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Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims

by Dorothy A. Harbeck and Ellen L. Buckwalter

A developing area concerning asylum and withholding of removal law involves applications based on sexual orientation. The Board of Immigration Appeals and a number of United States courts of appeals have issued decisions recognizing that homosexual individuals are members of a “particular social group” under the Immigration and Nationality Act. As with all asylum and withholding of removal cases, applications based on sexual orientation involve myriad issues, among them whether the respondent has established membership in the particular social group; whether the harm alleged rises to the level of persecution; whether persecution is on account of group membership; and whether internal relocation is possible. This article will review the case law relating to asylum and withholding of removal applications based on sexual orientation, beginning with the Board’s seminal decision in *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990). It will then highlight circuit court case law relating to two issues that arise on a regular basis in these cases: whether a respondent has established his or her homosexuality, and whether the mistreatment alleged can support a grant of relief.

Matter of Toboso-Alfonso and “Particular Social Group”

The Board’s decision in *Matter of Toboso-Alfonso*, supra, first established that homosexual individuals are members of a particular social group for purposes of asylum and withholding of removal. There, the Cuban respondent alleged that he was classified by the Cuban Government as a homosexual and that, in the Board’s words, he was “persecuted in Cuba and would be persecuted again on account of that status.” *Id.* at 820. The Immigration Judge granted withholding of deportation. In an originally unpublished decision dated March 12, 1990, the Board ruled “that the applicant established his membership in a particular social group in Cuba” based on his homosexuality.

Id. at 822. In response to the former Immigration and Naturalization Service’s argument that “socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act,” the Board stated that “[t]he applicant’s testimony and evidence . . . do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual.” *Id.* The Board further noted “that the Service has not challenged the Immigration Judge’s finding that homosexuality is an ‘immutable’ characteristic. Nor is there any evidence or argument that, once registered by the Cuban government as a homosexual, that characterization is subject to change.” *Id.*

On June 14, 1994, former Attorney General Janet Reno designated *Matter of Toboso-Alfonso* as precedent in all proceedings involving the same issues. The decision was accordingly published, opening the door to applications for asylum and withholding of removal based on sexual orientation.

The Ninth Circuit provided an important follow-up to *Matter of Toboso-Alfonso* in *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005). There, the court rejected any distinction between persecution for homosexual status and persecution for homosexual acts. In this case, following a grant of asylum, the Government argued on appeal that the respondent’s prospective persecution would occur, in the court’s words, not “on account of his status as a homosexual, but rather on account of him committing future homosexual acts.” *Id.* at 1173. The Ninth Circuit, however, ruled that to require the respondent to abstain from sex if he wished to avoid persecution would effectively force him “to change a fundamental aspect of his human identity,” thereby “forsak[ing] the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that ‘ha[ve] been accepted as an integral part of human freedom in many other counties.” *Id.* at 1173, (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)); see also *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005).

In other circuit court decisions since *Matter of Toboso-Alfonso*, *supra*, the concept of homosexuality as grounds for membership in a particular social group has been expanded slightly but not fundamentally altered. For example, in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), the Ninth Circuit stated that “gay men

in Mexico with female sexual identities” are a particular social group. *Id.* at 1095. In addition, women, as well as men, have been found to be members of a particular social group based on homosexuality. See, e.g., *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007). Only the Third and Ninth Circuits have signaled a willingness to consider particular social group status based on imputed, as opposed to actual, homosexual identity. In *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003), the Ghanaian respondent alleged, in the court’s words, “that he was persecuted by members of a cult and by the Ghanian [sic] police on account of their view that he was a homosexual, even though Amanfi did not identify himself as a homosexual and there was no independent evidence that he was.” *Id.* at 721. In remanding, following the denial of the respondent’s asylum application, the Third Circuit stated that “persecution ‘on account of’ membership in a social group . . . includes what the persecutor perceives to be the applicant’s membership in a social group.” *Id.* at 730. In an unpublished decision, the Ninth Circuit explicitly followed this result, stating that there is “no . . . question that one can be eligible for asylum as a result of persecution he suffers on account of imputed homosexuality.” *Pozos v. Gonzales*, 141 Fed. App’x. 629, 631 n.1 (9th Cir. 2005).

Establishing Social Group Membership

With the doctrine fairly well established that homosexuality constitutes grounds for membership in a particular social group, a related issue has emerged—the requirements for showing that a respondent is, in fact, a member of that group. Determining whether a respondent has established his or her homosexuality can be a complicated and sensitive task. Indeed, the fact that an asylum applicant might have to “prove” his or her sexuality has been criticized by some commentators as unfair. For example, one observer has stated that “it is not good enough for an asylum applicant simply to be attracted to people of the same sex; the applicant must be ‘gay enough’ for the government to find that they have met their burden of proof.” Deborah Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 LAW & SEXUALITY 135, 136 (2006). In more general terms, some commentators have asserted critically that U.S. culture is “attached to a rigid binary system of sexuality” which presumes individuals to be either heterosexual or homosexual when, these commentators argue, the reality is sometimes more fluid. See generally, Karen Moulding, *Imposing U.S. Sexual*

Categories on Other Nationals, 1 SEXUAL ORIENTATION AND THE LAW 8:16 (2008). Complicating these determinations is the fact that individuals sometimes hide their true sexual orientation from others, for reasons that may well include fear of persecution. Nevertheless, circuit courts have provided guidance on making determinations regarding whether a respondent has established his or her sexuality. Three main points emerge: (1) corroborating evidence of a respondent's sexuality can be required; (2) there is an awareness that, in certain situations, respondents might hide their sexual orientation; and (3) reliance on stereotypes should be avoided.

The Seventh Circuit has held that, in determining whether a respondent has established his or her homosexuality, an adjudicator can require corroborating evidence. In *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008), which was governed by the REAL ID Act, the Nigerian respondent argued that the Immigration Judge and the Board erred "by requiring him to corroborate his claim of persecution based on his membership in the social group of homosexual men." *Id.* at 381. The court rejected this argument, ruling that "[t]here is nothing in the nature of Eke's claims that would compel us to find that corroborating evidence was unavailable to him." *Id.* The court then quoted approvingly from the Board's decision in Eke's case

"[t]he applicant did not provide any supporting witnesses. . . . He also failed to either submit some kind of documentation indicating his sexual preferences . . . or establish that such evidence was not reasonably available to him. In fact, the applicant could not even provide the name of the gentleman with whom he was allegedly involved in a sexual relationship."

Id.

The Seventh Circuit has signaled its awareness, in *Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007), that because of a fear of persecution, some people may be justifiably reluctant to disclose their sexual orientation. There, the Liberian respondent failed to mention his homosexuality during an airport interview with Department of Homeland Security officers and a subsequent credible fear interview. Following these

interviews, the respondent applied for asylum based in part on alleged persecution as a homosexual. *Id.* at 657-58. The Immigration Judge ruled that the respondent was not credible, based in part on the respondent's failure to mention his homosexuality during the two interviews. *Id.* at 658. In remanding, the Seventh Circuit stated that "[w]e also think it reasonable that Mr. Moab would not have wanted to mention his sexual orientation [to the officers at the airport] for fear that revealing this information could cause further persecution as it had in his home country of Liberia." *Id.* at 661.

As a general matter, circuit courts have also held that determinations regarding whether a respondent has established that he or she is homosexual should not be based on stereotypes relating to manners of speaking, dressing, or behaving. In *Shahinaj v. Gonzales*, 481 F.3d 1027 (8th Cir. 2007), the Eighth Circuit reversed an adverse credibility finding that had been based in part on the findings that, in the Eighth Circuit's words, the Albanian respondent "did not dress or speak like or exhibit the mannerisms of a homosexual" and that he did not belong to "any Albanian homosexual organizations." *Id.* at 1029. In *Eke v. Mukasey*, *supra*, the Seventh Circuit signaled its distaste for reliance on stereotypes in determinations involving sexual orientation. There, in arguing that his due process rights were violated because his Immigration Court hearing was held by video, the respondent alleged that, in the Seventh Circuit's words, "if the [Immigration Judge] had seen him in person, the [Immigration Judge] would have recognized that [the respondent] is in fact homosexual." *Id.* at 382. The court reacted negatively to this argument, stating that "even if we thought (stereotypically) that something about [the respondent's] physical appearance could prove his homosexuality, he has not explained how the tele-video format prevented the [Immigration Judge] from considering that evidence." *Id.* at 383.

