



# U.S. Citizenship and Immigration Services

## **RAIO DIRECTORATE – OFFICER TRAINING**

***RAIO Combined Training Course***

# **WELL-FOUNDED FEAR**

## **TRAINING MODULE**

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## **WELL-FOUNDED FEAR**

### **Training Module**

#### **MODULE DESCRIPTION:**

This module discusses the definition of a refugee as codified in the Immigration and Nationality Act and its interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established a reasonable possibility of suffering future harm in the country of nationality or last habitual residence.

#### **TERMINAL PERFORMANCE OBJECTIVE(S)**

During an interview you (the Officer) will be able to elicit relevant information to correctly determine if an applicant has a well-founded fear of future persecution.

#### **ENABLING PERFORMANCE OBJECTIVES**

1. Explain the legal standard required to establish a well-founded fear of persecution.
2. Distinguish between the subjective and objective elements of well-founded fear.
3. Summarize the four basic criteria necessary to establish a well-founded fear of future persecution.
4. Analyze factors to consider in determining whether internal relocation is reasonable.

#### **INSTRUCTIONAL METHODS**

- Interactive Presentation
- Discussion
- Practical Exercises

#### **METHOD(S) OF EVALUATION**

- Observed Practical Exercises
- Multiple Choice Exam

## REQUIRED READING

1. *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).
2. United Nations High Commissioner for Refugees, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses)*. HCR/GIP/03/03 (10 February 2003).
3. United Nations High Commissioner for Refugees, *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. HCR/GIP/03/04 (23 July 2003).

### Division-Specific Required Reading - Refugee Division

### Division-Specific Required Reading - Asylum Division

### Division-Specific Required Reading - International Operations Division

## ADDITIONAL RESOURCES

### Division-Specific Additional Resources - Refugee Division

### Division-Specific Additional Resources - Asylum Division

### Division-Specific Additional Resources - International Operations Division

## CRITICAL TASKS

Task/ Skill #	Task Description
ILR3	Knowledge of the relevant sections of the Immigration and Nationality Act (INA) (4)
ILR4	Knowledge of the relevant sections of the 8 Code of Federal Regulations (CFR) (4)
ILR6	Knowledge of U.S. case law that impacts RAI0 (3)
ILR17	Knowledge of who has the burden of proof (4)
ILR18	Knowledge of different standards of proof (4)
ILR20	Knowledge of the criteria for refugee classification (4)

ILR21	Knowledge of the criteria for establishing a well-founded fear (WFF) (4)
ITK4	Knowledge of strategies and techniques for conducting non-adversarial interviews (e.g., question style, organization, active listening) (4)
IRK3	Knowledge of the procedures and guidelines for establishing an individual's identity (4)
RI1	Skill in identifying issues of claim (4)

**SCHEDULE OF REVISIONS**

<b>Date</b>	<b>Section (Number and Name)</b>	<b>Brief Description of Changes</b>	<b>Made By</b>

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1 INTRODUCTION

The refugee definition at INA § 101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of a protected characteristic. An applicant can establish eligibility for refugee resettlement or asylum even if he or she has not actually suffered persecution in the past. The requirements for an applicant to establish eligibility based on past persecution are discussed in the RAIO Training Modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution*. The requirements needed to establish that persecution or feared persecution is “on account of” any of the five protected grounds in the refugee definition are discussed in the RAIO Training Module, *Nexus and the Five Protected Grounds*.

This module discusses the elements necessary to establish a well-founded fear of future persecution and how to elicit testimony regarding each of these elements.

To correctly determine whether an applicant's fear is well-founded, you must have a firm understanding of: 1) the subjective and objective elements of well-founded fear; 2) the four-part *Mogharrabi* test;<sup>1</sup> and 3) the reasonable possibility standard of proof.

## 2 WELL-FOUNDED FEAR: BURDEN OF PROOF<sup>2</sup>

The burden of proof is on the applicant to establish that he or she is a refugee as defined in the refugee definition. Credible testimony alone may be sufficient to meet the

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<sup>1</sup> *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987).

<sup>2</sup> For information on establishing a well-founded fear based on Coercive Population Control, see [ASM Supplement – Coercive Population Control](#).

applicant's burden. As such, you, the officer, have a duty to elicit sufficient testimony to make the determination whether the applicant is eligible for asylum or refugee status.

An applicant for asylum or refugee status may qualify as a refugee either because he or she suffered past persecution or because he or she has a well-founded fear of persecution on account of a protected ground.

In asylum processing, if an applicant establishes past persecution, he or she shall be presumed to have a well-founded fear of future persecution on the basis of the original claim.<sup>3</sup> The burden of proof then shifts to the officer to rebut the presumption that the applicant has a well-founded fear of future persecution. That presumption may be rebutted if an Asylum Officer finds that there has been a fundamental change in circumstances to such an extent that the applicant no longer has a well-founded fear of persecution or the applicant could avoid future persecution by relocating to another part of his or her home country. See [ASM Supplement – Presumption Raised By Past Persecution](#).

The same is not true in overseas refugee processing. In refugee processing, an applicant may be admitted as a refugee if he or she establishes past persecution on account of a protected ground, regardless of changed circumstances or the possibility of internal relocation.<sup>4</sup>

An applicant who is claiming a well-founded fear of persecution based on coercive population control must establish more than a generalized fear that he or she will be persecuted. As this scenario is not often seen in the overseas refugee context, information regarding this issue is located in the [ASM Supplement – Coercive Population Control](#).

In either the asylum or refugee context, an applicant can show he or she is a refugee based solely on a well-founded fear of future persecution without having established past persecution.

### **3 ELEMENTS OF WELL-FOUNDED FEAR**

To establish a well-founded fear of persecution within the meaning of the refugee definition, an applicant must show that he or she has: 1) a subjective fear of persecution; and, 2) that the fear has an objective basis.<sup>5</sup>

#### **3.1 Subjective Element**

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<sup>3</sup> 8 C.F.R. § 208. See [ASM Supplement – Presumption Raised By Past Persecution](#).

<sup>4</sup> [INA § 101\(a\)\(42\)](#).

<sup>5</sup> UNHCR, [Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees](#), para. 38 (2011).

The applicant satisfies the subjective element if he or she credibly articulates a genuine fear of return.<sup>6</sup> As the *UNHCR Handbook* notes, when evaluating whether an applicant's fear is subjective, it is important to keep in mind the applicant's background, personal beliefs, sensitivities, societal status, and personality:

since psychological reactions of different individuals may not be the same in identical situations. One person may have strong political or religious convictions, the disregard of which would make life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape, another may carefully plan his departure.<sup>7</sup>

Fear has been defined as an apprehension or awareness of danger.<sup>8</sup> Fear of famine or natural disaster, without more, fails to meet this element as does general dissent, disagreement with a government, the desire for more personal freedom, or an improved economic situation.<sup>9</sup>

A genuine fear of persecution must be the applicant's primary motivation in seeking refugee or asylum status.<sup>10</sup> However, it need not be the only motivation.<sup>11</sup> An applicant may fear persecution *and* desire more personal freedom or economic advantage.

It is important to remember that just because an applicant exhibits courage in the face of danger this does not negate his or her genuine fear of persecution.<sup>12</sup>

### *Examples*

An applicant continued to protest against the government after an arrest, despite a lengthy detention.

An applicant returned to her country after fleeing, in the hopes that the situation had improved, even though she was tortured there in the past.

### *Relevant Questions*

Would the applicant be able to go back to his or her country? Why? Why not? Has the applicant ever gone back to his or her country? Why? Why not? (As a last resort, if

<sup>6</sup> See *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

<sup>7</sup> *UNHCR Handbook*, para. 40.

<sup>8</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 221 (BIA 1985); *UNHCR Handbook*, para. 39.

<sup>9</sup> *UNHCR Handbook*, para. 39; *Matter of Acosta*, 19 I. & N. Dec. 211, 221 (BIA 1985).

<sup>10</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 221 (BIA 1985).

<sup>11</sup> *UNHCR Handbook*, para. 39.

<sup>12</sup> *Smolnikova v. Gonzales*, 422 F.3d 1037, 1050 (9th Cir. 2005), citing *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9th Cir. 1995).

applicant does not respond) Is the applicant afraid to go back? Why? Why not? What does the applicant think would happen if he or she were to return to his or her country?

