

THE REAL ID ACT AND ASYLUM

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The REAL ID Act of 2005¹ introduced new challenges to the practice of immigration law. Many of the provisions of interest to immigration attorneys are found in Title I,² Section 101 (entitled “Preventing Terrorists from Obtaining Relief from Removal”) and Section 106 (entitled “Judicial Review of Orders of Removal”). This article focuses on the Act’s effect on applications for asylum and for relief under the Convention Against Torture. After a brief

analysis of changes in judicial review,³ the narrower definition of persecution,⁴ and more stringent standards for establishing credibility,⁵ we will provide a practical guide for preparing, presenting, and appealing cases for asylum and CAT relief.

CHANGES IN JUDICIAL REVIEW⁶

Elimination of Habeas Corpus Review of Removal Orders

The REAL ID Act purports to strip the district courts of jurisdiction to review removal orders (or any decision, including adjustment of status) specified to be within the discretion of the Attorney General or Secretary of Homeland Security by writ petitions. Repeated like a litany in §§242(a)(2)(A),⁷ (B),⁸ (C),⁹ (a)(4),¹⁰ and (a)(5) is the phrase (*new part in italics*): “Notwithstanding any other provision of law (*statutory or nonstatutory*), including section 2241¹¹ of title 28, United States Code, or any other habeas corpus provision, and sections 1361¹² and 1651¹³ of such title. . . .” The only statutory or non-statutory jurisdiction to contest a final “order of removal entered or issued under any provision” of the INA is now in the federal circuit courts of appeals.¹⁴

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¹The REAL ID Act is Division B (the last quarter) of a 93-page bill called “Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005.” Pub. L. No. 109-13; 119 Stat. 231 at 302–23.

² “Amendments to Federal Laws to Protect Against Terrorist Entry.” The other parts of REAL ID are Title II, “Improved Security for Drivers’ Licenses and Personal Identification Cards”; Title III, “Border Infrastructure and Technology Integration”; Title IV, “Temporary Workers”; and Title V, “Other Changes to Provisions Governing Nonimmigrant and Immigrant Visas.”

³ REAL ID §§101(e), 106.

⁴ REAL ID §101(a)(3)(B).

⁵ REAL ID §§101(a)(3) [adding a new subsection 208(b)(1)(B) to the INA] and 101(d)(2) [adding a new subsection 240(c)(4)(C) to the INA].

⁶ The text of INA §242, as amended, may be found at www.aifl.org/lac/lac_ina242amended_060105.pdf. Other useful REAL ID resources are found at AILF’s Legal Action Center: www.aifl.org/lac/lac_realidresources.htm.

⁷ Expedited removal at POE under §235(b)(1).

⁸ Denials of discretionary relief under §§212(h), 212(i), 240A, 240B, or 245.

⁹ Removal orders against persons removable for crimes.

¹⁰ Claims under United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment.

¹¹ Habeas Corpus.

¹² Writ of Mandamus.

¹³ All Writs Act.

¹⁴ REAL ID §106(a)(1)(B); INA §242(a)(5).

Review of Claims Under the Convention Against Torture (CAT)

CAT claims arise under the Convention itself and uncodified legislation,¹⁵ not under the INA. Under the 1998 statute, judicial review of CAT claims was “as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act,”¹⁶ but was not described in the INA. Now, under REAL ID, “any cause or claim” under CAT must be reviewed in the federal circuit courts of appeals.¹⁷ The one exception is habeas challenges to INA §235(b)(1), expedited removal at a port of entry.