Outside the asylum context, the Second Circuit issued a general warning against relying on stereotypes in making determinations regarding homosexuality in *Ali v. Mukasey*, 529 F.3d 478 (2d Cir. 2008). In *Ali*, a Convention Against Torture case, the Guyanan respondent alleged that he would be tortured because of both his status as a homosexual and as a criminal deportee. The Second Circuit described the portion of the Immigration Judge's decision relating to the respondent's homosexuality in the following terms:

First, [the Immigration Judge] found that Ali's claims – that he would more likely than not be tortured because of criminal deportee status and because of his sexual orientation – were incompatible. He opined that “violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people,” and therefore Ali was less likely to be viewed in Guyana as a member of either disfavored group.

....

As to the likelihood of torture as a homosexual, [the Immigration Judge] wondered how anyone in Guyana would even know that Ali was a homosexual. Ali would “need a partner or cooperating person” in order to be recognized as a homosexual, [the Immigration Judge] theorized, but “there's reason to be concerned about whether [Ali] is likely to form such a close relationship within a foreseeable period of time.” [The Immigration Judge] noted that Ali is a convicted criminal with ‘professed mental problems’ and ‘some problems with his personality’: “[f]urthermore, . . . [he] is not particularly communicative or articulate. He's not particularly skilled and mature in the way he expresses himself, shows his feelings, etc.” Therefore, “the picture of [Ali] as a proud, professed homosexual in Guyana seems to be more an expression of wishful thinking than something that's particularly likely to come true.”

Id. at 487.

Although Ali is not an asylum or withholding of removal case, the Second Circuit's decision is worth noting because the court criticized the above analysis for being based on “stereotypes about homosexuality and how it is made identifiable to others.” *Id.* at 492. The analysis criticized by the court—one based on stereotypes regarding homosexuality and on speculation regarding an individual's ability to form romantic relationships, as

well on the implication that an individual must be in a romantic relationship to possess a sexual orientation—would present an easy target for circuit courts in the asylum and withholding of removal context as well.

Establishing Persecution

The largest body of circuit court decisions relating to asylum and withholding of removal based on sexual orientation involves scenarios where the respondent has established that he or she is homosexual and faces mistreatment based on this status, but where it is contested whether the mistreatment constitutes persecution. Although these decisions involve a variety of factual scenarios, two important themes are present. First, like other forms of mistreatment, acts directed against homosexuals must be severe in nature to qualify as grounds for asylum or withholding of removal. In determining whether mistreatment is severe enough to support a grant of relief, a particularly relevant inquiry is whether the actions are merely “sporadic” in nature or are part of a pattern—the more sporadic the mistreatment, the less likely to support relief. Second, since a good deal of mistreatment based on sexual orientation is carried out by private individuals rather than the government, many cases involve difficult applications of the general rule for non-governmental persecution that, to form the basis for relief, mistreatment by private individuals must be carried out by entities the government is unable or unwilling to control.

Severe and Not Sporadic

In *Kimumwe v. Gonzales*, 431 F.3d 319 (8th Cir. 2005), the Eighth Circuit made the general point that persecution is an “extreme concept” to be reserved for severe mistreatment. There, among other allegations, the Zimbabwean respondent stated that police arrested him after he attempted to have sex with a fellow male university student. In affirming the denial of the respondent's asylum application, the court stated the following:

Although the government has stated its disapproval of homosexuality and espoused harsh anti-homosexual rhetoric, “persecution is an extreme concept”, typically requiring the infliction or threat of death, torture, or injury to one's person or freedom and the evidence here did not compel a

finding that a homosexual returned to Zimbabwe has a well-founded fear [of persecution].

Id. at 323 (quoting *Salkeld v. Gonzales*, 420 F.3d 804, 808-09 (8th Cir. 2005)).

On three occasions, the Eighth Circuit has emphasized the sporadic nature of mistreatment inflicted on respondents in declining to find them eligible for asylum or withholding of removal. In *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004), the court ruled that Botswanan police officers' entry without a warrant into an apartment the respondent shared with another man was insufficient to establish eligibility for withholding of removal. The court noted that the entry "was an isolated event and did not involve violence, threats, intimidation, detention, or even a search. Homosexual conduct is criminal in Botswana, as it was until recently in some jurisdictions within the United States, but Molathwa was never charged with a crime in Botswana." *Id.* at 554. In *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007), the Eighth Circuit affirmed the finding that "attacks on homosexuals and those with HIV . . . in Mexico . . . are not so numerous or so widespread as to support a claim that Morales has a well-founded fear of persecution." *supra*.

In *Salkeld v. Gonzales*, 420 F.3d 804 (8th Cir. 2005), the Eighth Circuit ruled that the Peruvian respondent failed to establish eligibility for withholding of removal, as he failed to show a clear probability of persecution. In this regard, the court stated the following:

Persecution is an extreme concept and much of the harassment and intimidation of which Salkend complains, while serious, does not rise to the level of persecution. The record contains evidence of some alarming instances of violence towards homosexuals, but these instances are relatively sporadic, and homosexuality is not penalized by the Peruvian government. Indeed, Peru does not have laws prohibiting homosexuality and there are no requirements for homosexuals to register themselves. Salkend admits he was never physically abused in Peru because of his suspected homosexuality. Moreover, the record shows, like the United States, where

some areas of our country are more hospitable to homosexuals than other areas, Peru has some locations in which homosexuals may live more safely.

Id. at 809 (citation omitted).

Similar to the Eighth Circuit, the Second Circuit has ruled that the isolated nature of an attack on a respondent supports a holding that he failed to establish eligibility for withholding of removal. *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006). In that case, the Second Circuit held that the respondent did not establish that his life or freedom would be threatened in Costa Rica, despite the fact that the respondent was raped by a police officer, and subjected to other mistreatment, on account of his homosexuality. With regard to the rape, the court noted that the Immigration Judge found that the "sexual assault, while 'despicable and abhorrent[,] . . . present[ed] a picture of an isolated act of random violence perpetrated by a corrupt police official and . . . [was therefore] insufficient to establish eligibility for asylum.'" *Id.* at 177. The Second Circuit commented that "[h]aving found that the rape was an isolated attack by a corrupt official, the [Immigration Judge] reasonably concluded that it did not justify withholding of removal." *Id.* at 181.

In two Ninth Circuit cases, the court considered similar factors while reaching the opposite conclusion that, because of both the severity and the ongoing nature of the mistreatment alleged by the respondents, the acts alleged constituted persecution. In *Boer-Sedano v. Gonzales*, *supra*, a "high-ranking police officer" forced the Mexican respondent to perform oral sex on him on nine occasions and once pointed his gun at the respondent. *Id.* at 1086. The Immigration Judge found that the respondent did not establish past persecution, because the sex acts were a "personal problem" with the particular police officer and because the respondent did not experience "systematic persecution." *Id.* at 1087 (quoting the Immigration Judge's decision). In remanding, the Ninth Circuit stated that both "the nine sex acts that Boer-Sedano was forced to perform rise to the level of persecution," and that "holding a loaded gun to Boer-Sedano's head and threatening to pull the trigger was . . . a death threat," which provides an independent basis for a finding of persecution. *Id.* at 1088. In *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997), the Ninth Circuit

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR AUGUST 2008

By John Guendelsberger

The United States Courts of Appeals issued 267 decisions in August 2008 in cases appealed from the Board. The courts affirmed the Board in 223 cases and reversed or remanded in 44 for an overall reversal rate of 16.5% compared to last month's 13.1%.

