

11.13

REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE (RAIO)



U.S. Citizenship and Immigration Services

RAIO DIRECTORATE – OFFICER TRAINING

RAIO Combined Training Program

READING AND USING CASE LAW

TRAINING MODULE

P.22 cases involve extreme hardship.
P.33 BIA, Circuit Court 等公开发布
9 case才能成为 precedent

Reading and Using Case Law

P.15 ~~巡回法庭的~~ 法院的 case 在法区之外也有用

READING AND USING CASE LAW

Training Module

P.30 law glossary

MODULE DESCRIPTION:

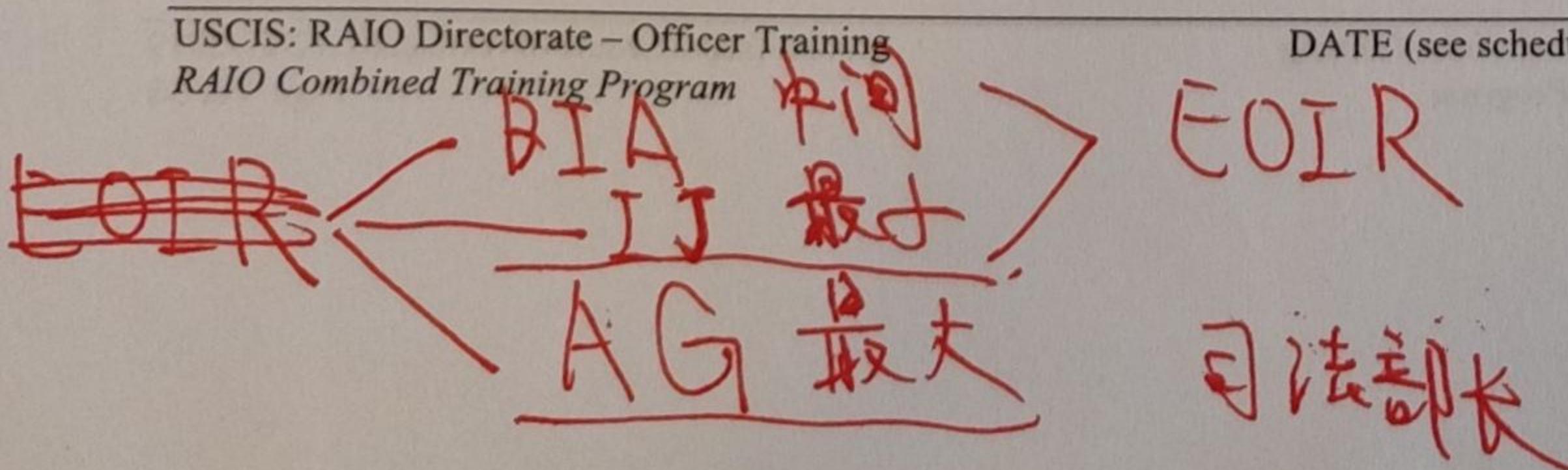
This module provides you with basic information on how to read cases from the Board of Immigration Appeals (BIA), the Attorney General (AG), and the U.S. federal courts. It includes guidance on how to identify the relevant components of a case, how to read and understand a case, and how to analyze and apply case law to make a decision or determination.

TERMINAL PERFORMANCE OBJECTIVE(S)

Given the field situation in which a legal issue is novel, ambiguous, or complex, you will be able to read, analyze, and apply case law to make a proper decision or determination.

ENABLING PERFORMANCE OBJECTIVES

1. Identify which party filed the appeal in a case.
2. Identify the section(s) of the Immigration and Nationality Act (INA) at issue in a case.
3. Identify the issues the administrative or judicial body addressed in a case.
4. Read a case and summarize the facts of the case.
5. Illustrate how the administrative or judicial body resolved the issue(s) in a case.
6. Distinguish the cases you are required to follow from those which are instructive but not binding on you.
7. Determine whether any part of a case is on point with the case before you.
8. Determine whether the facts of a given case can be distinguished from the case before you.



confronted with issues that are novel, ambiguous, or complex. Reading and understanding case law is a skill that you will develop over time; practice will help you develop this skill. The required reading by Orin Kerr, *How to Read a Legal Opinion*, in particular, can help you identify and understand the components of a case.

2 CASE LAW CONSIDERATIONS

2.1 Case Law Definition

Case law is defined as: “The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.¹”¹

Many published immigration-related cases by the BIA, the AG, and the federal courts involve individuals with stories just like the ones you will see every day.²

For example, a case may begin when an individual applies for a benefit under the Immigration and Nationality Act (INA) and a dispute arises over whether or not the individual qualifies for the benefit. The individual is referred to an Immigration Judge (IJ), who makes a decision to approve or deny the benefit. Either the individual or the government may appeal the IJ’s decision to the BIA. If the BIA denies the benefit, the individual may appeal the decision to the appropriate U.S. Court of Appeals and eventually to the U.S. Supreme Court. If the BIA decides in favor of the individual, the government cannot further appeal the case. The BIA and the courts publish decisions that analyze whether the decision below was legally correct. These decisions are referred to collectively as case law.

