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*339 GROUNDS FOR ASYLUM, WITHOLDING AND CAT PROTECTION: CURRENT ISSUES AND RECENT DEVELOPMENTS

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*341 ASYLUM AND WITHHOLDING OF REMOVAL

I. Particular Social Group

The BIA recently affirmed its *Matter of Acosta* framework for determining particular social group in *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).*See also Matter of C-A-*, 23 I&N Dec. 951, 956 (BIA 2006) (emphasizing that the Board "continues to adhere to the Acosta formulation"). One "relevant factor" to consider in determining whether an asserted social group meets *Matter of Acosta's* requirements is the group's "social visibility"--whether the common characteristic on which the group is based is generally recognizable by others in the applicant's community. *Id*. at 957;*Matter of A-M-E- & J-G-U-*, 24 I&N at 74. As noted previously by the Board, past persecution may be a "relevant factor in considering the group's visibility in society."*Matter of C-A-*, 23 I&N at 960.

The Supreme Court vacated the Ninth Circuit's decision in *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005), which held that disabled children constituted a particular social group, and that parents who provide care for them were also a social group. Without reaching the substantive particular social group issue, the Supreme Court remanded the case to the BIA on administrative law grounds, ordering further consideration in light of *Gonzales v. Thomas* 126 S. Ct. 1613 (2006) (per curiam) (holding that a court of appeals was not generally empowered to conduct de novo inquiries in review of administrative agency decisions nor to reach its own conclusions based upon such an inquiry).

II. Forced Marriage

In the first published federal appeals court opinion addressing the issue of forced marriage as a basis for asylum, the Second Circuit held that women subjected to forced marriages may be eligible for asylum. *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006). The Solicitor General has filed a certiorari petition claiming that the BIA had not

considered whether forced marriage can give rise to a particular social group, and that the federal court decision improperly expanded the scope of individuals entitled to seek asylum without the agency having had the opportunity to resolve the question in the first instance.

***342 III. Effect of the REAL ID Act**

a. Effective Date

In *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006), the BIA clarified that an asylum application renewed before an Immigration Judge takes the date of the original affirmative application for purposes of the applicability of REAL ID Act provisions: "where the respondent filed his applications for relief with an asylum officer prior to the May 11, 2005, effective date... but renewed his applications in removal proceedings before an Immigration Judge subsequent to that date," REAL ID credibility provisions did not apply.

b. Nexus, Credibility, and Corroboration

This year, asylum and withholding cases initiated after REAL ID's effective date have percolated up to the Board's and the circuit court's dockets. Despite the new provisions, all indications are that REAL ID has not worked any major change on existing nexus, credibility, and corroboration standards. This is entirely consistent with the text and legislative history of REAL ID, which indicate that the new provisions were intended to encode uniform standards based on existing BIA caselaw. *See*H.R. Rep. No. 109-72, 2005 U.S.C.C.A.N. at 287 (2005) (Conf. Rep.)

A recent Board decision addressed a claim involving mixed motives under REAL ID's requirement that a qualifying ground be "at least one central reason" for the persecution suffered or feared. According to the Board, the REAL ID Act language did not represent any significant change from existing BIA policy. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

The corroboration provision of REAL ID codifies the rule expressed in the Board's decision in *Matter of S-M-J*, according to which the applicant may be required in some circumstances to provide reasonably available documentary evidence to corroborate her credible testimony. *See id.*;Pub. L. No. 109-13, §101; *Matter of S-M-J*, 21 I. & N. Dec. 722, 724 (1997).

REAL ID's credibility provision may represent a change from existing standards in circuits where an adverse credibility determination must be based only on issues going to the heart of an applicants' claim (such as the Sixth and Ninth Circuits). However, the REAL ID Act is careful to specify that the fact-finder must consider the "totality of the circumstances, and all relevant factors" in reaching credibility determinations.

IV. Persecution

The Second Circuit discussed persecution in the context of detention in *Bekovic v. Gonzales*, 467 F.3d 223 (2006), writing that "while 'the difference between harassment and persecution is necessarily one of degree,' . . . the degree must be assessed with regard to the context in which the mistreatment occurs. The BIA must, therefore, be keenly ***343** sensitive to the fact that a "minor beating" or, for that matter, any physical degradation designed to cause pain, humiliation, or other suffering, may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground."*See also Delgado v. U.S. Att'y Gen.* 487 F.3d 855 (11th Cir. May 25, 2007) (holding that in determining whether an alien has suffered past persecution, the IJ must consider the cumulative effects of the incidents).

