

## CHAPTER 2 U.S. ASYLUM LAW

*Every spot of the world is overrun with oppression. Freedom hath been hunted round the globe. Asia, and Africa have long expelled her. —Europe regards her like a stranger, and England hath given her a warning to depart. O! receive the fugitive, and prepare in time an asylum for mankind.\**

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### 2.1. HISTORY

Americans often take for granted that we are a nation that offers refuge to the persecuted. Our national symbol, the Statue of Liberty, may have beckoned our great grandparents or even parents from oppressive conditions in their home countries. Indeed, our nation, even before it was a nation, offered sanctuary to individuals persecuted for religious and other reasons.

Throughout our first 100 years, the United States had a generous, open-door immigration policy. One interesting, but little known, community in the early years of our nation that exemplifies this generous policy was a French refugee settlement called Asylum (or Azilum), settled in 1793 in northeastern Pennsylvania by refugees from the French Revolution.<sup>1</sup> As one commentator has noted, this tradition of welcoming the persecuted was easier to honor when global population was low, travel was expensive and hazardous, and there were no immigration quotas.<sup>2</sup> Yet even the earliest federal controls on U.S. immigration, in the 19th century, provided protection for individuals fleeing persecution for political reasons.<sup>3</sup>

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\* Thomas Paine, *Common Sense* (1776).

<sup>1</sup> See E. Murray, *Azilum: French Refugee Colony* (1940).

<sup>2</sup> See D. Martin, *Asylum Case Law Sourcebook* (1998), at xvii.

<sup>3</sup> *Id.*

The Immigration and Nationality Act of 1952 (INA),<sup>4</sup> which is the foundation of our immigration law today, likewise allowed the admission of persecution-fleeing individuals who came to the United States outside of the formal refugee resettlement program. The 1952 Act also included a seventh preference category, §203(a)(7), which allowed refugees who were fleeing persecution from communist or communist-dominated countries or from the Middle East to be admitted to the United States.<sup>5</sup> This law may be attributed in part to international efforts, in the aftermath of World War II, to alleviate the plight of refugees and find lasting solutions to their uncertain legal and physical situation. Such efforts culminated in the adoption of the 1951 United Nations (U.N.) Convention relating to the Status of Refugees (Convention), an instrument that limited protection to refugees fearing persecution as a result of events occurring in Europe before January 1, 1951.<sup>6</sup>

The 1967 U.N. Protocol relating to the Status of Refugees (Protocol) incorporated Articles 2 through 34 of the Convention and removed its temporal and geographic limitations.<sup>7</sup> In 1968, the United States acceded to the Protocol and became obliged to abide by its provisions, including the broadened definition of “refugee” and the principle of *nonrefoulement*.<sup>8</sup> It was not until 1980, however, that Congress passed the Refugee Act<sup>9</sup> in an effort to bring U.S. law into conformity with international obligations under the Protocol. The act created a legal framework for refugees to apply from abroad and for asylum-seekers to apply from within the United States. The definition of “refugee” in the Refugee Act is virtually identical to the Protocol definition. In addition, revisions were made to the INA’s withholding of removal section—the *nonrefoulement* provision—to make it mandatory and to include exceptions or exclusion clauses found in the Convention and Protocol.

In 1996, U.S. Congress amended the INA explicitly to provide protection to individuals fleeing coercive population control methods and to permit the expedited removal of asylum-seekers who fail to establish a “credible fear” of persecution shortly after their arrival in the United States. This law, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA),<sup>10</sup> also expanded the number of offenses deemed to be particularly serious crimes, thereby barring otherwise eligible individuals from asylum and withholding of removal. Moreover, for the first time, U.S. law imposed a deadline for filing an asylum application. Applicants must file within one year after their arrival in the United States, unless they are able to establish extraordinary circumstances for the delay or the existence of changed circumstances that materially affect their eligibility for asylum. In 1998, Congress passed the Foreign Affairs Reform

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<sup>4</sup> Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §1101 *et seq.*).

<sup>5</sup> 8 USC §1153(a)(7) (repealed 1980).

<sup>6</sup> See Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), art. 1A.

<sup>7</sup> Protocol Relating to the Status of Refugees (Protocol), 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

<sup>8</sup> See ch. 1.1.1.