Your adjudications and determinations may make their way through our legal system and can become part of case law. A recent example is the case of Daniel Girmai Negusie. An Asylum Officer made a credible fear determination and referred Mr. Negusie to the IJ. Mr. Negusie asked for asylum and the IJ denied his asylum claim. Mr. Negusie appealed the decision, first to the BIA, then to the U.S. Court of Appeals for the Fifth Circuit, and eventually to the U.S. Supreme Court.³

2.2 When Case Law is Binding

A binding decision is one that a court or administrative body issues and that must be followed by the courts and administrative agencies below. The issuing court or administrative body is also bound by its own published decisions. However, courts or an administrative body can and do, on occasion, reverse their previous decisions.

¹ *Black's Law Dictionary*, 9th Reprint, 1987, p. 196.

² For information on the role of the BIA and the AG, see RAIO Training module, *Sources of Authority*.

³ *Negusie v. Holder*, 555 U.S. 511 (2009).

Example

Section 101(a)(42) of the INA, in part, defines a “refugee” as a person who, because of persecution or a well-founded fear of persecution is unable or unwilling to return to his or her country of nationality. Neither the INA nor the 8 C.F.R. define or further elaborate on the meaning of "persecution." Does persecution only mean physical harm? How severe does that physical harm have to be to qualify? Are there other forms of harm that can constitute persecution? Over many years, the BIA and the U.S. Courts of Appeals have attempted to define the parameters of what constitutes persecution for the purposes of asylum and refugee law by analyzing the issues in various published decisions. You will turn to those cases for guidance on whether the harm the applicant suffered was persecution.

Example

Section 212(h) of the INA states that an individual who is inadmissible based on certain criminal grounds of inadmissibility may have those grounds waived if he or she can show that denial of his or her admission to the United States would result in extreme hardship to a United States citizen (USC) or lawful permanent resident (LPR) spouse, parent, son, or daughter. Neither the INA nor the regulations defines extreme hardship. Therefore, when you are adjudicating a Form I-601, *Application for Waiver of Grounds of Inadmissibility*, you would look to case law for factors to consider when determining whether the qualifying relative has suffered extreme hardship.⁸

2.5 The Role of Case Law in Your Work

Case law plays a vital role in all of your adjudications and determinations. As an officer, you will read case law for the following reasons:

Staying Updated on the Developments That Directly Impact Your Work

The law as interpreted through case law is constantly changing and evolving. As new cases with new sets of facts make their way through the courts, the courts refine their previous decisions. This process often takes many years.

Knowing how to read case law allows you to see and understand where legal principles directly related to your adjudications come from and how they affect the work you do. When a new case is published, it will be important for you to know how to read it and to understand how the court’s decision impacts how you do your job. If a lawyer in a case before you cites to specific case law, it will be important for you to know how to read the case(s) and evaluate whether the case supports the applicant’s case.

⁸ See, e.g., *Hassan v. INS*, 927 F.2d 465 (9th Cir. 1991); *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978); *Matter of O-J-O-*, 21 I&N Dec. 381 (BIA 1996); *Matter of L-O-G-*, 21 I&N Dec. 413 (BIA 1996).

Making Decisions

Whether or not you cite to case law in your decisions, case law is behind the reasoning of the majority of your decisions. Knowing how to use case law will help you to make and support your decisions and determinations. There are certain cases that are included in the standard language in asylum decisions and in some overseas decisions. In some situations, you will need to rely on and cite to additional cases in your decisions.

Many of the applications and petitions you adjudicate will be relatively straightforward. After you gather and assess all the evidence in a particular application or petition you will find that the application or petition before you either clearly meets or does not meet all legal and procedural requirements. In situations like this, you will most likely not need additional case law for help in making the decision or determination.

When you come across scenarios that are novel, ambiguous, or complex, you will turn to various sources of authority, including case law, for clarification and guidance.

3 TYPES OF DECISIONS

3.1 Administrative Decisions

The Attorney General, part of the executive branch, established the Executive Office for Immigration Review (EOIR) to administer and interpret federal immigration laws and regulations through the conduct of immigration court proceedings, appellate reviews, and administrative hearings in individual cases.

Immigration Judges (IJs)

IJs hear cases of individuals who have been placed in removal proceedings by a variety of officers within the Department of Homeland Security (DHS). The charging document used by these officers to officially place an individual into removal proceedings is called a Notice to Appear (NTA). An NTA gives notice to the non-citizen that he or she must appear before an IJ at a specific location and time, on a specified date. The NTA lists factual allegations about the non-citizen and the reasons (the charges) why the non-citizen is being placed into removal proceedings. When the applicant appears before the IJ, he or she has the opportunity to respond to the charges in the NTA and to assert whether or not there is a defense to those charges, or whether he or she has some relief or other protection from removal.

