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**\*261 Past Persecution, Mental Illness and Humanitarian Asylum: Creating the Record to Win the Claim**

by Maria Baldini-Potermin, Esq. [FN1]

Refugees, asylees, and those seeking asylum have often seen the worst of humanity and, as a result, often suffer from different forms of mental illness, including some of the more common illnesses of post-traumatic stress disorder, anxiety, and depression. The effects of persecution and torture on individuals have been well-documented. [FN1]

Mental illness in refugees and asylees may manifest years after their arrival in the U.S. The mental illness may be demonstrated through minor criminal conduct or substance abuse. If left untreated, noncitizens may find themselves in trouble with the legal system and in removal proceedings as a result of criminal conduct.

Working with mentally ill noncitizen clients, especially those who may be detained throughout the removal proceedings, can be one of the most challenging experiences for an immigration practitioner. The conditions of their detention, often in remote county jails or Department of Homeland Security (DHS)-owned \*262 facilities, can exacerbate the symptoms of their mental illness and contribute to their difficulty in understanding their removal proceedings. Detention adds its own challenges to obtaining psychiatric evaluations and treatment. While noncitizens detained by DHS or in contract facilities are entitled to health care, numerous reports indicate that the medical and mental health treatment provide by these facilities and under the orders of DHS is lacking. [FN2] Documentation of the deterioration in a noncitizen's mental state due to the lack of necessary medications, the administration of inappropriate medications to treat and/or control the symptoms and/or mental illness, and the conditions under which a noncitizen is detained can be used as evidence to support a claim for humanitarian asylum.

This article will address case precedent regarding mental illness as a ground for asylum and for humanitarian asylum. [FN3] The Seventh Circuit Court of Appeals recently issued an important decision involving past persecution as a child, resulting mental illness, and humanitarian asylum based on "other serious harm," which will be the focus of this article along with practice pointers for practitioners regarding presenting a winning case before the immigration court and, if necessary, creating a record for appellate review. [FN4]

## **I. Procedural History of *Kholyavskiy v. Mukasey***

### **A. Mr. Kholyavskiy's Admission to the U.S. and the Related History of Removal Proceedings**

Mr. Kholyavskiy came to the U.S. as a refugee, along with his parents and younger brother, in 1992. He later adjusted his status to become a lawful permanent resident.

In 2001, Mr. Kholyavskiy was declared disabled by the Social Security Administration based on his severe social anxiety disorder and depression. [FN5] Later that year, Mr. Kholyavskiy was placed in removal proceedings based on his convictions for misdemeanor and felony crimes involving moral turpitude, [FN6] the commission of which were related to his mental illness. [FN7] He was ordered removed after his first attorney failed to file his application for asylum as ordered by the immigration judge (IJ). Mr. Kholyavskiy's appeal was later dismissed. [FN8]

In October 2004, the Board of Immigration Appeals (BIA) granted Mr. Kholyavskiy's motion to reopen and remanded his case for a hearing on the merits of his applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). [FN9] On remand, the IJ held an individual hearing in Mr. Kholyavskiy's case. Following testimony of a proffered expert witness on country conditions, Mr. Kholyavskiy suffered an acute psychotic breakdown, and his treating psychiatrist declared him legally incompetent. [FN10] Mr. Kholyavskiy was transferred to a mental health facility for treatment, and his removal proceedings were continued. [FN11]

At subsequent hearings, Mr. Kholyavskiy testified regarding his past experiences in Russia, his mental health conditions and need for medication, and his fear of returning to Russia. [FN12] His treating psychiatrist testified about his mental health, the combination of medications needed to control the symptoms of his mental illness, the unavailability of those medications in Russia, and his inability to function without his family to take care of his day-to-day needs. [FN13] The psychiatrist also testified that he did not believe that Mr. Kholyavskiy was a danger to others or that he was capable of intentional violence. [FN14] In a written decision, the IJ denied all of Mr. Kholyavskiy's applications for relief. [FN15]

Mr. Kholyavskiy timely appealed to the BIA, and the BIA upheld the IJ's decision. [FN16] Mr. Kholyavskiy filed his petition for review with the Seventh Circuit. Following the submission of his opening brief, the Office of Immigration Litigation (OIL) filed a motion for remand requesting that the BIA conduct further proceedings and consideration of Mr. Kholyavskiy's claim that he was a member of a protected social group and whether a legal presumption should have been applied to his claims for asylum and withholding of removal based on his prior grant of refugee status. [FN17] The Seventh Circuit granted the OIL's motion. [FN18] On remand, the BIA again denied Mr. Kholyavskiy's claims for relief, [FN19] and he filed a second petition for review. [FN20]

