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Persecution

What is persecution?

1. Severe harm or suffering
 1. May involve physical violence
 2. Non-physical violence may also constitute persecution **Example:** deliberate imposition of severe economic disadvantage or deprivation of liberty, food, housing, employment, or education
2. Inflicted to punish a person for possessing a belief or characteristic that the persecutor seeks to overcome

References: • *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), (modified on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)) • *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)

How is alleged harm assessed?

- When considering whether alleged harm constitutes persecution, the Immigration Judge considers the harm in the aggregate.
- Threats of harm alone usually are not enough to constitute persecution. Actual harm is generally required.

- Multiple incidents, considered together, may constitute persecution, especially if escalating in nature.

References: • *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998) • *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)

WHAT IS **NOT** PERSECUTION

The following, without more, generally do NOT constitute persecution:

- Discrimination
- Generalized conditions of violence
- Generalized poverty or an unfavorable economic situation
- Damage to personal property
- Attempts by law enforcement to detain a person for legal reasons
- Military recruitment
- Anonymous, non-specific threats

This list is non-exhaustive—

Well-founded Fear of Persecution

Definition of 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.” 7 The United Nations High Commission on Refugees (UNHCR) has endorsed a similar standard in its Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the

Status of Refugees. 8 Persecution has also frequently been defined as “the infliction of suffering or harm upon those who differ in a way regarded as offensive.” 9 Persecution is usually physical but can also be emotional or psychological. 10

Recognizing persecution is extremely fact-dependent and fact-specific. Although asylum adjudicators will determine what constitutes persecution on a case-by-case basis, they have consistently recognized certain types of behavior as persecution. 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.

As explored below, successful applicants must demonstrate that the persecution was motivated by one of the five protected grounds (race, religion, nationality, membership in a PSG or political opinion).

Serious Physical Harm

The most recognized form of persecution is the infliction of serious physical harm, including confinement, kidnapping, torture, and beatings. 11 Rape, sexual assault and other forms of gender-based violence are also persecution. 12

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. 13

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.” 14 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. 15

Female genital mutilation (FGM) is also a form of persecution. 16 Although the threat of FGM in the future can demonstrate a well-founded fear of persecution, a recent Ninth Circuit case has held that genital mutilation is an ongoing act of persecution “which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.” 17 Thus, both past FGM and the threat of having the procedure can be the basis for a well-founded fear of persecution.

Violence against an applicant’s family members can also support a case for asylum. 18

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.” 19 The coercive family planning practiced by the Chinese government may also constitute persecution. 20

The most significant holding in this area is the Ninth Circuit decision in *Pitcherskaia v. INS*. 21 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. 22

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. ²³ 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. ²⁴ 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.

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. ²⁵

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. ²⁶ Prosecution may be considered persecution, however, if there is either severe punishment or pretextual prosecution. ²⁷ 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. ²⁸ 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. ²⁹ Since *Lawrence v. Texas*, private consensual same-sex activity cannot be prohibited by law in the United States. ³⁰ 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. 31

3.1.1.4 Economic Persecution and Other Forms of Severe Discrimination

Generally, harassment and discrimination will not constitute persecution. Persecution is regarded as an extreme concept that differs from general discrimination against minority groups, 32 which requires “more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.” 33 Severe forms of discrimination may however amount to persecution in some instances. Discrimination will amount to persecution “if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.” 34 Cumulative discrimination that is increasing in severity will have a higher chance of being considered persecution. 35 For instance, the inability to travel safely within a country and forced expulsion from the country amount to persecution.³ 36

One form of severe discrimination recognized by the courts is in the form of economic persecution. Economic persecution requires a probability of deliberate imposition of substantial economic disadvantage based on a protected ground. 37 In a non-precedential case, the Ninth Circuit found that a lesbian from the Philippines had not experienced economic persecution when she could not continue working as a dentist because no patients would patronize her after they learned of her sexual orientation. The Court found that the inability to pursue one’s chosen profession, as opposed to the complete inability to find any livelihood, did not rise to the level of persecution, particularly considering that there was no showing that the government was unable or unwilling to address the problem. 38

Severe discrimination may be a ground for applicants living with HIV to claim asylum. The discrimination, however, must go beyond inadequate medical treatment. In one unpublished decision, an IJ found that a married woman living with HIV would be subject to persecution on account of severe discrimination. 39 In making this decision, the IJ considered documentary evidence that people living with HIV lost their jobs when employers learned of their status and that hospitals turned away HIV-positive patients. Additionally, the IJ determined that the woman could face criminal prosecution for being married despite a law barring people with HIV from marrying.

