



# **Recent Trends in Asylum Law**

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# Objectives:



- Participants will gain knowledge of recent case law regarding asylum issues relevant to torture survivors.
- Participants will gain knowledge of recent case law regarding mental impairment as it might affect asylum claims and psychological evaluations of their clients.
- Participants will have an opportunity for Q&A regarding trends and changes in immigration proceedings

# Legal Relief for Torture Survivors



**1. Asylum**

**2. Withholding of Removal**

**3. Convention Against Torture- Withholding of Removal**

**4. Convention Against Torture- Deferral of Removal**

# Asylum and Withholding of Removal



## Asylum

- Well-founded fear of persecution
- Fear of future persecution
- Affirmative or in removal (CIS or immigration court)

**INA sec. 208, 8 CFR secs. 208, 1208**

## Withholding of Removal

- Clear probability that life or freedom would be threatened if removed to country where persecution would occur

**INA sec. 241(b)(3), 8 CFR secs. 208.16, 1208.16**

# Convention Against Torture (CAT)



- **Willful blindness OR acquiescence to torture by a Government official 8 CFR sec. 1208.18**
  
- **Torture:**
  1. Severe physical or mental pain or suffering—extreme form of cruel and inhuman treatment
  2. Specifically intended to inflict severe or physical or mental pain or suffering
  3. Illicit purpose required e.g. obtaining information or a confession, punishment
  4. Intentional government act directed against a person in the offender's custody or control

*Matter of J-E*, 23 I&N Dec. 291 (BIA 1992); *Gourdet v. Holder*, 587 F.3d 1 (1<sup>st</sup> Cir. 2009)

# **Relief: The Road to Somewhere**



## **Asylum**

If granted asylum, one year later may apply for lawful permanent resident/LPR/green card status

## **Withholding of Removal**

Authorization to remain in the U.S. and work

## **CAT Withholding of Removal**

Authorization to remain in the U.S. and work

## **CAT Deferral of Removal**

Authorization to remain in the U.S. and work

# One-year Bar to Asylum



- Unless there are extraordinary circumstances, an individual must apply for asylum within one year of his/her entry into the U.S.
- The one-year rule does not apply to withholding of removal or relief under the Convention Against Torture.
- Extraordinary circumstances may include an individual who entered the U.S. and is in legal status e.g. F-1 student, mental or physical illness and others 8 CFR sec. 1208.4(a)(5)

# Other Bars to Asylum



- Aggravated felons (sometimes CAT deferral is available)
- Particularly serious crime
- Persecutor of others *Negusie v. Holder*, 555 U.S. 511 (2009) This case was remanded and is still pending.
- Firm resettlement in another country
- Danger to the security of the U.S.



# Affirmative v. Defensive Asylum Applications



- An individual already in the U.S. who applies for asylum within one year, will have an interview with a CIS Asylum Officer.
- If the Officer grants asylum, then the individual may apply for permanent resident status a year from the date of the grant of asylum.
- If the Officer does not grant relief, the Officer will refer the individual to the immigration court unless the individual is in lawful status in the U.S.

# Affirmative v. Defensive Asylum Applications cont'd



- An individual who attempts to enter the U.S. at a land, sea or air border and asks for asylum will have a **“credible fear” interview** with a CBP officer.
- The individual will be issued a Notice to Appear (NTA) and be placed in removal proceedings and, probably, be detained.
- An individual who re-enters the U.S. after deportation and requests asylum will have a **“reasonable fear” interview** with a CIS officer.

# Burden of Proof for Asylum



**WELL FOUNDED FEAR OF PAST PERSECUTION ON ACCOUNT OF:**

- 1. RACE**
- 2. RELIGION**
- 3. NATIONALITY**
- 4. POLITICAL OPINION OR**
- 5. PARTICULAR SOCIAL GROUP**

# How the MH Expert can help the Attorney or Accredited Representative get the Story



## **In a Non-Evaluation Context:**

- MH Expert as part of the legal team- confidentiality
- Help Atty/AR develop trust with the client
- Engender empowerment in the asylum applicant so the applicant becomes a member of the legal team
- Assist Atty/AR in spotting issues e.g. flat affect, missing appointments, body posture
- Teach Atty/AR about trauma- symptoms and effects on memory
- Aid in finding resources e.g. medical, therapy

# Proving Past Persecution

## The Role of the Mental Health Expert



- Is the asylum applicant's **STORY congruent with the symptoms** s/he relates? Nightmares, flashbacks, loss of appetite, etc.?
- Is the applicant's **AFFECT** congruent with the story? Appropriate? If flat, why?
- Are there **psychological TESTS** that can be used to prove or disprove the applicant's story with a reasonable degree of certainty?
- Can the MH expert prove that the applicant is suffering from a mental disorder and is not **MALINGERING** ?