<sup>9</sup> Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

<sup>10</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009–546 to 3009–724.

and Restructuring Act,<sup>11</sup> which contains a provision prohibiting the United States from returning an individual to a country where he or she would be subjected to torture.<sup>12</sup> In 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act,<sup>13</sup> which again expanded the bars to asylum and allowed for the detention of “suspected terrorists” even if they have been granted asylum. The REAL ID Act of 2005 made additional changes regarding credibility determinations and corroboration in asylum claims.<sup>14</sup> More recently, the Trafficking Victims Protection Reauthorization Act of 2008 allows unaccompanied children in removal proceedings to apply for asylum initially in a non-adversarial proceeding before U.S. Citizenship and Immigration Services (USCIS).<sup>15</sup>

Asylum law in the United States continues to evolve. Congress is considering several changes to the INA that would allow for more exceptions to the material support bar for asylum and provide greater protections for detained asylum-seekers. The Department of Homeland Security (DHS) is also expected to issue regulations regarding gender-based asylum claims. Asylum applicants and their representatives also play an important role in the evolution of asylum law as they strive for fairer and more generous applications of the law in their individual cases.

## 2.2. ASYLUM STANDARD—RELIEF AVAILABLE

Under §208(b) of the INA, the attorney general (AG) may, in his or her discretion, grant asylum to an individual who qualifies as a “refugee” within the meaning of INA §101(a)(42). Under the Homeland Security Act of 2002, this discretion to grant asylum extends to the DHS secretary and other DHS officials.<sup>16</sup> The definition includes the requirement that the asylum applicant demonstrate that he or she is unwilling or unable to return to his or her home country because of past persecution or a “well-founded fear” of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>17</sup>

The asylum applicant’s burden of proof is to demonstrate that there is a “reasonable possibility” that he or she will be persecuted.<sup>18</sup> An applicant for asylum may establish a well-founded fear by showing that a reasonable person in his or her circumstances would

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<sup>11</sup> Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, §2242(b), 112 Stat. 2681, 2681–822.

<sup>12</sup> See ch. 4.

<sup>13</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>14</sup> REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23.

<sup>15</sup> Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

<sup>16</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296, §§456, 1512, 1517, 116 Stat. 2135, 2200, 2310, 2311.

<sup>17</sup> The definition of “refugee” is set forth and explained in more detail in this chapter, at 2.4.

<sup>18</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987) (rejecting argument by legacy Immigration and Naturalization Service (INS) that the standard should be a “clear probability” of persecution).

fear persecution.<sup>19</sup> A fear may be well-founded “even if there is only a slight, though discernible, chance of persecution.”<sup>20</sup> An applicant must also establish that race, religion, nationality, membership in a particular social group, or political opinion “was or will be at least one central reason for persecuting the applicant.”<sup>21</sup> Asylum, unlike withholding of removal, may be denied in the exercise of discretion to a person who establishes eligibility for relief.<sup>22</sup> “The danger of persecution,” however, “should generally outweigh all but the most egregious of adverse factors.”<sup>23</sup>

Asylum also provides more permanent protection than withholding of removal. A person granted asylum, known as an “asylee,” may apply for permanent residency after one year under INA §209 and may eventually become a U.S. citizen. An asylee may also bring his or her spouse and children to the United States under 8 Code of Federal Regulations (CFR) §1208.21.<sup>24</sup>

- **Tip**—Every application for asylum is also considered to be an application for withholding of removal.<sup>25</sup> In most affirmative cases, however, the asylum office does not have authority to grant withholding of removal.<sup>26</sup>

### 2.3. WITHHOLDING STANDARD—RELIEF AVAILABLE

Under INA §241(b)(3)(A), the AG may not remove a person to a country where his or her life or freedom would be threatened because of the person’s race, religion, nationality, membership in a particular social group, or political opinion. Under the Homeland Security Act of 2002, this prohibition on removal extends to the DHS secretary and other DHS officials.<sup>27</sup> The applicant for withholding of removal, also known as restriction on removal, must show a clear probability of persecution or that it is more likely than not that he or she would be persecuted if removed to his or her home country.<sup>28</sup> This standard is more difficult to satisfy than the well-founded-fear standard for asylum.<sup>29</sup> While the granting of asylum is discretionary, withholding of removal to a

<sup>19</sup> See *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987); see also *Guevara-Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986); *Matter of D–V–*, 21 I&N Dec. 77, 78 (BIA 1993).