After a hearing on the merits, the IJ issues a decision whether the applicant is eligible or not for relief or other protection from removal.

Decisions issued by IJs are not published and not binding on you, but may be instructive.

The Board of Immigration Appeals (BIA)

IJ decisions may be appealed to the BIA, either by the individual or DHS. You must follow published BIA decisions when adjudicating cases involving similar issues, except when the decisions are modified or overruled by subsequent decisions of the BIA or by the Attorney General, or when there is a conflicting decision on the issue by the U.S. Court of Appeals in the circuit in which the decision is being made or by the Supreme Court. Published BIA decisions apply nationwide, except in federal circuits with conflicting law.

There is one exception to the requirement that officers follow U.S. Courts of Appeals opinions that conflict with BIA statutory interpretation on the same issue.⁹ When the BIA issues a decision that interprets an ambiguous statutory provision and that new BIA opinion conflicts with previously issued U.S. Court of Appeals rulings, the BIA's ruling must be followed, unless the prior judicial precedent held that the court's construction was the only permissible reading of the statute. In other words, a court's prior interpretation of a statute will overrule an agency's subsequent interpretation only if the relevant court opinion held the statute unambiguous. If a U.S. Court of Appeals revisits the issue in light of the BIA's new ruling, officers must follow the new Court of Appeals ruling.

You must follow published BIA decisions, unless they have been modified or overruled by later BIA, Attorney General (AG), Supreme Court, or controlling U.S. Court of Appeals decisions.

In the past, the BIA issued precedent decisions in "Interim Decision" form. Because all published decisions are now available in final form (as "I&N Decisions"), citations to "Interim Decisions" are no longer appropriate and are disfavored.¹⁰

All published BIA decisions may be found in the bound volumes of Administrative Decisions under Immigration and Nationality Laws of the United States. They are cited by volume. You may also access them on the internet at:

http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html

Citing to BIA Decisions

Example

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

⁹ *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

¹⁰ For the BIA's preferred citation convention, see
<http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/AppJ.pdf>

The United States Courts of Appeals

U.S. Courts of Appeals (Circuit Courts) are appellate courts that review U.S. District Court decisions and certain agency decisions.¹⁴ Certain BIA decisions may be appealed directly to the U.S. Court of Appeals in the circuit that has jurisdiction over the case.

U.S. Courts of Appeals decisions create law that is binding on adjudications arising within the court's jurisdiction and can provide guidance in adjudications that arise outside its jurisdiction.

Example

巡回法院 case 在法区之外也有用

Decisions issued by the U.S. Court of Appeals for the Seventh Circuit are only binding in adjudications made in Illinois, Indiana, and Wisconsin. An adjudicator in California, however, may use the reasoning in a Seventh Circuit decision in her adjudications, as long as the case does not conflict with case law in her jurisdiction.

The jurisdiction of U.S. Courts of Appeals is clearly defined and generally does not extend beyond the boundaries of the United States. Therefore, the decisions of the U.S. Courts of Appeals are not binding on officers adjudicating refugee applications and other immigration-related petitions and requests outside of the United States. However, the reasoning in Courts of Appeals decisions may be relied on in decision-making outside the United States as persuasive authority, particularly when adjudicating issues that the BIA and U.S. Supreme Court (and, in certain cases, the Administrative Appeals Office) have not directly or fully addressed.

Published U.S. Courts of Appeals decisions are considered precedential, meaning that they are binding on all lower courts within the jurisdiction of the circuit, except to the extent the decisions are modified or overruled by subsequent decisions of the circuit or by the U.S. Supreme Court.¹⁵ Similarly, U.S. Courts of Appeals decisions must be followed by EOIR (the BIA and IJs) and DHS officers when adjudicating cases arising within the U.S. Courts of Appeals' territorial jurisdiction. [Asylum Adjudications Supplement – Credible Fear and Reasonable Fear]

Note that different U.S. Courts of Appeals can and sometimes do publish conflicting opinions on certain issues. When such a "split" among the circuits occurs, you must follow the opinion of the circuit in which the case arises. If there is no published opinion on the issue in the circuit in which the case arises, unpublished opinions in the same circuit and opinions from the other circuits that have considered the issue should be consulted but are not binding on you.

¹⁴ See map, "The Thirteen Federal Judicial Circuits."

¹⁵ Note the exception to this rule of precedent when the BIA issues a subsequent opinion as discussed above at section 2.1 "Types of Decisions; Administrative Decisions; The Board of Immigration Appeals (BIA)."

