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Phair or Phoul in Philadelphia?: Third Circuit Speaks on De Novo Review, Sexual Abuse, and Res Judicata

by Edward R. Grant and Patricia M. Allen

W.C. Fields' tombstone may not *actually* say that on the whole, he would rather be in the City of Brotherly Love. But the joke lives on. Exactly why is a mystery—for what can be so wrong about a town defined by Pat's Steaks, the Penn Relays, and the Phanatic? Or, for those of a higher brow, by the Museum of Art and the Philadelphia Orchestra? The list could go on—everything from music pioneers Dick Clark at American Bandstand and the "Good Guys" at WIBG 99, to lunchtime hoagies and dinner at Le Bec Fin. And, yo, from Smokin' Joe Frazier to Rocky Balboa.

Then there is the United States Court of Appeals for the Third Circuit—which in recent years has racked up some notable precedents defining, and in some cases challenging, settled rules of immigration law. *See, e.g.*, *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *aff'g Nijhawan v. Att'y Gen. of U.S.*, 523 F.3d 387 (3d Cir. 2008); *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009) (rejecting, in part, the analysis of crimes involving moral turpitude in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)); *Hashmi v. Att'y Gen. of U.S.*, 531 F.3d 256 (3d Cir. 2008) (holding that the denial of a continuance based on case completion goals was an abuse of discretion), *vacating Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (adopting new standards for continuances based on pending visa petitions); *Pierre v. Att'y Gen. of U.S.*, 528 F.3d 180 (3d Cir. 2008) (en banc) (holding that torture must be inflicted with specific intent to qualify an applicant for protection under the Convention Against Torture ("CAT")). The Third Circuit clearly punches above its weight (as measured by the size of its immigration docket), and its impact can thus be felt far beyond the banks of the Delaware.

None of these landmark decisions, however, has as much potential impact on the day-to-day work of Immigration Judges and the Board as the Third Circuit's recent determinations that, in assessing an Immigration Judge's prediction of what might happen to an alien if returned to his country of

origin, the Board must apply the same deferential standard of review—"clearly erroneous"—that is applicable to findings of fact and credibility determinations. *Huang v. Att'y Gen. of U.S.*, No. 09-2437, 2010 WL 3489543 (3d Cir. Sept. 8, 2010), *abrogating Matter of A-S-B-* 24 I&N Dec. 493 (BIA 2008); *Kaplun v. Att'y Gen. of U.S.*, 602 F.3d 260 (3d Cir. 2010), *rev'g in part Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008). No other circuit has explicitly so held, although the Second Circuit ruled earlier this year that the Board erred in applying a "weight of the evidence" standard to reverse a grant of protection under the Convention Against Torture. *De La Rosa v. Holder*, 598 F.3d 103, 108 (2d Cir. 2010). *But see Cadet v. Bulger*, 377 F.3d 1173, 1192 (11th Cir. 2004) (holding that whether conditions in Haitian prisons constitute torture is a mixed question of law and fact).

Our discussion will focus on the multilayered issue presented in *Huang* and *Kaplun*. Although the specific holdings are limited for now to the Third Circuit, the analysis in both cases emphasizes the critical importance of making clearly identified findings of fact and, on appellate review, clearly identifying both the standard of review and the precise aspect of an Immigration Judge decision that is being reviewed.

In addition, we will discuss two other recent Third Circuit decisions that set up a direct conflict with the Ninth Circuit. *Duhaney v. Att'y Gen. of U.S.*, No. 08-2349, 2010 WL 3547434 (3d Cir. Sept. 14, 2010) (holding that lodging of additional charges after vacatur of a criminal conviction was not barred by res judicata and rejecting *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007)); *Restrepo v. Att'y Gen. of U.S.*, 617 F.3d 787 (3d Cir. 2010) (adopting a broad definition of "sexual abuse of a minor" and rejecting the interpretation in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc)).

Huang and Kaplun:

The Contours of De Novo and Clearly Erroneous Review

Ever since the 2002 regulations established the two-tier standard of review of Immigration Judge decisions, *see* 8 C.F.R. § 1003.1(d)(3), the Board of Immigration Appeals and Federal courts have struggled to define the precise contours of both "clearly erroneous" review, applicable to findings of fact and determinations of credibility, and de novo review, applicable to questions of law, discretion, and, in the words of the Attorney General when promulgating the regulation, "whether the facts established by a particular alien amount to 'past persecution' or a 'well-founded fear of future persecution.'" Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002).

In fact, both *Matter of V-K-* (Third Circuit) and *Matter of A-S-B-* (Ninth Circuit) resulted from Government motions to remand: in *Matter of A-S-B-*, 24 I&N Dec. at 495, for the Board to clarify and elaborate on its characterization of the "well-founded fear" determination as a question of law, and thus subject to de novo review; and in *Matter of V-K-*, 24 I&N Dec. at 500-01, for the Board to address whether it had the authority to reject the Immigration Judge's determination that the respondent would more likely than not be subject to torture with the acquiescence of authorities in the Ukraine.

