REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
TABLE OF CONTENTS FOR COURSE MATERIALS

Unit 9: Protected Ground of Political Opinion

79 F.3d 955
United States Court of Appeals,
Ninth Circuit.

Saideh FISHER, aka Saideh Hassib–Tehrani; Kian Hosseini Lavasani, Petitioners,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 91–70676.
|
Argued and Submitted April 13, 1993.
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Filed Oct. 5, 1994.
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Amended July 31, 1995.
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Order Granting Rehearing En Banc Filed Sept. 29, 1995.
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Decided April 2, 1996.

Opinion

Opinion by Judge WALLACE; Concurrence by Judge CANBY; Dissent by Judge NOONAN.

WALLACE, Circuit Judge:

Saideh Fisher and her son Kian Hosseini Lavasani are natives and citizens of Iran. On her behalf, as well as for her son, Fisher petitions for review of the Board of Immigration Appeals' (Board) decision denying her application for asylum and withholding of deportation. The Board also denied Fisher's application for voluntary departure pursuant to section 244(e) of the Immigration and Nationality Act (Act). 8 U.S.C. § 1254(e). We have jurisdiction over this timely appeal pursuant to 8 U.S.C. § 1105a(a). The petition is denied.

I

Fisher and her son entered the United States on April 30, 1984. Because her son's immigration status derives from her own, our discussion will focus on the status of Fisher. 8 C.F.R. § 208.21 (1995). Although Fisher was admitted as the fiancee of a United States citizen, she did not marry her then-fiancee within the 90–day period allowed by her visa. Instead, on August 4, 1984, she married Charles Fisher (Charles), a United States citizen. They were divorced in 1987.

Prior to their divorce, Charles filed a petition in support of Fisher's application for permanent resident status. On February 3, 1986, he withdrew the petition and filed an affidavit which stated, "I was given $500.00 to marry my wife Saideh." According to the affidavit, a co-worker apparently told Charles that Fisher's step-cousin, to whom she was originally engaged to be married, would pay him the $500. Charles also denied living with Fisher on a continuous basis since their marriage.

Accordingly, on February 3, 1986, the Immigration and Naturalization Service (INS) denied Fisher's application for permanent *959 resident status and began deportation proceedings. Fisher conceded deportability and filed for asylum and withholding of deportation pursuant to 8 U.S.C. §§ 1158(a), 1253(h).

An immigration judge (IJ) held two hearings, one on May 15, 1987, concerning Fisher's application for voluntary departure, and another on September 25, 1987, concerning Fisher's asylum application. At the May hearing, Fisher testified that she originally came to the United States to marry Robert Lavasani, her step-cousin. When she arrived, she learned that he was living with and had impregnated another woman. Upset and lonely, she testified that she then married Charles, but she denied offering him money to marry her. She suspected that Charles withdrew his petition in support of her application for permanent resident status because he "never kept his promises" and he took advantage of her.

Fisher testified that she lived with Charles as husband and wife for approximately one year. Yet in preparation for an interview conducted by INS officials to determine the validity of her marriage, Fisher testified that she reviewed potential questions and answers with Charles. She also

265

referred to handwritten notes during the interview, which contained information including: what time she and her husband went to sleep at night, how often she saw his two daughters, what kind of food he likes, what time he comes home from work, how much money he gives her, how long they have lived in their new house, what kind of car they own, what kind of television programs he watches, his parents' names, what clothing items he owns, and what brand of cigarettes he smokes. The notes also contained information such as her parents' names, her own birth date, and her place of work. Fisher testified that she needed these notes because she had difficulties remembering many things, in part because of her traumatic experiences in Iran.

Charles was not available to testify at the May hearing. The INS issued a subpoena, to which he did not respond; its investigations unit attempted to locate him, but without success. An INS officer who interviewed Fisher in depth also was unavailable to testify because he had been reassigned to Alaska. Another INS officer, who interviewed Fisher briefly, testified that she told him she had a bona fide marriage with Charles. The IJ decided that "the case will just have to stand on the evidence" presented as well as Fisher's own testimony. Fisher's counsel did not object.

At the September hearing on Fisher's asylum application, she testified that she left Iran in February 1984 following three events. First, Fisher testified that she was detained and questioned by Khomeini government officials because she attended a party at a male friend's home where she observed her host in a bathing suit. When this occurred is unclear, but she alleges to us that it was approximately six months prior to leaving Iran. Along with several other female guests, Fisher was held at the "Comite"—probably a police station—for several hours. The authorities recorded Fisher's name and address, and they told her that being present with a man in a bathing suit was "incorrect." She was then released.

The next incident occurred approximately one month prior to her departure from Iran. Fisher testified that four government officials stopped her on the street and ordered her into their car at gunpoint. She said she was stopped because she "had a few pieces of hair hanging out [of her chador or veil] by mistake." The officials told her that she was not dressed properly, returned her to her home, and admonished her not to appear on the street like that again.

The third incident occurred shortly after the "veil incident." Fisher testified that government officials came to her father's home, where Fisher lived, to search for political dissidents. She said that the search was a "normal" occurrence, and that she assumed the officials were looking for persons associated with her brother-in-law, who was in prison at the time. In her brief to this court, Fisher suggests that her brother-in-law was arrested for political activities, but there was no record testimony concerning the reasons for his imprisonment. Government officials did not question or detain Fisher as a result of the search. They merely asked her to inform them if she learned of any persons who were "against the regime," and they left.

*960 Fisher testified that these three events so traumatized her that she became ill, missed several months of work, and eventually left Iran. She argues that these events amount to persecution on account of her religious and political beliefs. With respect to these beliefs, Fisher testified that she did not believe in "the way [the Khomeini government] treat[s] people, the covering of the face, and the way of life" dictated by the government. When asked what might happen to her if she returned to Iran, Fisher responded that she "presumes" she would be "in a worse situation" than before she left. Significantly, Fisher did not state whether she would comply with the governmental requirements if she returned to Iran.

The IJ found Fisher's testimony concerning her application for asylum credible, but nevertheless denied her request for asylum and withholding of deportation because she did not have a well-founded fear of persecution and did not face a clear probability of persecution. The IJ also denied Fisher's request for voluntary departure, finding that she married Charles solely for immigration purposes. The IJ based his decision on Charles's affidavit and Fisher's behavior during her interview with the INS interviewing officer. He found Fisher's testimony concerning her marriage not credible.

Fisher appealed from the IJ's decisions to the Board, which independently reviewed the record and affirmed the IJ's findings concerning Fisher's application for asylum and withholding of deportation. The Board first held that general enforcement of Iran's rules concerning the interaction between men and women and clothing restrictions, which require all women to wear "ultraconservative dress," do not "rise to the level of persecution." It also held that although Fisher stated she feared persecution upon return to Iran, she failed to

present sufficient evidence showing how the government's actions related specifically to her and to her beliefs. For example, the Board found that Fisher provided no evidence of how the search of the family home related to her. The Board also adopted the IJ's findings and decision concerning Fisher's request for voluntary departure.

A three-judge panel of this court vacated the Board's decision and remanded, holding that (1) the Board failed to consider whether Fisher would suffer future persecution if she returned to Iran; (2) the Board improperly defined "persecution"; (3) Fisher may suffer persecution on account of her religious beliefs as a result of Iran's enforcement of its conduct and dress rules; and (4) Fisher may face persecution on account of her political beliefs based on a "totality of the circumstances." *Fisher v. INS,* 61 F.3d 1366 (9th Cir.1995). Because the three-judge panel remanded for the Board to reconsider Fisher's application for asylum, it did not reach the issue of voluntary departure. We decided to rehear this case en banc and withdraw our panel opinion.

II

[1] [2] [3] [4] [5] Section 208(a) of the Act, 8 U.S.C. § 1158(a), gives the Attorney General discretion to allow political asylum to any alien the Attorney General determines to be a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). A refugee is defined as an alien unwilling to return to his or her 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." 8 U.S.C. § 1101(a)(42)(A). To establish eligibility on the basis of a "well-founded fear of persecution," Fisher's fear of persecution must be both subjectively genuine and objectively reasonable. *Ghaly v. INS,* 58 F.3d 1425, 1428 (9th Cir.1995) (*Ghaly*). "The subjective component may be satisfied by credible testimony that the applicant genuinely fears persecution." *Prasad v. INS,* 47 F.3d 336, 338 (9th Cir.1995) (*Prasad*). The objective component requires a showing by credible, direct, and specific evidence in the record, of facts supporting a reasonable fear of persecution on the relevant ground. *Id.* Fisher has the burden of making this showing. *Ghaly,* 58 F.3d at 1428; 8 C.F.R. § 208.13(a) (1995).

[6] [7] [8] Section 243(h) of the Act, 8 U.S.C. § 1253(h), requires the Attorney General, subject to certain exceptions not relevant *961 here, to withhold deportation "if the Attorney General determines that such alien's life or freedom would be threatened ... on account of race, religion, nationality, membership in a particular social group, or political opinion." An alien is statutorily eligible for such relief if he or she demonstrates a "clear probability of persecution." *Ghaly,* 58 F.3d at 1429 (internal quotation omitted). This standard is more stringent than the "well-founded fear" standard applicable to requests for asylum, and it can be met only by showing that it is more likely than not that the alien will be persecuted if deported. *Id.* "Therefore, failure to satisfy the lesser standard of proof required to establish eligibility for asylum necessarily results in a failure to demonstrate eligibility for withholding of deportation as well." *Id.* Thus, we first focus on whether Fisher proved she was eligible for asylum.

[9] [10] [11] We review the Board's determination that Fisher failed to demonstrate a "well-founded fear of persecution," including its factual findings, for substantial evidence. *INS v. Elias–Zacarias,* 502 U.S. 478, 481, 112 S.Ct. 812, 815, 117 L.Ed.2d 38 (1992) (*Elias–Zacarias*); 8 U.S.C. § 1105a(a)(4). The burden on Fisher is a heavy one. To obtain reversal, Fisher must establish that the evidence not only supports the conclusion that she suffered persecution or has a well-founded fear of persecution, but compels it. *Ghaly,* 58 F.3d at 1431. Fisher must demonstrate that "the evidence [she] presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias–Zacarias,* 502 U.S. at 483–84, 112 S.Ct. at 817. "Phrased differently, [Fisher] must demonstrate that any reasonable factfinder would have to conclude that [she] has a well-founded fear of persecution." *Ghaly,* 58 F.3d at 1431 (internal quotation omitted). We review the Board's legal interpretations of the Act de novo, but such interpretations generally are entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (*Chevron*). *Ghaly,* 58 F.3d at 1429.

III

We begin by reviewing the Board's application of section

101(a)(42)(A) of the Act, which defines "refugee" as a person who has suffered persecution or has a well-founded fear of persecution. 8 U.S.C. § 1101(a)(42)(A). The Act does not define "persecution"; therefore, we must defer to the Board's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Romero v. INS,* 39 F.3d 977, 980 (9th Cir.1994), *quoting Chevron,* 467 U.S. at 844, 104 S.Ct. at 2782; *see also Barrera–Echavarria v. Rison,* 44 F.3d 1441, 1444 (9th Cir.) (en banc) (court may not substitute its own construction of the Act for the Board's reasonable interpretation), *cert. denied,* 516 U.S. 976, 116 S.Ct. 479, 133 L.Ed.2d 407 (1995).

[12] [13] In interpreting the Act, the Board is bound by our earlier decisions, which define "persecution" generally as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive." *See, e.g., Ghaly,* 58 F.3d at 1431, *quoting Prasad,* 47 F.3d at 339. Persecution is an extreme concept, which ordinarily does not include "[d]iscrimination on the basis of race or religion, as morally reprehensible as it may be." *Ghaly,* 58 F.3d at 1431.

The Board's analysis of "persecution" here is consistent with the Act and our prior decisions. The Board found that Fisher did not suffer persecution or have a well-founded fear of persecution based on the Iranian government's enforcement of its regulations against her. The Board stated that although enforcement of Iran's dress and conduct rules may seem harsh by Western standards, it does not "rise to the level of persecution." This conclusion is consistent with our cases that distinguish prosecution for general crimes from persecution, as well as those that construe persecution to include mental suffering. *See Abedini v. INS,* 971 F.2d 188 (9th Cir.1992) (*Abedini*); *Kovac v. INS,* 407 F.2d 102 (9th Cir.1969) (*Kovac*).

[14] Fisher's assertion that the government will prosecute her for violating the dress and conduct rules does not alone *962 amount to persecution on account of religious or political beliefs. She "merely has established that [she] faces a possibility of prosecution for an act deemed criminal in Iranian society, which is made applicable to all [women] in that country." *Abedini,* 971 F.2d at 191. The two exceptions to the general rule that prosecution does not amount to persecution—disproportionately severe punishment and pretextual prosecution—do not apply here. *See id.* First, Fisher failed to show that Iran selectively enforced its regulations against her or that she received disproportionately severe punishment on account of one of the five grounds enumerated in the Act. *See id.* Second, she failed to establish that the regulations as applied to her were "especially unconscionable or were merely a pretext to persecute [her] for [her] beliefs or characteristics." *Id., citing Alonzo v. INS,* 915 F.2d 546, 548 (9th Cir.1990) (holding that applicant must demonstrate government knew of his religious or political beliefs and attempted to conscript him in spite of those beliefs). Fisher testified that as a result of the "swimsuit incident," she and several other females present were detained by government officials. She also testified that the "veil incident" came about only because she had mistakenly left several strands of hair outside her chador. Neither of these occurrences indicates that government officials knew of her political or religious beliefs or punished her on account of them. Nor do they indicate that she was punished as a pretext to persecute her for her beliefs.

The Board's interpretation of persecution also is consistent with our decisions defining persecution to encompass both physical and mental suffering. *See Kovac,* 407 F.2d at 106–07 (Congress's deletion of "physical persecution" from the Act indicates persecution may include mental suffering). Based on the record Fisher established, the Board held that she failed to show any past or potential persecution, mental or physical. It found that Fisher failed to provide evidence showing that the enforcement of the dress and conduct regulations against her constituted persecution or created a well-founded fear of future persecution. *See Safaie v. INS,* 25 F.3d 636, 640–41 (8th Cir.1994) (general assertion that Iran's policies are repressive or that applicant disagrees with them does not "demonstrate that [the applicant] fears particularized persecution directed at her personally on the basis of her political opinion").

[15] [16] Fisher contends that although enforcement of laws such as those enforced against her could be viewed merely as harassment not reaching the level of persecution, Iran's human rights record somehow transforms common harassment into persecution. This argument is unacceptable. The mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States. Persecution requires the government actor to inflict suffering *on account of* an individual's religious or political beliefs, race, nationality,

or membership in a particular social group. *See Ghaly,* 58 F.3d at 1431 (defining persecution as infliction of suffering upon those who differ because of their religious or political beliefs); *cf.* 8 U.S.C. § 1101(a)(42)(A) (defining refugee as person who suffers persecution "on account of" one of the five enumerated grounds). It does not include mere discrimination, as offensive as it may be. *Ghaly,* 58 F.3d at 1431.

Fisher has the burden of showing the requisite connection between the Iranian government's acts and her religious or political beliefs. She must show that "the Iranian government's potential act of persecution stemmed from its desire to single [her] out for unique punishment because of [her] actually-held or perceived-to-be-held political or religious beliefs." *Abedini,* 971 F.2d at 192 n. 1; *see also Elias–Zacarias,* 502 U.S. at 482, 112 S.Ct. at 816 (" 'persecution on account of ... political opinion' in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's").

Fisher failed to show that Iran punished her because of her religious or political beliefs, or that, if she returned to Iran, she would violate the regulations because of her beliefs, thereby triggering government action. *Abedini,* 971 F.2d at 192 (applicant must show that the government was aware of his alleged beliefs). No evidence suggests *963 that Fisher ever "spoke out against the government's political or religious practices or even publicly articulated any political or religious opinions." *Id.* Although she stated that she is against the Khomeini regime and disagrees with its theory of Islam, she introduced no evidence suggesting that the three incidents she described were related to these beliefs.