The chart below provides the results from each circuit for August 2008 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	9	8	1	11.1
2nd	61	54	7	11.5
3rd	22	20	2	9.1
4th	13	12	1	7.7
5th	10	9	1	10.0
6th	5	4	1	20.0
7th	10	9	1	10.0
8th	11	9	2	18.2
9th	107	81	26	24.3
10th	4	4	0	0.3
11th	15	13	2	13.3
All:	267	223	44	16.5

Decisions this month were well below normal numbers while the percentage of reversals or remands was somewhat higher than usual. The Ninth Circuit reversed or remanded in 26 of its 107 decisions (24.3%). Nine of these reversals involved asylum and presented the following issues: adverse credibility (5 cases), level of harm for past persecution (1), relocation (1), and an Indonesian case remanded to further address "disfavored group" arguments made under *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). The other reversals involved a wide variety of issues on direct appeal or in motions to reopen. The court remanded in several cases in which Immigration Judges had denied continuance requests to complete fingerprinting, to obtain a crucial document through a FOIA request, or to obtain new counsel. Several other remands asked the Board to further address legal or evidentiary issues raised on appeal.

Five of the Second Circuit's seven reversals were in asylum cases. One involved a flawed credibility

determination. Three others found fault with the well-founded fear or "pattern and practice" analysis. The fifth was remanded with a request that "persecution" be distinguished from "discrimination." Of the remaining two remands, one was to consider documents in the record that were not addressed in the Immigration Judge's decision, the other for the Board to further address a legal issue related to adjustment of status eligibility.

Among the reversals from the other circuits, the Eighth Circuit found no constitutional right to effective assistance of counsel in immigration proceedings, but remanded for further consideration under the agency's regulatory and discretionary authority. In another case, the Third Circuit noted that ineffective assistance of counsel can amount to a violation of due process if the alien is prevented from effectively presenting his case. The Fourth Circuit found that the regulatory confidentiality requirements were violated in the course of an overseas investigation of an asylum applicant's claim. Finally, in a case involving the weight to be afforded a "laissez-passer" in establishing identity, the Eighth Circuit made clear that Wikipedia was not a reliable source.

The chart below shows the combined results for the first eight months of 2008 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	%
7th	76	61	15	19.7
9th	1227	985	242	19.7
2nd	742	636	106	14.3
6th	63	54	9	14.3
3rd	336	309	27	8.0
10th	42	39	3	7.9
11th	141	130	11	7.8
5th	91	87	4	4.4
4th	98	95	3	3.1
8th	60	57	3	5.0
1st	65	63	2	3.1
All:	2941	2516	425	14.5

By way of comparison, at this point in calendar year 2007 there were 485 reversals or remands out of 3086 total decisions (15.7%). In calendar year 2006 there were 669 reversals or remands out of 3831 total decisions (17.5%).

John Guendelsberger is Senior Counsel to the Board Chairman, and is currently serving as a temporary Board Member.

Change We Can – and Can’t – Rely On: Rebutting the “Presumptive Inference” from Past to Future Persecution

by Edward R. Grant

We are hearing a lot about “change” lately. It must have something to do with the Chicago Cubs and their drive to turn back the clock to 1908, the last time they won the World Series. (Or at least to 1945, when they last *played* in a Series). Should the North Siders pull off either feat, they would certainly grab the “mantle of change” from the once-maligned Boston Red Sox, who now seem permanently ensconced among the elite of the baseball world. How times, well, *change*.

Immigration Judges have to consider the issue of “change” on a routine basis. Specifically, when is a “change” in country conditions sufficiently “fundamental” to rebut the presumption, which follows from a finding that an asylum applicant has suffered persecution in the past, that the applicant has a well-founded fear of persecution? (For purposes of economy, this article will sometimes refer to this as the “presumptive inference,” a phrase borrowed from the Tenth Circuit Court of Appeals.) Does the “change” have to be comparable to the Red Sox feat of vanquishing the Curse of the Bambino (or the Cubs erasing the Curse of the Billy Goat)? Or is lesser change sufficient – akin, perhaps, to the Arizona Cardinals now playing a competitive brand of football. Several recent Circuit Court decisions provide new guidance on these questions.

Origins of the “Presumptive Inference” in Asylum and Withholding of Removal

Before unraveling these decisions, it is useful to recall the origins of the “changed circumstances” or “presumptive inference” doctrine. As the Board of

Immigration Appeals observed in *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989), early case law construing the definition of “refugee” (added to the Immigration and Nationality Act in 1980) focused on the meaning of a “well-founded fear.” *Id.* at 17-18. However, based on the definition’s reference to “persecution *or* a well-founded fear of persecution,” the Board found that an applicant is equally eligible for asylum upon a showing of past persecution. *Id.* at 18. Whether to grant asylum to such an alien then becomes an issue of discretion; the likelihood of present or future persecution bears upon that determination, and if the likelihood is low, asylum may be denied in the exercise of discretion.

In succinct fashion, the Board then laid the foundation of the “changed circumstances” rule:

where past persecution is established . . . the [Government] ordinarily will have to present, as a factor militating against the favorable exercise of discretion, evidence that there is little likelihood of present persecution, or the immigration judge or this Board may take administrative notice of changed circumstances in appropriate cases, such as where the government from which the threat of persecution arises has been removed from power.

Id.

The Board then held – in the portion of the decision that gave birth to the “*Chen* Rule” – that even if future persecution is unlikely, a favorable exercise of discretion is warranted for humanitarian reasons based on the severity of the past persecution and other factors. *Id.* at 20-21.

The *Chen* standards – enunciated in a mere three paragraphs – have stood the test of time, and have been codified into a successive series of regulations, most recently amended in December 2000. *See* 8 C.F.R. §§ 1208.13(b)(1), (b)(1)(i)(A) and (iii); 1208.16(b)(1)(i)(A). (As the latter citation demonstrates, the *Chen* doctrine now applies to withholding of removal, a mandatory form of relief with no discretionary element. This raises an interesting question – if the basis of the *Chen* doctrine was a set of standards to govern the exercise of discretion in *asylum* cases, what is the source of that doctrine when applied to a non-discretionary form of relief such as withholding of deportation? The answer is the authority

of the Attorney General to set standards for assessing whether an applicant has met his or her burden of proof to establish eligibility for relief. Despite the “prospective” nature of relief under the non-refoulement doctrine in Article 33 of the Refugee Convention, which is codified in the Immigration and Nationality Act under section 241(b)(3), 8 U.S.C § 1231(b)(3), the Attorney General has determined that proof of past persecution will be presumptive evidence of eligibility – evidence that can be rebutted.)

The standards have been clarified to emphasize that it is the burden of the government to prove the change in circumstances, to clarify that the “change” must be “fundamental,” and, chiefly through judicial decisions, that administrative notice of changed conditions must be carefully employed to ensure that the individual circumstances of a respondent’s claim remain paramount. *See, e.g., Galina v. INS*, 213 F.3d 955 (7th Cir. 2000) (holding “changed country conditions” analysis as to Latvia woefully inadequate; State Department reports suffer from “inherent bias” toward friendly nations); *Fergiste v. INS*, 138 F.3d 14 (1st Cir. 1998) (finding that specific evidence from the respondent off set generalized reports of improved conditions in Haiti offered by the government). The standards for a discretionary asylum grant based on “humanitarian” factors also differ to some extent from those for withholding of removal. For example, regulations applicable to asylum allow a discretionary grant, even if the presumptive inference has been rebutted, where the alien faces a reasonable possibility of “other serious harm” unrelated to the provisions of the refugee definition. 8 C.F.R. § 1208.13(b)(iii)(B). No such provision is available to applicants for withholding of removal. In addition, the regulations clarify that where the presumption has been rebutted, and the alien’s fear of future persecution is unrelated to past persecution, the burden of proof shifts back to the applicant. 8 C.F.R. §§ 1208.13(b)(1); 1208.16(b)(1)(iii) (the “relatedness” provisions).

Can Changed Circumstances Arise from the Infliction of Persecution Itself?