The Board's relatively brief response in both decisions was that ultimate determinations of eligibility for relief, to the extent they are based on "predictive" facts, are subject to de novo review. "[W]e do not consider a prediction of the probability of future torture to be a ruling of 'fact.'" *Matter of V-K-*, 24 I&N Dec. at 501. Rather, such a prediction "relates to whether the *ultimate* statutory requirement for establishing eligibility for relief was met and is therefore a mixed question of fact and law, or a question of 'judgment,'" specifically reserved by the regulation to de novo review. *Id*. at 502 (citing 8 C.F.R. § 1003.1(d)(3)(ii) (emphasis added)); *see also* 67 Fed. Reg. at 54,890 (stating that the "clearly erroneous" standard does not apply to the application of legal standards, such as whether an alien has established a well-founded fear of persecution). *Matter of A-S-B-* went perhaps a step further than *V-K-*, classifying the well-founded fear determination as a "matter of law," and declaring that "speculative findings about what may or may not happen to the respondent in the future" is not "fact-finding" because, among other things, "it is impossible to declare as 'fact' things that have not yet occurred." *Matter of A-S-B-*, 24 I&N Dec. at 497-98; *see also Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 212-13 & n.4 (BIA 2010) (stating that likelihoods cannot be "facts" because they involve future events).

Kaplun rejected the equivalence of "predictive" fact-finding with the Board's authority to determine ultimate

questions of eligibility for relief. The court pointed out that predictions of future events are often closely tied to findings of fact regarding past events—providing the colloquial example of calculating how long it will take to travel to Grandma's based on past journeys, and the legal example of a medical malpractice jury determining, based on "predictive" expert testimony, the level of disability a plaintiff will endure in future years. *Kaplun*, 602 F.3d at 269-70. Turning to the matter at hand, the court identified three findings made by the Immigration Judge: (1) that Kaplun was likely to come into contact with governmental entities; (2) that he would likely be the target for extortion and mistreatment; and (3) that the mistreatment would likely rise to the level of torture. *Id*. at 270-71. The first two, the court determined, are factual—specifically, findings that an alien is likely to be extorted, imprisoned, or beaten are findings of fact. However, the third question is one of law:

> Torture is a term of art, and whether imprisonment, beating, and extortion are severe enough to rise to the level of torture is a legal question. While the underlying facts vary . . . , the legal question remains the same: do the facts found by the IJ (and that the BIA determines are not clearly erroneous) meet the legal requirements for relief under the CAT? This is a question of law where the IJ has no comparative advantage over the BIA.

Id. at 271.

The Third Circuit thus implicitly agreed with the Board that the determination of CAT eligibility is a mixed question of law and fact in that it clearly involves a legal determination premised on particular factual findings. The Board erred, however, in "[g]lueing the two questions together" in such a way as to impose de novo review on both sides of the question. *Id. Kaplun* ruled that the "mixed question" must be broken into its component parts, with each addressed under the appropriate standard of review. This approach, the court declared, is the only one consistent with the plain language and explanatory comments to the 2002 regulation.

The court emphasized two critical points about the review of "predictive" facts. First, that its ruling applies to *all* facts related to future events, including the likelihood of contact with government authorities or others bent on harm, the type and level of harm likely to be inflicted, and, significantly, the likelihood of government acquiescence. Second, that its ruling does not preclude reversal of an Immigration Judge's findings on such matters, provided that this is done under the rubric of "clear error." *See Subrata v. Att'y Gen. of U.S.*, 378 F. App'x 226 (3d Cir. 2010) (affirming the Board's alternate finding that an Immigration Judge's prediction of future torture was clearly erroneous). *But see Kang v. Att'y Gen. of U.S.*, 611 F.3d 157, 166 (3d Cir. 2010) (rejecting as "inexplicable" the Board's assessment of evidence in rejecting an Immigration Judge's grant of CAT protection to a Chinese national under warrant for aiding North Korean refugees). Despite abundant signals in *Kaplun* that its "unglueing" of questions of fact from questions of law would apply to all forms of immigration relief, the court expressly reserved the question whether it would apply to claims for asylum.

The answer was not long in coming. Almost 5 months to the day after *Kaplun*, the Third Circuit held in *Huang* that an Immigration Judge's forecasting of whether there is a "reasonable possibility" that future events will occur is fact-finding and therefore subject to clear error review. "However," the court clarified, "this is far from the end of the matter," because the assessment of future events remains but one part of the determination of whether an alien has a "well-founded fear" of persecution. *Huang*, 2010 WL 3489543, at *7.

Huang noted that the well-founded fear inquiry, like the CAT inquiry, also requires an Immigration Judge to rule on three distinct elements, which, significantly, are not identical to those enumerated in *Kaplun*. The first, what may *happen* to an alien if returned to his home country, is predictably accorded clear error review. The second, whether those events would rise to the level of persecution, is just as predictably subject to de novo review by the Board. The third, whether the possibility of those events gives rise to a "well-founded" fear, is, not so predictably, also subject to de novo review, as a mixed question of law and fact. The factual inquiry requires the Immigration Judge to determine what may occur when an alien is repatriated based on individual facts or a pattern or practice of targeting members of a protected group. But the more critical determination, which *Huang* classifies as a legal question, is whether those predicted events "would cause a reasonable person in the alien's situation

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CIRCUIT COURT DECISIONS FOR SEPTEMBER 2010

by John Guendelsberger

The United States courts of appeals issued 382 decisions in September 2010 in cases appealed from the Board. The courts affirmed the Board in 349 cases and reversed or remanded in 33, for an overall reversal rate of 8.6% compared to last month's 13.7%. There were no reversals from the Firth, Fourth, Sixth, and Tenth Circuits.