### 3.2 Objective Element

In *Cardoza-Fonseca*, the Supreme Court concluded that the standard for establishing the likelihood of future harm in asylum is lower than the standard for establishing likelihood of future harm in withholding of deportation: “One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”<sup>13</sup>

*Cardoza-Fonseca* points to the following example to illustrate:

In a country where every tenth adult male is put to death or sent to a labor camp, “it would be only too apparent that anyone who has managed to escape from the country in question will have ‘well-founded fear of being persecuted’ upon his eventual return.”<sup>14</sup>

The determination of whether a fear is well-founded does not ultimately rest on the statistical probability of persecution, which is almost never available, but rather on whether the applicant’s fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution.<sup>15</sup>

An applicant must establish the likelihood of future persecution by the reasonable possibility standard of proof, i.e., that a reasonable person in the applicant’s circumstances would fear persecution upon return to his or her country of origin. The reasonable possibility standard is more generous than a “more likely than not” standard.<sup>16</sup>

## 4 THE *MOGHARRABI* TEST

<sup>13</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); see also *INS v. Stevic*, 467 U.S. 407 (1984).

<sup>14</sup> *INS v. Cardoza-Fonseca*, at 431, citing to 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 180 (1966).

<sup>15</sup> See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987); *Guevara Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986); *M.A. v. U.S. INS*, 899 F.2d 304, 311 (4th Cir. 1990). See also *Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007) (en banc) (to establish that her fears are objectively reasonable the applicant must provide evidence that is credible, direct, and specific); *Zheng v. Gonzales*, 475 F.3d 30 (1st Cir. 2007) (the applicant’s fears found not objectively reasonable, despite her personal opposition to China’s coercive population control policies, because her circumstances were no different from those of other Chinese women of marriageable age and she intended to abstain from sex until marriage).

<sup>16</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

*Matter of Mogharrabi* lays out a four-part test for determining well-founded fear. To establish a well-founded fear of future persecution, the applicant must establish the following elements:<sup>17</sup>

1. Possession (or imputed possession of a protected characteristic)
2. Awareness (the persecutor is aware or could become aware the applicant possesses the characteristic)
3. Capability (the persecutor has the capability of punishing the applicant)
4. Inclination (the persecutor has the inclination to punish the applicant)

This is sometimes referred to as “PACI” (pronounced “pah’-chee”) for the first letter in each element.

#### **4.1 Possession (or Imputed Possession) of a Protected Characteristic**

The applicant must establish that the characteristic falls within one of the protected grounds listed in the refugee definition. For additional information, see RAIO Training module, *Nexus and the Five Protected Grounds*. The applicant must establish that he or she possesses or is believed to possess the characteristic the persecutor seeks to overcome.<sup>18</sup> Although *Mogharrabi* states that the applicant must establish that the persecutor seeks to overcome the characteristic by means of punishment, more recent case law holds that the persecutor need not intend to punish or have any malignant intent toward the applicant.<sup>19</sup>

##### ***Relevant Questions***

Why is the applicant afraid of returning to his or her country? What does the persecutor not like about the applicant? Why would someone want to harm the applicant in his or her country? If harmed in the past, why did the persecutor harm applicant? What is the applicant's protected characteristic? How are others with the applicant's protected characteristic treated? What did the persecutor say to the applicant? Why would the persecutor think the applicant has a protected characteristic?

#### **4.2 Awareness**

The applicant must establish that the persecutor is aware or could become aware that the applicant possesses (or is believed to possess) the characteristic.

<sup>17</sup> *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987) modifying *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

<sup>18</sup> *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

<sup>19</sup> See *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); see also *Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997).

The applicant must establish that there is a reasonable possibility that the persecutor could become aware that the applicant possesses the characteristic; mere speculation that the persecutor could become aware is insufficient.<sup>20</sup>

The applicant is not required to hide his or her possession of a protected characteristic in order to avoid awareness.

### *Relevant Questions*

How would someone know that the applicant had the protected characteristic? How could someone recognize the applicant as someone with the protected characteristic? If you were in the applicant's country, how would you know the applicant was someone with the protected characteristic? How would the persecutor know that the applicant had returned to his or her country?

## **4.3 Capability**

The applicant must establish that the persecutor has the capability to persecute the applicant because he or she possesses a protected characteristic, or because the persecutor believes the applicant possesses a protected characteristic. Some factors to consider in evaluating capability include:

- whether the persecutor is a governmental entity and, if so, the extent of the government's power or authority
- whether the persecutor is a non-governmental entity, and if so, the extent to which the government is able or willing to control it<sup>21</sup>
- the extent to which the persecutor has the ability to enforce his or her will throughout the country

### *Relevant Questions*

Who is the persecutor? If the persecutor is a part of a government, what role does the persecutor play within the government? How much authority does the persecutor have? If the persecutor is part of the government, can the applicant seek protection from another government entity within the country? Why or why not? If the persecutor is a non-government actor, would the government be able to or want to protect the applicant? Did the applicant report the non-governmental actor to the police? Would the police or government offer any protection to the applicant?

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<sup>20</sup> See *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

<sup>21</sup> For additional information, see RAIO Training modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution* (section on *Entity the Government is Unable or Unwilling to Control*).

During the interview, you will need to ask the applicant questions about the persecutor's capability to persecute him or her. You may use country of origin information<sup>22</sup> to help you determine the capability of the persecutor to harm the applicant if the applicant is having difficulty answering your questions regarding capability.

#### 4.4 Inclination

The applicant must establish that the persecutor has the inclination to persecute him or her. Note that the applicant does not need to establish that the persecutor is inclined to *punish* the applicant, i.e., that the persecutor's actions are motivated by a malignant intent.<sup>23</sup>

##### *Relevant Questions*

If many months or years have passed, does the applicant think the persecutor would still want to harm him or her? Why? Why not? Does the applicant know anyone with his or her protected characteristic who has returned to the home country? What happened to the person who returned? Does the applicant know anyone in the same circumstances who remained in the home country? If so, what, if anything, has happened to that person in the home country? What does the applicant hear about the treatment of others possessing the applicant's protected characteristic in the home country now?

Similar to documenting the capability of the persecutor, you will need to ask the applicant questions about whether the persecutor would be inclined to persecute the applicant. If the applicant is unable to answer questions regarding whether the persecutor is inclined to persecute him or her, you may use country of origin information to help you determine the persecutor's inclination to persecute the applicant.<sup>24</sup> Factors to consider when evaluating inclination include any previous threats or harm from the persecutor and the persecutor's treatment of individuals similarly situated to the applicant. The motive of the persecutor is discussed in detail in the RAIO Training Module, *Nexus and the Five Protected Grounds*.

## 5 PATTERN OR PRACTICE

### 5.1 General Rule

The applicant need *not* show that he or she will be singled out individually for persecution, if the applicant shows that:

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<sup>22</sup> For additional information, see RAIO Training module, *Country of Origin Information*.

<sup>23</sup> *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

<sup>24</sup> As noted above, although *Mogharrabi* states that the applicant must establish that the persecutor seeks to overcome the characteristic by means of *punishment*, more recent case law holds that the persecutor need not intend to punish or have any malignant intent. See *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) and *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).



- There is a pattern or practice of persecution on account of any of the protected grounds against a group or category of persons similarly situated to the applicant.<sup>25</sup>
- The applicant belongs to or is identified with the persecuted group, so that a reasonable person in the applicant’s position would fear persecution.<sup>26</sup>

## 5.2 “Pattern or Practice” of Persecution

There is no established definition of “pattern or practice.” You must evaluate claims of well-founded fear based on a pattern or practice of persecution on a case-by-case basis. The Court of Appeals for the Eighth Circuit has interpreted “pattern or practice” to mean something “on the order of organized or systematic or pervasive persecution,” but held that it does not require a showing of persecution of all the members of the group.<sup>27</sup>

The Ninth Circuit has held that even if there is no systematic persecution of members of a group, persecution of some group members may support an applicant’s fear of being singled out in the future, if the applicant is similarly situated to those members. The court explained:

if the applicant is a member of a ‘disfavored’ group, but the group is not subject to systematic persecution, this court will look to (1) the risk level of membership in the group (i.e., the extent and the severity of persecution suffered by the group) and (2) the alien’s individual risk level (i.e., whether the alien has a special role in the group or is more likely to come to the attention of the persecutors making him a more likely target for persecution).<sup>28</sup>

The Ninth Circuit went on to state, “[t]he relationship between these two factors is correlational; that is to say, the more serious and widespread the threat of persecution to the group, the less individualized the threat of persecution needs to be.”<sup>29</sup>

<sup>25</sup> 8 C.F.R. § 208.13(b)(2)(iii)(A).

<sup>26</sup> 8 C.F.R. § 208.13(b)(2)(iii)(B).