# MH Expert and Atty/AR in the Courtroom



## Credibility issues

- Consistency in testimony
- Memory lapses
- Flat affect
- Confusion

## The standard for the expert to determine credibility

A reasonable degree of certainty

**Note: “credibility” is a legal determination made by the Immigration Judge.** The MH expert should discuss this issue in terms of whether she or he believes the applicant and why.

# Past Persecution Rebutted



- **If past persecution is found, there is a presumption that there will be future persecution**
- However, this **presumption may be rebutted by DHS** by showing, by a preponderance of the evidence, that:
  - 1) there is a **fundamental change of circumstances** OR
  - 2) that the **individual could relocate** to another area within the country and it would be **reasonable** to do so

# Future Persecution



- FUTURE persecution on account of one of the 5 grounds
- Future persecution may also be shown **without** one of the 5 grounds **IF** there was **PAST** persecution on account of one of the 5 grounds **AND**  
There is a **reasonable possibility of serious harm** *Matter of L-S*, 25 I&N Dec. 705 (BIA 2012)
- The individual does not need to be singled out for persecution if there is a pattern or practice of persecution of those similarly situated



# Particular Social Group



- ***Crespin Valladares v. Holder*** 632 F.3d 117 (4<sup>th</sup> Cir. 2011): prosecutorial witnesses, as well as their family members who suffered persecution on account of their family ties, constitutes a PSG.
- ***de Carvalho-Frois v. Holder***, C.A. 1/26/12) AILA Doc. No. 12012763 (1<sup>st</sup> Cir.) The court found that the petitioner's social group of witnesses to a serious crime whom the government is unable or unwilling to protect is not sufficiently "socially visible" to establish a particular social group.
- ***Garcia-Callejas v. Holder***, 1/24/12, AILA Doc. No. 12012564 (1<sup>st</sup> Cir.) The court found that the petitioner, who argued he was a target of gang recruitment and a returnee to El Salvador who would be perceived as wealthy, did not establish membership in a particular social group.
- ***Gaitan v. Holder***, 3/1/12, No. 10-1724, AILA Doc. No. 12030270 (8<sup>th</sup> Cir.) Upheld social visibility and particularity to establish PSG and denied gang-based asylum claim.
- ***Valdiviezo-Galdamez v. Holder***, 663 F.3d 582 (3<sup>rd</sup> Cir. 2011)
- ***Gatimi v. Holder***, 578 F.3d 611, 615-16 (7<sup>th</sup> Cir. 2009) (criticizing the BIA's decisions in *S-E-G-* and *E-A-G-* for being "inconsistent" with the BIA's precedents in *Acosta* and *Kasinga* and for failing to explain the reasons for adopting the "social visibility" criterion)

# Particular Social Group (cont.)



- ***Benitez Ramos v. Holder***, 589 F.3d 426, 430-31 (7th Cir. 2009) (social visibility not a requirement)
- ***Urbina-Mejia v. Holder***, 597 F.3d 360, 365-67 (6th Cir. 2010) (noting being a former gang member is an immutable characteristic and defining former members of the 18th Street gang as a "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members)
- ***Lizama v. Holder***, 629 F.3d 440, 447 (4th Cir. 2011) (upholding the BIA's definition of a particular social group as requiring that "(1) its members share common immutable characteristics, (2) these common characteristics give members 'social visibility, and (3) the group is defined with 'sufficient particularity to delimit its membership'")
- ***Ramos-Lopez v. Holder***, 563 F.3d 855, 862 (9th Cir. 2009) (upholding the BIA's adoption of the "social visibility" requirement)
- ***Scatambuli v. Holder***, 558 F.3d 53, 60 (1st Cir. 2009) (rejecting petitioners' claims the BIA is precluded from considering the visibility of a group)
- ***Fuentes-Hernandez v. Holder***, 411 F. App'x 438, 438-39 (2d Cir. 2011) (requires social visibility and particularity)

# Particular Social Group: Immutability



## Is the characteristic subject to change?

- Can a transgender change her/his identity?
- Can an effeminate gay male change his identity? *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9<sup>th</sup> Cir. 2000); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1994)

# **MH Expert- Immutable Characteristic**



- For a LGBTI applicant, the MH expert can attest to the immutability of the gender identity thus putting the applicant clearly in a Particular Social Group
- Is mental illness an immutable characteristic

# **Proving Future Persecution**

## **The Role of the Mental Health Expert**



- Is the asylum applicant's (AA's) memory affected by traumatic events in the past or an organic disorder e.g. brain injury. Is it a temporary or permanent memory impairment?
- Is there a DSM-IV-TR diagnosis for the applicant's mental state?
- If the MH expert performed the evaluation one year ago, did the MH expert perform an update?
- If the AA is doing better one year later, to what does the MH expert attribute the improvement?
- Are the original symptoms likely to recur if the AA is placed back in the same environment in the home country from which s/he fled?

