Outline from Jon Eric Garde for "Real ID, Criminal Issues And Hot Topics In Removal" session 2

THE PREAMBLE: To prevent terrorists from abusing the asylum laws of the United States, …

This preamble is based on a distorted reality that is created by confusing humanitarian relief with a shelter for terrorists, focusing on a certain few actual terrorists, identified to date, who are culpable of asylum abuse, while creating a false presumption that a sizable number of asylum seekers are terrorists. So, while the 10,000 annual cap is eliminated for aslyee adjustments at the back end of this process, the grounds to deny asylum are statutorily broadened, conversely narrowing the opportunity to be granted relief.

MIXED MOTIVE CASES ARE REPLACED BY A PRIMARY MOTIVE

The Board initially followed 9th Cir. Precedent promulgated in Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995), where in 1996, and repeatedly since then, the Board has held:

> In mixed motive cases, an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur; however, in proving past persecution, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground.

Matter of S-P-, 21 I&N Dec. 486 (BIA 1996).

HOW DOES THE REAL ID ACT CHANGE THIS?

IN GENERAL.—The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee with in the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or **will be a central reason** for persecuting the applicant. **INA Sec. 208(b)(1)(B)(i).**

COMMENTARY: A MORE PARTICULAR BURDEN OF PROOF

Notice how the five statutory grounds for a well founded fear are listed in the alternative, and not in any manner that can be interpreted as cumulative. The asylum seeker is given one reason, and one reason only to apply. It would appear that mixed motives cases are no longer contemplated under the Act. Prior to real ID, in presenting a mixed motives case, there was no requirement to compare the statutory protected basis for a well-founded fear and other reasons to fear return to one's home country that are not named in the statute, such as natural disaster, poverty or crime.

Additionally, nothing prevented the asylum seeker from presenting two or more alternative theories to fear persecution of the five named at Section 101(a)(42) of the Act, where the term refugee is defined**. Now, the asylum seeker must be constrained to**

select one basis only to fear persecution. The negative impact is that: 1) mixed motive cases will invite the adjudicator to find alternative non-protected reasons to fear return to one's home country while also inviting if not compelling government counsel on cross examination, to uncover non-protected grounds to fear return to one's home country, and 2) any presentation of two protected grounds for asylum will now dilute and confuse an application.

The Real ID Act also appears to establish a substantial evidence test for the asylum seeker to show, not only that he or she meets the subjective basis of a statutory protected ground for a well founded fear, **but now there is the additional requirement to show that** he or she is more likely than not to be more afraid of a statutory ground then another ground, such as poverty or general criminality. Thus, the presence of mixed motives requires a showing that the statutory basis to fear return to one's home country is much stronger than other reasons to be afraid.

THE REAL ID ACT CHANGES THE RELATIONSHIP BETWEEN TESTIMONIAL AND DOCUMENTARY EVIDENCE- IT HEIGHTENS THE NEED TO COOBORATE FACTS AND STATEMENTS WITH DOCUMENTARY EVIDENCE OF COUNTRY CONDITIONS AND WITH NON-TESTIMONIAL EVIDENCE OF AN ASYLUM SEEKERS SUBJECTIVE BASIS FOR A WELL-FOUNDED FEAR.

Under prior Supreme Court precedent, testimony alone, if detailed, credible and internally consistent, was sufficient to satisfy the evidentiary burden necessary to warrant favorable discretion. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985) affirmed on certiorari at **INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)**

Years later, Board precedent and the Attorney General's regulations found instituted a requirement to produce documentary evidence of country conditions to substantiate the objective basis to find a well founded fear of persecution. The Second Circuit Court of Appeals articulated BIA precedent and the Attorney General's governing regulations, in discussing the requirement of corroborative documentary evidence as would expected to be reasonably available. **Diallo v. INS, 232 F.3d 279 (9th Cir. 2000)** that

> Where an alien's **testimony** is the only evidence available, it can suffice where [it] is believable, **consistent,** and sufficiently detailed to provide a plausible and coherent account of the basis of the alien's alleged fear. However, . . . the introduction of [supporting] evidence is not purely an option with the asylum applicant; rather, corroborating evidence should be presented where available.
>
> Where the record contains general country information, and an applicant's claim relies primarily on personal experiences not reasonably subject to verification, corroborative documentary evidence of the asylum applicant's particular experience is not required. However, . . . where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided

> or an explanation should be given as to why such information was not presented. The absence of such corroboration can lead to a finding that an applicant has failed to meet his burden of proof.

