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REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE (RAIO)



# U.S. Citizenship and Immigration Services

## RAIO DIRECTORATE – OFFICER TRAINING

### RAIO Combined Training Course

### **DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION**

TRAINING MODULE

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- P.13 persecution must ~~be~~ rise above the ~~mere~~ harm  
 P.14 refuse to allow a person to practise his religion  
 (nonphysical harm)  
 P.15 cumulative instances of harm ~~to~~ <sup>要每次 harm 都屬</sup> protected grounds  
 one serious incident/threat → → persecution  
 P.16 several incidents/acts → (both) → persecution  
 P.18 arrest/detention (a minor beating) → persecution  
 P.18 merely harassment X → persecution  
 (only) discrimination  
 P.19 factors/incidents X → persecution  
 P.24 forced compliance with religious laws or practices  
 → persecution (psychological harm)  
 P.24 forced to renounce religious belief or to ~~desecrate~~ desecrate  
 an object of religion → persecution (psychological harm)  
 P.14 no requirement that an individual suffer  
 'serious injuries' → persecution  
 P.18-P.19 increase in severity, escalation  
 P.27. Gov agent is responsible for persecution it is unnecessary  
 to consider whether the applicant sought protection from the police  
 Or the other gov entity  
 P.45 burst into the house  
 P.23 psychological harm alone may be sufficient to persecution

P.20-P.24 3 Chinese example for persecution or not  
 P.32 past persecution established → Presumed well-founded  
 fear of future persec.

## DEFINITION OF PERSECUTION AND ELIGIBILITY BASED ON PAST PERSECUTION

Training Module

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## MODULE DESCRIPTION

This module discusses the definition of persecution and the determination as to whether an act constitutes persecution.

## TERMINAL PERFORMANCE OBJECTIVE(S)

When adjudicating a request for asylum or refugee resettlement, you will correctly apply the law to determine eligibility for asylum in the United States or resettlement in the United States as a refugee.

P.45 He was dismissed from his job, he was not given a reason.

## ENABLING PERFORMANCE OBJECTIVES

1. Distinguish between government and non-government agents of persecution.
2. Explain factors to consider in determining whether an act(s) is sufficiently serious to constitute persecution.
3. Explain factors to consider when deciding whether an applicant is eligible for asylum or refugee status based on past persecution alone.

## INSTRUCTIONAL METHODS

- Interactive Presentation
- Discussion
- Group and individual practical exercises

## METHOD(S) OF EVALUATION

- Multiple-choice exam

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

This is one in a series of modules on eligibility for asylum and refugee status. This module provides an overview of the definition of persecution and eligibility based on past persecution.

Other RAIO Training modules on asylum and refugee eligibility discuss:

- the basic elements of the refugee definition (*Refugee Definition*)
- eligibility based on fear of future persecution (*Well-Founded Fear*)
- the motive of the persecutor and the five protected grounds in the refugee definition (*Nexus and the Five Protected Grounds; Nexus: Particular Social Group*)
- the burden of proof and evidence (*Evidence*)
- the role of discretion (*Discretion*)
- participation in the persecution of others on account of a protected ground (*Analyzing the Persecutor Bar*)
- entry into and permanent status in a third country (*Firm Resettlement*)

In addition, for asylum adjudications, one of the Asylum Lesson Plans discusses mandatory reasons to deny asylum. For overseas refugee adjudications, the RAIO Training module, *Grounds of Inadmissibility* discusses reasons an applicant may be inadmissible to the United States and the availability of waivers. The RAD Access module discusses available means to access the U.S. Refugee Admissions Program.

## 2 PAST PERSECUTION

An applicant may establish that he or she is a refugee based on either past persecution or a well-founded fear of future persecution.<sup>1</sup>

The regulations implementing USCIS's discretionary authority to grant asylum, generally require a well-founded fear of persecution. If an applicant establishes past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.<sup>2</sup> Well-founded fear is presumed unless the officer establishes that a fundamental change in circumstances has occurred, such that the applicant no longer has a well-founded fear, or that the applicant could reasonably avoid future persecution by relocating to another part of his or her country of nationality.<sup>3</sup> If the persecutor is the government or is government-sponsored or the applicant has been persecuted in the past, there is a rebuttable presumption that internal relocation is not reasonable, unless you establish by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.<sup>4</sup> Asylum applicants who suffered past persecution but who no longer have a well-founded fear of future persecution may be granted asylum based on being unable or unwilling to return to the country due to the severity of the past persecution or if there is a reasonable possibility that the applicant will face other serious harm upon return.<sup>5</sup>

~~In~~ the overseas refugee processing context, there is no equivalent regulatory guidance on past persecution at 8 C.F.R. § 207. In the absence of such regulatory guidance, a plain language interpretation of the term refugee as defined in INA § 101(a)(2) is followed in overseas refugee processing. If an applicant credibly establishes that the harm he or she suffered in the past rose to the level of persecution on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility. A rebuttable presumption is neither created nor necessary. Nonetheless, as a matter of policy, refugee officers will always assess an applicant's well-founded fear of future persecution regardless of whether or not he or she has established past persecution.<sup>6</sup>

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<sup>1</sup> INA § 101(a)(2)

<sup>2</sup> INA § 208; INA § 101(a)(2); 8 C.F.R. § 208.13(b)(1).

<sup>3</sup> For additional information, see *Eligibility Based on Past Persecution*, below, and RAIO Training module, *Discretion*.

<sup>4</sup> 8 C.F.R. § 208.13(b)(3)(ii).

<sup>5</sup> 8 C.F.R. § 208.13(b)(1)(iii); For additional information on granting asylum in the absence of a Well-Founded Fear, see RAIO module, *Discretion*.

<sup>6</sup> See Refugee Affairs Division (RAD), *Refugee Application Assessment: Standard Operating Procedures (SOP)* (requiring officers to elicit testimony and assess well-founded fear even where applicants have demonstrated past persecution).

In contrast, the UN refugee definition focuses primarily on well-founded fear, rather than past persecution. The cessation clauses of the 1951 Convention, however, do provide that a refugee who no longer fears future persecution should be given protection due to compelling reasons arising from previous persecution.<sup>7</sup>

## 3 PERSECUTION

### 3.1 General Elements

#### Severity of Harm

To establish persecution, an applicant must show that the harm that the applicant experienced or fears is sufficiently serious to amount to persecution. The degree of harm must be addressed before you may find that the harm that the applicant suffered or fears can be considered “persecution.”

#### Motivation

An applicant also must prove that the persecutor’s motivation in harming, or seeking to harm him or her, is on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.<sup>8</sup> Proving motivation is discussed in more detail in RAIO Training module, *Nexus and the Five Protected Grounds*. You should separate the analysis of motivation from the evaluation of whether the harm rises to the level of persecution, in order to make the basis of your decision as clear as possible.

#### Persecutor

The applicant must show that the entity that harmed, or is threatening, the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.<sup>9</sup>

#### Location

Only harm suffered in the country of nationality or, if stateless, the country of last habitual residence, may be considered in a finding of past persecution, for the purpose of establishing eligibility. Harm suffered in the United States or a third country may be considered as evidence of a well-founded fear if the applicant can establish a connection between the persecutor and his or her country of origin.<sup>10</sup>

<sup>7</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, Article 1C, paras. (5) and (6), incorporated by reference into the 1967 Protocol relating to the Status of Refugees.

<sup>8</sup> For additional information, see RAIO Training module, *Nexus and the Five Protected Grounds*.

<sup>9</sup> For additional information, see section, *Identifying a Persecutor*.

<sup>10</sup> See 8 C.F.R. § 208.13(b)(1); *Costa v. Holder*, 733 F.3d 13, 15 (1st Cir. 2013).

**Example**

Applicant testifies to being the victim of domestic violence while living in the United States. Because applicant has filed a complaint against her spouse, the spouse has been removed to his country of nationality and now the applicant claims to fear additional harm from her spouse if returned to the same country as her spouse. In such a situation the applicant would not be considered to have suffered past persecution, but you would consider the violence suffered in the United States as evidence in your analysis of well-founded fear.

**3.2 Whether the Harm Amounts to Persecution****3.2.1 Board of Immigration Appeals (BIA) Decisions**

In an often-cited BIA decision, the BIA defined persecution as harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the persecutor seeks to overcome.<sup>11</sup>

The BIA later modified this definition and explicitly recognized that a "punitive" or "malignant" intent is not required for harm to constitute persecution.<sup>12</sup> The BIA concluded that persecution can consist of objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm.<sup>13</sup>

Additionally, the BIA has found that the term "persecution" encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution.<sup>14</sup> Non-physical harm may include "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."<sup>15</sup>

**3.2.2 Guidance from the Department of Justice**

In a proposed rule providing guidance on the definition of persecution, the Department of Justice indicated its approval of the conclusion in *Kasinga* that the existence of persecution does not require a malignant or punitive intent.<sup>16</sup> The Department also

<sup>11</sup> *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), modified by *Matter of Mogharabi*, 19 I&N Dec. 439, 446 (BIA 1987).

<sup>12</sup> *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

<sup>13</sup> *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996); for additional information, see RAJO Training module, *Nexus and the Five Protected Grounds*.

<sup>14</sup> *Matter of T-Z*, 24 I&N Dec. 163, 169-71 (BIA 2007).

<sup>15</sup> *Matter of T-Z*, 24 I&N Dec. at 171, citing *Laipenienks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

<sup>16</sup> U.S. Department of Justice, *Asylum and Withholding Definitions*, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. This proposed rule did not become a regulation but indicates the agency's view on the topic.

emphasized that the victim must experience the treatment as harm in order for persecution to exist. Thus, under this reasoning, in a case involving female genital mutilation, whether the applicant at hand would experience or has experienced the procedure as serious harm, not whether the perpetrator intends it as harm, is a key inquiry.

**3.2.3 Federal Court Decisions**

Persecution encompasses more than just physical harm. The Supreme Court has held that persecution is a broader concept than threats to "life or freedom."<sup>17</sup>

The U.S. Court of Appeals for the Ninth Circuit has defined "persecution" as "infliction of suffering or harm upon those who differ . . . in a way regarded as offensive" and "oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."<sup>18</sup> Such harm could include severe economic deprivation.<sup>19</sup>

Similarly, the Seventh Circuit described persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."<sup>20</sup> The term "persecution" includes actions less severe than threats to life or freedom. Non-life threatening violence and physical abuse also fall within the definition of persecution.<sup>21</sup> However, "actions must rise above the level of mere 'harassment' to constitute persecution."<sup>22</sup> More recently, the Seventh Circuit has faulted the BIA for failing to distinguish "...among three forms of oppressive behavior" that an applicant might experience: discrimination, harassment, and persecution.<sup>23</sup> The court offered the following definitions, in the absence of an agency definition:

- Discrimination "refers to unequal treatment, and is illustrated historically by India's caste system and the Jim Crow laws in the southern U.S. states."<sup>24</sup>
- Harassment "involves targeting members of a specified group for adverse treatment, but without the application of significant physical force."<sup>25</sup>
- Persecution is "the use of significant physical force against a person's body, or the infliction of comparable physical harm without direct application of force (locking a

<sup>17</sup> *INS v. Stevic*, 467 U.S. 407, 428 fn. 22 (1984).

<sup>18</sup> *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985).

<sup>19</sup> *Kovac*, 407 F.2d at 107.

<sup>20</sup> *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011).

<sup>24</sup> *Id.* at 947-48.

