not determine whether the persecution Kebede suffered qualifies her for asylum for humanitarian reasons. This question is not for us to decide in the first instance. *See Rodriguez-Matamoros v. INS,* 86 F.3d 158, 161 (9th Cir.1996). We remand to the BIA for a determination of whether Kebede's past persecution was atrocious, such that it warrants a grant of asylum.

PETITION GRANTED AND REMANDED.

All Citations

366 F.3d 808, 04 Cal. Daily Op. Serv. 3784, 2004 Daily Journal D.A.R. 5313

Footnotes

* We amend the caption to reflect that John Ashcroft, Attorney General, is the proper respondent pursuant to Fed. R.App. P. 43(c)(2). The Clerk shall amend the docket to reflect the above caption.

1 Amanuel is referred to throughout as Kebede's mother, as she raised Kebede from infancy after Kebede's biological parents died. Amanuel is actually Kebede's paternal grandmother. All references to Kebede's other relatives are made as if Amanuel was Kebede's mother.

End of Document

1. UNHCR

Written Submission on Behalf of the U.N. High Comm'r for Refugees in the [U.K.] Court of Appeal in Yasin Sepet and Erdem Bulbul v. Secretary of State for the Home Department

December 21, 2000, No. C2000/2777

I. Introduction

1. United Nations High Commissioner for Refugees (hereinafter "UNHCR") is grateful for the invitation issued by this Court through the Respondent "to make representations and/or appear".

2. In taking up this invitation, the UNHCR will restrict these submissions to questions relating to the construction of the Convention relating to the Status of Refugees 1951 and will not seek to make representations on the facts of these two appeals. At this stage the UNHCR will make only written representations ...

The UNHCR

3. Under the mandate conferred by the Statute of the Office of the United Nations High Commissioner for Refugees ("the UNHCR Statute"), the UNHCR currently protects some 22 million "persons of concern", including refugees.

4. Under its Statute, the UNHCR has been charged by the United Nations with

a) "the function of providing international protection ... to refugees" (Article 1); and

b) "Promoting the conclusion and ratification of international conventions for the protection of refugees, *supervising their application* and proposing amendments thereto." (Article 8, emphasis added)

5. Under Article 35 of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention") and Article II of the 1967 Protocol relating to the Status of Refugees ("the 1967 Protocol"), the United Kingdom, as one of the States Parties to the 1951 Convention, is under an obligation to:

> "... co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of *supervising the application of the provisions of this Convention.*" (Emphasis added)

6. The UNHCR supervises the application by the United Kingdom of the 1951 Convention through its Representative to the United Kingdom, an Officer of the organisation accredited to the Court of St. James.

7. The 1951 Convention, and the United Kingdom's obligations thereunder, have been incorporated into UK domestic law by virtue of section 69 of the Immigration and Asylum Act 1999, sections 1 and 2 of the Asylum and Immigration Appeals Act 1993 and paras. 327, 328 and 334 of the Immigration Rules (HC 395).

UNHCR and the issues in this appeal

8. The determination of this appeal will necessarily affect the manner in which the UNHCR discharges its supervisory functions under the 1951 Convention and the 1967 Protocol vis-á-vis the United Kingdom. Furthermore, the UNHCR anticipates that

a) The Court's judgment in this case may have significant influence on the interpretation and/or application of Article 1A(2) of the 1951 Convention by the

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courts and administrative authorities of the other 135 Contracting Parties to the 1951 Convention and/or the 1967 Protocol. In the absence of guidance from an international judicial body on the interpretation of the provision in question, the comparative jurisprudence of the superior courts of other Contracting Parties has assumed some importance. The parties before the Court in this appeal place significant weight on the jurisprudence of such courts.

b) Furthermore, the UNHCR has an interest in ensuring that the 1951 Convention is interpreted consistently by every Contracting State and in accordance with the humanitarian principles underlying its drafting, adoption and application.

9. The requirement for a uniform interpretation of international treaties throughout the Contracting States also underlies the approach adopted by the UK courts to the interpretation of international treaties: *T v. Secretary of State for the Home Department* [1996] AC 742.

10. Furthermore, the UNHCR is the repository of the archives of the 1951 Convention, which include its *travaux preparatoires* and comparative legislation and jurisprudence from all Contracting States (see Article 8(f) of the Statute). As a consequence, the UNHCR is in a unique position to make submissions on the legal principles underlying the interpretation of the 1951 Convention and to assist this Court in the task of interpreting its provisions.

11. The appeals before this Court raise important points of construction of the 1951 Convention, namely

a) the circumstances under which "partial" conscientious objectors to military service fall within the definition of "refugee" under the 1951 Convention; and

b) the relevance (if any) of the "motivation" of the persecutor in determining whether an individual fears persecution "for a Convention reason".*

In these submissions, the UNHCR will seek to restrict itself to these two issues and to the questions of (international) law they raise, but will not ... make representations on the facts of these two appeals, whether in relation to these two appellants or in relation to the specific situation in Turkey.

* * *

VI. "Motivation"

30. The Respondent in this case *inter alia* argues that "when considering whether any persecution is for a Convention reason, what has to be considered is the reasons which *motivate* the persecutor, not the asylum claimant as such" (emphasis added). The Respondent's skeleton argument goes on to state that "an individual is not persecuted by reason of them [his religion or opinions] unless they are what *motivate* his persecutor to persecute him" (emphasis added). In conclusion, the Respondent states that "whatever an individual's reasons for refusing military service, he will not be persecuted for a 'Convention reason' if his persecutor is indifferent to his *motives* and is concerned simply with securing his military service or punishing his refusal to serve" (emphasis added).

31. It is respectfully submitted that such a construction is not supported by Article 1A of the 1951 Convention. It is well recognised, not least in municipal case law,[19] that the

* [Authors' Note: This brief has been edited to present UNHCR's position on point b. only.

19. *See, e.g., Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal, ex parte Shah,* [1999] 2 A.C. 629, 646 (per Lord Steyn).

1951 Convention as an international treaty should be interpreted according to applicable rules, *i.e.* Article 31 of the Vienna Convention of the Law of Treaties, paragraph 1 of which provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

32. The wording of Article 1 A of the 1951 Convention does not include a consideration of the motivation of the persecutor as a condition for finding persecution for a Convention reasons [sic]. As a subjective element, Article 1 A includes only "fear" on the part of the asylum-seeker.[20]

33. Motivation as a necessary criterion for persecution cannot be read into the terms "for reasons of" in Article 1 A of the 1951 Convention. That phrase does not introduce a subjective element but merely links persecution to the persecution grounds in the sense of causation[21] ...

34. Considering the drafting history of the 1951 Convention, there is no indication at all that the drafters intended the motive or intent of the persecutor to be a (or the) controlling factor in either the definition of "refugee" or in the determination of refugee status. The 1951 Convention specifically focuses on objective factors.[23]

35. According to the preamble to the 1951 Convention, it is the object and purpose of that Convention to ensure the widest possible exercise of fundamental human rights and freedom to those within its remit.[24] UNHCR respectfully submits that to require proof of the motivation of the persecutor as an additional criterion in the determination of the ground for persecution would introduce a new element, not envisaged by the drafters of the 1951 Convention, potentially limiting the scope of Article 1A of the 1951 Convention in a way that contradicts its object and purpose.