In re M-D-, 21 I&N Dec.1180 (BIA 1998) (internal quotation marks, citations, and alterations omitted). This is an accurate statement of the standard the BIA has developed in recent decisions upon which the BIA has announced its intent to rely. See In re S-M-J-, 21 I&N Dec. 722 (BIA 1997); Matter of Dass, 20 I. & N. Dec. 120, 124-25 (BIA 1989); Matter of Mogharrabi, 19 I. & N. Dec. 439, 445-46 (BIA 1987). While **consistent**, **detailed, and credible testimony** may be sufficient to carry the alien's burden, **evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected.**

The Immigration and Naturalization Service regulations state that "the **testimony** of the applicant, if **credible,** may be sufficient to sustain the burden of proof without corroboration." **8 C.F.R. §§ 208.13(a), 208.16(b).** The use of the permissive term "may" implies that an applicant's **credible testimony** may not always satisfy the burden of proof. Moreover, the regulations were apparently drafted to ensure that lack of corroboration would not necessarily defeat an asylum claim, and were not drafted to excuse the requirement of corroboration in all cases in which an applicant's **testimony is credible.**

Corroborative evidence became an expected evidentiary component to proving an asylum case, wherein the Board notes within Matter of Y-B-, 21 I. & N. Dec. 1136 (BIA 1998), not only that:

(1) An asylum applicant does not meet his or her burden of proof by general and meager **testimony**

But the Board further notes:

(2) Specific, detailed, and **credible testimony** or a combination of detailed **testimony** and corroborative background evidence is necessary to prove a case for asylum.

The Board then creates a proportionate relationship between testimony and corroborative evidence in noting:

(3) The weaker an applicant's **testimony,** the greater the need for corroborative evidence.

However, the Ninth Circuit, in proper deference to Cardoza-Fonseca, overruled the Board, and undermined any presumption or reliance on the production of reasonably available documentary evidence in Ladha v. INS, 215 F.3d 889 (9th Cir. 2000), in finding that:

> To establish a well-founded fear of persecution, petitioners must show their fear to be both objectively reasonable and subjectively genuine. An alien satisfies the subjective component through his or her own credible testimony.

The objective component can be established in two different ways. One way to satisfy the objective component is to prove persecution in the past, giving rise to a rebuttable presumption that a well-founded fear of future persecution exists. The second way is to show a good reason to fear future persecution by adducing **credible,** direct, and specific evidence in the record of facts that would support a reasonable fear of persecution. **KEY TO THE ATTACK PUT FORTH BY THE REAL ID ACT SEEKS TO ELIMINATE THE FINDING THAT "**The objective requirement can be met by either through the production of specific documentary evidence or by **credible** and persuasive **testimony."**

Where an alien's **testimony** is the only evidence available, it can suffice where the **testimony** is **believable, consistent,** and **sufficiently detailed** to provide a **plausible and coherent account** of the basis of the alien's alleged fear, but that the introduction of such evidence is not purely an option with the asylum applicant; rather, corroborating evidence should be presented where available.

Where an IJ finds a [petitioner's] **testimony to be credible, uncontradicted testimony** must be taken as true" and petitioner's "actual, uncontradicted and **credible testimony** did evidence past persecution."); THE NINTH CIRCUIT CITING *Campos-Sanchez v. INS*, 164 F.3d 448, 451 n.1 (9th Cir. 1999) FOR THE PROPOSITON THAT ("If the BIA finds the petitioner **credible** on remand, it should not require corroborating documents in order to establish his claim of a well-founded fear of persecution. Our cases are clear that such **corroboration is encouraged but not required.**"); ALSO CITING *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998) FOR THE SAME PROPOSITION.

