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Portraits of Persecution: Analyzing Asylum Claims Filed by Artists

by Adam L. Fleming

"I cannot help but ask why they persecute me so." ~ Filmmaker Andrei Tarkovsky, announcing that he would seek asylum from the Soviet Union.[1]

Asylum seekers as a group tend to share some common traits, but it is occasionally helpful to consider issues that uniquely impact a particular subset of applicants. Such an inquiry may serve as a lens through which the broader field of asylum law can be viewed. This allows us to focus on recurring topics of discussion and to magnify other, less obvious, areas of dispute. This article will survey case law related to one such category of applicants: artists who are seeking asylum in the United States. The article will first examine the types of protected grounds on which artists most often premise their claims. Next it will address cases that have considered the intent of the persecutor in the context of attacks against artists. The third section of the article will discuss factors that may affect the reasonableness of an artist's fear of future harm. The final part will consider issues related to the definition of "persecution," as that term is applied to claims made by artists.

Protected Grounds

An applicant for asylum must establish that the persecution he fears will be "on account of" a protected ground, such as his or her race, religion, or nationality. Sections 101(a)(42) and 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A); *see also* section 241(b)(3)(A) of the Act, 8 U.S.C. § 1231(b)(3)(A).

In reported decisions, courts have addressed several different types of claims articulated by artists. The first half of this section is devoted to the protected ground most often advanced by artists—their alleged political opinions. Claims based on other grounds, such as race and religion, are discussed further below.

Political Opinion

The Act does not provide a definition of the phrase "political opinion." Consequently, there is some ambiguity about the term's exact parameters. *See, e.g.*, *Matter of N-M-*, 25 I&N Dec. 526, 528 (BIA 2011) (agreeing "that, *in some circumstances*, opposition to state corruption *may* provide evidence of an alien's political opinion" (emphasis added)). One popular law dictionary partially defines "political" as "pertaining to the conduct of government." *Political*, *Black's Law Dictionary* (10th ed. 2014). However, the term may have a broader or narrower meaning depending on its context. *See, e.g.*, *INS v. Elias-Zacarias*, 502 U.S. 478, 486 (1992) (Stevens, J., dissenting) (stating that a political opinion may be expressed "negatively as well as affirmatively").

The application of the term political opinion to forms of artistic expression likewise creates some uncertainties. While there are those who say that all art is political,[2] no circuit court has adopted this position in regard to asylum applications. Instead, the courts have considered each case based on its individual facts to determine whether the applicant possesses a bona fide political opinion.

An artist's political opinion is perhaps easiest to discern when he is aligned with (or opposed to) a specific public figure or political party. *See, e.g.*, *Tropnas v. Mukasey*, 287 F. App'x 890, 891 (1st Cir. 2008) (considering the case of an applicant who was threatened "because of his political artwork" critical of Haiti's then-president, Jean-Bertrand Aristide, but denying the petition for review on other grounds); *Assimonye v. Gonzales*, 173 F. App'x 543, 545 (9th Cir. 2006) (finding that the applicant had been persecuted in Nigeria on account of his participation in the Organisation for the Restoration of Biafra and a political music group called "Biafra"). In such cases, the artist's public expression is tied directly to his support for, or opposition to, a political actor or party.[3]

Where an artist is not linked to a specific figure or party, courts have sometimes recognized that he or she may possess a slightly more abstract, but nonetheless cognizable, political opinion. The United States Court of Appeals for the Sixth Circuit addressed one such case in *Alakhfash v. Holder*, 606 F. App'x 291, 292 (6th Cir. 2015) (considering an application filed by a "prominent entertainer, singer and actor in Yemen and the Arabic-speaking world"). After defining the applicant's political opinion as "support for . . . the reform movement in Yemen seeking better education and justice," the court concluded readily that he had established a proper basis for asylum. *Id*. at 293, 296 (devoting only two sentences to its discussion of the political opinion). Specifically, the court stated, "It is well established that being perceived as anti-government is a protected political ground for purposes of asylum and withholding of removal." *Id*. at 296.

Along the same lines, courts have also found (or implied) that the following fact patterns may support a political opinion claim: (1) writing articles and publishing "a music album that [was] critical of the government in Cameroon," *Tchokothe v. Ashcroft*, 111 F. App'x 421, 422 (6th Cir. 2004) (application denied for lack of credibility); (2) using "songs to plead for peace and cooperation" in Ethiopia and singing "songs [that] express support for the All Amhara People's Organization ('AAPO'), a recognized opposition group," *Teka v. Ashcroft*, 95 F. App'x 891, 892 (9th Cir. 2004) (application denied for lack of credibility); and (3) distributing a Farsi edition of Salman Rushdie's *The Satanic Verses*, in violation of Iranian law, *Zahedi v. INS*, 222 F.3d 1157, 1165–66 (9th Cir. 2000) (concluding that the applicant had demonstrated eligibility for relief).