Recently, some of the greatest controversy on the question of “changed circumstances” has revolved around whether the infliction of certain forms of persecution— notably forced sterilization or female genital mutilation (“FGM”)—can itself constitute a “change in circumstances” because such persecution is incapable of repetition. *See*

Matter of A-T, 24 I&N Dec. 296 (BIA 2007) (finding female genital mutilation incapable of repetition, constitutes a “changed circumstance” eliminating future fear of persecution for applicant for withholding of removal); *Matter of Y-T-L*, 23 I&N Dec. 601 (BIA 2003) (holding that forced sterilization, even though incapable of repetition, is an act of “continuing persecution” such that infliction constitutes a basis for granting relief under specific provisions of “refugee” definition pertaining to coercive family planning). *But see Matter of S-A-K- and H-A-H*, 24 I&N Dec. 464 (BIA 2008) (finding asylum applicant victims of FGM eligible for a discretionary grant of asylum due to severity of past harm, notwithstanding lack of well-founded fear of persecution).

The Second Circuit, and more recently, the Attorney General, have rejected the analysis in *Matter of A-T*, *see Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008); *Matter of A-T*, 24 I&N Dec. 617 (A.G. 2008). Both decisions concluded that the Board erred in presuming that FGM was incapable of repetition, particularly since there are four increasingly invasive categories of FGM. They also concluded that the Board had focused incorrectly on FGM as the only possible basis for further persecution, neglecting other actions that might be taken against the applicants on account of their claimed membership in a particular social group.

However, both the Second Circuit and the Attorney General remanded the cases before them on the precise question of “nexus.” In its decision in *Matter of A-T*, the Board had presumed, without clearly deciding, that the infliction of FGM on a young girl, which clearly constituted harm rising to the level of persecution, had been done on account of the applicant’s membership in an undefined social group. The Second Circuit, citing decisions from the Fourth, Eighth, and Ninth Circuits, stated that it “appears” that FGM was inflicted on the petitioners before it on the basis of their gender, combined with their ethnicity, nationality, or tribal membership. *Bah*, 529 F.3d at 112. However, the court determined that this was a question to be determined by the Board in the first instance.

The Attorney General also remanded that precise question to the Board, with clear admonitions for both the Board and the asylum applicant:

[I]t would be better practice for Immigration Judges and the Board to

address at the outset whether the applicant has established persecution on account of membership in a particular social group, rather than assuming it as the Board did here. Deciding that issue—and defining the particular social group of which the applicant is a part—is fundamental to the analysis of which party bears the burden of proof and what the nature of that burden is. Of course, because it is the applicant’s burden in the first instance to show that he or she had been persecuted in the past on account of a protected ground, the applicant must initially identify the particular social group or groups in which membership is claimed. *See* 8 C.F.R. § 1208.16(b); *see also Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).

A-T-, 24 I&N Dec. at 623, n.7. The Attorney General directed that if the Board finds past persecution on account of a protected ground, and subsequently finds the presumption arising from that finding to be rebutted, it should address what effect the “relatedness” provision of the withholding regulations has on the claim for relief. *Id.* at 624.

For purposes of the discussion here, one issue from *Bah* and *Matter of A-T-* is paramount. As the Attorney General noted, the Board erred in focusing too narrowly on whether the future harm to life or freedom that respondent feared would take the “identical” form—namely, female genital mutilation—as the harm she had suffered in the past. *A-T-*, 24 I&N Dec. at 622 (citing *A-T-*, 24 I&N Dec. at 299). The Attorney General continued:

That is not what the law requires. . . . [W] here an alien demonstrates that she suffered past persecution on account of one of the statutory bases, it is “presumed” that her life or freedom would be threatened in the future “on the basis of the original claim”—in other words, on account of the *same statutory ground*. Here, the “original claim” was not “[female genital mutilation] persecution,” as the Board put it but rather persecution on account of membership in a particular (albeit not clearly defined) social group. Accordingly, if respondent

was entitled to the presumption (a matter, as noted above, that the Board assumed, but did not actually decide), it was the Government’s burden to show “that changed conditions obviate[d] the risk to life or freedom related to the original claim”—here, persecution on account of membership in the particular social group—not to show “that the particular act of persecution suffered by the victim in the past will not recur.”

A-T-, 24 I&N Dec. at 622-23 (citations omitted) (quoting *Bah*, 529 F.3d at 115). As we turn to cases involving more “traditional” claims of political persecution, the principle enunciated here—that it is the danger of persecution overall, not the danger of the repeat of a particular *form* of persecution—will come into sharper focus.

When Can Improved Conditions in War-Torn Countries Constitute Sufficient “Change?”

The Ninth Circuit recently addressed the full application of the *Chen* rule in a case arising out of Sierra Leone, a nation whose barbaric civil conflict mercifully has come to an end. *Sowe v. Mukasey*, 538 F.3d 1281 (9th Cir. 2008). *Sowe* held that substantial evidence supported the Board’s finding that there had been a fundamental change in circumstances in Sierra Leone, demonstrated by the end of the conflict, the trial of Revolutionary United Front (“RUF”) rebels (who had persecuted the respondent and killed his parents) for war crimes, the holding of elections, and the withdrawal of international peacekeepers. The court rejected contentions that the Board and Immigration Judge relied improperly on a 2004 Department of State (“DOS”) country conditions report, noting that such reports are “the most appropriate and perhaps the best resource for information on political situations in foreign nations.” *Id.* at 1285 (quoting *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995)). The court also stated that it will defer to a rational construction of a country report, noting that such reports often contain contradictory information. The key is whether the Immigration Judge and the Board have provided an “individualized analysis” of how the changed country conditions “will affect the specific [applicant’s] situation.” *Id.* at 1286 (citing *Gonzalez-Hernandez v. Ashcroft*, 336 F.3d 995, 1000 (9th Cir. 2003)). In addition to the factors noted, the court cited evidence that Muslims in Sierra Leone constituted 60 percent of the population, and that

relations between religious groups are “amicable.” *Id.*

The court remanded, however, on the issue of “humanitarian” relief—specifically, whether asylum should be granted in the exercise of discretion due to the severity of the past persecution. The court’s rationale points again to the need for specificity in making findings of fact. In denying a “humanitarian” grant, the Board referred only to the persecution inflicted personally on the respondent, which included detention and beating by the RUF. However, the respondent also stated (in testimony the Immigration Judge found not credible) that his parents were killed by RUF rebels in 2001, that his brother was maimed, and that his sister was kidnapped. The Board did not address the adverse credibility determination, affirming the Immigration Judge’s alternate finding based on changed country conditions. However, this left open the critical question whether, assuming all of these events were true, whether the cumulative level of persecution was sufficient to warrant a discretionary grant of asylum. That credibility determination, the court concluded, must be addressed by the Board in the first instance. The case was remanded for that purpose. However, the Ninth Circuit rejected Mr. Sowe’s contention that he would face “other serious harm” – the other predicate for a “humanitarian” grant under the regulations. *Id.* at 1284. The evidence of changed conditions, the court concluded, was sufficient not only to rebut the presumptive inference, but also to foreclose this path to relief.

Sierra Leone is just one among several African countries that have seen recent descents into tribal and ethnic conflict, followed by negotiated peace and the resettlement of refugee populations. Mauritania is among the most notable of these. The Tenth Circuit recently took account of these changes and affirmed a Board decision finding that changed conditions in that West African nation “rebutted the presumptive inference from past to future persecution.” *Ba v. Mukasey*, 539 F.3d 1265, 1269 (10th Cir. 2008).

Ba first noted that the question before it is one of fact—therefore, the court of appeals must defer to a Board finding of changed country conditions “unless the record compels us to conclude that it was wrong.” *Id.* The respondent was among the tens of thousands of Mauritians of sub-Saharan origin who were expelled from the country and otherwise persecuted during a period of crisis now dating back 20 years. The court found the Board’s reliance on country reports showing the successful repatriation of most of the deportees to be reasonable—

although it cautioned that “inherently broad” statements in such reports “may not always address the specific concerns that are salient in a particular case.” *Id.* The country reports in this case uniformly showed that the specific crisis of 1989-1991 had long since ended, and that while severe problems still faced Mauritanian society, these problems did not establish that those returning from exile “will be *persecuted.*” *Id.* Thus, the court concluded that the difficulties faced by some returnees in recovering their land or receiving proper identity cards did not overcome the evidence of fundamentally changed circumstances. Nor did such evidence establish that the respondent would be subject to economic or social deprivation rising to the level of persecution. *Id.*

Liberia, a West African nation recovering from more recent and ferocious civil conflict, is the subject of two recent Eighth Circuit decisions, both affirming findings that the presumptive inference had been rebutted. In *Cooke v. Mukasey*, 538 F.3d 899 (8th Cir. 2008), the court, after finding that the respondent, a former official in the Liberian Ministry of Finance, has suffered past persecution from the forces of former rebel leader and president Charles Taylor, nevertheless the finding that “changed conditions” in Liberia since the downfall of the Taylor regime rebutted the presumption of well-founded fear. The court reached the same result in *Redd v. Mukasey*, 535 F.3d 838 (8th Cir. 2008).