There also is no evidence suggesting that if she returned to Iran, Fisher would not conform with the regulations. Indeed, she testified that the "veil incident" occurred because she *mistakenly* left several strands of hair outside her veil, not because she intended to make a political or religious statement. She also testified that the search of her father's home was "a normal thing that [the government does]," which suggests no connection to her religious or political beliefs whatsoever.

Because Fisher has demonstrated only discrimination on account of her sex, not persecution on account of her religious or political beliefs, she has failed to carry her burden under *Ghaly.* Persecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act.

[17] Fisher argues she did establish that enforcement of the regulations in Iran constitutes more than mere harassment. She bases her argument on information contained in the State Department's *Country Reports on Human Rights Practices for 1990,* which is not part of the administrative record. The Act limits our review to the "administrative record upon which the deportation order is based and the Attorney General's findings of fact." 8 U.S.C. § 1105a(a)(4). *See also Gomez–Vigil v. INS,* 990 F.2d 1111, 1113 (9th Cir.1993) (*Gomez–Vigil*) (reviewing court is "not permitted to consider evidence that is not part of the administrative record"); *Tejeda–Mata v. INS,* 626 F.2d 721, 726 (9th Cir.1980) (reviewing court does not conduct factfinding in the first instance), *cert. denied,* 456 U.S. 994, 102 S.Ct. 2280, 73 L.Ed.2d 1291 (1982); *Rybachek v. United States Environmental Protection Agency,* 904 F.2d 1276, 1296 n. 25 (9th Cir.1990) ("Judicial review of agency actions should generally be confined to the original record upon which the actions were based."). To the extent our prior decisions may be interpreted as authorizing us to take judicial notice of information not part of the administrative record or not previously submitted to the Board, they are overruled as inconsistent with the Act and prior precedent. These decisions include *Ubau–Marenco v. INS,* 67 F.3d 750, 759 (9th Cir.1995) (taking judicial notice of State Department Country Reports where INS did not object); *Nasseri v. Moschorak,* 34 F.3d 723, 727 (9th Cir.1994) (taking judicial notice of "background evidence" offered by petitioner); *Shirazi–Parsa v. INS,* 14 F.3d 1424, 1428 (9th Cir.1994) (*Shirazi–Parsa*) (suggesting that this court may take judicial notice even if Board did not abuse its discretion in declining to do so); *Lazo–Majano v. INS,* 813 F.2d 1432, 1435 (9th Cir.1987) (taking judicial notice of reports supporting petitioner's asylum claim).

Fisher could have requested the Board to take administrative notice of the Country Report, but she did not. If she had, and the Board refused, we would review the Board's action for an abuse of discretion. *Shirazi–Parsa,* 14 F.3d at 1428. Here, there is no such abuse because Fisher never offered the 1990 Country Report or the facts contained in it to the Board. *See Liu v. Waters,* 55 F.3d 421, 427 (9th Cir.1995) (Board is "not required independently to take administrative notice of [country] conditions" where petitioner "provided no such information"). Because we are limited to reviewing the facts considered by the Board, we are statutorily prevented from taking judicial notice of the Country Report. *See id.* (taking judicial notice only of materials

applicant presented to the Board for administrative notice). If Fisher believes the 1990 Country Report or other documents are material to her asylum application, her only course is to file a motion to reopen her deportation proceedings pursuant to 8 C.F.R. §§ 3.2, 208.19 (1995).

[18] Fisher also argued that the State Department's *Country Reports on Human Rights Practices for 1986* should be considered part of the administrative record because the IJ relied on a portion of it in rendering his decision. In rejecting Fisher's argument that she was fired from her teaching position in Iran solely because she is a *964 woman, the IJ stated that the 1986 Country Report provides no evidence that the government routinely fires women from teaching jobs. At oral argument before the en banc court, Fisher suggested that because the IJ relied on a portion of the 1986 Country Report, the entirety of the Report should be made part of the administrative record.

INS regulations provide that Department of State comments requested by the IJ in particular cases become part of the administrative record. 8 C.F.R. § 208.11(c) (1995). Here, the IJ did not request any such comments from the Department of State, and the IJ's reliance on the 1986 Country Report, which contains generally applicable information, cannot be construed as State Department comments within the meaning of the regulations.

[19] We may review out-of-record evidence only where (1) the Board considers the evidence; or (2) the Board abuses its discretion by failing to consider such evidence upon the motion of an applicant. *See Shirazi–Parsa,* 14 F.3d at 1428. Allowing the Board to consider out-of-record evidence only on motion of the applicant is consistent with the Act's placement of the burden of proof on the applicant's shoulders and with an analogous federal evidentiary rule. Federal Rule of Evidence 106 expresses the "rule of completeness," which states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." *See* Charles A. Wright & Kenneth W. Graham, Jr., 21 Federal Practice and Procedure §§ 5071–79 (1977 & Supp.1995). Where an applicant requests the Board to take administrative notice of evidence on which the IJ relied, we will review a refusal to do so for an abuse of discretion. *Shirazi–Parsa,* 14 F.3d at 1428; *see also Elnager v. INS,* 930 F.2d 784, 787 (9th Cir.1991) (Board "has the power to conduct a de novo review of the record ... and independently to determine the legal sufficiency of the evidence").

Fisher could have requested either the IJ or the Board to supplement the administrative record with the 1986 Country Report; she did neither. Her appeal brief to the Board contested neither the IJ's finding that she was not dismissed from her teaching position solely because of her status as a woman, nor the IJ's reliance on parts of the 1986 Country Report which she now claims support her asylum application. There is no evidence that the Board took into account the 1986 Country Report, and its decision is "sufficient for us to conduct our review and to be assured that the petitioner's case received individualized attention." *Ghaly,* 58 F.3d at 1430; *see also id.* (Board is not required to indicate with specificity the weight it accorded certain exhibits). We will not create a new administrative record on appeal by reviewing evidence that the Board did not consider. *See Gomez–Vigil,* 990 F.2d at 1113.

This is not a case such as *Gomez–Vigil,* where the Board took administrative notice of certain facts without providing the petitioner an opportunity to rebut the noticed facts. *Id.* at 1114. In this case, Fisher did not request the IJ to include the entirety of the Country Report. In addition, she had ample opportunity to request consideration of the Country Report and to rebut the IJ's findings in her appeal to the Board, but she failed to do so. We will not remand this case to the Board for it to consider evidence Fisher failed to present. *Roque–Carranza v. INS,* 778 F.2d 1373, 1373–74 (9th Cir.1985); *cf. Rivera–Cruz v. INS,* 948 F.2d 962, 967 (5th Cir.1991) (asylum applicant cannot raise new evidence on appeal from Board's decision to contest officially noticed facts).

In sum, the Board's decision concluding that Fisher failed to show she suffered persecution or had a well-founded fear of persecution on account of her political or religious beliefs is supported by substantial evidence. Fisher failed to allege acts constituting persecution, and she failed to show that the Iranian government took action against her because of her political or religious beliefs. Indeed, the record indicates that Fisher received routine punishment for violating generally applicable laws. Thus, she failed to carry her burden by not presenting evidence "such that a reasonable factfinder would have to conclude that the requisite fear of persecution *965 existed." *Elias–Zacarias,* 502 U.S. at 481, 112 S.Ct. at 815.

270

Because Fisher failed to satisfy the lesser standard of proof required to establish eligibility for asylum, she necessarily failed to demonstrate eligibility for withholding of deportation. *Ghaly,* 58 F.3d at 1429.

IV

[20] The Board also adopted the findings and decision of the IJ denying Fisher voluntary departure pursuant to 8 U.S.C. § 1254(e). We therefore review the IJ's decision. *Kazlauskas v. INS,* 46 F.3d 902, 905 (9th Cir.1995). We examine whether the IJ actually exercised his discretion and whether he did so in an arbitrary and capricious manner. *Abedini,* 971 F.2d at 193. The IJ need only support his conclusion with a "reasoned explanation based on legitimate concerns." *See id.*

Section 101(f)(6) of the Act states that "one who has given false testimony for the purpose of obtaining any benefits under [the Act]" cannot be regarded as possessing "good moral character" and thus is statutorily ineligible for voluntary departure. 8 U.S.C. § 1101(f). The IJ found that Fisher lacked "good moral character" because she entered into a sham marriage with Charles. He supported this finding with a "reasoned explanation" by considering Charles's affidavit and Fisher's preparation for her interview with the INS. Fisher asserted that she did not know that someone paid Charles $500 to marry her, and that she had legitimate reasons for having notes containing the answers to questions the INS would ask her at her interview. The IJ, however, found Fisher's testimony concerning her marriage not credible, and we must afford this finding "substantial deference." *De Valle v. INS,* 901 F.2d 787, 792 (9th Cir.1990) (internal quotations omitted). Based on the record, we cannot say that the IJ's denial of voluntary departure is not supported by a "reasoned explanation based on legitimate concerns."

[21] Fisher argues that the IJ's decision is "arbitrary and capricious" because the IJ relied on hearsay evidence—Charles's affidavit. She cites *Cunanan v. INS,* 856 F.2d 1373 (9th Cir.1988), for the proposition that the IJ abuses his discretion when he relies on hearsay evidence, because such out-of-court statements preclude the petitioner from confronting her witnesses. *Cunanan,* however, recognizes that "[i]n deportation proceedings, the test for admissibility is whether the hearsay statement is 'probative' and whether its admission is 'fundamentally fair.' " *Id.* at 1374, *quoting Baliza v. INS,* 709 F.2d 1231, 1233 (9th Cir.1983) (*Baliza*).

[22] The affidavit was clearly probative of an issue in the case; the question is whether it was fundamentally unfair for the IJ to rely on it. In *Baliza,* we held that admission of a hearsay affidavit was fundamentally unfair because the government made no reasonable effort to produce the declarant. *Baliza,* 709 F.2d at 1234. Here, the INS made reasonable efforts to find Charles before the hearing. In addition, Fisher's counsel could have objected to the IJ's reliance on the available evidence. The IJ stated that "the case will just have to stand on the evidence." He then said that "if either party wishes to question [Fisher] about her role in [the marriage], that's fine.... I'll consider that [testimony] as well." In response, Fisher's counsel stated, "That's what I'd like to do, Your Honor," and he proceeded to elicit testimony from Fisher. The IJ's reliance on Charles's affidavit was not "fundamentally unfair" under these circumstances.

PETITION DENIED.

CANBY, Circuit Judge, joined by THOMPSON, Circuit Judge, concurring in the judgment:

I agree with the result reached by the majority, but write separately to emphasize a crucial aspect of this case. At oral argument, Fisher's counsel *expressly disavowed any claim that Fisher was persecuted or feared persecution on account of her gender, or that persecution of women could constitute persecution "on account of ... membership in a particular social group* " within the meaning of 8 U.S.C. § 1101(a)(42)(A).

This essential fact must be taken into consideration in assessing Judge Wallace's majority opinion. There is no issue of gender *966 discrimination before our en banc court. The majority opinion should not be read as establishing that enforcement of criminal laws against women, or the infliction of suffering upon women, *because they are women* cannot constitute persecution under the Act. All that properly can be said is that the enforcement of criminal laws against Fisher because she is a woman does not, on this record, constitute persecution on grounds of *religion* or *political belief*—the only two grounds urged by Fisher.

Judge Wallace's opinion convincingly demonstrates that substantial evidence supports the Board's finding that Fisher was not persecuted, and did not have a well-founded fear of persecution, *on account of* her two asserted grounds of religion or political belief. I do not join the opinion, however, because it may too easily be misinterpreted as deciding, without briefing or argument, the important claim that it concedes Fisher did not raise: whether persecution of women because they are women is a ground for asylum under the Act.

There are several statements in Judge Wallace's majority opinion that could be misinterpreted as foreclosing the possibility that persecution of women on account of their gender presents a ground of asylum under the Act. Two of the clearest follow:

> Because Fisher has demonstrated only discrimination on account of her sex, not persecution on account of her religious or political beliefs, she has failed to carry her burden under *Ghaly*. Persecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act.

79 F.3d at 963. Again, in a similar vein, the opinion states:

> A law permitting the mere detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States. Persecution requires the government actor to inflict suffering *on account of* an individual's religious or political beliefs, race, nationality, or membership in a particular social group.

79 F.3d at 962.

These passages may be read as ruling on an issue of law that is not before us. Whether persecution directed at women constitutes persecution "on account of ... membership in a particular social group" within the meaning of section 1101(a)(42)(A) is an arguable point,[1] but it has not been argued or briefed in this case. The issue is not before us. Presumably these gratuitous statements on the merits of the question are dicta, but they should be left unsaid.

Nor can I embrace the majority opinion's treatment of a quotation from *Abedini v. INS*, 971 F.2d 188 (9th Cir.1992). *Abedini* ruled that persecution was not established by showing a possibility of "prosecution for an act deemed criminal in Iranian society, which is made applicable to all people in the country." *Id.* at 191. The majority opinion substitutes "all [women]" for "all people," 79 F.3d at 966, implying that there is no material difference between the two classes. Again, any implication that laws targeting women are no different from laws generally applicable to everyone must be dictum, but we should not express a view on the subject until it is briefed and argued to us in a case that turns on the point.

The case before us is a simple one when we restrict ourselves to the arguments properly before us. Fisher contends that Iranian authorities persecuted her, and she fears future persecution, on account of her religion or her political beliefs. She did not establish persecution, or a well-founded fear of persecution, on either of those grounds. No more need be said regarding the merits of her asylum claim. I agree that the immigration judge's denial of voluntary departure was not arbitrary or capricious. I therefore concur in the denial of Fisher's petition for review.

*967 NOONAN, Circuit Judge, joined by FLETCHER, Circuit Judge, dissenting:

To begin with, the petitioner identified herself at the immigration hearing as Saideh Hassib–Tehrani. Despite the fact that the INS and this court have continued to identify her as "Fisher," that appellation seems cruelly ironic when the majority denies that she was ever validly married to Fisher. It is always appropriate to refer to people by the names they give themselves. Consequently, in this dissent Saideh Hassib–Tehrani will be identified by the name she calls herself.

On October 5, 1994 a panel of this court unanimously remanded to the Board of Immigration Appeals (the Board) for further consideration of two claims: one, that Saideh Hassib–Tehrani feared persecution on account of her religious beliefs, and two, that she feared persecution on account of imputed political opinion. 37 F.3d 1371, 1383 and 1384. The panel did not decide that she was entitled to asylum on these grounds. It only decided that the Board had failed to analyze the evidence that supported asylum on these grounds. Today the majority opinion denies her petition on the ground that substantial evidence supports the Board's decision. However, the Board determined only that the petitioner's encounters with the regime did not amount to persecution without considering whether she had established a well-founded *fear* of persecution were she returned to Iran. I agree with the original panel that the case should be remanded to the Board for further consideration. The majority opinion now leaves open the possibility that she could move to reopen the proceedings before the Board pursuant to 8 C.F.R. §§ 3.2, 208.19 (1995). For a reason now to be stated, it is evident that reopening of the deportation proceedings should be acceptable to the government and granted by the Board. The principal division in this court is as to whether we should remand requiring reconsideration or whether the reopening should be left to the discretion of the government and the Board.