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Reading and Using Case Law

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Example

An officer deciding a case arising in the territorial jurisdiction of the Court of Appeals for the Second Circuit must evaluate the case consistently with published Second Circuit decisions (and precedent BIA or AG decisions) involving similar issues. That officer may seek guidance from the decisions of U.S. Courts of Appeals in other federal circuits but may only follow those holdings to the extent they do not conflict with published decisions rendered by the Second Circuit, the BIA or the AG. If the Court of Appeals for the Second Circuit and the BIA have conflicting decisions, the officer is bound to follow Second Circuit precedent.

Citing to U.S. Courts of Appeals Decisions

Decisions by the U.S. Courts of Appeals are contained in the Federal Reporter Series (1st, 2d, and 3d).

Example

Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).

This case can be found in volume 12 of the Federal Reporter, 3rd Series, on page 1233. It was decided by the United States Court of Appeals for the Third Circuit in 1993.

The United States Supreme Court

The U.S. Supreme Court has the discretion whether or not to hear appeals of decisions by U.S. Courts of Appeals. A party to a Court of Appeals decision seeking to appeal that decision files a petition for a writ of certiorari with the Supreme Court. The Supreme Court issues the writ of certiorari if it decides to hear the appeal. If the Supreme Court denies the petition for a writ of certiorari, the ruling of the Court of Appeals stands.¹⁶

The U.S. Supreme Court Rules provide some indication as to how the Supreme Court exercises its discretion to grant a petition for a writ of certiorari. Factors the Supreme Court may consider (among others) include:

- whether the U.S. Court of Appeals decision conflicts with the decisions of other Courts of Appeals
- whether the decision decides an important federal question that should be decided by the Supreme Court

¹⁶ The Supreme Court also has jurisdiction in certain other matters described in the US Supreme Court Rules. The Rules, especially Rules 10-20, provide a detailed picture of the scope of Supreme Court jurisdiction. This lesson focuses on *writs of certiorari* as the other areas of Supreme Court jurisdiction are less relevant to officers in the RAIO Directorate.

4.1 Where To Find Case Law

Published cases are compiled in case reporters. The Federal courts use a hierarchical organization (lowest to highest): trial court, appellate court, highest court. Courts at each level publish their decisions in chronological order in an official case reporter.¹⁸

Case law is available on Westlaw, a specialized database of legal materials that can be accessed by subscribers over the internet. Most officers will conduct the majority of their legal research on Westlaw. In addition to allowing researchers to find cases by citation, terms and connectors, and natural language searches, Westlaw provides other services, such as a citator service, a table of authorities, and key number searching ability. Officers may contact their home office for information on how to request Westlaw access as well as training on the database by Westlaw professionals.¹⁹

Case law may also be found on the internet using other databases and websites including Lexis, Findlaw, Cornell Legal Information Institute, and individual court web pages. For example, the NY Court of Appeals provides access to its recent decisions. Web sites that are free of charge usually do not have cases issued before 1990.²⁰ Each U.S. Court of Appeals maintains its own website containing general information, opinions, court calendars, and other information.²¹

Agencies of the U.S. Government have also made legal resources available on the web. A particularly useful site is the one maintained by the Executive Office for Immigration Review (EOIR). The EOIR site includes a direct link to BIA and AG decisions.²²

4.2 How to Determine If a Case Is Still “Good Law”

A case is still “good law” when its holding is recognized as authority for the disposition of similar cases and it has not been vacated, reversed, or overruled by a later case.

To determine if a case is still good law, you must verify whether the case has been overruled or whether the decision has been limited by other cases. Sometimes when a statute or regulation has been amended or repealed, a case will lose value as precedent. A case may also be reversed or overruled “on other grounds” not at issue in the case before you. For example, the BIA’s decision in *Matter of Acosta* was reversed on the issue of well-founded fear, but it still remains a landmark decision on the issue of defining a particular social group.

¹⁸ Cornell University Law School, Legal Information Institute. <http://www.law.cornell.edu>.

¹⁹ Westlaw can be accessed on the internet at <http://next.westlaw.com/>.

²⁰ Cornell University Law School, Legal Information Institute. “More About Federal Law Materials: Federal Law Materials on the Internet.” <http://www.law.cornell.edu/federal/comments/tellmore.html>.

²¹ U.S. Courts of Appeals sites can be access through the Federal Judiciary Homepage at <http://www.uscourts.gov>

²² The EOIR site can be accessed at <http://www.usdoj.gov/eoir/> and the OIL site can be accessed at http://www.justice.gov/civil/oil/as/oil-app_links.html.