Cooke first rejected the Immigration Judge’s conclusion that the respondent’s failure to apply for asylum on two prior trips to the United States rendered acts of harm inflicted against him “less significant” to the question of past persecution. The acts of harm, which included a severe beating in 1990, a 1997 raid on his home, and a 1998 arrest and detention, cumulatively rose to the level of persecution. *Cooke*, 538 F.3d at 905 (citing *Bah v. Gonzales*, 448 F.3d 1019, 1023-24 (8th Cir.2006) (past persecution established where Taylor’s forces burned petitioner’s home, threatened him with death, imprisoned him twice, and murdered his father)). The respondent’s explanation—that he wanted to bring his family to safety before applying for asylum—was reasonable and, in any event, the delay in filing did not diminish the severity of the harm that was inflicted. *Id.*

Cooke affirmed, however, the Immigration Judge’s alternate finding that the government rebutted the presumption arising from the past persecution. Applying the same “substantial evidence” standard cited in *Sowe*

and in *Ba*, the Eighth Circuit concluded that the evidence established not only that Charles Taylor had been deposed, but also that—on the very day of the Immigration Court hearing—had been captured and was slated for trial at The Hague. The court also noted the following measures taken since Taylor’s departure in 2003:

By the end of 2005, more than 25,000 disarmed and demobilized former combatants were required to enroll in reintegration programs. There were considerably fewer reports of human rights abuses by former combatants than in previous years. There were no reports that former rebel combatants arbitrarily arrested civilians. There were no reports that the government or its agents committed arbitrary or unlawful killings. There were no reports of politically motivated disappearances under the current government, as there had been during the civil war. There were, however, reports of police abuse and harassment, as well as arbitrary arrests by security forces (although less frequently than in previous years). Widespread government corruption remained, but a number of high-level officials were dismissed or suspended for corruption in 2005.

Id. at 907. The Immigration Judge’s citation to this evidence of changed conditions, all submitted by the Department of Homeland Security, established that the burden of rebutting the presumption had properly been placed on the government. *Id.* at 906. But Mr. Cooke raised another issue – the fact that he had been persecuted in the past for making specific allegations of corruption against a former Taylor ally who remained in political office. The court labeled this a close question, but concluded that there was no evidence—including from the respondent’s own expert witness—that the official in question had persecuted anyone since the departure of Taylor, or that anyone in the respondent’s political party had faced persecution during the same period.

In, *Redd*, the court addressed similar issues but more succinctly. The Immigration Judge found the respondent not credible, and made alternate findings that the harm inflicted on the respondent—which focused on the alleged rape of his wife—did not rise to the level of

persecution, and that in any event, the capture and trial of Charles Taylor constituted a fundamentally changed circumstance. The adverse credibility finding, based on conflict between the testimony of the respondent and his wife, was affirmed. In affirming the alternate holding on changed conditions, *Redd* briefly cited the removal of Taylor, his ongoing trial at The Hague, and the absence of evidence that his tribe, the Krahn, were currently subject to persecution in Liberia.

Sowe, Ba, Cooke, and Redd illustrate both the type and the degree of change that might be expected to support a finding of “fundamental” changed circumstances. In all three countries, periods of conflict had come to an end, previous governments were no longer in power, international authorities participated in peace-keeping and/or resettlement efforts, and efforts at reconciliation were established (if not always successful, as seems to be the case in Mauritania).

Significantly, all three circuits deferred to Board and Immigration Judge interpretations of the evidence regarding country conditions under the “substantial evidence” standard. This suggests that a “permissible” reading of such evidence, as long as it takes into account the specifics of an applicant’s claim, will merit deference.

A Different Turn: The Need for Particularized Analysis

But this does not paint the complete picture. The relative antipathy of the Seventh Circuit toward Department of State country reports is well established. *See Galina v. INS*, 213 F.3d 955 (7th Cir. 2000). And in the Second Circuit, as a recent case involving yet another troubled African nation reminds us, even change comparable to that in Liberia or Sierra Leone—or even that in Mauritania—will not always support a finding that the presumptive inference has been rebutted. *Passi v. Mukasey*, 535 F.3d 98 (2d Cir. 2008).

Passi involved a native of the Republic of Congo (Congo-Brazzaville) who, during a 1997 attack on his family by members of the government-backed “Cobra” militia, was beaten to unconsciousness. His father, a police officer under a former regime, was killed in the attack. The respondent and his family fled to Gabon, and from there he eventually came to the United States. The Immigration Judge pretermitted asylum on timeliness grounds, and denied withholding of removal based in part

on the changed political situation in Congo-Brazzaville. The respondent appealed only the denial of asylum. The Board assumed the application was timely, and that the respondent had testified credibly to actions amounting to past persecution. However, it concluded, based on a 2004 DOS country report, that the country's civil war had ended in 1999, and that there were no reports of politically-motivated killings or disappearances. Hence, the Board found that the presumption arising from its own presumed finding of past persecution had been rebutted.

The Second Circuit rejected this analysis as inconsistent with circuit caselaw requiring that information in country reports be employed "in a case-specific manner and supplement[ed] with further analysis." *Redd*, 535 F.3d at 101-02, (citing *Tambadou v. Gonzales*, 446 F.3d 298, 303 (2d Cir. 2006) (reversing "changed conditions" finding regarding Mauritania as based on inadequate and incomplete review of record)). In *Passi*, the critical issue was whether someone in the respondent's position—an ethnic Lari linked to former president Lissouba—would be safe due to the general improvements in country conditions. The court found that the Board overlooked pertinent evidence of continued clashes between Lari "Ninja" rebels and government forces, clashes which occurred despite a March 2003 peace accord and ongoing demobilization and reintegration of the rebels. Since the respondent was from Brazzaville, site of the most intense ongoing conflict, the Board erred in failing to consider this evidence.

As stated, the analysis in *Passi* seems unassailable—as long as one assumes, as did the Second Circuit, that the Board genuinely *overlooked* this evidence simply because it did not specifically mention it. The government argued that the Second Circuit had previously affirmed a "perfunctory" analysis of well-known changed conditions in Albania occurring with the fall of the communist Hoxha regime in 1991. *Hoxhallari v. Gonzales*, 468 F.3d 179 (2d Cir. 2007). *Hoxhillari* held that where changed conditions "evidently" prevail in a country with a large number of asylum claimants, the court will "safely assume" that Immigration Judges are well-versed in those changes, and need not make detailed findings regarding the presence of changed conditions. *Id.* at 187. That case, however, involved an Albanian democratic partisan who had been unharmed since the collapse of the Communist regime in 1991; in such a circumstance, no "robotic incantations" regarding changed conditions

were required. *Id.* According to *Passi*, Congo-Brazzaville presents a different circumstance: the change in conditions was not as dramatic, and there is no indication that natives of that country present an "appreciable" number of asylum claims "such that we could be confident in the agency's familiarity with the country." *Passi*, 535 F.3d at 103.