<sup>25</sup> *Id.* at 948.

person in a cell and starving him would be an example), or nonphysical harm of equal gravity," such as refusing to allow a person to practice his religion or pointing a gun at a person's head.<sup>26</sup>

The court then went on to distinguish between harassment and persecution as being the difference "between the nasty and the barbaric, or alternatively between wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge in any other country."<sup>27</sup>

The First Circuit has described persecution as an experience that "must rise above unpleasants, harassment and even basic suffering."<sup>28</sup> There is no requirement that an individual suffer "serious injuries" to be found to have suffered persecution.<sup>29</sup> However, the presence or absence of physical harm is relevant in determining whether the harm suffered by the applicant rises to the level of persecution.<sup>30</sup>

**Serious threats made against an applicant may constitute persecution even if the applicant was never physically harmed.**<sup>31</sup> Under some circumstances, a threat may be sufficiently serious and immediate to constitute persecution even if it is not explicit.<sup>32</sup> Consider the following issues to explore when evaluating whether a threat is serious enough to rise to the level of persecution:

- Has the persecutor attempted to act on the threat?<sup>33</sup>
- Is the nature of the threat itself indicative of its seriousness?<sup>34</sup>
- Has the persecutor harmed or attempted to harm the applicant in other ways?<sup>35</sup>
- Has the persecutor attacked, harassed, or threatened the applicant's family?<sup>36</sup>

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000).

<sup>29</sup> *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998); *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004); *Sanchez-Jimenez v. U.S. Atty' Gen.*, 492 F.3d 1223 (11th Cir. 2007).

<sup>30</sup> *Ruiz v. Mukasey*, 526 F.3d 31, 37 (1st Cir. 2008).

<sup>31</sup> *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by *Salazar-Paucar v. INS*, 290 F.3d 964 (9th Cir. 2002).

<sup>32</sup> *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014).

<sup>33</sup> *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (death threats alone may constitute persecution).

<sup>34</sup> *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998) (three letters within three months containing death threats constituted persecution).

<sup>35</sup> *Mejia v. U.S. Atty' Gen.*, 498 F.3d 1253, 1257-58 (11th Cir. 2007).

- Has the persecutor carried out threats issued to others similarly situated to the applicant?<sup>37</sup>
- Did the applicant suffer emotional or psychological harm as a result of the threat(s)?<sup>38</sup>

The federal courts, as well as the BIA, have held that cumulative instances of harm, considered in totality, may constitute persecution on account of a protected characteristic, so long as the discrete instances of harm were each inflicted on account of a protected characteristic.<sup>39</sup>

You should evaluate the entire scope of harm experienced and feared by the applicant to determine if he or she was persecuted and fears persecution.

### 3.2.4 Guidance from the UNHCR Handbook

The UNHCR Handbook explains the following:<sup>40</sup>

- A threat to life or freedom, or other serious violation of human rights on account of any of the protected grounds is always persecution.
- Other, less serious harm may constitute persecution depending on the circumstances.
- Acts that do not amount to persecution when considered separately can amount to persecution when considered cumulatively.

### 3.2.5 General Considerations

#### Individual Circumstances

It is important to take into account the individual circumstances of each case and to consider the feelings, opinions, age, and physical and psychological characteristics of the applicant in determining whether the harm suffered or feared rises to the level of persecution.<sup>41</sup> For example, one may hold passionate political or religious convictions, the hindrance of which would cause great suffering; while another may not have such strong convictions.<sup>42</sup>

<sup>36</sup> *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Sanchez-Jimenez v. U.S. Atty' Gen.*, 492 F.3d 1223, 1233 (11th Cir. 2007).

<sup>37</sup> *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998).

<sup>38</sup> For additional information, see section on *Psychological Harm*.

<sup>39</sup> *Chand v. INS*, 222 F.3d 1066, 1073 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996); *Korablinina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Matter of O-Z-&I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998); cf. *Mihalev v. Ashcroft*, 388 F.3d 722, 728 (9th Cir. 2004).

<sup>40</sup> *UNHCR Handbook*, paras. 51-55.

<sup>41</sup> *Id.* at para. 52.

<sup>42</sup> *Id.* at para. 40.

~~Age~~

In assessing whether harm rises to the level of persecution, you should determine the age of the applicant at the time the harm occurred and determine if age is a factor that should be considered.<sup>43</sup> For example, the effect of similar circumstances might be more severe on a child or an elderly person than they may be on others. Harm that may not rise to the level of persecution for an adult may be persecution if the harm is inflicted on a child. In considering whether past harm suffered by a child rises to the level of persecution, it is important to take into account a child's young age and dependence on family and community.<sup>44</sup>

**No Set Number of Incidents Required**

~~There is no minimum number of acts or incidents that must occur in order to establish persecution.~~<sup>45</sup> One serious incident or threat may constitute persecution, or there may be several incidents or acts, which considered together, constitute persecution.

**3.3 Human Rights Violations**

Violations of "core" or "fundamental" human rights, prohibited by international law, may constitute harm amounting to persecution. These rights include freedom from:

- arbitrary deprivation of life
- genocide
- slavery
- torture and other cruel, inhuman, or degrading treatment
- prolonged detention without notice of and an opportunity to contest the grounds for detention
- rape and other severe forms of sexual violence

Torture can take a wide variety of forms. It can include severe physical pain by beating or kicking, or pain inflicted with the help of objects such as canes, knives, cigarettes, or metal objects that transmit electric shock. Torture also includes the deliberate infliction of

<sup>43</sup> *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Ordonez-Quino v. Holder*, 760 F.3d 80, 93 (1st Cir. 2014).

<sup>44</sup> For additional information, see RAIO Training module, *Children's Claims*.

<sup>45</sup> See, e.g., *Vaduva v. INS*, 131 F.3d 689, 690 (7th Cir. 1997); and *Lumaj v. Gonzales*, 462 F.3d 574, 577 (6th Cir. 2006).

<sup>46</sup> See Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998), pp.68-9; and James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1992), p. 109.

severe mental suffering.<sup>47</sup> Torture will always rise to the level of persecution. Keep in mind, however, that for purposes of asylum or refugee status, as opposed to protection under the Convention Against Torture, torture must have been inflicted on account of one of the five protected grounds. Convention Against Torture protection is available in immigration court removal proceedings, see Asylum Lesson Plans on Credible Fear and Reasonable Fear.

Other fundamental rights are also protected by customary international law, such as the right to recognition as a person in the law, and ~~the right to freedom of thought, conscience, and religion or belief.~~<sup>48</sup> Deprivation of these rights may also constitute persecution.<sup>49</sup>

**Examples**

- The BIA has found that the enforcement of coercive family planning policy through forced abortion or sterilization is a violation of fundamental human rights. Forced abortion or sterilization deprives the individual of the right to make individual or conjugal decisions regarding reproductive rights.<sup>50</sup>
- The Third Circuit has stated that compelling an individual to engage in conduct that is abhorrent to that individual's deepest beliefs may constitute persecution.<sup>51</sup>
- UNHCR guidelines on religious-based refugee claims indicate that forced compliance could constitute persecution "if it becomes an intolerable interference with the individual's own religious belief, identity, or way of life and/or if noncompliance would result in disproportionate punishment."<sup>52</sup>

**3.4 Discrimination and Harassment**

<sup>47</sup> J. Herman Burgers & Hans Daalder, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), pp. 117-18. For additional information, see RAIO Training module, *International Human Rights Law* (section on Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

<sup>48</sup> Guy S. Goodwin-Gill, *The Refugee in International Law Second Edition* (New York: Oxford University Press, 1998), p.69.

<sup>49</sup> For additional information, see RAIO Training module, *The International Religious Freedom Act (IRFA) and Religious Persecution Claims*.

<sup>50</sup> See *Matter of S-L-C*, 24 I&N Dec. 1, 5-7 (BIA 2006), (en banc), overruled on other grounds by *Matter of J-S*, 24 I&N Dec. 520 (AG 2008); *Matter of Y-T-L*, 23 I&N Dec. 601, 607 (BIA 2003); UNHCR, *UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies* (Geneva: Aug. 2005).

<sup>51</sup> *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

<sup>52</sup> UNHRC, *Guidelines on International Protection: Religion-Based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, (HCR/GIP/04/06, 28 April 2004), para. 21.

Less preferential treatment and other forms of discrimination and harassment generally are not considered persecution.<sup>53</sup> Where discriminatory practices or instances of harassment accumulate or increase in severity to the extent that they lead to consequences of a substantially prejudicial nature, adverse actions that would themselves constitute only discrimination or harassment may, cumulatively, rise to the level of persecution.<sup>54</sup>

The Second Circuit Court of Appeals has indicated that differentiating between harassment and persecution can be a matter of degree and that adjudicators must consider the context in which mistreatment occurs.<sup>55</sup> A minor beating may constitute only harassment when inflicted by a non-governmental entity. In the context of an arrest or detention by a government official, however, a minor beating, if inflicted on account of a protected characteristic, may rise to the level of persecution.

(context)

The fact that a non-citizen does not enjoy all of the same rights as citizens in the country of last habitual residence is generally, by itself, not harm sufficient to rise to the level of persecution.<sup>56</sup>

#### Examples

- Discrimination did not rise to the level of persecution against an Armenian living in Russia when it included merely harassment and pushing by Russian officers because of ethnicity and being denied a job because "there were no jobs for Armenians."<sup>57</sup>
- An Egyptian Coptic Christian claimed that his career as a medical doctor would suffer because of discrimination against Christians. The Ninth Circuit found that this level of discrimination was insufficient to amount to persecution.<sup>58</sup> In contrast, the inability to practice medicine through the invalidation of a medical degree does amount to persecution when it is on account of the applicant's ethnicity.<sup>59</sup>

#### General Factors to Consider

Some relevant questions to consider in determining whether the discrimination and harassment of the applicant amount to persecution are:

<sup>53</sup> See UNHCR Handbook, paras. 54-55; *Sianojkova v. Holder*, 645 F.3d 943, 947-948 (7th Cir. 2011); *Matter of A-E-M-*, 21 I&N Dec. 1157, 1159 (BIA 1998); *Matter of V-F-D-*, 23 I&N Dec. 859, 863 (BIA 2006); *Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992); *Mikhaillevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998).

<sup>54</sup> *Ivanishvili v. USDOJ*, 433 F.3d 332, 342 (2d Cir. 2006).

<sup>55</sup> *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006).

<sup>56</sup> *Ahmed v. Ashcroft*, 341 F.3d 214, 217 (3d Cir. 2003); *Najjar v. Ashcroft*, 257 F.3d 1262, 1291 (11th Cir. 2001); *Faddoul v. INS*, 37 F.3d 185, 189 (5th Cir. 1994).

<sup>57</sup> *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000).

<sup>58</sup> *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995); cf. *Mansour v. Ashcroft*, 390 F.3d 667 (9th Cir. 2004).

<sup>59</sup> *Stserba v. Holder*, 646 F.3d 964, 976 (6th Cir. 2011).

- Was the harm actually persecution, not merely discrimination or harassment?
- How long has the discrimination or harassment lasted?
- Which human rights were affected?
- How has the discrimination or harassment affected the particular applicant?
- How many types of discriminatory practices or how much harassment has been imposed on the applicant, cumulatively?
- Has there been any escalation over time in the frequency or seriousness of the discrimination or harassment or has it remained at the same level over time?

