Unable or Unwilling Case Law

Primary Case Law

C-G-T, 28 I. & N. Dec. 740 (BIA 2023)

(1) Determining whether the government is or was unable or unwilling to protect the respondent from harm is a fact-specific inquiry based on consideration of all evidence.

(2) A respondent's failure to report harm is not necessarily fatal to a claim of persecution if the respondent can demonstrate that reporting private abuse to government authorities would have been futile or dangerous.

(3) When considering future harm, adjudicators should not expect a respondent to hide his or her sexual orientation if removed to his or her native country.

INS v. CARDOZA-FONSECA, 480 U.S. 421 (1987)

Standard of proof for asylum:
The 243(h) "clear probability" standard of proof does not govern asylum applications under 208(a). Pp. 427-449.

(a) The plain meaning of the statutory language indicates a congressional intent that the proof standards under 208(a) and 243(h) should differ. Section 243(h)'s "would be threatened" standard has no subjective component, but, in fact, requires objective evidence that it is more likely than not that the alien will be subject to persecution upon deportation. In contrast, 208(a)'s reference to "fear" makes the asylum eligibility determination turn to some extent on the alien's subjective mental state, and the fact that the fear must be "well founded" does not transform the standard into a "more likely than not" one. Moreover, the different emphasis of the two standards is highlighted by the fact that, although Congress simultaneously drafted 208(a)'s new standard and amended 243(h), it left 243(h)'s old standard intact. Pp. 430-432.

(b) The legislative history demonstrates the congressional intent that different standards apply under 208(a) and 243(h). Pp. 432-443.

(c) The argument of the Immigration and Naturalization Service (INS) that it is anomalous for 208(a) to have a less stringent eligibility standard than 243(h) since 208(a) affords greater benefits than 243(h) fails because it does not account for the fact that an alien who

satisfies the 208(a) standard must still face a discretionary asylum decision by the Attorney General, while an alien satisfying 243(h)'s stricter standard is automatically entitled to withholding of deportation. Pp. 443-445.

(d) The INS's argument that substantial deference should be accorded BIA's position that the "well-founded fear" and "clear probability" standards are equivalent is unpersuasive, since the narrow legal question of identicality is a pure question of statutory construction within the traditional purview of the courts, and is not a question of case-by-case interpretation of the type traditionally left to administrative agencies. Pp. 445-448.

REQUIREMENT

An applicant for asylum and withholding of removal has the burden to establish past persecution or fear of future persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42); see also 8 C.F.R. §§ 1208.13(a), 1208.16(b). Evidence of physical abuse and violence at the hands of government agents is relevant to whether the petitioner has experienced past persecution or has a well- founded fear of future persecution. *See Beskovic v. Gonzales*, **467 F.3d 223, 225–26**

(2d Cir. 2006). “Private acts can also constitute persecution if the government is unable or unwilling to control such actions.” *Pan v. Holder,* **777 F.3d 540, 543 (2d Cir. 2015). Evidence of physical abuse and violence at the hands of government agents is relevant to whether the petitioner has**

experienced past persecution or has a well-founded fear of future persecution. *See Beskovic v. Gonzales*, **467 F.3d 223, 225–26 (2d Cir. 2006). "Private acts can also constitute persecution if the government is unable or unwilling to control such actions."** *Pan v. Holder*, **777 F.3d 540, 543 (2d Cir. 2015).**

"Under the unwilling-or-unable standard, a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, condoned it or at least demonstrated a complete helplessness to protect the victims." *Singh v. Garland*, **11 F.4th 106, 114–15 (2d Cir. 2021) (quotation marks omitted).**

"[F]ailure to report harm is not necessarily fatal to a claim of persecution if the applicant can demonstrate that reporting private abuse to government authorities would have been futile or dangerous." Matter of C-G-T-, 28 I. & N. Dec. 740, 743 (B.I.A. 2023) (quotation marks omitted); *cf*. *Quintanilla-Mejia v. Garland*, **3 F.4th 569, 593 (2d Cir. 2021) ("[F]ailure to ask for police help is not enough, by itself, to preclude a finding of acquiescence.").**

BIA CASE LAW

C-G-T, 28 I. & N. Dec. 740 (BIA 2023)

(1) Determining whether the government is or was unable or unwilling to protect the respondent from harm is a fact-specific inquiry based on consideration of all evidence.