<sup>20</sup> *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000).

<sup>21</sup> INA §208(b)(1)(B)(i); 8 USC §1158(b)(1)(B)(i).

<sup>22</sup> See *Cardoza-Fonseca*, *supra* note 18, at 441; *Mogharrabi*, *supra* note 19, at 449; see also this chapter, at 2.7.1.

<sup>23</sup> *Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987).

<sup>24</sup> See ch. 3.15.

<sup>25</sup> 8 Code of Federal Regulations (CFR) §1208.3(b).

<sup>26</sup> See ch. 3.2.

<sup>27</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296, §§456, 1512, 1517, 116 Stat. 2135, 2200, 2310, 2311.

<sup>28</sup> See *Cardoza-Fonseca*, *supra* note 18, at 423; *INS v. Stevic*, 467 U.S. 407, 429–30 (1984).

<sup>29</sup> *Cardoza-Fonseca*, *supra* note 18, at 431; see *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007) (observing that a petition for withholding of removal “cannot be based on a fear of psychological harm alone”); *Capric v. Ashcroft*, 355 F.3d 1075, 1095 (7th Cir. 2004) (noting that the “clear probability” standard is “a much more demanding burden”); *Lim v. INS*, 224 F.3d 929, 938 (9th Cir. 2000) (finding that although the applicant was eligible for asylum, because his risk of persecution was less than 50

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particular country is mandatory if the AG determines that the applicant's life or freedom would be threatened in that country.<sup>30</sup>

The grant of withholding of removal, unlike asylum, does not give an individual an automatic right to remain in the United States, nor may he or she apply for permanent residency, obtain many federally funded benefits and assistance, or bring his or her spouse or children to the United States.<sup>31</sup> An individual granted withholding may be removed to a third country in which he or she would not face persecution if the United States is able to find such a country willing to accept the individual.<sup>32</sup> When an immigration judge (IJ) grants withholding but not asylum, the decision must include an explicit order of removal.<sup>33</sup>

## 2.4. DEFINITIONS

This section focuses on the definition of “refugee,” the terms that are included in that definition, and their interpretation by legacy Immigration and Naturalization Service (INS), DHS, the Board of Immigration Appeals (BIA), federal courts, U.S. Supreme Court, and Office of U.N. High Commissioner for Refugees (UNHCR). The refugee definition has evolved over time to conform to changes in law, as well as changes in the causes of and responses to refugee crises throughout the world.

### 2.4.1. Refugee

A “refugee,” as defined by the INA, is:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>34</sup>

The definition of refugee was amended in 1996 to ensure protection for individuals fleeing coercive population control methods. The revised definition includes the following provision:

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percent, he did not qualify for withholding). *But see Wang v. Ashcroft*, 341 F.3d 1015, 1022–23 (9th Cir. 2003) (an applicant who was subjected to two forced abortions, who had taken steps to have more children, and who would be subject to forced sterilization upon return to China qualified for withholding of removal).

<sup>30</sup> *Cardoza-Fonseca*, *supra* note 18, at 429; *Gonzales-Neyra v. INS*, 122 F.3d 1293, 1297 (9th Cir. 1997), *amended by* 133 F.3d 726 (9th Cir. 1998). *But see Salazar v. Ashcroft*, 359 F.3d 45, 52 (1st Cir. 2004) (denying withholding of removal claim based on finding that Peruvian asylum applicant “may” be able to voluntarily depart to Venezuela).

<sup>31</sup> *But see* 8 CFR §§208.16(e), 1208.16(e) (requiring asylum officers and immigration judges (IJs) to reconsider their discretionary denial of asylum in cases in which withholding of removal is granted, if such a decision effectively precludes the admission of the applicant's spouse or minor children).

<sup>32</sup> 8 CFR §§208.16(f), 1208.16(f); *see also Cardoza-Fonseca*, *supra* note 18, at 428, n.6; *Choeum v. INS*, 129 F.3d 29, 40 n.9 (1st Cir. 1997).

<sup>33</sup> *Matter of I-S- and C-S-*, 24 I&N Dec. 432 (BIA 2008).

