

**The Case for Humanitarian Asylum: Preparing Your Past Persecution  
Asylum Claim in a Backlogged Immigration System**

**Resource Guide**

**Asylum statutes**

- INA § 101(a)(42) – Definition of “Refugee”
- INA § 208 – Asylum eligibility, bars, and procedures

**Humanitarian asylum rule in international law**

United Nations High Commissioner for Refugee’s Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 136, concerning certain nationals whose reasons for becoming a refugee have ceased to exist.

**Humanitarian Asylum Regulations:**

- 8 C.F.R. § 208.13(b)(1)(iii) and 8 C.F.R. § 1208.13(b)(1)(iii) *Grant in the absence of well-founded fear of persecution*

An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the **severity of the past persecution**;

**OR**

(B) The applicant has established that there is a **reasonable possibility** that he or she may suffer **other serious harm** upon removal to that country.

- Department of Justice; *Asylum Procedures*, 65 Fed. Reg. 76,121, 76,127 (2000)
  - Preamble to regulatory amendments: “[O]ther serious harm . . . means harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution.”
  - For online access, see <https://www.gpo.gov/fdsys/pkg/FR-2000-12-06/pdf/00-30601.pdf>

- Executive Office for Immigration Review; *New Rules Regarding Procedures for Asylum and Withholding of Removal*, 63 Fed. Reg. 31,945, 31,947 (proposed June 11, 1998)
  - Preamble to proposed regulatory amendments explaining move to include “other serious harm” to the humanitarian asylum analysis:
 

“The Department believes it is appropriate to broaden the standards for the exercise of discretion . . . . For example, there may be cases where it is appropriate to offer protection to applicants who have suffered persecution in the past and who are at risk of future harm that is not related to a protected ground. Therefore, the rule includes, as a factor relevant to the exercise of discretion, whether the applicant may face a reasonable possibility of “other serious harm” upon return to the country of origin or last habitual residence.”
  - The preamble also explains the “reasonable possibility” standard:
 

“The “reasonable possibility” language is consistent with the Supreme Court’s and the Department’s regulatory interpretation of the well-founded fear standard. See *INS v. Cardoza-Fonseca*, 480 U.S. at 440; 8 CFR § 208.13(b)(2).”
  - For online access, see: <https://www.gpo.gov/fdsys/pkg/FR-1998-06-11/pdf/98-15590.pdf>
- 8 C.F.R. § 1208.13(c)
  - Lists statutory bars to asylum, including humanitarian asylum, found at INA § 208(b)(2)

## **Humanitarian Asylum Case Law:**

### General Case Law

- Past Persecution is a prerequisite for either prong of humanitarian asylum.
  - *Matter of D-I-M*, 24 I.&N. Dec. 446, 451 (BIA 2008)
    - Explaining it is the immigration judge’s duty to first rule on past persecution before adjudicating humanitarian asylum claims.
- Humanitarian asylum can be alternative path to relief absent a ruling on well-founded fear.
  - *Matter of S-A-K- & H-A-H-*, 24 I.&N. Dec. 464, 465 (BIA 2008)
    - In case where past persecution established, Board declined to address contested question whether the presumption of future persecution was rebutted, where evidence allowed grant of discretionary humanitarian asylum pursuant to 8 C.F.R. § 1208.13(b)(1)(iii)(A) due to severity of the past persecution.

### Severe Past Persecution

- *Matter of Chen*, 20 I.&N. Dec. 16 (BIA 1989)
  - Religious persecution during the Chinese cultural revolution created a genuine subjective fear of returning due to his history of mistreatment and the mistreatment and death of his father.
  - Seminal case regarding severe past persecution.