In *Rizvie v. Gonzales* (2007), the Second Circuit held that the BIA erred in failing to consider the context in which the applicant's beatings and sexual assault occurred and noted that the fact that the sexual assault occurred

in the context of her arrest based on imputed political opinion is evidence that the assault was motivated, at least in part, on that ground. Viewing the sexual assault in this context, it cannot be viewed as simply a criminal act. The court further noted that a persecutor may have mixed motives, and that an applicant need not show with absolute certainty why an event occurred, but only that the harm was motivated in part by an actual or imputed protected ground.

In Kantoni v. Gonzales, 461 F.3d 894 (2006), the Seventh Circuit ruled that a credible threat that causes a person to abandon lawful political or religions associations or beliefs constitutes persecution.

The Seventh Circuit has also recognized that there is no clear point at which multiple acts of mistreatment comprise past persecution: the number of acts "is merely one variable in the analysis of the whole of the petitioner's claim of past persecution."Gomez v. Gonzales, 473 F.3d 746 (2007).

In Hassan v. Gonzales (2007), the Eighth Circuit ruled that female genital mutilation constitutes persecution: "[W]e now join the growing number of our sister circuits that have considered this issue and concluded that there is 'no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law.'"

V. Coercive Population Control

The past year has seen several major decisions by both the BIA and federal courts relating to claims arising from coercive population control policies. Most notably, the Second Circuit handed down an en banc decision in *Shi Liang Lin v. Gonzales*, 2007 WL 2032066 (2007) rejecting the BIA's ruling in *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997) that an applicant whose spouse had been subjected to forced abortion or forced sterilization automatically establishes past persecution or a well-founded fear of future persecution on account of political opinion for purposes of the INA 101(a)(42)(a) refugee definition. The Court concluded that the BIA's reasoning was not entitled to Chevron deference because the operative language of IIRIRA §601 (a) unambiguously referred to a person--rather than a couple--who had individually suffered forced abortion or forced sterilization. However, spouses and partners may still establish past persecution or a well founded fear of future persecution based on other resistance to a coercive population control program. Furthermore, several judges concurring in the judgment emphasized ***344** that since the petitioners were all unmarried, the court need not have gone so far as to rule on the BIA's construction of the statute vis-à-vis married applicants whose spouses had suffered forced sterilization or forced abortion.

The Second Circuit's decision is at odds with *Matter of C-Y-Z-* and precedent in several other circuits. Attorneys reported that immigration judges began applying *Shi Liang Lin* to current cases almost immediately following the decision's publication. Its effect is also rippling through other circuits: the Third Circuit has ordered a rehearing en banc in *Jianzhong Shi v. Gonzales* specifically to address whether the court should defer to the BIA's decisions in *Matter of C-Y-Z-* and *Matter of S-L-L-*, 24 I. & N. Dec. 1 (BIA 2006), or adopt the Second Circuit's reasoning in *Shi Liang Lin v. Gonzales*.

Given the current trend, advocates in all circuits with clients whose spouses suffered forced sterilization or forced abortion should not rely solely on *Matter of C-Y-Z-* and consistent circuit court caselaw. Also emphasize the lasting effects of the abortion or sterilization on their family and the direct mental, psychological, and emotional harm a client suffers as a result of the targeting of their family and their spouse's persecution. Lory Rosenberg's concurrence in *Matter of C-Y-Z-* makes an excellent roadmap for advocates aiming to fortify their theory of the case in the wake of *Shi Liang Lin*. *See* 21 I&N Dec. at 920.

The Ninth Circuit held in *Li Bin Lin v. Gonzales,* 472 F.3d 1131 (9th Cir. 2007) that the plain language of INA 101(a)(42)(B) does not require a petitioner to resist birth control officials because he disapproves of the birth control program. His subjective reasons for resisiting need not be reviewed. Rather, the sole question is whether

the applicant claiming "resistance" physically or vocally resisted birth control officials while the officials performed duties related to the birth control program.