<sup>27</sup> See *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995); *Feleke v. INS*, 118 F.3d 594 (8th Cir. 1997); see also *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005) (adopting Eighth Circuit’s definition of “pattern or practice” of persecution), *Matter of A-M-*, 23 I&N Dec. 737, 741 (BIA 2005) (applying the Eighth Circuit standard in upholding the IJ’s finding that the applicant failed to establish a pattern or practice of persecution in Indonesia against Chinese Christians). See also *Meguenine v. INS*, 139 F.3d 25, 28 (1st Cir. 1998) (to establish a pattern or practice of persecution the applicant must submit evidence of “systematic persecution” of a group); *Mitreva v. Gonzales*, 417 F.3d 761, 765 (7th Cir. 2005) (citing case examples, and noting that “courts have interpreted the regulation to apply only in rare circumstances”).

<sup>28</sup> *Sael v. Ashcroft*, 386 F.3d 922, 925 (9th Cir. 2004); *Mgoian v. INS*, 184 F.3d 1029, 1035 n. 4 (9th Cir. 1999); citing to *Kotas v. INS*, 31 F.3d 847, 853 (9th Cir. 1994); see also *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996).

<sup>29</sup> *Mgoian* at 1035; see also *Kotas* and *Singh*.

The First, Third, and Seventh Circuits have rejected the Ninth Circuit’s use of a lower “disfavored group” standard where there is insufficient evidence to establish a “pattern or practice” of persecution.<sup>30</sup>

### 5.3 Group or Category of Individuals Similarly Situated

There is no established rule regarding the type of group or category with which the applicant must be identified. The group could include a few individuals or many. However, the members of the group or category must share some common characteristic that the persecutor seeks to overcome and that falls within one of the protected grounds in the refugee definition.<sup>31</sup>

#### *Relevant Questions*

How were others similarly situated to the applicant treated in the applicant’s home country? How were others treated, with whom the applicant was associated? How would the applicant be seen as connected with this group? How does the persecutor treat people who are seen as belonging to this group? Have other people in this group who also fled returned to the home country? How have they been treated? What has happened to them?

You should also consult country conditions reports to determine whether the applicant belongs to a group at risk of harm and the extent to which that group is at risk.

## 6 PERSECUTION OF INDIVIDUALS CLOSELY RELATED TO THE APPLICANT

### 6.1 Objective Evidence Supporting Fear

The persecution of family members or other individuals closely associated with the applicant may provide objective evidence that the applicant’s fear of future persecution is well-founded, even if there is no pattern or practice of persecution of such individuals. On the other hand, continued safety of individuals similarly situated to the applicant may, in some cases, be evidence that the applicant’s fear is not well-founded.<sup>32</sup>

<sup>30</sup> *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005) (finding that violence against Chinese Christians in Indonesia is not sufficiently widespread to constitute a “pattern or practice” of persecution); *Firmansjah v. Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005) (noting that the court has not recognized a lower threshold of proof based on membership in a “disfavored group” where the evidence is insufficient to establish “pattern or practice”); *Kho v. Keisler*, 505 F.3d 50, 55 (1st Cir. 2007) (noting that the disfavored group analysis creates a threshold for relieving applicants of the need to establish individualized persecution that is not found in the regulations).

<sup>31</sup> See, *Meguenine v. INS*, 139 F.3d 25 (1st Cir. 1998) (Applicant failed to establish well-founded fear based on pattern or practice of individuals similarly situated to him, because evidence indicated that those targeted were not persecuted because of the characteristic they shared with the applicant, but rather a characteristic the applicant did not possess – prominent opposition to Islamic fundamentalists).

<sup>32</sup> See *Matter of A-E-M-*, 21 I. & N. Dec. 1157 (BIA 1998); but see *Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994) (remanded to the BIA, in part, for the Board to consider evidence that others similarly situated to the applicant were also being subjected to violence by government forces).

## 6.2 Connection Must Be Established

The applicant must establish a connection between the persecution of the family member or associate and the harm that the applicant fears.<sup>33</sup>

### *Example*

An applicant's sister was arrested because she was a member of the same opposition party as the applicant. The sister and the applicant lived in the same city. The applicant learned of the arrest through continued contact with family in the home country. The sister's arrest must be considered in evaluating the applicant's claim. On the other hand, if the facts were different and the applicant did not live in the same city as her sister, had little contact with her, and had no association with her political party, the sister's arrest must still be considered, but might not be enough to establish a well-founded fear.

## 7 THREATS MAY BE SUFFICIENT WITHOUT HARM

Serious threats made against an applicant may constitute past persecution even if the applicant was never physically harmed.<sup>34</sup> A threat (anonymous or otherwise) may also be sufficient to establish a well-founded fear of persecution, depending on all of the circumstances of the case. There is no requirement that the applicant be harmed in the past or wait to see whether the threat will be carried out. The fact that an applicant has not been harmed in the past is not determinative of whether his or her fear of future persecution is well founded. However, the evidence must show that the threat is serious and that there is a reasonable possibility the threat will be carried out.<sup>35</sup>

Threats must be evaluated in light of the conditions in the country and the circumstances of the particular case. Anonymous threats could be a result of personal problems unrelated to any of the protected characteristics in the refugee definition. On the other hand, death squads may use anonymous threats to terrorize those over whom they seek control. The fact that a threat is anonymous does not necessarily detract from the seriousness of the threat. Further inquiry should be made regarding the circumstances and content of the threat to evaluate whether it provides a basis for a well-founded fear. In

<sup>33</sup> See *Matter of A-K-*, 24 I. & N. Dec. 275, 277-78 (BIA 2007) (the applicant was not eligible for withholding of removal, based on a fear that his daughters would be subjected to FGM, as he did not establish a pattern of persecution tied to him personally).

<sup>34</sup> *Salazar-Paucar v. INS*, 281 F.3d 1069, 1074 (9th Cir. 2002), amended by *Salazar-Paucar v. INS*, 290 F.3d 964 (9th Cir. 2002). For additional information, see RAIO Training modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution*.

<sup>35</sup> *Matter of Villalta*, 20 I&N Dec. 142 (BIA 1990); *Kaiser v. Ashcroft*, 390 F.3d 653, 658 (9th Cir. 2004); *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988); *Sotelo-Aquije v. Slattery*, 17 F.3d 33 (2d Cir. 1994); *Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994).

many cases, the content of an anonymous threat sheds light on the identity of the source of the threat.<sup>36</sup>

In determining whether a threat or threats establish a well-founded fear of persecution, you should elicit information from the applicant about all of the circumstances relating to the threat. Factors to consider may include:

- whether others have received similar threats, and what happened to those individuals
- the authority or power of the individual or group that made the threat
- any activities that may have placed the applicant at risk
- country of origin reports

## **8 SIGNIFICANT LAPSE OF TIME BETWEEN OCCURRENCE OF EVENT(S) AND FLIGHT**

### **8.1 General Rule**

A significant lapse of time between the occurrence of incidents that form the basis of the claim and an applicant's departure from the country may be evidence that the applicant's fear is not well-founded.<sup>37</sup> The lapse of time may indicate that:

- the applicant does not possess a genuine fear of harm
- the persecutor does not possess the ability or the inclination to harm the applicant

### **8.2 Possible Exceptions**

There may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or being harmed, including:

- lack of funds to arrange for departure from the country
- time to arrange for the safety of family members

<sup>36</sup> See, e.g., *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir.1990); *Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994); *Gailius v. INS*, 147 F.3d 34 (1st Cir. 1998); *Kaiser v. Ashcroft*, 390 F.3d 653, 658 (9th Cir. 2004); *Canales-Vargas v. Gonzales*, 441 F.3d 739, 744-745 (9th Cir. 2006) (finding that the timing of threats – two or three weeks after the applicant publicly denounced the Shining Path guerrillas – was circumstantial evidence sufficient to establish the Shining Path as the source of the threats).

<sup>37</sup> See *Castillo v. INS*, 951 F.2d 1117 (9th Cir. 1991); *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005) (upholding BIA's determination that applicant did not establish a subjective fear of future persecution when she had remained in Indonesia for two years after the robbery that formed the basis of her claim to asylum).

- belief that the situation would improve
- promotion of a cause within the home country
- temporary disinclination or inability by the persecutor to harm the applicant

### 8.3 Factors to Consider

To evaluate the weight to be given to this issue, it is important to consider all circumstances,<sup>38</sup> including:

#### **The amount of time the applicant remained**

A relatively short period, such as weeks or months, may not be significant, whereas years could be significant, depending on the circumstances. You must ascertain whether the length of time has a significant impact on the applicant's claim.

#### **The reason for the delay**

There may have been a lack of opportunity to escape or the applicant may have had other legitimate reasons for deciding to remain in the country. On the other hand, an applicant may provide reasons that are not consistent with his or her alleged reasons for leaving the country.

#### **The applicant's location during that time**

Whether the applicant remained near the place of persecution, or went into hiding, or moved to a distant location within the country, may have a bearing on the issue. If an applicant remained in the area where the persecutor could easily locate the applicant, you must elicit additional testimony as to why the applicant did so, as well as reasons why the persecutor did not continue his or her activities against the applicant.