Enhanced Review of Legal Claims

The new §242(a)(2)(D) provides:

Judicial Review of Certain Legal Claims.— Nothing in subparagraph (B) [eliminating review of denials of discretionary relief] or (C) [eliminating review for persons ordered removed on criminal grounds], or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In *Fernandez-Ruiz*, the Ninth Circuit broadly interpreted REAL ID’s statutory allowance for constitutional review by the federal circuit courts of appeals:

By this amendment, Congress restored judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders. . . . Congress repealed all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) or (C) following the amendment of that section by the REAL ID Act.¹⁸

Subject to re-interpretation of *Fernandez*, the courts of appeals now have jurisdiction to review all constitutional issues and questions of law related to a final order of removal. Thus, it is important to

make a record, during removal proceedings, of testing legal and constitutional issues, in order to exhaust administrative remedies and preserve the issues for judicial review.

PROVING PERSECUTION

Persecution “On Account Of” a Protected Ground

A foreign national can qualify for asylum¹⁹ if he or she satisfies the INA’s definition of “refugee.”²⁰ REAL ID does not substantially change the definition of refugee, but addresses the burden of proof. A refugee is one who:

- is outside of his or her country of nationality (or, if stateless, the country of last habitual residence); and
- is unable or unwilling to avail himself or herself of the protection of that country because of
- past persecution, or
- a well-founded fear of future persecution; and
- the persecution was or would be on account of race, religion, nationality, membership in a particular social group, or political opinion.

“Central Reasons” for Persecution

Under the new burden of proof in §208(b)(1)(B)(i), “the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant.”

Establishing that one of the statutorily enumerated grounds was the “central reason” for persecution is a difficult task, and review of an adverse finding is also difficult.²¹ Even without the centrality standard, asylum applicants generally have had difficulty establishing their persecutors’ precise motivations.²² Persecution may also be on account of

¹⁵ Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. No. 105-277, 112 Stat. 2681, 2682–821).

¹⁶ *Id.* Subsection 2242(d).

¹⁷ INA §242(a)(4), added by REAL ID §106(a)(1)(B).

¹⁸ *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585 (9th Cir. 2005).

¹⁹ INA §208(b)(1)(B).

²⁰ INA §101(a)(42)(A).

²¹ “Since the statute makes motive critical, he must provide some evidence of it, direct or circumstantial. And if he seeks to obtain judicial reversal of the BIA’s determination, he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.” *INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992).

²² Indeed, federal courts have noted that demonstrating persecution as having occurred “on account of” one of the

mixed motives, some of which are not concerned with any of the five protected grounds. The Ninth Circuit has allowed asylum claims where persecution was—or would be—at least partly “on account of” one of the enumerated grounds.²³

What criteria will be acceptable for judging centrality? REAL ID suggests that a haphazard or undisciplined presentation, either in the application or in testimony, may be fatal to the asylum claim. The attorney will have to develop a theory of the case and bring to focus the “central” motives for persecution.

A Form I-589, whether prepared by an attorney, a notario, or a friend of the client, may fail to state or fail to give prominence to the central motive for persecution. Asylum applicants may lack the ability to give a statement that remains focused on a “central motive” of the persecutor. The attorney will have to work carefully to obtain such a statement. Moreover, in preparing the client after the I-589 has been filed, the attorney’s theory of the case will often change dramatically. In any event, the client will have to be coached on how to present testimony to maintain a focus on the central motives of the persecutor.

However, a change in the theory of the case, or a different narrative of the motivations of the persecutor, could be more troublesome for credibility findings after REAL ID. If the statements are perceived as inconsistent, the statute makes clear that the advocate will have to present the circumstances under which the statements were made.

Credibility Inconsistencies

REAL ID defines the “totality of the circumstances” test for credibility:

(iii) CREDIBILITY DETERMINATION.— Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or wit-

ness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor. There is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.²⁴

The provision that inaccuracies in the applicant’s statements will support a negative credibility finding, even if the inaccuracies do not go to the heart of the asylum claim, is a disapproval of case law standards in the Third and Ninth Circuits, standards which were becoming recognized, if not followed, in some other circuits.²⁵