On the other hand, artists who are unable to connect their art to *any* political opinion may have their claims denied on that basis. For example, in *Mamun v. Holder*, 355 F. App'x 575, 577 (2d Cir. 2009), the Second Circuit affirmed the denial of asylum, noting that although the applicant argued that he would be persecuted in Bangladesh based on his "cultural and artistic activities in the United States," he had not explained "how his activities in a Bangladeshi theater group in the United States [bore] a political dimension." Similarly, the Ninth Circuit held in *Nunez-Acevedo v. INS*, No. 89-70535, 1991 WL 99078, at *1–3 (9th Cir. June 10, 1991), that the Board did not err in denying an asylum application filed by a Nicaraguan violinist who "refused to play in concerts for Sandinista soldiers," in part because the applicant's refusal was not based upon his opposition to the group, but rather because he "would be transported [to the Sandinista bases] in an unsafe truck."

Other Protected Grounds

Although less common, artists seeking asylum have also premised their claims on protected grounds *other than* a political opinion. These types of claims

generally attempt to connect the individual's artistic expression to a central aspect of his or her identity—such as race, religion, or nationality. However, because these claims have sometimes been denied for reasons other than a failure to articulate a protected ground, the courts have not always clearly addressed the protected grounds identified in the applications for relief.

In one unpublished decision, for instance, the Eleventh Circuit observed that the applicant was a musician who had been "detained and tortured [in Iran] for playing his instrument," but the court did not clarify the precise relevance of these facts in the asylum context. *Lahijani v. U.S. Att'y Gen.*, 133 F. App'x 591, 592 (11th Cir. 2005). The court also noted that the applicant was Jewish—and that "Iranian Jews are regularly charged with made-up allegations of spying for Israel and sentenced to long terms in jail by government-sponsored kangaroo courts." However, the court did not indicate whether it might view his religion as being independent of or somehow related to his status as a musician. These questions were left unresolved because the Eleventh Circuit denied the petition for review on other grounds.

In some instances, the nature of an artist's work may make it easier to discern the aspect that a persecutor seeks to suppress. In *Erebara v. Ashcroft*, 124 F. App'x 444, 445 (7th Cir. 2005), for example, the Seventh Circuit appeared to accept a musician's claim that he was abused by Serbian police officers on account of "his race (ethnic Albanian) and religion (Muslim)." In that case, a police officer had sliced the musician's hand with a broken bottle after a group of officers had told him, "[I]f you keep on playing Albanian weddings we'll cut off your fingers." *Id*. (noting that the "wound . . . prevented him from performing for six months"). However, the court did not directly address whether the harm suffered was on account of his race or religion because it otherwise concluded that the applicant had not met his burden of proof to show that he was eligible for relief. *See id*. at 445–48.

No reported decisions were located in which an artist successfully argued that he or she feared persecution on account of membership in a "particular social group" of artists (or a similarly articulated group). *But see Chougui v. Holder*, Nos. 07-70313, 07-73131, 2011 U.S. App. LEXIS 3297, at *4–5 (9th Cir. Feb. 18, 2011) (noting that the applicant submitted newspaper articles regarding the persecution of Algerian political singers, but finding that there was no corroborating evidence that identified the applicant "as *a member of this social group* or a holder of any particular political beliefs" (emphasis added)).

Nexus and the Intent of the Persecutor

Assuming that an asylum applicant has articulated a protected ground, he or she must still establish that the protected ground "was or will be at least one central reason" for any feared harm. Section 208(b)(1)(B)(i) of the Act. The protected ground "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007), *petition for review denied*, *Ndayshimiye v. Att'y Gen. of U.S.*, 557 F.3d 124, 131 (3d Cir. 2009) (holding that the Board's interpretation was reasonable overall, but disapproving of the consideration of whether a protected ground is "subordinate"). Discerning a persecutor's intent can be a difficult task, particularly where the persecutor appears to hold multiple motives. *See, e.g.*, *Matter of N-M-*, 25 I&N Dec. at 530–32.

As with other asylum seekers, artists may be attacked for reasons wholly unrelated to a political opinion or other protected trait. Accordingly, courts have sometimes closely examined an alleged persecutor's motives to determine whether an artist is eligible for asylum or related relief. In *Said v. Ashcroft*, 93 F. App'x 83 (7th Cir. 2004), the Seventh Circuit upheld an Immigration Judge's conclusion that the harm feared by the applicant, a renowned Palestinian musician, was on account of his education and "special skills as a singer," as opposed to his political views. *Id*. at 85–86. The court noted that the record indicated that "singers [were] useful to the Intifada movement because religious songs . . . are used to incite violence against Israel." *Id*. at 86. The court reasoned that the musician's position was analogous to an individual who had resisted conscription by guerilla organizations during a civil conflict. *See id*. (citing *INS v. Elias-Zacarias*, 502 U.S. at 483). The Seventh Circuit found that regardless of his real or imputed political views, "he had specific value to [his attackers] as a voice through which their anti-Israeli sentiment could be spread." *Id*. This type of goal-oriented violence is distinguishable from persecution on account of a protected ground.

The Ninth Circuit addressed a similar situation in *Manrique-Barillas v. INS*, No. 98-71411, 2000 WL 336489 (9th Cir. Mar. 30, 2000). There the court

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CIRCUIT COURT DECISIONS FOR OCTOBER 2015

by John Guendelsberger

The United States courts of appeals issued 163 decisions in October 2015 in cases appealed from the Board. The courts affirmed the Board in 144 cases and reversed or remanded in 19, for an overall reversal rate of 11.7%, compared to last month's 8.4%. There were no reversals from the First, Fourth, Sixth, Eighth, and Eleventh Circuits.