The chart below shows the results from each circuit for September 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	3	3	0	0.0
Second	56	54	2	3.6
Third	27	22	5	18.5
Fourth	8	8	0	0.0
Fifth	17	14	3	17.6
Sixth	4	4	0	0.0
Seventh	4	3	1	25.0
Eighth	4	3	1	25.0
Ninth	239	219	20	8.4
Tenth	3	3	0	0.0
Eleventh	17	16	1	5.9
All	382	349	33	8.6

The 382 decisions included 159 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 99 direct appeals from denials of other forms of relief from removal or from findings of removal; and 124 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	159	146	13	8.2
Other Relief	99	88	11	11.1
Motions	124	115	9	5.3

The 13 reversals and remands in asylum cases included 2 adverse credibility determinations (Ninth and Eleventh Circuit) and 2 cases from the Ninth Circuit to apply "disfavored group" analysis in Indonesian cases. The other cases addressed a wide assortment of issues, including level of harm for past persecution, nexus, the Board's standard of review of Immigration Judge fact-finding, and remand to address a humanitarian claim to asylum.

Of the 11 reversals in the "other relief" category, most involved criminal grounds of removal and the proper application of the categorical and modified categorical approaches. There were also three *Carachuri-Rosendo* remands, two from the Fifth Circuit and one from the Seventh.

Four of the nine motions to reopen cases involved ineffective assistance of counsel. Two others concerned whether evidence demonstrated changed country conditions or whether newly available evidence was fully considered. Another pair of cases addressed effect of departure with in proceedings.

The chart below shows the combined numbers for January 2010 through September 2010, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Seventh	50	39	11	22.0
Ninth	1533	1300	233	15.2
Fifth	122	106	16	13.1
Third	347	311	36	10.4
Sixth	86	78	8	9.3
Eleventh	176	162	14	8.0
Eighth	52	48	4	7.7
Tenth	30	28	2	6.7
First	31	29	2	6.5
Second	727	684	43	5.9
Fourth	106	101	5	4.7
All	3260	2886	374	11.5

Notably, last year's reversal rate at this point (January through September 2009) was also 11.5%, with 3689 total decisions and 467 reversals.

The numbers by type of case on appeal for the first 8 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	1625	1432	193	11.9
Other Relief	703	603	100	14.2
Motions	932	851	81	8.7

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

Second Circuit:

Wellington v. Holder, __F.3d__, 2010 WL 4103759 (2d Cir. Oct. 20, 2010): The Second Circuit denied the petition for review of an Immigration Judge's order (affirmed by the Board) finding the alien removable under section 212(a)(2)(A)(i)(II) of the Act based on her New York State conviction for possession of a controlled substance (cocaine). The Immigration Judge rejected the alien's argument that based on the Second Circuit's decision in *Rehman v. INS*, 544 F.2d 71 (2d Cir. 1976), she should not be considered "convicted" in light of the State court's subsequent issuance of a Certificate of Relief from Disabilities. The court agreed with the Immigration Judge that *Rehman* was no longer controlling following the 1996 amendment to the Act that included a statutory definition of the term "conviction" (section 101(a)(48)(A) of the Act). The court noted that five circuits have affirmed the Board's subsequent holding in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), which was rejected by the Ninth Circuit, that a rehabilitative action that is not related to a procedural or substantive defect in the underlying criminal proceeding has no impact on a conviction under the new definition. Citing its decision in *Saleh v. Gonzales*, 495 F.3d 17 (2d Cir. 2007), which found section 101(a)(48)(A) to be "ambiguous with respect to the treatment of convictions subject to rehabilitative treatment," thus allowing a full "spectrum of possible interpretations," the court found the Board's interpretation in *Roldan* to be permissible and therefore deserving of *Chevron* deference.

Third Circuit:

De Leon-Ochoa v. Att'y Gen. of U.S., __F.3d__, 2010 WL 3817082 (3d Cir. Oct. 1, 2010): In three consolidated cases, the Third Circuit denied the aliens' petitions for review from decisions of the Board denying their applications for temporary protected status ("TPS") for failure to personally satisfy the requirements of continuous residence and continuous physical presence. The court initially discussed what deference it owed to nonprecedent Board decisions issued by single Board members. In the end, the court declined to rule on this issue, which had not been briefed, was barely argued, and was not dispositive of the issues presented. The court rejected the aliens' argument that they had constructively satisfied the continuous residence requirement "through imputation of their parents' residence," finding this claim to be inconsistent with the plain meaning of the statute, the regulations, and the consistent position of the Attorney General. As to the statutory requirement that a TPS applicant must establish continuous physical presence in the U.S. "since the effective date of the most recent designation of that foreign state," the court was not persuaded by the aliens' argument that the phrase "most recent designation" should be read as the most recent *extension* of TPS status.