<sup>34</sup> INA §101(a)(42)(A); 8 USC §1101(a)(42)(A).

For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.<sup>35</sup>

The refugee definition specifically excludes any individual “who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion.”<sup>36</sup>

#### 2.4.2. Country of Nationality and Statelessness

There are two references to the term “nationality” in the refugee definition. The first refers to a status akin to, but not exactly, citizenship. In interpreting what it means for an applicant to be outside his or her country of nationality, the BIA has looked to the definition of “national” found within the INA. Section 101(a)(21) defines “national” as a person owing permanent allegiance to a state. In *Matter of Fatoumata Toure*, the BIA concluded that an applicant who was a citizen of Guinea and feared persecution there was eligible for asylum despite the fact that she possessed a passport from the Ivory Coast.<sup>37</sup> The BIA looked to the INA definition of “national,” UNHCR’s *Handbook*,<sup>38</sup> and the refugee definition and found that a contrary result would require the deportation of the asylum applicant to a country where she has little or no connection.<sup>39</sup> An applicant’s nationality, or lack of nationality, is a threshold question in determining eligibility for asylum.<sup>40</sup> One recent change to the law, however, allows North Korean citizens to apply for asylum, even if they have a right to legal citizenship in South Korea.<sup>41</sup> The failure of the IJ or the BIA to address nationality may be grounds for remand.<sup>42</sup> In contrast, when interpreting nationality for purposes of determining the

<sup>35</sup> INA §101(a)(42); 8 USC §1101(a)(42). This amendment is addressed further in this chapter, at 2.4.11.

<sup>36</sup> INA §101(a)(42)(B); 8 USC §1101(a)(42)(B). For a further discussion of this bar to asylum and withholding of removal, see this chapter, at 2.7.2.

<sup>37</sup> *Matter of Fatoumata Toure*, A24 876 244 (BIA 1990), reprinted in 8 *Bender’s Immigr. Case Rep.* B1-105.

<sup>38</sup> U.N. High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), available at [www.unhcr.org/publ/PUBL/3d58e13b4.pdf](http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf).

<sup>39</sup> *Matter of Fatoumata Toure*, *supra* note 37.

<sup>40</sup> *Wangchuck v. DHS*, 448 F.3d 524, 528 (2d Cir. 2006) (applicant was born in India to Tibetan refugee parents); *Dhoumo v. BIA*, 416 F.3d 172, 173 (2d Cir. 2005) (applicant was born in India of Tibetan parents in Tibetan refugee camp).

<sup>41</sup> North Korean Human Rights Act of 2004, Pub. L. No. 108-333, 118 Stat. 1287 (2004). Section 302(a) provides: “North Koreans are not barred from eligibility from refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of [South Korea].” *But see Matter of K–R–Y– and K–C–S–*, 24 I&N Dec. 133 (BIA 2007) (finding natives of North Korea who became citizens of South Korea were precluded from establishing eligibility for asylum based on their firm resettlement in South Korea).

<sup>42</sup> *Matter of K–R–Y– and K–C–S–*, *supra* note 41.

motivation of the persecution, *i.e.*, persecution on account of “nationality,” courts have defined the term more broadly to include ethnicity and race.<sup>43</sup>

The refugee definition also specifically allows for protection of individuals who have no nationality and who are outside of their country of last habitual residence.<sup>44</sup> The United Nations defines “stateless person” as “a person who is not considered a national by any State under the operation of its law.”<sup>45</sup> The mere fact that a stateless applicant’s country of last habitual residence refuses to allow the applicant to return does not negate an asylum claim from that country.<sup>46</sup>

The BIA has adopted the definition of “last habitual residence” as “a place of general abode” or the applicant’s “principal, actual dwelling place in fact, without regard to intent” based on the INA definition of residence.<sup>47</sup> This definition was accorded *Chevron* deference by the U.S. Court of Appeals for the Third Circuit in *Paripovic v. Gonzales*, which held that a stateless Croatian last habitually resided in Serbia, where he had lived for two years.<sup>48</sup>