#### ***B. Mr. Kholyavskiy's Detention by ICE and Litigation Related to His Release Under an Order of Supervision***

As noted above, Mr. Kholyavskiy's remanded removal proceedings took place while he was in DHS custody. Mr. Kholyavskiy was detained by the Chicago office of U.S. Immigration and Customs Enforcement (ICE) in August 2004 following his arrest for a charge of disorderly conduct, the warrant for which was eventually quashed by the state court. The ICE office denied his requests to be released under an order of supervision, and the IJ held that he was subject to mandatory detention under INA § 236(c) [8 USCA § 1226(c)] based on convictions for multiple crimes involving moral turpitude. The BIA affirmed the IJ's denial of his request for bond.

\*263 In April 2005, Mr. Kholyavskiy filed a petition for a writ of habeas corpus pursuant to 28 USCA § 2241 in the U.S. District Court for the Northern District of Illinois. The district court dismissed his petition, agreeing with the government that his custodian was not the Chicago ICE Field Office Director but, rather, the warden of the Kenosha County Detention Center in Wisconsin. Mr. Kholyavskiy appealed the decision of the district court to the Seventh Circuit Court of Appeals. [FN21] In a published decision on the heels of the U.S. Supreme Court's decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), [FN22] the Seventh Circuit agreed with

the district court that Mr. Kholyavskiy failed to name the proper custodian and dismissed his appeal. [FN23]

While his habeas appeal was pending, Mr. Kholyavskiy filed a second petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Wisconsin. In that petition, he named the Sheriff of the Kenosha County Detention Center as his custodian along with the Chicago ICE Field Director. The Chicago ICE Office continued its efforts to remove Mr. Kholyavskiy while his petition for review of the BIA's decision denying his applications for relief was pending before the Seventh Circuit. [FN24] The Russian Embassy twice issued letters to the Chicago ICE Field Director refusing to issue a travel document for Mr. Kholyavskiy's removal to Russia and stating that Russia neither recognized him as a citizen of Russia nor would grant him Russian citizenship. [FN25] On March 15, 2006, the district court ordered DHS to make a custody determination under INA § 241 [8 USCA § 1231]. [FN26] The Chicago ICE Office released Mr. Kholyavskiy the next day under an order of supervision. [FN27]

## II. The Seventh Circuit's Decision Regarding Mr. Kholyavskiy's Second Petition for Review

### ***A. Mr. Kholyavskiy's Due Process Claims***

Mr. Kholyavskiy raised several claims that the IJ violated his due process right to a fair hearing, including two that involved his mental illness. Mr. Kholyavskiy argued that the IJ violated his right to present evidence by failing to recognize his proffered country conditions witness as an expert on the treatment of Jews and the mentally ill in Russia, by failing to admit all of the evidence submitted with his motion to reopen into the remanded removal proceeding, and by conducting the removal hearing in a manner which exacerbated Mr. Kholyavskiy's mental illness. [FN28]

Stating that the Federal Rules of Evidence do not apply to removal proceedings, the Seventh Circuit rejected Mr. Kholyavskiy's argument that the IJ's failure to recognize his proffered witness on country conditions as an expert violated his right to a fair hearing. [FN29] Instead, the Seventh Circuit framed the issue to be whether an IJ's evidentiary ruling "frustrated the alien's reasonable opportunity to present evidence on his own behalf." [FN30] The Seventh Circuit agreed with the IJ and the BIA that the proffered witness was not an expert on Jews or the mentally ill in Russia and that Mr. Kholyavskiy had the opportunity to present his testimony. [FN31]

In his motion to reopen based on ineffective assistance of counsel, Mr. Kholyavskiy submitted documentation that the IJ considered to be voluminous. [FN32] The Seventh Circuit agreed with the IJ's request that Mr. Kholyavskiy review the documentation and resubmit only the documentation pertinent to his claims for relief. [FN33]