To find out whether a case has been altered by subsequent decisions or legislation you must conduct legal research. Case citators list cases that have referenced a particular case and are the most useful tool in researching whether cases remain good law. The most commonly used citator is *Shepard's Citations*; therefore this process of research is often called "Shepardizing." Westlaw provides a similar citator service called "KeyCite," which uses a system of colored flags and symbols next to case and statute headings to alert the reader to subsequent changes that may have affected the precedential value of the case.²³ [Other Materials – KeyCite Symbols]

4.3 How to "Brief" a Case

"Briefing" a case means summarizing it with a focus on the crucial elements of the case. When you first begin reading and briefing cases, it may be helpful to follow the "IRAC" method. IRAC (pronounced "eye'-rack") stands for: Issue, Rule, Analysis (or Application), and Conclusion. This method is used by beginning law students to help familiarize them with reading and understanding case law. It is also a tool for writing legal memoranda. For purposes of this training module, we will use the IRAC method as a reading tool.

Before attempting to "brief" a case, read the case at least once.²⁴ As you read the case, keep in mind the four IRAC elements. When you are finished reading the case for the first time, brief the case by identifying the IRAC elements from the case.

In addition to the four IRAC elements, it is also important for you to identify and summarize the relevant facts and procedural history of the case.²⁵ You will then be ready to not only discuss the case, but to compare and contrast it to other cases involving a similar issue.

When you summarize the facts of the case, remember to check if there was a finding made regarding the credibility of the applicant or evidence. If the testimonial and documentary evidence is credible, then the story, as asserted by the applicant, is treated as established fact.

Determining the procedural history of the case means that you will first identify who wrote or produced the opinion. Was it the U.S. Supreme Court? The Ninth Circuit Court of Appeals? The BIA? The Attorney General? (Hint: Check under the title of the case: the court and year of the decision will be given). Next, you will determine how the lower courts, e.g., the IJ, the BIA, or the Court of Appeals, decided the case.

When using the IRAC method, you will be able to quickly identify:

²³ Westlaw, "Keycite On Westlaw Next" (Thomson Reuters 2011).

²⁴ California State University Northridge, How to Brief a Case Using the "IRAC" Method.

²⁵ Id.

This may be the most important part of briefing a case. The court will have examined the facts in light of the rule and considered all "sides" and arguments presented to it. It is important to understand how courts apply the rule to the facts and analyze the case in order to properly predict outcomes in future cases involving the same issue and whether a decision is "on point" or "distinguishable" from the case before you.

Ask "What does the court consider to be a relevant fact given the rule of law? How does the court interpret the rule?"

Example

Does the court consider the age of the child in the determination of what amounts to persecution? Does the court focus on country of origin information to determine the motive of the persecutor?

When asking yourself these questions, resist the temptation to merely repeat what the court said in analyzing the facts. Rather, think about what the court's analysis means to you, and summarize the court's rationale in your own words. If you encounter a term that you do not know, use the glossary below or a dictionary to find its meaning.

C: The outcome (the Conclusion)³⁰

What was the final outcome of the case? In one or two sentences, state the court's ultimate finding.

4.4 How to Determine Whether a Case is "On Point"

A case is "on point" when the decision in the case is relevant to the case you are currently adjudicating. This means that the case or cases you have read contain facts similar to the case at hand, and that the outcome in this case or cases is based on that similar set of facts.

Example

You are adjudicating an I-601 waiver and have to decide whether a qualifying relative of the applicant has suffered the required degree of extreme hardship under INA 212(h). The applicant in your case is from Brazil. The applicant has a 13 year-old USC child who was born and raised in the United States and understands some Portuguese but does not speak it.

Cases that are "on point" with the above case are cases where the BIA and the courts have analyzed what extreme hardship means in the context of a USC child who would have to go live in his or her parent's home country.³¹

²⁹ California State University Northridge, *How to Brief a Case Using the "IRAC" Method*.

³⁰ *Id.*

4.5 Determine Whether a Case is “Distinguishable”

Finding that a case is “distinguishable” is the opposite of finding that a case is on point. A distinguishable case is one that is less relevant than other cases, to your assessment of the issue. When you wish to distinguish the case before you from a particular published case, you will assert that the facts and circumstances of the case before you differ in material ways from those of the published case to such an extent that the holding in the published decision is not “controlling.”

Example

In adjudicating an I-601 waiver, you must compare and contrast the facts in the applicant’s case with existing case law on extreme hardship.

Consider the same applicant from the “on point” example above: an applicant from Brazil with a 13 year-old U.S. Citizen (USC) child who was born and raised in the United States. In *Matter of Pilch*, the BIA found that the respondents’ three USC children (the oldest of whom was 6) would not suffer extreme hardship if forced to return to Poland because they had been exposed to the Polish language by their parents and there was no evidence that they would be deprived of educational opportunities in Poland.³²

Pilch is distinguishable from the case you are adjudicating because the applicant’s child in your case is considerably older than the oldest Pilch child, and has therefore had more time to become integrated into the American community and language. While the Pilch children had been exposed to Polish, the child in your case speaks no Portuguese and would be unable to make an adequate transition to daily life in Brazil.³³

The more the facts of your case are similar to the opinion you are relying on, the more on point it is. The more the facts of your case are different from the opinion you are relying on, the more distinguishable it is. Finding cases that are on point or distinguishable are equally appropriate ways to use legal opinions as persuasive authority.