36. Furthermore, there are significant practical difficulties in imposing such a requirement: in many instances, it will be difficult if not impossible for the applicant to provide any evidence of the motivation of the persecutor.[25] Whether the persecutor acted without any, or with a neutral, motivation or with enmity or intent to harm the applicant is a matter, which the latter cannot reasonably be asked to establish. The UNHCR Handbook, it is submitted, rightly stresses that the requirement of evidence should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself.[26]

37. This position is perhaps best expressed in the very detailed analysis provided by Judge Kirby in the *Chen Shi Hai* case decided by the High Court of Australia:[27]

* * *

39. In an even more recent decision of the High Court of Australia, McHugh J held that although "the motivation of this relatively small group of Marehans might arguably throw

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20. *See* UNHCR Handbook, paragraphs 37 et seq.
21. *See Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal, ex parte Shah*, [1999] 2 A.C. 629, 643 (per Lord Steyn).
23. *See* Guy S. Goodwin-Gill, op. cit., p. 50 to 51.
24. *See, e.g.*, House of Lords, *Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal, ex parte Shah*, [1999] 2 A.C. 629, 639 (per Lord Steyn).
25. *See*, for instance, Goodwin-Gill, op. cit., p. 50.
26. *See* UNHCR Handbook, paragraph 197.
27. *See* High Court of Australia, *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19 (13 April 2000).

some light on what Marehans generally might do to the applicant", he did "not think that a finding as to the motivation for this incident was so necessary that, by failing to find that motivation, the Tribunal erred in law."[29]

40. This position is further supported by the clear position taken by the German Constitutional Court. In a 1987 decision concerning Ahmadis in Pakistan, the Court firmly rejected the concept of motivation of persecution until then applied by the Federal Administrative Court. The Court stated that persecution for reasons of political opinion could not be denied simply because Pakistan was motivated, when enacting certain criminal laws, to guarantee public order. What was decisive was whether the acts in question, based on law of general application or not, amounted to persecution in an objective sense.[30] That decision was again confirmed in a 1989 decision of the German Constitutional Court concerning the application of a Turkish national of Kurdish origin. The Court there held that the subjective motives of the persecutor were irrelevant for the determination of the right to asylum or refugee status.[31]

* * *

VII. Conclusions

48. UNHCR's submissions are:

* * *

e) In order for a fear of persecution to be "for a Convention reason" there is no requirement for the Convention reason to be the motivation or intention of the persecutor. Although proof of such a motive or intent may facilitate the establishment of the connection between the feared persecution and the Convention reason, a person may be recognised as a refugee if the *effect* of a law of general application, which on its face is non-discriminatory, is harmful to that individual "for reasons of" any of the five listed grounds in Article 1A. The jurisprudence and commentaries on this point overwhelmingly supports the position put forward by Professor Goodwin-Gill that "... while evidence of such motivation may be sufficient to establish a claim to refugee status, it cannot be considered a *necessary* condition."[40]

Notes

1. Why might the UNHCR become involved as an *amicus* in individual refugee cases? Does the UNHCR answer that question when it states in its brief that it "anticipates" that the U.K. court's judgment "may have significant influence on the interpretation and/or application" of the Convention refugee definition by the other 135 State parties? UNHCR also expresses its "interest in ensuring that the 1951 Convention is interpreted consistently by every Contracting State and in accordance with the humanitarian principles underlying its drafting, adoption and application." (¶ 8 of brief.)

2. In explaining its interpretation of "for reasons of" UNHCR proffers that the term "does not introduce a subjective element but merely links persecution to the persecution

29. *See* High Court of Australia, *Minister for Immigration and Multicultural Affairs v. Ibrahim* [2000] HCA 55 (26 Oct. 2000), paragraph 84.

30. *See Bundesverfassungsgericht* (Federal Constitutional Court), 2 BvR 478, 962/86 (1 July 1987), BVerfGE 76, 143 at 166.

31. *See ibid.*, 2 BvR 958/86 (20 December 1989), BVerfGE 81, 142 at 151.

40. Goodwin Gill op cit p 50, section 4.3.1.

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441 F.3d 739
United States Court of Appeals,
Ninth Circuit.

Jacqueline CANALES-VARGAS, Petitioner,
v.
Alberto R. GONZALES,* Attorney General,
Respondent.

No. 03-71737.
|
Filed March 21, 2006.

Before HARRY PREGERSON, ALEX KOZINSKI, and MICHAEL DALY HAWKINS, Circuit Judges.

Opinion

PREGERSON, Circuit Judge.

An Immigration Judge ("IJ") denied Petitioner Jacqueline Canales-Vargas' applications for suspension of deportation, asylum, and withholding of deportation. The Board of Immigration Appeals ("BIA") affirmed without opinion. We have jurisdiction under 8 U.S.C. § 1252. For the reasons set forth below, we grant Canales-Vargas's petition in part and remand to the BIA for further proceedings.

BACKGROUND[1]

Canales-Vargas is a native and citizen of Peru. She first entered the United States in 1986 and stayed until May 1989, when she then returned to Peru. She reentered the United States in December 1990. She claims that in April 1990, while she was in Peru, she attended a political rally where she gave a speech denouncing the terrorist group Sendero Luminoso (the "Shining Path"). After the rally, she began receiving threatening notes and phone calls of escalating severity, including some that threatened her with death if she did not leave Peru.

Specifically, beginning two or three weeks after she spoke at the political rally in April 1990, Canales-Vargas received five or six threatening notes and various threatening phone calls. The last threatening phone call came just before she left Peru in November 1990. In addition to threats to harm only her, Canales-Vargas also received a note threatening to place a bomb in her house and kill her family if she failed to leave Peru. According to Canales-Vargas, the letters and phone calls became more aggressive and menacing over time. Originally, the threats told her to "shut up" and "not to speak about things [she] did not know about." Eventually, however, the letters and phone calls threatened her and her family with death if she did not leave Peru.[2] The IJ ***742** concluded that Canales-Vargas was statutorily ineligible for suspension of deportation because she lacked continuous physical presence in the United States. The IJ also concluded that Canales-Vargas was not entitled to asylum or withholding of deportation because she failed to establish that she suffered past persecution or faced any threat of future persecution if returned to Peru. The BIA affirmed the IJ's decision without opinion. Canales-Vargas petitions for review of her final order of removal.

STANDARD OF REVIEW

[1] Because administrative proceedings commenced before April 1, 1997, and the final administrative order was issued after October 30, 1996, the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-546 (1996), apply to this case. *See Kalaw v. INS,* 133 F.3d 1147, 1150 (9th Cir.1997). Where, as here, the BIA affirms the decision of the IJ without opinion, we review the decision of the IJ as the final agency decision. *See Falcon Carriche v. Ashcroft,* 350 F.3d 845, 849 (9th Cir.2003). We review the BIA's decision that Petitioner has not established entitlement to suspension of deportation or eligibility for asylum or withholding of deportation for substantial evidence. *See Lopez-Alvarado v. Ashcroft,* 381 F.3d 847, 850-51 (9th Cir.2004); *Wang v. Ashcroft,* 341 F.3d 1015, 1019-20 (9th Cir.2003).

DISCUSSION

....

