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# APPENDIX E

## Sample IJ Review Brief (Annotated)

The sample Immigration Judge (IJ) Review Brief below is meant to accompany the Asylum Seeker Advocacy Project (ASAP)'s Guide, *Vindicating the Rights of Asylum Seekers at the Border and Beyond: A Guide to Representing Asylum Seekers in Expedited Removal and Reinstatement of Removal Proceedings*.

The full guide is available on ASAP's website, at [asylumadvocacy.org/resources](https://asylumadvocacy.org/resources). The guide is intended to assist lawyers and advocates and is not a substitute for independent legal advice in a client's case. The cases cited herein do not constitute an exhaustive search of relevant case law in all jurisdictions.

The enclosed sample includes both reasonable and credible fear language, and references to credible or reasonable fear are noted throughout. Please modify based on clients' circumstances and choose either the reasonable fear or credible fear language.

Advocates should be sure to include relevant case law and fact patterns as necessary to tailor to clients' circumstances, as well as exhibits and research relevant to the particular country condition arguments and tailored to the claim and country of origin. Finally, advocates should note that this guide was updated in April 2019 and should take care to review the latest case law and policy in light of *Matter of A-B-*, 27 I. & N. Dec 316 (A.G. 2018), *Grace v. Whitaker*, 344 F. Supp.3d 96 (D.D.C. 2018), and subsequent developments.



[Attorney Name]  
[CONTACT INFO]

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
[CITY, STATE]

In the matter of:

[FULL NAME]  
[CHILD'S NAME]

Applicants

File No. XXX-XXX-XXX  
File No. XXX-XXX-XXX

[NAME'S] MEMORANDUM OF LAW AND EXHIBITS  
IN SUPPORT OF A FINDING OF [REASONABLE/CREDIBLE] FEAR  
OF PERSECUTION OR TORTURE



UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
[CITY, STATE]

\_\_\_\_\_  
In the matter of: )  
)  
)  
[FULL NAME] )  
[CHILD'S NAME] )  
)  
Applicants )  
\_\_\_\_\_ )

File No. XXX-XXX-XXX  
File No. XXX-XXX-XXX

[FULL NAME]'S MEMORANDUM OF LAW  
IN SUPPORT OF A FINDING OF [CREDIBLE/REASONABLE] FEAR  
OF PERSECUTION OR TORTURE

Now come Applicants, by and through undersigned [*pro bono*] counsel, and respectfully ask the Court to consider the following arguments in determining that they have a [CREDIBLE/REASONABLE] fear of persecution or torture in [COUNTRY].

INTRODUCTION

The circumstances of Applicants, [NAME] and [HER] child, [CHILD'S NAME], support a finding of a [CREDIBLE/REASONABLE] fear of persecution or torture. [BRIEFLY SET FORTH STRONGEST FACTS AND ARGUMENT FOR RELIEF]. However, the Asylum Officer failed to properly assess Applicants' claims. [LIST PROBLEMS, E.G. INADEQUATE QUESTIONING AND NAME'S TROUBLED MENTAL STATE]. These errors prevented the applicants from submitting critical evidence. Applicants now submit substantial new evidence in the form of a [DECLARATION, SUPPORTING DECLARATION, PHYSICAL EVIDENCE, etc.]



In conducting a Negative Credible Fear Review to evaluate these claims, this Court has the authority to consider *any* oral or written statements of [NAME] or corroborating witnesses and institutional reports. 8 C.F.R. § 1003.42(c). To this end, we respectfully ask this Court to review the information contained in this brief as well as the attached exhibits, all of which support a positive finding of [REASONABLE/CREDIBLE] fear.

### **ARGUMENT**

#### **I. THE [CREDIBLE/REASONABLE] FEAR STANDARD IS INTENDED TO BE A LOW INITIAL THRESHOLD DETERMINATION**

[USE SECTION A IF THE INTERVIEW WAS A CREDIBLE FEAR INTERVIEW (CFI); USE SECTION B IF THE INTERVIEW WAS A REASONABLE FEAR INTERVIEW (RFI). SEE CHAPTER 1 FOR MORE INFORMATION.]

##### **A. A credible fear of persecution exists if [NAME] has a “significant possibility” of establishing as little as a ten percent chance of future persecution in [COUNTRY].**

In negative credible fear review proceedings, the regulation provides that the immigration judge (“IJ”) “shall make a *de novo* determination as to whether there is a significant possibility... that the alien could establish eligibility for asylum... or withholding under section 241(b)(3) of the Act or withholding under the Convention Against Torture.” 8 C.F.R. § 1003.42(d). When these regulations were implemented, the Department of Justice described the credible fear standard as “a low threshold of proof of *potential* entitlement to asylum.” 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997) (emphasis added).

