national IMMIGRATION project
of the National Lawyers Guild

2201 Wisconsin Ave. Suite 200, Washington, DC 20007 | Tel. (617) 227-9727 Fax (617) 227-5495 | nipnlg.org @nipnlg

Practice Alert: Coronavirus Asylum Claims Based on "Other Serious Harm"
March 19, 2020 (revised April 6, 2020)[1]

NOTE: Humanitarian asylum described in this alert is only available to applicants with a separate basis for asylum grounded in past events. This practice alert does NOT recommend applying for asylum based only on future fear related to COVID-19; protection through "other serious harm" requires more than that. We suggest an argument to be made only after an independent asylum claim on a protected ground (race, religion, national origin, political opinion, or particular social group) is recognized as constituting past persecution, such that the burden of proof will shift to the government to show that either country conditions have changed or the applicant is able to relocate safely within their country. If that burden is met, "other serious harm" can satisfy the well-founded fear requirement of asylum. But the concept of future "other serious harm" that encompasses current COVID-19 conditions in an applicant's country of origin cannot substitute for or skip over a past basis for asylum.

I. Introduction

If your client has established past persecution on account of a protected ground, it is presumed that they possess a well-founded fear of persecution in their country of origin. While the government can rebut this presumption based on changed country conditions or internal relocation, asylum applicants may also demonstrate that they warrant relief by showing that "other serious harm" would befall them if they were removed.

Unlike a "well-founded fear," "other serious harm" need not (i) be related to past persecution or (ii) have any nexus to a protected ground. In the context of COVID-19, precedents about the unavailability of medical care, inability to access medication, and lack of health insurance potentially constituting "other serious harm" provide an important avenue to consider at every stage of removal proceedings, including reconsideration of credible-fear denials, merits hearings, and post-merits

---

[1] Copyright © 2020, the National Immigration Project of the National Lawyers Guild. This advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case. Counsel should independently confirm whether the law in their circuit has changed since the date of this advisory. The authors of this practice alert are Cristina Velez, NIPNLG Senior Staff Attorney and Christopher Rickerd, Consultant with NIPNLG. We are grateful for information in this practice alert derived from the University of Minnesota Law School's CLE resource, "The Case for Humanitarian Asylum." (Feb. 13, 2018), https://www.law.umn.edu/sites/law.umn.edu/files/humanitarian_asylum_resource_guide.pdf

motions to reopen or remand. "Other serious harm" based on the virus can also be a component of affirmative asylum applications.

II. The Regulation

In January 2001, asylum regulations came into effect that added a new avenue to relief apart from establishing "well-founded fear." The Department of Justice explained that "other serious harm" means "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution. Mere economic disadvantage or the inability to practice one's chosen profession would not qualify as 'other serious harm.'"[2]

8 C.F.R. § 208.13(b)(1)(iii)(B) and § 1208.13(b)(1)(iii)(B) now state:

> *Grant in the absence of well-founded fear of persecution*. An applicant described in paragraph (b)(1)(i) of this section[3] who is not barred from a grant of asylum under paragraph (c) of this section [4], may be granted asylum, in the exercise of the decision-maker's discretion, if: . . .
>
> (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

The regulatory history explains that "reasonable possibility" is equivalent to *Cardoza-Fonseca*'s 10% standard, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) ("There is simply no room in the United Nations' definition for concluding that, because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, he or she has no 'well founded fear' of the event's happening.").[5]

III. Precedent

---

[2] INS Final Rule, *Asylum Procedures*. 65 Fed. Reg. 76,121, 76,127 (Dec. 6, 2000), https://www.federalregister.gov/documents/2000/12/06/00-30601/asylum-procedures
[3] Changed country conditions and internal relocation bars to establishing a well-founded fear.
[4] Mandatory-denial grounds.
[5] EOIR, *New Rules Regarding Procedures for Asylum and Withholding of Removal*. 63 Fed. Reg. 31,945, 31,947 (June 11, 1998).

2201 Wisconsin Ave. Suite 200, Washington, DC 20007 |Tel. (617) 227-9727 Fax (617) 227-5495 | nipnlg.org @nipnlg

a. *Matter of L-S-*

Matter of L-S-, 25 I&N Dec. 705 (BIA 2012), is the agency's leading "other serious harm" case. Respondent established past persecution, but the IJ concluded that changed country conditions rebutted the presumption of a well-founded fear. The BIA began by emphasizing that it is a respondent's burden to establish "other serious harm." *Id.* at 710, 713. It noted that "[t]o date, there has been little legal guidance interpreting the meaning of 'other serious harm' under the regulation. Prior to the 2001 change that added this provision, the regulation already permitted asylum grants for 'compelling reasons' based on the severity of past persecution, that is, the so-called '*Chen* grants.'" *Id.* at 713 (citing *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989)).[6]

In *Matter of Chen*, the BIA recognized that where an asylum applicant has experienced "atrocious forms of persecution," they "should in some cases be treated as refugees or asylees even when the likelihood of future persecution may not be great." 20 I&N Dec. at 19 (citing the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1979)). In such cases, the adjudicator was authorized to grant "humanitarian asylum" as a matter of discretion. This finding was echoed in *Matter of S-A-K- and H-A-H-*, which extended humanitarian asylum to survivors of female genital mutilation upon a showing of "aggravated circumstances." 24 I&N Dec. 464 (BIA 2008). Claims for relief using "other serious harm," on the other hand, do not require such an extreme showing of severe past persecution.