Some significant factors to consider in determining whether discrimination and harassment amount to persecution include:

- serious restrictions on the right to earn a livelihood<sup>60</sup>
- serious restrictions on the access to normally available educational facilities
- arbitrary interference with a person's privacy, family, home, or correspondence
- relegation to substandard dwellings
- exclusions from institutions of higher learning
- enforced social or civil inactivity
- passport denial
- constant surveillance
- pressure to become an informer
- confiscation of property
- the accumulation and type of discriminatory practices or harassment that have been imposed on the applicant

Generally none of these factors, by themselves, would be considered to rise to the level of severity necessary to constitute persecution, but may, on a case by case basis, be deemed to rise to the level of persecution. Each case must be judged individually based on the unique facts of that claim.

<sup>60</sup> See, e.g., *Gormley v. Ashcroft*, 364 F.3d 1172, 1179 (9th Cir. 2004) (in rejecting claim, court relied on fact that South African government provided unemployment compensation to couple laid off pursuant to affirmative action).

### 3.5 Arrests and Detention

In evaluating whether a detention is persecution, consider:

- length of the detention
- legitimacy of the government action
- mistreatment during the detention
- judicial processes or due process rights accorded<sup>61</sup>

Generally, a brief detention without mistreatment will not constitute persecution. Prolonged detention is a deprivation of liberty, which may constitute a violation of a fundamental human right and amount to persecution. Similarly, multiple brief detentions may, considered cumulatively, amount to persecution. Evidence of mistreatment during detention also may establish persecution.<sup>62</sup>

#### Examples

- A Chinese Christian was arrested during an underground religious service, detained for seven days, and repeatedly beaten. On one occasion, he was chained to an iron bar outside in the rain for several hours, causing him to become ill. The Eleventh Circuit Court of Appeals held that the evidence compelled the conclusion that the harm the applicant suffered rose to the level of persecution.<sup>63</sup>
- A Kosovar Albanian was interrogated on three occasions by Serbian police. One time, during a 24-hour detention, he suffered an injury to his hands caused by the police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.<sup>64</sup>
- 这个解释有误  
A 16-year old Chinese girl was detained for two days by police, during which time she was pushed and her hair was pulled, she was expelled from school, and her home was ransacked by police. The Seventh Circuit held that substantial evidence supported a finding that the applicant had not suffered past persecution.<sup>65</sup>

因为她卖书法轮功，没有司法归为五大理由，他人扣齐庄  
因为日本的假护照到美国，使得她 credible to the  
US

<sup>61</sup> For additional information, see RAJO Training module, *Nexus and the Five Protected Grounds*.

<sup>62</sup> *Asani v. INS*, 154 F.3d 719, 723 (7th Cir. 1998) (the court instructed the BIA on remand to apply the correct persecution standard and questioned the BIA, using the incorrect standard applied, "If having two teeth knocked out and being deprived of sufficient food and water are not 'serious injuries' or 'physical harm,' what is?")

<sup>63</sup> *Shi v. U.S. Att'y Gen.*, 707 F.3d 1231, 1237-1239 (11th Cir. 2013).

<sup>64</sup> *Prela v. Ashcroft*, 394 F.3d 515, 518 (7th Cir. 2005).

<sup>65</sup> *Mei Dan Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004).

这个解释有误  
就这次事件

- 这个解释有误  
A Chinese national was detained at a police station for three days, during which time he was interrogated for two hours and hit on his back with a rod approximately ten times, causing him pain and temporary red marks, but not requiring any medical treatment. The Ninth Circuit found that the facts did not compel a finding of past persecution.<sup>66</sup>

Gu被 arrest & detain 以后, 还是可以 return to SOV job, 但是没有 passport  
A Bulgarian Christian was detained by police twice, each for two days, and on a third occasion was beaten by police in her home, resulting in a miscarriage of her pregnancy. The Seventh Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.<sup>67</sup>

- A Bulgarian of Roma descent was detained by police for ten days, during which time he was beaten daily with sandbags and forced to perform heavy labor. The applicant suffered no significant bodily injury. The Ninth Circuit found that treatment suffered by the applicant was so severe as to compel a finding of past persecution.<sup>68</sup>

### 3.6 Economic Harm

To rise to the level of persecution, economic harm must be deliberately imposed and severe.<sup>69</sup> Severe economic harm must be harm "above and beyond [the economic difficulties] generally shared by others in the country of origin and involve more than the mere loss of social advantages or physical comforts."<sup>70</sup>

In *Matter of T-Z-*, the Board held that adjudicators should apply the following test in determining whether economic harm amounts to persecution: whether the applicant suffered or faces a "deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life."<sup>71</sup> An applicant, however, need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution.<sup>72</sup>

In this decision, the BIA highlighted some factors to consider in assessing whether the fines and job loss at issue amounted to persecution,<sup>73</sup> including

<sup>66</sup> *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006).

<sup>67</sup> *Vladimirova v. Ashcroft*, 377 F.3d 690, 693 (7th Cir. 2004).

<sup>68</sup> *Mihalev v. Ashcroft*, 388 F.3d 722, 730 (9th Cir. 2004).

<sup>69</sup> See *Minwalla v. INS*, 706 F.2d 831, 835 (8th Cir. 1983); *Ambati v. Reno*, 233 F.3d 1054, 1060 (7th Cir. 2000); *Guan Shan Liao v. INS*, 293 F.3d 61, 69-70 (2d Cir. 2002).

<sup>70</sup> *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007).

<sup>71</sup> *Matter of T-Z-*, 24 I&N Dec. 163, 173 (BIA 2007). See also *Vicente-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008) (adopting *Matter of T-Z-* standard on economic persecution); *Borca v. INS*, 77 F.3d 210 (7th Cir. 1996) (holding that total economic deprivation is not required to establish persecution).

<sup>72</sup> *Matter of T-Z-*, 24 I&N Dec. at 173.

<sup>73</sup> *Id.* at 173-75.

Gu被 arrest & detain 以后, 还是可以参加 religions services  
还是在 SOV 工作, 还是可以拿到护照  
被 rod 打了 10 次, 需要 medical treatment (不认为 credible)

- the applicant's and his or her household's earnings
- the applicant's net worth
- other employment available to the applicant
- loss of housing
- loss of health benefits
- loss of school tuition and educational opportunities
- loss of food rations
- confiscation of property, including household furniture and appliances
- any other relevant factor

In *Vincent v. Holder*, the Sixth Circuit held that the burning of the applicant's house was "sufficiently severe and targeted to constitute persecution," relying on *T-Z*'s holding that a large-scale confiscation of property may in itself constitute persecution.<sup>74</sup> In contrast, in *Yun Jian Zhang v. Gonzales*, the Seventh Circuit held that the partial destruction of the applicant's house was not severe economic harm where damage could be repaired, particularly given that the applicant worked in construction; the applicant continued to be gainfully employed; the family found shelter at his in-laws' home; and the government did not continue to harm him or his family.<sup>75</sup>

他可以继续工作赚钱

In *Zhen Hua Li v. Att'y Gen. of U.S.*, the Third Circuit held that a fine worth eighteen months' salary, combined with being blacklisted from any government employment and from most other forms of legitimate employment, the loss of health benefits, school tuition, and food rations, and the confiscation of his household furniture and appliances, would constitute the deliberate imposition of severe economic disadvantage that could threaten his family's freedom, if not their lives.<sup>76</sup> In *Mu Ying Wu v. U.S. Att'y Gen.*, on the other hand, the Eleventh Circuit held that substantial evidence supported a finding that a fine that would amount to about 60 to 100 per cent of the applicant's family's annual income, which could be paid in installments or which the applicant could avoid paying by forgoing free medical care and public education for her children, would not, without any additional harm, rise to the level of persecution.<sup>77</sup>

<sup>74</sup> *Vincent v. Holder*, 632 F.3d 351, 355 (6th Cir. 2011), citing *T-Z*, 24 I&N Dec. at 174.

<sup>75</sup> *Yun Jian Zhang v. Gonzales*, 495 F.3d 773, 777-78 (7th Cir. 2007).

<sup>76</sup> *Zhen Hua Li v. Att'y Gen. of U.S.*, 400 F.3d 157, 166-69 (3d Cir. 2005).

<sup>77</sup> *Mu Ying Wu v. U.S. Att'y Gen.*, 745 F.3d 1140, 1157 (11th Cir. 2014).

Applying the BIA's standard in *Matter of T-Z*, the Eighth Circuit has held that being relegated to low-level jobs despite advanced schooling did not amount to severe economic deprivation. Because private employment remained available, the economic discrimination was not sufficiently harsh so as to constitute persecution.<sup>78</sup>

An applicant's loss of employment as a result of a government-sponsored employment program instituted to correct past discrimination is not sufficient to support a finding of past persecution on account of a protected characteristic where the government provided considerable unemployment compensation to the applicant, and other similarly situated individuals were able to maintain or regain employment.<sup>79</sup> On the other hand, a program of state-sponsored economic discrimination against a disfavored group within the society that could lead to extreme economic harm may amount to past persecution.<sup>80</sup>

### 3.7 Psychological Harm

#### 3.7.1 Psychological Harm Alone May Be Sufficient to Constitute Persecution

You should always consider evidence, including the applicant's testimony, that the events he or she experienced caused psychological harm.<sup>81</sup> Psychological harm alone may rise to the level of persecution.<sup>82</sup> Evidence of the applicant's psychological and emotional characteristics, such as the applicant's age or trauma suffered as a result of past harm, are relevant to determining whether psychological harm amounts to persecution.

#### 3.7.2 Under The Convention Against Torture, Severe Mental Harm Alone May Be Sufficient to Constitute Torture

Under the Convention Against Torture, severe mental suffering may constitute torture under certain circumstances.<sup>83</sup> Some examples of mental suffering that fall within this definition of torture, and thus would be considered serious enough to rise to the level of persecution, include:

<sup>78</sup> *Beck v. Mukasey*, 527 F.3d 737, 741 (8th Cir. 2008).

<sup>79</sup> *Gormley v. Ashcroft*, 364 F.3d 1172 (9th Cir. 2004).

<sup>80</sup> *Himri v. Ashcroft*, 378 F.3d 932, 937 (9th Cir. 2004) (finding that Palestinian applicants were members of a persecuted minority who, due to Kuwaiti state-sponsored economic discrimination, would be subject to denial of right to work, attend school, and to obtain drinking water if returned to Kuwait).

<sup>81</sup> For additional information, see RAIO Training module, *Interviewing Survivors of Torture*.

<sup>82</sup> *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir. 2006) ("a finding of past persecution might rest on a showing of psychological harm"); *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) ("Persecution may be emotional or psychological, as well as physical."). The Fourth Circuit held that in withholding of removal cases only, which are not at issue in asylum or refugee adjudications, psychological harm alone cannot amount to persecution. *Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007).

<sup>83</sup> See 136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465; and 8 C.F.R. § 208.18.

- mental harm caused by the intentional infliction or threatened infliction of severe physical pain or suffering
- administration or threatened administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality
- threat of imminent death
- threat that another person will imminently be subjected to death or severe physical pain or suffering

### 3.7.3 Other Forms of Mental Harm May Be Sufficient to Constitute Persecution

Other forms of mental harm that amount to persecution, but may not amount to torture include:

- receipt of threats over a prolonged period of time, causing the applicant to live in a state of constant fear
- being forced to witness the harm of others<sup>84</sup>
- forced compliance with religious laws or practices that are abhorrent to an applicant's beliefs

For example, the Ninth Circuit found in *Mashiri v. Ashcroft* that the emotional trauma suffered by a native of Afghanistan living in Germany was sufficiently severe to amount to persecution. The cumulative harm resulted from watching as a foreign-owned store in her neighborhood was burned, finding her home vandalized and ransacked, running from a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the results of beatings of her husband and children.<sup>85</sup>

The U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that are deeply abhorrent to a person's beliefs may constitute persecution. For example, being forced to renounce religious beliefs or to desecrate an object of religious importance might be persecution if the victim holds strong religious beliefs.<sup>86</sup>

## 3.8 Sexual Harm

### 3.8.1 Rape and Other Sexual Abuse

<sup>84</sup> See *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Khup v. Ashcroft*, 376 F.3d 898, 904 (9th Cir. 2004). But see *Shoagira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (upholding a finding that the emotional harm suffered did not rise to the level of persecution).