The Sea–Change In Government Policy. A compelling reason that either remand or reopening should occur is that this case occurs in a kind of time warp in which governmental policies, now abandoned by the government, operate to decide the case. The decision of the Immigration Judge was given in 1987. The decision of the Board was given in 1990. The decision of the panel was given in 1994. On May 26, 1995 a new approach to the basic problems present in this case was announced by the INS Field Operations Office of International Affairs in the Department of Justice. Addressed to "All INS Asylum Office/rs" and entitled "Considerations for Asylum Officers Adjudicating Asylum Claims From Women," *reprinted at* 72 *Interpreter Releases* 781 (June 5, 1995) (hereinafter "Considerations"), the policy is set out in a public document and given a large and appropriate amount of attention in the media. *See, e.g.* Michael Sniffen, *U.S. Stresses That Sexual Persecution Can be Basis for Asylum,* The Associated Press, May 26, 1995, AM Cycle; Ashley Dunn, *U.S. to Accept Asylum Pleas for Sex Abuse,* N.Y. Times, May 27, 1995, at 1. The Considerations are put forward as "*required reading* for all interviewing and supervising Asylum Officers". Considerations at 18 (emphasis in original). Training in these guidelines is required in order to enhance the ability of Asylum Officers "to make informed, consistent and fair decisions." *Id.* at 19. Supervisors of Asylum Officers are to be held accountable "for assuring that Asylum Officers fully implement this guidance." *Id.*

Under the heading "Background and International Guidance" the Asylum Officers are told: "The evaluation of gender-based claims *must* be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations." *Id.* at 2 (emphasis supplied). Among the international documents then cited are the 1979 Convention on the Elimination of All Forms of Discrimination Against Women and the 1993 Declaration on the Elimination of Violence Against Women, adopted by the General Assembly of the United Nations. According to the guidelines, the Declaration recognizes violence against women "as both a per se violation of human rights and as an impediment to the enjoyment by women of other human rights." *Id.* at 2. A third ***968** document cited by the Considerations was adopted by the Executive Committee of the United Nations High Commissioner for Refugees in 1985 and, as summarized by the Considerations For Asylum Officers, declares that states were free to adopt the interpretation "that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a 'particular social group' " for asylum purposes. *Id.* at 3. In other words, this whole class of women is eligible for asylum consideration as persons persecuted on account of their membership in the social group of nonconforming and therefore harshly treated women. This conclusion is reinforced by reference to the Guidelines adopted in 1993 by the Canadian Immigration and Refugee Board which formally recognize that "women fleeing persecution because of their gender can be found to be refugees." *Id.*

Against this background of international guidance, Asylum Officers of the United States are instructed that the laws and customs of some countries

> "contain gender-discriminatory provisions. Breaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh

> treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, the civil, political, social and economic rights of women are often diminished in these countries."

Id. at 4. The Asylum Officers are instructed that claims must be analyzed under the laws of the United States "but gender-related claims can raise issues of particular complexity, and it is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-related claims." *Id.* at 8. In particular, it is stated that persecution occurs when oppression is inflicted "because of a difference [that] the persecutor will not tolerate," citing *Hernandez–Ortiz v. INS,* 777 F.2d 509, 516 (9th Cir.1985), and that discriminatory practices and experiences "can accumulate over time or increase in intensity so that they may rise to the level of persecution." Considerations at 9 (quoting U.S. Department of Justice, Immigration and Naturalization Service, *Basic Law Manual* at [28], *reprinted in* Charles Gordon and Stanley Mailman, 8 *Immigration Law and Procedure* (rev. ed.1995)). The contrary-to-fact hypothetical indulged in by the majority (a law in the United States not constituting persecution of a social group although permitting detention, arrest "or even imprisonment" of a woman for not wearing a chador) suggests that these guidelines have not been assimilated by this court.

The guidelines go on to cite in particular the panel opinion in this very case at a time when rehearing en banc was pending. *Id.* at 10. Without the slightest criticism of the analysis and conclusions reached by the panel, the guidelines quote the panel at 37 F.3d at 1379 emphasizing that persecution should not be evaluated "solely on the basis of the physical sanction" and that requiring a person with religious views different from those espoused by a religious regime to conform to the regime's laws when the laws are fundamentally abhorrent to that person's religious convictions could result in anguish amounting to persecution. The Considerations further note that a woman could have imputed to her a political opinion about laws based on gender—a political opinion which would be the basis of persecution by those enforcing the regime's views. The Considerations quote with approval the Board's statement in *Matter of Acosta,* 19 I & N Dec. 211, 233 (March 1, 1985), that persecution on account of membership in a particular social group had to be based on those who "share a common, immutable characteristic. The shared characteristic might be an innate one such as sex...." Considerations at 12. The Considerations leave open whether, under existing precedent, "gender might be one characteristic that combines with others to define the particular social group." Considerations at 13. The guidelines are an invitation to develop asylum law with special attention to the problems of women oppressed on account of their nonconformity with the moral codes of a rigorist regime.

*969 As Judge Canby's concurrence observes, the case as governed by the guidelines has not been presented to us and so cannot now be decided by us. The majority of the en banc panel reaching out to decide what it has no power to decide speaks of course for those making up this majority. Its dicta do not constitute Ninth Circuit law. It is this particular majority which has the view that if in the United States a law imposed a religiously-inspired dress code on all women under penalty of imprisonment the law would not be evidence of persecution of a particular social group. If only there is a law, if only the law is general enough, half of the population may be subjected to discrimination and subject to incarceration for disobedience to the discriminatory regulation. We are not very far from *The Handmaid's Tale* when seven judges of this court are capable of expressing such a view.

In oral argument the court inquired of counsel representing the government whether he was in agreement with the guidelines of May 1995. After a pause, counsel said that he was sure his client was in agreement with them. This answer cannot be faulted for its honesty, but it suggests that there are elements in the INS who have not assimilated the spirit of the new guidelines. It would be tragic if government policy towards a woman claiming persecution or fear of persecution today should be decided on the basis of a policy that has become obsolete. There is no unfairness to the petitioner in letting the new guidelines apply to her case. There is no unfairness to the government in suggesting that it follow its new rules. This case was presented, argued and decided without any attention whatsoever to the guidelines that Asylum Officers today are supposed to "fully implement" and that are important to "informed, consistent and fair decisions." What advantage accrues to the government in avoiding the Considerations? This case needs to be heard again with the Board free to follow the guidelines of May 1995. If the majority agreed that this case should be remanded because the Board erred, that would be possible; because

the majority does not, reopening is the path to achieving this objective. The Board has the discretion to reopen, and the present policy of the government indicates that it would be a proper exercise of the Board's discretion to do so.

We turn to the case as it has been presented to us.

Saideh Hassib–Tehrani's Fear. The statute itself establishes that what must be shown by a person seeking asylum is something less than what is required by the standard for withholding of deportation. The higher standard for withholding requires showing something that is more probable than not. The standard for showing fear is less. *INS v. Cardoza–Fonseca,* 480 U.S. 421, 427–32, 107 S.Ct. 1207, 1211–14, 94 L.Ed.2d 434 (1987), *Singh v. Ilchert,* 69 F.3d 375, 381 (9th Cir.1995). There is a grave temptation for judges, used as they are to determinations of probability, to invoke unconsciously the higher standard in assessing fear. The Supreme Court reminds us that a chance of one-in-ten of serious harm befalling one is enough to establish fear that qualifies for asylum. *Cardoza–Fonseca,* 480 U.S. at 440, 107 S.Ct. at 1217.

The common teaching of this circuit is that fear has a subjective component and an objective component. The dichotomy is easy to state but not so easy to grasp. Fear is an emotion. As an emotion it must be subjective. Our requirement of an "objective" component reflects the judicial desire to have some way of checking on whether a fear is imaginary or fantastic. We have spoken in terms of evidence showing a credible, direct and specific basis for the fear. *Prasad v. INS,* 47 F.3d 336, 338 (9th Cir.1995). We still must integrate that credible, direct and specific basis with the subjective reaction of the person who says that she is scared.

In this case, the claim is not that Saideh Hassib–Tehrani has suffered persecution but that she fears that if she is returned to Iran she will suffer persecution. No one doubts the genuineness of her emotion. Does she have a credible, direct and specific basis for this fear? She cites three bad things that happened to her before she left her native country. Found in mixed company where the host wore his swimsuit she was arrested, handcuffed, taken to a government center, and held for four hours; her name and address were taken. The experience was traumatic *970 ("they hurt me"), and she became depressed, ill and unable to continue with her valued job as a teacher. Subsequently, caught with strands of hair outside her chador, she was seized upon the street by government agents or government-approved vigilantes, put into a car at gunpoint, lectured on her clothing, and driven to her home. Later in the year her home was actually invaded by government agents searching for suspected enemies of the government. None of the incidents in themselves are of such gravity that they constitute persecution. As credible, direct, specific facts which make her fear persecution if she returns to Iran, the incidents have a different significance. They indicate to her that the authorities know about her, know that she has been a nonconformist on points of great importance to the authorities and foretell that she will suffer more serious harm if she is returned to the country.

The Board stopped its analysis with its finding that she had not suffered persecution in the three incidents. The Board did not address her fear of persecution in the future. The Board focused on her opinions as they had been expressed in Iran. But this focus was as inappropriate as was the Board's stopping at past persecution.

The structure of the statute authorizing asylum is modelled on the Fifteenth Amendment to the Constitution prohibiting the denial of rights "on account of" race, color or previous condition of servitude. Persecution must be "on account of" a characteristic belonging to the victim. *INS v. Elias–Zacarias,* 502 U.S. 478, 482, 112 S.Ct. 812, 815–16, 117 L.Ed.2d 38 (1992). That elementary proposition does not eliminate from consideration the view that the alleged persecutors take of the victim. *See Mendoza Perez v. INS,* 902 F.2d 760, 762 (9th Cir.1990).

For example, it is the conjunction of the victim's political opinion and religious belief, as perceived by the persecutors, with the persecutors' reaction to that opinion or belief, which produces persecution. So, as the Supreme Court tells us, Jews in Nazi Germany were not persecuted on account of their political opinion. *Elias–Zacarias,* 502 U.S. at 482, 112 S.Ct. at 815–16. Rather, they were persecuted as members of a particular group variously viewed as religious, ethnic, or social by the Nazis. The Jews did not need to raise a finger against their persecutors, or whisper a criticism, in order to be the maligned objects of hatred. Similarly, what befell Saideh Hassib–Tehrani was not because she had demonstrated a sympathy for feminism or voiced a more tolerant interpretation of Islam than the Ayatollah's or expressed in Iran any dissent from the rigorist regime. The arrests and search occurred because the regime perceived her as a religious nonconformist. The way in which she led her

daily life was enough to invite repression. It was on account of her religious opinion, as perceived by the regime viewing her unconventional routine behaviors, that she was arrested and that she foreseeably will face more serious repression if she returns. *See Abedini v. INS,* 971 F.2d 188, 192 n. 1 (9th Cir.1992). As Iran is a theocracy, the religious beliefs imputed to her by the regime were also political opinions, and the persecution she fears from the regime would also be "on account of" those imputed political opinions.

In this case Saideh Hassib–Tehrani has testified that she is a Muslim but that she does not believe that the government is a truly Muslim regime. She reaches that belief from "the way they treat people, the covering of the face, the way of life." She is opposed to the regime's fundamentalist beliefs and so invites persecution. Her views, which have been made public in the course of these proceedings are not concealed from the Iranian authorities. *See Bastanipour v. INS,* 980 F.2d 1129, 1133 (7th Cir.1992). If we wished to discount expression of opinion offered by a petitioner during a hearing, we should seal the record and disguise the petitioner's identity in our published reports. If the testimony in an asylum proceeding is not shielded from the government of the country to which a person may be returned, it is only fair to take that testimony into account in determining whether a petitioner has a basis for believing that the government will persecute her if she is returned. According to her testimony in this case Hassib–Tehrani has a political opinion and religious beliefs on account *971 of which she can reasonably fear persecution.

What kind of trouble is she likely to receive at the hands of the government if she goes back? What is she scared of? We begin with the information in the administrative record by virtue of its incorporation of the detailed information on Iran provided by the United States Department of State to the Committee On Foreign Relations, U.S. Senate, and the Committee on Foreign Affairs, U.S. House of Representatives, in the State Department's *Country Reports on Human Rights Practices for 1986* (1987) (hereafter "the 1986 Country Report"). According to this official information, Iran was not a country without laws and procedures. It was a country in the grip of righteous religious revolutionaries, intolerant of even the slightest departure from the norms that they believed required by the Koran. It was a country in which vigilantes, with government approval, enforced the dress code and other matters of gender decorum. It was a country where, once in the hands of police or prison officials, there was no effective restraint on arbitrary infliction of suffering. According to the 1986 Country Report, a person in Saideh Hassib–Tehrani's position faced arrest by revolutionary guards, prolonged detention, interrogation under torture, imprisonment, and arbitrary beatings on the soles of her feet. The government has produced no evidence that these conditions have changed.

The majority in this case says that we cannot use the 1986 Country Report because it did not form part of the administrative record. That is not entirely accurate. The immigration judge did use a portion of this report in making his decision, as the majority concedes. 79 F.3d at 964. This use of the report makes it part of the record. *Cf.* 8 C.F.R. § 208.9(f) ("The application, all supporting information provided by the applicant, any comments submitted by the Department of State, or by the Service, *and any other information considered by the Asylum Officer* shall comprise the record.") (emphasis added). In addition, by using the report, the immigration judge brought into play the following regulation that governs immigration hearings:

> **Comments from the Department of State**
>
> (a) At its option, the Department of State may provide detailed country conditions information addressing the specific conditions relevant to eligibility for refugee status according to the grounds specified in section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42). Any such information relied upon by an immigration judge in deciding a claim for asylum or withholding of deportation shall be made part of the record and the parties shall be provided an opportunity to review and respond to such information prior to the issuance of a decision.

8 C.F.R. § 208.11 (1995). It is apparent that the State Department's Country Reports are "detailed country conditions information" within the terms of this regulation. The term "information" in the second sentence cannot be isolated from the whole phrase qualifying "information". That being so, it is not the specific detail relied on by the immigration judge but the "detailed country conditions information," or "Country Report" that is made part of the record. Consequently, the 1986 Country Report is properly before us.

In summary, we are asked in this en banc court to decide whether the Board had substantial evidence for concluding that Saideh Hassib–Tehrani had fear, and

reason to fear, persecution on account of her religious beliefs and political opinion if she were now deported to Iran. In the end, in deciding that question we are required to integrate the objective evidence with her subjective emotions and to ask whether a person with her experiences, who fell ill after being handcuffed and detained for four hours, would be scared of suffering on account of her now openly expressed opposition to the regime if she were sent back. In *Bastanipour,* Judge Posner asked the government's lawyer "whether *he* would fear persecution by Iran if he were in Bastanipour's religious and political shoes and he conceded that he would." *Bastanipour,* 980 F.2d at 1133. We did not ask the government lawyer a similar *972 question but we should ask ourselves: If we had the beliefs and the experience and the gender of Saideh Hassib–Tehrani, would we reasonably fear that we had a one-in-ten chance of suffering seriously on account of our beliefs if we returned to Iran? The answer, it may be suggested, is obvious. If it is obvious, the Board necessarily erred in its contrary finding.

On Remand or Reopening. There is more that should be before the Board on remand or reopening. Under the governing statute the immigration judge conducting the deportation proceedings "shall determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses." 8 U.S.C. § 1252(b). In this role, the immigration judge has duties imposed by statute that are different from the functions of an Article III judge. He has the specific duties of interrogating, examining and cross-examining, and he also has the duty of presenting evidence. In short, the immigration judge has the duty of developing the record on which his or her decision must be based. *Id.* For that reason the immigration judge for these purposes is also described as a "special inquiry officer." *Id.*; *see also* 8 C.F.R. § 1.1(*l*).

These statutory obligations put the immigration judge in a position analogous to that of an administrative law judge hearing a Social Security claim. The immigration judge has, analogously, the "special duty to fully and fairly develop the record." *See Brown v. Heckler,* 713 F.2d 441, 443 (9th Cir.1983). Like the administrative law judge the immigration judge has the obligation to be informed about the facts relevant to the decision being made. *Heckler v. Campbell,* 461 U.S. 458, 471, n. 1, 103 S.Ct. 1952, 1959 n. 1, 76 L.Ed.2d 66 (Brennan, J., concurring) (1983).

In a case such as the one at bar the information available from the State Department on the country conditions is obviously relevant; and the relevant information stands in need of updating with the passage of each year. As the majority opinion notes, it should be open to Saideh Hassib–Tehrani to reopen the proceeding before the Board to present the most relevant up-to-date information from the State Department on conditions in Iran. Why should the Board adjudicate about conditions in a far-away land without getting the most reliable kind of information, information all the more acceptable because it comes from an agency of the United States? The government has no reason to resist such a reopening. The government is not the enemy of the alien. Its interest is that the asylum-seeker should obtain asylum if she is entitled to it. The Country Reports bear on this entitlement.