The Asylum Officer Basic Training Course (AOBTC) notes that even though an applicant may have resided in more than one country and may fear persecution in more than one country, his or her claim “should be analyzed based on the country of *last* habitual residence only.”<sup>49</sup> The AOBTC also cautions that “last habitual residence” is distinct from, and should not be confused with, firm resettlement.<sup>50</sup> The AOBTC states that an applicant may have last habitually resided in a country, even if he or she has not been firmly resettled there.<sup>51</sup> Nevertheless, at least two courts have held that the BIA’s determination that a person was firmly resettled in a country is an implicit finding that the person last habitually resided there.<sup>52</sup>

The break-up of the Soviet Union and unresolved land and nationality issues in the Middle East have contributed to a rising number of stateless persons. Such persons are afforded protection under U.S. asylum law if they are able to establish a well-founded fear of persecution in their country of last habitual residence. For example, Palestinians who resided in Saudi Arabia, Qatar, and the United Arab Emirates—and who, following

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<sup>43</sup> See this chapter, at 2.4.9.

<sup>44</sup> See INA §101(a)(42); 8 USC §1101(a)(42); see also UNHCR *Handbook*, *supra* note 38, at ¶¶101–05.

<sup>45</sup> See Convention Relating to the Status of Stateless Persons, 360 U.N.T.S. 117 (1954), art. I(1).

<sup>46</sup> *Ouda v. INS*, 324 F.3d 445, 452–53 (6th Cir. 2003) (noting that refusal to accept the applicant could be further evidence of persecution).

<sup>47</sup> INA §101(a)(33); 8 USC §1101(a)(33).

<sup>48</sup> *Paripovic v. Gonzales*, 418 F.3d 240, 244 (3d Cir. 2005).

<sup>49</sup> Asylum Officer Basic Training Course (AOBTC), Lesson: Asylum Eligibility Part I, at 11 (Dec. 5, 2002) (emphasis in original), available at [www.rmscdenver.org/aobtc/Elig1persecution6de02lp-links.pdf](http://www.rmscdenver.org/aobtc/Elig1persecution6de02lp-links.pdf).

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Id.* For a further discussion of firm resettlement, see this chapter, at 2.7.3.

<sup>52</sup> *Tesfamichael v. Gonzales*, 469 F.3d 109, 115 (5th Cir. 2006); *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1294 (11th Cir. 2001).

the Persian Gulf War, were expelled, denied re-entry, and/or had their property confiscated—are eligible for asylum in the United States.<sup>53</sup>

### 2.4.3. Unable or Unwilling to Return

The definition of refugee includes the requirement that the asylum applicant demonstrate that he or she is unwilling or unable to return to, or avail him- or herself of the protection of, his or her country because of persecution or a well-founded fear of persecution.<sup>54</sup> Being “unwilling” to return relates to an asylum applicant’s fear of return. As UNHCR’s *Handbook* provides:

[A]n applicant’s well-founded fear of persecution must be in relation to the country of his nationality. As long as he has no fear in relation to the country of his nationality, he can be expected to avail himself of that country’s protection. He is not in need of international protection and is therefore not a refugee.<sup>55</sup>

Being “unable” to avail oneself of such protection implies circumstances that are beyond the will of the person concerned. The *Handbook* recognizes that when a country is in a state of war, including civil war, or other grave disturbance, it may be prevented from extending protection or such protection may be ineffective.<sup>56</sup> Moreover, in cases in which protection by the country of nationality may be purposely denied to the applicant, such denial of protection may confirm the applicant’s fear of persecution, and may even be an element of persecution.<sup>57</sup> Therefore, a denial of services, such as a refusal of a national passport or extension of its validity, or denial of admittance to the home territory may constitute a refusal of protection within the refugee definition.<sup>58</sup> In contrast, the term “unwilling” refers to individuals who refuse to accept the protection of their home countries.<sup>59</sup>

### 2.4.4. Well-Founded Fear

To establish a “well-founded fear of persecution,” an asylum applicant must show that a reasonable person in the same circumstances would fear persecution if removed to his or her home country.<sup>60</sup> The U.S. Supreme Court noted that “[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50 percent chance of

<sup>53</sup> See Immigration and Naturalization Service (INS) Office of General Counsel, Legal Opinion: Palestinian Asylum Applicants (Oct. 27, 1995), reprinted in 72 *Interpreter Releases* 1553 (Nov. 13, 1995); see also *Ouda v. INS*, 324 F.3d 445 (6th Cir. 2003) (granting asylum to a Palestinian forced to leave Kuwait).