Fei Mei Cheng v. Att'y Gen. of U.S., __F.3d__, 2010 WL 3896198 (3d Cir. Oct. 6, 2010): The court granted the petition for review of a female asylum-seeker from China whose coercive family planning claim had been denied by the Board. The alien's refusal to submit to a required abortion and her unsuccessful efforts to avoid a subsequent IUD requirement caused her and her family to suffer a series of punitive actions, including threats, the detention of her boyfriend, and the seizure of her family's farm and truck (their sole means of support). The court rejected the alien's appeal argument that the requisite IUD implantation and check-ups throughout her reproductive years constituted the equivalent of sterilization. The court found the Board's distinction in *Matter of M-F-W- & L-G-* between sterilization and IUD insertion based on the insufficient permanence of the latter to be reasonable and therefore granted *Chevron* deference. However, the court also found that the alien had established that she suffered past persecution on account of her "other resistance" to China's coercive population control policies and remanded to allow the agency to make the ultimate determination of asylum eligibility.

Fifth Circuit:

Rodriguez-Barajas v. Holder, __F.3d__, 2010 WL 4075078 (5th Cir. Oct. 19, 2010): The Fifth Circuit granted a petition for review challenging the Board's determination that it lacked jurisdiction under 8 C.F.R. § 1003.4 because of the alien's departure to Mexico while his habeas petition was pending in Federal court, which resulted in a remand to the Board. The Board ruled that such departure

constituted a withdrawal of the appeal pursuant to the regulation, which references departures "subsequent to the taking of an appeal, but prior to a decision thereon." The court held that where a departure occurred after an appeal to the Board had been adjudicated but while the habeas petition was pending, the departure was not "prior to a decision" on appeal, so the Board had jurisdiction on remand. In a footnote, the court declined to determine whether a departure that occurs while the remanded case is pending before the Board would constitute a withdrawal under 8 C.F.R. § 1003.4.

Ninth Circuit:

Cortez-Guillen v. Holder, __F.3d__, 2010 WL 3859629 (9th Cir. Oct. 5, 2010): The Ninth Circuit granted the petition for review of a decision of the Board holding that the crime of coercion under section 11.41.530(a)(1) of the Alaska Statutes was categorically a crime of violence and thus an aggravated felony under section 101(a)(43)(F) of the Act. The court noted that although the language of the State statute "requires the perpetrator to instill fear in the victim, should he not comply with the demands made on him," such fear need not be of physical violence only but could include nonviolent actions such as blackmail. The matter was therefore remanded to the Board to reconsider the issue under the modified categorical approach.

Covarrubias Toposte v. Holder, __F.3d__, 2010 WL 4189306 (9th Cir. Oct. 26, 2010): The court held that the Board erred in finding that a conviction under section 246 of the California Penal Code was for a crime of violence. The petitioner was convicted of shooting an inhabited dwelling or vehicle and was sentenced to 7 years' imprisonment. The Immigration Judge held that the offense was categorically a crime of violence under both 18 U.S.C. §§ 16(a) and (b) and found the petitioner removable as an aggravated felon pursuant to sections 101(a)(43)(F) and 237(a)(2)(A)(iii) of the Act. Considering only 18 U.S.C. § 16(b), the Board affirmed the finding and dismissed the appeal. Looking only at 18 U.S.C. § 16(b), the court used the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990), and concluded that an offense under section 246 is a general intent crime requiring reckless mens rea. However, under 18 U.S.C. § 16(b), the underlying offense requires intentional use of force or a substantial risk that force will be used intentionally during its commission. Here, the petitioner intentionally discharged a gun with reckless disregard and created a risk of injury to other people and damage to property. However, the shooting did not involve a "substantial risk of using force with intent against persons or property." The court rejected as speculative the Government's argument that such a shooting would evoke a reaction from the occupant of the building or vehicle, which would lead to intentional force by the offender against the occupant.

Tenth Circuit:

Dallakoti v. Holder, __F.3d__, 2010 WL 3860994 (10th Cir. Oct. 5, 2010): The Tenth Circuit denied the petition for review of an asylum-seeker from Nepal whose claim was denied by an Immigration Judge for failure to establish a nexus to his claimed fear of harm. The alien owned a gas station in Nepal; as a result, he was coerced by Maoist rebels to provide them with gasoline and money and was beaten on one occasion when he refused. While admitting that the Maoists' motives were primarily to obtain money and gasoline, he claimed as an additional motive a political opinion imputed to him by the rebels because his father and uncle had served as officers in Nepali political parties in the past. Acknowledging that the case arose under the REAL ID Act's requirement to establish that a protected ground constituted at least "one central reason" for the persecution, the court found that the alien's "scant and inconsistent testimony about political opinions" fell far short of the compelling evidence required for reversal.

BIA PRECEDENT DECISIONS

In *Matter of Greunangerl*, 25 I&N Dec. 351 (BIA 2010), the Board held that bribery of a public official in violation of 18 U.S.C. § 201(b)(1)(A) is not an offense relating to commercial bribery and is therefore not an aggravated felony under section 101(a)(43)(R) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(R). Noting the fundamental conceptual difference in purpose between bribery of a public official and commercial bribery, the Board stated that the gravamen of an offense of bribery of a public official is the intent to influence official conduct. The expectation of pecuniary gain or loss to the Government is immaterial. Commercial bribery, on the other hand, focuses on influencing action in the private sector involving the breach of a duty of fidelity. While the phrase "relating to" in section 101(a)(43)(R) of the Act encompasses a broad range of conduct, it is not so broad as to include bribery of public officials. Therefore the Board concluded that the respondent's crime was not categorically an aggravated felony. It also found that the offense was not an aggravated felony under the modified categorical approach.