Unlike most questions litigated in federal court, the most relevant questions in an asylum proceeding depend on knowledge of conditions in some foreign land. The Board should not stultify itself by denying itself the benefit of responsible reports on the country in question. When a judge decides about issues within the United States the judge necessarily puts to use a vast fund of knowledge gained through experience of living in this country; and that experience does not form part of any administrative record. Lacking such experience of tyrannical regimes abroad, the Board is free to consult not only the Country Reports issued by the State Department but also responsible information from other sources. The special inquiry officer is specifically authorized to do so. 8 C.F.R. § 208.12(a). When the special inquiry officer has not, and when the information in the administrative record is eight years old, the Board should welcome the submission of up-to-date Country Reports.

Involuntary Departure. Although it might be hoped that the issue will never need to be finally resolved, the possibility exists that Saideh Hassib–Tehrani will be returned to Iran because the Immigration Judge found that she gave false testimony at the immigration hearing. On this point the Board made no findings of its own but simply adopted the Immigration Judge's findings. Consequently it is our task to look at them.

The Immigration Judge found Saideh Hassib–Tehrani to be "lying" when she testified that she had been married to Charles Fisher. A.R. at 44. The evidence given weight by the Immigration Judge consisted of two things: an affidavit of Charles Fisher and *973 notes that Saideh Hassib–Tehrani had prepared for her hearing. The notes

were amazingly non-probative of deceit. As the majority observes, the notes contained information such as her parents' home town, birth date and her place of work. She was certainly not going to lie about these matters. The fact that she had notes about her life with Fisher seems to fall within her own explanation for all the notes, *viz.* that she had a poor memory and was nervous and wanted to have all the facts at her fingertips when she testified.

Fisher's affidavit read as follows: "I was given $500.00 to marry my wife Saideh from a friend named Rick Ronquillo, Amalco Metals employee. That if I married Saideh from Iran, that I would receive $500.00 cash. From her cousin Bob. I have not resided with Saideh on continuios [sic] basis sense [sic] our marriage." The background of this affidavit is provided by Saideh Hassib–Tehrani herself. She came to the United States expecting to marry Bob. She found him living with another woman. Bob had every reason to try to find someone to take his place, and he did. Bob's solution of a sad situation does not reflect on the credibility or the moral character of Saideh Hassib–Tehrani.

What does Fisher's affidavit prove? It proves that Fisher believes that he had married Saideh Hassib–Tehrani. It implies that he had resided with her. It is not probative of a fake marriage. It reveals nothing about whether Saideh Hassib–Tehrani knew of Fisher's motive and whether therefore her testimony that the marriage was not one entered into for immigration purposes was false; indeed, nothing in the record suggests that she even knew about the payment, much less caused Bob to make it. The affidavit invites interrogation. Saideh Hassib–Tehrani's testimony explains why cousin Bob had offered Fisher $500.00. The monetary motivation for the marriage does not establish that it was invalid or fictitious. No doubt all should marry for love; but many marriages in the history of the world have been entered for mercenary motives. Without substantial evidence in the record supporting the Immigration Judge's determination, there should be a grant of voluntary departure.

All Citations

79 F.3d 955, 96 Cal. Daily Op. Serv. 2252, 96 Daily Journal D.A.R. 3751

Footnotes

1 *See, e.g., Matter of Acosta,* 19 I & N Dec. 211 (BIA 1985), defining the term "particular social group" as "a group of persons all of whom share a common, immutable characteristic" and opining that "[t]he shared characteristic might be an innate one such as *sex,* color, or kinship ties...." *Id.* at 233 (emphasis added). *See also Fatin v. INS,* 12 F.3d 1233, 1240 (3d Cir.1993) (petitioner who establishes fear of persecution in Iran because she is a woman has identified a requisite "particular social group" for purposes of asylum).

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18 F.3d 1017
United States Court of Appeals,
Second Circuit.

Vicente OSORIO, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.
Lawyers Committee for Human Rights, Amicus Curiae.

Decided March 7, 1994.

Before: NEWMAN, Chief Judge, OAKES and CARDAMONE, Circuit Judges.

Opinion

OAKES, Senior Circuit Judge:

This petition for review raises several questions under the Immigration and Nationality Act of 1952, *as amended,* (the "Act"), 8 U.S.C. §§ 1101 *et seq.* (1988 & Supp. IV *1021 1992): (1) whether the applicant for asylum was persecuted solely on account of his involvement in an economic dispute with his government and therefore was ineligible for political asylum? (2) whether Congress intended to exclude from eligibility applicants who were persecuted because of their political beliefs and their involvement in an economic dispute with their government? (3) whether the applicant established a well-founded fear of political persecution? (4) whether membership in a union constitutes membership in a social group for purposes of asylum (or withholding of deportation)? and (5) whether it is more likely than not that the applicant's life or freedom would be threatened in Guatemala because of his political opinion?

On March 15, 1989, Vicente Osorio, a Guatemalan union leader, and his wife, Maria Aracely Morales, entered the United States in violation of Act section 241(a)(2). 8 U.S.C. § 1251(a) (1988).[1] They sought asylum or, in the alternative, withholding of deportation. *See* 8 U.S.C. §§ 1158(a), 1253(h)(1) (1988 & Supp. IV 1992). Instead, on August 22, 1990, Immigration Judge John K. Speer (the "IJ") denied Osorio's application for asylum, or withholding of deportation, but granted his application for voluntary departure to Costa Rica. *See* 8 U.S.C. § 1254(e) (1988 & Supp. IV 1992). On April 22, 1993, the Board of Immigration Appeals (the "BIA") affirmed. We now reverse the BIA's denial of Osorio's eligibility for asylum and order that withholding of deportation be granted to Osorio.

I.

Asylum and Withholding of Deportation Under the Act

....

III. *Background*

A. Circumstances Leading to Osorio's Departure from Guatemala

The petitioner, Vicente Osorio, is a former Guatemalan sanitation worker, who began working for the City of Guatemala in 1971. In 1984, Osorio became a member of the union, Sindicato Central De Trabajadores Municipales (Central Municipal Workers Union) (the "SCTM"). On February 7, 1984, he was elected to the SCTM's Executive Committee for a two-year term. In February 1986, Osorio's co-workers re-elected him to a second term. Of the 6,000 municipal workers in Guatemala City at that time, 3,500 were members of the SCTM. As a member of the SCTM Executive Committee, Osorio was in charge of 500 employees at his work site. Furthermore, as a union leader, Osorio negotiated with the municipal government, and organized demonstrations and strikes-including a strike in April 1986 in which the Guatemalan central government sent police into a municipal building overtaken by the strikers; the police beat and attacked the workers with tear gas.

On November 12, 1986, the SCTM held a general strike of more than 3,000 workers because, as Osorio testified, the "rights of the workers were being trampled upon." The strike lasted only eleven days because, as Osorio testified, union members were being killed. The SCTM Executive Committee went to the Guatemalan Labor

279

Minister for help. Although the Minister declared the strike illegal, he agreed to act as a mediator between the SCTM and the Mayor. In November or December of 1986, the Mayor of Guatemala City selectively fired Osorio and 75 other union members for engaging in the illegal strike.

Several acts of violence against members of the SCTM punctuated the time leading to the November 1986 strike. First, on January 17, 1986, several unidentified armed men shot and killed SCTM member Efraln Cotzal Sisimit in Guatemala City. Then, in February of that year, three heavily-armed men kidnapped SCTM Finance Secretary José Mercedes Sotz Caté, who was beaten before escaping from his abductors. Three months later, Sotz Caté witnessed the shooting of his three-year-old son, an attack undoubtedly meant for Sotz Caté himself, leaving the boy paralyzed from the waist down. *See* Transcript of Hearing at 45, *In re Osorio,* No. 29 770 391 (March 23, 1990) ("Transcript of Hearing"); Guatemala Human Rights Commission/USA, *Guatemala Human Rights Update # 1/92* (January 13, 1992) (citing Amnesty International Report). Then, on July 23, 1986, SCTM Secretary Justo Rufino Reyes was stabbed to death near the municipal building. *See* Transcript of Hearing at 47-48. The IJ characterized these acts of violence surrounding the SCTM as "unfortunate incidents." Incredibly, the BIA makes no reference to these incidents in its decision, although it does discuss in detail the "illegal" November strike.

After the November strike, Osorio unsuccessfully sought reinstatement for the terminated workers. Osorio also testified that he could never again obtain employment in Guatemala City because of his SCTM activities.

Osorio also organized a mass media campaign. During his media appearances, Osorio accused the government of human rights ***1024** violations, including charging the government with responsibility for the escalated killings and abductions of union members:

> ... when we were fired, our next step was to try to get our jobs back and by this we tried to communicate by using the press, the radio and television and I personally spoke out against the injustices against the violation of our rights as workers and indicating [sic] that our free expression, our free thinking was a violation of such rights was against the law.

Transcript of Hearing at 57-58 (March 23, 1990); *see also* Transcript of Hearing at 82 (April 23, 1990).

At this time, violence against the union and its members continued. For example, in 1987, SCTM member Carlos Oscal was kidnapped for three days. Furthermore, despite the election of a civilian government in 1986 to replace the former military dictatorship, violence against organized labor in general continued throughout the period between 1986 and 1989 when Osorio fled Guatemala. [Some cites to evidence omitted.] *U.S. Artists, Writers Protest Killing of Guatemalan Unionist,* Reuters, Aug. 11, 1989; Victoria Irwin, *A Voice Against Rights Abuses,* Christian Sci. Monitor, Dec. 13, 1988, at 6 (recounting the story of a well-known union leader who "has been kidnapped by government troops, had a death threat painted on his home, and was told he could no longer teach in his town"); Lindsey Gruson, *Political Violence Up in Guatemala in Recent Months,* N.Y. Times, Nov. 13, 1988, at A1 (quoting Americas Watch observer Anne Manuel as stating that "[i]n spite of two and a half years of civilian government, Guatemala remains one of the worst human rights violators in the hemisphere;" stating that "*politically motivated* kidnappings, disappearances and murders of labor leaders, union organizers and leftists have increased almost every month"; and relating that of the 33 "*politically related* killings in the first 10 months" of the new presidency, "[m]ost of those killed ... were peasants and leftists, including students and *union organizers*") (emphases added); Julio Godoy, *Guatemala: Renewed Violence, Renewed Fears,* Inter Press Serv., May 19, 1988 (*available in* LEXIS, News library, Allnws File) (quoting from a report submitted by Americas Watch to President Cerezo stating that "since Cerezo became president, at least six trade unionists were murdered and another eight have disappeared"); Elizabeth Ross, *Peace Brigadiers Help Central Americans Simply By Their Presence,* Christian Sci. Monitor, Mar. 21, 1988, at 3 (discussing *inter alia* the work of international "watch dog" organizations in safeguarding human rights in Guatemala and El Salvador and in "benefit[ting] striking Guatemalan labor unions, whose members are subject to death threats or kidnapping"); *Guatemala: Bodies of Two "Disappeared" Show Signs of Execution,* Inter Press Serv., Mar. 9, 1987 (*available in* LEXIS, News library, Allnws File) (recounting the gruesome discovery outside Guatemala City of the "bodies of a union leader and a

280

student, their faces mutilated and their heads riddled with bullet holes"); *Guatemala Urged to Probe Alleged Trade Union Killings,* Reuters, (*available in* LEXIS, News library, Allnws File) June 2, 1986 (stating that the I.L.O. "has urged Guatemala's new government to investigate reported killings, woundings and disappearances of more than 70 labor unionists [in] six years").

In December 1988, Osorio received an anonymous note at his home warning him "to abandon the struggle, to stop with the outspokenness, because if I continue with the struggle and my outspokenness, something more serious would happen to me." Transcript of Hearing at 66 (March 23, 1990) (recounting from memory the contents of the written threat).

In January 1989, Angel Melgar, a former rebel, suggested in a publicly-televised interview that certain unidentified Guatemalan unions had been infiltrated by subversive, communist guerrillas. Although Osorio denied that he or his union had been affiliated with the guerrillas, he feared that Melgar's charges left him open to government reprisal. *See, e.g.,* Lucy Hood, *Despite Government Action, Rights Abuses Rise in Guatemala,* Christian Sci. Monitor, Dec. 29, 1987, at 9 ("[i]n its campaign against leftist guerrillas ***1025** in the late 1970s and early 1980s, the Army killed thousands of peasants suspected of supporting the guerrillas. *Union leaders,* university students, and anyone else considered a leftist sympathizer were also targeted by the Army") (emphasis added). In February 1989, Osorio received a second note containing a death threat against him and his family. Fearing for their lives, Osorio and his wife fled Guatemala in March 1989.

*** Although the Osorios are legally entitled to return to Guatemala, and although the Osorios wish to return to their homeland, Osorio stated that they cannot return to Guatemala at this time because "[he] believe[s] [he] will be killed because of the death threat [he] received.... [He] would return to [his] country if the circumstances changed so that [he was] no longer in danger." *Id.* (*cited in* Joint Appendix at A-224).

C. The Guatemalan Government's View of Union Activity

[12] Under the *Elias-Zacarias* test for political asylum, discussed *infra,* to determine whether persecution occurred *on account of* political opinion, we must look to the victim's, not the persecutor's, beliefs. *See Elias-Zacarias,* 502 U.S. at ----, 112 S.Ct. at 816. Nevertheless, the persecutor's view of union activity not only gives the background necessary to understand the dispute leading to the persecution, it also provides some evidence of the victim's political beliefs. *See id.* at ----, 112 S.Ct. at 817 (holding that the victim of persecution must provide direct or circumstantial evidence of the persecutor's motive because the Act makes motive critical). According to the expert testimony of Frank Howard, an attorney with Americas Watch, which is a non-profit organization that monitors human rights abuses in Central America, there are two types of labor unions in Guatemala: independent and government-controlled. SCTM is an independent labor union. The independent labor unions of Guatemala historically have been at the forefront of democratic opposition to the military governments which ruled from 1954 through 1986. During this time, labor organizers and union members have suffered severe political repression as a result of their opposition activities. *See* Americas Watch, *Human Rights in Guatemala During President Cerezo's First Year,* British Parliamentary Human Rights Group, February 1987 (*cited in* Joint Appendix at A-19 to A-64); Transcript of Hearing at 97 to 122 (April 23, 1990). At the hearing, Howard further testified that Melgar's claim that certain Guatemalan unions had been infiltrated by communist guerrillas was probably false. Howard stated that Melgar was under the total control of the army when he made those statements.

After the election of the first civilian government in over thirty years, experts and commentators in the field speculated that the election of a civilian government would reduce, if not eliminate, the violence against union members and other individuals of groups considered by authorities to be subversive or leftist sympathizers. *See, e.g., Revival of Guatemalan Unions,* Latin American Regional Reports: Mexico and Central America, May 2, 1986 ("[r]epressed and silenced by successive military rulers for most of the past three decades, the Guatemalan trade union movement has sprung to life since the mid-January return to civilian government ***1026** under the christian democrat president Vinicio Cerezo"). This prediction never materialized. "In several respects, the human rights situation has grown appreciably worse following each of two coup attempts in May 1988 and May 1989. In recent months political killings and other attacks have been targeted against prominent labor leaders, human rights activists, student leaders and others who are now or have been involved in political activities." Lawyers Committee for Human Rights, Abandoning the

281

Victims: The U.N. Advisory Services Program in Guatemala 1 (Feb. 1990). Osorio presented substantial evidence that the Guatemalan civilian government also viewed the demands of the independent unions as a challenge to its authority rather than solely an economic matter of bargaining over the terms and conditions of employment. As noted in an exhibit to an amicus brief filed by the Lawyers Committee for Human Rights:

> While the Guatemalan government remains formally a civilian one, and while it can point to new organizational structures for the protection and promotion of human rights, the de facto human rights situation remains extremely grave. Political killings in Guatemala dramatically increased in 1989. *Opposition groups, including non-governmental human rights groups, trade unions and peasant activists have been subject to intimidation, death threats and-increasingly so in recent months-to extra-judicial killings.*

Id. at 15 (emphasis added).

D. Immigration Proceedings

[The IJ denied asylum and withholding; on appeal, the BIA afirmed.]