#### **The applicant's activities during that time**

It may be relevant to determine whether the applicant went into hiding or assumed his or her normal routine. If the applicant made attempts to reduce his or her vulnerability to persecution, and believed that those attempts would be effective, this could explain the delay. If the applicant did not change his or her daily routine, you should explore whether the applicant continued to remain vulnerable to the possibility of persecution.

#### **The persecutor's activities during that time, if known**

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<sup>38</sup> See *Gonzales v. INS*, 82 F.3d 903, 909 (9th Cir. 1996) (finding that the applicant's stay in Nicaragua for 3 years after the first threat did not undermine her claim of a well-founded fear where the threats were repeated, applicant took steps to protect herself, and a pattern of violence against her family members made her fear well-founded).

If the persecutor suspends persecutory activities during the time in which the applicant remained in his or her country, this could explain the delayed departure.

## **9 RETURN TO COUNTRY OF FEARED PERSECUTION**

### **9.1 Effect on Well-Founded Fear Evaluation**

Depending on the circumstances, an applicant's return to the country of feared persecution may indicate that the applicant does not possess a genuine (subjective) fear of persecution or that the applicant's fear is not objectively reasonable. However, return to the country of feared persecution does not necessarily defeat the claim.<sup>39</sup>

The regulations at 8 C.F.R. § 208.8(b) address the effect of return to the home country in the context of an asylum seeker. Please see the [ASM Supplement – Return to Country of Feared Persecution](#) for further information on this topic. While there is no equivalent regulation governing overseas refugee adjudications, return to the country of feared persecution in this context may affect whether the applicant has a well-founded fear of persecution. [RAD Supplement – Return to Country of Feared Persecution](#). For additional information, see RAIO Training modules, *Refugee Definition* and *Definition of Persecution and Eligibility Based on Past Persecution*.

In the overseas refugee context, an applicant need only establish either past persecution or a well-founded fear of future persecution.

### **9.2 Factors to Consider**

#### **Why Did Applicant Return?**

In evaluating the weight to be given to an applicant's return, you must consider the reason the applicant returned. There may be one or more compelling reasons for an applicant to return. For example, the Ninth Circuit held that the fact that applicant returned to the country of feared persecution to get her child, whose custodian had died, did not undercut the genuineness of her fear.<sup>40</sup>

#### **What Happened Upon Return?**

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<sup>39</sup> Procedurally, an applicant with a pending asylum application who leaves the United States without advance parole is presumed to have abandoned his or her asylum claim, regardless of the country he or she travels to. [8 C.F.R. § 208.8\(b\)](#). The presumption is generally overcome by the applicant's appearance at the asylum office. Return to country of feared persecution is also addressed in the RAIO Training module, *Refugee Definition and Past Persecution*. In this section, you should focus on how the applicant's return factors into the analysis of well-founded fear.

<sup>40</sup> *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987); see also *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (Applicant's return to country of feared persecution because he wanted to help his uncle and sister who had been arrested was not inconsistent with a well-founded fear).

It is also important to consider what happened to the applicant after he or she returned to the country of feared persecution. Threats or harm experienced upon return would strengthen the applicant's claim that he or she faces a reasonable risk of persecution. However, the ability to return to and remain safely in the country of feared persecution would undercut the reasonableness of the applicant's fear, particularly if the applicant remained there a significant amount of time and lived openly (not in hiding).

### *Examples*

- An applicant returned to his home country of Lebanon to attend to his dying father. Out of fear of persecution, he cut short his visit and returned to the United States before his father's funeral. Four years later, he returned to Lebanon to attend to his dying mother. Because a fear of persecution, the applicant delayed this visit and by the time he arrived in Lebanon his mother had already died. The court concluded that these two return visits were not substantial evidence that the applicant's fear of persecution was not well-founded.<sup>41</sup>
- A Rwandan applicant provided "reasonable explanations" for remaining in school in her home country and several return trips to her home country after she fled, according to the First Circuit Court of Appeals.<sup>42</sup> The court noted that all members of her immediate family had been killed and she returned at the urging of a close friend, a nun, who was not aware that she had been raped in Rwanda and who believed that the applicant would no longer be a target after her father's death. The court also relied on the fact that the applicant had no means of financial or emotional support, except for the nun, and her only means of obtaining an education was through the free education offered at the National University of Rwanda. Upon return, the applicant changed her name, but was soon discovered. She also returned later to obtain her transcript so that she might be able to attend school in the United States. The court concluded that "[f]aced with no viable means of support otherwise, people take risks in the face of their fears."<sup>43</sup>

## **10 POSSESSION OF TRAVEL DOCUMENTS**

### **10.1 General Rule**

Possession of a valid national passport and other official travel documents is not a bar to refugee status. However, possession of such documents may be considered in evaluating whether the applicant is at reasonable risk of harm from the government, because it may be evidence that the government is not inclined to harm the applicant. This would only be relevant when the government is the persecutor.

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<sup>41</sup> *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005).

<sup>42</sup> *Mukamusoni v. Ashcroft*, 390 F.3d 110, 125 (1st Cir. 2004).

<sup>43</sup> *Mukamusoni v. Ashcroft*, 390 F.3d at 126.

## 10.2 Factors to Consider

To evaluate the weight to be given to the applicant's possession of travel documents, the circumstances surrounding the acquisition of the documents should be elicited and considered. Factors to consider include:

- Whether the passport-issuing or exit control agency is separate from the branch of government that seeks to harm the applicant and whether that agency is aware of the applicant's situation<sup>44</sup>
- Whether the applicant obtained the documents surreptitiously (e.g., through a bribe or with the help of a friend)
- Whether the government issued the documents so that the applicant would go into exile
- Whether the applicant obtained the documents prior to the incidents that gave rise to the applicant's fear

## 11 REFUGEE SUR PLACE

### 11.1 Definition

UNHCR defines a "refugee *sur place*" as a "person who was not a refugee when he left his country, but who becomes a refugee at a later date."<sup>45</sup> An individual may become a refugee due to circumstances arising in the country of origin after the individual left, or due to actions the individual took while outside his or her country.<sup>46</sup>

### 11.2 Analysis

To evaluate a claim, you should apply the *Mogharrabi* four-pronged test, just as in any other claim of well-founded fear. A common issue that arises in such cases is whether there is a reasonable possibility the persecutor could become aware that the applicant possesses a characteristic that the persecutor seeks to overcome, or might impute the characteristic to the applicant.

### 11.3 Factors to Consider

<sup>44</sup>See *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (finding that IJ erred in failing to consider Khup's explanation that he obtained the passport through a broker to whom he paid a large sum of money and IJ failed to explore how the applicant was able to renew the passport).

<sup>45</sup> *UNHCR Handbook*, para. 94.

<sup>46</sup>*UNHCR Handbook*, paras. 94-96: Refugees "sur place;" See *Kyaw ZwarTun v. INS*, 445 F.3d 554 (2d Cir. 2006) (finding error where the IJ failed to consider whether the applicant's political activities since coming to the US, even if not motivated by actual political beliefs, established a well-founded fear of persecution).



- The visibility of the applicant’s activities outside the country of feared persecution (e.g., does the applicant attend or speak at small and large rallies, give money to an organization, is the applicant active online or in social media, or has the applicant been exposed by the press?)
- The extent of the feared persecutor’s network outside the country of feared persecution (e.g., does the applicant’s government closely monitor nationals abroad?)
- The persecutor’s opinion of those who have resided in other countries (e.g., is the applicant’s government suspicious of those who have resided in countries viewed as political opponents?)

### *Examples*

An Iranian national had an altercation with an Iranian official at the Iranian Interests Section of the Algerian Embassy in the United States. The applicant accused the official of robbing Iran and being a religious fascist. In response, the official pulled a gun and threatened the applicant. The BIA found that a reasonable person in the applicant’s situation would fear persecution on account of political opinion, because the applicant’s opposition to the authorities was known to an Iranian official, and it was not disputed that the Iranian regime persecutes its opponents.<sup>47</sup>

## 12 INTERNAL RELOCATION

### 12.1 Countrywide Scope of Feared Persecution

The threat of feared persecution must exist throughout the country where persecution is feared, unless it is unreasonable for the applicant to relocate within the country. If the applicant can *reasonably* relocate to another part of the country to avoid future persecution, then the applicant’s fear of persecution is not well-founded.<sup>48</sup> When determining whether internal relocation is an option, apply the reasonableness test explained below.

A countrywide threat of persecution is not required to establish past persecution. It is not logical to state that a person was or was not harmed countrywide in the past. If an applicant suffered persecution on account of a protected ground, then the applicant is a refugee, irrespective of whether the persecutor would have had the ability to harm the applicant if the applicant had relocated within the country.