<sup>85</sup> *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004).

<sup>86</sup> *Fatin v. INS*, 12 F.3d 1233, 1241-42 (3d Cir. 1993).

Rape and other severe forms of sexual harm constitute harm amounting to persecution, as they are forms of serious physical harm.<sup>87</sup> Rape is regarded as a "form of aggression constituting an egregious violation of humanity," which can constitute torture.<sup>88</sup>

You should also consider less severe sexual harm when determining whether harm amounts to persecution.<sup>89</sup> You must examine the entire circumstances of the case before you, including any resulting psychological harm, the social or cultural perceptions of the applicant as a victim of the sexual harm, and other effects on the applicant resulting from the harm.

#### Example

The applicant was stopped by the police several times and three times was stripped and twice threatened with sodomy by a gun barrel. In overturning the IJ's decision, the court stated, "[m]ost egregiously, the IJ failed to consider the significance of the sexual humiliation that occurred on three occasions. This court has previously noted that abuse of this nature can make all the difference."<sup>90</sup>

### 3.8.2 Female Genital Mutilation or Female Genital Cutting

The practice of female genital mutilation (FGM), also known as female genital cutting (FGC), is objectively a sufficiently serious form of harm to constitute persecution.<sup>91</sup> Generally, in determining whether FGM is persecution to the applicant, you should consider whether the applicant experienced or would experience the procedure as serious harm.<sup>92</sup> The BIA in *Matter of S-A-K- & H-A-H-* recognized that FGM imposed on a young child constituted past persecution.<sup>93</sup> The BIA held that she and her mother had suffered an atrocious form of persecution that resulted in continuing physical pain and discomfort and that they merited humanitarian asylum based on the severity of their harm.<sup>94</sup>

<sup>87</sup> See Memorandum from Phyllis Coven, INS Office of International Affairs, to INS Asylum Officers and HQASM Coordinators, *Considerations For Asylum Officers Adjudicating Asylum Claims From Women*, (26 May 1995), p.9.

<sup>88</sup> See UNHCR, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), para. 9; *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9th Cir. 2000); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996); and *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003).

<sup>89</sup> See, e.g., *Angoucheva v. INS*, 106 F.3d 781, 790 (7th Cir. 1997).

<sup>90</sup> *Haider v. Holder*, 595 F.3d 276, 288 (6th Cir. 2010).

<sup>91</sup> See *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

<sup>92</sup> U.S. Department of Justice, *Asylum and Withholding Definitions*, 65 Fed. Reg., 76588, 76590, Dec. 7, 2000. The proposed rule did not become a regulation but represents the agency's view on the topic.

<sup>93</sup> *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008)

<sup>94</sup> *Id.* at 465-66.

Even in countries that have prohibited the practice of FGM, the government may condone, tolerate, or be unable to protect against the practice. The fact that a state has enacted a law prohibiting FGM does not necessarily indicate that the government is willing and able to protect an applicant.<sup>95</sup>

### 3.9 Harm to Family Members or Other Third Parties

Harm to an applicant's family member or another third party may constitute persecution of the applicant where the harm the applicant suffers is serious enough to amount to persecution and where the persecutor's motivation in harming the third party is to harm the applicant.<sup>96</sup> The BIA has held that emotional harm may rise to the level of persecution where a person "persecutes someone close to an applicant, such as a spouse, parent, child or other relative, with the intended purpose of causing emotional harm to the applicant, but does not directly harm the applicant himself."<sup>97</sup> For example, the wife of a political dissident may be abducted and killed as a way of teaching her husband a political lesson.

An applicant may suffer severe psychological harm from the knowledge that another individual has been harmed in an effort to persecute the applicant.<sup>98</sup> The harm may be intensified if the applicant feels that his or her status or actions led the persecutor to harm the family member or if the applicant witnessed the harm to the family member.<sup>99</sup> The witnessing of harm to a family member or third party will not constitute persecution of the applicant, unless the intent in harming the third party is to cause harm to the applicant, the applicant's family, or all members of a group to which the applicant belongs on account of a protected characteristic.<sup>100</sup> Furthermore, as explained above, harm that would constitute torture will always rise to the level of persecution, and the definition of torture under U.S. law includes threats that another person would be imminently subjected to death or severe physical pain or suffering.<sup>101</sup>

<sup>95</sup> For additional information, see section, *Entity the Government is Unable or Unwilling to Control*.

<sup>96</sup> See Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

<sup>97</sup> *Matter of A-K-*, 24 I&N Dec 275 (BIA 2007); see also *Sumolang v. Holder*, 723 F.3d 1080, 1084 (9th Cir. 2013) (finding that the emotional harm an applicant suffered from the death of her child constituted persecution where doctors had denied the child medical treatment because of the mother's race and the parents' religion).

<sup>98</sup> For additional information, see RAIO Training module, *Interviewing - Survivors of Torture*.

<sup>99</sup> See Memorandum from Joseph Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., *Persecution of Family Members*, (30 June 1997).

<sup>100</sup> See *N.L.A. v. Holder*, 744 F.3d 425, 432-433 (7th Cir. 2014) (holding that a direct threat to an applicant's family member may cause suffering that constitutes persecution of an applicant where the threat is intended to target the entire family); *Panoto v. Holder*, 770 F.3d 43, 47 (1st Cir. 2014) (finding that the harm an Indonesian Christian applicant suffered when a bomb was planted at her church and, within six months, she witnessed a fellow Christian passenger being brutally murdered during a ferry hijacking by an anti-Christian group could constitute persecution of the applicant on account of her religion).

<sup>101</sup> 8 C.F.R. § 208.18(a)(4)(iv); see also Section 3.3, Human Rights Violations.

For example, if a persecutor severely assaults an applicant's spouse and indicates that the harm was motivated by the applicant's political activity, the applicant may be able to establish that he was persecuted on account of his political opinion. However, psychological harm suffered by an applicant based on the harm to a family member would not constitute persecution if the family member was targeted solely because of the family member's own protected characteristic rather than the protected characteristic(s) of the applicant. In the latter case, the harm was not directed at the applicant.

## 4 IDENTIFYING A PERSECUTOR

Inherent in the meaning of persecution is the principle that the harm that an applicant suffered or fears must be inflicted either by the government of the country where the applicant fears persecution, or by a person or group that the government is unable or unwilling to control.<sup>102</sup>

The UNHCR Handbook, para. 65 provides context:

Persecution is normally related to the action taken by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizable fractions of the population do not respect the religious beliefs of their neighbors. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

### 4.1 The Government

In cases in which the applicant was harmed or fears harm by the government, the applicant must establish the following:

- the harm or feared harm was on account of a protected characteristic
- the harm or feared harm is sufficiently serious to rise to the level of persecution
- the persecutor or feared persecutor is an agent or agents of the government

The Court of Appeals for the Ninth Circuit has stated that where a government agent is responsible for the persecution, it is unnecessary to consider whether the applicant sought protection from the police or other government entity.<sup>103</sup>

<sup>102</sup> See *Matter of Villalba*, 20 I&N Dec. 142, 147 (BIA 1990); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996); and *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (en banc).

<sup>103</sup> *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004).

Seventh Circuit held that substantial evidence supported the conclusion that the Indian government was not unwilling or unable to protect him at the time.<sup>111</sup>

- A Colombian applicant who was threatened and attacked several times by the Revolutionary Armed Forces of Colombia (FARC) because of her political activity did not report any of the incidents to the police. The BIA concluded that she had not established that the Colombian government was unwilling or unable to protect her because she did not seek protection from law enforcement. The Eleventh Circuit Court of Appeals held that the BIA erred in its decision because it failed to address the applicant's argument that her testimony and country conditions evidence established that reporting the attacks to law enforcement would have been futile.<sup>112</sup>

#### 4.2.4 Unwilling to Control

There may be situations in which the government is unwilling to control the persecutor for reasons enumerated in the refugee definition (the government shares, or does not wish to oppose, the persecutor's opinion about the applicant's protected characteristic).<sup>113</sup> However, there is no requirement that the government's unwillingness to protect the applicant be motivated by any protected characteristic.<sup>114</sup>

A government may be unwilling to intervene in what are perceived to be domestic disputes within a family, or in disputes between tribes, or in a dispute that involves societal customs.<sup>115</sup> You may need to evaluate country conditions information concerning relevant laws and the enforcement of those laws, as well as the applicant's testimony, to determine if the government is unwilling to control the persecutor.

Evidence that the government is unwilling to control the persecutor could include a failure to investigate reported acts of violence, a refusal to make a report of acts of violence or harassment, closing investigations on bases clearly not supported by the circumstances of the case, statements indicating an unwillingness to protect certain victims of crimes, and evidence that other similar allegations of violence go uninvestigated.<sup>116</sup>

#### 4.2.5 Unable to Control

<sup>111</sup> *Vahora v. Holder*, 707 F.3d 904, 908-909 (7th Cir. 2013).

<sup>112</sup> *Lopez v. U.S. Atty Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2010).

<sup>113</sup> UNHCR Handbook, para. 65.

<sup>114</sup> *Doe v. Holder*, 736 F.3d 871, 878 (9th Cir. 2013).

<sup>115</sup> UNHCR, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/02, 7 May 2002), paras. 9, 15 and 19.

<sup>116</sup> *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004).

No government can guarantee the safety of each of its citizens or control all potential persecutors at all times. In order for you to find that the government was "unable to control" a non-governmental persecutor when the applicant was harmed, the applicant "must show more than just a difficulty controlling private behavior. Rather, the applicant must show that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims."<sup>117</sup> Where the state has made reasonable efforts to control the persecutor or protect the applicant, the harm the applicant suffered does not constitute persecution.<sup>118</sup> However, generalized evidence that the government has attempted to control a private persecutor does not preclude you from finding, based on the applicant's testimony and the record as a whole, that the government was unable or unwilling to control the persecutor in an applicant's individual case.<sup>119</sup> In most cases, the determination of whether a government is unable to control the entity that harmed the applicant requires careful evaluation of the most current country of origin information available, as well as an evaluation of the applicant's circumstances.

#### Examples

- A Pakistani applicant received death threats from the Taliban after he urged people in his community to oppose them, and his house was attacked with a grenade. He reported the incidents to the police, and they investigated and took statements from witnesses, but they did not apprehend the perpetrators. The First Circuit upheld the BIA's determination that the applicant had not demonstrated the Pakistani government's inability to control the persecutors because law enforcement officials had made reasonable efforts to protect him and, according to country conditions evidence, had ~~had~~ some success in combating the Taliban in his area; although the government had not "eradicated" the threat the Taliban posed, a reasonable factfinder could conclude that it was willing and able to control them.<sup>120</sup>
- A Mexican applicant was kidnapped and beaten by the Los Zetas drug cartel because of his own activities opposing Los Zetas while in the Mexican armed forces. The Ninth Circuit held that the BIA's determination that the Mexican government was willing and able to control the persecutors was in error because it failed to consider significant evidence in the record that the Mexican government's efforts to control the persecutor had been

<sup>117</sup> *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732-733 (8th Cir. 2013) (citations omitted); see also *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005) (holding that the state must provide "protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct").