During the long [BIA appeal] delay, Amnesty International reported that Guatemalan authorities again threatened the life of Osorio's union colleague, Sotz Caté, forcing him to leave the country. The threatening letter read in part: " 'We are aware of the denunciations you made against the Government while you were abroad, and that you are back in Guatemala working in the trade union movement ... We are giving you a limited time to leave the country or else be physically eliminated.' " *See* Guatemala Human Rights Commission/USA, *Guatemala Human Rights Update # 1/92* (Jan. 13, 1992), Joint Appendix at 10 (quoting from letter).

***

V. *Discussion*

[13] An alien who enters the United States without inspection is subject to deportation proceedings. 8 U.S.C. § 1251(a)(2) (1988); *see also Sale,* 509 U.S. at ----, 113 S.Ct. at 2552; *Dhine v. Slattery,* 3 F.3d 613, 617 (2d Cir.1993). Under such circumstances, the alien may apply for asylum in the United States or request withholding of deportation to a specific country if the "alien expresses fear of persecution or harm upon return to his country of origin or to a country to which he may be deported after exclusion from the United States." 8 C.F.R. § 236.3(a) (1993).

A. Request for Asylum

[14] The government will grant Osorio's request for asylum if he can prove that (1) he is eligible for asylum, and (2) there are no significant reasons for denying asylum. *See* 8 U.S.C. § 1158(a) (1988); 8 C.F.R. §§ 208.13, and 208.14 (1993). Osorio is eligible for asylum if he shows that he is a refugee within the meaning of section 101(a)(42)(A) of the Act.***

[15] [16] Osorio has the burden of proving that he is a refugee within the meaning of section 101(a)(42). Osorio may establish his refugee status on one of two bases: (1) actual past persecution on account of Osorio's political opinions or his membership in a particular social group, or (2) well-founded fear of future persecution on account of Osorio's political opinions or his membership in a particular social group. *See* 8 C.F.R. § 208.13(b). ***

***

The key issue on appeal is whether Osorio's fear of future persecution is on account ***1028** of two specific grounds for asylum: his political opinion or his membership in a social group. Assuming Osorio was persecuted *because of* his membership in or leadership of SCTM, discussed *infra,* we must determine whether such persecution constitutes persecution because of (1) political opinion or (2) membership in a social group. The first question, persecution *because of* political opinion, turns on the answer to the question whether the BIA's characterization of the dispute between Osorio and the City of Guatemala as "economic" precludes a finding that the persecution resulting therefrom may also be properly characterized as political. We take each question in turn.

a. Osorio's Fear of Persecution on Account of His Political Opinion

The BIA dismissed Osorio's plea for asylum in one paragraph:

> [Osorio] has not demonstrated that his fear of persecution is premised

282

> upon political opinion or any of the other enumerated grounds. While the Guatemalan authorities [sic] abuse of SCTM members is to be condemned, the fundamental nature of their dispute was economic, concerning wages and the reinstatement of workers. The possible existence of a generalized "political" motive underlying the government's action is inadequate to establish that [Osorio] fears persecution on account of political opinion. *Elias-Zacarias,* 502 U.S. at ----, 112 S.Ct. at 116. General oppression by a government does not demonstrate persecution within the meaning of the Act (citation omitted).

BIA Opinion, at 4.

Distilled to its basic form, the BIA argues as follows: The dispute between Osorio and Guatemala is fundamentally "economic"; therefore, Osorio is ineligible for asylum. To jump from the characterization of a dispute as economic to the conclusion that Osorio is ineligible for asylum, the BIA must have assumed that if a dispute is properly characterized as economic, it cannot be characterized as political.

[17] The BIA relies on the Supreme Court's decision in *Elias-Zacarias* to make the jump from the characterization of the dispute between Osorio and his government as economic to the conclusion that Osorio is not eligible for asylum. In *Elias-Zacarias,* in construing the phrase, "persecution on account of ... political opinion," the Supreme Court looked to the ordinary meaning of the phrase and held it to mean "persecution on account of the *victim's* political opinion, not the persecutor's." *Elias-Zacarias,* 502 U.S. at ----, 112 S.Ct. at 816. As an example of his position, Justice Scalia argued that a Jew in a Nazi regime would not have been eligible for *political* asylum (although presumably such a person would be eligible for religious asylum) because Nazis did not persecute Jews on account of their political beliefs, but rather on account of their religious beliefs. Nothing in *Elias-Zacarias* suggests, however, that where an applicant fears persecution for both political and religious beliefs, that refugee should be denied eligibility for political asylum. Similarly, where an applicant fears persecution for both his political and economic beliefs, nothing in *Elias-Zacarias* precludes a finding that the applicant is eligible for political asylum.

Our reading of the BIA's decision, the legal analysis of which is sparse, suggests to us that the BIA's conclusion rests on shaky grounds: According to the BIA, Osorio was *persecuted on account of his economic stands against the government* in the context of economic strife, and, therefore, Osorio was not eligible for asylum because the laws of the United States do not provide for economic asylum.

[18] [19] The problem is not with the BIA's characterization of the dispute as economic. Rather, the problem is with the BIA's illogical leap from this characterization to the conclusion that Osorio was not eligible for asylum. The plain meaning of the phrase "persecution on account of the victim's political opinion," does not mean persecution *solely* on account of the victim's political opinion. That is, the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution. At oral argument, counsel for Osorio made this point well when she likened the BIA's view to the opinion that Aleksandr ***1029** Solzhenitsyn would not have been eligible for political asylum because his dispute with the former Soviet Union is properly characterized as a literary, rather than a political, dispute. Regardless of whether their dispute might have been characterized as a literary dispute, it might also have been properly characterized as a political dispute.

As the U.N. Handbook observed:

> The distinction between an economic migrant and a refugee is ... sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group.
>
> ... On the other hand, what appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves.

U.N. Handbook, at §§ 62-64.

[20] We agree. Any attempt to unravel economic from political motives is untenable in this case. No substantial evidence supports the view that Osorio's dispute with the Guatemalan governmental officials was solely economic. Rather, substantial evidence, as recounted in the background section of this opinion, compels the view that Guatemalan authorities persecuted Osorio because he and his union posed a political threat to their authority via their organized opposition activities. Although several conflicts between Osorio and his government were in the context of economic disputes, the death threats to him and others were independent of these disputes. Osorio and his union colleagues presented grievances to the government often, but not solely in the form of strikes. And after Osorio's termination, such grievances manifested themselves into an organized media campaign led by Osorio who "became well-known in Guatemala because of the continuous demands that I spoke out. I became very outspoken regarding the demands that I wanted for the union. I spoke out through the ... television, radio, and the newspapers and my demands were very legal.... I was not violating any law when I was expressing these demands through all the means of communication." Transcript of Hearing at 63 (March 23, 1990).

[21] [22] In applying *Elias-Zacarias* to the facts of Osorio's case, the BIA took as given that the Guatemalan government had actually persecuted Osorio. While acknowledging government persecution of a union leader on account of his union activities, the BIA summarily dismissed the underlying political motives of Osorio's persecutors as irrelevant and argued that Osorio "has not demonstrated that his fear of persecution is premised upon political opinion or any of the other enumerated grounds." BIA Opinion, at 4. In so concluding, the BIA examined neither the political dimension of this dispute nor its political context. The BIA neglected what the Act made critical-political motive. *Elias-Zacarias,* 502 U.S. at ----, 112 S.Ct. at 817. To dismiss the underlying political motives of Osorio's persecutors as "irrelevant," the BIA apparently relied on this passage of *Elias-Zacarias:*

> In [the Court of Appeals's] view, a guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes "persecution on account of ... political opinion," ... "because the persecutors' motive in carrying out the kidnapping is political." ... [This is] irrelevant.

Elias-Zacarias, 502 U.S. at ----, 112 S.Ct. at 815 (citation omitted). The BIA has misread *Elias-Zacarias.* Under *Elias-Zacarias,* the persecutor's political motive is insufficient to infer the relevant causal connection, persecution on account of the victim's political opinion. As the Supreme Court continues to state, the Act makes motive critical and therefore the victim of the persecution must provide some evidence of the persecutor's motive. *Id.* at ----, 112 S.Ct. at 817.

[23] [24] Thus, by drawing the conclusion that the dispute between Osorio and Guatemala was economic and not political, the BIA ignored the political context of the dispute. In particular, in a country where the ***1030** standard of living is low, and where the government suppresses civil liberties and commits widespread human rights violations, unions (and student organizations) are often the only vehicles for political expression. *See generally* Amnesty International, Guatemala: The Human Rights Record (1987) (recounting stories of government abductions, beatings and executions of trade union leaders on account of their union activities); *see also* C.B. Macpherson, *Problems in Human Rights in the Late Twentieth Century, in* The Rise and Fall of Economic Justice 21, 28 (1985) (arguing that in states such as the "current Latin American regimes" where the standard of living is "so low that a decent human subsistence for everyone cannot presently be provided," the regime often implements a "trade-off" policy in which the regime justifies the sacrifice of human rights as necessary for economic development; such policies, rather than benefitting the poor, have led to "the suppression of trade unions, of political parties, and of elementary civil liberties"). Thus, Guatemalan government persecution of Osorio and other union members on account of their union activities is not political solely because the government views union activities as subversive although such views are some evidence of the persecutor's motives and therefore of the appropriate characterization of the dispute for purposes of asylum. And the persecution is not political solely because of the nature of Osorio's actions, his media campaigning, for instance. Osorio's non-government-controlled union activities, which manifested themselves as opposition to government policies, coupled with his actions after his termination, represented a political threat to the government's authority. As Osorio himself acknowledges: "I continue with my union because I was born with a goal ... to always struggle to achieve things in life, struggle for the good of the workers, struggle for the good of the farmers and the people who are always repressed in our country." Transcript of Hearing at 61 (March 23, 1990). Union leaders such as Osorio also challenge the political status

quo in Guatemala by example because they are democratically elected to represent the interests of their constituents. These interests ordinarily include better terms and conditions of employment, or higher wages. These interests also include the attainment of civil liberties, particularly where the employer is the government.

[25] The BIA's decision thus reveals a complete lack of understanding of the political dynamics in Guatemala. Relying on one sentence in *Elias-Zacarias,* "the mere existence of a generalized 'political motive' underlying the [persecution] is inadequate to establish ... the proposition that [the victim] fears persecution *on account of* political opinion," the BIA intentionally ignores the underlying political context of the dispute. *Elias-Zacarias* does not stand for the proposition that we ignore the political motives of the oppressors. Often, such motives are the only evidence of the victim's political beliefs, other than the testimony of the victim himself or herself.

[26] [27] [28] Osorio's union activities imply a political opinion. The Government argues that he has not established what his political opinion is, but the Government's view of what constitutes a political opinion is too narrow. The Government complains that Osorio has never stated "which political party he belongs to, which political philosophy he espouses or which political leaders he supports. He never placed himself, SCTM or the city government at any point along the political spectrum." Government's Brief at 24. We agree with Osorio that the Government's argument betrays an impoverished view of what political opinions are, especially in a country like Guatemala where certain democratic rights have only a tenuous hold. Osorio argues that "it is not only people in political parties who have political opinions." Reply Brief at 10-11. He continues: "[I]n a nascent democracy it is often those outside [ ] the formal institutions of government who are most involved in politics." *Id.* at 11. Osorio is not a politician in the tradition of those who run for office in the twentieth-century United States. Rather, like Aleksandr Solzhenitsyn, Osorio is a dissident, and accordingly marked by the authorities for persecution. Refugee law does not require that Osorio be a politician, only that he is persecuted in his home country for his political beliefs. We believe that Osorio's activities ***1031** clearly evince the political opinion that strikes by municipal workers should be legal and that workers should be given more rights. Guatemala's persecution of Osorio was motivated in large part because it wanted to silence the expression of these political beliefs. Consequently, the BIA decision incorrectly stands for the proposition that if a government persecutes a national or resident on account of such person's political beliefs, but the individual is a union organizer whose fame and mode of communication comes through the organization of a labor movement, the individual is not eligible for political asylum because such activity is predominantly economic, not political. *Cf. Sotelo-Aquije v. Slattery,* 17 F.3d 33, 36-37 (2d Cir.1994) (BIA finding that applicant was not eligible for political asylum because although the applicant was an elected leader of CUAVES-an El Salvadoran group that politically opposed a highly organized guerilla organization-and although this guerilla organization sent threats to the applicant and other members of CUAVES, the applicant was persecuted not because of his political beliefs but because he was a community leader; reversed). This interpretation of the Act contradicts the plain meaning of the Act. *See Elias-Zacarias,* 502 U.S. at ----, 112 S.Ct. at 815; Sunstein, *Law and Administration After Chevron, supra* at 2109 (citing cases in which the Supreme Court has implemented syntactical analyses to reject an agency interpretations of the law).

b. Summary of the Characterization of Osorio's Persecution

In short, we hold that the BIA's interpretation of political asylum contradicts the plain language and congressional intent of the Act. We further hold that Osorio suffered persecution on account of his political beliefs and that the BIA's characterization of Osorio's persecution as solely on account of his economic activities is not reasonably supported by substantial evidence on the record. Therefore, we need not reach the question whether Osorio would also have been eligible for asylum on account of his membership in a particular social group, namely, the SCTM. Instead, having determined that Osorio feared persecution on account of his political beliefs, we now examine the question whether Osorio was eligible for political asylum.

2. Basis for Osorio's Eligibility for Political Asylum

[29] Osorio may establish his eligibility for asylum on one of two bases: (1) actual past persecution, or (2) well-founded fear of future persecution on account of his political opinions. *See* 8 C.F.R. § 208.13(b). We find that substantial evidence on the record compels the conclusion that Osorio is eligible for asylum because he has a well-founded fear of persecution on account of his political beliefs.

a. Eligibility Based on Well-Founded Fear of Future Persecution

To establish a well-founded fear of persecution, Osorio must establish that (1) "he has a fear of persecution in [Guatemala] on account of ... political opinion," (2) "there is a reasonable possibility of actually suffering such persecution if he were to return to [Guatemala]," and (3) "he is unable or unwilling to return to or avail himself of the protection of [Guatemala] because of such fear." 8 C.F.R. § 208.13(b)(2). We have established that Osorio fears persecution because of his political opinion and that he is unwilling to return to Guatemala because of a well-founded fear of prosecution. Therefore, we focus on whether there is a reasonable possibility that Osorio would actually suffer such persecution if he were to return to Guatemala.

To sustain his burden of proving a well-founded fear of persecution, Osorio need not establish that he would be singled out for persecution if he can establish that (A) "there is a pattern or practice in [Guatemala] of persecution of groups of persons similarly situated to the applicant on account of ... membership in a particular social group, or political opinion," and (B) Osorio is a member of and identifies with "such group of persons such that his fear of persecution upon return is reasonable." 8 C.F.R. § 208.13(b)(2)(i)(A), (B). Finally, the "[IJ] shall give *due consideration* to evidence that the [Guatemalan government] persecutes its nationals or residents if they leave the country without authorization ***1032** or seek asylum in another country." 8 C.F.R. § 208.13(b)(2)(ii) (emphasis added).

b. Pattern of Persecution in Guatemala

[30] As we illustrate above, Osorio's testimony coupled with the background facts of this case establish an overwhelming "pattern ... in [Guatemala] of persecution of groups of persons similarly situated to [Osorio] on account of ... [his] political opinion." 8 C.F.R. § 208.13(b)(2)(i)(A). The tragic events preceding the November 1986 general strike themselves compel us to conclude that union leaders like Osorio are at grave risk of persecution by Guatemalan authorities. The IJ incorrectly dismissed these events as "unfortunate incidents," and the BIA, by failing to re-open the hearing to hear evidence that Guatemalan authorities again threatened the life of Osorio's union colleague, Sotz Caté, because of his denunciations of the Guatemalan government while abroad, failed to give "*due consideration* to evidence that the [Guatemalan government] persecutes its nationals or residents if they leave the country without authorization or seek asylum in another country." 8 C.F.R. § 208.13(b)(2)(ii) (emphasis added).