### ***B. Mr. Kholyavskiy's Claim of Past Persecution***

Mr. Kholyavskiy argued that he had suffered past persecution based on his Jewish race, religion and family (constituting a particular social group) in numerous incidents, beginning when he was a child and continuing until he and his family departed Russia to come to the U.S. as refugees in 1992. In their decisions, the IJ and the BIA considered only two incidents worthy of mention: a grade school incident where Mr. Kholyavskiy's pants were pulled down by students in the school bathroom and he was identified as a Jew by his circumcised genitals and mocked, and a second incident where he was attacked and bitten by a dog as commanded by another student, which resulted in his receiving 40 rabies shots. [FN34]

In *Kholyavskiy v. Mukasey*, the Seventh Circuit sharply criticized the IJ's indifference to the multiple incidents of harm and harassment and his failure to recognize Mr. Kholyavskiy's age when he suffered the harm. [FN35] The Seventh Circuit found that the IJ's and BIA's accounting of the two incidents did not "accurately depict either the severity or pervasiveness of the abuses he suffered." [FN36] The Seventh Circuit discussed the school bathroom incident in light of case law relating to privacy, childhood sexual abuse and mistreatment, as recognized by Congress and judicial precedent. [FN37]

The Seventh Circuit also took the IJ and the BIA to task for considering the dog attack as an isolated incident. [FN38] The Seventh Circuit then summarized Mr. Kholyavskiy's other claims regarding past persecution, including other physical abuse by children, name-calling ("kike"), and phone calls threatening a coming pogrom [FN39] received at his family's home. [FN40] The Seventh Circuit found that the discrimination and harassment experienced by Mr. Kholyavskiy "pervaded" his neighborhood as well. [FN41] The Seventh Circuit held: \*264

A review of the BIA's decision leaves us with the conviction that the Board did not consider the "cumulative significance" of the events recounted by Mr. Kholyavskiy and his mother. *Tchemkou*, 495 F.3d at 790 [FN42] (quoting *Poradisova*, 420 F.3d at 79). [FN43] More important, the BIA had an obligation to evaluate the impact of these actions on a child between the ages of eight and thirteen. It does not appear, however, in addressing the question of past persecution, the BIA considered Mr. Kholyavskiy's age at the time these events occurred--a factor that, we have noted, "may bear heavily on the question of whether an applicant was persecuted." *Liu*, 380 F.3d at 314. [FN44]

In sum, the BIA did not employ the correct standard in evaluating Mr. Kholyavskiy's claims....We remand for further proceedings Mr. Kholyavskiy's application for asylum based on past persecution. We are confident that, on remand, the BIA will evaluate the record comprehensively according to the standard that we have articulated here. [FN45]

### ***C. Mental Illness as an Immutable Characteristic***

Although Mr. Kholyavskiy sought and received mental health treatment beginning in 1996, it was not until 2001 when he found a psychiatrist who was able to correctly diagnose his mental illness. [FN46] It took several attempts for his treating psychiatrist to diagnose his mental illness as severe social anxiety disorder and depression and to find the proper combination of medications to control the symptoms. [FN47] The IJ found, and the BIA agreed, that Mr. Kholyavskiy's mental illness was not an immutable characteristic or a cognizable basis for asylum because his mental illness "can be treated with medication such that by his own actions he will be able to avoid persecution." [FN48]

In a careful review of the treating psychiatrist's detailed affidavit, his testimony, and the medical records submitted by Mr. Kholyavskiy, the Seventh Circuit squarely rejected the IJ's characterization of Mr. Kholyavskiy's mental illness as controllable. The Seventh Circuit cited to the psychiatrist's affidavit in which he declared that Mr. Kholyavskiy has a character disorder consisting of avoidant, schizoid, and narcissistic personality features which the psychiatrist believed were not amenable to change. [FN49] The Seventh Circuit noted that the psychiatrist's conclusion was that Mr. Kholyavskiy's mental illnesses are permanent and not controlled by medication. [FN50]

The Seventh Circuit did not, however, reach the issue of whether the mentally ill constitute a particular social group because it agreed with the BIA that Mr. Kholyavskiy had not established that he would suffer future persecution in Russia on account of his mental illness. [FN51] The Seventh Circuit noted that the unavailability of treatment is a "valid consideration" for purposes of humanitarian asylum. [FN52]

**D. Humanitarian Asylum: The Chen Standard Under the First Regulatory Prong and the “Other Serious Harm” Standard Under the Second Regulatory Prong**