II. Asylum

A. Applicable Legal Standard

[3] To be eligible for asylum, Canales-Vargas must

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establish that she is a refugee-namely, that she is a person unable or unwilling to return to Peru "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." *Sael v. Ashcroft,* 386 F.3d 922, 924 (9th Cir.2004); 8 U.S.C. § 1101(a)(42)(A). The source of the persecution must be the government or forces that the government is unwilling or unable to control. *See Mashiri v. Ashcroft,* 383 F.3d 1112, 1119 (9th Cir.2004).

[4] [5] To be "well-founded," an asylum applicant's "fear of persecution must be both subjectively genuine and objectively reasonable." *Sael,* 386 F.3d at 924. "An applicant 'satisfies the subjective component by credibly testifying that she genuinely fears persecution.' " *Id.* (quoting *Mgoian v. INS,* 184 F.3d 1029, 1035 (9th Cir.1999)). An asylum applicant "generally satisfies the objective component in one of two ways: either by establishing that she has suffered persecution in the past or by showing that she has a good reason to fear future persecution." *Id.* (quoting *Mgoian,* 184 F.3d at 1035). While a well-founded fear must be objectively reasonable, it "does not require certainty of persecution or even a probability of persecution." *Hoxha v. Ashcroft,* 319 F.3d 1179, 1184(9th Cir.2003). "Even a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear." *Sael,* 386 F.3d at 925(quoting *Knezevic v. Ashcroft,* 367 F.3d 1206, 1212 (9th Cir.2004)).

B. Analysis

1. Past Persecution

[6] Canales-Vargas may demonstrate past persecution on account of a political opinion with evidence that (1) she has been a victim of persecution; (2) she holds a political opinion; (3) her political opinion was known to her persecutors; and (4) the persecution has been on account of her political opinion. *See Gonzales-Neyra,* 122 F.3d 1293, 1296 (9th Cir.1997) (citing *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir.1997)). Proof of past persecution gives rise to a presumption of a well-founded fear of future persecution and shifts the evidentiary burden to the government to rebut that presumption. *See, e.g., Popova v. INS,* 273 F.3d 1251, 1259 (9th Cir.2001).

[7] "In asylum and withholding of deportation cases, we have consistently held that death threats alone can constitute persecution." *Navas,* 217 F.3d. at 658; *see also, e.g., Mashiri v. Ashcroft,* 383 F.3d 1112, 1119 (9th Cir.2004); *Siong v. INS,* 376 F.3d 1030, 1039 (9th Cir.2004); *Khup v. Ashcroft,* 376 F.3d 898, 903 (9th Cir.2004) (quoting *Navas,* 217 F.3d at 658); *Njuguna v. Ashcroft,* 374 F.3d 765, 770 (9th Cir.2004); ***744** *Rios v. Ashcroft,* 287 F.3d 895, 900 (9th Cir.2002); *Lim v. INS,* 224 F.3d 929, 935 (9th Cir.2000); *Del Carmen Molina v. INS,* 170 F.3d 1247, 1249 (9th Cir.1999); *Briones v. INS,* 175 F.3d 727, 729 (9th Cir.1999); *Garrovillas v. INS,* 156 F.3d 1010, 1016 (9th Cir.1998); *Gonzales-Neyra,* 122 F.3d at 1296; *Gonzalez v. INS,* 82 F.3d 903, 909-10(9th Cir.1996); *Gomez-Saballos v. INS,* 79 F.3d 912, 916 (9th Cir.1996); *Aguilera-Cota v. INS,* 914 F.2d 1375, 1383-84 (9th Cir.1990).

[8] Arguably, Canales-Vargas's credible testimony did not establish that the threats that she received "inflict[ed] sufficient suffering or harm to compel a finding of past persecution." *Lim,* 224 F.3d at 936(internal quotation marks omitted). But Canales-Vargas argues that the notes and calls, in and of themselves, constitute persecution. While *Navas* tells us that death threats alone can be persecution, it does not specify if all threats-based on a protected ground-are sufficient to establish persecution. *Navas,* 217 F.3d at 658.

In *Navas,* the petitioner presented suffering in excess of mere threats. *See id.* ("[Navas's] case involves considerably more; here, Navas was not only threatened with death, but two members of his family were murdered, he was shot at, and his mother beaten."). In contrast to the petitioner in *Navas,* Canales-Vargas received written and telephone threats that were never carried out. The record indicates that the Shining Path neither confronted Canales-Vargas nor physically harmed her. For these reasons, among others, the IJ found that Canales-Vargas did not suffer past persecution. We uphold the IJ's finding because the evidence does not compel a contrary result. *See Monjaraz-Munoz v. INS,* 327 F.3d 892, 895 (9th Cir.2003).

2. Future Persecution

[9] Although Canales-Vargas cannot demonstrate past persecution, she may be eligible for asylum relief if she can prove a fear of future persecution. To demonstrate a fear of future persecution on account of a political opinion, Canales-Vargas must show that (1) she holds a political opinion; (2) her political opinion is known to her

persecutors; and (3) the persecution will be on account of her political opinion. *See Gonzales-Neyra,* 122 F.3d at 1296.

[10] Canales-Vargas satisfies the first and second *Gonzales-Neyra* requirements because the death threats she received were a direct consequence of the speeches she made at a political rally in April 1990. It is obvious to us that she holds a political opinion and that her persecutors are aware of her opinion. Our dissenting colleague makes much of the fact that the death threats received by Canales-Vargas were anonymous. *See* Dissent at 2962-64. Critically, however, our case law does not require a victim of past persecution or an applicant fearing future persecution to marshal direct evidence of her persecutor's (or would-be persecutor's) identity or the precise reason why she has been (or would be) a target of persecution. It is true that, in some cases, "isolated ... acts perpetrated by anonymous [individuals or groups] do not establish [past] persecution" and will not establish a well-founded fear of future persecution. *Gormley v. Ashcroft,* 364 F.3d 1172, 1177 (9th Cir.2004) (citing *Rostomian v. INS,* 210 F.3d 1088, 1089 (9th Cir.2000)). But in other cases, "the factual circumstances alone" may constitute sufficient circumstantial evidence of a persecutor's identity or motives. *Navas,* 217 F.3d at 657; *see also Deloso v. Ashcroft,* 393 F.3d 858, 865-66 (9th Cir.2005) (holding that circumstantial evidence of motive may include, *inter alia,* the timing of the persecution and signs or emblems left at the site of persecution). We find that the timing of the threats received by *745 Canales-Vargas, which began two or three weeks after the April 1990 political rally at which she publicly criticized the Shining Path, are sufficient circumstantial evidence that the Shining Path was responsible for the threats and that its motive was to retaliate against Canales-Vargas for publicly criticizing it.[4]

To satisfy the third requirement, Canales-Vargas testified that she received notes and phone calls of escalating severity which eventually threatened her and her family with death if she did not relinquish her political opinion and leave Peru. These threats, made by a recognized terrorist organization, create at least a one-in-ten chance that Canales-Vargas would be severely harmed-if not, killed-if the Shining Path discovered that she had returned to Peru.[5] *See Sael,* 386 F.3d at 925.