The chart below shows the results from each circuit for October 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	14	12	2	14.3
Third	11	10	1	9.1
Fourth	9	9	0	0.0
Fifth	5	4	1	20.0
Sixth	5	5	0	0.0
Seventh	3	2	1	33.3
Eighth	4	4	0	0.0
Ninth	92	79	13	14.1
Tenth	8	7	1	12.5
Eleventh	9	9	0	0.0
All	163	144	19	11.7

The 163 decisions included 86 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 36 direct appeals from denials of other forms of relief from removal or from findings of removal; and 41 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	86	81	5	5.8
Other Relief	36	28	8	22.2
Motions	41	35	6	14.6

The five reversals or remands in asylum cases involved particular social group (three cases), credibility, and protection under the Convention Against Torture. The eight reversals or remands in the "other relief" category addressed the categorical approach (four cases), adjustment of status (two cases), the section 237(a)(1)(H) fraud waiver, and the stop-time rule for cancellation of removal. The six motions cases involved changed country conditions (three cases), equitable tolling (two cases), and a remand to consider an issue raised but not addressed.

The chart below shows the combined numbers for January through October 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	30	23	7	23.3
Ninth	714	577	137	19.2
Tenth	50	43	7	14.0
First	30	27	3	10.0
Third	93	84	9	9.7
Second	230	211	19	8.3
Eleventh	66	61	5	7.6
Sixth	56	52	4	7.1
Fourth	91	86	5	5.5
Eighth	38	36	2	5.3
Fifth	99	96	3	3.0
All	1497	1296	201	13.4

Last year's reversal rate at this point (January through October 2014) was 15.5%, with 1868 total decisions and 289 reversals or remands.

The numbers by type of case on appeal for the first 10 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	749	645	104	13.9
Other Relief	400	336	64	16.0
Motions	348	315	33	9.5

CIRCUIT COURT DECISIONS FOR NOVEMBER 2015

The United States courts of appeals issued 213 decisions in November 2015 in cases appealed from the Board. The courts affirmed the Board in 189 cases and reversed or remanded in 24, for an overall reversal rate of 11.3%, compared to last month's 11.7%. There were no reversals from the First, Second, Fifth, Sixth, Seventh, and Eighth Circuits.

The chart below shows the results from each circuit for November 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	18	18	0	0.0
Third	9	7	2	22.2
Fourth	9	7	2	22.2
Fifth	13	13	0	0.0
Sixth	8	8	0	0.0
Seventh	3	3	0	0.0
Eighth	3	3	0	0.0
Ninth	131	114	17	13.0
Tenth	7	5	2	28.6
Eleventh	9	8	1	11.1
All	213	189	24	11.3

The 213 decisions included 105 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 59 direct appeals from denials of other forms of relief from removal or from findings of removal; and 49 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	105	89	16	15.2
Other Relief	59	52	7	11.9
Motions	49	48	1	2.0

The 16 reversals or remands in asylum cases involved particular social group (9 cases), credibility (5 cases), protection under the Convention Against Torture, and internal relocation. The seven reversals or remands in the "other relief" category addressed the categorical approach (two cases), application of *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), to drug paraphernalia offenses (two cases), a crime involving moral turpitude, adjustment of status, and voluntary departure. The motion to reopen involved changed country conditions.

The chart below shows the combined numbers for January through November 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	33	26	7	21.2
Ninth	845	691	154	18.2
Tenth	57	48	9	15.8
Third	102	91	11	10.8
First	33	30	3	9.1
Eleventh	75	69	6	8.0
Second	248	229	19	7.7
Fourth	100	93	7	7.0
Sixth	64	60	4	6.3
Eighth	41	39	2	4.9
Fifth	112	109	3	2.7
All	1710	1485	225	13.2

Last year's reversal rate at this point (January through November 2014) was 15.7%, with 2001 total decisions and 315 reversals or remands.

The numbers by type of case on appeal for the first 11 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	854	734	120	14.1
Other Relief	459	388	71	15.5
Motions	397	363	34	8.6

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Second Circuit:

Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015): The Second Circuit affirmed a district court's judgment granting an alien's petition for a writ of habeus corpus where the alien challenged his continued detention under the mandatory detention provisions of the Act. The petitioner was convicted in 2010 of a drug-related offense and sentenced to probation. In 2013, he was taken into custody by immigration authorities pursuant to section 236(c) of the Act , 8 U.S.C. § 1226(c), a provision that requires the detention of aliens convicted of certain crimes. The district court concluded that section 236(c), which directs the Attorney General to take into custody certain criminal aliens "when the alien is released" from criminal custody, did not apply to the petitioner because he was not detained "when released," but was instead detained 3 years later. The Second Circuit disagreed, concluding that *Chevron* deference was owed to the Board's interpretation of the ambiguous phrase "when released." However, the court was persuaded by the petitioner's alternate argument that his indefinite detention without the right to apply for bail violated due process. Discussing the Supreme Court's holdings regarding the civil detention of aliens, the Second Circuit observed that while the Court approved the detention of aliens for a limited period during removal proceedings in *Demore v. Kim*, 538 U.S. 510 (2003), it concluded in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that the indefinite detention of an alien creates "constitutional concerns." To avoid such constitutional concerns, the Second Circuit concluded that the mandatory detention provisions of section 236(c) must be read to include an implicit temporal limitation. Acknowledging disagreement over what constitutes a "reasonable" period of detention, the court elected to follow the Ninth Circuit's "bright-line" approach of requiring a bond hearing within 6 months of an alien's detention. The court further held that bail must be afforded unless the Government establishes "by clear and convincing evidence that the immigrant poses a risk of flight or a risk of danger to the community."