Humanitarian asylum is a form of relief which may be a viable form of relief where a noncitizen's severe past persecution occurred many years ago and/or has had long-term effects or where she may suffer other “serious” harm not on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. Where a noncitizen has demonstrated that he or she has suffered past persecution and DHS has rebutted the presumption of future persecution, a noncitizen can still be granted asylum: (1) where he demonstrates compelling reasons for being unwilling or unable to return to the designated country based on the severity of the past persecution; [FN53] or (2) where he demonstrates the reasonable possibility that he will suffer other serious harm if he is removed to the designated country. [FN54]

The seminal BIA case which resulted in the humanitarian asylum regulation is *Matter of Chen*, 20 I. & N. Dec. 16 (B.I.A. 1989). In *Matter of Chen*, the BIA referred to the “general humanitarian principle” in paragraph 136 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. [FN55] The BIA found that the noncitizen had suffered severe past persecution including physical and mental abuse during the Chinese Cultural Revolution on account of his family and their strong religious beliefs but did not have a well-founded fear of future persecution. [FN56] The BIA, however, granted asylum based on the severity of the noncitizen's past persecution in the exercise of its discretion. [FN57]

The majority of the decisions issued by the BIA and the circuit courts of appeals address whether past persecution in a case meets the *Chen* standard, that is, whether the noncitizen has suffered “severe” or “atrocious” persecution. [FN58] The BIA has consistently held that ongoing harm or severe psychological trauma from the persecution is required for humanitarian asylum, and the circuit courts of appeals have split in their opinions. [FN59]

The Seventh Circuit addresses the “other serious harm” standard for humanitarian asylum. In its decision, the Seventh Circuit found that Mr. Kholyavskiy's experiences in Russia and the resulting effects on his mental health did not meet the “severe” or “atrocious” level of past persecution required under *Chen* or 8 CFR § 1208.13(b)(1)(iii)(A), the first ground for humanitarian asylum. [FN60] However, in light of its discussion regarding the evidence of Mr. Kholyavskiy's past persecution claim, the Seventh Circuit considered that by removing him to Russia, he would be “without the only medications that \*265 effectively have controlled the symptoms of his mental illness” and would be incapable of functioning on his own and it was questionable whether he would be able to obtain medical care or housing without a “propiska” (required residence permit) and such removal would constitute debilitation and homelessness and thus “serious harms” under 8 CFR § 1208.13(b)(1)(iii)(B), the second ground for humanitarian asylum. [FN61] The Seventh Circuit remanded Mr. Kholyavskiy's case for further consideration by the BIA. [FN62] The case is currently pending before the immigration judge. [FN63]

**E. Creating the Record**

The main challenge for practitioners is to thoroughly develop the record before the IJ and the BIA to have the relief sought granted and to preserve judicial review. The following are practice pointers for preparing claims of asylum, humanitarian asylum, withholding of removal, and relief under the CAT for applicants who are mentally ill:

*Evidence from Medical and Treatment Providers:* [FN64]

- Have the client sign the required authorization for release of records for each medical provider. [FN65]
- Timely send out the authorization and include the date by which the records are needed.
- For current providers, request a detailed curriculum vitas and letters on their letterhead or, where possible, affidavits from the medical providers covering:
  - Diagnoses, including the steps taken to arrive at the current diagnosis. The steps can include:
    - Prior medications with dosages and whether the medications were effective in controlling the symptoms or the mental illness;
    - Prior physical therapy treatments, such as shock treatment, and the effects (or lack thereof) on the noncitizen;
  - Current treatment:
    - Any current medications and whether they are effective in controlling the symptoms of the mental illness or the noncitizen has achieved a complete recovery from the mental illness; [FN66] if a certain medication or combination of medications only controls symptoms of the mental illness, which symptoms and the extent of the control of the illness should be identified; the length of time that a person can take the medications before contraindications occur; side effects of each medication, if any; whether the current medications are available in the country designated for removal; [FN67]
    - Alternative medications that can be prescribed with the same or similar efficacy and whether those medications are available in the country designated for removal;
  - Psychotherapy;
  - Physical therapy.
- Prognosis:
  - Anticipated treatment and the likelihood that there may be any improvement or deterioration in the control of the symptoms of the mental illness or a complete recovery from the mental illness.
  - Whether a physician must physically evaluate the noncitizen to continue prescribing the particular medication to control the symptoms of the mental illness; [FN68]
- The effect of the removal on the noncitizen to the country designated for removal, including:
  - Whether a qualified physician is available in the country designated for removal to treat the noncitizen;
  - Whether the noncitizen will be eligible for government-funded medical care abroad if he or she is unable to pay for medical care;
  - Whether the noncitizen will be able to obtain treatment from a physician in the country designated for removal, i.e., whether the noncitizen, if stateless, will be able to obtain treatment and whether societal discrimination