Minor inconsistencies are not unusual for asylum applicants who have experienced traumatic life events. The Ninth Circuit has incorporated this view into case law, saying:

discrepancies . . . which reveal nothing about an asylum applicant’s fear of his safety [are] ‘minor inconsistencies’ that cannot form the basis of an adverse credibility finding.²⁶

Minor inconsistencies in the record that do not relate to the basis of an applicant’s alleged fear of persecution, go to the heart of the asylum claim, or reveal anything about an asylum applicant’s fear for his safety are insufficient to support an adverse credibility finding.²⁷

INA’s enumerated grounds was already an onerous task: “The ‘on account of’ question goes to the motives of the persecutor, and the Ninth Circuit has “long recognized” that “motives can be difficult to pin down.” *Gafoor v. INS*, 231 F.3d 645, 650 (9th Cir. 2000). See also *Ramirez-Rivas v. INS*, 899 F.2d 864, 869 (9th Cir. 1990) (“Evidence of the motive of the persecutor is hard to come by.”).

²³ “[T]he statute covers persecution on account of a protected ground even where the persecutor acts out of mixed motives. . . . the protected ground need only constitute a motive for the persecution in question; it need not be the sole motive.” *Mihalev v. Ashcroft*, 388 F.3d 722, 727 (9th Cir. 2004).

²⁴ INA §208(b)(1)(B)(iii), added by REAL ID §101(a)(3).

²⁵ *Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003); *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000); *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002); *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998); *Uwase v. Ashcroft*, 349 F.3d 1039, 1043 (7th Cir. 2003); *Kondakova v. Ashcroft*, 383 F.3d 792, 796 (8th Cir. 2004) (recognizing the standard, but not applying it); *Capric v. Ashcroft*, 355 F.3d 1075, 1090 (7th Cir. 2004) (same).

²⁶ *Bandar v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000).

²⁷ *Manimbao v. Ashcroft*, 329 F.3d 655, 660 (9th Cir. 2003).

What will happen to standards in the Third and Ninth Circuits, where discrepancies that cannot be viewed as attempts to enhance claims of persecution have no bearing on credibility?²⁸ Apparent inconsistencies based on faulty or unreliable translations may not be sufficient to support a negative credibility finding.²⁹

[W]e have long recognized that difficulties in interpretation may result in seeming inconsistencies, especially in cases . . . where there is a language barrier.³⁰

Discrepancies capable of being attributed to a typographical or clerical error . . . cannot form the basis of an adverse credibility finding.³¹

In order for REAL ID's provision to remain consistent with Ninth Circuit jurisprudence, one may read REAL ID to allow inconsistencies, even minor ones, to be only one factor among many when assessing the overall credibility of an asylum applicant. However, even REAL ID, demanding a review of the totality of circumstances, should not be read as allowing a minor irrelevant inconsistency to negate an otherwise credible and well-corroborated asylum claim. The choice of which factors to use should continue to remain within the discretion of the immigration judge, as it did before REAL ID.

Demeanor as a Statutory Ground for Denial

Refugees often have suffered traumatic persecution. Torture victims tend to have trouble remembering exact times, dates, and names; the flashbacks of their memory are more likely to be fragmented rather than detailed. Traumatic "memories" consist of emotional and sensory states, with little verbal representation, which explains why our clients' testimonies can be fragmented at times. Persons suffering from post-traumatic stress disorder will, in most

cases, have intense aversion to describing the trauma.

According to a study by two Harvard psychiatrists, such dissociative processing of a traumatic experience "complicates the capacity to communicate about the trauma. In some people, the memories of trauma may have no verbal (explicit) component at all."³² Memories of the trauma "tend, at least initially, to be experienced primarily as fragments of the sensory components of the event: as visual images, olfactory, auditory, or kinesthetic sensations, or intense waves of feelings."³³ When people feel threatened, they experience a significant narrowing of consciousness, and remain focused on the central perceptual details; "explicit memory" may fail.³⁴

These credibility factors also apply to withholding of removal cases, denials of relief under the Convention Against Torture, cancellation of removal, Violence Against Women Act cancellation cases, Nicaraguan Adjustment and Central American Relief Act (NACARA), Cuban Adjustment Act cases, and other discretionary cases.