The Board of Immigration Appeals has published several precedent cases relating to coercive population control in the past year, some of which may take on added significance in view of the *Shi Liang Lin* decision. The BIA issued a precedent decision on forced abortion as persecution in *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007). The case, involving a married couple from China, notes that an abortion is forced by threats of harm when a reasonable person would objectively view the threats for refusing the abortion to be genuine, and the threatened harm, if carried out, would rise to the level of persecution. Moreover, nonphysical forms of harm, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life, may amount to persecution.

In *Matter of J-H-S-*, 24 I&N Dec. 196 (BIA 2007), the BIA held that a person who fathers or gives birth to two or more children in China may qualify as a refugee if he or she establishes that the births are a violation of family planning policies that would be punished by local officials in a way that would give rise to a well-founded fear of persecution.

***345** In *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007), the BIA held that where the evidence of record did not demonstrate that the Chinese Government has a national policy of requiring forced sterilization of a parent who returns with a second child born outside of China, and where the applicant fails to provide evidence that sanctions imposed pursuant to local family planning policies in China would rise to the level of persecution, then the applicant has no well-founded fear of persecution.

Matter of S-Y-G-, 24 I&N Dec. 247 (BIA 2007), discusses the legal standard for a motion to reopen. The applicant did not meet the heavy burden to show that her proffered evidence is material and reflects "changed circumstances arising in the country of nationality" to support the motion where the documents submitted reflect general birth planning policies in her home province that do not specifically show any likelihood that she or similarly situated Chinese nationals will be persecuted as a result of the birth of a second child in the United States.

CONVENTION AGAINST TORTURE

Note: Due to the lower volume of CAT caselaw and more limited coverage than asylum/withholding in other practice publications, the author has included cases from the last several years in the discussion below.

I. Severity of Harm/Definition of Torture

This area of CAT law continues to be fluid, with findings resting largely on the individual, contextualized circumstances of each case and less on any per se rules about what manner of harm meets the torture definition. However, recent caselaw provides several useful signposts. Beatings alone can be considered torture if they are sufficiently severe and other elements of the torture definition (especially government acquiescence) are satisfied. *See Zewdie v. Ashcroft*, 381 F.3d 804 (8th Cir. 2004) (holding that beating with sticks and wire whips is torture, but only evidence of past torture in this case); *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003); *Al-Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001) (holding that severe beatings and burning with cigarettes is severe harm); *but see Pavlyk v. Gonzales*, 469 F.3d 1082, 1091 (7th Cir. 2006) ("the pain and suffering caused by the prison conditions would fall within the exception to torture for lawful sanctions"); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004) (holding that beating with sticks and belts is "cruel and degrading" but not enough to be torture); *Xin Wen Chi v. United States AG*, 215 Fed. Appx. 910, 913 (11th Cir. 2007) ("[w]e have upheld the BIA's determination that prison police brutality, such as beatings with fists, sticks, and belts, did not rise to the level of torture").

Rape is well-accepted as constituting torture as long as the government acquiescence element is satisfied; ac-

ceptance of FGM as torture is also gowing. *See Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (holding that FGM is grounds for asylum and calling FGM "torture" without addressing the implications for CAT); *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003) (finding that rape can be torture); *Al-****346** *Saher v. INS*, 268 F.3d 1143 (9th Cir. 2001) (including rape among acts that may constitute torture). Other cases are less explicit but seem to assume that rape would have satisfied the definition of torture if the petitioner had proven other elements of her case. *See, e.g., Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006).

There is significant interaction among the definitions of torture, the application of the "more likely than not" standard, and the government acquiescence requirement. Domestic violence may be considered torture if paired with a strong element of government acquiescence. *See Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003); *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001) (conceding that in "a situation in which the authorities ignore or consent to severe domestic violence, the Convention appears to compel protection for a victim").

More unique forms of harm, such as internment at "re-education camps" in China, are less accepted as torture. Although courts and adjudicators seem to accept that some individuals interned at such camps suffer torture, they do not necessarily accept that a "more likely than not" prospect of internment is tantamount to a "more likely than not" chance of suffering torture. *See Xue Zhen Chen v. Gonzales*, 470 F.3d 1131, 1140 (5th Cir. 2006) ("[a] careful review of the record indicates that there appears to be no question that some individuals in China have been subjected to acts constituting torture in either prisons or detention centers, and that some illegal emigrants are sent to reeducation-through-labor camps. Although the gravity of this reality does not escape us, the information in the record does not indicate with any certainty that illegal emigrants are more likely than not sent to reeducation-through-labor camps, and then subjected to torture."); *Zhang v. Ashcroft*, 388 F.3d 713, 718 (9th Cir. 2004) (holding that a sentencing to a reeducation camp because of Falun Gong membership is persecution but not torture); *see also Mu Xiang Lin v. United States DOJ*, 432 F.3d 156 (2d Cir. 2005); *Lian v. Ashcroft*, 379 F.3d 457 (7th Cir. 2004); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