<sup>118</sup> *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013).

<sup>119</sup> See *N.L.A. v. Holder*, 744 F.3d 425, 441-442 (7th Cir. 2014) (holding that the BIA erred in relying solely on country conditions reports indicating that some parts of the Colombian government have recently engaged in efforts to control the FARC and ignoring applicants' testimony that the police were not willing to help them in their particular situation).

<sup>120</sup> *Khan*, 727 F.3d at 7.

unsuccessful; instead, it had focused solely on the government's willingness.<sup>121</sup>

A government in the midst of a civil war, or one that is unable to exercise its authority over portions of the country may be unable to control the persecutor in areas of the country where its influence does not extend.<sup>122</sup> An evaluation of how people similarly situated to the applicant are treated, even in portions of the country where the government does exercise its authority, is relevant to the determination of whether the government is unable to control the entity that persecuted the applicant.

In order to establish that he or she is a refugee based on past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis.<sup>123</sup> The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution in the specific locale where the applicant was persecuted.

## 5 ELIGIBILITY BASED ON PAST PERSECUTION

### ~~5.1~~ In the Refugee Context: Past Persecution is Sufficient

Overseas, if an applicant for classification as a refugee credibly establishes that the harm he or she suffered in the past rose to the level of persecution, and that the harm was on account of a protected ground, the past persecution, in and of itself, establishes the applicant's eligibility for refugee status. However, officers must still elicit testimony on and assess whether or not an applicant has a well-founded fear of persecution on account of any of the five protected grounds.<sup>124</sup>

### 5.2 In the Asylum Context: Presumption of Well-Founded Fear

In the asylum context, if an applicant has established past persecution on account of a protected characteristic, the applicant is not required to separately establish that his or her fear of future persecution is well-founded.<sup>125</sup> It is presumed that the applicant's fear of future persecution, on the basis of the original claim, is well-founded, and the burden of proof shifts to USCIS to establish by a preponderance of the evidence that,

<sup>121</sup> *Madrigal v. Holder*, 716 F.3d 499, 506-507 (9th Cir. 2013).

<sup>122</sup> *Matter of H-*, 21 I&N Dec. 337, 345 (BIA 1996).

<sup>123</sup> *Mashiri v. Ashcroft*, 383 F.3d 1121, 1122 (9th Cir. 2004).

<sup>124</sup> See RAD Refugee Application Assessment SOP. RAD requires assessment of both past persecution and well-founded fear for several reasons, including situations of split credibility, where the applicant is found not credible on past persecution, but demonstrates a credible, well-founded fear of future persecution. See RAIO Lesson Plan,

<sup>125</sup> 8 C.F.R. § 208.13(b)(1); see *Matter of A-T-*, 24 I&N Dec. 617 (AG 2008)

- due to a fundamental change in circumstances, the fear is no longer well-founded or
- the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.<sup>126</sup>

If USCIS does not meet this burden, the applicant's fear is well-founded. A well-founded fear of persecution on the basis of the original claim means fear of persecution on account of the protected characteristic on which the applicant was found to have suffered past persecution. If USCIS is able to rebut the presumption of well-founded fear, the applicant may still be granted asylum, in the exercise of discretion, based on severe past persecution, or other serious harm. For more information, see [\[ASM Supplement 1\]](#)

## 6 CONCLUSION

An applicant must meet all the elements of the refugee definition in order to establish eligibility for protection as a refugee or asylee. Unlike the international definition, the definition of refugee in the INA allows an applicant to establish eligibility by a showing of past persecution, without having to establish a well-founded fear of persecution in the future. In order to show past persecution the applicant must establish that he or she has suffered harm in the past that rises to the level of severity necessary to constitute persecution, that the harm was inflicted on account of a protected characteristic, and that the agent of harm was either a part of the government, or an entity that the government was unable or unwilling to control.

## 7 SUMMARY

### 7.1 Persecution

To establish persecution, an applicant must prove that the harm he or she experienced was inflicted by the government or an entity the government was unable or unwilling to control.

To establish persecution, the level and type of harm experienced by the applicant must be sufficiently serious to constitute persecution.

<sup>126</sup> For further information refer to RAIO Training module, *Well-Founded Fear and Matter of A-T-*, 24 I&N Dec. 617 (AG 2008).

There is no single definition of persecution. Guidance may be found in precedent decisions, the UNHCR Handbook, and international human rights law. The determination of whether an act or acts constitute persecution must be decided on a case-by-case basis, taking into account all the circumstances of the case including the physical and psychological characteristics of the applicant.

Serious violations of core or fundamental human rights that are prohibited by customary international law almost always constitute persecution. Less severe human rights violations may also be considered persecution. Discrimination, harassment, and economic harm may be considered persecution, depending on the severity and duration of the harm. The harm may be psychological, such as the threat of imminent death, the threat of infliction of severe physical pain or suffering, or the threat that another person will imminently be subjected to death or severe physical pain or suffering.

Acts that in themselves do not amount to persecution may, when considered cumulatively, constitute persecution.

## 7.2 Eligibility Based on Past Persecution

In the overseas refugee context, an applicant is eligible for refugee status if he or she establishes past persecution on account of one of the five protected grounds. There is no requirement that the applicant have an on-going fear of future persecution. Also, if the past harm is found to have risen to the level of persecution, there is no additional requirement that the harm be particularly severe and compelling in order to grant status on past persecution alone.

In the asylum context, after an applicant has established eligibility through past persecution, you must still consider whether there is a well-founded fear. In this inquiry the burden of proof is on the government to show by a preponderance of the evidence that a well-founded fear no longer exists. If you can show that the applicant no longer has a well-founded fear, the application should be denied or referred as a matter of discretion unless the applicant can show that there are compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution, or that there is a reasonable possibility they would face other serious harm if returned.

## PRACTICAL EXERCISES

### Practical Exercise # 1

- Title: *Persecution Exercise*
- Student Materials:

#### Fact Pattern:

You are the parent of a sixteen year old girl. She attends the local public high school and is a member of the marching band. She is also involved with several extra-curricular activities. She has a 3.8 grade point average and has already been accepted to several distinguished universities.

One activity that she participates in is a student club known as Students for Civic Responsibility, and she is one of the main organizers. Another is Students for Social Change, and she is the Secretary of this club. These clubs have been very active in holding information fairs on a wide range of issues, such as police violence, spouse abuse, corruption in local government, and environmental concerns. These clubs are regularly contributing articles and letters to the local paper, have their own websites, and produce their own monthly newsletters.

One winter day you returned home from work, and your daughter did not come home from band practice at the normal time that she usually arrives home. After a delay of about 40 minutes, you begin to call a few of her friends. They tell you that band practice was cancelled due to the band director's illness, and that there were no after-school activities. The last person you talk to tells you that he saw your daughter talking to some police officers at the parking lot of the school, but his bus pulled away before he could see what happened. You call the school, but at this late hour, there is no answer.

You then call the local police station to find out if there was some problem involving your daughter, and if they know where she is. The duty officer at the station tells you that he does not have any record of any incident involving your daughter, and that there was no incident at the school that day. When you explain that your daughter was last seen talking to police officers at the school, the duty officer tells you that he has no record of the police being at the school that day. You then request to make a missing persons report, but are advised that you must wait 48 hours after the disappearance before they will take a report.

You call all of the other area police departments, but you are told the same thing. You call every person that you can think of that might know of your daughter's

whereabouts, explaining the situation, and asking them for more leads. All of your leads turn up dry.

It is now about 10:00 PM. You get in your car and begin driving throughout the neighborhood, starting with the high school, and working your way out. You drive until 2:00 AM, and then return home. No one is at home and there are no messages on your answering machine. You call out from work the next morning, and repeat the whole process. You finally get the police to accept a missing persons report early. You contact the local television news station and ask for help. They tell you to call them the next day, just in case she shows up.

On the third day you call out from work again and continue to look for your daughter. Once again, there is no luck.

The same on the fourth day. But on the fourth night you get a telephone call at 1:00 AM and you hear your daughter crying and begging you in a shaken voice to pick her up outside the Municipal Building. You speed to the building and find your daughter huddled in a phone booth. You make sure that she is not physically injured, and take her home.

After calming her, you are able to talk to her about what happened. She tells you that the police came to the school and stopped her when she came out of the school. Once they verified her identity, they told her that there was a family emergency, and that she must accompany them to the station. Once at the station, she was handcuffed without explanation, and taken by two men in dark suits to a car, and was driven to another building about an hour away. She was placed in a solitary cell. The men did not talk to her at all, despite her plea for an explanation. She was given two meals each day, and her cell had a sink and faucet with potable water. On the last night, she was taken from her cell, again without explanation, and dropped off in front of the municipal building. She saw the telephone booth and called home. She has no idea who the men were or why she was held for four days.

The next day you call the police and demand an explanation, but they tell you that they do not know what you are talking about. You call a reporter at the local television station and try to explain the situation, but the reporter tells you that, without more information, he cannot help you. In the meantime, your daughter refuses to leave the house, and is afraid to be alone.

Finally, one day you get an anonymous telephone call and the caller tells you that they know that your daughter was under the custody of the FBI. You call the nearest FBI office and demand an explanation. You are simply told that it is none of your business, and that if you persist, you might need several days in a cell.

#### Discussion:

1. Would you conclude that your daughter was a victim of persecution? If so,

why? If not, why not?

#### Practical Exercise # 2

- Title: *Matter of H - Past Persecution*
- Student Materials:

#### Fact Pattern:

The applicant is a native of Somalia and an undisputed member of the Darood clan and the Marehan subclan, an entity which is identifiable by kinship ties and vocal inflection or accent. For 21 years Somalia had been ruled by Mohammed Siad Barre, a member of the Marehan subclan, which constitutes less than 1 percent of the population of Somalia. In December of 1990, an uprising was instituted by members of the other clans, which ultimately caused Mohammed Siad Barre to relinquish his power and to flee the capital city of Mogadishu on January 21, 1991.

As a result of favoritism that had been shown to members of the Marehan subclan during the course of Mohammed Siad Barre's often brutal regime, the clans which rebelled against this regime sought to retaliate against those who had benefited from the regime. The applicant's father, a businessman who had greatly benefited from his membership in the Marehan subclan, was murdered at his place of business in Mogadishu on January 12, 1991, by members of the opposition United Somali Congress, composed mostly of members of the Hawiye clan. The applicant's family home, located in the Marehan section of the city, was targeted 2 days later by the same group. During the course of that attack, the applicant's brother was shot. He was later murdered at the hospital to which he had been brought for the treatment of his injury.

On January 13, 1991, 1 day after the attack on the applicant's home, he fled Mogadishu with his step-mother and younger siblings to a smaller town, Kismayu, which was a stronghold of the Darood clan. Approximately 1 month later, that town was attacked by the United Somali Congress. As a result, the applicant, who was not with his family at the time, was rounded up and detained without charges along with many other Darood clan members. During the course of his 5-day detention, the applicant was badly beaten on his head, back, and forearm with a rifle butt and a bayonet, resulting in scars to his body which remain to the present. A maternal uncle of the applicant, who was a member of the United Somali Congress, recognized him and assisted in his escape, driving him approximately 40 kilometers in the direction of Kenya.

## Practical Exercises

## Definition of Persecution and Eligibility Based on Past Persecution

### Discussion:

1. Is the applicant unwilling or unable to return to his/her country due to past harm or mistreatment? Yes  No
2. If no, go to Question 3. If yes, identify the perpetrator(s) of, and describe, harm or mistreatment.