Fourth Circuit:

Oliva v. Lynch, No. 14-1780, --- F.3d ---, 2015 WL 7568245 (4th Cir. Nov. 25, 2015): The Fourth Circuit granted the petition for review from the Board's denial of asylum to a former gang member from El Salvador. The Board had affirmed the Immigration Judge's determination that neither particular social group presented by the petitioner—(1) "Salvadorans who are former members of MS–13 and who left the gang, without its permission, for moral and religious reasons," and (2) "Salvadorans who were recruited to be members of MS–13 as children and who left the gang as minors, without its permission, for moral and religious reasons"—was cognizable under asylum law. Additionally, the Board had affirmed the Immigration Judge's determination that the petitioner did not establish a nexus between his fear and his membership in either group. MS-13 required the petitioner to make regular "rent" payments to maintain his inactive status. The court observed that such extortion has been found to constitute persecution even where physical harm will result only upon the target's failure to pay. The court further determined that the threats and demands were on account of the fact that the petitioner left the gang. Since a nexus thus existed, the court remanded for the Board to address evidence in the record of the proposed group's social visibility, "including evidence of government- and community-driven programs to help former gang members rehabilitate themselves and an affidavit from a community organizer who stated that former gang members who leave the gang for religious reasons become seriously and visibly involved in churches."

Eighth Circuit:

Choge v. Lynch, 806 F.3d 438 (8th Cir. 2015): The Eighth Circuit denied the petition for review challenging an Immigration Judge's ruling that the petitioner had waived his application for adjustment of status. The petitioner had been instructed by the Immigration Judge to submit a filing fee, fingerprints, and an affidavit of support and to bring his wife to testify at the merits hearing. The petitioner had not complied with any of these requirements by the hearing date 10 months later. The Board affirmed the Immigration Judge's decision deeming the application waived and denying the petitioner's request for a further continuance. The circuit court found no abuse of discretion, noting that 8 C.F.R. § 1003.31(c) empowers Immigration Judges to deem late-filed applications waived when submitted after the set deadlines. Regarding the denial of a continuance, the court cited its prior holding that an Immigration Judge "traditionally has discretion to avoid unduly protracted hearings." The court found that in this case, such discretion was properly exercised when the date was set for a final hearing to adjudicate the adjustment application. The court found that the petitioner was provided notice of the requirements and noted that he did not contend that the 10-month period provided to accomplish the requirements was inadequate.

The court concluded that the petitioner "has not pointed to any convincing reason why he neither satisfied the requirements for his adjustment of status application nor moved for a further continuance prior to the hearing itself." In a footnote, the court concluded that neither the Immigration Judge nor the Board erred in not applying the factors articulated in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), given that the issue in the instant case was not the potential approval of the visa petition, but rather the petitioner's fulfillment of the remaining requirements for adjustment of status.

Ninth Circuit:

Bringas-Rodriguez v. Lynch, 805 F.3d 1171 (9th Cir. 2015): The Ninth Circuit denied the petition for review from the Board's decision affirming the denial of asylum, withholding of removal, and protection under the Convention Against Torture from Mexico. The petitioner claimed to have suffered past persecution on account of his sexual orientation in Mexico and to fear future persecution if returned there. The court concluded that, even if the petitioner had established that his relatives and neighbor had sexually abused him on account of his sexual orientation, he did not show that the Mexican Government was unable or unwilling to provide protection from that abuse. Citing similarities to the facts of *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080–81 (9th Cir. 2011), the court concluded that neither the Department of State country reports nor the petitioner's vague hearsay statements about his friend's experiences in Mexico sufficiently demonstrated the Government's inability or unwillingness to protect him. Additionally, the petitioner had not established a well-founded fear of future persecution based on a "pattern or practice" of persecution against gay men in Mexico since he failed to offer evidence showing a change in country conditions after *Castro-Martinez*. The court did not reach the merits of the petitioner's argument that he would be singled out for persecution as a member of a disfavored group because the petitioner failed to raise this argument before the Board. In considering his claim under the Convention Against Torture, the court reasoned that the same evidence supporting the Board's dismissal of the pattern-or-practice claim also supported the conclusion that country conditions were "insufficiently dangerous for gay people to constitute a likelihood of government-initiated or -sanctioned torture." Lastly, the court found that the Board did not abuse its discretion in concluding that the petitioner's recent HIV diagnosis did not by itself require remand where the petitioner had not shown that this additional factor would impact the outcome of his underlying claim. The panel decision contained a dissenting opinion, which reasoned that this decision and *Castro-Martinez* demand "unrealistic specificity from country reports" and "effectively eliminate" the use of hearsay evidence in support of an assertion that others have reported incidents of abuse without any meaningful Government response.

Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015): The Ninth Circuit reviewed a decision of a district court requiring bond hearings for four classes of detained aliens. The class action suit was filed on behalf of aliens detained under four sections of the Act: section 235(b) (aliens seeking admission to the United States); section 236(a) (aliens awaiting a decision on their removal from the United States); section 236(c) (aliens convicted of certain classes of crimes); and section 241(a) (aliens subject to a final order of removal). Noting that the class was defined to include only aliens who are detained "pending completion of removal proceedings," the Ninth Circuit concluded that the class must exclude aliens who are subject to a final order of removal and detained pursuant to section 241(a) of the Act. The court therefore reversed the district court's grant of summary judgment and a permanent injunction as to that category of detainee only. As to those detained under the other three sections of the Act previously noted, the Ninth Circuit upheld the district court's injunction requiring bond hearings and also held that Immigration Judges must consider the length of detention and provide bond hearings every 6 months. It also clarified that its order does not require "Immigration Judges to release any single individual; rather, we are affirming a minimal procedural safeguard . . . to ensure that after a lengthy period of detention, the government continues to have a legitimate interest in the further deprivation of an individual's liberty." The case was remanded to the district court for the entry of a revised injunction.

Tenth Circuit:

Cespedes v. Lynch, 805 F.3d 1274 (10th Cir. 2015): The Tenth Circuit denied the petition for review from the Board's decision affirming an Immigration Judge's removal order. The petitioner was found removable pursuant to section 237(a)(2)(E)(ii) of the Act, 8 U.S.C.

§ 1227(a)(2)(E)(ii), for violating a domestic-violence protection order. The petitioner did not dispute that the provision of the order that he was convicted of violating stated that "the defendant shall not contact . . . the protected party," but he argued that his conviction did not fall within the Federal statute because the conviction was for merely attempting to call his wife by telephone. Relying on its decision in *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011), the Board disagreed with this argument. The court concluded that the Board's interpretation in *Strydom* deserves *Chevron* deference because the phrase "the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury" is ambiguous and that the Board's interpretation was reasonable. The court noted that the purpose of the State protection order was to prevent domestic violence, and that "the state legislature explicitly recognized the value of such orders in protecting victims." The court stated that it was "eminently reasonable to conclude that such order 'involves protection' against threats of violence and bodily injury" since contact can create a "significant risk of escalation to violence."

A.G. PRECEDENT DECISION

In *Matter of Chairez and Sama*, 26 I&N Dec. 686 (A.G. 2015), the Attorney General referred these cases to herself for review of the issue of the proper approach for determining statutory "divisibility" in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Attorney General asked the parties and interested amici to address the issue of divisibility, in particular whether a criminal statute can be considered "divisible" under the modified categorical approach only if jurors must be unanimous as to the version of the offense committed.

BIA PRECEDENT DECISIONS

In the companion cases of *Matter of Castrejon-Colino*, 26 I&N Dec. 667 (BIA 2015), and *Matter of Garcia-Ramirez*, 26 I&N Dec. 674 (BIA 2015), the Board considered the question of the sufficiency of evidence that may document an alien's acceptance of a voluntary return in lieu of formal proceedings such that an alien has experienced a break in the continuous physical presence required for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). The Board held that fingerprints and photographic evidence taken when an alien voluntarily departed after being refused admission were insufficient to interrupt his or her continuous physical presence absent evidence that the alien had been advised of the right to appear before an Immigration Judge and had waived that right. The decisions clarified *Matter of Avilez*, 23 I&N Dec. 799 (BIA 2005), where the Board had identified fingerprints and photographs as evidence that may establish that an alien had been subjected to a "formal, documented process" at the border resulting in the alien's election to voluntarily depart.

In *Matter of Castrejon-Colino*, the Board agreed with the respondent that the evidence of his brief border encounter, where he was photographed and fingerprinted and affixed his signature on an electronic device with unknown content before voluntarily departing, was insufficient to establish that he was informed of his right to a hearing before an Immigration Judge and that his voluntary departure was in lieu of being placed in removal proceedings. The Board noted that nine circuit courts of appeals have approved the general principle set forth in *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002), that a voluntary return accepted in lieu of formal removal proceedings may terminate continuous physical presence. The Board clarified that photographs and fingerprints, which were types of evidence mentioned in *Matter of Avilez*, may not necessarily demonstrate that the process leading to a voluntary return was sufficiently formal to result in a break in the accrual of continuous physical presence for cancellation of removal. The Board stated that in cases where the issue whether voluntary departure interrupted continuous physical presence arises, Immigration Judges and the parties should fully develop the record as to: (1) the date and place of the border encounter; (2) the possibility that an alien was alternatively subject to exclusion, deportation, or removal proceedings where he or she had a right to a hearing before an Immigration Judge; and (3) the formality of the process, including how the threat of proceedings was communicated to the alien, what advisals were given, and whether the alien was aware that the agreement to depart was in lieu of the initiation of proceedings.

The Board concluded that where an alien has a right to a hearing before an Immigration Judge, there must be reliable testimonial or documentary record evidence to establish that the alien was informed of that right and waived it before a voluntary departure can be sufficiently formal to interrupt his or her physical presence. Since

the evidence did not demonstrate that the respondent was subjected to a sufficiently formal process to break his continuous physical presence, the appeal was sustained and the record was remanded for the Immigration Judge to consider the respondent's application for cancellation of removal.