- *Matter of B-*, 21 I.&N. Dec. 366, 72 (BIA 1995)
  - Applicant imprisoned for political reasons and faced “the routine use of various forms of physical torture and psychological abuse, including beatings and electrical shocks, inadequate diet and medical care, and the integration of political prisoners with criminal and mentally ill prisoners. . . . likely exacerbated by his separation from his family and the fact that his missing father’s fate was unknown.”
- *Matter of N-M-A-*, 22 I.&N. Dec. 312, 325 (BIA 1998)
  - “[A]sylum is warranted for ‘humanitarian reasons’ *only* if [the applicant] demonstrates that in the past [he] or his family has suffered under atrocious forms of persecution.”
  - Declined to extend humanitarian asylum for severe past persecution where applicant had experienced a month-long detention and beatings, but he knew his father who had disappeared was likely dead. The court looked at the degree of harm suffered, the length of time over which harm was inflicted, and whether there was evidence of severe psychological trauma resulting from the harm.
- *Matter of S-A-K- & H-A-H-*, 24 I.&N. Dec. 464 (BIA 2008)
  - Finding severe past persecution where applicant suffered FGM resulting in continuing pain and physical discomfort.
- *Ordonez-Quino v. Holder*, 760 F.3d 80, 94 (1d Cir. 2014)
  - While the Court did not decide the issue of humanitarian asylum, it indicated that extraordinary suffering and permanent disability are factors when considering severe past persecution.
- *Jalloh v. Gonzales*, 498 F.3d 148 (2d Cir. 2006)
  - Must show evidence of long-lasting physical or mental effects of the persecution.
- *Naizgi v. Gonzales*, 455 F.3d 484 (4th Cir. 2006)
  - “Under our precedent, “[e]ligibility for asylum based on severity of persecution alone is reserved for the *most atrocious abuse*.” *Gonahasa v. INS*, 181 F.3d 538, 544 (4th Cir.1999)(emphasis added). We have limited the humanitarian asylum exception to “ ‘the rare case where past persecution is so severe that it would be inhumane to return the alien even in the absence of any risk of future persecution.’ ” *Id.* (quoting *Vaduva v. INS*, 131 F.3d 689, 690 (7th Cir.1997)).”
- *Lal v. I.N.S.*, 255 F.3d 998, 1004 (9th Cir. 2001), opinion amended on reh'g, 268 F.3d 1148 (9th Cir. 2001)
  - Severe past persecution does not require an ongoing disability.
- *Feresin v. Ashcroft*, 83 F.App’x 904, 907 (9th Cir. 2003)
  - Imprisoned and severely beaten “until practically dead” on a weekly basis resulting in a continuing physical deformity.
- *Ghotra v. Gonzales*, 179 F.App’x 989 (9th Cir. 2006)
  - Ongoing torture (here, electrical shocks to the mouth) constitutes severe past persecution.

### Other Serious Harm

- *Matter of L-S-*, 25 I.&N. Dec. 705, 714 (BIA 2012)
  - “No nexus between the ‘other serious harm’ and an asylum ground . . . need be shown.”

- Harms must be considered in the aggregate and viewed under the totality of the circumstances.
- Harms and conditions faced by large segments of the population should be considered.
- Harms may include “civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury.”
- *Sheriff v. Att’y Gen. of the U.S.*, 587 F.3d 584, 596 (3d Cir. 2009)
  - The possibility of being murdered may qualify as “other serious harm.”
- *Pllumi v. Att’y Gen. of the U.S.*, 642 F.3d 155, 162-63 (3d Cir. 2011)
  - Unavailability of necessary medical care could constitute “other serious harm.”
- *Khoyavswkiy v. Mukasey*, 540 F.3d 555, 576-77 (7<sup>th</sup> Cir. 2008)
  - Inability to access medication can be a factor in determining “other serious harm.”
- *Belishta v. Ashcroft*, 378 F.3d 1078, 1080-81 (9<sup>th</sup> Cir. 2004)
  - Violence motivated solely by financial gain can constitute “other serious harm.”
- *Mohammed v. Gonzales*, 400 F.3d 785, 801 (9<sup>th</sup> Cir. 2005)
  - Ongoing human rights abuses including killing of civilians may constitute “other serious harm.”
- *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9<sup>th</sup> Cir. 2005)
  - Lack of health insurance and unavailability of necessary medications factor into a determination of “other serious harm.”

#### Waiving Humanitarian Asylum

- Some courts explicitly, and the BIA at least implicitly, have explained the regulation 8 C.F.R. § 1208.13(b) as setting forth successive stages of asylum analysis that all asylum adjudicators are required to consider and complete, including an assessment of discretionary humanitarian asylum in any case where a properly raised claim of past persecution has been established, but the resulting presumption of a well-founded fear of future persecution may be rebutted.
  - *Ordonez-Quino v. Holder*, 760 F.3d 80, 95 (1d Cir. 2014)
 

“[C]ontrary to the BIA’s assertion, Ordonez–Quino did not waive his claim to humanitarian asylum by not explicitly requesting it from the IJ apart from his overall past-persecution-based asylum claim. As the government explains, what we refer to as “humanitarian asylum” is not a separate form of relief created by the Immigration and Nationality Act. Rather, it is a discretionary form of relief that may be granted to certain asylum seekers. See 8 C.F.R. § 1208.13(b)(1)(iii)(A)-(B). Neither the BIA nor the government has cited any case—and we have found none—requiring an asylum seeker to request humanitarian asylum independent of other past-persecution-based asylum relief before the IJ in order to preserve his claim to humanitarian asylum before the BIA.”
  - *Matter of L-S-*, 25 I.&N. Dec. 705 (BIA 2012)

- Beware, however, that some courts like the Eighth Circuit, and the BIA in other contexts, apply strict standards for waiver of sub-claims in immigration cases, and may treat humanitarian asylum as a “waived” aspect of an asylum case. The best practice, especially in the Eighth Circuit, is to exercise caution and always explicitly raise, argue, and preserve humanitarian asylum as though it could be treated as a distinct asylum claim.
  - *Garcia-Colindres v. Holder*, 700 F.3d 1153, 1158–59 (8th Cir. 2012)
  - *Mambwe v. Holder*, 572 F.3d 540, 550–551 (8th Cir. 2009)
  - *Martinez Carcamo v. Holder*, 613 F.3d 916, 925 n. 6 (8th Cir. 2013)