# NOTE

# *Pitcherskaia v. I.N.S.*: The Ninth Circuit Attempts to Cure the Definition of Persecution

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In March 1992, Alla Pitcherskaia, a thirty-five-year-old Russian native and citizen, entered the United States as a visitor.[1] In June of that same year, she applied for asylum based on a fear of persecution because of anti-Communist political opinions held by both herself and her father.[2] The Immigration and Naturalization Service Asylum Office interviewed Ms. Pitcherskaia and, after finding that she failed to establish a well-founded fear of persecution, denied her application and placed her in deportation proceedings for overstaying her visa.[3] Ms. Pitcherskaia then renewed her request for asylum and withholding of deportation or, in the alternative, voluntary departure, claiming an additional basis for granting her petition.[4] This additional basis was her past persecution and feared future persecution because she belongs to a particular social group, that of Russian lesbians, and because she politically supports the civil rights of gays and lesbians in Russia.[5]

In a full hearing before an Immigration Judge (IJ), Ms. Pitcherskaia testified that she had first been arrested in 1980 by the militia, charged with "hooliganism," and detained for fifteen days after protesting the beating of a gay friend by a school director.[6] One year later she was arrested again, imprisoned, and beaten for demanding the release of the leader of a lesbian youth organization of which she is a member.[7] She claims that this arrest resulted in warnings to dissociate from the organization and threats of involuntary psychiatric confinement if she did not do so.[8] She was arrested several times over the next two years and, on

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1. *See* Pitcherskaia v. I.N.S., 118 F.3d 641, 643 (9th Cir. 1997).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.* at 644. "Hooliganism" is a catchall criminal charge used in Russia to detain people, particularly for political reasons, without trial for 10-15 days. *See id.* n.2.
7. *See id.* at 644. This demonstration was admitted by Ms. Pitcherskaia to be illegal since it was unlawful for more than three people to demonstrate or assemble without permission from the Russian government. *See id.* n.3.
8. *See id.* at 644.

occasion, was beaten and forced to identify other gays and lesbians.[9] In 1983, she was arrested and again charged with "hooliganism," the reasons for which she claims were her known sexual identity and political opinions.[10]

These arrests continued from 1985 to 1991.[11] During this time, Ms. Pitcherskaia was abducted by the militia and interrogated about her sexual identity while visiting an ex-girlfriend who was being forcibly detained in a mental institution.[12] She was registered as a "suspected lesbian," although she denied it, and was ordered to undergo treatment at her local clinic.[13] Failure to comply with this order would result in forced attendance and forced institutionalization.[14] Her attendance at the "therapy" sessions resulted in her being diagnosed with "slow-going schizophrenia" and being prescribed sedative drugs.[15] Several other arrests occurred while Ms. Pitcherskaia was in the homes of gay friends, and "Demands for Appearance" were issued so that the militia could interrogate her about her sexual orientation and political activities.[16] Two more such "Demands for Appearance" have been issued since her arrival in the United States; her failure to respond is the basis for her fear that she will be forcibly institutionalized if she returns to Russia.[17]

After hearing testimony concerning these events and reviewing the State Department's advisory opinion, the IJ denied Ms. Pitcherskaia's applications for asylum and withholding of deportation, instead granting thirty days voluntary departure.[18] Ms. Pitcherskaia then appealed to the Board of Immigration Appeals (BIA or Board), which also denied her petitions for asylum and withholding of deportation, reinstating voluntary departure.[19] The BIA found that Ms. Pitcherskaia had failed to meet her burden of establishing eligibility for relief under either Section 208(a) or 243(h) of the Immigration and Nationality Act (INA or Act), concluding she had not, in fact, been persecuted.[20] The BIA majority found that the

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9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.* Ms. Pitcherskaia's ex-girlfriend was herself being subjected to various "therapies" intended to change her sexual orientation, including electric shock treatment, while institutionalized. *See id.*
13. *Id.*
14. *See id.*
15. *Id.* "Slow-going schizophrenia" is another catchall phrase used in Russia, often used to "diagnose" homosexuals. Ms. Pitcherskaia testified that she never took the sedative drugs the psychiatrist prescribed. *See id.*
16. *See id.*
17. *See id.* at 645.
18. *See id.*
19. *See id.*
20. *See id.*