The IJ gave two reasons as to why he believed that Canales-Vargas' fear of future persecution was not well founded.[6] First, the IJ found that during the seven months that Canales-Vargas remained in Peru, "certainly, the Shining Path could have reached her and punished her ....[but t]hey did not do anything." It is true that the Shining Path did not personally confront or physically harm Canales-Vargas in the seven months that she remained in Peru. But over that period of time, the threats that she received increased in severity, and she left Peru for the United States promptly after receiving the last threatening phone call in November *746 1990. We do not fault Canales-Vargas for remaining in Peru until the quantity and severity of the threats that she received eclipsed her breaking-point. Indeed, our precedents tell us that we cannot. *See, e.g., Gonzalez v. INS,* 82 F.3d 903, 909 (9th Cir.1996) (noting that there is no "rule that if the departure was a considerable time after the first threat, then the fear was not genuine or well founded"); *Damaize-Job v. INS,* 787 F.2d 1332, 1336 (9th Cir.1986) (two-year stay in Nicaragua after release from persecutors' custody not determinative).

The IJ also found that "it is quite remote and quite unlikely that, given the fact that [Canales-Vargas] has been away from Peru for approximately six years, actually, more than six years, that the Shining Path would be interested in her at this point in time." Our dissenting colleague echoes this concern by stressing that, now, after this case has percolated up from the IJ to the BIA and to this court, "the threats in this case are almost fifteen years old." Dissent at 749. Certainly, the age of the threats that Canales-Vargas received are relevant to our evaluation of the reasonableness of Canales-Vargas' fear. And if we were required to find a "certainty of persecution or even a probability of persecution," *Hoxha,* 319 F.3d at 1184, our conclusion might be different. But when evaluating an asylum applicant's future persecution claim, as we do here, we apply a much lower standard, which requires us to find only a "ten percent chance that the applicant will be persecuted in the future." *Sael,* 386 F.3d at 925. In light of the Shining Path's "ruthless[ ] efficien[cy]" in persecuting its political opponents-to borrow our dissenting colleague's words, Dissent at 749-we have no trouble concluding that Canales-Vargas satisfies this low standard. *See Cardenas v. INS,* 294 F.3d 1062, 1064, 1067 (9th Cir.2002) (finding well-founded fear based on nine year-old Shining Path threats).

In sum, reversal of the IJ's denial of Canales-Vargas's asylum application is warranted because "the evidence would compel any reasonable factfinder to conclude that the requisite fear of persecution has been shown." *Navas,* 217 F.3d at 657; *see also Kahssai v. INS,* 16 F.3d 323,

329 (9th Cir.1994) (per curiam) (Reinhardt, J., concurring) ("The fact that [petitioner] did not suffer physical harm is not determinative of her claim of persecution: there are other equally serious forms of injury that result from persecution.").

III. Withholding of Deportation

A. Applicable Legal Standard

[11] [12] An applicant is entitled to withholding of deportation if he or she can establish a "clear probability," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 430, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), that his or her "life or freedom would be threatened" upon return because of his or her "race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1231(b)(3)(A); *see also Thomas v. Gonzales,* 409 F.3d 1177, 1182 (9th Cir.2005) (en banc). This "clear probability" standard, interpreted as meaning "more likely than not," is more stringent than asylum's "well-founded fear" standard because withholding of deportation is a mandatory form of relief. *Navas,* 217 F.3d at 655. A petitioner who establishes eligibility for asylum raises a presumption of entitlement to withholding of deportation. *See Salazar-Paucar v. INS,* 281 F.3d 1069, 1077 (9th Cir.), *amended by* 290 F.3d 964(9th Cir.2002); *see also Cardoza-Fonseca,* 480 U.S. at 430, 107 S.Ct. 1207; *INS v. Stevic,* 467 U.S. 407, 424, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984).

*747 *B. Analysis*

[13] While Canales-Vargas's testimony "compel[s] any reasonable factfinder to conclude" that she faces at least a ten percent chance of future persecution, her testimony does not establish that it is "more likely than not" that she will suffer future persecution. *Navas,* 217 F.3d at 655, 657. That is, although Canales-Vargas has demonstrated a well-founded fear of future persecution, she has not shown that she faces a "clear probability" of persecution if removed. *Id.* at 655. The non-confrontational threats that Canales-Vargas received almost thirteen years ago establish a ten-percent possibility of future persecution but not the clear probability of it. Without proving a clear probability of persecution, and lacking sufficient evidence of past persecution, Canales-Vargas is not entitled to withholding of deportation. Thus, we affirm the IJ's conclusion that Canales-Vargas is not entitled to withholding of deportation.

CONCLUSION

For the reasons set forth above, we grant the petition for review in part and find that Canales-Vargas has established a well-founded fear of future persecution and is therefore eligible for asylum. However, we deny the petition for review of the IJ's denial of withholding of deportation, as we do not consider the evidence strong enough to meet the higher standard for that form of relief. We also find that Canales-Vargas has failed to meet the "continuous presence" element required for suspension of deportation.

PETITION GRANTED IN PART and REMANDED.

KOZINSKI, Circuit Judge, dissenting:

We have never before held that anonymous death threats, without a scintilla of corroborating harassment, compel a finding that an asylum seeker's fear of persecution is well founded, and I cannot join the majority in interfering, yet again, with the ability of Immigration Judges to do their jobs. Petitioner doesn't allege she endured any harassment other than anonymous threats-not beatings, not detention, not face-to-face confrontation-to support her claim that she will be persecuted if she returns to Peru. The majority nevertheless holds not merely that a reasonable factfinder *could* have determined that Canales-Vargas has a well-founded fear of future persecution, but that a reasonable factfinder would be *required* to so find. *See INS v. Elias-Zacarias,* 502 U.S. 478, 481 & n. 1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). This conclusion contravenes both Supreme Court and circuit precedent requiring deference to the administrative agency.

The majority concedes, as it must, that the handful of anonymous threats petitioner received doesn't amount to past persecution. *See* maj. at 744. So our cases holding that "death threats alone can constitute persecution," *Navas v. INS,* 217 F.3d 646, 658 (9th Cir.2000), are entirely beside the point. *Navas* stands for the unremarkable proposition that the harm inflicted by living under threat of death can sometimes be severe enough to constitute persecution. The majority thus correctly notes that "[t]he fact that [petitioner] did not suffer physical

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harm is not determinative of her claim of persecution." Maj. at 746 (second alteration in original) (quoting *Kahssai v. INS,* 16 F.3d 323, 329 (9th Cir.1994) (per curiam) (Reinhardt, J., concurring)). And it cites other cases stating that death threats alone can constitute persecution. *See, e.g., Khup v. Ashcroft,* 376 F.3d 898, 903 (9th Cir.2004); *Rios v. Ashcroft,* 287 F.3d 895, 900 (9th Cir.2002). But all of these authorities are irrelevant once the majority holds, as it must, that petitioner hasn't been persecuted.

***748** The only remaining question is whether petitioner, who was not persecuted in the past, nevertheless has a well-founded fear of future persecution. Since the IJ found that she had no well-founded fear, our role is a limited one: to examine the record and decide whether it *compels* the conclusion that the IJ erred in this regard. *See Elias-Zacarias,* 502 U.S. at 481, 112 S.Ct. 812. And what does the record show? Over fifteen years ago, petitioner spoke out against the Shining Path in a five-to-ten minute speech before a crowd of 250 people. A few weeks later, an anonymous letter appeared under her door, warning her to keep her mouth shut. Over the next seven months, the harassment escalated-four or five more letters followed, along with a number of threatening telephone calls. The most menacing threatened to place a bomb in petitioner's home and kill her family. The letters and callers never claimed to be associated with the Shining Path, so petitioner can't be sure who made the threats.[1] Throughout that period, the threats never materialized-petitioner was never injured in any way, or even confronted face to face, before she left for the United States.