Both points—that change is not as "evident" in Congo-Brazzaville as in Albania, and that the Board has not seen enough Congo asylum cases to earn a presumption of expertise—raise a number of questions. The changes in Congo—which as *Passi* noted include the ongoing demobilization and reintegration of the rebel forces allied with the respondent's own ethnic group—appear comparable to those in Liberia or Sierra Leone. At the very least, such a comparison would be a "permissible" reading of the country conditions evidence, worthy of deference under the substantial evidence standard. The Second Circuit has a well-earned reputation for requiring analytical precision, and its specific focus on the situation of the Lari ethnic group, and the Board's lack of similar focus, may be sufficient to explain its decision not to grant such deference. However, the second point—a sort of "numbers-based" presumption of expertise—is more difficult to reconcile. Having dealt with large numbers of claims from one particular country might make it easier or more efficient for a Board member or Immigration Judge to assess the relevant country conditions evidence. It's harder to see how that translates to assessing whether the resulting assessment is *correct*, i.e., whether the evidence in the record of proceeding supports the conclusions drawn by the adjudicator. Put another way, an Immigration Judge in New York will have more "volume-based" expertise in Chinese claims than an Immigration Judge in Miami—and vice-versa for claims from Colombia or Venezuela. Common sense *might* suggest that the Judge with such experience might be a "better" judge of similar claims. But that is not always the case, and in any event, it seems an odd factor for an appellate court, with a narrow standard of review ("manifestly contrary to the law and an abuse of discretion," *see* section 242(b)(4)(D) of the Act, 8 U.S.C § 1252 (b)(4)(D)), and with little knowledge of an individual judge's or Board Member's caseload, to employ in ruling on a petition for review.

These concerns prompted Chief Judge Jacobs of the Second Circuit to pen a concurrence in *Passi*, emphasizing that neither it nor *Tambadou* be interpreted to place an undue analytical burden on the Board. *Passi*,

535 F.3d at 104. *Tambadou*, the chief judge noted, involved a Board decision relying on a 6 year-old country report, and failed to consider testimony that many of those repatriated to Mauritania from Senegal had been killed. By ignoring evidence favorable to *Tambadou*, the Board erred in its changed conditions analysis. But, the chief judge cautioned, the need for “individualized analysis” should not be overstated:

First, to the extent that an asylum applicant’s personal history and characteristics do not constitute protected grounds, *Tambadou* does *not* require the agency to consider those facts in determining whether country conditions have changed. Such a requirement would gut the usefulness of country reports as an indicator that country conditions have changed, and would transcend the purposes of the asylum laws.

Second, *Tambadou* does *not* prevent the agency from resting its finding of changed country conditions solely on country reports even if other record evidence conflicts with it.

Third, *Tambadou* does not require that the agency perform and enunciate any kind of specific, on-record “analysis” justifying its findings that country conditions have changed. “[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B). The agency’s findings with respect to changed country conditions are therefore upheld when record evidence supports those determinations. To survive our review for substantial evidence, the agency need not engage in special on-record recitation of facts, or perform any ceremony or incantation.

Id. at 104-05 (Jacobs, concurring). One can imagine, based on the Jacobs concurrence, that the issues presented by *Hoxhillari*, *Tambadou*, *Bah*, and *Passi* are not settled in the Second Circuit. If not within that one circuit, what prospect is there across the wider landscape of circuit case law?

Conclusion: Potential Resolution

Some of these issues await the Board’s consideration of the remanded cases in *Bah v. Mukasey* (asylum) and *Matter of A-T-* (withholding of removal). The Attorney General has provided a degree of direction, but beyond that, it would be improper to speculate on the potential resolution of a pending case.

However, the collective lesson from the cases discussed here—including those that affirmed a finding of “changed circumstances” rebutting the “presumptive inference” of the *Chen* rule—is that there is no alternative to a detailed consideration of how present country conditions affect the *specifics* of an applicant’s claim for either form of relief. “Robotic incantations” of evidence too obvious to be repeated may not be required. *Hoxhillari*, 468 F.3d at 187. But as demonstrated in *Passi*, a specific localized fear of persecution may be only tangentially related to the end of a nationwide civil conflict. *Bah* and *A-T-*, as discussed, both emphasize that it is the threat of *some* form of harm on account of a protected ground, not the repetition of a particular act or type of persecution suffered in the past, that is pivotal. Finally, cases only touched lightly here demonstrate the need to give appropriate weight to all sources of country conditions evidence present in the record. While not all circuits are as skeptical of U.S. Government reports as is the Seventh Circuit, it is also critical not to give such reports presumptive weight when evidence of like credibility, from other sources, provides a contradictory view.

Edward R. Grant is a Member of the Board of Immigration Appeals. He is indebted to the research and editorial assistance of Elisabeth Yu, Presidential Management Fellow at the Board.

RECENT COURT DECISIONS

First Circuit

Pina v. Mukasey, ___ F. 3d ___, 2008 WL 4181694 (1st Cir. Sept. 12, 2008): The First Circuit reversed a decision of the Board, which had reversed the Immigration Judge’s finding that the respondent derived U.S. citizenship through his father under the Child Citizenship Act of 2000. As the respondent’s parents were separated, and only his father had naturalized, the determinative factor was whether the

father had “legal custody” under Massachusetts law. After a lengthy analysis, the court concluded that the informal joint custody agreement reached between the parents (but never filed in court) satisfied the State law.

Seventh Circuit

Jeziarski v. Mukasey, __ F.3d __, 2008 WL 4149753 (7th Cir. Sept. 10, 2008): The Seventh Circuit dismissed an appeal from the Board’s denial of a motion to reopen based on a claim of ineffective assistance of counsel. The Board held that the respondent had failed to establish prejudice. The court held that it lacked jurisdiction to consider the issue. It noted that no statute or constitutional provision provides a right to reopening a removal proceeding based upon ineffective assistance. It further found no rule set by the Board requiring reopening based on this ground. The court noted that the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff’d*, 857 F.2d 10 (1st Cir. 1988), do not compel reopening if satisfied; they are merely necessary prerequisite to reopening being considered. The court thus concluded that reopening based on ineffective assistance of counsel was entirely discretionary, and therefore outside of the court’s jurisdiction.

Fernandez v. Mukasey, __ F.3d __, 2008 WL 4193005 (7th Cir. Sept. 15, 2008): The court dismissed the appeals of three petitioners who were found to be aggravated felons based on repeat controlled substance convictions. In each case, the repeat offense involved simple possession. Relying on a prior holding in a non-immigration context (*U.S. v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), *reh’g denied*, 513 F.3d 776 (7th Cir. 2007)), the court rejected the argument that the second conviction must have been treated by the state court as a recidivist offense in order to qualify as a hypothetical federal felony. The court thus rejected the reasoning in the Board’s precedent decision in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), but noted that the case was decided by the Board after *Pacheco-Diaz* and failed to address that decision.

Musollari v. Mukasey, __ F.3d __, 2008 WL 4276565 (7th Cir. Sept. 19, 2008): The court dismissed the appeal of the respondent, whose application for asylum was denied by the Immigration Judge. The respondent specifically challenged the Immigration Judge’s adverse credibility finding, which the court found to contain several factual errors. The court further found impermissible the Immigration Judge’s disbelief that the respondent had served as a polling place observer, based on the frequency

of such claim among Albanian asylum applicants. Nevertheless, the court found that the balance of the evidence relied on by the Immigration Judge was sufficient to support the adverse credibility finding, and therefore concluded that in spite of the errors, the record did not compel a contrary conclusion.

Ninth Circuit

Santos-Lemus v. Mukasey, __ F.3d __, 2008 WL 4111900 (9th Cir. Sept. 8, 2008): The Ninth Circuit upheld the Board’s denial of asylum based upon fear of the MS-13 gang in El Salvador. The respondent claimed that his fear was linked to his membership in two particular social groups: his family (based on the gang’s murder of one of his brothers and threats against two others), and the group of “young men in El Salvador resisting gang violence.” The court found no nexus to his family membership, as his mother, who was similarly situated, remained unharmed in El Salvador. Citing the Board’s precedent decision in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), the court further rejected the second proposed group as “too loosely defined” and lacking the requisite social visibility.