Russian militia and psychiatric facilities intended to "cure" Ms. Pitcherskaia, not to punish her, through the use of involuntary psychiatric treatments and these actions did not constitute "persecution" within the meaning of the Act.[21] The BIA also concluded sufficient changes had taken place in Russia to make future persecution unlikely.[22] Ms. Pitcherskaia then petitioned the United States Court of Appeals for the Ninth Circuit for review of the BIA's decision denying her applications.[23] At the hearing, the court acknowledged inconsistencies in the interpretation of "persecution" among courts and administrative agencies.[24] The court, holding that Section 1101(a)(42)(A) of the INA does not require an alien seeking asylum to prove that her persecutor harbored a subjective intent to harm or punish, found that the BIA majority applied an erroneous definition of persecution and granted Ms. Pitcherskaia's petition for review, reversing the BIA's order denying asylum and withholding of deportation.[25]

In the United States, the INA,[26] as amended by the Refugee Act of 1980 (Refugee Act),[27] governs matters concerning immigration and asylum. In order to conform the INA to the United Nations Protocol Relating to the Status of Refugees, the Refugee Act amended the INA by adding elements that an alien must satisfy to qualify as a refugee.[28] A refugee is defined by this statute as a person who is outside his or her country or the country where he or she has habitually resided and who is unable or unwilling to return to or avail himself or herself of the protection of that country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[29] Once designated as a refugee, an alien is eligible for consideration of asylum by the Attorney General.[30]

Legal interpretations of the Act by the Board are reviewed de novo.[31] However, in instances where the governing statute does not define certain terms, such interpretations made by an agency are generally entitled to

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21. *See id.*
22. *See id.*
23. *See id.* at 643.
24. *See id.* at 647-48.
25. *See id.* at 649.
26. 8 U.S.C. § 1101-1525 (1994).
27. *Id.*
28. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223. The United States acceded to the Protocol in 1968.
29. 8 U.S.C. § 1101(a)(42)(A).
30. See 8 U.S.C. § 1158(b).
31. *See* Fisher v. I.N.S., 79 F.3d 955, 961 (9th Cir. 1996)

deference.[32] The Act does not define "persecution;" thus courts will defer to the Board's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute."[33]

The Ninth Circuit adopted its definition of the word "persecution" in *Kovac v. I.N.S.*[34] Here, the court found that "there is nothing to indicate that Congress intended [the Act] to encompass any less than the word 'persecution' ordinarily conveys—the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."[35] This is an objective definition of persecution because it is determined by what a reasonable person would deem "offensive," as opposed to the subjective intent of the persecutor.[36] In *Kovac*, the court reversed an INS order for deportation because the finding that the petitioner's testimony "completely belied" his own claims was based upon a "patent misconstruction" and was therefore arbitrary and capricious.[37] The court remanded the case, stating, "where, as in this case, there is substantial doubt that the administrative agency would have reached the result it did absent the defective finding, remand is required."[38]

In *Sagermark v. I.N.S.*,[39] the Ninth Circuit upheld a decision by the INS to deny a request for asylum and withholding of deportation because a Swedish alien had not presented evidence substantial enough to support a well-founded fear of persecution.[40] The court reiterated its definition of persecution, also implying that if Sagermark had actually produced evidence that he would be unjustly institutionalized if he returned to Sweden, he might have been able to support a claim of persecution.[41] In fact, the alien did not present substantial evidence of persecution at the hands of the Swedish government so the BIA's ruling was upheld.[42]

In *I.N.S. v. Elias-Zacarias*,[43] the Supreme Court reversed a decision by the Ninth Circuit denying the re-opening of a petition for political asylum and deportation. That case turned on a determination of what constituted persecution on account of political opinion.[44] The rule in that