The overall picture reveals a pattern of persecution that is horrific, and rivalled in this hemisphere perhaps only by the pattern of persecution in El Salvador.

c. Osorio's Identification with Such Group

There is no doubt that Osorio identifies with the group of individuals who are commonly persecuted in Guatemala. It is his identification with this group of individuals, union leaders, that makes his fear of future persecution credible, and well-founded.

In short, we hold that, as a matter of law, Osorio was eligible for political asylum, and that the IJ and the BIA were incorrect in holding otherwise.

3. Discretion

[31] Although Osorio was eligible for asylum, the Attorney General, in her discretion, may deny asylum to eligible applicants like Osorio. Because of the strength of Osorio's fear of persecution if he were to return to Guatemala, we believe it would be an abuse of discretion not to grant him asylum. Further, none of the mandatory reasons for denial apply in this case. *See* 8 C.F.R. § 208.14.

B. Request for Withholding of Deportation

[32] [33] [34] "If the Asylum Officer denies an alien's application for asylum, he shall also decide whether the alien is entitled to withholding of deportation under section 243(h) of the Act." 8 C.F.R. § 208.16(a). The burden of proof necessary to establish a successful request for withholding of deportation is higher than that necessary to establish a successful request for asylum. *See Cardoza-Fonseca,* 480 U.S. at 446, 107 S.Ct. at 1221 ("Congress did not intend the two standards to be identical"). On this petition for review, the government relies on *Cardoza-Fonseca* for the proposition that "where ... an applicant cannot meet the requirements for asylum, the applicant *a fortiori* is ineligible for

withholding of deportation." Respondent's Brief at 19; *see also Saleh,* 962 F.2d at 240 ("[b]ecause the standard for withholding of deportation is more stringent than that for asylum, and the grounds specified in §§ 1101(a)(42)(A) and 1253(h)(1) are identical, an alien who cannot establish eligibility for asylum cannot obtain withholding of deportation"). However, as we explained earlier, while it is true that an applicant who is not eligible for asylum is *a fortiori* ineligible for withholding of deportation, it is not the case that all applicants denied asylum must be denied withholding of deportation. *See Cardoza-Fonseca,* 480 U.S. at 443-45, 107 S.Ct. at 1219-21. An applicant who proves that he or she is *eligible* for asylum, but is denied asylum in the BIA's exercise of discretion, remains eligible for withholding of deportation. If the applicant is able to meet the higher standard necessary to show eligibility for withholding of deportation, specifically that "*it is more likely than not*" that the applicant's "life or freedom would be threatened in the proposed country of deportation on account of ... [his or her] political opinion," 8 C.F.R. § 208.16(b)(1), and none of the exceptions apply (none of which apply in this case), then the BIA *must* withhold deportation. *1033 *See Cardoza-Fonseca,* 480 U.S. at 443, 107 S.Ct. at 1219.

[35] In this case, Osorio has met his burden. Substantial evidence on the record compels us to conclude that it is more likely than not that his life or freedom would be threatened in Guatemala on account of his political opinion. Many of Osorio's close colleagues have already perished at the hands of the Guatemalan government. In 1986 alone, immediately prior to the November general strike, Osorio's fellow union member, Efraín Cotzal Sisimit, was shot and killed in Guatemala City; his fellow SCTM leader, Sotz Caté, was kidnapped and beaten; Sotz Caté's three-year-old son was shot and paralyzed; and SCTM secretary, Justo Rufino Reyes, was stabbed to death near the municipal building in Guatemala City. Further, all outside accounts of events in Guatemala confirm that union leaders are among those targeted for life-threatening political persecution. Osorio himself was the subject of several death threats. Thus, we hold that the IJ and BIA were incorrect in denying Osorio's application for withholding of deportation.

VI. *Conclusion*

In conclusion, we reverse the order of the BIA. We hold that Osorio is eligible for asylum and order that withholding of deportation be granted to him.

All Citations

18 F.3d 1017, 62 USLW 2565

238 F.3d 239
United States Court of Appeals,
Third Circuit.

LI WU LIN, Petitioner,
v.
IMMIGRATION & NATURALIZATION SERVICE, Respondent.

Filed Jan. 24, 2001.

BEFORE: BARRY, COWEN and WOOD, JR.,* Circuit Judges.

OPINION OF THE COURT

COWEN, Circuit Judge.

Li Wu Lin, once a student in the People's Republic of China, participated prominently in four pro-democracy protests in the weeks and days before the massacre at Tiananmen Square. Fearing persecution in the wake of the government's crackdown, Lin fled his country and eventually arrived in the United States where he sought both political asylum under § 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a), and withholding of deportation under § 243(h) of the Act, 8 U.S.C. § 1253(h). The immigration judge and the Board of Immigration Appeals have denied him relief under both provisions, clearing the way for his deportation. Lin now brings this petition for review.

I

In the spring of 1989 Lin was fifteen-years old and a student at a middle school in the Fujian Province. Sympathetic to the student movement then gaining momentum, Lin joined in marches that protested the government's corruption, undemocratic rule, and disregard for human rights.

The first demonstration that Lin joined occurred on May 18th, 1989, and involved about 1,000 students who gathered in front of a county government building. Because Lin is unusually tall and, as he puts it, "very active," he was placed at the front of the march and given a protest sign to hold and a headband to wear that demanded freedom for China. He explained that a few of his teachers helped organize the demonstration and participated in the march, but others were afraid of getting involved.

On May 25th Lin again joined the head of the assembled crowd, held a sign, and marched to the county government building. This time when they arrived at the building, the police and army blocked the entrance. Lin and the others tried to push through the barricade to occupy the building, but the officers and soldiers pushed the students back, beating them with electric batons. Lin said he shielded himself ***242** with his arms as he retreated. A few days later Lin headed another parade on May 30th, and he went to a fourth on June 2nd when he traveled with others to a large demonstration in front of the city government building in Fuzhou, a large city in the province.

Two days after this last demonstration, the protest movement in China ended with the Tiananmen Square massacre in Beijing on June 4th, 1989. According to every major American newspaper, Chinese soldiers accompanied by 25-ton tanks drove the student protesters from Tiananmen Square, fired on them with automatic weapons, and crushed others to death under the tanks. Newspapers reported that at least 700 people were killed. *See, e.g.,* Daniel Southerland, *Death in Tiananmen; Witnesses Describe the Devastating Assault,* Washington Post, June 5, 1989, at A1.

Although he did not live in Beijing and had not participated in any protests there, Lin was worried about the sharp change in the government's response to the protests. After an uncle informed him that the police were seeking one of his relatives for her participation in protests, he feared that they would soon come after him too, so he traveled to an aunt's home in another town about twenty minutes away by bus.

Six days after the massacre in Beijing, on June 10th, two police officers and a brigade leader in fact came to Lin's home. Because he was not there, they spoke to his mother (Lin's father is deceased) and gave her a subpoena demanding that Lin appear immediately for interrogation at the Security Section, Public Security Bureau. In his

288

written personal statement Lin said that "the officers told my mother I was involved in the democracy movement and they demanded to know my location. When she didn't tell, they demanded she find me.... They said I would be arrested and punished strictly if I was caught, including imprisonment." App. at 126.

*** Lin's mother managed to mail him the subpoena she received. A copy of the subpoena, with a translation, has been included in the record, and all of the information on it is consistent with Lin's story. The immigration judge did request that the government check the age or authenticity of the document, but the government failed to take any action.

Despite the police's delivery of the subpoena, Lin never reported for interrogation. Instead he moved from his aunt's house to a much more distant location three hours away, where he stayed for roughly two-and-a-half years while his family gathered the money to pay a smuggler to take him out of the country. During his wait, Lin said he worked briefly in a bakery for a few months, but then quit because he was afraid he would attract the government's attention.

Officials returned to Lin's home five more times to look for him. The first time they returned, on June 20th, 1989, Lin said that the officers took his mother to the Changle County Security Bureau, detained her for half a day, and threatened her when she would not reveal her son's location. Lin said they "asked her many times about me and threatened to jail her." App. at 126. The officers returned in early July of 1989, at the end of 1989, on May 1, 1990, and in January of 1991. Lin explained, "They always asked for my location, said I had participated in the student movement, and continued to say I would be in serious trouble if caught." App. at 127.

Lin learned that one of his classmates, Lin Bin, whom he knew well, was arrested and sentenced to one year of detention and forced labor. In March of 1990 three other classmates were arrested, beaten, and sentenced to between one and one-and-a-half years of detention and forced labor. *243 Lin testified that these classmates "all had participated in the same events that I did, and all were sentenced for their student movement activities." App. at 127.

Once the smugglers supplied him with a fake passport from Singapore, Lin left China on January 25th, 1992, and traveled by airplane first to Sen Jen (phonetic spelling) and then Hong Kong where he stayed for about a week. After a brief stopover in Singapore, he moved again to somewhere in former Czechoslovakia, where he lived with another person from China for about eight months. From there he took a train to a country whose identity he never learned and boarded a plane for the United States, arriving on October 31st, 1992.

[The IJ denied relief, and the BIA affirmed.]
***

In its two-page opinion, the Board found Lin's testimony credible ***[but] nevertheless concluded that Lin did not have a well-founded fear of persecution in China. The Board reasoned, as did the immigration judge, that since Lin admitted in his testimony that he joined the other demonstrators in attempting to occupy a county government building during the second demonstration, the subpoena merely showed that the Chinese government was interested in enforcing a neutral law of general applicability, namely the law against trespass.

II

*** In this case Lin seeks to establish that he has a well-founded fear of persecution because of his political opinions. Breaking this standard into parts, we can say that Lin must show that (1) the government pursued him because of his political opinions, (2) the action that the government would take against him is sufficiently serious to constitute persecution, and (3) he has a "well-founded fear" that the persecution will in fact occur. *See, e.g., Chang*, 119 F.3d at 1067 n. 9.

[3] [4] For the government's action to constitute persecution, it must amount to more than "generally harsh conditions *244 shared by many other persons," but "does include threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom." *Chang*, 119 F.3d at 1066 (citations omitted). The requirement that his fear be "well-founded" includes both a subjective and objective component. No one has ever questioned that Lin holds a genuine subjective fear of persecution, so our focus is on the objective standard-i.e., was his subjective fear of persecution "supported by objective evidence that persecution is a reasonable possibility." *Chang*, 119 F.3d at 1066 (*citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 430, 440, 107 S.Ct. 1207, 1212, 1217-18, 94 L.Ed.2d 434 (1987)). This standard "does not require a showing that

persecution is more likely than not. Fear can be well-founded even 'when there is less than 50% chance of the occurrence taking place.' " *Chang*, 119 F.3d at 1066 (*quoting Cardoza-Fonseca*, 480 U.S. 421 at 431, 107 S.Ct. 1207 at 1213, 94 L.Ed.2d 434).

[5] [6] If an alien satisfies these standards for political asylum, then the Attorney General has discretion to decide whether to grant asylum or not. *Cardoza-Fonseca*, 480 U.S. at 428 n. 5, 107 S.Ct. at 1211 n. 5. By contrast, if an alien qualifies for withholding of deportation, the second type of relief at issue in this appeal, then the Attorney General is prohibited from deporting the alien to the country where the persecution will occur. 480 U.S. at 429 n. 6, 107 S.Ct. at 1212 n. 6.

[7] To qualify for mandatory relief under withholding of deportation, Lin must show a clear probability that upon his return to China "his life or freedom would be threatened" because of his political opinions. *Chang*, 119 F.3d at 1066. Put differently, the standard is that he must show that it is more likely than not that he will face persecution if he is deported. *Cardoza-Fonseca*, 480 U.S. at 430, 107 S.Ct. at 1212.

[8] In *Chang* we held that an alien can be entitled to both asylum and withholding of deportation based on a fear of prosecution under a law of general applicability. "[T]he memory of Hitler's atrocities and of the legal system he corrupted to serve his purposes ... are still too fresh for us to suppose that physical persecution may not bear the nihil obstat of a 'recognized judicial system.' " *Chang*, 119 F.3d at 1060-61 (*quoting Sovich v. Esperdy*, 319 F.2d 21, 28 (2d Cir.1963)). We concluded that if the prosecution is motivated by one of the enumerated factors, such as political opinion, and if the punishment under the law is sufficiently serious to constitute persecution, then the prosecution under the law of general applicability can justify asylum or withholding of deportation. *Chang*, 119 F.3d at 1061.

III

[9] We conclude that Lin has satisfied both the standards for political asylum and those for withholding of deportation. The Board reasoned in our case that while Lin is credible-a conclusion in keeping with our decisions in *Senathirajah* and *Balasubramanrim v. INS*, 143 F.3d 157 (3d Cir.1998)-he does not face persecution. Instead, the Board speculated, his testimony only established that the Chinese police sought him for trespass. But the Board's view of events is wholly unsupported by the record. Nowhere is there any evidence that the Chinese police sought Lin because of his trespass as opposed to his political expression. Indeed, for all the evidence revealed, the government was not even aware that Lin committed trespass as part of his participation in marches. Lin specifically asserted that when the police first came to his house, they said that they sought him because he was "involved in the democracy movement." The police said nothing about trespass. Lin also specifically stated that his classmates were beaten, incarcerated, and subjected to forced labor "for their student movement activities."

***245** More fundamentally, Lin's subpoena was issued six days after the Chinese government used tanks and machine guns to kill at least 700 hundred and possibly more nonviolent protesters. It is difficult to believe that in the wake of political repression on that scale that the government was acting as a disinterested enforcer of neutral laws when it demanded that Lin appear for interrogation. We do not understand why the government would send two police officers and a brigade leader if it did not believe more was at stake than a fifteen-year old's trespass. Nor does it make sense that if simple trespass was at issue, the police would return five more times over the course of the next year and a half. That is a long time to pursue a middle-school student's trespass. Nor would it make sense that they would take Lin's mother to the security bureau and interrogate her for half a day about his whereabouts. Nor is it very plausible that the government would subject Lin's classmates to the punishment they received if trespassing was foremost on the government's mind.

The idea that the subpoena was not aimed at Lin's political expression also flies in the face of what journalists reported shortly after the massacre in Tiananmen Square. On June 9th, 1989-the day before the police brought the subpoena to Lin's mother-the Wall Street Journal reported that the Chinese government "launch[ed] a campaign of arrests against student and other demonstrators." The article said that Premier Li Peng appeared on television for the first time since the massacre and was "shown congratulating troops on behalf of the government and the Communist Party." The article continued, "Government television announcements demanded that student demonstration leaders and free labor-union organizers turn themselves in or face arrest." James P. Sterba, *Campaign is Begun to Arrest Protesters as Signs Grow that Hardliners Prevail,* Wall Street

290

Journal, June 9, 1989. See also Nicholas D. Kristof, *China's Premier Reappears; Army Seems to Tighten Grip,* New York Times, June 9, 1989; Nicholas D. Kristof, *Crackdown in China; A Student Leader Turns Himself In,* June 17, 1989 ("The[Chinese] Government today reported a new series of arrests around the nation of those involved in the democracy movement."). Even a passing familiarity with China's history in the twentieth century would remind the Boar d that the Chinese government has frequently used force and coercion to suppress political dissent. The Cultural Revolution occurred as recently as 1966 to 1976-within Lin's own life. Severe political repression is not a remote part of China's history.

Indeed, Assistant Secretary Harold Koh's recent testimony in March of 2000 before a House subcommittee indicated, "In the weeks leading up to both June 4th, the 10th anniversary of the Tiananmen massacre, and October 1st, the 50th anniversary of the founding of the People's Republic, the Government moved against political dissidents across the country, detaining and formally arresting scores of activists nationwide and thwarting any attempts to use the anniversaries as opportunities for protest." Testimony before the Subcommittee on International Operations and Human Rights, U.S. House of Representatives, Washington D.C., March 8, 2000, *http://www.state.gov/www/policy_remarks/2000.* In the brief Lin submitted in 1993 to the Board, he points out that the State Department's 1992 Country Report stated that 20-30% of the protesters detained for participating in the pro-democracy protests were still imprisoned at that time, and the number of people incarcerated could be in the thousands. App. at 7. Other reports put the numbers even higher. *Id.*

When the government's lawyer skeptically questioned Lin about why he remembered the exact day he left China-January 25th, 1989-Lin testified:

> I escaped out of my country. I was so scared of the arrest by the Chinese Public ***246** Security Bureau officers, so I could still remember it.
>
> Q. Okay.
>
> A. I was so scared.
>
> Q. Thank you.