Threats of extrajudicial killing and assassination are accepted as torture. *See Comollari v. Ashcroft*, 378 F.3d 694 (7th Cir. 2004) (rejecting the government's contention that assassination is not torture because it can be painless); *Habtemichael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004) (holding that extrajudicial execution/death threats can be torture if the intent requirement is met).

Imprisonment alone, even in poor conditions, is not necessarily considered torture in the absence of other factors. *See Xin Wen Chi v. United States AG*, 215 Fed. Appx. 910, 914 (11th Cir. 2007) (unpublished) (holding that a Chinese applicant's "potential imprisonment for violation of China's emigration laws would not amount to torture within the meaning of the CAT"); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003) (holding that imprisonment of Chinese military deserters does not "inherently" constitute torture); *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002) (holding that deplorable conditions in **Haitian prisons** do not constitute torture).

Economic harm is not considered torture. *See San Chung Jo v. Gonzales*, 458 F.3d 104, 110 (2d Cir. 2006) (holding that the harm must be "more severe than that ***347** which would suffice to prove persecution"; "[i]n sum, we see no indication in the definition of torture that that concept was intended to encompass destruction, thefts, expropriations, or other deprivations of property.")

II. Government Acquiescence - Definition

There has been a backlash against *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000) which interpreted the clause "awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity"8 C.F.R. § 208.18 (a)(7) as "willful acceptance" rather than "willful blindness". The Ninth Circuit led this backlash in *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), rejecting the *Matter of S-V-* interpretation and setting "willful blindness" as the floor.

Most of the other circuits have followed, some quite recently. *See Silva-Rengifo v. AG of the United States*, 473 F.3d 58 (3d Cir. 2007); *Amir v. Gonzales*, 467 F.3d 921 (6th Cir. 2006); *Tunis v. Gonzales*, 447 F.3d 547 (7th Cir. 2006); *Mouawad v. Gonzales*, 479 F.3d 589, 596 (8th Cir. 2007); *Ferry v. Gonzales*, 457 F.3d 1117 (10th Cir. 2006); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341 (5th Cir. 2002).

The First Circuit has not attempted to define government acquiescence and seems to simply uphold BIA determinations of lack of proof in this area. *See, e.g., Lopez v. Gonzales*, 2007 U.S. App. LEXIS 16752 (1st Cir. 2007); *Toure v. Ashcroft*, 400 F.3d 44, 50 (1st Cir. 2005).

To the author's knowledge, the Eleventh Circuit has not directly addressed the issue. However, certain cases may give some indication of its view of acquiescence. *See Reyes-Sanchez v. United States AG*, 369 F.3d 1239, 1242 (11th Cir. 2004) ("[]n Reyes's view, the deliberate or willful acceptance standard is inconsistent with the FARRA and the CAT regulations. He bases this argument upon recent precedent from the Ninth Circuit.... We need not address this question today. Reyes's CAT claim plainly fails under the definition of 'acquiescence' set forth in the regulations"); *Hidalgo v. United States AG*, 154 Fed. Appx. 827, 829 (11th Cir. 2005) ("[p]etitioners [Costa Rican drug informants] have not shown government acquiescence to their alleged torture threats, as required by the CAT. The evidence showed the threat of harm to Petitioners mostly derived from criminals, not the government. To the extent that government officials were involved, they appear to have been rogue employees not carrying out governmental instructions"); *Akem v. United States AG*, 194 Fed. Appx. 648, 654 (11th Cir. 2006) ("[t]he BIA's finding that FGM would not be performed with the acquiescence of a government official is supported by substantial evidence. Although FGM is not a federal crime, the Nigerian federal government publicly opposes the practice and the governments of Cross River and Rivers states banned the practice in 1999. The fact that the practice continues despite the ban does not compel a finding of acquiescence").