In distinguishing grants under *Chen* based on severity of past persecution from "other serious harm" cases, the BIA explained how to analyze the latter:

> When considering the possibility of "other serious harm," the focus should be on current conditions and the potential for new physical or psychological harm that the applicant might suffer. While "other serious harm" must equal the severity of persecution, it may be wholly unrelated to the past harm. Moreover, pursuant to the regulation, the asylum applicant need only establish a "reasonable possibility" of such "other serious harm"; a showing of "compelling reasons" is not required under this provision. We also emphasize that *no nexus* between the "other serious harm" and an asylum

[6] Codified at 8 C.F.R. § 208.13(b)(1)(iii)(A) and § 1208.13(b)(1)(iii)(A).

2201 Wisconsin Ave. Suite 200, Washington, DC 20007 | Tel. (617) 227-9727 Fax (617) 227-5495 | nipnlg.org @nipnlg

> ground protected under the Act need be shown.
>
> Therefore, at this stage of proceedings, adjudicators considering "other serious harm" should be cognizant of conditions in the applicant's country of return and should pay particular attention to major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant. Such conditions may include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury.

25 I&N Dec. at 714 (emphasis in original).

b. Courts of Appeals

Matter of L-S- cited a half-dozen circuit-court cases decided in the decade since "other serious harm" was added to the regulations in 2001. *Id.* at 714-15. Three have direct implications for the current virus situation. *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155 (3d Cir. 2011), remanded because the BIA erred in stating that "concerns about [Pllumi's] future healthcare on his return to Albania are not relevant." *Id.* at 163. The court concluded: "[I]t is conceivable that, in extreme circumstances, harm resulting from the unavailability of necessary medical care could constitute 'other serious harm' under 8 C.F.R. § 1208.13(b)(1)(iii)(B). We hasten to add and to emphasize that we are not suggesting that differing standards of healthcare around the world are, in themselves, a basis for asylum. We are only holding that the issue of health care is not off the table in the asylum context . . . . [I]t is within the BIA's authority to consider health concerns and associated 'harms' resulting from deportation when it exercises its discretion in deciding whether to grant humanitarian asylum." *Id.* at 162-63.

Pllumi discussed *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008) (argued by Maria Baldini-Potermin). In remanding for the agency to decide "other serious harm" first, the court provided guidance: "[T]he record suggests that, if returned to Russia, Mr. Kholyavskiy would be without the only medications that effectively have controlled the symptoms of his mental illness and would be incapable of functioning on his own. It also is highly questionable whether he would be able to obtain housing and medical treatment, especially given his lack of 'propiska.' [resident permit]. Debilitation and homelessness both would appear to constitute serious harms for purposes of 8 C.F.R. § 1208.13(b)[(1)](iii)(B)." *Id.* at 577.

In the Ninth Circuit, *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005), addressed an internal relocation case within Mexico where the presumption of well-founded fear applied due to past persecution on a protected ground. Although not directly applying the "other serious harm" regulation, *Boer-Sedano* considered 8 C.F.R. § 1208.13(b)(3) in the context of internal relocation, including the stated regulatory factor of "whether the applicant would face other serious harm in the place of suggested relocation." *Id.* at 1090. In granting the petition, the court determined that the record compelled a conclusion that "other serious harm" would result anywhere in Mexico:

> [T]he evidence reveals that Boer-Sedano's health status would make relocation unreasonable. Boer-Sedano's doctor testified that Boer-Sedano's treatment has been complicated by his resistance to virtually all licensed AIDS medications. In response, Boer-Sedano's doctor prescribed investigational medications, which he testified are unavailable — even for purchase — in Mexico. The doctor testified that Boer-Sedano's condition would "rapidly deteriorate" without these drugs. Boer-Sedano produced evidence to corroborate the doctor's testimony that the AIDS drugs he takes are unavailable in Mexico. Boer-Sedano also testified that his status as a homosexual with AIDS would make it impossible to find a job to provide health insurance or money to pay to import the needed drugs from elsewhere.

Id. at 1091 (citations omitted).

IV. Conclusion

Clients who have established past persecution on account of a protected ground, but are rebutted by the government's showing of changed country conditions or the possibility of internal relocation may argue that they remain eligible for asylum because of their vulnerability to "other serious harm" in countries struggling to contain and treat COVID-19.[7] Given the fast-changing situation, moreover, continued spread of the virus is expected to implicate many more countries to which asylum-seekers fear return.

[7] Countries on the CDC's list of Travel Health Notices can be found at: https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html#travel-1. Note that on March 18, 2020, the Executive Office of Immigration Review (EOIR) issued a Policy Memorandum incorporating the CDC's list at: https://www.justice.gov/eoir/file/1259226/download. Practitioners are urged to refer to the CDC link for the most up to date list of affected countries.

national IMMIGRATION project of the National Lawyers Guild

2201 Wisconsin Ave. Suite 200, Washington, DC 20007 |Tel. (617) 227-9727 Fax (617) 227-5495 | nipnlg.org @nipnlg

Please do not hesitate to contact Cristina Velez at cristina@nipnlg.org or Christopher Rickerd at rickerd.imm@gmail.com if you have any questions or need any further information.