In assessing an applicant’s well-founded fear and internal relocation, apply the following two-step approach:

<sup>47</sup> *Matter of Mogharrabi*, 19 I. & N. 439 (1987); see also *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992).

<sup>48</sup> 8 C.F.R. § 208.13(b)(3)(i)

1. Determine if an applicant could avoid future persecution by relocating to another part of the applicant's home country.<sup>49</sup> If you find that an applicant will not be persecuted in another part of the country, then,
2. Determine if an applicant's relocation, under all circumstances, would be reasonable<sup>50</sup>

### *Examples*

- In some countries, it would be unreasonable to require a single woman to relocate to areas where she has no family or social safety net.
- For an applicant with a disability, it would be unreasonable to expect the applicant to relocate to an area that lacks appropriate medical care.
- Where relocation is inconvenient because the applicant lacks social connection such as family and friends, it may nonetheless be reasonable to expect the applicant to relocate if the applicant has sufficient funds, the applicant could obtain employment, and where he or she could integrate into the new area without difficulties.
- It could be reasonable to expect an applicant to relocate to a safe area of his country, even though he does not fluently speak the dialect used in that location.

## **12.2 Government or Government-Sponsored Persecutor**

In cases in which the feared persecutor is a government or is government-sponsored, you must presume that there is no reasonable internal relocation option. This presumption may be overcome if you show by a preponderance of the evidence that the applicant could avoid future persecution by relocating to another part of the applicant's country and that it would be reasonable to expect the applicant to relocate.<sup>51</sup>

## **12.3 Non-Governmental Persecutor or Entity**

If the persecutor is a non-governmental entity, the applicant must demonstrate that there is no reasonable internal relocation option. Analyze the facts according to the two-step test for internal relocation. First, determine if the applicant could avoid future persecution by relocating to another part of the country. If the applicant would not face persecution in another part of the country, then determine if, under all circumstances, it would be reasonable to expect the applicant to relocate.

### *Examples*

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<sup>49</sup> [8 C.F.R. § 208.13\(b\)\(2\)\(ii\)](#).

<sup>50</sup> [8 C.F.R. § 208.13\(b\)\(2\)\(ii\)](#).

<sup>51</sup> [8 C.F.R. § 208.13\(b\)\(3\)\(ii\)](#)

- If the persecutor is a rebel group that has control of, and access to, a substantial part of the country, then the applicant could not avoid future persecution by relocating. On the other hand, if the persecutor is a local rebel group whose scope of power is limited to a remote area of a country, the applicant might not have a well-founded fear in another part of the country. In addition, if the applicant has the support of family in an area where the rebels are inactive, or the government has effectively protected individuals from rebel threats in other parts of the country, it might be reasonable to expect the applicant to relocate.
- If the persecutor is a nationally known religious leader that has *de facto* power and access to large parts of the country, then the applicant could not avoid persecution by relocating to another part of the applicant's home country and your inquiry would end there. On the other hand, if the persecutor is a local religious leader whose scope of power is limited to a remote area of the country, the applicant might not have a well-founded fear in another part of the country. In this situation, you should move on to the second step of the test and determine if it would be reasonable, under all circumstances, to expect the applicant to relocate.

## 12.4 Considerations in Evaluating When Internal Relocation Is Reasonable

If the fear of persecution is not countrywide, you must determine whether it would be reasonable for the applicant to relocate within the country of feared persecution. In determining reasonableness, you should consider the following factors. These are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

### **Whether the Applicant Would Face Other Serious Harm**

Other serious harm means harm that may not be inflicted on account of one of the five protected grounds in the refugee definition, 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.

This factor may overlap with the other factors described below

### **Any Ongoing Civil Strife**

There may be a civil war occurring in parts of the country, making it unreasonable for the applicant to relocate.

### ***Example***

The only place where the persecutor has no authority is within the war-torn area; or the applicant would have to travel through unsafe areas to try to get to a place not controlled by the persecutor.

### **Administrative, Economic, or Judicial Infrastructure**

There may be circumstances under which aspects of the infrastructure may make relocation difficult. Depending on the circumstances, such infrastructure may make it very difficult for an individual to live in another part of the country.

### *Example*

In certain situations, the fact that women may not have the same legal rights as men may hinder an applicant's ability to relocate; or a member of a particular tribe may be unable to live safely among other tribes because of social and cultural constraints in the country.

### **Geographical Limitations**

There may be situations in which geographical limitations, such as mountains, deserts, jungles, etc., would present barriers to accessing a safe part of a country. Or, there may be cases in which the only safe places in a country are places in which an individual would have difficulty surviving due to the geography (e.g., an uninhabitable desert).

### **Social and Cultural Constraints**

You may consider factors such as age, gender, health, and social and familial ties. The applicant may also possess a characteristic that would readily distinguish the applicant from the general population and affect his safety in the new location. The applicant may speak a dialect or have a physical appearance unique to a minority group or to a certain part of the country that would make it difficult for the applicant to integrate into the new area. An applicant's high or low profile status may also affect his or her ability to safely relocate to another part of the country. There may be other social or cultural constraints that make it unreasonable for the applicant to relocate.

### *Example*

In some countries a woman may be unable to live safely or survive economically without a husband or other family members.

### **Other Factors**

Any other factors specific to the case that would make it unreasonable for the applicant to relocate should be considered.

## **12.5 Applicant Relocated before Leaving the Country of Feared Persecution**

There is no requirement that an applicant first attempt to relocate in his or her country before flight. However, the fact that an applicant lived safely in another part of his or her country for a significant period of time before leaving the country may be evidence that the threat of persecution does not exist countrywide, and that the applicant can reasonably relocate within the country to avoid future persecution. It is important to consider the applicant's circumstances in the place the applicant relocated. Considerations include

whether the applicant was able to live a relatively normal life in that location or was forced to live in hiding; whether the persecutor knew of the applicant's relocation; and the length of time the applicant lived in the new location.

### 13 COUNTRY OF ORIGIN INFORMATION<sup>52</sup>

Information regarding the conditions in an applicant's country is critical in evaluating whether the applicant's fear of future persecution is well-founded. You are required to keep abreast of country of origin information and to research available information in evaluating claims.

### 14 CONCLUSION

The main component of determining whether an applicant's fear is well-founded is the 4-part *Mogharrabi* test. In order to establish that a well-founded fear exists, the applicant must establish that the likelihood of future persecution on account of a protected ground is a reasonable possibility.

### 15 SUMMARY

#### *Elements of a Well-Founded Fear*

To establish a well-founded fear of persecution, the applicant must show that the fear is genuine (the subjective basis) and that it has an objective basis in fact.

#### *No Requirement of Past Harm*

There is no requirement that the applicant have suffered harm in the past to establish a well-founded fear of future persecution.

#### *Objective Basis for Fear*

The requirement of an objective basis is met if the applicant establishes that the fear of persecution is reasonable; i.e., that there is a reasonable possibility of suffering persecution in the future.

#### *The Mogharrabi Test*

If an applicant establishes all four prongs of the Mogharrabi test, as modified by *Matter of Kasinga and Pitcherskaia v. INS*<sup>53</sup>, the fear of persecution is well-founded. The elements of the four-prong test are 1) applicant possesses (or is believed to possess) a

<sup>52</sup> For additional information, see RAIO Training module, *Country of Origin Information*.

<sup>53</sup> See *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); see also *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997)

protected characteristic; 2) persecutor is aware or could become aware that applicant possesses the characteristic; 3) persecutor is capable of persecuting applicant; and 4) persecutor is inclined to persecute applicant.

### ***Pattern or Practice***

An applicant does not need to show that he or she will be singled out if there is 1) a pattern or practice of persecution of a group or category of individuals similarly situated to the applicant, and 2) the applicant belongs to or is identified with the group or category of persons such that a reasonable person in the applicant's position would fear persecution.

### ***Persecution of Family Members or Close Associates***

Persecution of family members or others associated with the applicant may be objective evidence that the applicant's fear is well founded. However, the applicant must establish some connection between such persecution and the persecution the applicant fears.

### ***Threats***

Threats (anonymous or otherwise) may be sufficient to establish a well-founded fear if the applicant establishes that there is a reasonable possibility the threats will be carried out. If the threat is anonymous, you should consider all possible sources of the threat, the content of the threat, circumstances surrounding the threat, and country conditions information.

### ***Applicant Remains in Country after Threats or Harm***

A significant lapse of time between the incidents that give rise to the claim and the applicant's departure from the country may indicate that the fear is not well-founded. However, the reasons and circumstances for delayed departure must be considered.