### Perpetrators:

3. Harm/Mistreatment:
4. Does the claimed harm or mistreatment rise to the level of persecution? If no, explain. Yes  No

### Practical Exercise #3

- Title: Applicant Testimony and Interview Notes – Past Persecution
- Student Materials:

#### Fact Pattern:

The Applicant testified that before fleeing his country, he resided with his son and his Russian wife in the Ukrainian city of Kharkiv. On February 12, 1992, he attended a political rally at which he gave a short speech promoting democracy and unification with Russia. Immediately after he finished his speech, someone grabbed him and began to beat him. He recognized the insignia on the clothing of his attacker as a symbol of "Rukh," a nationalistic, pro-Ukrainian independence movement. The Applicant required stitches on his lip and eyebrow from the beating. That evening, he discovered a leaflet from Rukh in his pocket, with the message "Kikes, get away from Ukraine." He testified that he began to receive similar anti-Semitic leaflets at home in his mailbox or slipped under the door. The record contains one of the leaflets he received in 1993.

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

On January 3, 1993, the Applicant was attacked on his way home from work. He heard a voice saying, "Sasha, we've been waiting for you for quite some time." He

## Practical Exercises

## Definition of Persecution and Eligibility Based on Past Persecution

was thrown to the ground and kicked. During the beating, the attackers repeatedly warned him to take his "Moskal" wife and "mixed" son out of Ukraine. He sustained a rib injury from the attack.

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

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

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

### Practical Exercise #4

- Title: Eligibility – Discussion of Discrimination or Harassment Persecution
- Student Materials:

#### Fact Pattern 2-a:

Applicant is a 50-year-old male native and citizen of Egypt who entered the United States in 1990, and was admitted as a visitor.

Applicant credibly testified that he is a Coptic Christian. Applicant was a successful accountant in Cairo and owned his own business. He was the only Christian business owner in a building with approximately 15 businesses. Because of Applicant's social standing, fundamentalist Muslims tried to force him to convert to Islam; they felt that it would be a great success if a successful businessman converted to Islam. Fundamentalist Muslim religious leaders visited Applicant several times at his office and to tell him how much he could benefit by becoming Muslim. Applicant expressed his Christian beliefs and asked the religious leaders to leave him alone. He accused them of being fanatics. The Muslim religious leaders

then organized a Muslim boycott of Applicant's business. As a result, Applicant lost approximately 40% of his clientele. Other business owners in the building began to pray in front of Applicant's door making it difficult for clients to come and go. Whenever they encountered Applicant, the other business owners would degrade Applicant's religion. One day Applicant found that the sign for his business had been smashed. Applicant learned from a friend that the Muslims who smashed the sign arranged with the police to accuse Applicant of defaming Islam if he reported the incident. Therefore, Applicant was afraid to report the incident to the police. Applicant was also afraid to hang another sign identifying his business. Shortly after this, Applicant's car was vandalized.

Applicant used to attend Church regularly. However, because of the harassment he and other congregants experienced, Applicant began to attend church less frequently. Stones and feces were thrown at his church. Muslims standing outside would call out pejorative names and degrade the Christian religion. As a result, Applicant and his family no longer felt it was safe to go to church.

Because of the decrease in business, Applicant found it more difficult to support his family. He also worried about his children who were often taunted at school because of their religion. He feared the situation for Christians would only deteriorate. Therefore, he brought his family to the United States and applied for asylum.

#### Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution.
2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.
3. What additional information could be elicited to better evaluate the claim?

#### Fact Pattern 2-b:

Applicant is a 31-year-old female citizen of Belarus. Applicant credibly testified that she was often humiliated at school because of her Pentecostal religion. As an adult, Applicant continued to be harassed because of her religion. Applicant and her husband often held prayer meetings in their home. Their neighbors, who accused them of participating in a cult and practicing magic, would throw trash and waste in front of Applicant's door and would threaten to call the police, which they often did. When the police arrived, they would push people around and threaten to exile Applicant and her husband if they did not stop praying. On one occasion when a neighbor called the police in 1989, the police roughly pushed the congregants and destroyed some of Applicant's property. Applicant was eight months pregnant at

the time. The police told the congregants that if they did not stop praying, they would be detained.

~~Applicant had difficulty finding and retaining employment. Her employers dismissed her after learning that the police were often summoned to her home because she held prayer meetings there.~~

Applicant received inadequate medical care when she was once hospitalized for removal of a tumor. One of the nurses knew Applicant was Pentecostal. She told the other nurses, who then neglected to care for Applicant. Applicant was often left waiting for long periods of time before nurses would respond to her calls for assistance to get to the bathroom, and several times Applicant was not brought meals when other patients were fed. Two times, nurses neglected to give her pain killers at the prescribed time.

#### Discussion

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Also consider the individual characteristics of Applicant (would it make a difference whether or not she were pregnant when pushed?)
2. What additional information could be elicited to better evaluate the claim?

#### Fact Pattern 2-c:

Applicant is a 28-year old male from Russia. Applicant credibility testified that he is Jewish, though he has never practiced his religion and does not believe in any one religion. Because he is Jewish, he experienced discrimination in Russia. For example, he was not admitted to a university and could not pursue his dream to study Russian literature. He was admitted to a technical school for machinery and technology, where he learned the trade of machinist. Applicant stated that he had difficulty obtaining employment as a machinist and eventually found work as a cashier. Applicant was never given any raises and was generally harassed at work. For example, his supervisor would tell him that he was not correctly doing his work, even though Applicant followed all the instructions his supervisor gave him. Applicant came to the United States to visit an aunt. He now wants to remain in the United States where he can pursue his life-long dream of studying Russian literature.

#### Discussion

1. Discuss issue of whether the harm Applicant experienced in the past

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甚至可以 dismiss due to some reason I do not know

amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment. Consider also individual characteristics of Applicant.

2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 2-d:**

Applicant is a 25-year old citizen of Russia. When Applicant was in primary school, she was the only Jew in her class. The teacher often hit Applicant's hands with a wooden pointer without giving her a reason. She was too young to understand at the time, but she now believes she was treated this way because she is Jewish. None of the other children were treated the same way. Applicant's parents moved her to another school, where she had problems with other students. They made fun of her and taunted her, making pejorative nicknames out of her last names, because she is Jewish. Applicant was moved to a different school. Applicant had difficulties with her feet and received a note from a physician explaining that she should not participate in physical exercises and competition. Her teacher did not believe that she had problems with her feet and said the note was only an excuse from a Jewish doctor. Applicant was forced to participate in a physical competition and, as a result, was hospitalized for several months as doctors tried to heal her feet.

Applicant did not receive good grades at the university, even though she prepared better than other students. Because she did not receive good grades, Applicant was not entitled to a stipend. She believes she was given poor grades, because she is Jewish. Since she could not obtain a stipend, she was forced to attend night school so that she could earn money during the day. She was not able to pass one class, even though she prepared for it. The professor explained that she would not pass the Applicant, because Applicant is Jewish. In 1987, Applicant was expelled from school, because she complained about receiving a lower grade than a student who was not as prepared as she was. When the faculty later changed, Applicant was readmitted. As a result of these set-backs, it took Applicant seven years to graduate from university, even though the average time for completion was four years.

From 1986 to 1988, Applicant worked as an assistant teacher. She felt that other teachers isolated her and made it difficult for her to work with the children by speaking poorly to her in front of the children. Applicant told a teacher that her grandfather was on the ritual committee at the main Moscow synagogue. This exacerbated the poor treatment she had been receiving. Because Applicant felt she could not do her job in that atmosphere, she quit her job. She then worked as a teacher at a different school until she left Russia.

One evening as Applicant was returning home from a friend's house, she was stopped by three men. They pushed her and made pejorative comments such as

"You Jews should get out of Russia." They spoke in general about Jews and also said, "Pamiat will show you," indicating that they were associated with the anti-Semitic group, Pamiat. A man walked near-by, and his presence frightened the three men. They ran away, leaving Applicant frightened, but unharmed.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.
2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 2-e:**

Applicant is a 48-year old male citizen from Belarus. Applicant credibly testified that he was born and raised in Minsk, where he attended the Polytechnic Institute. After graduation, he was certified as an electrical engineer. Applicant interviewed for a position as an electrical engineer at the Enterprise of Refrigeration and was told to report to personnel to complete an application. At the personnel office, Applicant's internal passport was checked. He was then told that there was no position available. Applicant believes he was told this because his internal passport revealed that he is Jewish. Applicant took another job as an electrician and continued to work as an electrician for approximately twenty years until he came to the United States in 1991. Applicant's job required him to travel quite a bit. At one time, he was required to spend two months to the Gomel Region, where radiation from Chernobyl was still very high. When Applicant asked why he, as opposed to other employees, was sent to that region, he was told, "Go to Israel, there is no radiation there. You should be thankful that with your passport, you are able to keep this job."

Applicant's wife worked as an accountant. After Applicant's wife married Applicant, she stopped receiving the promotions she had been receiving every year prior to the marriage.

In the last three or four years that the Applicant lived in Minsk, his family received threatening letters in the mail box once or twice a month. The letters said, "Dirty Jews, go to Israel."

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into

account severity and duration of discriminatory actions and/or harassment.

- What additional information could be elicited to better evaluate the claim?

#### Fact Pattern 2-f:

Applicant is a 38-year old male citizen of Romania. Applicant credibly testified that he is a woodcarver and had his own studio and business in Romania. In 1986, Applicant organized the people in his town to strike to protest the building of a chemical plant near the town. Applicant publicly spoke out against the government – accusing the local politicians of corruption and failure to represent the people's interest. Applicant began receiving anonymous letters stating that if he did not stop speaking out against the government, his home and studio would be burned. Applicant's wife was fired from her government job. Undercover government agents began to watch Applicant and would go to his studio about two or three times a week. When the undercover agents went to Applicant's studio, they would linger inside, asking him questions about what he did and how much money he made, and would watch the people who entered his studio. Sometimes, the agents would remain at the studio all day, making it difficult for Applicant to work. Customers, who feared the agents, stopped coming to Applicant's studio. This continued for several months before Applicant left Romania.

#### Discussion

- Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect, taking into account the severity and duration of discriminatory actions and/or harassment.
- What additional information could be elicited to better evaluate the claim?

#### Practical Exercise #5

- Title: Eligibility – Discussion of Past Persecution
- Student Materials:

#### Fact Pattern 3-a:

Applicant is a 40 year old female native and citizen of India. Applicant credibly testified that she is Muslim, but lived in a predominantly Hindu neighborhood. During Muslim-Hindu riots that erupted after the destruction of a mosque by

(2)

fundamentalist Hindus, Applicant remained hidden in her bedroom, praying for protection of her son, who had been out in the street when the rioting erupted. The riots occurred during the month of Ramadan and Applicant was fasting, as prescribed by her religious beliefs. As Applicant prayed, a Hindu mob burst into the house and pulled Applicant out into the streets. They removed from Applicant's head the scarf that she wore over her head whenever in the company of men and began making obscene gestures at her. Several men then dragged a beaten teenager and threw him at her feet. She recognized the teenager as her son. The leader of the mob thrust a piece of cooked pork into Applicant's hand and ordered her to eat it. At first Applicant refused, because she was prohibited by her religious beliefs from eating pork and she was also prohibited from eating prior to sundown during the month of Ramadan. The leader struck Applicant's son with a bamboo stick, then threatened to beat her son even more if she did not eat the pork. Despite the religious prohibition, Applicant ate the pork to save her son from further abuse. Satisfied, the leader of the mob led the mob on to find their next victim.