The Asylum Officer Training Course Lesson Plan explicitly points out that the credible fear standard “does not require the applicant to demonstrate that the chances of success are more likely than not.” U.S. Citizenship & Immigration Servs., RAIO, Asylum Division, Officer Training Course: Credible Fear of Persecution and Torture Determinations 15 (Feb. 13, 2017). The training materials state that the credible fear standard, which requires a “substantial and



realistic possibility of success,” is “lower than the ‘preponderance of the evidence standard.’” *Id.* at 16 (citing *Holmes v. Amerex Rent-a-Car*, 180 F.3d 294, 297 (D.C. Cir. 1999)).

The United States Supreme Court and the Court of Appeals for the Seventh Circuit have both explained that an asylum applicant “may establish a reasonable possibility of future persecution by showing that there is even a 10 percent chance that [s]he will be... persecuted.” *Kllokoqi v. Gonzales*, 439 F.3d 336, 345 (7th Cir. 2005) (citation omitted); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (“There is simply no room in the United Nations’ definition [of refugee status] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.”) (internal citation omitted). If there is disagreement among the United States Courts of Appeal as to the proper interpretation of a legal issue, or the claim otherwise raises an unresolved issue of law, and there is no conflicting DHS or Asylum Division policy or guidance on the issue, then generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.<sup>1</sup> In this case, if Applicant can establish a “significant possibility” that, at a full hearing on the merits, [SHE] could establish even a 10% chance of future persecution, then the Asylum Officer’s determination of no credible fear must be vacated. *See* 8 C.F.R. § 1003.42(d)-(f).

**B. A reasonable fear of persecution exists if [NAME] can establish that it is *not unreasonable* [SHE] will be persecuted or tortured in [COUNTRY].**

The regulations provide that an “Asylum Officer’s negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien’s request.” 8

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<sup>1</sup> *See* U.S. Citizenship & Immigration Servs, RAIQ, Asylum Division, *Officer Training Course: Credible Fear of Persecution and Torture Determinations* 17 (Feb. 13, 2017), available at [https://drive.google.com/file/d/0B\\_6gbFPjVDoxY0FCczROOFZ4SVk/edit](https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit); Exec. Office for Immigration Review Guidance on *Grace v. Whitaker*, No. 18-cv-01853 (D.D.C. DEC. 19, 2018), available at <https://uchastings.app.box.com/s/k99txxw746bg7wghirak8w7d86tqlnjt/file/381907558796>.



C.F.R. § 1208.31(g). If the IJ concurs with the Asylum Officer's "determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to the Service for removal of the alien." 8 C.F.R. § 1208.31(g)(1). If the IJ finds that "the alien has a reasonable fear of persecution or torture, the alien may submit a Form I-589, Application for Asylum and Withholding of Removal." 8 C.F.R. § 1208.31(g)(2). An alien "shall be determined to have a reasonable fear of persecution or torture if the alien establishes a *reasonable possibility* that he or she would be persecuted on account of [a protected ground] or a *reasonable possibility* that he or she would be tortured in the country of removal." 8 C.F.R. § 1208.31(c) (emphasis added).

In the absence of a statutory definition, the United States Supreme Court "construe[s] a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). The same principle applies to regulatory terms. *See, e.g. Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) ("As a general interpretative principle, the plain meaning of a regulation governs." (internal citation and quotation marks omitted)). Because the word "reasonable" is not defined in Title 8 of the Code of Federal Regulations, this Court should construe it according to its ordinary meaning. In ordinary usage, something is reasonable when it is *not unreasonable*.

In the instant case, Applicants submit that as long as the *possibility* is not *unreasonable* that [NAME] will be persecuted or tortured in [COUNTRY], this Court should find that [SHE] has a reasonable fear of persecution or torture and allow [HER] to present [HER] claims for relief at a full hearing on the merits in withholding-only proceedings.

**II. [NAME] HAS SUFFERED PAST PERSECUTION, HAS A [CREDIBLE/REASONABLE] FEAR OF FUTURE PERSECUTION AND TORTURE, [AND IS ELIGIBLE FOR HUMANITARIAN ASYLUM]**

**A. The past harm [NAME] suffered rises to the level of persecution.**



[DESCRIBE HARM AND PERSECUTION, CITING TO DECLARATION AND OTHER EVIDENCE.]

**B. Applicant's [MEMBERSHIP IN A COGNIZABLE PARTICULAR SOCIAL GROUP/POLITICAL OPINION/OTHER PROTECTED GROUND] was one central reason for the persecution [SHE] suffered.**

[INCLUDE RELEVANT CASE LAW ON THE SPECIFIC PSG OR OTHER PROTECTED GROUND, TIE TO FACTS, AND INCLUDE CITATIONS TO COUNTRY CONDITIONS. BE SURE TO ADDRESS NEXUS. SEE CHAPTER 1 FOR INFORMATION AND RESOURCES. IT IS OFTEN WISE TO ARGUE MULTIPLE PROTECTED GROUNDS.]

Accordingly, [NAME] is "presumed to have a well-founded fear of persecution." 8 C.F.R. § 1208.13(b)(1). Thus, in a hearing, the government will bear the burden of establishing that the [PERSECUTOR] no longer poses a threat to [HER] and [HER] child.