<sup>54</sup> INA §101(a)(42); 8 USC §1101(a)(42); see also *Matter of D–V–*, 21 I&N Dec. 77, 78 (BIA 1993).

<sup>55</sup> UNHCR *Handbook*, *supra* note 38, at ¶90.

<sup>56</sup> *Id.* at ¶98.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at ¶99.

<sup>59</sup> *Id.* at ¶100.

<sup>60</sup> See *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987); see also *Ahmed v. Gonzales*, 467 F.3d 669, 674 (7th Cir. 2006); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998); *M.A. v. INS*, 899 F.2d 304, 311 (4th Cir. 1990).

the occurrence taking place.”<sup>61</sup> The Court suggested that even a 1-in-10 chance of suffering persecution would make an applicant’s fear well-founded.<sup>62</sup> The Court, however, did not hold that a well-founded fear requires *at least* a 1-in-10 chance of persecution, but only that the persecution feared must be a reasonable possibility.<sup>63</sup> It could, therefore, be argued that even a less than 1-in-10 chance is sufficient to meet the well-founded-fear standard. A fear may be well-founded “even if there is only a slight, though discernible, chance of persecution.”<sup>64</sup>

A well-founded fear of persecution has both a subjective and an objective component. An asylum applicant’s subjective fear of persecution must be objectively reasonable.<sup>65</sup> The subjective component requires a showing that the applicant’s fear is genuine.<sup>66</sup> The objective component requires a showing that the fear is reasonable.<sup>67</sup> Mere irrational apprehension is insufficient.<sup>68</sup>

It is rare that an asylum officer (AO) or IJ will find that an asylum applicant lacks a subjective fear. Courts have rejected an IJ’s reliance on the principle that a voluntary return to one’s home country always and inherently negates completely a fear of persecution.<sup>69</sup>

An asylum applicant may establish the objective basis of his or her fear by submitting evidence regarding conditions in his or her home country.<sup>70</sup> A number of BIA decisions have highlighted the increasing importance of such evidence.<sup>71</sup> A recent change to the

<sup>61</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

<sup>62</sup> *Id.* at 440.

<sup>63</sup> *Id.*

<sup>64</sup> *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000).

<sup>65</sup> *Kratchmarov v. Heston*, 172 F.3d 551, 553 (8th Cir. 1999); *Bhatt v. Reno*, 172 F.3d 978, 981 (7th Cir. 1999); *Mikhael v. INS*, 115 F.3d 299, 304 (5th Cir. 1997).

<sup>66</sup> *Ravix v. Mukasey*, 552 F.3d 42, 46 (1st Cir. 2009) (noting that the applicants made several trips to Haiti from the United States and that their extended families remained in Haiti unharmed); *Samedov v. Gonzales*, 422 F.3d 704, 708 (8th Cir. 2005) (upholding IJ’s finding that the applicant lacked a subjective fear because he entered and exited the United States several times before applying for asylum); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004); *Bhatt, supra* note 65, at 981.

<sup>67</sup> *Samedov, supra* note 66; *see also Francois v. INS*, 283 F.3d 926, 930 (8th Cir. 2002) (“The objective element requires a showing of credible, direct, specific evidence that a reasonable person would fear persecution . . .”).

<sup>68</sup> *Gonahasa v. INS*, 181 F.3d 538, 541 (4th Cir. 1999).

<sup>69</sup> *De Santamaria v. U.S. Att’y Gen.*, 525 F.3d 999, 1011 (11th Cir. 2008). *See also Pavlova v. INS*, 441 F.3d 82, 89 n.5 (2d Cir. 2006) (“In light of strong attachments to their home countries, refugees may venture abroad in a state of uncertainty about the permanence of their departure, hoping the persecution will abate.”)

<sup>70</sup> *See* this chapter, at 2.6.3.