Figueroa v. Mukasey, __ F.3d __, 2008 WL 4149031 (9th Cir. Sept. 10, 2008): The Ninth Circuit reversed the Immigration Judge’s decision denying non-LPR cancellation of removal relief to a husband and wife from Mexico. The court found that the Immigration Judge applied an incorrect legal standard in requiring the resulting harm to their USC children to be “unconscionable” in order to constitute “exceptional and extremely unusual hardship.” The court found such requirement to be contrary to the Board’s precedent decisions in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001) and *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). The court found that the Immigration Judge further erred in considering the present condition of the USC children, and not looking to any future condition that the parents’ deportation could cause.

Bromfield v. Mukasey, __ F. 3d __, 2008 WL 4192026 (9th Cir. Sept. 15, 2008): The court reversed the Board’s decision, affirming an Immigration Judge’s denial of asylum, withholding of removal and CAT protection to an applicant from Jamaica. The court held that a pattern or practice of persecution of gay men exists in Jamaica. It further held that the Immigration Judge applied the wrong legal standard in denying CAT relief. In stating that the respondent was required to show that

he would suffer torture by the Jamaican Government, the Immigration Judge erred in failing to consider Government acquiescence, which was established by the record.

Mota v. Mukasey, ___ F.3d ___, 2008 WL 4224920 (9th Cir. Sept. 17, 2008): The court reversed the Immigration Judge's decision (affirmed by the Board), finding the respondent statutorily ineligible for non-LPR cancellation of removal due to her 1990 California conviction for "Inflicting Injury Upon a Child." The court vacated such determination in light of the Board's subsequent decision in *Matter of Gonzales-Silva*, 24 I&N Dec. 218 (BIA 2007), which held that the domestic violence grounds of removal, section 237(a)(2)(E) of the Act, shall apply only to convictions occurring on or after the effective date of IIRIRA (i.e., April 1, 1997).

AG/BIA PRECEDENT DECISIONS

In *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008), the Attorney General certified and then vacated the Board's decision denying respondent's claim for withholding of removal and remanded the claim for further proceedings. The respondent sought asylum and withholding of removal based upon her claim that she had been subjected to female genital mutilation ("FGM") in Mali. In a published decision, *Matter of A-T-*, 24 I&N Dec. 296 (BIA), the Board rejected the respondent's asylum claim as barred by the 1-year filing deadline. As to the withholding claim, the Board assumed that the respondent was a member of a social group and that FGM can constitute persecution but found that any presumption of future persecution was rebutted by the change in the respondent's situation arising from the infliction of FGM upon her.

The Attorney General found that the Board committed error in finding that FGM can only occur once, and that any future harm must take precisely the same form as past persecution. The Attorney General observed that as a factual matter, FGM can be repeated. Furthermore, the presumption that attaches after past persecution is found is that an alien's life or freedom would be threatened "on the basis of the original claim," which means that it is on account of the same statutory ground. 8 C.F.R. § 1208.16(b)(1)(i). In this case, the original claim was not FGM, but persecution on account of membership in a particular social group. The Attorney General asked the Board to consider whether the respondent is entitled to the presumption of future persecution on account

of membership in a particular social group, whether the Government has rebutted the presumption, and what effect, if any, the relatedness provision in 8 C.F.R. § 1208.16(b)(1)(iii) has on respondent's claim for relief.

The Attorney General lifted a stay imposed on the Board by Attorneys General Ashcroft and Reno in *Matter of R-A-*, 24 I&N Dec. 629 (A.G. 2008). In 1999, the Board issued a decision denying a claim for asylum filed by an alien who had been the victim of domestic violence in Guatemala. *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999; A.G. 2001). The respondent had asserted that she was persecuted based on a social group defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." Attorney General Reno vacated the Board's decision and directed the Board on remand to stay consideration of the case pending publication of a final rule which would have amended the asylum regulations pertaining to the meaning of the terms persecution, on account of, and particular social group. Attorney General Ashcroft certified the case, but then remanded it directing the Board to reconsider its decision in light of the final rule. *Matter of R-A-*, 23 I&N Dec. 694 (A.G. 2005). The final rule has never been published. In lifting the stay, the Attorney General indicated that in the years since the stay order, the Board and courts of appeals have issued numerous decisions that, while not directly on point, may have relevance to issues relating to domestic violence. The Attorney General indicated that the Board may proceed with reconsideration of *Matter of R-A-* and the other cases involving similarly situated aliens being held by the Board. Lastly, the Attorney General noted that the Board is free to exercise its own discretion and issue a precedent decision establishing a uniform standard nationwide when interpreting ambiguous statutory language.

In *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008), the Board found that in order to obtain derivative citizenship under former section 321(a) of the Act, 8 U.S.C. § 1432(a), an alien must acquire the status of an alien lawfully admitted for permanent residence while he or she is under the age of 18 years. In this case, the respondent entered the United States at the age of 4 as the child of an F-1 nonimmigrant student. His father and mother naturalized when the respondent was 17, but he did not become a lawful permanent resident until he was 21. The Immigration Judge had found that the respondent demonstrated that he resided permanently in the United States while under 18 years, and the respondent need

not have been residing pursuant to a lawful admission for permanent residence. Construing the term “residing permanently” in section 321(a)(5), the Board found that the term implies lawful residence since an alien remaining without authorization can be removed at any time. Similarly, an alien admitted for a temporary period cannot be considered to reside permanently in this country. This is bolstered by the parallel language in the definition of “lawfully admitted for permanent residence,” historical treatment of derivative citizenship claims, and the fact that to read it otherwise would negate the first clause in section 321(a)(5).

In *Matter of Guadarrama*, 24 I&N Dec. 625 (BIA 2008), the Board found that an alien who made a false claim to citizenship on a Form I-9 (Employment Eligibility Verification) to obtain employment may be a person who is not of good moral character, but such a finding is not automatically mandated by section 101(f) of the Act. The Immigration Judge noted the changes made to the good moral character provision that prevented certain aliens who made a false claim to citizenship but reasonably believed themselves to be United States citizens from being found lacking in good moral character. The Immigration Judge reasoned that an alien who did not fall within this exception could not show good moral character under the catch-all provision. The Board rejected this reason and sustained the respondent’s appeal.

REGULATORY UPDATE

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

Revision to Direct Mail Program for Submitting Form N-400, Application for Naturalization

ACTION: Notice.

SUMMARY: U.S. Citizenship and Immigration Services (“USCIS”) is revising its Direct Mail Program so that certain filings of Form N-400, Application for Naturalization, will now be filed at a designated lockbox facility instead of a USCIS Service Center. However, if you are the spouse of an active member of the Armed Forces, this notice instructs you now to file your Form N-400 at the Nebraska Service Center (“NSC”), whether you are filing from within the U.S. or abroad. This notice does not change the filing location for Forms N-400 filed by active members or certain veterans of the Armed Forces who are eligible to apply for naturalization under sections 328 or

329 of the Immigration and Nationality Act.

DATES: This notice becomes effective October 14, 2008.

73 Fed. Reg. 56,729

DEPARTMENT OF STATE

22 CFR Part 41

Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended

ACTION: Final rule.

SUMMARY: This rule establishes regulatory exceptions to travel restrictions, established in the Tom Lantos Block Burmese JADE Act, that were put in place for Burmese nationals. The rule allows the Department to exempt certain Burmese diplomats and officials from the travel restrictions.

DATES: Effective Date: This rule is effective September 30, 2008.

73 Fed. Reg. 56,879

DEPARTMENT OF STATE

Bureau of Consular Affairs; Registration for the Diversity Immigrant (DV-2010) Visa Program

ACTION: Notice.

SUMMARY: This public notice provides information on how to apply for the DV-2010 Program. This notice is issued pursuant to 22 CFR 42.33(b)(3) which implements sections 201(a)(3), 201(e), 203(c) and 204(a)(1) (I) of the Immigration and Nationality Act, as amended (8 U.S.C. 1151, 1153, and 1154(a)(1)(I)).