**C. [NAME] and [CHILD'S NAME] merit a grant of humanitarian asylum**

[USE THIS SECTION ONLY IF THE INTERVIEW WAS A CREDIBLE FEAR INTERVIEW (CFI).]

Even in the event that it is determined that [NAME] and [HER] child lack the nexus establishing a well-founded fear of future persecution, they will be eligible for a grant of humanitarian asylum based on the fact that [NAME] suffered severe past persecution and will likely face other serious harm if returned to [COUNTRY]. *See* 8 C.F.R. § 1208.13(b)(1)(iii) (listing the circumstances under which asylum may be granted in the absence of a well-founded fear of persecution); *see also Matter of L-S-*, 25 I&N Dec. 705, 710–15 (BIA 2012) (explaining that humanitarian asylum can be granted on the basis of "compelling reasons" arising out of past persecution or the "reasonable possibility" that an applicant who establishes past persecution will face "other serious harm" if returned to his or her country of origin). An analysis of "other harm" can include both general country conditions, as well as the particular challenges [NAME] faces. *Id.* at 714 ("[A]djudicators considering 'other serious harm' should be cognizant of conditions in the applicant's country of return and should pay particular attention to major problems that large



segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant.”).

[INSERT FACTS, COUNTRY CONDITIONS, AND CASE LAW RELEVANT TO THE SPECIFIC CLAIM]

**D. Applicants are eligible for relief under the Convention Against Torture (CAT).**

[NAME] would likely face torture in [COUNTRY], where public officials either acquiesce<sup>2</sup> in or consent to the [HARMS AT ISSUE]. *See* 8 C.F.R. § 208.18(a)(1)-(6) (defining torture under U.S. law, which incorporates the definitions established under the CAT). [INSERT RELEVANT FACTS AND COUNTRY CONDITIONS.]

**C. Country condition reports corroborate Applicants’ claims.**

[ADD QUOTATIONS AND CITATIONS TO COUNTRY CONDITIONS INFORMATION SUPPORTING APPLICANTS’ CLAIMS. GOOD SOURCES INCLUDE THE CENTER FOR GENDER AND REFUGEE STUDIES (CGRS): <http://cgrs.uchastings.edu/assistance> AND TEMPLE UNIVERSITY: <https://www2.law.temple.edu/cs/atoc/>.]

**III. THE ASYLUM OFFICER DID NOT PROPERLY ASSESS APPLICANTS’ ASYLUM CLAIM**

[NAME] was given a [CREDIBLE/REASONABLE] Fear Interview with an Asylum Officer on the same day [SHE] was detained, [DATE]. The Asylum Officer found [HER] testimony credible, but concluded (1) that there was insufficient nexus to a protected ground, and (2) that there was no significant possibility that the harm [SHE] fears would be inflicted with the consent or acquiescence of the [COUNTRY] government. These erroneous conclusions resulted from [LIST PROBLEMS, E.G. INADEQUATE QUESTIONING AND NAME’S TROUBLED MENTAL STATE].

<sup>2</sup> *See* 8 C.F.R. § 1208.18(a)(7) (“Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004), *as amended* (Apr. 12, 2004) (“In terms of state action, torture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.”)

most of cases died<sup>9</sup> of nexus problem



[DESCRIBE PROBLEMS WITH INTERVIEW, QUOTING TRANSCRIPT WHERE RELEVANT AND MENTIONING SIGNS OF PSYCHOLOGICAL TRAUMA AND DISTRESS, IF APPLICABLE.]

Because of [HER] meritorious claims that have not been fully considered, [NAME] is entitled to the process of a full asylum hearing.

### CONCLUSION

The record presented with this brief and relevant legal precedent compels the conclusion that [NAME] and [HER] child have established past persecution and have a well-founded fear of future persecution due to multiple protected grounds. If removed, [NAME] reasonably fears future torture and death at the hands of [PERSECUTOR] with the participation, acquiescence, or willful blindness of the [COUNTRY] government. [HER] fears are corroborated by [SOURCES SUCH AS COUNTRY CONDITIONS, EXPERT REPORTS, OR OTHER DECLARATIONS.] This significant risk of future torture and persecution is due to [HER] [DESCRIBE PROTECTED GROUND(S)].

If provided with an individual hearing, [NAME] will testify that, contrary to the Asylum Officer's erroneous findings, [SHE] and [CHILD] have been targeted as a result of [PROTECTED GROUND(S)]. Furthermore, [SHE] will attest that [SHE] holds a well-founded fear of future persecution on these [PROTECTED GROUND(S)].

Applicants have suffered past persecution and have plainly met the low threshold for a finding of [CREDIBLE/REASONABLE] fear. For all of the reasons set forth herein, those stated in the [NAME]'s attached declaration and other exhibits, and those to which [SHE] will testify before this Court at [HER] hearing, Applicants respectfully ask the Court vacate the negative determinations of the Asylum Officer.