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32. *See id.* (citing Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984)).
33. *Id.* (quoting Romero v. I.N.S., 39 F.3d 977, 980 (9th Cir. 1994)).
34. 407 F.2d 102 (9th Cir. 1969).
35. *Id.* at 107.
36. *See* Pitcherskaia v. I.N.S., 118 F.3d 641, 647 (9th Cir. 1997).
37. *Kovac*, 407 F.2d at 107.
38. *Id.* at 107-08 (quoting Braniff Airways, Inc. v. CAB, 379 F.2d 453 (D.C. Cir. 1967)).
39. 767 F.2d 645 (9th Cir. 1985).
40. *See id.* at 649-50.
41. *See id.* at 650.
42. *See id.* at 651.
43. 502 U.S. 478 (1992).
44. *See id.* at 482.

case created the often-cited "motive requirement."[45] The Court ruled that due to the words "on account of" used in the Act, the motive of the persecutor is only important when used to show that an alien was persecuted "on account of" a characteristic he himself has or is perceived to have.[46] Thus, the Supreme Court held that the existence of a general political motive underlying forced conscription into guerrilla military forces did not constitute persecution on account of political opinion.[47]

However, the BIA, along with several circuit courts, has used a definition of persecution that includes intent to punish or inflict harm. In the 1985 BIA decision *Acosta*,[48] the Board stated that for an alien to show he will likely become the victim of persecution, the alien must demonstrate that

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.[49]

In this case, the BIA went into detail concerning the meaning of persecution prevalent before the Refugee Act came into being.[50] It pointed to two significant aspects of the common construction: the intent to punish and the type of punishment being inflicted by a government or someone the government is unable or unwilling to control.[51] The Board concluded that words used in an original act, when repeated in subsequent legislation, are presumed to retain the same meaning; therefore, the Board saw no reason not to apply the pre-Refugee Act construction of persecution.[52]

The Seventh Circuit also used a definition that includes punishment in *Sivaainkaran v. I.N.S.*[53] The court acknowledged that "persecution" is not defined in the Act, but stated that in the past it has described persecution as "punishment" or "the infliction of harm" for political,

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45. *See, e.g.*, Pitcherskaia v. I.N.S., 118 F.3d 641, 646-47 (9th Cir. 1997); Fisher v. I.N.S., 79 F.3d 955 (9th Cir. 1996); Sivaainkaran v. I.N.S., 972 F.2d 161, 165 (7th Cir. 1992); Canas-Segovia v. I.N.S., 970 F.2d 599, 601 (9th Cir. 1992).

46. *See Elias-Zacarias*, 502 U.S. at 482. In the noted case, the court states that the BIA erroneously relied on this motive requirement as requiring an alien to prove that a persecutor intended to inflict harm in order to punish. *See Pitcherskaia*, 118 F.3d at 647.

47. *See Elias-Zacarias*, 502 U.S. at 482.

48. Acosta, 19 I. & N. Dec. 211 (BIA 1985).

49. *Id.* at 212.

50. *See id*. at 222-23.

51. *See id.* at 222.

52. *See id.* at 222-23.

53. 972 F.2d 161 (7th Cir. 1992).

religious, or other reasons that are offensive.[54] In that case, the Seventh Circuit denied an application for asylum and withholding of deportation, finding that the petitioner did not have a well-founded fear of persecution simply because he feared harassment resulting from an ethno-religious conflict in Sri Lanka.[55] The court noted that "political turmoil alone does not permit the judiciary to stretch the definition of 'refugee' to cover sympathetic, yet statutorily ineligible, asylum applicants."[56]

The Fifth Circuit has likewise adopted a definition of persecution that includes punishment. In *Faddoul v. I.N.S.*,[57] the court denied asylum and withholding of deportation to a Palestinian alien because his claims did not show that harm or suffering would be inflicted on him as punishment for possessing a belief or characteristic that his persecutor wanted to overcome.[58] The court found that the conditions imposed on the alien were also imposed on other non-Saudis within Saudi Arabia, and, thus, he could not show that Palestinians, as a group, had been singled out for persecution.[59]

In the noted case, the court began by reviewing the statutory scheme for granting asylum. First, the court restated the definition of a refugee provided by the Act and noted that "either past persecution or a well-founded fear of future persecution provide eligibility for a discretionary grant of asylum."[60] The court then laid out a two-part test for the establishment of a well-founded fear of persecution. This test requires both a "subjectively genuine" and "objectively reasonable" fear of persecution "on account of" political opinion or membership in a particular social group.[61] "The subjective component requires that the

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54. *See id.* at 165 n.2.