App. at 98.

On appeal the government defends the Board's decision by invoking a one-page letter that the State Department submitted to the immigration judge. But the thrust of that letter was to reject Lin's credibility-something the Board expressly did not do. Because the Board never cited the State Department's letter in its opinion and could not have relied on it with much logical consistency, we question to what extent the Board's decision can be upheld based on what that letter said. Perhaps the government's theory is that the Board implicitly rejected Lin's credibility to the extent that it conflicted with what was said in the letter. But the Board of course never identified any part of Lin's testimony that it rejected as not credible, and so we have no way to evaluate the validity of its reasons for purportedly rejecting part of his story. Despite these defects in relying on the State Department's letter, however, we will address the contents of that letter because we find its reasoning as unconvincing as the Board's.

One reason that the State Department's letter rejected Lin's account as not credible was that he stayed in China "three years" after the subpoena was issued, yet he did "not explain clearly how he managed, assuming the police were after him, to avoid arrest by staying at the home of a relative who could have been found easily by local security authorities." App. at 130.

Initially, we observe that Lin stayed in China for two-and-a-half years, not three as the letter said, and there are only the most fleeting references in the record about where or with whom he stayed during those years. We also want to emphasize that no one ever asked him how he avoided the authorities. And Lin did volunteer that he tried to escape detection by moving three hours away, and added that he quit working in a bakery after a few months because he was afraid he would attract the government's attention. But the most fundamental point here, of course, is that the authorities could have easily decided that pursuing Lin, a fifteen-year old, was not worth the resources it would take to discover him three hours distant and in hiding. China is a big country.

While the State Department's letter acknowledged that the agency did "not have independent knowledge about this applicant," it concluded that Lin's "description of the vigorous police efforts against him and his schoolmates is inconsistent with the situation as we understand it." App. 130. Specifically, the letter said that the "demonstrations [i]n Fuzhou were far less dramatic than those in Beijing,

and the crackdown in their aftermath was similarly mild." *Id.* The only evidence capable of evaluation that the letter cited in support of these claims is an article written by two American college professors who had brought a class of their students to China some time before the Tiananmen Square demonstrations.

[10] Before we discuss this article, we think it is important to emphasize that the Board's decisions cannot be sustained simply by invoking the State Department's authority. We are expected to conduct review of the Board's decisions, and that procedural safeguard would be destroyed if the Board could justify its decisions simply by invoking assertions by the State Department that themselves provide no means for evaluating their validity. *See Galina v. INS*, 213 F.3d 955, 958-59 (7th Cir.2000). The Board cannot hide behind the State Department's letterhead. We turn therefore to the college professor's article and its value in assessing the legitimacy of Lin's claims.

The first problem with the article is that it is difficult to discern how close the authors were to the specific county where Lin lived and whether they had any first- *247 hand knowledge about the demonstrations there or the police response to it. Their article does observe that Fujian Province, the region they discuss, is the size of Nicaragua or the former Czechoslovakia and had in 1989 a population of 26 million people. Obviously they were not speaking from personal experience about all the demonstrations in a region that size. And there are reasons to doubt how well their observations generalize. While they described as "benign" the police response to the protests that they saw, and add that a month before the massacre, the Provincial Party Committee had "praised [the students'] patriotism," app. at 134-35, the authors do not mention any of the protests Lin described, protests that the Board accepted as having occurred and that indeed formed the basis of its decision.

The Board's own reasoning relied on the fact that the police sought Lin because he tried to press past police and soldiers to occupy a government building. And Lin explained that during that clash, the authorities beat protesters with electric batons, confrontations that the professors showed no awareness of while describing the police response as benign. The authors also maintained that the demonstrations in the region "reached their peak" on May 18th, which was the date Lin joined in his first march. These omissions and errors reinforce the impression that the professors' on-the-ground observations may not have been as accurate as those by someone like Lin who lived all his life in the area.

But the most important defect in the government's reliance on this article is that the benign police responses reported by the authors all occurred before the massacre in Tiananmen Square. Events before the massacre are not the appropriate standard for judging the political fallout afterwards. It is well understood that the Chinese government's decision to use force against the protesters in Beijing was the product of a power struggle within the government and that those favoring less freedom emerged in control. This shift in leadership inevitably prompted a more repressive approach by the government. Even the authors of the article acknowledge that before the massacre, "Fujian officials were reluctant to take tough measures against demonstrators, perhaps because they could not predict the outcome of the crisis." *Id.* at 134. The authors also indicated that the situation was much more serious after the massacre. Even in the location where the authors were, "there was a realistic acceptance that further demonstrations would be dangerous. We only witnessed one more, on 6 June." *Id.* at 136. The article adds that the university in Fuzhou closed two weeks early, and while a short time later national and provincial education commissions "demanded that schools make students return to class," many parents were afraid to let their children return. App. at 137. The authors observed, "By 18 June, Fuzhou was utterly quiet." *Id.*

At one point the article does remark, "A few students were questioned by the police, but we heard of no arrests." App. at 142. But there is no reason to think that two American college professors-who were busily shepherding a class of students-were especially well informed about whom the police sought, particularly in a region with 26 million inhabitants in an area the size of former Czechoslovakia. The Chinese government did not make these college professors privy to their enforcement plans. Lin testified credibly that the police served him with a subpoena six days after the massacre in Beijing, and he even supplied the subpoena to the immigration judge. He also testified that he learned that four of his classmates were arrested and punished for their participation in protests. Significantly, Lin said that at least three of those arrests occurred in March of 1990, a date well after the article was written and almost a year after the massacre.

The article also acknowledged that the Chinese government was keenly aware of public relations and did

try to manipulate foreigners who were visiting. The authors ***248** commented that when the evening news showed footage of two of the American students walking in a march with Chinese students, the professors received a call rebuking them even before the broadcast was over, and the police refused to extend any student's visa beyond the end of the term. And once the massacre occurred, with its sea-change in the government's response, the professors explained that they declined to attend a banquet because other foreigners who had done so in other cities were filmed and televised as supporters of Beijing. It is also significant that we are not presented with any evidence vouching for the quality of the scholarship in this article.

We think Judge Posner's remarks in *Galina* about the Board's reliance on one of the State Department's country reports apply equally here: "The country report is evidence and sometimes the only evidence available, but the Board should treat it with a healthy skepticism, rather than, as is its tendency, as Holy Writ." *Galina*, 213 F.3d at 959. Finally, the article and Lin's account are actually consistent in many respects. Both report that frequent demonstrations occurred, and the article also confirms Lin's claim that the police had access to videotapes of the demonstrations. They also agree that the government's response was not as severe as in Beijing. But much as *Galina* cautioned that a country report saying that human rights were "generally respected" did not categorically rule out an alien's claims of persecution, *id.*, so too the fact that the government did not kill hundreds of people where Lin lived does not mean that the government took no repressive action there. The Board's performance in this case was less than it should have been, a problem that, as Judge Posner has remarked, appears to occur too often. See *Galina*, 213 F.3d at 958 (collecting cases). This court has itself rejected the Board's credibility judgments in two published opinions, *Balasubramanrim* and *Senathirajah*.

[11] At oral argument the government maintained that a year and a half of incarceration and forced labor for a fifteen-year old who voiced opposition to the government is not sufficiently severe punishment to qualify as persecution. We emphatically disagree. That is a very long sentence for simply voicing opposition to the government. If in *Chang* a one-year or possibly longer sentence was severe enough to qualify as persecution for an adult who violated China's exit laws based on his political beliefs, *see* 119 F.3d at 1066-67, we think it follows that the year-and-a-half and possibly longer sentence that Lin faces also constitutes persecution. We also think it is worth pointing out that Lin has in addition broken China's law by fleeing the country and faces the same prosecution for that offense as the petitioner in *Chang*. And unlike *Chang*, there can be no dispute that Lin fled because of his political beliefs.

IV

We hold that Lin has satisfied the standards for both political asylum and withholding of deportation. For the foregoing reasons, the Board's order of March 10, 2000, will be reversed and remanded for further proceedings consistent with this opinion.

All Citations

238 F.3d 239

20 I. & N. Dec. 149 (BIA), Interim Decision 3127, 1990 WL 385750

United States Department of Justice

Board of Immigration Appeals

MATTER OF IZATULA

In Exclusion Proceedings

A-29060863

Decided by Board February 6, 1990

**1 (1) The general rule that prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution is inapplicable in countries where a coup is the only means of effectuating political change. Dwomoh v. Sava, 696 F.Supp. 970 (S.D.N.Y.1988), followed.

(2) Alien who actively assisted the mujahedin in Afghanistan, and who was sought out by the Afghan regime because of that activity, established a well-founded fear of persecution within the meaning of the Immigration and Nationality Act since there was no basis in the record to conclude that any punishment imposed on the alien would be an example of prosecution for an attempt to overthrow a lawfully constituted government.

This is an appeal from the decision, dated April 3, 1989, in which the immigration judge denied the applicant's requests for relief pursuant to sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h) (1982), and ordered that the applicant be excluded and deported from the United States. The appeal will be sustained.

The applicant is a 23–year–old native and citizen of Afghanistan. The applicant is married, but his wife and son are residing in Afghanistan. The applicant arrived in the United States on January 14, 1989. He was subsequently placed in exclusion proceedings pursuant *150 to sections 212(a)(19) and (20) of the Act, 8 U.S.C. §§ 1182(a)(19) and (20) (1982). The applicant requested asylum and completed a written application for that relief.[1] The applicant's asylum application was referred to the Department of State Bureau of Human Rights and Humanitarian Affairs ("BHRHA") for an advisory opinion. The BHRHA advised that it "has no factual material about this specific applicant." The BHRHA advised further that information regarding human rights practices in Afghanistan can be found in "the State Department's Country Reports on Human Rights Practices."

At the hearing on the merits of his asylum and withholding requests, the applicant conceded that he was excludable under section 212(a)(20) of the Act. The applicant then presented testimony in support of his applications for relief under sections 208(a) and 243(h). At the conclusion of the hearing, the immigration judge entered his decision finding the applicant excludable under section 212(a)(20) of the Act and denying him asylum and withholding of deportation.

**2 On appeal, the applicant contends that the immigration judge erred in denying his asylum and withholding of deportation applications. An applicant who seeks relief under section 208(a) may be granted asylum in the exercise of the Attorney General's discretion if that applicant qualifies as a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1982). That section, in turn, defines a "refugee" as follows:
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.

The applicant bears the burden of proving that he is eligible for relief under section 208(a). See 8 C.F.R. § 208.5 (1989).

In order to qualify for withholding of deportation under section 243(h) of the Act, an applicant must show a "clear probability of persecution" if he is returned to a designated country. That is, the applicant must show that it is "more likely than not" that his life or freedom would be threatened in Afghanistan owing to his "race, religion, nationality, membership in a particular social group, or political opinion." See INS v. Stevic, 467 U.S. 407 (1984). The applicant also bears the burden of showing eligibility for relief under section 243(h). See 8 C.F.R. § 242.17(c) (1989). In INS v. Cardoza–Fonseca, 480 U.S. 421 (1987), the Supreme Court held that there is a ***151** significant difference between the standards for relief under section 208(a) and section 243(h), and that a section 208(a) applicant need not show a likelihood of persecution in order to be eligible for asylum. See also Carcamo–Flores v. INS, 805 F.2d 60 (2d Cir.1986). We stated in Matter of Mogharrabi, Interim Decision 3028 (BIA 1987), that an alien can establish eligibility for asylum by showing that a reasonable person in his circumstances would fear persecution in a given country.

The applicant here gave the following testimony in support of his asylum request. He stated that he was raised in Kandahar in Afghanistan, and that he attended school there until 1980, when he was 14 – years old. The applicant then began to manage a general store, after his father, who had previously operated the store, retired.

The applicant testified that he avoided the representatives of the Soviet-supported Afghan Army and the KHAD secret police when he was in Afghanistan, because he did not want to be conscripted and forced to fight against his own countrymen. The applicant testified further that between 1985 and 1988, he assisted the mujahedin by providing them with clothes, groceries, and other supplies. He stated that during this period he let his younger brother run the store. The applicant would obtain a list from the mujahedin indicating the items which they needed, and he would then obtain these supplies with the assistance of his brother. The applicant stated that his brother was able to travel freely around Kandahar because he was not old enough for the Army to be interested in conscripting him. The applicant also stated that he himself would deliver supplies to the mujahedin at night, so that he could avoid being seen by members of the Army or other security forces.

****3** The applicant testified further that his brother was arrested by KHAD secret police in October 1988. He stated that someone informed the KHAD police that he and his brother were assisting the mujahedin. According to the applicant, the KHAD agents then came to the store and arrested his brother. The applicant learned from Ijim Mohammad, a man who lived next to the store, that the KHAD agents had asked for the applicant too when they arrested his brother. The applicant stated that he never saw or heard from his brother after the arrest, but he believed that his brother had been imprisoned.

The applicant stated that he hid at home for the 2 days following his brother's arrest. According to the applicant, on the second day that he was in hiding, a KHAD agent came to the house looking for him. The applicant's father told the KHAD agent that he did not know where the applicant was, and the agent "beat ... up" the applicant's father. The applicant stated that after the KHAD agent had left his home, he went to a village named Arghandab which is approximately 2 kilometers from Kandahar. The applicant's father moved with him to ***152** Arghandab, which was an area under mujahedin control. The applicant also stated that his uncle informed him that KHAD agents continued to look for him at his house in Kandahar after he had fled to Arghandab.

The applicant remained in Arghandab for 1 and 1/2 months. He fled Arghandab because of the "constant bombardment" there, and because his father was injured during an air raid near the house where the applicant and his father were living. The applicant travelled to Pakistan along with nine or ten members of the mujahedin. After he had arrived in Pakistan, the applicant stayed in Chaman for 3 days. He subsequently travelled to Karachi, where he remained for 20 days. In Karachi, the applicant paid a fee to an agent who provided him with a passport and a boarding pass. The applicant testified that he made arrangements to leave Pakistan because he had no family ties there, and because he could not afford to continue to pay for the hotel where he was staying in Karachi.

Finally, the applicant denied that he had displayed a fraudulent passport to examining immigration officers in this country. The applicant stated that he showed only his boarding pass to these officers, and that he immediately requested asylum. The applicant also stated that his father-in-law is in a lawful immigration status in this country.

The immigration judge based his denial of the applicant's asylum request on two separate grounds.[2] He found first that the applicant's fear of being conscripted by the pro-Soviet Afghan Army was no longer a valid basis for a persecution claim, due to the Soviet forces having withdrawn from Afghanistan in February 1989. Concerning the applicant's active support of the mujahedin, the immigration judge found that the applicant's fear of harm from the Afghan Government relates to "an act of prosecution rather than act of persecution for aiding groups in opposition in an attempt to overthrow the defacto [sic] government of Afghanistan."

**4 We concur with the immigration judge's reasoning that the applicant is not eligible for asylum based on an unwillingness to perform military service in Afghanistan. Since the Soviet forces have withdrawn from Afghanistan, an asylum claim based on a refusal to serve in the Afghan military is no different than any other alien's claim that he will be punished because he did not serve in his country's armed *153 forces. [Citations omitted.]

We do not agree, however, with the immigration judge's rationale that the applicant would be subject to prosecution in Afghanistan due to the assistance which he rendered on behalf of the mujahedin. The applicant established through his testimony that his brother was arrested, and not heard from again, because of his support for the mujahedin. He further established that the authorities sought him out too because he had assisted the mujahedin.