REGULATORY UPDATE

75 Fed. Reg. 67,383
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

Extension of the Designation of Somalia for Temporary Protected Status

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Somalia for temporary protected status (TPS) for 18 months, from its current expiration date of March 17, 2011 through September 17, 2012. The Secretary has determined that an 18-month extension is warranted because conditions in Somalia prompting the TPS designation continue to be met. Armed conflict in Somalia is ongoing and, due to such conflict and other extraordinary and temporary conditions, requiring the return of eligible individuals with TPS to Somalia would pose a serious threat to their personal safety. This Notice also sets forth procedures necessary for nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Somalia and whose applications have been granted or remain pending. Certain nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions. Information on late initial registration can be found on the USCIS Web site at *http:// www.uscis.gov* on the "Temporary Protected Status" homepage. USCIS will issue new EADs with a September 17, 2012 expiration date to eligible TPS beneficiaries who timely re-register and apply for EADs.
DATES: The extension of the TPS designation of Somalia is effective March 18, 2011, and will remain in effect through September 17, 2012. The 60-day re-registration period begins November 2, 2010 and will remain in effect until January 3, 2011.

75 Fed. Reg. 63,532
DEPARTMENT OF STATE

In the Matter of the Review of the Designation of the Armed Islamic Group and All Associated Aliases as Foreign Terrorist Organizations Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2003 re-designation of the Armed Islamic Group (GIA) as foreign terrorist organization have changed in such a manner as to warrant revocation of the designation. Although the GIA no longer meets the criteria for designation as a foreign terrorist organization, its remnants and some senior leaders have joined al Qa'ida in the Islamic Maghreb (AQIM), a designated Foreign Terrorist Organization.
Therefore, I hereby determine that the designation of the Armed Islamic Group as a foreign terrorist organization, pursuant to Section 219 of the Immigration and Nationality Act, as amended (8 U.S.C. 1189), shall be revoked.
Dated: September 28, 2010. Hillary Rodham Clinton, Secretary of State.

75 Fed. Reg. 62,173
DEPARTMENT OF STATE

In the Matter of the Review of the Designation of Jemaah Islamiya (JI and Other Aliases) as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 redesignation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.
Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.
Dated: September 28, 2010. Hillary Rodham Clinton, Secretary of State.

to fear persecution. That legal piece of the analysis properly receives *de novo* review . . . ." *Id.* at *9 (footnote omitted).

The court, in a lengthy footnote in *Huang*, traces the difference in its analysis to the difference between the burden that must be met in a CAT claim to prove a 50 per cent or greater probability of an event occurring, and the lower burden in an asylum claim to establish what is "reasonably possible" to occur.

> Fundamental to the [asylum] inquiry is a factual determination regarding whether the event the alien allegedly fears falls within the realm of the possible, *but an equally fundamental component of the analysis requires a judgment about whether the possible event actually gives rise to a reasonable fear*. . . . An IJ may find an event to be reasonably possible and conclude that an alien would have a well-founded fear of persecution based on it. The BIA may review that decision, and conclude, without rejecting the IJ's factual finding regarding the possibility of the event, that, in its judgment, the possibility of the event does not give rise to an objectively reasonable fear of persecution. Such a determination does not reject the IJ's factual finding that the event may occur; it merely constitutes a judgment by the BIA that the event, though possible, does not give rise to an objectively reasonable fear. That exercise is properly performed using a *de novo* standard of review.

Huang, 2010 WL 3489543, at *9 n.8 (emphasis added).

The court's analysis here is a close-run thing: in effect, an alien may have established a "reasonable possibility" that certain events may occur that is reversible only for clear error, but the Board, exercising de novo review, may ultimately determine that there is no or insufficient reasonable basis for the alien's stated fear. To justify its position, the court looked to precedents finding plenary review, in nonimmigration contexts, for mixed questions of law and fact. But more critical was the avowed intention of the Attorney General, in establishing the two-tier level of review, for the Board to be able to reconcile differing decisions based on "'essentially identical facts.'" *Id.* at *10 (quoting 67 Fed. Reg. at 54,890).

> Many aliens flee their home countries under very similar circumstances that should, in fairness, lead to similar outcomes in their asylum petitions. If a determination regarding an alien's well-founded fear were reviewed only under the clearly erroneous standard, it would be difficult to confront the problem of multiple IJs reviewing substantively similar asylum petitions but reaching different conclusions about whether a reasonable person would have a well-founded fear of persecution. The BIA would be powerless to correct the disparity, even when the petitions were identical in all meaningful respects. The BIA has recognized that preventing this type of discord among IJ decisions is one of its major institutional goals, and one that requires it to exercise *de novo* review over how reasonable people would respond to a particular set of facts.