<sup>71</sup> *See, e.g., Matter of S–M–J–*, 21 I&N Dec. 722, 724 (BIA 1997) (observing that the burden is on asylum applicants to provide evidence to buttress their claims); *Matter of Dass*, 20 I&N Dec. 120, 124–25 (BIA 1989) (highlighting the importance of background information in evaluating the applicant’s testimony); *see also Banks v. Gonzales*, 453 F.3d 449, 453 (7th Cir. 2006) (stressing the need for “concrete, case-specific evidence” to demonstrate the risk faced by the applicant in the country from

*continued*

INA by the REAL ID Act of 2005 provides that “[w]here a trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must* be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.”<sup>72</sup>

The BIA in *Matter of Mogharrabi* set forth the following four elements that an applicant for asylum must show in order to establish a well-founded fear of persecution: (1) the applicant possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the applicant possesses this belief or characteristic; (3) the persecutor has the capability of punishing the applicant; and (4) the persecutor has the inclination to punish the applicant.<sup>73</sup>

Asylum regulations further define “well-founded fear.” The regulations provide that an applicant has a well-founded fear of persecution if:

- The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;
- There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and
- He or she is unable or unwilling to return to, or avail him– or herself of the protection of, that country.<sup>74</sup>

An applicant does *not* have a well-founded fear if the applicant could avoid persecution by relocating to another part of the country, “if under *all* circumstances it would be reasonable to expect the applicant to do so.”<sup>75</sup> In determining the “reasonableness” of an internal relocation option, adjudicators should consider, among other things, the possibility of other serious harm, ongoing civil strife, the country’s infrastructure, geographic limitations, and social and cultural constraints.<sup>76</sup> The same factors are considered in determining whether a person’s life or freedom would be threatened in a withholding of removal claim.<sup>77</sup> The regulations also note that these factors “may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative” of whether relocation is reasonable.<sup>78</sup>

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which he or she is seeking asylum); *Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998) (the weaker an applicant’s testimony, the greater the need for corroborative evidence).

<sup>72</sup> INA §208(b)(1)(B)(ii); 8 USC §1158(b)(1)(B)(ii) (emphasis added).

<sup>73</sup> *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

<sup>74</sup> 8 CFR §§208.13(b)(2)(i), 1208.13(b)(2)(i).

<sup>75</sup> 8 CFR §§208.13(b)(2)(ii), 1208.13(b)(2)(ii) (emphasis added).

<sup>76</sup> 8 CFR §§208.13(b)(3), 1208.13(b)(3).

<sup>77</sup> 8 CFR §§208.16(b)(3), 1208.16(b)(3).

<sup>78</sup> 8 CFR §§208.13(b)(3), 208.16(b)(3), 1208.13(b)(3), and 1208.16(b)(3). For further discussion and prior case law regarding internal relocation alternatives, see this chapter, at 2.6.10.

### 2.4.5. Persecution

#### *Definition of Persecution*

In order to qualify for asylum, an applicant must demonstrate past persecution or a well-founded fear of future persecution. “Persecution” is a broad term that is not defined in the INA, nor has it been defined by the BIA.<sup>79</sup> As UNHCR acknowledges in its *Handbook*, “persecution” is difficult to define:

There is no universally accepted definition of “persecution,” and various attempts to formulate such a definition have met with little success ... [I]t may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.<sup>80</sup>

In addition, the *Handbook* states that “various measures not in themselves amounting to persecution (e.g., discrimination in different forms), in some cases combined with other adverse factors, such as a general atmosphere of insecurity in the country of origin, may amount to persecution on ‘cumulative grounds.’”<sup>81</sup>

The BIA has held that persecution is the infliction of harm or suffering by a government, or by persons a government is unwilling or unable to control, to overcome a characteristic of the victim.<sup>82</sup> It also has held that incidents of “harassment” do not amount to persecution, but has not explained the distinction between mere harassment and persecution.<sup>83</sup> The U.S. Court of Appeals for the First Circuit has noted that persecution is “protean word, capable of many meanings.”<sup>84</sup> Mistreatment can constitute persecution even though it does not embody a direct or unremitting threat to life or

<sup>79</sup> *Sahi v. Gonzales*, 416 F.3d 587, 588–89 (7th Cir. 2005) (criticizing the Board of Immigration Appeals (BIA) for failing to discharge its duty as an agency to define “persecution” and adding, “[W]e haven’t a clue as to what it thinks religious persecution is.”).

<sup>80</sup> UNHCR *Handbook*, *supra* note 38, at ¶51; *see also* *Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004) (non-life threatening violence and physical abuse also constitute torture).

