Asylum Law in the 5th Circuit

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Quick Overview of Asylum

The 5th Circuit

Cases to Know
Sources of Law

- Statute
  - INA § 208
- Regulations
  - 8 C.F.R. § 208.13
- Case Law
  - BIA decisions
  - 5th Circuit Court decision
  - Supreme Court decisions
- Persuasive Authorities
  - Other Circuit Court decisions
  - UNHCR Handbook
  - International Law
INA 208: Authority & Eligibility

- Must be physically present in the United States and meet the definition of a refugee under INA § 101(a)(42)(A)
  - Exceptions
    - Safe third country (not applicable to UAC)
    - One year deadline (not applicable to UAC)
      - Unless there are changed or extraordinary circumstances
    - Previous asylum application
      - Unless there are changed circumstances
  - Bars to relief
    - Persecution of others
    - Particularly serious crime
    - Serious nonpolitical crime
    - Danger to U.S. security
    - Terrorism-related grounds
ASYLUM: LEGAL PROTECTION FOR A PERSON WHO IS UNABLE OR UNWILLING TO RETURN TO THEIR COUNTRY OR AVOID THEMSELVES OF THE COUNTRY’S PROTECTION BECAUSE THEY HAVE SUFFERED...

Past persecution or Well-founded fear of future persecution

On account of 5 protected grounds

Race | Religion | Nationality | Political opinion | Particular social group
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Cases to Know
Facts:
- It is based at the John Minor Wisdom United States Court of Appeals Building in New Orleans, Louisiana.
- Composed of 17 active judges (there are currently 2 vacancies).
  - 2 judges appointed by Pres. Trump have been confirmed.
  - 2 additional appointments are pending.
- The Chief Judge is Carl E. Stewart and his 7-year term expires next year.
- The 5th Circuit played a pivotal role in the Civil Rights movement.

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The 5th Circuit

Cases to Know
Past Persecution

Morales v. Sessions, 860 F.3d 812 (5th Cir. 2017)

**Background:** Alien, who was ten-year-old native and citizen of El Salvador, filed petition for review of an order of the Board of Immigration Appeals (BIA), affirming Immigration Judge's (IJ's) denial of alien's application for asylum, withholding of removal under Immigration and Nationality Act (INA), and withholding of removal pursuant to United Nations Convention Against Torture (CAT).

**Holdings:** The Court of Appeals, W. Eugene Davis, Circuit Judge, held that:

- Perpetrator's verbal threat of future violence did not constitute past persecution required to support application for asylum and withholding of removal;
- Alien failed to establish past persecution based on alleged threat by mother's ex-boyfriend to “take out” his anger at mother on alien; and
- Finding that alien failed to demonstrate that she would more likely than not be tortured by, or with the acquiescence of, a public official in El Salvador, was supported by substantial evidence.
Singh v. Sessions, 880 F.3d 220 (5th Cir. 2018)

**Background:** Citizen of India filed petition for review of Board of Immigration Appeals (BIA) order affirming immigration judge's (IJ) denial of his application for asylum, withholding of removal, and protections under Convention Against Torture (CAT).

**Holdings:** The Court of Appeals, Stephen A. Higginson, Circuit Judge, held that:

- Alien's post traumatic stress disorder (PTSD) did not require IJ to accept that alien believed what he presented, and
- Substantial evidence supported IJ's adverse credibility determination.
Political Opinion

Diallo v. Holder, 601 Fed. Appx. 300 (5th Cir. 2015)

Background: Alien, a native of Guinea, petitioned for review of order of the Board of Immigration Appeals (BIA), upholding Immigration Judge's denial of his application for asylum and other relief.

Holdings: The Court of Appeals held that:

- Substantial evidence supported determination by the BIA that any past harm which alien suffered at hands of the Guinea government was not on account of imputed political opinion, and
- Substantial evidence supported the BIA's alternative finding that, even assuming that alien was persecuted in past on protected ground, any presumptive well-founded fear of future persecution was rebutted in view of significant changes in country conditions.
PSG - Immutable or Fundamental Characteristic

- UNHCR Guidelines
  - “A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of human rights.”

- Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)
  - “Persons all of whom share a common, immutable characteristic”
  - “Members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”
PSG - Social Distinction & Particularity

- Social visibility → Social distinction

- Social distinction refers to whether a group is perceived and recognized as a distinct entity by society.

- Particularity refers to the group being sufficiently distinct that it would constitute a discrete class of person with definable boundaries. Must not be amorphous, overbroad, diffuse, or subjective.
Orellana-Monson v. Holder, 685 F.3d 511 (5th Cir. 2012)

**Background:** Alien brothers, as citizens of El Salvador, petitioned for review of order of Board of Immigration Appeals (BIA), denying aliens' applications for asylum, withholding of removal, and relief under Convention Against Torture (CAT), after they were charged with being in United States without having been admitted or paroled.