against persons with mental illness in a particular country permeates the medical profession in that country as well. Any legal \*266 disqualifications for medical treatment as well as discrimination by the medical profession should be documented by the noncitizen through reports, news articles, and/or expert witness affidavits or testimony.

- Ability of the noncitizen to care for self, including basic needs, such as purchasing food, food preparation, dressing, money management, etc.
- The role of the noncitizen's immediate family members or friends in the U.S. in the noncitizen's daily life for mental and emotional support.
- The ability of the noncitizen to obtain housing on his/her own in the country designated for removal, including handling the application process for any required residency permits and possible negative interactions with those government officials.
- The impact on the noncitizen without his or her support network and whether the noncitizen would need to be institutionalized. An additional factor to be documented involves the availability and quality of the institutions along with the ability of the noncitizen to receive adequate care at the institution abroad.
- Whether the noncitizen constitutes a danger to himself/herself or to other people in the community where (1) the noncitizen has access to and takes the prescribed medications; and (2) the noncitizen does not have access to his/her medications.

*Other Evidence Relating to the Noncitizen's Mental Illness*

- School records regarding special education classes or individualized education plans;
- School transcripts;
- Letters/affidavits from teachers, counselors, and/or school social workers regarding the noncitizen's behavior and ability to learn;
- Social Security Administration records or decisions regarding applications for disability benefits, including a finding that the noncitizen is disabled and eligible for SSI benefits and the person designated as the "payee" of the noncitizen's benefits; and
- Participation in programs for individuals with mental illness and evaluations from those programs, such as job training.

*Evidence Regarding Relocation of Caregivers to Present Via Affidavit, Testimony, and/or Country Conditions Documentation*

- Whether any of the family members or friends who assist the noncitizen have the ability to relocate permanently to the country designated for removal. Considerations may include: past admission to the U.S. as a refugee by the current caregiver, the caregiver's ethnic and/or religious background, the caregiver's family and community ties to the U.S., and laws relating to the ability of the caregiver to immigrate to the foreign country.
- The presence of other family members in the country designated for removal and ability of the noncitizen to



obtain assistance from those individuals.

With proper preparation, a noncitizen may be granted humanitarian asylum based on past persecution and the possibility of “other serious harm” due to mental illness. One year after being granted humanitarian asylum, an asylee can apply for granted lawful permanent residence, [FN69] with subsequent naturalization as a future possibility. [FN70]

Practitioners are encouraged to raise humanitarian asylum claims for their noncitizen clients along with other forms of relief for which they qualify. The case law will continue to develop as practitioners litigate these cases before the USCIS Asylum Office, immigration courts, BIA, and federal courts.

*Editor's note* : *Interpreter Releases* is pleased to announce that this is the first in a series of articles which Maria Baldini-Potermin will be writing for *Interpreter Releases* this year as an expert author and contributor.

[FN1]. See, e.g., Hargreaves, *A Body of Evidence: Torture Among Asylum Seekers to the West*, *The Lancet*, vol. 359, pages 793-94 (2002); Wilson, *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims* (2004); Editors Jaranson and Popkin, *Caring for Victims of Torture*, (1998); Silove, Steele, Mollica, *Detention of asylum seekers: assault on health, human rights, and social development*, *The Lancet*, vol. 357, pages 1436-7 (2001); Piwowarczyk, [Seeking Asylum: A Mental Health Perspective](#), *16 Geo. Immigr. L.J.* 155 (Fall 2001). \*267