### ***Return to Country of Persecution***

An applicant's return to the country of feared persecution generally weakens the applicant's claim of a well-founded fear of persecution. Consideration must be given to the reasons the applicant returned and what happened to the applicant once he or she returned. Return to the country of feared persecution does not necessarily defeat an applicant's claim.

### ***Possession of Travel Documents***

Possession of valid travel documents does not preclude eligibility for refugee or asylum status, but may indicate that the applicant's government does not have the inclination to harm the applicant. All of the circumstances surrounding acquisition of such documents must be considered.

### ***Refugee Sur Place***

An applicant may become a refugee due to events that occur while the applicant is outside his or her country. These events may be changed circumstances in the applicant's country, or actions the applicant takes while outside of his or her country that put him or her at risk if the applicant returns to the country.

### ***Internal Relocation***

A fear is not well-founded if the applicant could avoid future persecution by relocating to another part of his or her country, and, under all the circumstances, it would be reasonable to expect the applicant to do so. You must consider whether the persecutor is the government or is government-sponsored; the extent of the authority of the persecutor; and any factors that may make it unreasonable for the applicant to relocate. In the Asylum context, the burden of proof shifts to the officer to show that the applicant could reasonably relocate to avoid future persecution if past persecution has been established or if the persecutor is the government or is government-sponsored.

### ***Country of Origin Information***

You must consider current conditions in the applicant's country to evaluate whether an applicant's fear of future persecution is well-founded.

**PRACTICAL EXERCISES**

**Practical Exercise # 1**

- **Title:**
- **Student Materials:**



**OTHER MATERIALS**

There are no Other Materials for this module.

**SUPPLEMENT A – REFUGEE AFFAIRS DIVISION**

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

**REQUIRED READING**

- 1.
- 2.

**ADDITIONAL RESOURCES**

- 1.
- 2.

**SUPPLEMENTS**

**RAD Supplement – Return to Country of Feared Persecution**

**Returns in the Iraqi Context**

**Response to Query**

**Date:** May 15, 2009

**Subject:** Returns Guidance

**Keywords:** Returns, Iraq, Well-Founded Fear, Objective Fear

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**Query:** To what degree do voluntary returns to Iraq (or other countries of claimed persecution) undercut claims of a well founded fear of future persecution?

**Response:**

While the voluntary return to the country of claimed persecution may indicate that an alien is willing and able to return, it does not in and of itself preclude the establishment of eligibility for refugee status. **The reasons motivating the**

**temporary return, including the intent and circumstances surrounding such, are the most critical factors in determining if an applicant is unable or unwilling to return or if his/her return calls into question the credibility of the applicant's past persecution or well-founded fear claim.** In all of these cases, you should weigh the reasons for the applicant's return, with what happened to the applicant previously and the circumstances of the return (why they returned, what activities they engaged in upon return, what happened during the return, the length of the return).

According to the April 2009, *UNHCR Eligibility Guidelines for Assessing the International Protection needs of Iraqi Asylum-Seekers*, "the situation in Iraq has further evolved, with important improvements in the overall security situation in many parts of the country." This improvement in conditions may help to explain why we're seeing so many applicants traveling back and forth frequently. UNHCR goes on to say that "the developments and improvements all have to be seen in context. Conditions can still be unpredictable, with several set-backs occurring, and there are major uncertainties and risks remaining." "It is UNHCR's assessment that the improvement of the situation in Iraq does not yet constitute fundamental changes sufficient to allow a general application of the cessation clauses of Articles 1C(5) or (6) of the 1951 Convention." Therefore, the UNHCR believes that the conditions/reasons that made these individuals refugees still exist.

Here are some factors to consider when addressing the return issue:

1) Has the applicant suffered past persecution?

The refugee definition requires an applicant to demonstrate **either** actual past persecution **or** a well-founded fear of future persecution. An applicant may also establish both actual past persecution and a well-founded fear of persecution; however, it is only required that one or the other be established to be eligible for refugee status.

Regarding returns, if past persecution is established, you would want to look at whether the return calls into question the credibility of the past persecution.

For example: the applicant returns to the same place the past persecution took place.

Some sample questions to ask would be: Did he/she live openly? How long did he/she return for? Why did he/she return? Did any incidents of harm occur during the return?

Based on these responses, you would want to evaluate if it is plausible that the applicant would return. Does it call into question the past persecution?

For example: The applicant responds that he/she returned to Iraq every 3 months for a 1 month period to continue operating his/her business. The applicant's claim

is that he was threatened and beaten at his place of business, and told he would be killed if he continued to sell his goods to the Americans. The return calls into question whether the past persecution claim is credible, particularly, if no incidents occurred during his/her regular returns. In such cases, the credibility issue should be well documented in the Assessment.

If the applicant returned but did not go to the same place/undertake same activities/live openly, the act of returning is less likely to call into question the past persecution.

2) Why did the Applicant Return? What are the Conditions of the Return/Stay in Iraq?

Family: In general, returns for family or personal reasons such as picking up a child whose custodian died, visiting an old or sick parent, or some other family emergency will not be cause for concern. You should, nevertheless, briefly ask about the circumstances surrounding return: length of stay, if applicant went back to the same area, if so, were they in hiding, were there any incidents upon return. These cases should be adjudicated on a case-by-case basis.

Economic reasons: Consider whether the applicant went back to his/her old job or are running the same business as before—this could be problematic because it seems the alleged persecutor could easily identify/find the applicant. Look at where the applicant's job is – for example, if it is in the Green Zone where there may be more protection, such a return may not be cause for concern. Would want to consider how destitute the family is in country of asylum. We know that applicants are struggling to make ends meet, so this should be taken into account. If an applicant goes back numerous times to pick up checks, etc, may want to ask if anyone else could pick it up for them, how it is they continue to get paid if not working, if they have sought assistance or work in country of asylum, etc. Then evaluate based on those responses.

Education: Would want to determine if the student could study in country of asylum. (Refugee children generally receive basic schooling.) For return, how long did the applicant stay? Is the educational institution the same they always attended? Is it near the place from which they claim a fear or at a more distant location? Where did the applicant live during the return? How did they manage to stay safe? Did they go and take exams and immediately flee again? Did they go to pick up their diploma?—couldn't anyone else have done that for them? If other members of the family experienced past persecution, how was applicant able to stay and study? Did any incidents of harm occur during the return/stay in Iraq?

Certain scenarios that will generally undermine a well-founded fear claim: returns for vacation or to establish new business contacts. **NOTE: If the applicant has a credible past persecution claim, such a return generally will not adversely**

**affect his/her eligibility.**

3) Who has returned?

If it is the derivatives that are traveling back and forth, they are not the ones that need to establish well founded fear, rather it is the PA. As such, a return by a derivative is generally not problematic, but you should consider if their travel calls into question any claimed persecution of the PA.

Is the PA returning on his/her own or with the whole family? Does the whole family remain in Iraq except for the PA? How are they surviving? Did any incidents of harm occur during the return/stay in Iraq?

4) Have the most Concrete Reasons for Denial been Addressed/Documented?

In general, if making a denial for Returns it should be a strong denial, because this is the kind of denial that someone reviewing an RFR might review and given country conditions think the applicant does have a WFF, thus overturning or sending for reinterview. If the returns signal a credibility issue with the applicant, it's probably better to deny on credibility.

Also, if there are multiple cross-referenced cases with this issue being denied on credibility issue, the credibility issue should be referenced on each, in case they are reviewed separately by someone doing RFRs. You can always say, "see SY-xxxxx for credibility analysis" to alert a future reviewer that this person was part of a family unit and more information is available. This would be useful for the x-refed cases SY-107144-147, in which an entire family was denied, although the major reasons for the denial are in the mother's case. If any of the adult children's cases was reviewed without the mother's case on hand, the reviewer might be inclined to send the case for reinterview. However, when looked at as a family unit, there would be much less of this tendency since the mother's denial is described most fully

## SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

### REQUIRED READING

- 1.
- 2.

### ADDITIONAL RESOURCES

- 1.
- 2.