The BIA, however, seems to be adhering to its previous interpretation. *See In re J-B-N- & S- M-*, 24 I&N Dec. 208, 217 (BIA 2007) ("[t]he respondents have not shown ***348** that anyone in the Rwandan Government would affirmatively consent or acquiesce to their torture. They are therefore not entitled to protection under the Convention Against Torture.")

III. Government Acquiescence - Specific Intent

(Interpretation of "intentionally inflicted" in 8 C.F.R. § 208.18(a))

This issue continues to be contested both among the circuits and within individual courts and the BIA. Some courts have been reluctant to adopt the "specific intent" language of the BIA, taken from *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), which held that terrible conditions in **Haitian prisons** do not indicate a specific intent of the government to torture prisoners. *See Habtemichael v. Ashcroft*, 370 F.3d 774 (8th Cir. 2004) (holding that the regulations did not require a showing of specific intent and that the intent requirement is satisfied if "prolonged mental pain or suffering either is purposefully inflicted or is the foreseeable consequence of a deliberate act"); *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003) (rejecting specific intent requirement and interpreting regulation to mean the exclusion of severe pain or suffering that is the unintended consequence of an intentional act).

Many courts, however, follow *Matter of J-E-*, finding that widespread abominable conditions, such as in certain prisons, do not by themselves establish government acquiescence. These decisions often also rest on a determination that the treatment in question did not rise to the level of torture. *See Francois v. Gonzales*, 448 F.3d 645 (3d Cir. 2006); *Auguste v. Ridge*, 395 F.3d 123, 128 (3d Cir. 2005) (upholding the BIA interpretation of specific intent in a **Haitian prison** case and apparently reversing *Zubeda*);*Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005).*But see Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004) (holding that treatment in **Haitian prison** rises

to the level of torture but applicant failed to prove likelihood); *Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 639 (8th Cir. 2007) (returning to the exact phrasology of 8 C.F.R. § 1208.18(a)(7) and perhaps moving away from its decision in *Alemu*).

Acquiescence appears more likely to be established if the petitioner can show a more specific reason for his torture or condition that would heighten his vulnerability and suffering, though the courts do not explicitly use this logic in their opinions. *See, e.g., Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002) (petitioner was an Armenian Christian returning to Iran with a great likelihood of imprisonment); *Lavira v. Gonzales*, 478 F.3d 158 (3d Cir. 2007) (petitioner was in very poor health and disabled and risked imprisonment in Haiti).

To the author's knowledge the question has not yet been directly addressed by the Second, Fourth, Fifth, Sixth, Seventh and Tenth Circuits.

IV. Government Acquiescence - Non-state Actors

The trend here is to find that the mere inability of the government to control non-state actors is insufficient to establish acquiescence. *See* ***349** *Mouawad v. Gonzales*, 479 F.3d 589, 596 (8th Cir. 2007) ("[a] government does not acquiesce in the torture of its citizens merely because it 'is aware of torture but powerless to stop it"') (citations omitted); *Tamara-Gomez v. Gonzales*, 447 F.3d 343 (5th Cir. 2006) (citing *Reyes-Sanchez v. U.S. Attorney General* to support a finding denying government acquiescence to activities of the FARC); *Ferry v. Gonzales*, 457 F.3d 1117, 1130-1131 (10th Cir. 2006) (holding that the failure of a government to prevent rebel action is not acquiescence defined as willful blindness); *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Cir. 2005) (finding that the inability of police to solve a crime does not establish acquiescence); *Reyes-Sanchez v. U.S. Attorney General*, 369 F.3d 1239 (11th Cir. 2004) (holding that a CAT claim fails when the government opposes rebel group in a case in which the police came to investigate but were unable to catch the perpetrators); *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (holding that CAT claim fails when government opposes rebel group); Velasquez-*Velasquez v. INS*, 53 Fed. Appx. 359 (6th Cir. 2002) (unpublished) (holding that CAT does not protect petitioners from rebel guerillas outside of government control).

Acquiescence may be established if the government is found to be willfully blind. *See, e.g., Mouawad v. Gonzales*, 479 F.3d 589, 596 (8th Cir. 2007) ("[a] government does not acquiesce in the torture of its citizens merely because it 'is aware of torture but powerless to stop it,' but it does cross the line into acquiescence when it shows 'willful blindness toward the torture of citizens by third parties"') (citations omitted).*See also* discussion above concerning willful blindness and willful acceptance, *supra* at II.

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