In *Matter of Garcia-Ramirez*, the respondent had been apprehended at the border several times where he was photographed (and possibly fingerprinted) before being returned to Mexico. The respondent stated that he had never been informed of his legal rights or of an opportunity to appear before an Immigration Judge. Noting its conclusion in *Matter of Castrejon-Colino*, the Board held that when an alien has the right to appear before an Immigration Judge, fingerprint and photographic evidence of the alien's voluntary departure is not enough to show a process of sufficient formality to break continuous physical presence without evidence that the alien was informed of the right to a hearing and waived that right. As in *Matter of Castrejon-Colino,* the appeal was sustained and the record was remanded for fact-finding concerning the respondent's departure as a threshold issue affecting his potential eligibility for cancellation of removal.

In *Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015), the Board held that when a respondent's competency is at issue, neither party bears the burden of proof to establish whether or not the respondent is competent. Rather, where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes the respondent's competency. The Board noted that a competency finding is a finding of fact, which the Board reviews for clear error.

The respondent had provided evidence of a long history of mental illness, and the Department of Homeland Security ("DHS") filed a notice that his mental health diagnosis rendered him a potential member of the class certified in *Franco-Gonzalez v. Holder*, No. CV 10-02211-DMG (DTBx), 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013). Following an individualized assessment in accordance with *Matter of M-A-M-*, the Immigration Judge determined that the respondent was competent to proceed.

The Board explained that indicia of incompetency may arise through evidence or observations by the Immigration Judge. Stating that the DHS has an obligation to submit evidence of competency that is in its possession, the Board observed that a collaborative approach enables both parties to help the Immigration Judge appropriately develop the record. Citing the burden of proof with respect to competency applied in Federal habeas proceedings—which are also civil, rather than criminal, proceedings—the Board concluded that neither party in removal proceedings bears the burden of proving whether or not a respondent is mentally competent. Rather, in the presence of indicia of incompetency, the Immigration Judge should decide if a preponderance of the evidence establishes that the respondent is competent.

After review of the record, the Board concluded that the Immigration Judge had appropriately conducted a detailed competency determination, which was not clearly erroneous. However, remand of the record was deemed to be necessary for further consideration of the respondent's applications for withholding of removal and protection under the Convention Against Torture. Because competency is not a static condition, the Immigration Judge was instructed to evaluate the respondent's competency again on remand.

In *Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015), the Board held that requirements under the Federal Rules of Evidence for the admission of expert testimony are inapposite to a respondent's testimony about events of which he or she has first-hand knowledge. Additionally, the Board noted that conduct by an Immigration Judge that may be perceived as bullying or hostile is never appropriate, particularly in cases involving minors.

When the minor respondent's counsel attempted to question him about any psychological issues arising from his experiences in Guatemala, the Immigration Judge interrupted and directed that the respondent be qualified as an expert witness capable of testifying about psychological problems. The Immigration Judge asked the respondent, who testified to attending school through the sixth grade, if he had ever lectured on a professional level in psychology. Before allowing the respondent to testify as a lay witness, the Immigration Judge required

counsel to stipulate that the respondent had never lectured, written professional journals, or had training in psychology.

The Board concluded that the Immigration Judge erred in stating that the respondent had to be qualified as an expert witness. Noting that the Federal Rules of Evidence prohibit a lay witness from giving an opinion based on "scientific, technical, or other specialized knowledge" without being qualified as an expert witness, the Board observed that the rule was inapposite in this case because the respondent testified about events that he personally experienced and offered no opinion testimony. Additionally, the Board pointed out that the testimony was probative and its admission was fundamentally fair, in accordance with the test for admission of evidence in immigration proceedings.

As to the Immigration Judge's conduct, the Board expressed its view that the exchange during the "expert witness" discussion was belittling and insensitive to the respondent, given his age and the experiences about which counsel was attempting to elicit testimony. The Board noted that the high standards expected of an Immigration Judge include treating respondents with dignity, respect, courtesy, and fairness, and that these standards help to ensure that a respondent is afforded a full and fair hearing before a neutral fact-finder. Concluding that these standards had not been met in this case, the Board vacated the Immigration Judge's decision and remanded the record for assignment to a different Immigration Judge.

In *Matter of Castro-Lopez*, 26 I&N Dec. 693 (BIA 2015), the Board considered the 10-year continuous physical presence requirement described in 8 C.F.R. § 1240.66(c)(2) for certain aliens seeking special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), Pub. L. No. 105-100, tit. II, 111 Stat. 2160, 2193, 2196 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997). The Board held that the 10-year continuous physical presence period is measured from the date of the most recently incurred ground of removal when that ground is among those listed in 8 C.F.R. § 1240.66(c)(1).

The Immigration Judge sustained the charges that the respondent was inadmissible both because he had entered without inspection in 1996 and because he had been convicted of a controlled substance offense in 2013. Considering the respondent's special rule cancellation of removal application, the Immigration Judge applied the heightened standard for establishing continuous physical presence set forth in 8 C.F.R. § 1240.66(c), which provides that an alien must establish that he has been in the United States continuously for not less than 10 years "immediately following the commission of an act, or the assumption of a status constituting a ground of removal." Finding that the respondent had been continuously physically present since his illegal entry, which conferred a status constituting a ground of removal, the Immigration Judge determined that the respondent had satisfied the heightened continuous physical presence requirement for NACARA cancellation of removal. The DHS appealed that ruling.