55. *See id.* at 165.

56. *Id.*

57. 37 F.3d 185 (5th Cir. 1994).

58. *See id.* at 188. The alien's claims included Saudi Arabia's denial of basic living, citizenship, and exit/re-entry privileges. The court, however, rested on the fact that neither the petitioner nor his family had ever been arrested, detained, interrogated, or physically harmed. *See id.*

59. *See id.* at 188-89.

60. Pitcherskaia v. I.N.S., 118 F.3d 641, 645 (9th Cir. 1997) (citing Lopez-Galarza v. I.N.S., 99 F.3d 954, 958 (9th Cir. 1996)). The court noted that in order for Ms. Pitcherskaia to qualify for claims of persecution based on membership in a particular social group, she would have to prove that she was in fact a member of a particular social group. *See id.* n.5. Ms. Pitcherskaia claims that her status as a Russian lesbian satisfies this requirement. *See id.* at 643. The IJ also followed this assumption. *See id.* at 645 n.5. The BIA, however, did not review the issue because of its finding that Ms. Pitcherskaia had not proved the threshold requirement that she was in fact persecuted. *See id.* As this court's decision was based on reviewing the BIA's definition of persecution, it did not rule on whether or not Ms. Pitcherskaia was actually persecuted and thus neither did it look at whether Ms. Pitcherskaia was qualified to bring claims as a member of a particular social group. *See id.*

61. *Id.* at 646.

applicant have a genuine concern that he will be persecuted."[62] To satisfy this first requirement, an alien need only testify that she does fear persecution.[63] To prove the objective component of the test, an alien must present credible, direct, and specific evidence to establish a reasonable fear of persecution.[64] The court stated that evidence of past persecution is enough to create a presumption of a well-founded fear of persecution[65] and is also enough to establish eligibility for asylum on its own.[66] The court also noted that a presumption of a well-founded fear of persecution may be rebutted by evidence that conditions in the country have undergone significant changes, as was the BIA's alternative reasoning.[67]

The court next moved to an analysis of the definition of persecution. Ms. Pitcherskaia claimed in her appeal that in requiring intent to punish in order to prove persecution, the BIA applied an erroneous legal standard.[68] The BIA had rejected Ms. Pitcherskaia's claims of persecution because, although they were based on involuntary confinement and forced psychiatric treatments, the government explained these actions were intended to cure her of the "illness" of homosexuality, not to punish her.[69] The court decided that in accepting this reasoning and requiring proof of intent to harm or punish, the BIA had erred.[70]

In its reasoning, the court noted that although many cases of persecution may involve individuals who do have a subjective intent to punish their victims, this does not mean that such motives are required for claims of persecution to be proven.[71] The court also pointed out that neither the Ninth Circuit nor the Supreme Court has found the construction of "persecution" that the BIA attempted to use here to be implied by the Act.[72] The court also restated its definition of "persecution" and stressed that it turns on what a reasonable person would deem offensive, not the intent of the persecutor.[73] Further, the court established that the BIA had erroneously read the motive requirement stated in *Elias-Zacarias* as requiring a motive of punishment.[74] The court