The BHRHA advisory opinion in the record makes reference to the Department of State's 1988 Country Reports on Human Rights Practices, Joint Committee of the Senate and House of Representatives, 101st Congress, 1st Session (1989) [[[[hereinafter "Country Reports"]. The Country Reports provide the following concerning the Afghan Government's treatment of suspected political opponents:
Regime authorities frequently employ torture to punish or to extract information or confessions. The policy is widespread, indicating that it has official sanction. Victims often claim that Soviet officials monitor and indirectly control the torture sessions. Torture techniques include both physical and psychological abuse. Use of electric shock to sensitive parts of the body, immersion in water, and beatings are common forms of physical abuse reported by victims and witnesses. Threats of abuse against family members and prolonged sleep deprivation are typical forms of psychological abuse. Persistent reports describe cases of mental disturbances induced by torture in regime prisons. Political prisoners are usually not segregated from criminal or mentally ill prisoners. Medical care is commonly described as minimal at Pol-e-Charkhi, where prisoners are generally required to wait at least a month before being allowed access to medical personnel. According to reliable reports, many prisoners died in 1988 as a result of inadequate diet, corporal punishment, and torture.

Id. at 1269. Furthermore, the Country Reports estimate that there are "at least several thousand" political prisoners being held in Afghanistan. Id. at 1271. The [INS] has submitted no evidence to rebut the information***. Thus, we find that the applicant has demonstrated that he is at risk of imprisonment, at a minimum, in Afghanistan because of his political activity there.

5 Moreover, we find no basis in the record to conclude * that any punishment which the Afghan Government might impose on the applicant on account of his support for the mujahedin would be *** a legitimate and internationally recognized government taking action to defend itself from an armed rebellion. The Country Reports explain that in Afghanistan, *154 "[c]itizens have neither the right nor the ability peacefully to change their government. Afghanistan is a totalitarian state under the control of the [People's Democratic Party of Afghanistan], which is kept in power by the Soviet Union." Country Reports, supra, at 1273. We accordingly find the existing political situation in Afghanistan to be different from that of countries where citizens have an opportunity to seek change in the political structure of the government via peaceful processes. See Dwomoh v. Sava, 696 F.Supp. 970, 979 (S.D.N.Y.1988) ("general rule [[[that] prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution ... [is not] applicable in countries where a coup is the only means through which a change in the political regime can be effected"). [Because]*** the applicant has established that he is at risk of being punished for his political activities in Afghanistan, and because there is no basis in the record to conclude that any punishment imposed by the Afghan Government would be a legitimate exercise of sovereign authority, we conclude that the applicant has established a well-founded fear of persecution in Afghanistan. A reasonable

person in the applicant's position would fear persecution in Afghanistan within the meaning of the Act. Matter of Mogharrabi, supra.

The remaining issue in this case is whether the applicant warrants a favorable exercise of discretion. We note that the applicant denied that he sought to enter the United States by fraud, and the Service did not submit any evidence regarding this issue.[3] There is also no indication in the record that the applicant had permission to work or to remain in Pakistan. The applicant established that he has at least one relative in a lawful immigration status here. As there are no adverse factors in his record, we find, considering the totality of the circumstances, that the applicant's asylum application should be approved as a matter of discretion. See Matter of Pula, Interim Decision 3033 (BIA 1987).

Because the applicant will be granted asylum, we need not address the issue of the applicant's eligibility for withholding of deportation. See Matter of Mogharrabi, supra, at 12. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained and the decision of the immigration judge denying the applicant's request for asylum is reversed.

FURTHER ORDER: The applicant is granted asylum pursuant to section 208(a) of the Immigration and Nationality Act, as amended, and the proceedings are terminated.

*155 CONCURRING OPINION: Fred W. Vacca, Board Member omitted.

EXCERPTS FROM THE UNHCR HANDBOOK

B. Deserters and persons avoiding militar y service

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The Penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion. In respect of Africa, however, see the definition in Article 1 (2) of the OAU Convention concerning the Specific Aspects of Refugee Problems in Africa, quoted in para. 22 above. See Annex VI, items (6) and (7).

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

Notes

1. In the U.S., there are a number of cases across the circuit courts of appeal which affirm the principle that punishment for evading conscription laws does not generally constitute persecution. *See, e.g., Foroglou v. INS*, 170 F.3d 68 (1st Cir. 1999), *cert. denied, Foroglou v. INS*, 528 U.S. 819 (1999) (Greek atheist who was a follower of Ayn Rand's Objectivist philosophy could not qualify without showing targeting or disproportionate punishment for his beliefs); *Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004) (Iranian applicant who failed to show an attempt to recruit or harm him for an enumerated ground did not qualify for relief).

2. Several decisions are illustrative of the principle that disproportionate punishment for refusal to serve, or desertion from service can be the basis for a successful claim. See, *e.g., Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999) in which the Ninth Circuit Court of Appeals granted relief to the indigenous Guatemalan asylum seeker who had suffered racially motivated violence in the military; the court ruled that he had "clearly established that he would suffer disproportionately severe punishment for his desertion on account of his race[.]" In *Begzatowski v. INS*, 278 F.3d 665 (7th Cir. 2002), the Seventh Circuit Court of Appeals granted relief to the ethnic Albanian asylum seeker who had deserted from the Yugoslavian army after suffering ethnically motivated persecution during his service. The court noted that he had been threatened with violence by his Serbian officers, deprived of military training, and repeatedly sent to the front line of battle without training and bullets, while Serbian soldiers were fully armed.

b. Evolving U.S. Jurisprudence

(1) Double Standard in Application of the Handbook

In the 1980s there were a multitude of cases in the United States from diverse countries involving young men who fled their home countries to avoid military service. The substantial number of cases based on draft evasion or desertion provided the Board of Immigration Appeals the opportunity to chart a course in conscription cases.

In some of its earliest decisions, which involved nationals of Afghanistan when that country was under Soviet control, the Board granted relief even though there was no showing of the factors outlined in the UNHCR HANDBOOK. For example, the applicant in *In re Salim*, 18 I & N Dec. 311 (BIA 1982), fled Afghanistan after refusing to join the army. He alleged neither disproportionate punishment nor conscientious objection. Without mentioning the HANDBOOK criteria, the Board granted relief, referring only to the high level of desertion from the Soviet-backed Afghan Army, and the brutal method of recruitment used to replenish the ranks. The Board repeated this approach in several unpublished decisions adjudicating claims of young Afghani men, who like Salim, did not base their claims on the HANDBOOK criteria. For example, in *In re Noory*, BIA unpublished dec., File No. A24 081 415 (argued Oct. 28, 1985), where the applicant alleged a fear of recruitment into the Afghani Army, the Board reversed the immigration judge's denial of political asylum. In *In re Momen*, BIA unpublished dec., File No. A27 026 208 (argued Oct. 10, 1985) the Board expressly noted that its grant of relief was "based solely on the applicant's assertion that he will be conscripted into the Afghan Army if returned to that country." *Id.* at 3.

The Board took a distinctly different approach in the cases of young men fleeing conscription in El Salvador or Guatemala. Asylum and withholding were denied in these claims, even though the applicants asserted that they would suffer disproportionate punishment, or that

the performance of military service would be violative of political, religious or moral convictions, or valid reasons of conscience. The Board's rationale for denial varied. In some cases, the Board distanced itself from the HANDBOOK, rejecting that it could provide useful guidance. In other instances, it accepted the authority of the HANDBOOK, but appeared to apply its provisions in an overly-rigid manner, which resulted in consistent denials of relief.

(2) Religiously-Motivated Conscientious Objection

In addition to these inconsistent trends at the Board, the Supreme Court's decision in *Zacarias* had significant implications for claims of asylum from young men whose conscientious objection was based on religious beliefs. Prior to *Zacarias,* the Ninth Circuit Court of Appeals had ruled that the punishment of Salvadoran Jehovah's Witnesses for their refusal to serve in the military was persecution on account of religion, even though it was the result of a uniform, generally applicable military requirement. *Cañas-Segovia v. I.N.S.*, 902 F.2d 717 (9th Cir. 1990) (*Cañas I*). In relevant part, the Ninth Circuit had held that:

> The record reveals that both the IJ and BIA determined that the Cañases had genuine religious convictions which prevent them from performing military service. The record also reveals that the Salvadoran conscription policy allows no exemption for religious reasons and refusal to serve results in punishment by imprisonment. Under the Salvadoran conscription policy, if the Cañases refuse to do military service, then they will go to prison. Any reasonable person in this position would conclude that the punishment would be on account of his religious beliefs.
>
> The result is that if the Cañases follow their religious beliefs and refuse to do military service, they will suffer imprisonment. This adds up to a clear probability of persecution on account of religious beliefs because it is "more likely than not," [citations omitted] that the Cañases will suffer imprisonment due to their religious convictions. *See* HANDBOOK ¶¶ 167–74.

Id. at 727.

The Ninth Circuit's decision in *Cañas I* was based on the rationale that the *effect* of the government's conscription requirement was religious persecution, notwithstanding the absence of a governmental *intent* to punish the Jehovah's Witnesses for their religion. This rationale became untenable in the wake of the Supreme Court's clear imposition of an intent requirement in *Zacarias.* The Supreme Court vacated *Cañas I,* and on remand, the Ninth Circuit held that:

> In *Elias-Zacarias,* the Court made clear that a petitioner alleging persecution must present some evidence, direct or circumstantial, of the persecutor's motive. 112 S.Ct. at 816–17. This motive requirement stems from section 1101's "persecution on account of" language.
>
> * * *
>
> In light of *Elias-Zacarias*'s adoption of a motive requirement, Cañas-Segovia can no longer prove religious persecution.

Cañas II, 970 F.2d at 601.

The *Cañas* cases highlight the differences in analysis and outcome between nexus determinations which are intent-based and those which are effects-based, an issue which was addressed in Chapter 5. The intent-based analysis requires proof of motivation, while the effects-based approach looks to the impact on the individual. The imposition of an intent

substantial economic disadvantage" on account of Ghebremedhin's beliefs might even standing alone be sufficient to entitle him to asylum. *See Borca v. INS*, 77 F.3d 210, 216 (7th Cir.1996); *Gormley v. Ashcroft*, 364 F.3d 1172, 1178 (9th Cir.2004).

But we need not stop with economic disadvantage. Ghebremedhin's situation should he be returned to Eritrea would be even more dire, for that country has been known to incarcerate Jehovah's Witnesses who refuse to participate in national service on religious grounds. U.S. Dep't of State, Int'l Religious Freedom Report 2003 (Dec.2003). Some members of the church have been imprisoned for more than 9 years, although the maximum penalty for refusal to perform service is 3 years' imprisonment, and "extreme physical punishment" has been employed in an attempt to coerce them to serve. U.S. Dep't of State, Country Reports on Human Rights Practices 2003 (Feb.2004). Ghebremedhin himself identified two close associates, a brother and a university colleague, who were incarcerated and beaten to death because they maintained that their convictions as Jehovah's Witnesses barred them from serving. Although it is well established that governments may draft citizens for military service and punish those who avoid the draft, *Mojsilovic v. INS*, 156 F.3d 743, 747 (7th Cir.1998), it may be persecution to punish those who evade the draft based on genuine religious objections to military service, *Vujisic v. INS*, 224 F.3d 578, 581 (7th Cir.2000); *Pelinkovic v. Ashcroft*, 366 F.3d 532, 537 (7th Cir.2004). Further, the evidence in the record is quite clear that although Eritrea requires national service of all its citizens, "the Government has singled out Jehovah's Witnesses who were conscientious objectors for harsher treatment." U.S. Dep't of State, Int'l Religious Freedom Report 2003 (Dec.2003). When a country subjects a draft evader to more serious punishment than others who have also evaded service because of his race, religion, nationality, social group, or political opinion, this amounts to persecution rather than simple nationalism. *Vujisic*, 224 F.3d at 581; *Mekhoukh v. Ashcroft*, 358 F.3d 118, 126 (1st Cir.2004); *M.A. v. INS*, 858 F.2d 210, 215 (4th Cir.1988). Eritrea's history of persecution of Jehovah's Witnesses has not previously escaped the notice of this court, *see Muhur v. Ashcroft*, 355 F.3d 958, 959 (7th Cir.2004), and nothing in the record demonstrates that Ghebremedhin would not face the same dangers should he be returned there.

Ghebremedhin, 385 F.3d at 1119–1120.

What these "Religion +" cases demonstrate is that adjudicators and advocates alike should not reflexively assume that cases of religiously-motivated conscientious objectors are no longer viable after the *Cañas* and *Zacarias* decisions. Claims should be carefully examined for the array of factors which affected the analysis in cases such as *Ilchuk* and *Ghebremedhim*.

(3) Political Objections to Military Action, and Condemnation by the International Community

The Board of Immigration Appeals, and various circuit courts have applied a restrictive interpretation to claims arising under UNHCR HANDBOOK ¶171, which applies to cases where the refusal to serve is based on political disagreement with the military action. In political objection cases, the HANDBOOK requires that the military action be "condemned by the international community as contrary to basic rules of human conduct[.]" In 1987, in its first published decision on the issue, the BIA held that in order to meet ¶171's requirement of condemnation, there had to be a United Nations resolution making this finding. *In re A-G-*, 19 I. & N. Dec. 502 (BIA 1987).

The Board's ruling was appealed to the Fourth Circuit Court of Appeals, which rejected the BIA's requirement of a U.N. resolution:

> ... [W]e do not think that M.A. [identified as "A-G-" when the case was before the BIA] must wait for international bodies such as the United Nations[19] to condemn officially the atrocities committed by a nation's military in order to be eligible for political asylum. Paragraph 171 of the HANDBOOK shelters those individuals who do not wish to be associated with military action "condemned by the international community as contrary to basic rules of human conduct..." These basic rules are well documented and readily available to guide the Board in discerning what types of actions are considered unacceptable by the world community. The Geneva Conventions of August 12, 1949 represent the international consensus regarding minimum standards of conduct during wartime. They include the following, as to all of which M.A. has presented evidence to show their contravention by the Salvadoran military: the obligation to treat humanely persons taking no active part in hostilities, and the prohibition of certain acts, including violence to life and person, specifically murder of all kinds, mutilation, cruel treatment, and torture; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court. *See* Art. 3, Geneva Conventions of August 12, 1949, reprinted in United States Treaties and Other International Agreements Vol. 6, part 3 (1955). *M.A. v. INS*, 858 F.2d 210, 218 (4th Cir. 1990) (*M.A. I*)

However, the Fourth Circuit Court of Appeals granted the INS's request to hear the case *en banc*, and the *en banc* decision affirmed the Board's original requirement of a U.N. resolution condemning the military action. Among the points at issue was whether pronouncements by private organizations, such as Americas Watch and Amnesty International, regarding the conduct of the war, could be relied upon to show military action "condemned by the international community as contrary to basic rules of human conduct[.]" The three judge panel had ruled that such documentation could be relied upon, while the court, sitting *en banc*, had rejected it as being "problematic almost to the point of being non-justiciable[.]" *M.A. v. INS*, 899 F.2d 304, 313 (4th Cir. 1990) (*M.A. II*).

In explaining its refusal to rely upon the information provided by these organizations, the court sitting *en banc* noted that "[a]lthough we do not wish to disparage the work of private investigative bodies in exposing inhumane practices, these organizations may have their own agenda and concerns, and their condemnations are virtually onmipresent." *Id.* To the degree that it may be true that private human rights organizations have their own "agendas and concerns," is there any reason to believe that intergovernmental bodies such as the United Nations are free from their own set of agendas and concerns?

Not all U.S. circuit courts have followed the rule established by the Board and affirmed by the Fourth Circuit in *M.A. II*. We will look at one of the Ninth Circuit's earliest cases

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19. The United Nations has "expressed deep concern at the situation of human rights in El Salvador," noting that as of 1985 "a situation of generalized warlike violence continues to exist, that the number of attacks on life and the economic structure remains a cause for concern, and that the number of political prisoners and abductions has increased." United Nations General Assembly Resolution No. 401139 (Dec. 13, 1985).

The United Nations has also documented civilian casualties inflicted by the regular armed forces in El Salvador by the use of methods it found "genuinely disturbing." United Nations Economic and Social Council, Final Report on the Situation of Human Rights in El Salvador, submitted by Professor Jose Antonio Pastor Ridruejo in fulfillment of the mandate conferred under Commission resolution 1984/52 (February 1, 1985).