The Board observed that 8 C.F.R. § 1240.66(c) essentially adopted the framework for suspension of deportation under former section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2) (1994). Reviewing its jurisprudence concerning the period of continuous physical presence for applications for suspension of deportation, the Board noted its prior holding that when more than one ground of deportation existed, the period of continuous physical presence should be calculated from the latest deportable offense. Since the language of 8 C.F.R. § 1240.66(c) is substantively identical to the continuous physical presence section of the suspension of deportation statute, the Board found it appropriate to adopt the same interpretation for adjudicating special rule cancellation of removal of applications. The record was remanded for further proceedings consistent with the Board's decision.

Portraits of Persecution *continued*

concluded that the applicant had not established a causal connection between any political opinion that she held and the harm she feared she would suffer at the hands of the "Sendero Luminoso," a Peruvian guerrilla organization. *See Manrique-Barillas v. INS,* 2000 WL 336489, at *1. The Ninth Circuit stated that her own testimony indicated that "the Sendero Luminoso members wanted to recruit her not for any political reason, but because . . . they wished to use her artistic talents in posters and leaflets." *Id.* (concluding that the guerrilla group also targeted the applicant because she could identify them).

Factors Affecting the Reasonableness of an Artist's Fear

Separate from the issue of the applicant's protected ground is a determination as to the *likelihood* that he or she will be harmed if removed from the United States. This is relevant for both asylum and withholding of removal. Generally speaking, an individual seeking asylum must establish that he or she possesses a "well-founded fear of persecution" on account of a protected ground. *See* section 101(a)(42) of the Act; *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (stating that an applicant's fear is well founded if "a reasonable person in his circumstances would fear persecution"). To establish eligibility for withholding of removal, the applicant must show that it is "more likely than not" that he or she would be subjected to persecution upon return to the country of removal. *Matter of C-T-L-*, 25 I&N Dec. 341, 343 (BIA 2010). Many of the factors considered in other asylum applications will be relevant to claims filed by artists. However, courts and the Board have also identified certain considerations that are more unique to applications filed by artists.

The likelihood that an artist will be harmed in the future may be affected by whether he participated in prohibited activities prior to his arrival in the United States. For example, in *Matter of Kojoory*, 12 I&N Dec. 215, 217–20 (BIA 1967), the Board held that an "artist responsible for a highly critical caricature of the Shah" had not shown that he would be persecuted if returned to Iran. The court noted that the applicant's claim was "weakened . . . by the fact that he participated in absolutely no political activity of any sort prior to coming to the United States." *Id.* at 219.

An artist's intent to continue (or not continue) his or her artistic work in the future may also impact an assessment of the reasonableness of the claimed fear of harm. In *Toro v. Attorney General of the U.S.*, 371 F. App'x 279, 280–81 (3d Cir. 2010), the Third Circuit rejected an art teacher's claim that he would be singled out for persecution in Colombia—even though he testified that men associated with the Armed Forces of Colombia ("FARC") had previously threatened him and damaged paintings of his that were critical of the FARC. The court noted in particular that the applicant conceded that he no longer produced paintings that were critical of the FARC. *Id.* at 284 (concluding that the record did not demonstrate that "the FARC would have any continued interest in pursuing" him).

Other factors that may affect the likelihood that an artist will be subjected to harm in the future include: (1) the prominence of the artist, *see, e.g.*, *Alakhfash v. Holder*, 606 F. App'x at 298 (concluding that the Immigration Judge "did not give sufficient weight to [the musician's] status as a well-known celebrity in Yemen"); (2) whether the artist has participated in other political activities, *see, e.g.*, *Saint-Jour v. U.S. Att'y Gen.*, 341 F. App'x 592, 593, 599 (11th Cir. 2009) (noting that the applicant, "a musician and poet who had written songs and poems criticizing [Haiti's] Lavalas Government," had "failed to present evidence of a 'pattern or practice' of persecution by the Lavalas party against it detractors—particularly those, like him, who criticized the Lavalas party in a book and a song but were not involved in other anti-Lavalas activities"); and (3) country conditions related to the exercise of free speech or expression, *see, e.g.*, *Vamadevan v. Att'y Gen. of U.S.*, 495 F. App'x 278, 282 (3d Cir. 2012) (affirming the Board's conclusion that the applicant had not established a well-founded fear of persecution based on "his alleged desire to publish a new . . . collection of poems," including poems that were critical of the Indian Government, where a United States Department of State report indicated "that the Indian government generally respected, in practice, the constitutional rights to freedom of speech and expression").

Harm Constituting "Persecution"

Persecution has been construed generally as "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). A showing of extreme physical abuse may be the clearest way for any applicant to show that he has been subjected to past persecution. This holds true for artists as well. For example, in *Assimonye v. Gonzales*, 173 F. App'x at 544–45, the Ninth Circuit held that the record "clearly" established that the applicant—a member of a political music group who was imprisoned for a month and subjected to daily beatings—had suffered past persecution in Nigeria. The court stated that his mistreatment, "which included being hung from hooks, lashed with whips, and rolled on the ground[,] . . . unequivocally constitute[d] 'infliction of suffering or harm' that [was] sufficiently extreme to constitute

persecution." *Id*. at 545 (concluding that the applicant was thus entitled to a presumption that he possessed a well-founded fear of persecution).