4.6 How to Follow a “Test” Laid Out by a Court

The BIA and federal courts sometimes develop “tests” to guide the analysis of certain legal issues. Where case law has set forth a test for the issue you are adjudicating, you must first identify the elements of the test that must be satisfied. Then apply the facts from the case you are adjudicating to each of the elements of the test until you reach a conclusion.

³¹ See, e.g., *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001) and *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

³² *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996).

³³ *Id.* at 632.

Example

Over the course of several years, the BIA developed a four-part test known as the *Mogharrabi*³⁴ test (named after the case where the test was refined into its current form) to determine whether an applicant meets the refugee definition elements of well-founded fear.

The four parts of the *Mogharrabi* test are listed below. To determine if the applicant before you has a well-founded fear of persecution, ask yourself if:

1. the applicant possesses (or is believed to possess) a protected characteristic;
2. the persecutor is aware or could become aware that applicant possesses the characteristic;
3. the persecutor is capable of persecuting applicant; and,
4. the persecutor is inclined to persecute applicant.

If an applicant establishes all four parts of the test then the fear of persecution is well-founded. This test is sometimes referred to as the PACI test or analysis (pronounced “pah’-chee”): P = Possession; A = Awareness; C = Capability; I = Inclination.

5 CONCLUSION

Understanding how to find, read, interpret, and use case law in your adjudications is important for all officers within the RAIO Directorate. Although not all of the divisions require officers to cite case law in their decisions, all officers must follow the requirements set forth in binding case law. Being familiar with the terminology used in case law, the parts of a case, the courts and administrative bodies that issue decisions relevant to your adjudications, and what constitutes binding precedent will help you adjudicate your cases and make legally sufficient decisions.

6 SUMMARY

Binding and Non-Binding Case Law

Officers must follow precedent BIA and AG decisions, except when they have been modified or overruled by subsequent decisions of the BIA or AG or there is a conflicting published opinion on the issue by the U.S. Supreme Court or by the U.S. Court of Appeals with jurisdiction over the matter.

³⁴ *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

Officers are bound by Supreme Court decisions regardless of jurisdiction. Officers are bound by published decisions of the U.S. Courts of Appeals when adjudicating cases arising within the court's jurisdiction, except to the extent the decisions are modified or overruled by subsequent decisions of the circuit or by the U.S. Supreme Court.

Officers adjudicating refugee and other immigration related petitions and requests overseas are not bound by the decisions of the U.S. Courts of Appeals but may refer to them and use them as guidance in their own determinations and decisions provided they do not conflict with case law that is binding.

Immigration Judges do not issue precedent decisions.

Following Tests Established by Case Law

When case law sets forth a test for the issue you are adjudicating, follow a two-step process to apply it to your case. First, identify the elements of the test that must be satisfied. Then, apply the facts from the case you are adjudicating to each of the elements of the test to reach a conclusion.

Determining Whether a Case is On Point or Distinguishable

A case is "on point" when the decision in the case is relevant to the case you are currently adjudicating. When attempting to rely on a particular decision as precedential, you assert that the facts and circumstances of the case you are currently adjudicating are similar to those of the published case to such an extent that your case is "controlled" by the holding in the published decision.

A case is distinguishable when the facts and circumstances of the case before you differ in material ways from those of the published case to such an extent that the holding in the published decision is not controlling.

Determining Whether a Case is still Valid

To determine whether a case is still valid, or "good law," conduct legal research to make sure it has not been overruled or limited by other cases or legislation that the case is interpreting.

OTHER MATERIALS – GLOSSARY³⁷

- **Adopted Decisions:** During 2005, the Acting Deputy Director of USCIS began adopting selected decisions of the Administrative Appeals Office (AAO) as USCIS policy. Such decisions are known as “Adopted Decisions.” Unlike Interim Decisions, Adopted Decisions are neither case law nor legally binding precedents. However, they do provide guidance to applicants, petitioners, practitioners, and government officials in the correct interpretation of immigration law, regulations and policy. Refer to Adopted Decisions by name (in italics), USCIS Adopted Decision number, AAO and full date (in parentheses), and the location where it can be found.
- **Affirm:** A disposition of a case where an appellate court ratifies the judgment of the lower court if the majority of the court agrees with the lower court's decision.
- **Appeal:** An appeal is “a proceeding in which the losing party requests a higher court for review of a lower court's judgment for the purpose of convincing the higher court that the lower court's judgment was incorrect.” An appeal can also be “a proceeding for the review of an agency decision at a higher level within the agency or in a court.”
- **Appellate:** Of or relating to an appeal or appeals generally
- **Applicant:** In some BIA cases, the individual in question will be identified by the term “applicant” because he or she applied for a benefit before the Executive Office for Immigration Review.
- **Binding Authority / Binding Precedent:** See Mandatory Authority below
- **Citation:** Information necessary to locate a case in a Reporter. The citation generally appears at the top of the case next to or below the title. Every case has a uniform citation code that includes the name of the case, the volume number and name of the reporter where the case is published, the page number, the name of the court, and the date of the decision.
- **Concurring Opinion:** A concurring opinion is an opinion by one or more members of the court that agrees with the final outcome of the majority opinion, but uses different reasoning to reach that outcome or desires to emphasize a particular point. Concurring opinions are found after the disposition of a case, but are not written in all cases.