HOW DOES THE REAL ID ACT CHANGE THIS?

INA Sec. 208(b)(1)(B)(ii).

''SUSTAINING BURDEN.—**The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration**, but only if the applicant satisfies the trier of fact that the applicant's testimony is **credible**, is **persuasive**, and refers to **specific facts** sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines, **in the trier of fact's discretion, that the applicant should provide evidence which corroborates** otherwise credible testimony, **such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence without departing the United States.** The inability to obtain corroborating evidence does not excuse the applicant from meeting the applicant's burden of proof.

The new companion regulations provide that:

Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence. 8 CFR §

COMMENTARY

Good lawyering is needed now more than ever. The REAL ID Act heightens the quality of testimony required, heightens the need for documentary evidence for those persons who are incapable of providing fact specific, detailed, credible and persuasive accounts of their persecution. Bearing in mind that bonafide asylum seekers invariably suffer PTSD, these exacting requirements discard the rule of lenity for beneficiaries most in need of it, straining the psychological and emotional capacity of the asylum seeker in having to provide such exact testimony, while straining their financial resources in having to put forth the requisite documentary evidence or expertise witness to prove up country conditions. More being demanded from our traumatized clients, asylum adjudications now risk being treated akin to college entrance examinations!

STRATEGY

At this juncture, corroborative documentary evidence is mandatory for the competent practitioner. Moreover, it is feasible given the ample number of sources for human rights relatated documentation. AILA and ILW are two organizations providing numerous linkages to human rights websites with comprehensive research engines. There are others which can be located using well selected key words within any number of well known search engines.

For those in need of guidance in conducting such a search, various human rights organizations such as Amnesty International and UNHCR are available, should you provide them enough advance notice, to assist you in securing documentary evidence that is specific to your claim or to refer you to expert witnesses where such documentation does not exist due to the inability of human rights monitors to function within a given country. In working with expert witnesses, be sure to familiarize yourself with voir dire technique and the Federal Rules of Evidence, Rule 702, governing the presentation of expert witnesses. Of course, such an expert would be well qualified to explain why corroborative evidence is unavailable. Moreover, where resources are limited, yet, you can access a computer, document your well worded search on several respected search engines to demonstrate that no documentation could be produced despite your competent, comprehensive, and diligent search.

Psychologists are also indispensable, and so too is medical documentation, to explain medical the psychological impediments that prevent the asylum seeker from providing clear, understandable, chronologically logical testimony. They are essential both as treating physicians to prepare the applicant for testimony, prescribing medication as necessary, or as expert witnesses to explain why someone with your client's psychological condition would be incapable of providing testimony to meet the new statutory standard.

PRIOR JUDICIAL DECISIONS REQUIRED INCONSISTENCIES TO BE MATERIAL IN ORDER TO FIND CREDABILITY LACKING, THAT IS, THE INCONSISTANCIES WOULD HAVE TO COMPROMISE AND CALL TO QUESTION THE VERY HEART OF THE APPLICANT'S CLAIM.

The rule of lenity is under attack.

Only material inconsistencies had been permitted within varied circuit courts to undermine the credibility of the asylum seeker's testimony. Singh v. Gonzales, 403 F.3d 1081, 1085 (9th Cir. 2005); see e.g. Bandari v. INS, 227 F.3d 1160, 1167 (9th Cir. 2000)(minor omissions of facts on initial application or discrepancies concerning dates existing over seven years prior to application are immaterial and irrelevant to evaluating credibility). Zhen Li Iao v. Gonzales, 400 F.3d 530, 532 (7th Cir. 2005). The Seventh Circuit notes six disturbing findings concerning the vast number of immigration cases flooding appellate courts:

1. *A lack of familiarity with relevant foreign cultures*.
2. *An exaggerated notion of how much religious people know about their religion*.
3. *An exaggerated notion of the availability, especially in poor nations, of documentary evidence of religious membership*
4. *Insensitivity to the possibility of misunderstandings caused by the use of translators of difficult languages* such as Chinese, and relatedly, *insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American*, such as the Chinese.
5. *Reluctance to make clean determinations of credibility*.
6. *Affirmances by the Board of Immigration Appeals either with no opinion or with a very short, unhelpful, boilerplate opinion*, even when, as in this case, the immigration judge's opinion contains manifest errors of fact and logic.