### SUPPLEMENTS

#### ASM Supplement – Coercive Population Control

##### **Establishing an Objective Fear Based on Violation of Coercive Population Control Policies**

An applicant claiming a well-founded fear of persecution under China's coercive family planning policy as a result of the birth of two or more children, or any other violation, must demonstrate more than a generalized fear that he or she will be persecuted. To demonstrate that his or her fear is objectively reasonable the applicant needs to establish a personal risk of being singled out for persecution or that there is a pattern or practice of persecution of those similarly situated to him or her in the area where he or she resides.<sup>54</sup>

In *Matter of J-H-S-* the Board found that because there are so many provincial and local variations in the application and enforcement of China's national family

<sup>54</sup> *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007).

planning program that, to meet his or her burden of proof, the applicant must show:

1. the details of the applicable family planning policy in the locality where he or she resides<sup>55</sup>
2. that he or she is in violation of the local policy
3. that the violation of the policy would be punished in the local area where he or she lives in a way that would give rise to an objective fear of future persecution<sup>56</sup>

The three part analysis elaborated in *Matter of J-H-S-* must be applied on a case-by-case basis and is to be used to determine whether the applicant has a well-founded fear of persecution in all instances involving the birth of a second or subsequent child, regardless of whether the applicant's children were born in China or abroad.<sup>57</sup>

#### **Use of Country Conditions Specific to Applicant's Local Area of Residence**

You must consult country conditions reports for the local area (provincial or municipal) where the applicant resides in order to determine the specific policies that apply to each case.<sup>58</sup>

Relevant considerations that may be used to determine whether there has been a

<sup>55</sup> *Matter of J-H-S-*, 24 I. & N. Dec.196 (BIA 2007).

<sup>56</sup> *Matter of J-H-S-*, 24 I. & N. Dec. at 199. *See also*, *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007) (evidence did not establish a national policy requiring forced sterilization upon birth of second child overseas, and evidence was insufficient to show that in Fujian Province, any sanctions for out of plan births would rise to the level of persecution); *Matter of J-H-S-* (evidence did not demonstrate that the birth of a second child would violate family planning policy in Fujian province); *see also* [Huang v. U.S. INS, 421 F.3d 125 \(2d Cir. 2005\)](#) (well-founded fear of persecution not established where country conditions show that local Fujian province authorities are lax in the enforcement of the one-child policy and frequently allow the birth of a second child in situations such as the applicant's where the firstborn child is a girl.); *Matter of C-C-*, 23 I. & N. Dec. 899 (BIA 2006) (Violation of policy not established where Chinese policy allows individuals to apply for the birth of a second child four years after the birth of the first child, and the applicant's second child was born six years after her firstborn).

<sup>57</sup> *See Matter of J-H-S-* at 202 (the evidence did not demonstrate that in Fujian province enforcement mechanisms would be triggered after the birth of a second child to someone, such as the applicant, whose first child was female).

<sup>58</sup> *Matter of J-W-S-* at 194 (well-founded fear not established where country conditions evidence did not support the applicant's claim that he would be sterilized upon return to Fujian province with two children born in the US. The evidence showed that, at most, the applicant and his wife would be subjected to 'sanctions and penalties' the severity of which would not rise to the level of persecution.). *See Matter of C-C-*, at 900-903 (the affidavit of demographer John Aird, submitted by the applicant as a source of country conditions evidence, was insufficient to show that the Chinese government has an established national policy of sterilizing returning Chinese citizens who have had more than one child while living abroad because the affidavit was generalized, not based on personal knowledge, did not specifically address situations of individuals similarly situated to the applicant, and the 2005 State Department country report contradicted the affidavit); [Yu v. US Att'y Gen.](#), 513 F.3d 346 (3d Cir. 2008) (affirmed *Matter of C-C-* regarding the Aird affidavit).

violation of the local coercive planning policy include:

1. the gender of the children
2. the spacing between the children's births
3. the parents' marital status
4. whether or not the parents are government employees •

For example, in *Matter of S-Y-G-*, the BIA denied a motion to reopen asylum proceedings based on the birth of a second child in the U.S.<sup>59</sup> The BIA held that the applicant's reproductive behavior may not be viewed as violating the family planning policies in Fujian Province because she was not a government employee, and there was a seven-year interval between the birth of her two children. The BIA also found that even if the applicant did violate the local family planning policy, any sanctions would likely be economic sanctions that would not rise to the level of persecution.

### ASM Supplement – Return to Country of Feared Persecution

As a procedural matter, the regulations provide that an asylum applicant who returns to the country of feared persecution with a grant of advance parole is presumed to have abandoned his or her claim. This presumption is overcome if there are compelling reasons for the applicant's return to that country. In addition, even if the presumption of abandonment is not overcome by compelling reasons for the return, events that occurred during the time that the applicant was in his country could be the basis for a new claim. Procedurally, the applicant whose experiences upon return provide the basis for a new claim would not be required to submit a new I-589, but would be required to testify about events that occurred during the return to the country of feared persecution.<sup>60</sup>

An applicant's return to the country of feared persecution, and the events that occur during that return, may not lead to a procedural finding that the asylum application was abandoned; however, the return to the country of persecution raises substantive questions regarding whether or not the applicant has a well-founded fear of return to that country.

<sup>59</sup> *Matter of S-Y-G-*, 24 I. & N. Dec.247 (2007).

<sup>60</sup> For additional information, see RAI0 Training module, *Refugee Definition and Past Persecution*.



### ASM Supplement – Presumption Raised by Past Persecution

#### **General Rule**

If past persecution on account of a protected characteristic is established, then the applicant is a refugee and

1. it is presumed that the applicant has a well-founded fear of future persecution on the basis of the original claim
2. unless it is established by a preponderance of the evidence that
  - i. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or
  - ii. the applicant could avoid future persecution through internal relocation and under all the circumstances it would be reasonable for the applicant to do so<sup>61</sup> •

#### **Explanation (Burden Shift)**

This means that once the applicant has established past persecution, the Asylum Officer must presume that the applicant's fear of future persecution is well founded. This is a presumption that may be rebutted. In order to rebut the presumption, however, the burden of proof shifts to the officer to establish by a preponderance of the evidence that the fear of future persecution is no longer well-founded.

The officer must weigh all available evidence to determine whether a preponderance of the evidence shows that there has been a fundamental change in circumstances such that the applicant's fear of persecution is no longer well-founded, or the applicant could reasonably avoid future persecution through internal relocation. This will require a thorough knowledge and understanding of current country conditions in the applicant's country and the circumstances of the individual applicant.<sup>62</sup>

#### **Consideration Regarding Source of Persecution**

The presumption raised by a finding of past persecution applies only to a fear of future persecution based on the original claim of persecution and does not apply to

<sup>61</sup> [8 C.F.R. § 208.13\(b\)\(1\)](#). For additional information, see RAIO Training module, *Evidence Assessment*.

<sup>62</sup> The Asylum Officer should consider not only country conditions, but other aspects of the applicant's circumstances, as well, to evaluate whether a preponderance of the evidence establishes that the applicant's fear of persecution is not well founded. See [section XI.D.](#), Fundamental Changes Must Affect Applicant's Situation, below.

fear of persecution on account of a different basis, unrelated to the past persecution.<sup>63</sup>

As the Attorney General clarified in *Matter of A-T*, “on the basis of the original claim” means that the future persecution feared is “on account of the same statutory ground” on which the applicant suffered past persecution. In other words, the presumption applies when a fear of future persecution arises from the same protected characteristic on account of which applicant was targeted for past persecution.<sup>64</sup>

The applicant does not have to fear that he or she will suffer the identical type of harm in the future that he or she suffered in the past in order to retain the presumption of future persecution so long as the fear of any future harm is on account of the original basis for persecution.

The BIA has made clear that a change in regime does not automatically shift the burden of proof back on an applicant to show well-founded fear of persecution from the changed regime or its successor. (See discussion below regarding what constitutes a change in circumstances sufficient to overcome the presumption.)<sup>65</sup>

### Fundamental Changes Must Affect Applicant’s Situation

The fundamental change in circumstances may relate to country conditions in the applicant’s country or to the applicant’s personal circumstances. However, the change must directly affect the risk of harm the applicant fears on account of the protected ground in order to overcome the presumption.

The BIA has emphasized that simply demonstrating a change, such as a change in regime, cannot substitute for careful analysis of the facts of each applicant’s individual circumstances.<sup>66</sup> Similarly, the First Circuit has held that the “abstract” materials indicating fundamentally changed circumstances “do not automatically trump the specific evidence presented by the applicant.”<sup>67</sup>

<sup>63</sup> 8 C.F.R. § 208.13(b)(1); See *Matter of A-T*, 24 I. & N. Dec.617 (A.G. 2008) (vacating *Matter of A-T*, 24 I. & N. Dec.296 (BIA 2007)), *Matter of N-M-A-*, 22 I. & N. Dec. 312 (BIA 1998); see *Hasalla v. Ashcroft*, 367 F.3d 799, 804 (8th Cir. 2004).

<sup>64</sup> See *Matter of A-T* at 622; cf., *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (finding that the presumption of well-founded fear does not operate only as to the exact same harm experienced in the past.); *Bah v. Mukasey*, 529 F.3d 99, 115 (2d Cir. 2008) (identical harm not required to rebut the presumption, “the government must show that changed conditions obviate the risk to life or freedom related to the original claim, e.g. persecution on account of membership in [the] particular social group.”)