[FN2]. See “Medical Care” in “Detainee Handbook, DHS Detention and Operations Manual, available at <http://www.ice.gov/doclib/pi/dro/opsmanual/handbk.pdf>; see also Priest and Goldstein, *Careless Detention. Medical Care in Immigrant Prisons*, *The Washington Post*, 4 part series, 5/11/2008-5/14/2008, available at <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>; N. Bernstein, *US Issues Scathing Report on Immigrant Who Died in Detention*, *The New York Times*, 1/16/2009, available at [http://www.nytimes.com/2009/01/16/us/16detain.html?\\_r=1](http://www.nytimes.com/2009/01/16/us/16detain.html?_r=1); Bernstein, *Federal Report Recommends Improvements in Reporting Deaths of Immigrant Detainees*, *The New York Times*, 7/3/2008, <http://www.nytimes.com/2008/07/03/us/03detain.html>; Bernstein and Preston, *Better Health Care Sought for Detained Immigrants*, *The New York Times*, 5/7/2008, <http://www.nytimes.com/2008/05/07/washington/07detain.html>. For the text of bills on medical and mental health care for detainees, see *Detainee Basic Medical Care Act of 2008*, S. 3005 and H.R. 5950, available at [http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03005:\\$/bss/d110query.html](http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN03005:$/bss/d110query.html) and [http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR05950:\\$/bss/d110query.html](http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR05950:$/bss/d110query.html).

[FN3]. To the extent that a particular social group involving the mentally ill has been recognized for purposes of asylum eligibility, it will be noted for purposes of framing claims for withholding of removal. However, an applicant who is not statutorily eligible for asylum may still qualify for withholding of removal.

[FN4]. *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008), discussed in 85 *Interpreter Releases* 2717, 2719 (Oct. 13, 2008).

[FN5]. See *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 899 (E.D. Wis. 2007), discussed in 84 *Interpreter Releases* 571, 574 (Mar. 12, 2007); *Kholyavskiy v. Mukasey*, 540 F.3d at 560.

[FN6]. Mr. Kholyavskiy's convictions included trespassing, two misdemeanor retail thefts, harassment, battery,



burglary of an auto parts store, and unlawful possession of counterfeit prescription forms. See *Kholyavskiy v. Mukasey*, 540 F.3d at 560.

[FN7]. Under the stop-time rule for lawful permanent resident cancellation of removal at INA § 240A(d)(1) [8 USCA § 1229b(d)(1)], Mr. Kholyavskiy was not statutorily eligible based on the commission dates of his misdemeanor retail theft offenses.

[FN8]. Upon receipt of his “bag and baggage” notice from the Immigration and Customs Enforcement, Detention and Removal Office, Mr. Kholyavskiy retained new counsel and filed a motion to reopen based on ineffective assistance of counsel. *Matter of Kholyavskiy*, A71-093-229 (B.I.A. Sept. 7, 2005).

[FN9]. See *id.*

[FN10]. See *Kholyavskiy v. Mukasey*, 540 F.3d at 560-61.

[FN11]. See *id.* at 561.

[FN12]. See *id.*

[FN13]. See *id.* at 560-61.

[FN14]. See *id.* at 561.

[FN15]. See *id.* at 561-63.

[FN16]. See *id.* at 563.

[FN17]. See *id.* at 563-4.

[FN18]. See *id.* at 564.

[FN19]. See *id.* at 564 (discussing the reasoning in the BIA's decision following remand).

[FN20]. See *id.*

[FN21]. See *Kholyavskiy v. Achim*, case no. 05C2257 (N.D. Ill. 2005).

[FN22]. In *Rumsfeld v. Padilla*, the U.S. Supreme Court noted that the federal circuit courts of appeals had split on the issue regarding whether the U.S. Attorney General or the warden of the facility is the custodian for purposes of a petition for a writ of habeas corpus filed by an alien pending deportation proceedings. See *Rumsfeld v. Padilla*, 542 U.S. 426, 435, fn. 8 (2004) (citing precedent demonstrating the circuit split). The U.S. Supreme Court, however, declined to address the issue as it was not before the Court. See *id.* The circuit split remains today. For decisions regarding the proper custodian for a habeas petition, see *Roman v. Ashcroft*, 340 F.3d 314, 320 (6th Cir. 2003) (holding warden is proper custodian); *Armentero v. I.N.S.*, 340 F.3d 1058 (9th Cir. 2003) (holding ICE field director is proper custodian. Note, however, that this decision was withdrawn, and there is not a precedent decision on the issue in the circuit. Accordingly, it may be wise to name both the ICE Field Office Director and the warden of the facility as custodians to cover all the bases in case the Ninth Circuit revisits the issue); *Henderson v. I.N.S.*, 157 F.3d 106, 126 (2d Cir. 1998), discussed in 76 Interpreter Releases 415 (Mar. 15, 1999) and 75 Interpreter Releases 1441 (Oct. 19, 1998) (discussing but declining to decide the issue); *Vasquez v.*

*Reno*, 233 F.3d 688, 690 (1st Cir. 2000), discussed in 78 Interpreter Releases 331 (Feb. 5, 2001) (holding that the warden of the facility is the proper custodian); *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006) (same).