The Immigration Judge (IJ) carefully considered this evidence, and rendered a thoughtful and well-reasoned opinion.[2] The IJ gave two reasons that petitioner's fear of future persecution was not well founded: First, during the seven months that she remained in Peru, "[c]ertainly, the Shining Path could have reached her and punished her if they thought that's what they wanted, for her failure to leave promptly. They did not do anything." Second, "it is quite remote and quite unlikely that, given the fact that she has been away from Peru for approximately six years, actually, more than six years, that the Shining Path would be interested in her at this point in time."

The majority rejects the IJ's reasons, and holds that "[t]hese threats, made by a recognized terrorist organization, create at least a one-in-ten chance that Canales-Vargas would be severely harmed-if not, killed-if the Shining Path discovered that she had returned to Peru." Maj. at 745. The majority's opinion can only be read to announce a per se rule that any death threat from a group capable of carrying through on it requires a finding that the petitioner's fear of persecution is well founded. The majority's only authority for this dubious proposition is *Sael v. Ashcroft,* 386 F.3d 922, 925 (9th Cir.2004), which said nothing of the sort. Sael endured a lot more than threats to cause her to fear persecution: Her car tires were slashed, her house was stoned, and a mob attempted to break into her house. *See id.* at 927.

We have never held that anonymous threats, without more, compel a finding that a fear is well founded. We have always required the petitioner to demonstrate some corroborating facts in addition to the threats to show that the threats should be taken seriously. For example, in *Marcos v. Gonzales,* 410 F.3d 1112 (9th Cir.2005), the petitioner joined a network of amateur radio operators who reported guerilla group activity to the Philippine Army. *Id.* at 1115-16. For several years, ***749** he received ten death threats a month over the radio, and telephone death threats three to five times daily at his house. *Id.* at 1116. In addition, guerillas confronted him in person and repeated the threats both at his house and at his office. *Id.* The police took these threats seriously enough to provide him special protection at work. *Id.* And in other threat cases, the threats were also backed up by in-person confrontation, or worse. *See, e.g., Kaiser v. Ashcroft,* 390 F.3d 653, 658 (9th Cir.2004) (family members followed by death squad); *Siong v. INS,* 376 F.3d 1030, 1039 (9th Cir.2004) (attacks on four friends).

Had the majority analyzed the facts of Canales-Vargas's case under our caselaw, it would have been compelled to affirm for the two reasons the IJ gave. First, the IJ noted that "if the Shining Path really intended to harm her or her family, they had plenty of time to do that." As the majority emphasizes, when the Shining Path wants to persecute political opponents, it is ruthlessly efficient at doing so. *See* maj. at 745 n.5. But by petitioner's own testimony, we know that the rebels knew who she was and where she lived, yet they never bothered to confront her directly, much less attempt to act on their threats.

The majority nevertheless rejects the IJ's reasoning, noting that the threats increased in severity over time and that petitioner left Peru promptly after the last one. Neither observation undermines the IJ's reasoning. The majority also cites two cases, *Gonzalez v. INS,* 82 F.3d 903, 909 (9th Cir.1996), and *Damaize-Job v. INS,* 787

F.2d 1332, 1336 (9th Cir.1986), for the proposition that a quiet period during which the persecutors don't act on their threats isn't determinative. It's true that the fact "that none of the threats against Petitioners have yet to be carried out does not render their fear unreasonable." *Kaiser,* 390 F.3d at 658. Otherwise, death threats could never support a future persecution finding. "What matters is whether the group making the threat has the will or the ability to carry it out." *Bolanos-Hernandez v. INS,* 767 F.2d 1277, 1285 (9th Cir.1985). Under *Lim v. INS,* 224 F.3d 929 (9th Cir.2000), a period where rebels don't make good on their threats is "relevant," *see id.* at 935, because a lengthy period without harm suggests that the terrorists didn't have the will to carry through with their threats.

In the two cases that the majority cites, there wasn't any doubt that the government was willing to make good on its threats: In *Damaize-Job,* the government threatened petitioner with death after imprisoning and torturing him for three months. Petitioner's uncle and sister had disappeared, likely murdered by the government. *See Damaize-Job,* 787 F.2d at 1334. Likewise, in *Gonzalez,* government soldiers personally threatened the petitioner, and her family members were imprisoned and beaten. *See Gonzalez,* 82 F.3d at 906. But Canales-Vargas can't point to *anything* in the record, much less physical violence, corroborating willingness and ability to carry out the threats.

This is reason enough to deny the petition, but the IJ gave us more: The threats in this case are almost fifteen years old. The older threats get, the more likely it is that the persecutors have moved on to other targets. For example, in *Prasad v. INS,* 47 F.3d 336 (9th Cir.1995), we found the petitioner's fear of persecution wasn't well founded in part because there was no evidence that the government had any continuing interest in him. *Id.* at 339; *see also Useinovic v. INS,* 313 F.3d 1025, 1032-33 (7th Cir.2002) (noting that petitioner "did not suffer severe consequences for his actions at the time he acted, and the passage of time since these activities only lessened the likelihood he would face ***750** any persecution"). Nor is there any evidence that, as in other Shining Path cases, *see, e.g., Gonzales-Neyra v. INS,* 122 F.3d 1293, 1295 (9th Cir.1997), the guerillas have attempted to keep track of petitioner's whereabouts after she left Peru.

The majority concedes that "the age of the threats that Canales-Vargas received are relevant to our evaluation of the reasonableness of Canales-Vargas' fear." Maj. at 746. And then it concedes that the age of the threats may bring the likelihood that Canales-Vargas will be persecuted below fifty percent. *Id.* But it can't quite bring itself to admit that the age of the threats would allow a reasonable IJ to conclude that the likelihood of future persecution is below ten percent. The majority doesn't explain why not. Instead, it cites to *Cardenas v. INS,* 294 F.3d 1062, 1064, 1067 (9th Cir.2002), where we found a well-founded fear based on threats from the Shining Path that were nine years old. But in *Cardenas,* the Shining Path suspected the petitioner of informing the government about its activities, in part because his brother was a policeman. The Shining Path responded by painting threats in public view on Cardenas's house. The petitioner, scared for his life, agreed to help the Shining Path smuggle supplies, but he reneged on the deal. Shining Path members were angry enough to track him and his family throughout the country, threatening them again after they moved from their hometown in Lima to a smaller town, and still again when they returned to Lima six months later. We concluded that the Shining Path's interest in Cardenas was so strong that it was unlikely to have waned over time. There's nothing like that here-no public threats, no anger at broken deals, no stalking in another Peruvian city. It wasn't unreasonable for the IJ to look at the evidence and conclude that lo these many years later, the Shining Path is likely to have moved on to other targets.

When we review an IJ's findings, our job is to examine the facts in light of the IJ's reasoning and determine whether it is supported by substantial evidence. The majority has substituted its own judgment for the IJ's, and announced that ancient death threats compel a finding that a petitioner's fear of persecution is well founded today. This approach finds no support in our caselaw. The IJ closely reviewed the record, and gave reasons for his decision that are supported by substantial evidence. We must deny the petition.