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the Immigration Judge should consider the reasonableness of the respondent's failure to seek assistance rom the authorities in his country as part of considering all evidence regarding whether the government was unable or unwilling to protect the respondent. See id. at 1069 (stating that whether or not a victim reports harm, and evidence explaining why not, are factors in the unable or unwilling analysis). This analysis should include the respondent's testimony, available corroborating evidence, and country conditions reports. See, e.g., Rosales Justo, 895 F.3d at 166 (emphasizing the importance of reviewing the entire record); Matter of S-A-, 22 I&N Dec. at 1332–33, 1335 (evaluating record evidence). 5 For example, the record indicates the respondent testified that children do not make reports to the authorities in the Dominican Republic and they do what they are told. He testified that his father would have killed him if he reported the abuse to the authorities, that he did not report to a teacher because everyone knew his father, and that he reported the abuse to his grandmother but she did not take any action. The respondent also testified that his access to government assistance was further limited because he lived in a small town far from the nearest city. Determining whether it was reasonable for the respondent not to seek help from the authorities in his own country is a fact-based inquiry. Cf. Rosales Justo, 895 F.3d at 161 n.6. A mere "subjective belief" that reporting would be futile is not sufficient to establish that a government is unable or unwilling to provide protection. Morales-Morales, 857 F.3d at 135. Rather, a respondent must demonstrate, based on the record as a whole, that the government is unable or unwilling to protect him or her from persecution. Compare Morales-Morales, 857 F.3d at 136 (concluding that the respondent did not satisfy his burden because he testified that if he had

reported incidents, the perpetrators “would go to jail”), with Doe v. Att’y Gen. of U.S.,

SECOND CIRCUIT CASE LAW

Castellanos-Ventura v. Garland, No. 21-6293 (2d Cir. 2024)

https://law.justia.com/cases/federal/appellate-courts/ca2/21-6293/21-6293-2024-09-13.html

The United States Court of Appeals for the Second Circuit reviewed the case. The court found that the agency incorrectly applied the "unable or unwilling to control" standard. It noted the agency failed to consider whether it would have been futile or dangerous for Castellanos-Ventura, as an abused child, to seek protection. Additionally, the agency did not evaluate significant evidence indicating the Honduran government's inability to protect women and children from violence. The court granted the petition for review and remanded the case to the BIA for further proceedings consistent with its opinion.

Castellanos-Ventura v. Garland, 21-6293 (2d Cir. 2024)

https://www.courtlistener.com/opinion/10116086/castellanos-ventura-v-garland/

A woman was being victimized by members of her family and criminals in her community in Honduras. She *never went to the police or reported the abuse.* **Nevertheless, the Second Circuit found that due to her being under 17 for most of the abuse and due to the country condition reports showing how difficult it is for women and children to report crime in Honduras, the BIA erred by finding that she did not prove that the government of Honduras was unable or unwilling to protect her.**

> **“Under the unwilling-or-unable standard, a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, condoned it or at least demonstrated a complete helplessness to protect the victims.” Singh v. Garland, 11 F.4th 106, 114–15 (2d Cir. 2021) (quotation marks omitted). “[F]ailure to report harm is not necessarily fatal to a claim of persecution if the applicant can demonstrate that reporting private abuse to government authorities would have been futile or dangerous.” Matter of C-G-T-, 743 (B.I.A. 2023) (quotation marks omitted); cf. Quintanilla-Mejia v. Garland, 593 (2d Cir. 2021) (“[F]ailure to ask for police help is not enough, by itself, to preclude a finding of acquiescence.”).**

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