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62. *Id.* (quoting Aguilera-Cota v. I.N.S., 914 F.2d 1375, 1378 (9th Cir. 1990)).
63. *See id.* (citing Acewicz v. I.N.S., 984 F.2d 1056, 1061 (9th Cir. 1993)).
64. *See id.* (citing Lopez-Galarza v. I.N.S., 99 F.3d 954, 958-59 (9th Cir. 1996)).
65. *See id.* at 646 (citing 8 C.F.R. § 208.13(b)(1)(i)).
66. *See Lopez-Galarza*, 99 F.3d 954, 959 (9th Cir. 1996).
67. *See Pitcherskaia*, 118 F.3d at 646 (citing Prasad v. I.N.S., 101 F.3d 614, 617 (9th Cir. 1996)).
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.* (citing *Fauziya Kasinga*, Int. Dec. 3278 at 12 (BIA 1996)).
72. *See id.* at 646-47.
73. *See id.* at 647.
74. *See id.*

explained that this motive requirement referred only to the use of a specific characteristic of the victim as a reason to persecute.[75] It does not refer to the persecutor having any other motive.[76]

The court stated that the BIA confused the terms "punishment" and "persecution" in applying the test for establishing a well-founded fear of persecution set out in *Acosta*.[77] The court compared the standard definitions for both words and determined that while "punishment" implies that the victim is believed to have committed a crime or some other wrong, "persecution" only requires that the victim is caused harm or suffering.[78] The BIA had relied on the holdings of *Acosta*, as well as *Mogharrabi*,[79] to show the requirement of a subjective intent to punish, and to this extent, the Ninth Circuit rejected these holdings.[80]

The court concluded that the BIA's requirement of subjective intent was unwarranted.[81] Stating that a persecutor's benevolent intent does not allow him to overcome the statutory definition of persecution, the court granted Ms. Pitcherskaia's petition for review and reversed the BIA's order denying asylum and withholding of deportation.[82]

The decision in *Pitcherskaia* provides an example of the problems encountered when statutory definitions are unclear. Case law demonstrates that neither the judiciary nor administrative agencies are consistent in their definitions of persecution. The denial of Ms. Pitcherskaia's petitions was reversed here but could easily have been upheld by another circuit.

The Ninth Circuit itself, however, has been consistent in its definition of persecution. For almost thirty years, it has worked under a definition of persecution that does not include the requirement of a subjective intent to punish.[83] The decision in *Pitcherskaia* falls in line with the Ninth Circuit's past reasoning under this definition.

Although the court does realize that deference is usually afforded to the Board's interpretations of the Act where definitions are ambiguous, it believes that in this case the interpretation was so erroneous as to fall into one of the stated exceptions. The interesting, yet somewhat puzzling,

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75. *See id.*
76. *See id.*
77. *See id.*
78. *See id.* at 648 (relying on WEBSTER'S NEW COLLEGIATE DICTIONARY 628, 685 (2d ed. 1956)).
79. Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).
80. *See Pitcherskaia*, 118 F.3d at 648.
81. *See id.*
82. *See id.*
83. *See* Sagermark v. I.N.S., 767 F.2d 645, 649 (9th Cir. 1985) (quoting Kovac v. I.N.S., 407 F.2d 102, 107 (9th Cir. 1969)).

aspect of the decision revolves around who is to give deference to whom and when. The court is supposed to give deference to the BIA's interpretations of the Act where meaning is unclear, but, in interpreting the Act, the BIA is bound by the court's prior decisions interpreting the Act.[84] In this case, this would mean that the BIA would be bound by prior Ninth Circuit decisions when trying to determine if an alien has proven claims of persecution. The court, for its part, would then have to give deference to the BIA decision which, if the system worked properly, should already be in line with the circuit precedent.

This reveals the problem that the Ninth Circuit has attempted to correct by reversing and remanding the BIA's denial. It appears that had the BIA indeed taken direction from prior rulings by the Ninth Circuit, it would have found an acceptable definition of persecution. Instead, it relied on two of its own prior decisions[85] to give a working definition of persecution and then attempted to reinforce these cases by misconstruing the holdings of two Ninth Circuit cases.[86] As a result, the BIA ruling seemed arbitrary and capricious giving the Ninth Circuit room to reverse it.