<sup>65</sup> *Matter of N-M-A-*, 22 I. & N. Dec. 312, 320 (BIA 1998).

<sup>66</sup> *Matter of N-M-A-*, 22 I. & N. Dec. 312 (BIA 1998).

<sup>67</sup> *Fergiste v. INS*, 138 F.3d 14, 19 (1st Cir. 1998); See also *Rios v. Ashcroft*, 287 F.3d 895, 901 (9th Cir. 2002) (DHS “is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant’s specific grounds

For example, a despot may be removed from a seat of government, but still wield enough influence to pose a threat to an applicant, or a new government may harbor the same animosities towards an applicant as the old regime.<sup>68</sup> Those types of changes would not rebut the presumption of well-founded fear. The determinative issue is whether the changes are such that the particular applicant's fear of persecution is no longer well-founded.

Evidence that an applicant may still be at risk despite a change in circumstances includes, but is not limited to, evidence that the applicant or individuals similarly situated to the applicant continued to be threatened on account of the protected characteristic after circumstances have changed.<sup>69</sup>

### **Forced Sterilization Does Not Constitute a Change in Circumstances**

In *Matter of Y-T-L* the BIA considered whether the fact that an asylum applicant had been forcibly sterilized could constitute a change in circumstances such that the applicant's fear of future persecution would no longer be well founded.<sup>70</sup> The BIA found that the intent of Congress in amending the definition of a refugee, coupled with the "permanent and continuing" nature of the harm suffered by one forcibly sterilized, prevents finding a fundamental change in circumstances based on an act of forced sterilization, even when a long period of time has passed since the sterilization.

### **Female Genital Mutilation and Fundamental Change in Circumstances**

#### **1. Attorney General Decision: *Matter of A-T***

The Attorney General (AG) vacated the BIA's decision which held that female genital mutilation was a fundamental change in circumstances.<sup>71</sup> The AG found that the BIA had made several errors of law and fact. As in all cases in which the applicant demonstrates past persecution, in claims involving FGM the government has the burden of rebutting the presumption of well-founded fear by establishing evidence of fundamental change in circumstances (or that the applicant can relocate). The AG noted in *Matter of A-T*, that the applicant was subjected to FGM on account of membership in a particular social group, not on account of FGM; FGM was the harm suffered not the original basis on account of which the

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for his well-founded fear of future persecution. Information about general changes in the country is not sufficient."); *Berishaj v. Ashcroft*, 378 F.3d 314, 327 (3d Cir. 2004); *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008).

<sup>68</sup> See *Mihaylov v. Ashcroft*, 379 F.3d 15, 23 (1st Cir. 2004).

<sup>69</sup> See e.g., *Gailius v. INS*, 147 F.3d 34 (1st Cir. 1998).

<sup>70</sup> *Matter of Y-T-L*, 23 I. & N. Dec. 601 (BIA 2003); see also *Qu v. Gonzales*, 399 F.3d 1195, 1203 (9th Cir. 2005) (adopting *Matter of Y-T-L*); *Zhang v. Gonzales*, 434 F.3d 993, 1001-1002 (7th Cir. 2006) (same).

<sup>71</sup> *Matter of A-T*, 24 I. & N. Dec. 617, 622-623 (A.G. 2008) (vacating in part *Matter of A-T*, 24 I. & N. Dec. 296 (BIA 2007)).

applicant was persecuted. Hence, to rebut the presumption of well-founded fear the government had to show that there had been a fundamental change of circumstances such that the applicant no longer had a well-founded fear of suffering any other harm, including the possible repetition of FGM, on the basis of membership in the particular social group for which she was persecuted.

For most claims based on the infliction of FGM the protected characteristic asserted is membership in a particular social group, and the particular social group is often defined as some subset of women who possess (or possessed) the trait of not having undergone FGM as required by the social expectations under which they live. In many cases, after having been subjected to FGM in the past, the applicant will no longer be a member of the particular social group on account of which she was persecuted. Therefore, having undergone FGM removes the applicant from the particular social group for which she was targeted, and will often constitute a fundamental change in circumstances such that the applicant's fear of harm on the basis of the original claim no longer will be well-founded.

The Attorney General's decision in *Matter of A-T-* makes it clear that the fact that a woman has been subjected to FGM in the past does not preclude a valid claim that she retains a well-founded fear of future persecution if it is established that she would be subject to additional FGM (for example, it may be the practice of a woman's tribe to subject her to a second infibulation after she has given birth; or it may be that the first time she was subject to FGM the procedure was not performed to the extent required by her culture).<sup>72</sup> The possibility of re-infibulation should be considered in determining whether there has been a fundamental change in circumstances.

The Attorney General's holding in *Matter of A-T-* controls in all jurisdictions. Note that the Attorney General decision is consistent with and relies in part on the Second Circuit's holding discussed below.

2. The Federal Courts:
  - i. Second Circuit: *Bah v. Mukasey*

In *Bah v. Mukasey*, the Second Circuit court held that the infliction of FGM does not, without more, relieve the government of the burden of establishing a fundamental change in circumstances.<sup>73</sup> First, women could be subjected to the repetition of FGM and, additionally, the woman could be subjected to other forms of harm on account of the protected characteristic for which she was subject to FGM. The court stated that "Nothing in the regulations suggest that the future

<sup>72</sup> United States Department of State, Office of the Under Secretary for Global Affairs, Office of the Senior Coordinator for International Women's Issues, [Female Genital Mutilation \(FGM\)](#), p.6 (Washington, DC: Feb. 1, 2000, updated June 27, 2001).

<sup>73</sup> [Bah v. Mukasey](#), 529 F.3d 99 (2d Cir. 2008).

threats to life or freedom must come in the same *form* or be the same *act* as the past persecution.” (Emphasis in the original.)

The Second Circuit’s finding in *Bah v. Mukasey* is precedent law for the Second Circuit; all other circuits need to apply the Attorney General’s decision in *Matter of A-T-*.

ii. Ninth Circuit: *Mohammed v. Gonzales*

In its decision in *Matter of A-T-*, the BIA rejected the Ninth Circuit’s finding in *Mohammed v. Gonzales*, 400 F.3d 785 (9<sup>th</sup> Cir., 2005) that female genital mutilation constituted a permanent and continuing act of persecution, such that “the presumption of well-founded fear in such cases cannot be rebutted.” *Mohammed v. Gonzalez*, at 801. The Attorney General’s decision vacating the Board’s decision in *Matter of A-T-* did not specifically address the “permanent and continuing” persecution theory. His analysis, however, makes clear that past FGM can be *part of* a fundamental change in circumstances that rebuts the presumption of well-founded fear, implicitly rejecting the Ninth Circuit’s theory that such a presumption can never be rebutted. Moreover, as the Attorney General’s opinion sets forth a comprehensive analysis of such claims that has never been rejected by the Ninth Circuit or other Circuit courts, it remains the controlling precedent for cases involving past FGM. Accordingly, officers should not rely upon a “permanent and continuing” persecution theory in FGM cases as such reliance would be inconsistent with the controlling precedent set forth by the Attorney General in *Matter of A-T-*. The severity of any ongoing harm to an applicant, however, may be considered in determining whether to grant asylum based on the severity of the past persecution.

iii. Rebuttal of well-founded fear and consideration of granting asylum in the absence of a well-founded fear

If it is found that there has been a fundamental change in circumstances such that the presumption of well-founded fear is rebutted in a case where the applicant was subjected to FGM, you then need to consider whether it is appropriate to grant asylum in the absence of a well-founded fear either based on the severity of the past persecution or because of a reasonable possibility that the applicant would suffer other serious harm upon return.<sup>74</sup> This issue was addressed by the BIA in *Matter of S-A-K- and H-A-H-*.<sup>75</sup>

For discussion of factors to consider in determining whether past is harm sufficiently severe as to provide compelling reasons to grant asylum in the absence of a well-founded fear, and discussion of *Matter of S-A-K- and H-A-H-* where the

<sup>74</sup> 8 C.F.R. 208.13(b)(1)(iii).

<sup>75</sup> *Matter of S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008). See also *Matter of N-M-A-*, 22 I. & N. Dec. 312 (BIA 1998).

BIA found that discretion should be exercised to grant asylum based on the severity of the persecution to a mother and daughter who were subjected to FGM, see RAIO Training module, *Refugee Definition and Past Persecution*.

**SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION**

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

**REQUIRED READING**

- 1.
- 2.

**ADDITIONAL RESOURCES**

- 1.
- 2.

**SUPPLEMENTS**

<p style="text-align: center;"><b><u>IO Supplement</u></b></p> <p style="text-align: center;"><b>Module Section Subheading</b></p>
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