

Persecution

Overview of Persecution

The BIA has defined “persecution” as “either a threat to life or freedom of, or infliction of suffering or harm upon those who differ in a way regarded as offensive.” See *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). The BIA and the Second Circuit have found that although persecution must rise above mere harassment, the infliction of suffering or harm “need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.” *Matter of Laipenieks*, 18 I&N Dec. 433, 456-457 (BIA 1983). Persecution can thus include threats to freedom or life and non-life-threatening violence. *Ivanishvili v. DHS*, 433 F.3d 332, 341 (2d Cir. 2006); see also, *Laipenieks*, 18 I&N Dec. at 457 (persecution may encompass “mental” aspects); see also, *Zaman v. Gonzales*, 168 Fed. Appx. 470, 472 (2d Cir. 2006) (remanding for IJ to “explicitly consider the evidence” of death threats, “decide whether that evidence is credible, and if so, whether such threats constitute past persecution”); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998) (persecution “encompasses a variety of forms of adverse treatment, including...non-physical forms of harm”).

Harm is Cumulative & Each Instance of Harm Cannot be Considered in Isolation

Adjudicators must weigh the “cumulative” significance of multiple instances of harm. *Poradisova v. Gonzales*, 420 F.3d 70, 79 (2d Cir. 2005) (finding that the IJ below erred in “addressing the severity of each event in isolation, without considering its cumulative significance”); *Manzur v. DHS*, 494 F.3d 281, 290 (2d Cir. 2007) (taking isolated incidents out of context may be misleading; the cumulative effect of the applicant’s experience must be taken into account); *Matter of O-Z- & I-Z-*, 22 I&N Dec. at 25-26 (beatings and threats may constitute persecution “in the aggregate”).

Defining Persecution

Although persecution is not specifically defined within the INA, the courts have held 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.” See *Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983).

The following five broad categories describe abuse that adjudicators may find rise to the level of persecution:

- 1. serious physical harm;**
- 2. coercive medical or psychological treatment;**
- 3. invidious prosecution or disproportionate punishment for a criminal offense;**
- 4. severe discrimination and economic persecution, and**
- 5. severe criminal extortion or robbery.**

Serious Physical Harm

The most recognized form of persecution is the infliction of serious physical harm, including confinement, kidnapping, torture, and beatings. Rape, sexual assault and other forms of gender-based violence are also persecution.

The rape and beating of an LGBTQ/H person on account of their sexual orientation, gender identity, and/or HIV status constitutes persecution. Many LGBTQ individuals have been raped or sexually assaulted as “punishment” for their sexual orientation or gender identity. In the case of *Hernandez-Montiel*, the Ninth Circuit found that there was persecution when a “gay man with a female sexual identity” was detained, strip-searched, sexually assaulted, and raped by police officers on more than one occasion and sexually assaulted and attacked by a group of men.

Threats of violence will generally not be sufficient to establish past persecution unless the threats themselves cause significant harm. “Threats standing alone...constitute persecution in only a small category of cases and only when the threats are so menacing as to cause significant actual suffering or harm.” Threats will be more likely to establish future persecution if the applicant can demonstrate that the group who is making the threats has the will and ability to carry them out.


Coercive Medical and Psychological Treatment

Certain types of medical and psychological treatment will demonstrate a well-founded fear of persecution. The Board of Immigration Appeals has

found that “forced institutionalization, electroshock treatments and drug injections could constitute persecution.” The coercive family planning practiced by the Chinese government may also constitute persecution.

The most significant holding in this area is the Ninth Circuit decision in *Pitcherskaia v. INS*. Pitcherskaia, a lesbian from Russia, was arrested and imprisoned on several occasions for protesting violence and discrimination against gays and lesbians in Russia. The militia threatened her with forced institutionalization and required her to attend therapy sessions. She was prescribed sedative medication which she successfully refused. In addition, an ex-girlfriend of hers was institutionalized against her will and was subjected to electric shock treatment and other treatments meant to ‘cure’ her of her sexual orientation. The Ninth Circuit ruled that it is not necessary for the persecutor to intend harm in order for unwanted medical or psychological treatment to amount to persecution, as long as the victim experiences the treatment as harmful. The proper test is whether or not a reasonable person would have found the suffering inflicted as offensive.

Lack of access to adequate medical treatment, however, is generally not considered persecution. HIV-positive asylum applicants will have difficulty securing asylum status on this basis. Nevertheless, at least two international human rights law tribunals have recognized that a country’s failure or inability to provide life-sustaining medical treatment can allow for protection under refugee law. In addition, lack of adequate medical treatment for HIV/AIDS has been one of several factors that have been considered when a claim is made based on HIV status. The discrepancy within the cases may be attributed to the difference between not receiving the best quality medical care and government refusal to provide basic medical care to people with HIV/AIDS.



HIV DIAGNOSIS IN THE SUB-STANDARD PRISON CONDITIONS OF THE COUNTRY OF CITIZENSHIP WOULD RESULT IN DEATH. There have also been successful non-precedential Convention Against Torture claims for individuals living with HIV who were able to demonstrate that they would be incarcerated in sub-standard conditions if returned to their home countries. Finding that such incarceration would like lead to death, at least two Immigration Judges (IJs) have granted CAT under these circumstances

Invidious Prosecution or Disproportionate Punishment for a Criminal Offense

Asylum status will not be granted for criminal prosecution as a result of a violation of a fairly administered law. Prosecution may be considered persecution, however, if there is either severe punishment or pretextual prosecution. Asylum adjudicators will focus on whether the punishment under a country's laws is disproportionately severe or whether the law or punishment is contrary to international human rights standards. In determining whether a particular law is considered to be in violation of human rights standards, asylum adjudicators may use U.S. law as comparison. Since *Lawrence v. Texas*, private consensual same-sex activity cannot be prohibited by law in the United States. This ruling helps demonstrate that sodomy laws in other countries are in violation of rights explicitly recognized by the United States.

Many countries still prohibit homosexual acts in their criminal codes. The existence of such a law, however, may not be sufficient to demonstrate

persecution. Several unpublished decisions emphasize the importance of evidence that the laws are actually enforced

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