All Citations

441 F.3d 739, 06 Cal. Daily Op. Serv. 2352, 2006 Daily Journal D.A.R. 3347

Footnotes

Canales-Vargas v. Gonzales, 441 F.3d 739 (2006)

06 Cal. Daily Op. Serv. 2352, 2006 Daily Journal D.A.R. 3347

* Alberto Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States. *See* Fed. R.App. P. 43(c)(2).

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

1 Our recitation of the facts is derived largely from Canales-Vargas's testimony. Because the IJ did not make an adverse credibility determination against Canales-Vargas, her testimony must be taken as true. *See Navas v. INS,* 217 F.3d 646, 652 n. 3 (9th Cir.2000) ("Where the BIA does not make an explicit adverse credibility finding, we must assume that the applicant's factual contentions are true.").

2 Canales-Vargas also claims in her opening brief that she was shot four times by members of the Shining Path. As both the Government and our dissenting colleague properly note, *see* Dissent at 748 n. 1, these facts are not in the record and appear to be a vestige from a different immigration case that Canales-Vargas' attorney cut-and-pasted into the brief in this case. Of course, we do not hold the sloppiness of Canales-Vargas' attorney against Canales-Vargas herself. *Cf. Escobar-Grijalva v. INS,* 206 F.3d 1331, 1335 (9th Cir.2000) ("The administrative record in this case.... gives a picture of attorneys shuffling cases and clients, imposing on immigration judges and on hapless petitioners alike. There is a need to clean house, to get rid of those who prey on the ignorant. The starting point is not to make the helpless the victims.").

3 The IJ denied Canales-Vargas' suspension application by applying the pre-IIRIRA rule that "brief, casual, and innocent" departures are exempted from the seven-year continuous presence requirement. *See Aguilera-Medina v. INS,* 137 F.3d 1401, 1402 (9th Cir.1998) (citing *Rosenberg v. Fleuti,* 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963)). The 90/180 rule that we apply today replaced the "brief, casual, and innocent" standard for determining when a departure breaks continuous physical presence, *see Mendiola-Sanchez v. Ashcroft,* 381 F.3d 937, 939 (9th Cir.2004), and we have reluctantly concluded that the 90/180 rule is not impermissibly retroactive when applied to petitioners-like Canales-Vargas-who left the country for more than 90 days before IIRIRA's passage, *see id.* at 941("[W]e pause in recognition of the injustice of this result."); *see also Garcia-Ramirez v. Gonzales,* 423 F.3d 935, 941 (9th Cir.2005) (Fisher, J., concurring) ("reluctantly" applying 90/180 rule).

4 Moreover, an applicant will be entitled to asylum if "there is a pattern or practice in his or her country ... of persecution of a group of persons similarly situated to the applicant on account of ... political opinion." 8 C.F.R. § 1208.13(b)(2)(iii)(A). As our dissenting colleague properly notes, the Shining Path is "ruthlessly efficient" at persecuting its political opponents when it wants to do so. Dissent at 749.

5 The Government concedes that the Shining Path remains "a terrorist group involved in numerous human rights abuses." In light of the wealth of evidence in the record that this is the case, the Government would be hard pressed to contend otherwise. For example, on April 29, 1994, the Latin America Institute of the University of New Mexico wrote that "[g]uerrillas from Sendero Luminoso [Shining Path] have staged a series of ambushes against the military, plus bloody attacks against civilians in recent weeks." U.N.M. Latin Am. Inst., *Peruvian Military Continues Offensive Against Sendero Luminoso Amid Growing Charges of Human Rights Abuses,* NOTISUR-LATIN AM. POL. AFF.. (April 29, 1994), *available at* http://ssdc.ucsd.edu/news/notisur/h94/notisur.19940429.html. According to David Montoya, a terrorism expert at the Center for Development Studies, a prestigious Lima-based think tank, the Shining Path is present in fifteen of Peru's twenty-four provinces. Allen Scrutton, *Left for Dead, Peru's Rebels Regroup,* S.F. CHRON., Aug. 14, 1995, at A6. A March 1995 State Department report noted that the "Sendero Luminoso continued to assassinate civilians, including peasants, farmers, villagers, indigenous people, civil authorities and public servants...." 1995 U.S. Dep't of State, Peru: Country Reports on Human Rights Practices: 1994(Mar.1995). The same report says that "[t]here are credible accounts that Sendero tortured people to death by means such as slitting throats, strangulation, stoning, and burning. In August Sendero sympathizers tortured four people they accused of cooperating with the police ... for 3 days before killing them." *Id.*

6 Our dissenting colleague lauds the IJ's "carefully considered ... thoughtful and well-reasoned opinion." Dissent at 748; *see also id.* at 750 ("The IJ closely reviewed the record...."). But that does not necessarily mean that substantial evidence, when viewed through the proper lens, will support an IJ's decision. In political opinion cases like this, the asylum applicant must show that he or she "faces the prospect of ... persecution[ ] *because* of [his or her] political opinion." *Navas,* 217 F.3d at 656 (emphasis in original); *see also Njuguna,* 374 F.3d at 770 ("He must establish that the political opinion would motivate his potential persecutors."). Canales-Vargas' testimony about the notes and phone

calls she received easily satisfy this requirement.

1 Petitioner claims in her opening brief that she was shot four times by Shining Path terrorists in Peru and that she identified her assailant. Were these claims true, this would be a very different case. But as the government noted in its brief, these facts are nowhere to be found in the record, and probably come from a different case entirely.

2 Although he expressed some doubt as to petitioner's credibility, he made no express adverse credibility finding, so we accept her testimony as true. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1137-38 (9th Cir.2004).

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KeyCite Red Flag - Severe Negative Treatment
Opinion Vacated, Appeal Dismissed by Demiraj v. Holder, 5th Cir., May 31, 2012

631 F.3d 194
United States Court of Appeals,
Fifth Circuit.

Rudina DEMIRAJ; Rediol Demiraj, Petitioners,
v.
Eric H. HOLDER, Jr., U.S. Attorney General, Respondent.

No. 08–60991.
|
Jan. 11, 2011.

Background: Aliens, natives and citizens of Albania, petitioned for review of the orders of the Board of Immigration Appeals (BIA), denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

Holdings: The Court of Appeals, Haynes, Circuit Judge, held that:

aliens did not have fear of persecution "on account of" their family membership, as required to support grant of asylum and withholding of removal, and

aliens were not entitled to relief under the CAT.

Petition denied.

HAYNES, Circuit Judge:

Rudina Demiraj and her son, Rediol Demiraj, petition for review of the decision of *196 the Board of Immigration Appeals ("BIA") denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture. The petitioners, who are Albanian nationals, are the wife and son of Edmond Demiraj, a material witness in the United States' prosecution of Bill Bedini. While conceding removability, the petitioners contend that they reasonably fear reprisal from Bedini and his associates if they are returned to Albania.

While the petitioners have assembled competent record vidence of the risks they may face upon returning to Albania, we, like the Immigration Judge ("IJ") and the BIA, nevertheless conclude that those concerns do not entitle them to the relief they seek under the Immigration and Nationality Act. We therefore DENY the petition for review.