In another non-precedential case, a man living with HIV from Togo was granted asylum by an IJ. The IJ considered evidence that drugs for treating HIV/AIDS were scarce or nonexistent in Togo, that a cousin of the applicant had been sent home to die when he was sick from AIDS-related illnesses, and that the applicant would be ostracized by the community and would be unable to secure work. 40 In contrast, the BIA, in an unpublished decision, affirmed a denial of withholding of removal based on future persecution based on HIV status. In the decision, the BIA suggested that the evidence needs to demonstrate social stigma and not just an increasing infection rate in a particular country. The BIA also noted the importance of showing that poor treatment of those suffering from AIDS is due to severe discrimination against those living with AIDS rather than a reflection of widespread poverty and unemployment. 41

Severe Criminal Extortion or Robbery

Extortion can constitute persecution when the extortion clearly and selectively occurs on account of one of the five statutorily listed grounds (including PSG membership). 42 Threatening to disclose one's sexual orientation to a hostile community may constitute persecution if the applicant can put forth evidence that makes it reasonable to believe that the extortion was at least partially based on the fact that the individual is gay or imputed to be gay. 43

Crime alone will most likely not reach the level of persecution. 44 If, however, the applicant can demonstrate that a robbery or assault was motivated by a protected characteristic and that the police failed to provide protection, it may constitute persecution. 45

A gay man from Mexico failed to gain asylum because the BIA found that incidents where police had called him immoral and extorted money from him, thieves had robbed him while calling him gay, and a group of men had beat him up while yelling 'faggot' did not constitute persecution, but were rather only harassment and discrimination. 46 The case illustrates how robbery and extortion will generally have to reach a certain level of extremity in order to amount to persecution.

Proving that robbery and extortion amount to persecution will be difficult if the country in question is experiencing civil unrest and economic strife, conditions which greatly increase the incidence of both forms of crime against the general population. 47

3.1.2 Establishing a Well-Founded Fear

In order to demonstrate a well-founded fear of return, an asylum applicant must establish that they have both a subjective and objective fear of returning to their country of origin. 48 The subjective component requires that the applicant demonstrate a genuine fear of persecution. 49 “An asylum applicant’s candid, credible, and sincere testimony demonstrating a genuine fear of persecution satisfies the subjective component of the well-founded fear standard.” 50 The UNHCR stated that “an evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions.” 51 Although not binding on U.S. asylum applications, the Handbook is persuasive authority.

The test for the objective component is whether a reasonable person in the applicant’s circumstances would fear persecution. The objective element requires credible, direct, and specific evidence that supports a reasonable fear of persecution. 52 According to the Supreme Court, a chance of persecution that is as low as ten percent may result in a well-founded fear sufficient for asylum. 53 54 As long as the objective component is established by the evidence, it need not be shown that the situation will probably result in persecution. It “is enough that persecution is a reasonable possibility.” 55

Past Persecution

An applicant may be granted asylum based on past persecution alone. If an applicant sufficiently demonstrates past persecution, they are presumed to have a well-founded fear of persecution. 56 The presumption of a well-founded fear of persecution, however, can be rebutted if a preponderance of the evidence demonstrates that there has been a fundamental change in circumstances or that the applicant could reasonably relocate to another part of the country of origin. 57

Even without a demonstration of a well-founded fear of persecution, the applicant may be granted asylum if there are compelling reasons that they are unwilling or unable to return based on the severity of the past persecution or if the applicant has established that there is a reasonable

possibility that they may suffer other serious harm. 58

Making a case for a well-founded fear of persecution based on past persecution may be weakened if the applicant remained in their country of origin for a lengthy period of time after the initial persecution without any additional incidents. 59 Adjudicators may also find it damaging to a case if the applicant has returned to the country of origin since arriving in the United States. 60 Return trips without incident may be one factor that can contribute to a rebuttal of the presumption of future persecution established by past persecution. 61 In one unpublished Ninth Circuit opinion, the Court found that return trips alone do not rebut a presumption of well-founded fear. 62 The case, *Pena-Torres v. Gonzales*, involved a gay applicant who took several trips back to his native Mexico after he was the victim of persecution by the police. The Court found that the return trips alone did not rebut the presumption of well-founded fear, particularly since the State Department report corroborated violence against gay men.

If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of demonstrating that the fear is well-founded. 63 Establishing past persecution generally provides the strongest case for an asylum claim because it puts the burden on DHS to demonstrate that the fear is not well-founded.

Pattern and Practice of Persecution against Similarly Situated Persons

An applicant can demonstrate a well-founded fear of persecution by showing that there is a pattern or practice in their country of persecution of LGBTQ/H individuals. The applicant must establish that they are LGBTQ/H and that their fear upon return is reasonable. 64 Persecution against a specific group must be systemic, pervasive, or organized in order to amount to a pattern or practice sufficient for establishing a fear of future persecution. 65 An applicant will not have a well-founded fear of persecution if it would be reasonable for them to relocate to another part of their country of origin. 66

Fear of future persecution tends to be the more difficult route for demonstrating asylum eligibility. The applicant will need to provide documentation from compelling, accurate, and clearly identified sources in order to establish a pattern of mistreatment. Helpful documents include reports by recognized and respected human rights and LGBTQ/H international rights organizations, such as Amnesty International, Human Rights Watch, the OutRight Action Internatoinal, and the International Lesbian and Gay Association. The applicant should also include newspaper articles regarding violence against LGBTQ/H individuals in the country of origin. Testimony by experts on conditions in the country in question will also be considered. U.S. State Department Reports on country conditions will be highly influential in the absence of contradictory evidence. 67