**Holdings:** The Court of Appeals, Edith Brown Clement, Circuit Judge, held that:

1. In matter of first impression, BIA's particularity and social visibility requirements for defining membership in particular social group are valid;
2. Aliens were ineligible for asylum as they lacked membership in particular social group for which they feared future persecution; and
3. Aliens' eligibility for withholding of removal was foreclosed by their ineligibility for asylum.
Hernandez-De La Cruz v. Lynch, 819 F.3d 784 (5th Cir. 2016)

**Background:** Alien, a native and citizen of Mexico, petitioned for review of Board of Immigration Appeals' denial of his applications for withholding of removal and protection under Convention Against Torture (CAT).

**Holdings:** The Court of Appeals, Stephen A. Higginson, Circuit Judge, held that:

- Court of Appeals lacked jurisdiction to consider alien's claim that his whistleblowing activity caused him to be threatened with persecution on basis of his membership in particular social group;
- Court of Appeals lacked jurisdiction over reinstatement of alien's removal order to extent he argued BIA erroneously found he was mistreated by people driven by economic motives; and
- Alien failed to demonstrate that his proposed social group of former informants was sufficiently particular to constitute a social group for which membership in group would protect him from removal.
PSG - Women unable to leave domestic relationship

Macias v. Sessions, 694 F. App'x 314 (5th Cir. 2017)

The BIA ruled that Morales Macias had not shown that she was unable to leave her domestic relationship and therefore had not shown a reasonable fear of persecution based on membership in a social group of Mexican women defined by that characteristic. The BIA based its decision on evidence presented and was substantially reasonable. See Carbajal-Gonzalez v. INS, 78 F.3d 194, 197 (5th Cir. 1996). Morales Macias has not shown that no reasonable factfinder could reach a contrary conclusion. See Chen v. Gonzales, 470 F.3d 1131, 1134 (5th Cir. 2006). Neither has Morales Macias shown that the BIA erred in concluding that her second claimed social group — Mexican women viewed as property by virtue of a domestic relationship — lacked sufficient particularity. See Matter of W-G-R-, 26 I. & N. Dec. 208, 214, 217, 224 (BIA 2014), rev. granted in part, vacated in part, on other grounds, 842 F.3d 1125 (9th Cir. 2016); see also Orellana-Monson v. Holder, 685 F.3d 511, 519 (5th Cir. 2012).
Demiraj v. Holder, 631 F.3d 194 (5th Cir. 2011), opinion vacated, appeal dismissed, 08-60991, 2012 WL 2051799 (5th Cir. May 31, 2012)

Background: Aliens, natives and citizens of Albania, petitioned for review of the orders of the Board of Immigration Appeals (BIA), denying their applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

Holdings: The Court of Appeals, Haynes, Circuit Judge, held that:

- Aliens did not have fear of persecution “on account of” their family membership, as required to support grant of asylum and withholding of removal
  - Albanian aliens, who were the wife and son of prosecution witness who was identified as a material witness to testify against Albanian suspect charged in the United States for human smuggling, did not have fear of persecution “on account of” their membership in the particular social group of their family, as required to support grant of asylum and withholding of removal; aliens would by targeted by the suspect and his associates in Albania, not because of their familial status, but rather because of suspect's attempt to seek personal revenge against the witness.

- Aliens were not entitled to relief under the CAT.
Gonzalez-Soto v. Lynch, 841 F.3d 682 (5th Cir. 2016)

**Background:** Native and citizen of Mexico filed petition for review of Board of Immigration Appeals (BIA) order dismissing his appeal from immigration judge's (IJ) order denying his application for withholding removal.

**Holdings:** The Court of Appeals held that:

- Alien failed to establish clear probability of persecution upon his return to Mexico based on his father's murder of another man two decades earlier, and
- Alien was not entitled to withholding or removal based on his fear of persecution for being perceived to have wealth.
Castillo-Enriquez v. Holder, 690 F.3d 667 (5th Cir. 2012)

**Background:** Alien petitioned for review of order of Board of Immigration Appeals (BIA) dismissing his appeal of the denial of his applications for withholding of removal and Temporary Protected Status (TPS).

**Holding:** The Court of Appeals, Jerry E. Smith, Circuit Judge, held that alien was not rendered eligible for TPS by his parents' eligibility for TPS.
Garcia v. Holder, 756 F.3d 885 (5th Cir. 2014)

**Background:** Alien, a native and citizen of El Salvador, filed pro se petition for review of an order of the Board of Immigration Appeals (BIA) denying his application for withholding of removal and relief under the Convention Against Torture (CAT).

**Holdings:** The Court of Appeals, James E. Graves, Jr., Circuit Judge, held that:
- Denial of withholding of removal was warranted, and
- Remand to the BIA was required for further consideration of claim for relief under CAT.
Iruegas-Valdez v. Yates, 846 F.3d 806 (5th Cir. 2017)

**Background:** Alien, a Mexican national, petitioned for review of the decision of the Board of Immigration Appeals (BIA) affirming Immigration Judge's (IJ) denial of his application for withholding of removal and relief under the Convention Against Torture (CAT).

**Holdings:** The Court of Appeals, Edith Brown Clement, Circuit Judge, held that:

- It was required to remand case to BIA for consideration of alien's eligibility for withholding of removal based upon alien's fear of persecution on account of membership in a particular social group, and
- Remand to BIA was required for further consideration of claim for relief under the CAT.
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