#### Discussion

- Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect.
- What additional information could be elicited to better evaluate the claim?

#### Fact Pattern 3-b:

Mr. Z is a citizen of Poland. From 1974 to February 1982, he worked as a manager of a livestock farm owned by the Polish government. At the end of 1981, he refused to sign an oath of loyalty to party officials. Soon after this refusal, the police arrested and interrogated Mr. Z three times. He was not physically mistreated on any of these occasions. In February of 1982, he was dismissed from his job. He was not given a reason. He then started his own business, a fox farm. He was again arrested in April of 1982 and interrogated about his association with Mr. M, a Solidarity member to whom he had loaned money. Although Mr. Z had loaned Mr. M money, he was not himself involved in the activities of Solidarity. Beginning in June of 1982 and continuing until December of 1984, the police would summon Mr. Z every two to three months and interrogate him over a period of three to five hours, primarily about his relationship to Mr. M, but also about his own activities. He was not physically harmed during any of these detentions. Mr. Z's final detention occurred in 1984, while he was in Warsaw selling fox furs. He was detained for 36 hours but released once the police determined that his papers were in order. Although the police spoke harshly to the applicant, he was not physically harmed during this detention. When Mr. Z returned home after this detention, he found that his apartment had been searched and some money and foxes confiscated. He left Poland shortly thereafter and entered the United States on a tourist visa.

**Discussion**

1. Discuss issue of whether the harm Applicant experienced in the past amounts to persecution. Which rights were affected? How seriously? Consider each incident and then consider cumulative effect.
2. What additional information could be elicited to better evaluate the claim?

**Fact Pattern 3-c:**

Applicant is a 42-year-old male native and citizen of Peru. Applicant credibly testified that he lived in the city of Lima, where he worked at a bank. He owned and his wife managed a small dairy farm outside the city. In early 1988, he attended a public rally for the Democratic Action (AD) party at the invitation of his uncle, a political activist. At the rally, Applicant was challenged by a police officer who demanded his identification and questioned him about his supposed membership in *Sendero Luminoso* (SL). Applicant denied membership in SL. Applicant's wife testified that her husband may have been questioned because his uncle has a history of political activism for the opposition AD party and had often been harassed by the police.

In the weeks following the rally, Applicant was questioned repeatedly at his home and work by police officers concerning his supposed affiliation with SL. On three occasions he was taken from home by the police for further interrogation at the police station. The interrogation sessions at the police station lasted from 3 to 5 hours. During these interrogations, Applicant was initially pressured by slaps in the face with a wet cloth, and then the abuse progressed to blows with closed fists. At the bank where Applicant worked, police officers periodically appeared and kept watch on him while he worked, causing consternation among his co-workers and his supervisor. Applicant insisted that he had no relation to SL and the police were unable to come up with any evidence to link him to the terrorist group.

On May 15, 1988, two men attempted to abduct Applicant's son as he was leaving school. They were deterred by alarms which Applicant's wife and other parents raised. Applicant's wife believes the abductors were policemen. This incident caused Applicant to take precautionary measures. He sent his wife and son to live with his grandparents in another city and began planning the family's departure from Peru.

Applicant testified further that the employees of his dairy farm learned that he was under suspicion as an SL member. Some of the employees were SL members or sympathizers. They took advantage of the situation to invite him to join SL. He said he wanted nothing to do with the SL because he opposed their Communist ideology. Shortly after his departure from Peru in September of 1988, Applicant's dairy was burned by a mob shouting "Long Live *Sendero Luminoso*!"

**Discussion**

1. Does the harm Applicant suffered from the police amount to persecution?
2. Does the harm Applicant suffered from the SL amount to persecution? Discuss which rights have been violated and the degree of harm Applicant suffered from each event and cumulatively.
3. What additional information could be elicited to better evaluate the claim?

**Practical Exercise #6**

- **Title:** Eligibility – Discussion of Persecution
- **Student Materials:**

**Fact Pattern 4-a:**

Vladimir is a 43-year old native of Lviv, Ukraine, where he owns a small bookstore. He started the bookstore because no one would hire him for employment because his father is ethnic Turkmen. Vladimir's name and distinct facial features make him stand out among Ukrainians and reveal his ethnicity.

Starting five years ago, policemen came to his store demanding that he pay them approximately \$100.00 monthly to make sure that "nothing would happen" to his store. Although the amount represented a severe hardship to him, he paid it because he was afraid what might happen if he did not.

Five months ago, the policemen told him that his mandatory monthly donation was increased to \$500.00. He told them that he was barely able to pay \$100.00. They warned him to consider the consequences. He had no money to pay the demanded amount. The policemen returned after one week, and severely beat him with sticks, and kicked him with their steel-toed boots. They left him alone, bleeding and unconscious in the back of his store. Luckily, he was found by an off-duty employee, who returned to the store having forgotten her keys.

Vladimir returned to the store after a month of recuperation. After he returned to work, he re-arranged the window display to feature a book critical about the Ukrainian role in the Nazi holocaust during World War II. The book had been discussed at the Orthodox Church he attends.

The following morning, before Vladimir opened the store, a large crowd gathered outside and chanted, "No more Jews." A few minutes later, several men in the crowd broke the storefront glass and destroyed all the books in the new display.

## Practical Exercises

### Definition of Persecution and Eligibility Based on Past Persecution

They then proceeded to set the business on fire, which completely destroyed the building.

When Vladimir arrived, he was stunned by the chaotic scene. A policeman passing through the area observed the commotion and quickly came to the scene. When the policeman inquired as to the cause of the trouble, the people in the crowd told him that it was because of the displayed books. The policeman observed the activity for a few minutes and then hit Vladimir on the head several times with his nightstick. Vladimir lost consciousness. "That should do it," the policeman said before returning to his vehicle and driving away.

Vladimir was hospitalized for 2 days to recover from the beating. After he was released, he went to visit the site of his store, and he saw the store had been totally destroyed by fire. On its site was a huge sign, stating "Ukrainians yes, Jews no."

#### Discussion

1. Discuss whether the harm Vladimir experienced in the past amounts to past persecution.
2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of discriminatory action and/or harassment.
3. What additional information could be elicited to better evaluate the claim?

#### Fact Pattern 4-b:

The applicant, Laurita Tong, is a 24-year old Chinese ethnic female native of Indonesia. She has lived her entire life in Jakarta. Three years ago, she completed her university studies with a bachelor's degree in Travel and Tourism. Her family owns a successful travel agency in Jakarta, where she works.

Laurita is Catholic by birth and attends church whenever she can – usually twice a month and on most holy days.

On April 14, 2004, she was walking to work when a native Indonesian man, who was sitting on the steps of his house, stared at her as she walked by. Each day thereafter, he stared at her as she walked to work. Laurita was convinced that he was giving her the "evil eye," and that horrible things would happen to her. The windows of his house were covered with pictures of Muslim religious leaders.

On May 2, 2004, a group of native Indonesians blew up the church that Laurita attends. These people often harassed the churchgoers on Sundays and told them that they would be cursed unless they converted to Islam. Laurita became afraid to attend church after that happened.

## Practical Exercises

### Definition of Persecution and Eligibility Based on Past Persecution

On May 12, 2004, Indonesian natives raped Laurita's best friend, Melanie. The men told her that she should "go back to China."

On May 27, 2004, Laurita was leaving a shoe store when a native Indonesian man grabbed her roughly and yelled, "I hate you rich Chinese. Give me all your money, or I'll kill you now." Laurita handed over her purse, and the man ran away.

After these events, Laurita suffered from severe anxiety and depression. She was afraid to leave her house because she was worried what would happen to her. She did not leave her house until June 2, 2004, when she left Indonesia. Her father gave her an airplane ticket for Seattle, where she arrived the same day.

#### Discussion

1. Discuss whether the harm experienced by Laurita in the past amounts to persecution.
2. Which rights were affected? How seriously? Consider each incident and then consider the cumulative effect, taking into account the severity and duration of each act.

#### Fact Pattern 4-c:

Applicant, Lin Xiang, is a 25-year old female native and citizen of China. For two years, she has worked as a bookkeeper at the Fujian Electronics Cooperative, a private business, which has received subsidies from the Chinese government. During the last three months, Lin and most of the other 314 workers have not received any pay because of unexpected financial shortages.

Lin became increasingly outraged. She wrote and printed a pamphlet explaining that the owners of the business had recently bought new homes, luxury vehicles, and even enjoyed vacations in Monte Carlo. She included a photo of one of the owner's homes in her pamphlet. Because of her position at the company, she had personal knowledge of the financial circumstances of the business.

Lin went out late one night in February to distribute the pamphlets into random mailboxes in several apartment buildings. She distributed the pamphlets in a similar manner each night for ten nights. On the tenth night, she was walking in a different neighborhood with about 75 pamphlets in her backpack when a policeman asked her what she was doing out on the street at 1:10 a.m. She replied that she came outside to walk because she could not sleep. He inquired as to what she carried in her backpack, and she told him she had documents from her work. He insisted on inspecting the documents, and after he did so, he angrily chastised her for lying and for disturbing the public social order. He then handcuffed her and brought her to the local Public Security Bureau.

Upon arrival at the Public Security Bureau, Lin was required to identify herself,

and to explain what she had been doing. She explained that she had not been paid since December, and that she did not have enough food to feed her little girl. The police asked Lin who employed her and who put her up to distributing the pamphlets. Lin told the police that she does not get paid for her work and that everything she does is accomplished on her own.

The investigator angrily stated, "I don't believe you. I want you to examine yourself, and understand the damage you have done," he said. Then, he grabbed her and struck her on her back with an electric baton. She was released without conditions after 24 hours without further harm. However, as a result of the electric shock, she suffered a miscarriage in her third month of pregnancy.

After her release, she received notice that she was terminated from her employment. She sought other employment, but was unable to find any job because of her "bad record."

She became despondent, and realized that she could no longer live in China.

#### Discussion

1. Does the harm experienced by the applicant constitute persecution?
2. What facts support your conclusion?
3. What additional information, if any, would help evaluate this claim?

The output of the *House of Commons* debate is an overview of all possible arguments pro and con of the position. Because of the competitive element in the debate all participants are stimulated to actively contribute and take turns.

- **Method**

#### Preparation

The debate will be based on any of the fact patterns from the practical exercises above, seeking subject matter that will be stimulating, controversial and interesting for all participants. The group will be split into three teams and for each fact pattern used, one team will be assigned the role of supporter of the applicant's claim, one group will be assigned to oppose the applicant's claim, and the third group will act as a jury. This will not take more than 5 minutes.

#### Tasks

Every group prepares, in separate rooms, for the coming debate. In approximately 10 minutes, each group collects arguments for the defense of the group's stand in the debate. The participants prepare themselves both on the content of the arguments and on the presentation of the arguments.

#### Organization

The debate will be facilitated by a panel chairman. Next to this, there is the jury group, who will observe and judge the debate and the debaters.

### Practical Exercise #7

#### Alternative Exercise For Any of the PEs Above With Multiple Fact Patterns

- **Title:** *House of Commons Debate*

- **Introduction**

The participants of the face-to-face session are challenged in the *House of Commons* debate to react to stimulating positions. A panel chairman facilitates the debate and a jury is responsible for the judgment concerning the content of the arguments. The nature of the positions and the role of the panel chairman guarantee a lively discussion, in which "pro's" and "con's" surface very quickly. Per round you need approximately 45 minutes.