# Future Persecution (cont.)



- If the diagnosis is **Major Depressive Disorder, Recurrent**, does this mean that it may totally disappear and never reoccur? What are the chances that it will reoccur? Under what circumstances would it reoccur? Is it an immutable characteristic?
- What does the diagnosis: **Psychotic disorder, NOS** (not otherwise specified mean)? Is it an immutable characteristic?

# Social Visibility and the MH Expert



- Are the symptoms **visible to society** e.g. hallucinations, depression?
- Would the **symptoms be exacerbated** if the asylum applicant were forced to return to his home country?
- Would the **symptoms lead to** homelessness, unkempt appearance, inability to work?

# Lesbian, Gay, Bisexual, Transgender and Intersex Claims



- **USCIS RAIO Directorate- Officer Training, 12/28/2011**
- **Yates memoranda: 4/16/2004 and 04/13/2012**
- ***Castro-Martinez v. Holder*, 641 F.3d 1103 (9<sup>th</sup> Cir. 2011)**  
(denied asylum to gay, HIV-positive Mexican man)
- ***Lopez –Amador v. Holder*, 649 F.3d 880 (8<sup>th</sup> Cir. 2011)**  
(denied asylum to Venezuelan lesbian)
- ***Ormondi v. Holder* (8<sup>th</sup> Cir. March 15, 2012)** (remanded because transcript indiscernible but found IJ decision requiring corroboration was reasonable)



# MH Expert and LGBTI Claims



## How MH Experts Can Help Atty/AR

- Confirm gender identity via thorough history and interview
- Discuss gender identity as something the individual cannot change
- Discuss gender identity as “socially visible”
- Discuss effects of hormones or silicon injections on individual’s gender identification

# Mental Competency



- ***Matter of M-A-M, 25 I&N Dec. 274 (BIA 2011)***
- **The TEST for mental competency:**
  - 1. Rational and factual understanding of the proceedings**
  - 2. Ability to communicate with lawyer if there is one AND**
  - 3. Ability to cross-examine and perform direct examination of witnesses**

# How the IJ Determines Competency



- The IJ **may**, but **is not required by *M-A-M***, to get a **competency evaluation** for a mentally disabled applicant for asylum, withholding or CAT.
- The IJ may ask that DHS secure a **competency evaluation**
- The MH evaluator will have to determine whether the Respondent is **malingering**
- The MH evaluator's job will be to assess competency but in doing so, there should be a **DSM-IV-TR diagnosis** and other helpful information regarding mental illness

# The Notice to Appear



- **IJ may not accept an admission of removability** from an unrepresented Respondent who is incompetent and unaccompanied 8 CFR sec. 1240.10
- **If Respondent was pro se** and pled to the allegations and conceded the charge of deportability and later was found to be mentally incompetent, argue that you should re-do the pleadings e.g. contest aggravated felony.
- **Competency should be determined before the pleadings are taken.**

# Testimony of the MH Expert



- Particular questions that may arise on direct or cross-examination or that the IJ may pose to the MH expert:
- DHS may contest the expert's qualifications. Be sure to include CV, current license(s) with evaluation so that the attorney files all of these with the court.
- **Note: For a new MH practitioner, all experience including practicums, internships are relevant vis-à-vis qualifications**
- Have you been compensated for your report?
- Have you always testified for the Respondent?

# Testimony of the MH Expert (cond)



- How many asylum applicants have you seen?
- Have you ever found that you did not believe the applicant's story?
- Did the attorney or accredited representative talk to you before you finished your report?
- Did you make any changes to your report after speaking with the Atty/AR?

# Procedural Safeguards



- ***Matter of M-A-M***
- The trial may go forward if the Respondent is mentally incompetent or mentally ill as long as there are procedural safeguards
- If the IJ finds the Respondent to be mentally incompetent, the IJ may terminate or administratively close the proceeding.
- Procedural safeguards may include the IJ talking in simple terms to the pro se applicant, a mental competency evaluation, change of venue so Respondent is closer to family
- **Note: DHS must produce any records relevant to competency**

# Trial Strategies



- **DHS must produce any documents** relating to inadmissibility and deportability and any other relevant documents *Matter of M-A-M*
- Motion for a **Subpoena Duces Tecum** – does HIPAA block the IJ's ability to secure the records?
- Motion to Change **Venue**
- Motion for **Televideo** with client
- Motion for **Telephonic Testimony** for witnesses
- Motion to **Administratively Close**
- Motion to **Terminate**



# Competency Resources



- American Immigration Council Practice Advisory
- EOIR Benchbook
- ABA standards for representation of mentally incompetent individuals

# Right to Appointed Counsel



- **Current law:** Respondent has a right to counsel in immigration proceedings at his/her own expense
- Mentally disabled, detained, indigent Respondents have a right to **appointed** counsel *Franco-Gonzales v. Holder*, No. 10-02211 (C.D., filed March 26, 2010)
- Certain juveniles have a right to appointed counsel, *In re Gault*, 387 U.S. 1 (1967)