The basis of the persecution in this case is interesting in and of itself. Alla Pitcherskaia was being subjected to involuntary confinement and treatment because she is a homosexual.[87] The Russian government has apparently taken the stance that homosexuality is an "illness" that can be "cured."[88] This is a very controversial opinion; the petitioner herself does not appear to feel as though her homosexuality is a malady with which she has been stricken, nor do many others, both within and outside of her social group. Further, this is not a condition that the petitioner has stated she wants "cured." It is also not a condition that is causing harm to her or to others. Yet, the Russian government has taken it upon itself to "relieve" her of this supposed "illness" through the unpleasant and humiliating means of detention, interrogation, threatened involuntary psychiatric confinement, prescription of sedative drugs, forced hypnotic treatment, and beatings.[89] This is a very implausible explanation.

Had the Ninth Circuit upheld the denial of Ms. Pitcherskaia's petitions, it would have taken a large step backward in the evolution of

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84. *See Pitcherskaia*, 118 F.3d at 646 (citing Fisher v. I.N.S., 79 F.3d 955, 961 (9th Cir. 1996)).

85. *See* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987); Acosta, 19 I. & N. Dec. 211 (BIA 1985).

86. *See* I.N.S. v. Elias-Zacarias, 502 U.S. 478 (1992); Canas-Segovia v. I.N.S., 970 F.2d 599 (9th Cir. 1992).

87. *See Pitcherskaia*, 118 F.3d at 644.

88. *See id.*

89. *See id.* at 643-644.

human rights. As the court stated, "the fact that a persecutor believes the harm he is inflicting is 'good for' his victim does not make it any less painful to the victim. . . . Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims."[90] If governments or individuals are allowed to engage in any behavior they want concerning another person as long as they believe it is "good for" the person being acted upon, the world could become a frightening place. The human rights laws that many nations have in place would be rendered utterly meaningless. While it is true that governments are supposed to do that which is in the best interest of the people, the best interests of the people are rarely served by targeting a segment of the population for persecution. Those in power would have the ability to "cure" any trait they decide is undesirable. This should terrify us all, as it has been shown throughout history that what the majority finds desirable can change with rapid frequency.

Nations have human rights laws to protect their citizens as well as the citizens of other nations. If people were able to get around these laws by simply stating that they were "curing" someone to correct what they saw as a problem, the laws would be totally useless. For these laws to work, they must be applied uniformly, not merely arbitrarily in cases that are uncontroversial. This means that if persecution occurs and a country has the statutory means to consider an alien for asylum, then those means should be exercised, particularly when the persecution attacks human dignity at such a base level.

Future consequences of decisions such as these must be taken into account. If nations are allowed to torture their own people to "cure" sexual orientation, it is impossible to know where the line will be drawn. For this reason, the inclusion of a punishment requirement in the determination of whether or not a person has grounds for asylum based on persecution is not feasible. This type of *mens rea* requirement makes these claims more difficult to prove. The Ninth Circuit, as well as other circuits,[91] has realized this. It is more feasible to let the actions speak for themselves.

The Ninth Circuit has gone in the right direction by reversing the denial of petitions in this case. Had the court upheld the decision of the BIA, its ruling would not only have been inconsistent with its prior decisions and interpretations of the Act but would have upheld a

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90. *Id.* at 648.

91. *See* Faddoul v. I.N.S., 37 F.3d 185 (5th Cir. 1994); Sivaainkaran v. I.N.S., 972 F.2d 161 (7th Cir. 1992).

transparent attempt to conceal obvious persecution. The BIA was given clear and concise direction in previous Ninth Circuit rulings; in this case, the Board chose not to give those rulings the deference they required. The court's reversal of the decision on appeal should have come as no surprise.

Undoubtedly, questions such as this will continue to confront the judiciary—matters that, on the surface, appear to involve only definitional detail, but which in fact go directly to the core of one's personal dignity and basic individual liberties. This country's complex asylum process, coupled with the lack of clarity in its statutory scheme, insures that there will always be room for interpretation. This time, the Ninth Circuit has not only taken advantage of the opportunity to exercise consistency, but also to speak out on behalf of international human rights.