³⁷ The definitions in this glossary were taken from the following sources if not otherwise identified: Black’s Law Dictionary, (Bryan A. Garner, ed., Thomson Reuters 2009); Findlaw Legal Dictionary (Thomson Reuters 2011); and, West’s Encyclopedia of American Law, edition 2, (The Gale Group 2008).

- **Deciding Body / Issuing Body:** The deciding body, or issuing body, is the court or administrative agency that issued the decision or opinion.
- **De Novo:** The term “de novo” means “anew.” A de novo hearing means the reviewing court will decide the matter anew, and give no deference to the lower court's findings. It can also be the new hearing of a matter, conducted as if the original hearing never took place.
- **Dicta/Dictum:** An opinion by a court on an issue that is not essential to the decision but that is directly involved. Dicta is not binding, but often provides useful guidance or persuasive authority for courts and adjudicators in subsequent cases.
 - **Example:** The primary issue in the 1981 U.S. Supreme Court case, *Fedorenko v. United States*, was whether the misrepresentation Fedorenko made on his visa and naturalization applications could be the basis for stripping him of his U.S. citizenship.³⁸ In its 39-page decision, the Supreme Court briefly addressed what “assisting” in the persecution of others meant and, in a footnote, offered an example of a continuum of conduct where, on one end, the conduct was not assisting in persecution, and on the other end it was. Even though assisting in the persecution of others was not the primary issue in the case, this example has been used by the lower courts ever since as persuasive guidance on how to analyze the persecutor bar.
- **Dismiss:** A disposition of a case where an appellate court terminates an appeal if it finds that the appeal is without merit or not properly filed before the appellate body.
- **Disposition:** “the final determination of a matter (as a case or motion) by a court or quasi-judicial tribunal.” A disposition may be to: Affirm, Dismiss, Remand, Reverse, or Sustain.
- **Dissenting Opinion:** Dissenting opinions are written by a judge (or judges) who disagree(s) with the decision reached by the majority of the court. The dissenting opinion explains the reasoning of the dissenting judge(s). Dissenting opinions are found after the disposition and concurring opinions; however, dissenting opinions are not written for all cases.
- **Distinguish:** The definition of distinguish is: “To note a significant factual, procedural, or legal difference in (an earlier case), usually to minimize the case's precedential effect or to show that it is inapplicable.”
- **Headnotes:** Editorial descriptions of individual legal rules and principles discussed within a case. Headnotes are usually numbered so readers can easily find where that specific point of law appears in the opinion.

³⁸ *Fedorenko v. United States*, 449 U.S. 490 (1981).

the type of case and the benefit at issue. Parties may be referred to as: Applicant, Petitioner, Plaintiff, or Respondent.

- **Per Curiam:** A ruling by at least a majority of the court acting collectively and anonymously. The opinion does not list the individual judges responsible for the opinion.
- **Persuasive Authority (Persuasive Precedent):** Non-binding sources of authority that a court or adjudicator may consult for guidance, but is not required to follow in making its decision.
 - **Example:** When a U.S. Court of Appeals is faced with a novel issue, it might look at decisions from other circuits to consider the reasoning of others on similar issues. However, the court might find the reasoning of another circuit persuasive in forming its own decision, but would not be required to follow any of the other circuits.
- **Petitioner:** The petitioner is a person filing an action or appealing from a lower court's judgment. In visa petition proceedings, the petitioner is the sponsoring individual or entity.
- **Plaintiff:** A plaintiff is an individual or organization who initiates a lawsuit.
- **Precedent:** "A decided case that furnishes a basis for determining later cases involving similar facts or issues." Precedent can be mandatory, or binding, on a court or adjudicator. Precedent that is not binding on a court or an adjudicator can still be used as persuasive authority. The BIA issues a precedent decision when it selects a case for publication. Non-published cases are not binding and not considered precedent decisions. A precedent decision in one jurisdiction, for example a published Second Circuit decision, is not binding precedent in another jurisdiction, such as, for example, the Ninth Circuit, but may be used as persuasive authority.

The BIA selects decisions for publication that meet one or more of several criteria, including but not limited to: the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.⁴⁰

- **Pro Bono or Pro Bono Publico:** A Latin phrase meaning "for the public good" and which usually means that legal services are being provided at no cost or for a small fee. In many states, lawyers are required or encouraged to provide pro bono legal services. Law firms also encourage attorneys within the firm to be active in pro bono efforts within their communities.