Id. (citing *Matter of Burbano*, 20 I&N Dec. 872, 873-74 (BIA 1994)). Thus, "[o]nce the IJ resolves factual issues . . . , assessing how a reasonable person would respond to those facts is a question of law, and the BIA is within its authority to review that assessment under a *de novo* standard." *Id.* at *11. In doing so, however, the Board must consider the evidence on which the Immigration Judge relied and must explain why the record, taken as a whole, warrants a conclusion different from that reached by the Immigration Judge. *Id.*

This, *Huang* concluded, the Board failed to do. In reversing the grant of asylum to the petitioner, a Chinese woman who feared sterilization based on the birth of two children in the United States, the Board failed to address the evidence relied upon by the Immigration Judge and, instead, "cherry-pick[ed] a few pieces of evidence" to support its conclusion. *Id.* at *12. In contrast to *Kang*, 611 F.3d 157, where the court found that the record compelled a finding that torture was likely and thus declined to remand for further proceedings on the question, *Huang* acknowledged the conflicting state of the record on enforcement of the coercive family planning policy and remanded the record for further proceedings, including application of the proper standard of review.

While *Kaplun* and *Huang* hold sway (for now) only in the Third Circuit, their assessment of the respective roles of Immigration Judges and the Board, and of the importance (and limitations) of findings of fact, merit general consideration and provide timely guidance in drafting decisions. *Huang* suggests that an Immigration Judge should make a clear distinction between the "predictive" factual finding that a certain event or events may or may not occur, and the separate, legal determination whether there is an objective basis to fear such events. Drawing the distinction poses some conceptual difficulties for both analysis and articulation. In many cases, however, the sheer odds of certain events occurring will satisfy the "objective reasonableness" standard. In others, such as *Huang* itself, the case is less clear, and the evidence more conflicting. The Board, for its part, should be even more precise in articulating the standard of review that it is applying to each set of findings by the Immigration Judge: whether facts are past or predictive; whether past or prospective harm rises to the level of persecution; and whether there is an objective basis to fear persecution.

Two questions not answered by *Kaplun* and *Huang* warrant mention: whether Board review of applications for withholding of removal under section 241(b)(3) of the Act should be guided by *Kaplun* or by *Huang*; and whether the determination that past or prospective harm is "on account of" a ground specified in the definition of a "refugee" is a finding of fact or conclusion of law. On the first question, the language in *Huang* granting the Board wider berth to assess whether fear of harm is objectively reasonable appears limited to asylum cases. If true, this would limit the Board's de novo review in withholding cases to determine whether past or future harm constitutes persecution. The second question is trickier—while fact-finding pertinent to the "nexus"' inquiry would clearly fall under "clear error" review, the conclusion that such facts establish a nexus would appear to be a question of law or, at the very least, a mixed question of law and fact. Clearly, in cases arising under the REAL ID Act, the conclusion that animus toward an applicant's political opinion or religion constitutes "one central reason" for feared harm seems to be legal in nature. Also, many of the same institutional goals cited in *Huang* for according the Board de novo review on the objective reasonableness of a claim would appear equally applicable to the question of nexus. These prognostications may be as valid as the lead author's pick of the Phillies to return to the World Series this year, but are nonetheless offered as possible guidance for handling such issues in Third Circuit cases until further clarified by the court itself.

***Restrepo*: Solidifying the Consensus on "Sexual Abuse of a Minor"**

The Third Circuit has not been reluctant, as demonstrated by *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, and other decisions, to question the Board's rulings on deportability for certain criminal offenses. *See, e.g.*, *Evanson v. Att'y Gen. of U.S.*, 550 F.3d 284 (3d Cir. 2008); *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005); *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002). Its recent decision in *Restrepo*, however, joins the majority of circuits that have endorsed the Board's definition of the aggravated felony of "sexual abuse of a minor" and represents perhaps the sharpest rebuke yet to the dissenting approach adopted by the Ninth Circuit. *Restrepo*, 617 F.3d 787 (deferring to the Board's definition in *Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999)). *Contra Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010).

Congress left the term "sexual abuse of a minor" undefined when it added the offense to the list of aggravated felonies in 1996. The Board in *Rodriguez-Rodriguez* chose, from among the variety of definitions present in other provisions of Federal law, the definition in 18 U.S.C. § 3509(a)(8)—not a provision assigning criminal liability, but one pertaining to the rights of child victims and child witnesses. That statute provides:

> "[S]exual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children . . . .

Restrepo rejected the chief argument that was presented by petitioners (who had been found deportable as aggravated felons under *Rodriguez-Rodriguez*) and was accepted only thus far by the Ninth Circuit: that "sexual abuse" should be defined by reference to the crime as defined in Federal *criminal* statutes, primarily 18 U.S.C.

§ 2243(a) which, unlike the definition adopted by the Board, requires physical contact with the victim:

> Whoever . . . knowingly engages in a sexual act with another person who—
>
> (1) has attained the age of 12 years but has not attained the age of 16 years; and
>
> (2) is at least four years younger than the person so engaging;
>
> or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

In rejecting the argument, *Restrepo* concluded that sole reliance on § 2243 would be contrary to congressional intent "to expand the scope of activities constituting an aggravated felony." *Restrepo*, 617 F.3d at 799. The court conducted a survey of State statutes proscribing sexual abuse against minors and found that "to limit the definition of sexual abuse of a minor to the conduct proscribed in § 2243, a host of misconduct criminalized by state law would not qualify as an aggravated felony under the INA." *Id.* at 799. For example, the court found that, under the petitioner's and Ninth Circuit's view, sex crimes against minors in New Jersey, Pennsylvania, and Delaware involving intentional touching of the minor victim's "sexual or other intimate parts, " either directly or through the clothing, would fail to qualify as "sexual abuse of a minor" simply because § 2243 exempts touching through the clothing. *Id.* at 795 n.7.