I. Facts & Procedural History

Rudina Demiraj and her minor son, Rediol, entered the United States without inspection in October 2000. Mrs. Demiraj timely filed an application for asylum, withholding of removal, and protection under article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"), Dec. 10, 1984, S. TREATY DOC. No. 100–20, 1465 U.N.T.S. 85, 113. Mrs. Demiraj named Rediol as a derivative beneficiary of her application. In her application, filed on September 28, 2001, and refiled as corrected on November 19, 2001, Mrs. Demiraj asserted that she was entitled to the relief requested because of her and her family's political involvement in opposing Albania's former communist regime and current socialist party and consequent fear of reprisal and torture in Albania.[1] ***

In February 2004, the BIA alled Mrs. Demiraj to reopen her case based on changed circumstances. After the IJ's initial disposition of Mrs. Demiraj's case, Mr. Demiraj was shot in Albania by Bill Bedini, an Albanian wanted in the United States for human smuggling.[2] Mr. Demiraj had been identified by the United States as a material witness against Bedini, but Mr. Demiraj never actually testified against Bedini because Bedini fled to Albania. After Mr. Demiraj was deported to Albania, Bedini kidnaped, beat, and shot Mr. Demiraj because of his cooperation with the United States' efforts to prosecute Bedini. After Mr. Demiraj recovered from the shooting, local police in Albania took his statement but intimated that they would not investigate the crime. Bedini threatened Mr. Demiraj again, and he fled to the United States. Mr. Demiraj was granted withholding of removal in a separate proceeding.[3] During the same time *197 period, two of Mr. Demiraj's nieces were also kidnaped by Bedini and his associates and trafficked to Italy. After escaping, the nieces fled to the United States and were granted asylum.

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III. Discussion

[5] Mrs. Demiraj and her son asserted three grounds for relief from removal before the IJ and the BIA: (1) asylum, (2) *198 withholding of removal based on a probability of persecution, and (3) protection under the Convention Against Torture.***

A. Asylum & Withholding of Removal

The BIA found the petitioners ineligible for asylum or withholding of removal because, even crediting all of the petitioners' evidence, Mrs. Demiraj and her son could not demonstrate that any persecution they might suffer in Albania was "on account of" their membership in the Demiraj family within the meaning of the statute and regulation. ***

The petitioners argue that they would be persecuted in Albania by Bedini "on account of" their membership in a particular social group, namely, the Demiraj family. The BIA, in its order after voluntary remand, agreed with the petitioners that the "Demiraj family" could constitute a "particular social group" within the meaning of the asylum and withholding of removal statutes, and the government does not dispute that conclusion.

[6] The core of this case instead is the question of whether Mrs. Demiraj's evidence showed that she reasonably feared persecution or likely would be persecuted "on account of" her family membership.[5] *See Thuri v. Ashcroft,* 380 F.3d 788, 792 (5th Cir.2004). The IJ and the BIA concluded that the evidence did not establish this requisite connection between her family membership and the identified persecution by Bedini and his associates. The only dispute between the parties is whether the facts as found by the IJ constitute, as a matter of law, proof of persecution "on account of" Mrs. Demiraj's membership in the Demiraj family or not.

After considering the record and the case law, the BIA explained its conclusion thus:

> *199 Nexus may be shown ... where there is a desire [by the alleged or feared persecutor] to punish membership in the particular social group, [and] also where there is a desire [by the persecutor] to overcome what is deemed to be an offensive characteristic identifying the particular social group. The respondents here [viz., Mrs. Demiraj and her son] must identify some evidence, direct or circumstantial, that the assailants are motivated, at least in part, by a desire to punish or to overcome the family relationship to [Mrs. Demiraj]' s husband.
>
> Here, the individuals involved were seeking revenge against [Mr. Demiraj] for his testimony, and seek to harm [him] by attacking the respondents. We do not ordinarily find that acts motivated solely by criminal intent, personal vendettas, or personal desires for revenge establish the required nexus .... On this record, although the respondents are members of a particular social group, we do not find they fear persecution on account of this membership. Rather, the problems they may face are on account of revenge the assailants are attempting to extract against [Mr. Demiraj].

In re Demiraj, Nos. A095 218 801 & 802, slip op. at 2–3 (B.I.A. Oct. 14, 2008) (internal citations omitted).

The parties disagree about the meaning of "on account of." We need not resolve that dispute here because, even assuming that the petitioners' definition—"because of"—is the correct one, they cannot prevail. The crucial finding here is that the record discloses no evidence that Mrs. Demiraj would be targeted for her membership in the Demiraj family *as such.* Rather, the evidence strongly suggests that Mrs. Demiraj, her son, and Mr. Demiraj's nieces were targeted because they are people who are important to Mr. Demiraj—that is, because hurting them would hurt Mr. Demiraj. No one suggests that distant members of the Demiraj family have been systematically targeted as would be the case if, for example, a persecutor sought to terminate a line of dynastic succession. Nor does the record suggest that the fact of Mr. and Mrs. Demiraj's marriage and formal inclusion in the Demiraj family matters to Bedini; that is, Mrs. Demiraj would not be any safer in Albania if she divorced Mr. Demiraj and renounced membership in the family, nor would she be any safer if she were Mr. Demiraj's girlfriend of many years rather than his wife. The record here discloses a quintessentially personal motivation, not one based on a prohibited reason under the INA.[6] Thus, the record in this case does not compel us to reject the BIA's determination here. Mrs. Demiraj and her son *200 are not entitled to asylum or withholding of removal.

IV. Conclusion

We find no error in the BIA's conclusion that the petitioners are not entitled to asylum, withholding of removal under the INA, or protection under the Convention Against Torture. We therefore must DENY

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the petitions.

DENNIS, Circuit Judge, dissenting:
I respectfully dissent. To show persecution "on account of" a protected ground, 8 U.S.C. § 1101(a)(42)(A) "only 'requires the alien to prove *some* nexus between the persecution and [one of] the five protected grounds.' " *Thuri v. Ashcroft,* 380 F.3d 788, 792 (5th Cir.2004) (quoting *Ontunez–Tursios v. Ashcroft,* 303 F.3d 341, 349 (5th Cir.2002)).[1] The evidence presented by Mrs. Demiraj in this case clearly demonstrates a nexus between the persecution she fears and the protected ground of membership in a social group, i.e., her membership in the family of Mr. Demiraj.

Bedini, an Albanian mobster, has shown himself to be a powerful person capable of brutal violence. Bedini previously threatened Mr. Demiraj for agreeing to aid the United States government in its investigation of his involvement in human smuggling, and, in March 2003, abducted Mr. Demiraj and his brother. Bedini and the other captors beat both men, and Bedini then shot Mr. Demiraj at close range. Although Mr. Demiraj survived, his physician ***202** later told him that he was "lucky the bullet did not go through [his] kidney." Although Mr. Demiraj requested help from the police, they refused to take any action against Bedini. Mr. Demiraj then escaped to the United States in April 2003, and was granted withholding of removal.