Individualized Fear of Future Persecution

An individual who has not suffered persecution can nevertheless demonstrate a well-founded fear. In *Matter of Mogharrabi*, the BIA 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. 68

Karouni v. Gonzales is a significant precedential case for sexual-orientation based asylum claims because it is based only on a finding of a well-founded fear of future persecution. Karouni, a gay man living with AIDS from Lebanon, had satisfied the requirements for both a subjective and objective fear based on future persecution by providing evidence that Hizballah militants frequently persecuted gay men, that his cousin had been killed on the basis of his sexual orientation, and that his own sexual orientation had been disclosed to the police by other gay men who had been beaten by authorities. 69

On Account of Membership in a Particular Social Group

The applicant must prove that the persecution they fear in the future is motivated by their actual or imputed membership in a PSG. Since 1994, when Attorney General Janet Reno designated *Matter of Toboso-Alfonso* as precedent, “homosexual men” has been recognized as a PSG under asylum law. More recently, the Ninth Circuit has ruled that “all alien homosexuals are members of a ‘particular social group.’” 70 In the case *Amanfi v. Ashcroft*, the Third Circuit held that imputed membership in the PSG of gay men can also be grounds for an asylum claim. In *Amanfi*, the Court recognized that persecution on account of sexual orientation may be sufficient for an asylum claim even if the victim is actually not gay but is thought to be by the persecutor. 71 In that case, a man from Ghana engaged in homosexual activity with another man in order to be spared from being ritually sacrificed, after which he was continuously beaten by police for his perceived homosexuality.

The Ninth Circuit has also found in the case of *Hernandez-Montiel* that “gay men with female sexual identities” constitute a PSG. 72 The Court rejected the argument that Hernandez-Montiel’s female identity was volitional, concluding that his presentation as female was immutable and inherent in his identity and that he could not be required to change it. The Court reaffirmed its holding in *Reyes-Reyes v. Ashcroft*. 73 Although transgender persons have not been explicitly found to constitute a PSG, there have been many successful non-precedential cases. 74

People living with HIV have not explicitly been found to constitute a PSG for the purposes of asylum. In 1996, the legacy INS Office of the General Counsel recommended that the PSG of people with HIV be recognized for the purposes of asylum law. 75 Some IJs have found that HIV status can form the basis of a PSG membership. 76 The BIA has also recognized, in an unpublished opinion, that people living with AIDS can comprise a PSG. 77 Although these decisions are significant for applicants living with HIV, because the rulings are not precedential, such applicants will still need to individually establish that people living with HIV in their countries constitute a PSG.

An essential component of an asylum application for a lesbian, gay, or bisexual applicant will be proving that they are in fact lesbian, gay, or bisexual. Relevant proof may include testimony or documentation by past partners or friends living in the United States.

The applicant must also provide evidence, either direct or circumstantial, that the persecution is on account of their sexual orientation, gender identity, or HIV status. 78 In an unpublished decision, *Pena-Torres v. Gonzales*, the Ninth Circuit reversed an IJ's decision that a gay man from Mexico had suffered from police brutality rather than persecution on account of his sexual orientation. 79 The Ninth Circuit remanded the case for a new determination regarding asylum eligibility because it found that an incident where the applicant was beaten to the point where he required medical attention and was threatened by the police after leaving a gay bar, did amount to past persecution on account of his sexual orientation. The Court reached this conclusion by citing evidence that the police had attacked the applicant only after they asked him whether he was gay.

Significantly, the BIA has consistently followed the doctrine of "mixed motives" which holds that there can be more than one motivation for the persecution, as long as the harm was motivated in part by an actual or imputed ground as shown by direct or circumstantial evidence produced by the applicant. 80

If an applicant does not clearly fit within a precedentially defined PSG, they must establish that they are a member of a PSG. The major case setting forth what constitutes membership in a PSG is *Matter of Acosta*. 81

“ ‘Persecution on account of membership in a particular social group’ mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. 82

PSGs should be defined in specific terms rather than in broad, generally applicable terms such as youth and gender. For instance, the following PSGs have met the requirements for asylum: young women of the Tchamba-Kunsuntu tribe who have not suffered FGM, as practiced by that tribe, and

who oppose the practice, and HIV-positive individuals living in the Ivory Coast and Togo.

As noted, broad PSGs, such as gender, will not satisfy the membership requirement as it is currently construed. This exclusion long created difficulties for those who sought asylum in order to escape domestic violence or other forms of violence within the private sphere, before the BIA's precedential decision in *Matter of A-R-C-G-*. Even today, PSGs must be defined with sufficient particularity that its boundaries are discrete and definable. The group must also be socially distinct—that is, the society in question must distinguish individuals who share the defining characteristic of the PSG from those who do not. This “visibility” does not mean ocular or literal visibility, or explicit, outward identification by the applicant with the PSG.

Political opinion may be an additional ground that LGBTQ/H individuals can claim asylum. LGBTQ/H people who are involved with gay rights groups may use political opinion as a supplemental ground for asylum claims. In addition, the BIA has found that persecution can be based on an imputed political opinion.

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