The court also rejected the petitioner's argument that an element of "violence" should be read into the definition of "sexual abuse of a minor" solely because of the violent nature of the offenses also enumerated at section 101(a)(43)(A) of the Act (i.e., murder and rape). To do so, the court held, would be to misunderstand the broader context of the legislation, its object, and policy. The court consulted the House conference report and found that "sexual abuse of a minor" was added to the Act along with other amendments classifying crimes of domestic violence, stalking, child abuse, child neglect, and child abandonment, with the intent to "expand both the protections afforded to minors and the penalties applicable to aliens who commit crimes against minors." *Restrepo*, 617 F.3d at 794. The court found that it would be "counterintuitive" to limit the definition of the phrase by requiring an element of violence and applying the definition found in 18 U.S.C. § 2243. *Id.* at 795.

The court also noted the Second Circuit's endorsement of the Board's reasoning in *Rodriguez-Rodriguez*. In *Mugalli v. Ashcroft*, 258 F.3d 52, 58-59 (2d Cir. 2001), the Second Circuit agreed that § 3509(a) was appropriate because "it is consonant with the generally understood broad meaning of the term 'sexual abuse' as reflected in *Black's* [*Law Dictionary*]." The Third Circuit agreed with the Second Circuit that the "reasonableness of the [Board's] resort to § 3509(a) to define 'sexual abuse of a minor' is rooted in the consonance between that statutory provision and the commonly accepted definition of 'sexual abuse.'" *Restrepo*, 617 F.3d at 796. Aside from the Second Circuit, the Seventh Circuit has also explicitly adopted the definition supplied in *Rodriguez-Rodriguez* via deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Gaiskov v. Holder*, 567 F.3d 832, 835 (7th Cir. 2009). Furthermore, while the Tenth, Eleventh, and Fifth Circuits have not applied *Chevron* deference to the Board's definition, they have independently found that application of § 3509(a) was proper. *See Vargas v. DHS*, 451 F.3d 1105, 1107-08 (10th Cir. 2006); *Bahar v. Ashcroft*, 264 F.3d 1309, 1311-12 (11th Cir. 2001); *United States v. Zavala-Sustaita*, 214 F.3d 601, 606-08 (5th Cir. 2000).

As previously chronicled in these pages, the Ninth Circuit has a different impression. It does not accord *Chevron* deference to the Board in light of its determination that "Congress ha[d] enumerated the elements of the offense" at 18 U.S.C. § 2243. *Estrada-Espinoza v. Mukasey*, 546 F.3d at 1152. Determining this section to be "specific congressional guidance" on the definition of "sexual abuse of a minor," the Ninth Circuit found it not necessary to "determine the "'generic sense in which the term is now used in the criminal codes of most States.'" *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). The Third Circuit noted "with interest" that the Ninth Circuit has since retreated from this position and limited its holding to statutory rape laws. *Restrepo*, 617 F.3d at 799 (citing *United States v. Medina-Villa*, 567 F.3d 507, 515 (9th Cir. 2009)).

In May, the Ninth Circuit reiterated its commitment to the principle that such laws, in order to constitute sexual abuse of a minor, must explicitly protect minors aged 16 or under and must address conduct that is both sexual *and* abusive in nature—there is no presumption that all sexual conduct with a minor is inherently abusive. *Rivera-Cuartas*, 605 F.3d 699. The

petitioner had been convicted in Arizona for performing oral sex on a 16-year-old boy and was sentenced to 3 years' probation. Ariz. Rev. Stat. § 13-1405(A) ("[A] person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age."). Finding the case controlled by *Estrada-Espinoza* and *Medina-Villa*, the court held not only that this offense is not categorically "sexual abuse of a minor," but also that its lack of an age difference requirement and the element of abuse disqualifies it from the application of the modified categorical approach. *Rivera-Cuartas*, 605 F.3d at 702 (citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007)). The court also emphasized that a criminal statute includes the element of "abuse" only if "it expressly prohibits conduct that causes 'physical or psychological harm in light of the age of the victim in question.'" *Id.* (quoting *Medina-Villa*, 567 F.3d at 513).

Restrepo and *Rivera-Cuartas* further sharpen the circuit conflict on the question of sexual abuse. It remains to be seen if the Supreme Court will step in to settle the matter. A petition for certiorari in *Restrepo* would present perhaps the clearest opportunity yet for the Justices to do so.

Duhaney: Res Judicata No Bar To Filing New Crime-Based Charges

Recent years have seen a rise in the number of cases where the Government seeks to file new charges, particularly involving criminal convictions, where the initial charges have been nullified by appellate precedent or vacatur of the conviction(s) on which those charges were based. With *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), now in the books, expect such instances to increase, as State convictions are vacated on the basis of ineffective assistance of counsel in not advising on the immigration consequences of a guilty plea. Immigration Judges and the Board will thus likely face more cases where, after such a vacatur, the Department of Homeland Security ("DHS") seeks to file new charges based on other criminal convictions or grounds of deportability that could have been filed initially, but were not. A recent Third Circuit decision, adopting a "transactional" approach to the doctrine of res judicata in administrative proceedings, confirmed the DHS's ability to file such new charges. *Duhaney*, 2010 WL 3547434.