But the term persecution is not limited to physical abuse, and some forms of nonphysical harm may have particular relevance to claims filed by artists. The Board has recognized that "economic deprivation or restrictions so severe that they constitute a threat to an individual's life or freedom" may also constitute persecution. *Matter of Acosta*, 19 I&N Dec. at 222. Nonphysical harm may qualify as "persecution" where it "involve[s] the deliberate deprivation of basic necessities" or where "an extraordinarily severe fine or wholesale seizure of assets may be so severe as to amount to persecution, even though the basic necessities of life might still be attainable." *Matter of T-Z-*, 24 I&N Dec. 163, 171 (BIA 2007). Although an asylum seeker "need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity," something more than mere economic disadvantage must be established. *Id*. at 172–73.

Consistent with this standard, an artist may qualify for asylum if he or she experiences severe financial impositions or the loss of employment opportunities. This issue was perhaps most thoroughly discussed in *De Leon v. INS*, No. 93-70584, 1995 WL 74783 (9th Cir. Feb. 23, 1995), a case involving the Philippine folksinger Florante De Leon (better known by his stage name, "Florante"). In that case, the Ninth Circuit parsed the various harms that Florante suffered after he continued to sing songs that were critical of the Philippine Government. The court first concluded that a "decline in concert bookings [did] not amount to persecution." *See id.* at *5. However, the Ninth Circuit continued by addressing the other repressive actions taken by the Government, which included threats of violence and economic impairments. The court criticized the Board for overlooking Florante's evidence of more substantial financial injury. Specifically, he had testified that people who wanted to play his music on the radio or to have him appear in concert could not because they feared that the Government might retaliate by seizing their assets. *See id.* The Ninth Circuit remanded the case for further consideration of these significant economic impositions in conjunction with Florante's other feared harms.

An artist's claim of past persecution may suffer if his or her economic deprivation is limited or not entirely related to his claimed maltreatment. *See, e.g.*, *Obuhovs v. U.S. Dep't of Homeland Sec.*, 162 F. App'x 45, 47–48 (2d Cir. 2006) (remanding on other grounds, but rejecting a claim of economic persecution where the applicant "admitted that he was capable of supporting himself and his family in Latvia by supplying produce to local vendors and that he [was] no longer capable of pursuing a career as a professional musician"). In general, the Board has recognized that the "availability of other sources of income has been a key factor in assessing the impact of economic sanctions." *See Matter of T-Z-*, 24 I&N Dec. at 174. Thus, the artist's earning power prior to the imposition of government sanctions and his ability to secure other work may be relevant.

Conclusion

The persecuted artist may be a timeworn trope. Nonetheless, as these cases show, many artists continue to fear abuse in their home countries. *See*, *e.g.*, *Pyakurel v. Lynch*, No. 14-9544, 2015 WL 6685450, --- F. App'x --- (10th Cir. Nov. 3, 2015) (denying a petition for review that was filed by "a well-known actor, documentary filmmaker, script writer, and author" from Nepal). Such applications often present compelling narratives that reach beyond the realm of immigration law. For example, in the case of the folk singer Florante De Leon, the Ninth Circuit observed that Florante's hardships did not end with his escape from the Philippines:

> Neither Mr. nor Mrs. De Leon [was] happy about trading the lives they had led in the Philippines for their new lives in the United States. Mr. De Leon said that he found it very hard working eight hours a night as a hospital security guard for $3.50 an hour, instead of being a celebrity in the Philippines, recognized by nine out of ten people in the street. . . . Mrs. De Leon preferred her life with maids and a driver in the Philippines, to having to work in the United States. But, she testified, "I'm scared to go home."

De Leon v. INS, 1995 WL 74783, at *2. However, the point of highlighting these cases is not merely to recount

gripping tales. The aim of this article is to explore the mechanisms of asylum law in a specific context. While claims filed by artists may sometimes contain fascinating personal stories, they just as frequently raise challenging legal issues that invite careful review.

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1. Andrew Hurst, *'I Do Not Exist' in USSR, Director Says*, The Globe and Mail (Canada), July 11, 1984, 1984 WLNR 849347.

2. *See, e.g.*, Vivienne Chow, *Is Milk of Human Kindness No More?*, South China Morning Post, May 17, 2013, 2013 WLNR 12095800 (quoting the executive director of a Hong Kong art space).

3. To advance such a claim, the artist is not necessarily required to possess a full understanding of the complexities of his country's political situation. For example, in *Joseph v. Holder*, 600 F.3d 1235, 1245 (9th Cir. 2010), the Ninth Circuit criticized the Immigration Judge for discounting the testimony of the applicant—a native of Haiti who created a musical group in support of President Aristide—based on a finding that he had only a rudimentary understanding of the political situation in Haiti. In its reversal of the Immigration Judge's adverse credibility finding, the court held that it was speculation for the Immigration Judge to assume that a songwriter for the president "would have a sophisticated understanding of Haiti's political situation." *Id*.

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