CORROBORATION

REAL ID puts into statute a requirement that any well-prepared case should try to meet—corroboration of the asylum applicant's story. The Act requires immigration judges (IJ) to demand from asylum and withholding applicants corroborating evidence supporting their claims unless the IJ believes that an applicant does not have it and cannot reasonably obtain it.³⁵ Of course, what can be "reasonably obtained" is an open question.

Asylum seekers must often leave their homes without corroborating evidence, which makes it more difficult for them to obtain such evidence after they have fled. The Ninth Circuit has long recognized the problem of corroboration in asylum cases:

We recognize that omitting a corroboration requirement may invite those whose lives or freedom are not threatened to manufacture evidence of specific danger. But the imposition of such a requirement would result in the deportation of many

²⁸ *Wang v. Ashcroft*, 341 F.3d 1015 (9th Cir. 2003); *Shah v. INS*, 220 F.3d 1062 (9th Cir. 2000); *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002); *Senathirajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998).

²⁹ *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999); *Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003).

³⁰ *Singh v. INS*, 292 F.3d 1017, 1021–23 (9th Cir. 2002) (perceived inconsistencies between applicant's airport interview and testimony did not constitute a valid ground for an adverse credibility determination, especially given the lack of an interpreter who spoke applicant's language).

³¹ *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).

³² Van der Kolk and Fisler, "Dissociation and the Fragmentary Nature of Traumatic Memories," *Journal of Traumatic Stress*, Vol. 8, No. 4, 1995, at 512.

³³ *Id.* at 513.

³⁴ *Id.* at 511.

³⁵ INA §208(b)(1)(B)(iii).

people whose lives genuinely are in jeopardy. Authentic refugees rarely are able to offer direct corroboration of specific threats. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.³⁶

REAL ID demands that asylum applicants provide the immigration court with objective evidence supporting their asylum claim unless they can provide an acceptable explanation as to why such evidence is unobtainable:

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.³⁷

The decision of whether corroborating evidence was obtainable is a question of fact reviewable under the "substantial evidence" standard:

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 208(b)(1)(B), 240(c)(4)(B), or 241(b)(3)(C), unless the court finds, pursuant to section 242(b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.³⁸

Although "availability of" is reviewed under the substantial evidence standard, there is a question whether the "should provide" element will be reviewed for abuse of discretion.

³⁶ *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984).

³⁷ INA §208(b)(1)(B)(iii). Nearly identical language also now applies to other applications for relief from removal under INA §240(c)(4).

³⁸ INA §242(b)(4). The referenced Section 242(b)(4)(B) says, "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."

Another key issue is interpreting the meaning of "corroborating" evidence. Must it be evidence that corroborates details of the applicant's story, or could it be general reports of country conditions, such as reported by the U.S. State Department, Human Rights Watch, Amnesty International, or other news agencies?

Corroborating evidence may come from psychological and medical reports from doctors who have examined the client. It is extremely important to have these examinations done early in the case, as they can influence a judge's credibility analysis and also may uncover new, previously untold or repressed incidents of torture. These alternative sources of corroborating evidence may be crucial to the success of an asylum case, which already hinges on the credibility of the client. Finally, evidence of past torture is one of the primary factors in granting relief under the Convention Against Torture, and presenting corroborating evidence and credible testimony about past torture will aid attempts to procure relief.

REAL ID may lend support to IJs who would deny asylum for the applicant's failure to provide corroboration if the IJ believes relevant corroborating evidence could reasonably be obtained. REAL ID reinforces the importance of diligence in discovering, obtaining, and submitting all available corroborating evidence.

The client needs to be put on notice as early in the proceedings as possible. They should be asked to collect any papers that can be obtained from the client's home country, including birth certificates, news stories, and anything of this nature. It could also include testimony of other witnesses.