<sup>81</sup> UNHCR *Handbook*, *supra* note 38, at ¶53; *see also* *Krotova v. Gonzales*, 416 F.3d 1080, 1084 (9th Cir. 2005) (the combination of sustained economic pressure, physical violence and threats against the applicant and her close associates, and the restrictions on her ability to practice her religion cumulatively amount to persecution); *Chand v. INS*, 222 F.3d 1066, 1074 n.15 (9th Cir. 2000) (finding the BIA erred by considering each incident of harm “in isolation, without analyzing the cumulative harm Chand suffered”); *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998) (finding that, cumulatively, the experiences suffered by the petitioner compel the conclusion that she suffered persecution where, in conjunction with the political and social turmoil in her country, she received many threats against her life); *Matter of [name not provided]*, (IJ Dec. 20, 2000) (Baltimore, MD) (Gossart, IJ), *reported in* 78 *Interpreter Releases* 233 (Jan. 15, 2001) (finding that refusal to render medical aid, firing or refusing to hire a person, and forcing someone to leave their community or state, due to their HIV status, when viewed cumulatively, amounts to persecution).

<sup>82</sup> *See Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (finding that female genital mutilation is a form of persecution).

<sup>83</sup> *Matter of A–E–M–*, 21 I&N Dec. 1157, 1159 (BIA 1998), *cited in* *Sahi v. Gonzales*, 416 F.3d 587, 589 (7th Cir. 2005) (criticizing the BIA for its failure to define persecution).

<sup>84</sup> *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008).

freedom.<sup>85</sup> The Seventh U.S. Circuit Court of Appeal's definition of persecution is "punishment or the infliction of harm for political, religious or other reasons that this country does not recognize as legitimate."<sup>86</sup> The Eighth Circuit's definition is "the infliction or threat of death, torture, or injury to one's person or freedom...".<sup>87</sup> Persecution does not require bodily harm.<sup>88</sup> Nor does it require a threat to life or freedom.<sup>89</sup>

The term "persecution," however, does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.<sup>90</sup> Nor does the term embrace harm solely arising out of civil strife or anarchy.<sup>91</sup> Persecution, however, does include violent conduct that generally goes beyond the mere annoyance and distress that characterize harassment.<sup>92</sup>

The lack of a precise definition or enumeration of acts that constitute persecution enables adjudicators to examine the circumstances in each case. As a result, in recent years a number of cases have expanded asylum protection to previously unprotected groups, such as children, homosexuals, and women. As one commentator has observed:

There being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution. Assessments must be made from case to case by taking account, on the one hand, of the notions of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured.<sup>93</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Bace v. Ashcroft*, 352 F.3d 1133, 1137 (7th Cir. 2003) (noting that the actions must rise above the level of mere harassment).

<sup>87</sup> *Ngure v. Ashcroft*, 367 F.3d 975, 989–90 (8th Cir. 2004).

<sup>88</sup> *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998).

<sup>89</sup> *Bhatt v. Reno*, 172 F.3d 978, 981 (7th Cir. 1999); *Singh*, *supra* note 88, at 967.

<sup>90</sup> *See, e.g., Ahmed v. Gonzales*, 467 F.3d 669, 673 (7th Cir. 2006) (finding that general conditions of hardship that affect entire populations are not persecution); *Mikhael v. INS*, 115 F.3d 299, 304 (5th Cir. 1997) (finding no past persecution where applicant was briefly detained twice, his home was bombed, his father was kidnapped and held for three days, and a brother was kidnapped and tortured); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (finding that the applicant failed to establish that the treatment she would face upon return to Iran amounts to persecution); *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995) (no past persecution where applicant was interrogated, beaten, and kicked while detained for six hours); *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (holding that kidnapping was not persecution where the sole motivation was to make money).

<sup>91</sup> *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

<sup>92</sup> *Ivanishvili v. Gonzales*, 433 F.3d 332, 340 (2d Cir. 2006) (finding that the IJ failed to distinguish between harassment and persecution in the case of a Jehovah's Witness who was subjected to threats and attacks).

<sup>93</sup> G. Goodwin-Gill, *The Refugee in International Law* 69 (2d Ed. 1996).