- **Output**

### SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

#### REQUIRED READING

1. 8 C.F.R. § 208.13(b)

#### ADDITIONAL RESOURCES

1. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors and Deputy Directors, Change in Instruction Concerning One Year Filing Deadline and Past Persecution, (15 March 2001) (HQ/IAO 120/16.13).
2. Memorandum from Joseph E. Langlois, Director, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Persecution of Family Members, (30 June 1997).
3. Memorandum from David A. Martin, INS Office of General Counsel, to Management Team, et al., Asylum Based on Coercive Family Planning Policies – Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (21 Oct. 1996) (HQCOP 120/11.33-P).
4. Memorandum from David A. Martin, INS Office of General Counsel, to Asylum Division, Legal Opinion: Palestinian Asylum Applicants, (27 Oct. 1995) (Genco Opinion 95-14).
5. Memorandum from David A. Martin, INS Office of General Counsel, to John Cummings, Acting Assistant Commissioner, CORAP, Legal Opinion: Application of the Lautenberg Amendment to Asylum Applications Under INA Section 208, (6 Oct. 1995) (Genco Opinion 95-17).
6. Memorandum from Rosemary Melville, Asylum Division, INS Office of International Affairs, to Asylum Office Directors, et al., Follow Up on Gender Guidelines Training, (7 July 1995) (208.9.9).

7. Memorandum from Phyllis Coven, INS Office of International Affairs, to Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, (26 May 1995).
8. T. Alexander Aleinikoff. "The Meaning of 'Persecution' in United States Asylum Law," *International Journal of Refugee Law* 3, no. 1 (1991): 411-434.
9. UNHCR, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies (Aug. 2005).

#### SUPPLEMENTS

##### ASM Supplement – 1

##### **Exercise of Discretion to Grant Based on Past Persecution, No Well-Founded Fear**

If past persecution on account of a protected characteristic is established, then the applicant meets the statutory definition of refugee. Regulation and case law provide guidelines on the exercise of discretion to grant asylum to a refugee who has been persecuted in the past, but who no longer has a well-founded fear of persecution.<sup>127</sup>

##### • Granting Asylum in the Absence of a Well-Founded Fear

Regulations direct that the adjudicator's discretion should be exercised to deny asylum to an applicant whose fear of future persecution is no longer well founded,<sup>128</sup> unless either of the following occurs:

- "The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution."<sup>129</sup>
- "The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."<sup>130</sup>

##### • Severity of Past Persecution

When evaluating when to exercise discretion to grant asylum based on past

<sup>127</sup> INA 101(a)(42)

<sup>128</sup> 8 C.F.R. § 208.13(b)(1)(iii)

<sup>129</sup> 8 C.F.R. § 208.13(b)(1)(iii)(A)

<sup>130</sup> 8 C.F.R. § 208.13(b)(1)(iii)(B)

persecution alone, the factors you should consider include:

- duration of persecution
- intensity of persecution
- age at the time of persecution
- persecution of family members
- conditions under which persecution was inflicted
- whether it would be unduly frightening or painful for the applicant to return to the country of persecution
- whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted
- any other relevant factor

• **BIA Precedent Decisions**

Several BIA decisions provide guidance on the circumstances in which persecution has been so severe as to provide compelling reasons to grant asylum in the absence of a well-founded fear.

*Matter of Chen*

In *Matter of Chen*, the BIA held that discretion should be exercised to grant asylum to an applicant for whom there was little likelihood of future persecution. The applicant in that case related a long history of persecution suffered by both himself and his family during the Cultural Revolution in China. As a young boy (beginning when he was eight years old) the applicant was held under house arrest for six months and deprived of an opportunity to go to school and later abused by teachers and classmates in school. The applicant was forced to endure two years of re-education, during which time he was physically abused, resulting in hearing loss, anxiety, and suicidal inclinations. In finding that the applicant was eligible for asylum based on the past persecution alone, the BIA considered the fact that the applicant no longer had family in China and that though there was no longer an objective fear of persecution, the applicant subjectively feared future harm.<sup>131</sup>

*Matter of Chen* is a leading administrative opinion on asylum eligibility based on past persecution alone; however, the case does not establish a threshold of severity of harm required for a discretionary grant of asylum. In other words, the harm does not have to reach the severity of the harm in *Matter of Chen* for asylum to be granted based on past persecution alone. However, if the harm described is comparable to the harm suffered by *Chen*, an exercise of discretion to grant asylum

<sup>131</sup> *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

may be warranted.

*Matter of H-*

In *Matter of H-*, the BIA did not decide the issue of whether the applicant should be granted asylum in the absence of a well-founded fear, but remanded the case to the IJ to decide whether a grant of asylum was warranted. The BIA held that “[c]entral to a discretionary finding in past persecution cases should be careful attention to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past.”<sup>132</sup>

*Matter of B-*

In *Matter of B-*, the BIA found that an Afghani who had suffered persecution under the previous Communist regime was no longer at reasonable risk of persecution. Nevertheless, the BIA held that discretion should be exercised to grant asylum based on the severity of the persecution the applicant had suffered in the past – a 13-month detention, during which time the applicant endured frequent physical (sleep deprivation, beatings, electric shocks) and mental (not knowing the fate of his father who was also detained and separation from his family) torture, inadequate diet and medical care, and integration with the criminal population – and the on-going civil strife in Afghanistan at the time of decision.<sup>133</sup>

*Matter of N-M-A-*

In *Matter of N-M-A-* the BIA found that a grant of asylum in the absence of a well-founded fear was not warranted where the applicant's father was kidnapped, the applicant's home was searched twice, and the applicant was detained for one month (during which time he was beaten periodically and deprived of food for three days). In reaching that conclusion, the BIA noted that the harm was not of a great degree, suffered over a great period of time, and did not result in severe psychological trauma such that a grant in the absence of a well-founded fear was warranted.<sup>134</sup>

*Matter of S-A-K- and H-A-H-*

In *Matter of S-A-K- and H-A-H-*, the BIA held that discretion should be exercised to grant asylum to a mother and daughter who had been involuntarily subjected to FGM based on the severity of the persecution they suffered. Some of the factors the Board considered in finding that the persecution was severe were: the applicant's daughter was subjected to FGM at an early age and was not anesthetized for the procedure; the mother nearly died from an infection she developed after the procedure; both mother and daughter had to have their vaginal opening reopened

<sup>132</sup> *Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996).

<sup>133</sup> *Matter of B-*, 21 I&N Dec. 66 (BIA 1995).

<sup>134</sup> *Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998).

later on in their lives, in the case of the mother about five times; mother and daughter continued to experience medical problems related to the procedure (e.g., the mother experienced great pain and the daughter had difficulty urinating and cannot menstruate); and the mother was beaten because she opposed having her daughters subjected to FGM.<sup>135</sup>

• **Federal Court Decisions**

A comparison of the decisions above with the federal cases below will help you understand the application of this standard.

~~X~~ Eighth Circuit – *Reyes-Morales v. Gonzales*

The court upheld the BIA's denial of asylum finding that the applicant did not establish that the past persecution he suffered was sufficiently serious to warrant a discretionary grant of asylum in the absence of a well-founded fear.<sup>136</sup> In this case, members of the Salvadoran military beat the applicant to unconsciousness, resulting in a physical deformity and several scars.<sup>137</sup> The applicant's friend was killed during the same incident. On review, a federal court cannot disturb a discretionary ruling by the BIA unless it is arbitrary or capricious.

~~X~~ Third Circuit – *Lukwago v. Ashcroft*

The court held that although forcible conscription of a child by a guerrilla group may constitute persecution, it was not on account of a protected ground. The severity of past harm cannot provide the basis for a grant of asylum in the absence of a well-founded fear if the applicant has not established that the harm was inflicted on account of a protected ground.<sup>138</sup>

• ~~X~~ **“Other Serious Harm”**

Even where the past persecution suffered by an applicant does not rise to the higher level of severe persecution, a grant in the absence of a well-founded fear may be justified where there is a reasonable possibility that an applicant who suffered past persecution may face other serious harm upon return.<sup>139</sup>

<sup>135</sup> *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008).

<sup>136</sup> For additional federal cases, see *Lal v. INS*, 255 F.3d 998, 1009–10, as amended by *Lal v. INS*, 268 F.3d 1148 (9th Cir. 2001); and *Vongsakdy v. INS*, 171 F.3d 1203, 1206–07 (9th Cir. 1999).

<sup>137</sup> *Reyes-Morales v. Gonzales*, 435 F.3d 937, 942 (8th Cir. 2006).

<sup>138</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 173–74 (3d Cir. 2003).

<sup>139</sup> 8 C.F.R. 208.13(b)(1)(iii)(B)

By “other serious harm,” the Department means harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but that is so serious that it equals the severity of persecution.<sup>140</sup>

In considering whether there is a reasonable possibility of other serious harm, you should focus on current conditions that could severely affect the applicant, such as civil strife and extreme economic deprivation, as well as on the potential for new physical or psychological harm that the applicant might suffer.<sup>141</sup> Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as “other serious harm.”

Two federal courts that have considered this regulation have noted that the following circumstances might qualify as “other serious harm.”

- harm resulting from the unavailability of necessary medical care<sup>142</sup>
- debilitation and homelessness due to unavailability of specific medications<sup>143</sup>

In *Matter of T-Z-* the BIA found that to rise to the level of persecution and, thus, be considered “serious” economic disadvantage, the harm must be not just substantial but “severe,” and deliberately imposed.<sup>144</sup> When analyzing whether economic disadvantage constitutes “other serious harm,” you need to determine if the harm is “serious.” In making that determination, you need to focus your analysis on whether the economic disadvantage feared is “severe” as required by *Matter of T-Z-*, but you do not need to find that the economic harm will be deliberately imposed. The deliberate imposition requirement of *Matter of T-Z-* is not required in the context of analyzing “other serious harm” because in that context the harm feared does not necessarily have to be volitionally imposed by a persecutor on account of a protected characteristic but can be the result as well from non-volitional situations and events such as, for example, natural disasters.

• **Additional Humanitarian Factors**

To the extent that the revised regulations changed the parameters governing the exercise of discretion to grant asylum in the absence of a well-founded fear, the current regulations supersede discussions of discretion contained in precedent decisions rendered prior to December 6, 2000.

For example, in *Matter of H-*, the BIA indicated that on remand the Immigration

<sup>140</sup> 65 FR 76121 at 76127; *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012).

<sup>141</sup> *Matter of L-S-*, 25 I. & N. Dec. 705 (BIA 2012).

<sup>142</sup> *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011).

<sup>143</sup> *Kholayavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008).

<sup>144</sup> For additional information, see section on *Economic Harm*.

Judge could consider humanitarian factors independent of the applicant's past persecution, such as age, health, or family ties, when exercising discretion to grant asylum.<sup>145</sup> However, in the supplemental information to the final rule, the Department of Justice specifically stated that it did not intend for adjudicators to consider additional humanitarian factors unrelated to the severity of past persecution or other serious harm in exercising discretion to grant asylum in the absence of a well-founded fear.<sup>146</sup> Thus, under the current rules, humanitarian factors such as those that the BIA referenced in *Matter of H-* are considered in the exercise of discretion analysis only if they have a connection to either the severity of past persecution or to other serious harm that the applicant may suffer.

**SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION**

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the lesson plan referenced in the subheading of the supplement text box.

**REQUIRED READING**

1.

**ADDITIONAL RESOURCES**

1.

**SUPPLEMENTS**

**IO Supplement**

**Module Section Subheading**

<sup>145</sup> *Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996).

<sup>146</sup> 65 FR 76121 at 76127.