PREPARATION OF THE CASE

A detailed and focused declaration must be filed along with the asylum application. Often completion of the declaration will require multiple meetings with a client and require many revisions. As the client's story becomes clearer, the attorney can develop a theory of the case and help the client frame the story in a way that exposes the motive of the persecutor. The client must be intimately familiar with the language and substance of the declaration because it will form the basis for an immigration judge's credibility analysis. A detailed declaration is important because traditional sources of corroborating evidence are typically unavailable in asylum cases. Presenting a declaration that is consistent with testi-

mony given at the subsequent hearings will positively impact the immigration judge's credibility analysis. To facilitate this, try to accomplish the following:

- (1) Make your office a safe and inviting space;
- (2) Develop multi-lingual, multi-cultural staff or on-call assistants;
- (3) If your client is less than fluent in English, it is critical that you have a competent interpreter;
- (4) If your client does not fully understand you, or vice-versa, mistakes and inconsistencies can result;
- (5) Always use a disinterested translator; never use the client's spouse, parent, sibling, or a child (particularly the client's child) as a translator. This will not only risk traumatizing the family member, it might risk the client withholding information relevant to the asylum claim because of shame in discussing such matters before a close relative;
- (6) Do not have the client's children in the room during the interview, and consider whether all family members need to be excluded from the interview.
- (7) As you prepare, be aware that you are dealing with an individual who may have suffered profound mental and/or physical harm and that different cultures deal with such issues differently;
- (8) Set aside enough time to interview the client, so that neither you nor the client feels rushed. Taking the client's declaration can be a lengthy process, due to such potential factors as trauma in reliving painful events, the need to establishing a rapport with the client, educating the client about what you are doing, and translation problems;
- (9) Explain in advance that you may be asking painful and intrusive questions in order to determine whether, and to what extent, the client has experienced torture/persecution;
- (10) Ask very specific, simple, and short questions. Never ask lengthy or complex questions. They often confuse the client;
- (11) Use open-ended questions to encourage the applicant to disclose any past threats or acts of violence they may have encountered. Depending upon the rapport that develops, you can then direct your questioning toward more specific questions;
- (12) Take notes with as much detail as possible, so that you can remind your client about things he or she may not remember later. Consider tape-recording the interview;

(13) Realize that you will probably not get all the information you need in the first interview;

(14) If your client has a hard time remembering dates, try to help him or her tie dates to the occurrences of an event he or she remembers well—for example, a holiday or the birth of a child. This is not a history exam, and some dates cannot be remembered or precisely reconstructed. Do not let anxiety about remembering dates distort a natural manner of telling the story;

(15) Once the first draft is written, *read* the declaration to the client and make necessary corrections;

(16) Have the client come back for three to five more interviews, during which the client hears his or her own declaration, and he or she can add, delete, or change it;

(17) Refer the client to a licensed psychologist or psychiatrist for psychological evaluation in the very early stages. Clients may often disclose important information that was left out during the attorney-client interview. If past violence or even torture was a factor in your client's story, consider working closely with nonprofit organizations that provide medical, psychological, and case management and counseling services to victims of torture, such as the Program for Torture Victims of Los Angeles (PTV) and the South Asian Network.

With regard to credibility, it is essential to present the applicant's case in a manner in which the trier of fact understands. If the judge is able to understand the case, he or she is more likely to believe it. The analysis of country conditions and the place that the applicant holds in his or her own society must be made before the court process begins. The practitioner must present the case in a way that would allow the judge to see the individual facts emerge from a logical perspective, taking into account both the historical situation of the applicant and that of his or her social or political group. Most asylees come from an underclass or a minority. In order to understand the case, the judge must be given the historical analysis before the case is heard. Do not leave it to the judge to try to comprehend the political trends at the hearing. This must be prepared for him or her before court, in the form of a trial brief and documented by country reports.