Asking and Telling *continued*

ruled that the Russian respondent established persecution in a case where, while living in the former Soviet Union, she was arrested by a militia and was later registered at a government-run clinic as a “suspected lesbian” and forced to attend “therapy sessions.” *Id.* at 644.¹

Finally, in *Bromfield v. Mukasey*, __ F.3d __, 2008 WL 4192026 (9th Cir. Sept. 15, 2008), the Ninth Circuit relied on what it deemed the severity and pervasiveness of mistreatment in Jamaica in ruling that there is a “pattern or practice of persecution” against homosexual men in that country. *Id.* at *5. Such a finding makes it easier for a respondent to qualify for relief because, under 8 C.F.R. §§ 1208.13(b)(2)(iii) and 1208.16(b)(2), an applicant for

asylum or withholding of removal who establishes a pattern or practice of persecution is not required to show that he or she would personally be singled out for persecution, if certain conditions are met. In its decision, the Ninth Circuit deemed it significant that the State Department Country Report on Jamaica described a “culture of severe discrimination” against homosexuals, in which “brutality against homosexuals [was] ‘widespread.’” *Id.* at *4 (quoting from the Country Report). In addition, the court emphasized that Jamaican law criminalizes homosexual acts and that, according to the Country Report, this law is enforced, although the respondent was never prosecuted for such an offense. The court stated that “[b]ecause the prohibition is directly related to a protected ground—membership in the particular social group of homosexual men—prosecution under the law will always constitute persecution.” *Id.* at * 4.²

Public v. Private

With respect to the distinction between private and public mistreatment, two cases, one from the Eighth Circuit and one from the First Circuit, provide examples of mistreatment by private parties that did not support relief because the respondents failed to show that the would-be persecutors were beyond the control of the government. In *Kimumwe v. Gonzales, supra*, the Zimbabwean respondent testified that, in the court’s words, “local authorities harassed him by chasing him and making disparaging remarks, neighbors spat on him, kicked him, and threw stones at him, and that on one occasion, he was beaten by villagers and shocked with an electric wire.” *Id.* at 322. In declining to deem this mistreatment to be persecution, the Eighth Circuit stated that

[a]ctions by private parties are not attributable to the government, absent a showing that the harm is inflicted by persons that the government is unwilling or unable to control and we conclude that the [Immigration Judge] reasonably declined to find on this record that the incidents involving neighbors and villagers described by Kimumwe amounted to persecution by official authorities.”

Id. at 322-23 (citation omitted).

In *Galicia v. Ashcroft*, 396 F.3d 446 (1st Cir. 2005), the Guatemalan respondent alleged that he was “beaten

and verbally abused . . . by his neighbors” in Guatemala. *Id.* at 447. The First Circuit affirmed the denial of the asylum application, based in part on a finding that the respondent “did not show that the harassment he suffered was by the government or a group the government could not control.” *Id.* at 448.

Two other decisions, one from the Eighth Circuit and one from the Ninth Circuit, fall on the other side of the line. Here, the cases were remanded due to deficient analyses of whether the would-be private persecutors were beyond the control of the government. In *Nabulwala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007), the Ugandan respondent testified that she was physically abused by family members when she disclosed her homosexuality; that she was attacked by a mob while attending a meeting of a lesbian organization at her university; that she was forced by family members to have sex with someone she did not know; and that she was forced out of her clan due to her homosexuality. *Id.* at 1116-17. In remanding following the denial of the respondent’s applications, the Eighth Circuit stated that the Immigration Judge “erred in concluding that to qualify for asylum, Nabulwala had to demonstrate persecution at the hand of government officials. Persecution may be a harm to be inflicted either by the government or a country or by persons or an organization that the government was unwilling or unable to control.” *Id.* at 1118 (quoting *Suprun v. Gonzalez*, 442 F.3d 1078, 1080 (8th Cir. 2006)).

In *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, (9th Cir. 2004), the Salvadoran respondent alleged that, when he was 13 years old, “he was kidnaped by a group of men, taken to a remote location in the mountains, and raped and beaten because of his homosexual orientation. . . . Fearing reprisal, he never told his family or the authorities about these crimes.” *Id.* at 785. The Ninth Circuit remanded based in part on a finding that, in denying the respondent’s withholding of removal application, the Immigration Judge erroneously required that the respondent demonstrate that “anyone in the government or acting on behalf of the government would want to torture him.” *Id.* at 789.

Finally, in *Ornelas-Chavez v. Gonzales*, 448 F.3d 1052 (9th Cir. 2006), the Ninth Circuit expanded on the general rule for private persecution outlined above, stating that there is no per se requirement that an individual report to the police mistreatment based on sexual orientation. Here, the Mexican respondent alleged a long history of mistreatment based on “his homosexuality and female

sexual identity” by his family members, teachers, and co-workers. *Id.* at 1054-55. According to the court, the Board stated that “where the respondent never reported his incidents of harm to government authorities, and where the background evidence in the record is inconclusive, the Immigration Judge properly found that the respondent did not prove that the Mexican government is unwilling or unable to control those who harmed or may harm him.” *Id.* at 1055 (quoting the Board’s decision). In remanding, the Ninth Circuit ruled that “an applicant who seeks to establish eligibility for [withholding of removal] on the basis of past persecution at the hands of private parties the government is unwilling or unable to control need not have reported that persecution to the authorities if he can convincingly establish that doing so have been futile or would have subjected him to further abuse.” *Id.* at 1058.

Conclusion

This article has presented a brief history of asylum and withholding of removal applications based on sexual orientation, as well as a guide to the issues that arise most often in these cases. However, this is not an exhaustive summary. Two other issues that have been addressed by the circuit courts, albeit less frequently than those described above, include whether persecution has occurred “on account of” homosexual status, and whether internal relocation to avoid persecution is possible.³ Given that *Matter of Toboso-Alfonso*, which granted particular social group status to homosexuals, was only published in 1994, case law on this topic is still somewhat limited. As persecution based on sexual orientation represents a developing area of asylum law, it is reasonable to expect more case law, and more commentary from observers, in the coming years. In the meantime, when sexual orientation cases arise, special attention should be paid to the issues described above.

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1. In *Pitcherskaia*, the Ninth Circuit was primarily concerned with making the point that persecution does not require any intent to punish. There, the Board had affirmed the denial of the respondent’s asylum application, based in part on a finding that, in the Ninth Circuit’s words, “the militia and psychiatric institutions intended to ‘cure’ her, not to punish her, and thus their actions did not constitute ‘persecution’ within the meaning of the Act.” *Id.* at 645. In remanding, the Ninth Circuit ruled that “[a]lthough we have

held that unreasonably severe punishment can constitute ‘persecution’. . . . ‘punishment’ is neither a mandatory nor a sufficient aspect of persecution. . . . The fact that a persecutor believes the harm he is inflicting is ‘good for’ his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution.” *Id.* at 647-48 (citations omitted).

2. The Eighth and Ninth Circuits—the two circuits that have analyzed foreign laws criminalizing homosexual acts—have viewed the effects of these laws on applications for relief somewhat differently. As noted in the text, the Ninth Circuit saw the existence of a Jamaican law criminalizing homosexual acts as significant in establishing a pattern or practice of persecution in Jamaica, even though the respondent was never prosecuted under this law. *Bromfiel v. Mukasey*, *supra*, at *5. In addition, the Ninth Circuit ruled that prosecution under this law is per se persecution. *Id.*

The Eighth Circuit’s holdings regarding such laws, noted previously in the text, both expand on and conflict with the Ninth Circuit’s holdings in *Bromfiel*. First, in *Salkeld v. Gonzales*, *supra*, the Eighth Circuit, addressing an angle not yet explored by the Ninth Circuit, cited the lack of laws in Peru criminalizing homosexuality to support its finding that the respondent did not establish persecution. *Id.* at 809. Second, in contrast to the Ninth Circuit in *Bromfiel*, the Eighth Circuit in *Molathwa* both downplayed the importance of anti-homosexual laws and seemed to hold that, for such a law to support a finding of persecution, the respondent should have actually been prosecuted. Specifically, in finding the respondent ineligible for relief, the court stated that “[h]omosexual conduct is criminal in Botswana, as it was until recently in some jurisdictions within the United States, but *Molathwa* was never charged with a crime in Botswana.” *Molathwa v. Ashcroft*, *supra*, at 554.

3. Regarding both issues, see, e.g., *Boer-Sedano v. Gonzales*, *supra*.

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