Besides this attack, Bedini has targeted other Demiraj family members because they are members of Mr. Demiraj's family. In April 2003, several men, one of whom appears to have been Bedini, kidnapped two of the Demirajs' nieces in Albania and took them to Italy, where the captors attempted to force the nieces—ages 19 and 21—into prostitution. Upon being given clothes to wear for standing on the street, the girls began to cry and protest that they were not prostitutes. One captor, who may have been Bedini, became angry and beat the girls, saying that "this was payback to your [U]ncle Edmund [Mr. Demiraj] for when I was in the United States." The captors then tied the nieces up for days with no food, water, or access to a toilet. Eventually, the nieces, who "both had pain all over, felt sick and nauseated," and had urinated on themselves, consented to work as prostitutes. They were told to clean themselves up and to put on makeup. They were taken outside to the streets, where "[t]he same man ... who shot [their] Uncle Edmund" gave them "some condoms and told [the nieces] how to use them for sex." Not long afterwards, the nieces, through sheer luck and a kind taxi driver, managed to escape from their captors and contact their family. Their family worried that if the nieces returned to Albania, Bedini would attack them again, and that the local police would refuse to intervene, as they had done after Mr. Demiraj was shot. The nieces then fled to the United States and were granted asylum.

Three years later, in 2006, Bedini and his associates abducted at gunpoint the nieces' younger sister, who was 19 years old at the time, and took her to Germany. Bedini beat her, saying that he had "warned [her] sisters not to escape from us because their [the Demiraj] family was going to pay for everything," and that "[n]ow you're going to pay for your sisters and your uncle. You better don't do the same as your sisters." Like her sisters, this niece was taken to the streets for prostitution, but managed to escape, and fled to the United States, where she was granted asylum. In addition, the brother who was abducted with Mr. Demiraj has now fled to Greece, and Mr. Demiraj's parents, who have been threatened by Bedini, have gone into hiding.

The majority characterizes all of this as involving merely personal revenge, but there is no evidence that Bedini has any grudge against Mrs. Demiraj, her son, or any other Demiraj family members as individuals—rather, his only interest in them is because of their membership in the family of Mr. Demiraj.

In *Torres v. Mukasey,* 551 F.3d 616 (7th Cir.2008), whose facts are markedly similar to those of the instant case, the Seventh Circuit explained that "[a] successful asylee must show that he was persecuted because of his ... membership in a particular social group," and concluded that "the record shows that [the petitioner] clearly did establish ... a nexus" between his mistreatment and his family membership, where the petitioner presented evidence that he had been mistreated by the Honduran military because of his relationship to his brothers, who were considered military deserters. *Id.* at 629–30. The Seventh Circuit explained:

> [The petitioner's] testimony is rife with examples that provide his family's history as the nexus for his mistreatment. Throughout the hearing, [the petitioner] ***203** noted the numerous occasions on which ... his primary persecutor[ ] referenced [the petitioner's]

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> family while inflicting harm on [the petitioner]. In at least one instance when [the persecutor] placed an unloaded pistol to [the petitioner's] head and pulled the trigger, [the petitioner] testified that [the persecutor] said, "You are going to pay for your brothers' desertion. You are going to pay for his escape because you are the last one that ... we ... have." According to [the petitioner's] testimony, [the persecutor] told [the petitioner] that he placed [the petitioner] in the water barrel because "I had to pay for the escape of my brothers." [The petitioner] testified that when [the persecutor] forced [the petitioner] to run nude in front of his unit, [the persecutor] ordered, "Put this man to run until he falls dead .... Because you have to pay for what your brothers did for their escape because they violated. They defy the army." [The petitioner] also stated, "I was so afraid that I was going to stay in [the army] and I was afraid to die in there. Because ... [the persecutor] told me that I was never going to leave that place .... Because I was going to pay for my brothers' escape because I was the last one that remained."

Id. at 630 (internal citations omitted). In this case, we have essentially the same situation: Mrs. Demiraj faces a grave risk of attack from Bedini if she returns to Albania because of her membership in the family of Mr. Demiraj. She married Mr. Demiraj in 1992 and, several years later, he agreed to aid the United States government in a criminal prosecution against Bedini, thereby exposing his family to the depredations of Bedini. Mrs. Demiraj's family membership puts her at risk of attacks similar to what other family members have already experienced.

Accordingly, Mrs. Demiraj is entitled to protection under 8 U.S.C. § 1101(a)(42)(A), which grants asylum to persons who have a well-founded fear of persecution because of their membership in a particular social group:

> To establish that he is a member of a "particular social group," [the petitioner] must show that he was a member of a group of persons that share a common characteristic that they either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.

Ontunez–Tursios, 303 F.3d at 352. The majority and the BIA do not dispute that membership in a family meets these criteria. Family membership is a characteristic that a person either cannot change (if he or she is related by blood) or should not be required to change (if he or she is related by marriage). The purpose of asylum law is to honor a moral obligation to protect people who are threatened with persecution because of characteristics like these. The Seventh Circuit applied the law correctly in *Torres,* a case that I find indistinguishable from the current case. The majority has created a circuit split and put our court on the wrong side of it. I therefore dissent.

All Citations

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6 For this reason, our decision does not conflict with the Seventh Circuit's decision in *Torres v. Mukasey,* 551 F.3d 616 (7th Cir.2008). *Torres* held that a petitioner had successfully demonstrated persecution on account of membership in his family where he had been singled out for extreme mistreatment while enlisted in the Honduran army simply because, "within Honduran military circles[,] the Flores Torres clan is known as a family of deserters." *Id.* at 622. The Seventh Circuit characterized the persecution of the petitioners in that proceeding as retribution "for the perceived offenses of his four brothers," *id.* at 623, but the facts of that case make quite clear that the petitioner's persecutors in the Honduran military had generalized their resentment of the brothers for desertion into a vengeful hatred of an entire family as a group of deserters. *See id.* at 623–24. Here, by contrast, the IJ and BIA determined that Bedini was motivated by personal revenge; that is, that Mrs. Demiraj is at risk because Bedini seeks to hurt Mr. Demiraj by hurting her—not because he has a generalized desire to hurt the Demiraj family as such. That finding has support in the

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record, and we are therefore obliged to defer to it. *See, e.g., Shaikh,* 588 F.3d at 863.

7 Our recent decision in *Hakim* clarifying the definition of "willful blindness" similarly continues to require at least "awareness" on the part of the government. 628 F.3d at 155–57, 2010 WL 5064379, at *5–6 (citing and quoting *Zheng v. Ashcroft,* 332 F.3d 1186, 1194–96 (9th Cir.2003) (rejecting BIA's former standard for acquiescence because "the BIA's interpretation ... impermissibly requires *more than awareness*" (emphasis added))).

1 The REAL ID Act of 2005 changed the "on account of" language to the following: "To establish that the applicant is a refugee ... the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(ii) (emphasis added). The BIA has held that this new standard applies not only to applications for asylum, but also to applications for withholding of removal. *In re C–T–L–,* 25 I. & N. Dec. 341, 344–48 (B.I.A.2010). However, the REAL ID Act applies "only prospectively to applications for asylum or withholding of removal made on or after the effective date of the Act, May 11, 2005." *Aligwekwe v. Holder,* 345 Fed.Appx. 915, 920 n. 4 (5th Cir.2009) (unpublished) (citing REAL ID Act of 2005, Pub.L. No. 109–13, § 101(h), 119 Stat. 302, 305). Mrs. Demiraj's application for asylum or withholding of removal was filed before 2005. Therefore, as the majority states, the REAL ID Act does not apply in this case.

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