The petitioner had a complex criminal and procedural history. Convicted by jury in 1985 of second degree manslaughter and criminal possession of a weapon, and by guilty plea the same year of criminal sale of a controlled substance, he was placed in deportation proceedings in 1986, based solely on the controlled substance conviction. He applied for and received a waiver under former section 212(c) of the Act. At the 1993 hearing on section 212(c) relief, the Government's trial attorney, when asked about the firearms offense (which could not have been waived under section 212(c)), responded that there might be a problem in lodging such a charge to the effective date of the relevant ground of deportation, and that while such a charge might be lodged in the future, he doubted that the Government would do that. The Immigration Judge expressed "real reservations," based on res judicata, that such charges could be lodged in the future.

There matters rested until Duhaney pled guilty to drug possession in 2000 and a Notice to Appear was filed based on that conviction in 2004. He was duly found deportable, with no eligibility for relief—a decision affirmed by the Board in 2005. The following year, a State court vacated the conviction with prejudice, prompting *both* parties to file motions to reopen: Duhaney seeking termination of proceedings, and the Government seeking a remand in order to file new charges of removal. The motion was granted, and new charges were lodged based on the 1985 firearms and drug trafficking convictions. Before the Third Circuit, the petitioner argued, among other things, that res judicata barred the filing of the firearms charge, since that charge could have been filed in the initial proceeding brought in 1993, as well as in the second proceeding when filed in 2004.

The Third Circuit disagreed. Its "transactional approach" to res judicata generally requires that plaintiffs present in a single suit all claims for relief arising out of the same transaction or occurrence. *Duhaney*, 2010 WL 3547434, at *7. In this case, the "transactions" were not the prior deportation and removal proceedings, but, as the Government argued, the specific factual occurrences giving rise to each charge of removal.

> [T]he Government's approach to defining the relevant cause of action is more faithful to our res judicata precedent and the equitable principles underlying the

> doctrine, to say nothing of congressional intent. . . . [T]he Government secured a removal order against Duhaney based on criminal convictions for which it had not previously charged Duhaney as removable. Although there are common elements of fact between the two removal proceedings, the critical acts and the necessary documentation were different for the two proceedings. . . . [T]he doctrine of res judicata did not bar the Government from lodging additional charges of removability after Duhaney's 2000 conviction was vacated.

Id.

As with *Restrepo*, the Third Circuit noted its agreement with the approach of the Second Circuit, and its disagreement with the Ninth Circuit. *See Channer v. DHS*, 527 F.3d 275, 281-82 (2d Cir. 2008) (finding that res judicata did not apply to removal proceedings brought on a State criminal conviction after the original proceedings based on a vacated Federal conviction were terminated, because each proceeding stemmed from a separate transaction). *Contra Al-Mutarreb v. Holder*, 561 F.3d 1023 (9th Cir. 2009); *Bravo-Pedroza*, 475 F.3d at 1360 (stating that "elementary fairness" requires the Government to charge all available grounds of removal in the initial proceeding and holding that res judicata barred the second proceeding based on a separate conviction). *But see Poblete Mendoza v. Holder*, 606 F.3d 1137 (9th Cir. 2010) (holding that res judicata does not bar the use of a prior shoplifting charge that could not, standing alone, have been a ground for removal in the prior proceeding, because only the commission of a subsequent crime involving moral turpitude made the shoplifting conviction a ground for a removal charge).

The Seventh Circuit also follows the "transactional" test and has held that an initial deportation proceeding based on a conviction for sexual assault did not bar a subsequent proceeding based on that same conviction, because the second proceeding was based on a new theory—aggravated felony—which did not exist at the time of the first proceeding, and which Congress explicitly made retroactive. *Alvear-Velez v. Mukasey*, 540 F.3d 672 (7th Cir. 2008). Because of the change in law, there was no "identity of the cause of action" between the first proceeding and the second. *Id.* at 681; *see also Channer*, 527 F.3d at 280 n.4 (questioning whether res judicata even applies in cases of aliens convicted of aggravated felonies, given clear and unambiguous congressional intent to remove such aliens).

Conclusion

While no single theme unites *Kaplun*, *Huang*, *Restrepo*, and *Duhaney*, each decision adds some analytical clarity to issues commonly faced in Immigration Courts and at the Board. One need not agree, for example, that "predictive facts" are in the same category as "historical facts" to benefit from the Third Circuit's explication why such determinations by an Immigration Judge are not in precisely the same category as the definition of what constitues "torture" or "persecution." Similarly, in circuits that have not squarely addressed what the proper contours of "sexual abuse of a minor" are, or whether old convictions can be the basis for new removal proceedings, *Restrepo* and *Duhaney* provide a valuable counterweight to the outlying views of the Ninth Circuit.

Edward R. Grant, whose schoolbooks were once graced by Official WIBG-99 Bookcovers, was appointed to the Board of Immigration Appeals in January 1998.

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