⁴⁰ BIA Practice Manual, Chapter 1, p.9, available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf>.

- **Pro Se:** The Latin term pro se means “on one’s own behalf.” In the legal context the term refers to individuals who represent themselves.
 - **Example:** In Matter of K-L-, the respondent represented himself. In the published decision after “on behalf of the respondent,” where the name of the legal representative is typically listed, the term pro se was written.⁴¹
- **Procedural History:** Court opinions generally begin by stating the procedural history of the case. The procedural history will typically include information about where the case began, what the lower court or administrative agency decided, which party appealed the decision to the higher court and, sometimes, the issue on appeal.
- **Remand:** A disposition of a case where an appellate court may return a case to the lower court for reconsideration if there was an error in law or procedure, or for consideration of new evidence. The appellate court outlines where the lower court erred and usually sets out specific instructions that it expects the lower court to follow when reconsidering the case.
- **Reporter:** “A published volume of the decisions of a court or a group of courts.”

Decisions of the BIA are published in a reporter called the Administrative Decisions Under Immigration and Nationality Laws (I&N Dec.).

Decisions of the U.S. Courts of Appeals are published in the Federal Reporter (F.), the Federal Reporter, Second Series (F.2d), and the Federal Reporter, Third Series (F.3d).

Supreme Court decisions are published in the United States Reports (U.S.).

- **Respondent:** The respondent is the individual or organization against whom an appeal is brought. In removal, deportation, or bond proceedings, the alien is generally referred to as the respondent because he or she is responding to the government’s charges.
- **Reverse:** to overturn (a judgment) on appeal.
- **Standard of Review:** a measure by which an appellate court reviews the finding of a lower court. A reviewing court may apply one or more standards of review within a decision depending on the issues raised in the appeal.
- **Statement of Facts:** A description of circumstances, events, or occurrences as they were testified to or recorded at the hearing. The “facts” of the case would be the events as admitted into evidence in the adjudication. Appellate bodies, such as the BIA and U.S. Courts of Appeals, write statements of fact based on the information already on record.

⁴¹ Matter of K-L-, 20 I&N Dec. 654 (BIA 1993)

- **Statement of the Law:** After describing what happened in the lower court, identifying which party is appealing, and what the issue or issues are on appeal, i.e., the procedural history of the case, the decision will generally state the section of the law that is at issue. This will probably include the relevant section of the INA, the regulations, and possibly relevant precedent case law.
- **Sustain:** As a disposition of a case, an appellate court may sustain an appeal when it agrees with the appellant's legal reasoning in bringing an appeal, and is akin to reversing a decision of the lower court.
- **Syllabus:** “[A] case summary appearing before the printed judicial opinion in a law report, briefly reciting the facts and the holding of the case.”
- **Title:** The title of a case includes the names of the parties in the case, or the petitioner’s name, initials, or alias.
- **Unpublished Decisions:** Decisions that the court has not selected for publication in an official reporter. These decisions are only binding on the parties involved; they are not binding precedent and should not be cited as mandatory authority. All immigration judge decisions are unpublished. Parties sometimes cite to unpublished decisions as persuasive authority.

SUPPLEMENT B – ASYLUM ADJUDICATIONS

The following information is specific to asylum adjudications. Information in each text box contains adjudication-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

REQUIRED READING

Memorandum from Joseph E. Langlois to All Asylum Office Staff: “Notification of Ramos v. Holder, Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit” (March 2, 2009).

Note: Further discussion of this topic may be found in the RAIO Training module, *Nexus and the Five Protected Grounds*.

ADDITIONAL RESOURCES

None

SUPPLEMENTS

Asylum Adjudications Supplement - Credible Fear and Reasonable Fear

The credible fear process serves a screening function and its purpose is not to foreclose on possible viable claims, but to dispose of claims where there is no significant possibility of success. Where the law is unsettled, as when there are conflicting decisions or no specific case that is *on-point*, a claim generally will meet the credible fear standard. The purpose of the credible fear screening is to ensure access to a full hearing for all individuals who qualify under the standard.

Similar to credible fear determinations, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly unmeritorious or frivolous claims. See Asylum Division training modules on Credible Fear and Reasonable Fear. In cases where circuit courts have issued conflicting decisions, the credible fear determination must reflect the legal interpretation most favorable to the alien. The same is not true for reasonable fear determinations, however. Although both processes are screening mechanisms, there are fundamental differences that warrant differentiating between them in this regard. While credible

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fear is intended to identify aliens subject to expedited removal who have a significant possibility of qualifying for asylum, reasonable fear is a higher standard, intended to ensure compliance with international legal obligations implemented by withholding under INA 241(b)(3) and protection under the Convention Against Torture in cases of individuals whom Congress has precluded from asylum.