HOW DOES REAL ID ADDRESS THESE CONCERNS?

INA Sec. 208(b)(1)(B)(iii).

CREDIBILITY DETERMINATION.—The trier of fact should consider all relevant factors and may, [as a matter of that person's] discretion, base… a credibility determination on any such factor, including the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (**whenever made and whether or not made under oath**), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, **without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. There is no presumption of credibility.''**

- Relevant factors in determining credibility appear to weigh heavily on all of the traditional forms of demeanor evidence evaluated by appellate courts.

- No opportunity is given to explain inconsistencies

- Ill prepared applications with use of a notary public, not made under oath, or otherwise prepared and presented by someone with minimal education,

suffering from undiagnosed PTSD, can be used to discredit the later work of an attorney.

- Meanwhile, demeanor evidence appears to be mandated by statute for use in determining inaccuracies or falsehoods in testimonial statements, **without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, ?!?!?!, and absent a presumption of credibility where testimony is inherently consistent and detailed in all material respects. Can you say kangaroo court?**

- Greater deference is given to State Department Reports, which have been questioned frequently in the Ninth Circuit as being neither authoritative nor comprehensive when describing how members of a persecuted group are reported to live in peace in an asylum seeker's home country while failing to addressing the possible human rights violations which correspond to an applicant's asylum claim. Shah v. INS**,** 220 F.3d 1062, 1069 (9th Cir. 2000); Singh v. Ilchert, 69 F.3d 375, 380 (9th Cir. 1995).

- Yet, the Statute fails to address other reputable human rights reports, such as Human Rights Watch and Amnesty International. The work wrought by the American Baptist Churches, as applied nationally, required asylum officers to have access to and consider other human rights reports apart from those issued by the State Department, appear to have been set back by Congress.

- TIPS AND STRATEGIES TO COPE WITH THIS REGIME:

    - This section of the statute compels the government do rigorously cross-examine your client. As immaterial issues can go to credibility and veracity, government attorney's are given fishing licenses. Challenge this practice when accounted with will voiced objections on the record.
    - Now more than ever, with cross examination is likely to take on a sinister and unfair demension, requiring the us to gauge our client's psychological and intellectual abilities:
        - The more expressive, the more articulate, the more clearly communicative he or she is, then, the more detail you can present through his or her testimony. Take the bird-in-flight approach, and cover your story in time and space with as much mastery of detail as your client can command.
        - However, if your client is less educated, if more introverted, if he or she is manifestly traumatized, then, take the turtle approach. Hunker down and focus on a succinct impenatrateable manner of presenting his or her testimony so as to minimally satisfy the elements of his or her asylum claim, and enable him or her to address alterior motives to seek protection on cross examination.
        - Make sure he or she understands the elements of the case.

        - Train him or her to be responsive to all questions, whether relevant or irrelevant to his claim, BUT, responding consistent to the theory of the case to a question not directly addressing this theory will get your client labeled by an IJ as “scripted”.
        - Make sure he or she is well drilled to respond that he or she does not understand a question rather than try to answer it, AND, as advocate, be vigilant to object to compound, or vaguely worded questions that a currently objectionable anyway.

- Where your client’s psychological condition prevents him or her from testifying coherently, get him or her therapy as the first order of business. As needed, get her medicated if the physician decides this is best.

- Congress needs to be challenged in its distortion of the basic rules of evidence. That which is immaterial is permitted to be material. That which is material may be transformed into being immaterial or irrelevant by some form of pre-emption due to the applicant’s shifty or dishonest demeanor??? The standard created here is clearly void for vagueness and as such, this section of the Act needs to be attacked in the courts as being violative of due process.

- Moreover, Congress may be attempting to pre-empt the 1952 Convention, the 1967 Protocal as incorporated within the 1980 Refugee Act, so as to call into question our country’s compliance with our international obligations.