[FN23]. See *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006), discussed in 83 Interpreter Releases 835, 838 (May 1, 2006) (holding that the custodian of an individual detained pursuant to the immigration laws is the immediate custodian who is the person who has day-to-day control over the facility in which the individual is detained).

[FN24]. See *Kholyavskiy v. Gonzales*, case no. 05-3775.

[FN25]. See *Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897, 899 (E.D. Wis. 2007).

[FN26]. See *id.* at 900.

[FN27]. See *id.*

[FN28]. See *Kholyavskiy v. Mukasey*, 540 F.3d at 565.

[FN29]. See *id.* at 565-66.

[FN30]. See *id.* at 565.

[FN31]. See *id.* at 566.

[FN32]. See *id.* at 566-67. \*268

[FN33]. See *id.* Mr. Kholyavskiy's motion to reopen was based on the standards set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), and his application was considered under the standards in effect prior to the REAL ID Act of 2005, tit. I, § 101(d)(2), Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). Under the REAL ID Act of 2005, which amended INA § 240(c)(4)(B) [8 USCA § 1229(c)(4)(B)], the burden of proof on a noncitizen for relief increased and an applicant must provide evidence to corroborate his testimony. Under INA § 240(c)(4)(C) [8 USCA § 1229(c)(4)(C)], the IJ must consider the credibility of the testimony in light of the other evidence of record, including Department of State country reports. Contrary to the Seventh Circuit's reasoning, INA § 240(b)(4)(B) [8 USCA § 1229(b)(4)(B)] provides that an alien shall have a reasonable opportunity to present evidence on his own behalf and INA § 240(b)(4)(C) [8 USCA § 1229(b)(4)(B)] provides that a complete record shall be kept of all testimony and evidence produced at a removal proceeding. The Due Process Clause of the Fifth Amendment of the Constitution does not place page limitations on an alien's right to present relevant and corroborating evidence. Finally, under the Attorney General's recent decision, *Matter of Compean*, 24 I. & N. Dec. 710 (A.G. 2009), discussed in 86 Interpreter Releases 205 (Jan. 16, 2009), the standard for obtaining the reopening of a claim has been raised substantially and requires more documentation than under *Matter of Lozada*, supra. Counsel should give special attention to the specific documentation required to meet the AG's requirement that a noncitizen demonstrate a probability that he will be granted relief if his removal proceedings are reopened.

[FN34]. See *id.* at 570-72.

[FN35]. See *id.* at 570-72 (quoting the INS' Guidelines for Children's Asylum Claims, "harm a child fears or has suffered...may be relatively less than that of an adult and still qualify as persecution").

[FN36]. *Kholyavskiy v. Mukasey*, 540 F.3d at 570.

[FN37]. *Kholyavskiy v. Mukasey*, 540 F.3d at 570, citing *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), and comparing *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (noting claims of torture were alleged to include that detainees were “‘forc[ed]...to be naked for prolonged periods of time’ and ‘photographed while naked’”) and *U.S. v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001), and *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir. 1997).

[FN38]. See *Kholyavskiy v. Mukasey*, 540 F.3d at 571.

[FN39]. The term pogrom as a reference to large-scale, targeted, and repeated anti-Semitic rioting.

[FN40]. See *id.*

[FN41]. See *id.*

[FN42]. *Tchemkou v. Gonzales*, 495 F.3d 785 (7th Cir. 2007).

[FN43]. *Poradisova v. Gonzales*, 420 F.3d 70 (2d Cir. 2005).

[FN44]. *Liu v. Ashcroft*, 380 F.3d 307 (7th Cir. 2004).

[FN45]. See *id.* at 571-72. In addition, the Seventh Circuit has previously rejected respondent's compartmentalized approach to considering past persecution. See *Tchemkou v. Gonzales*, 495 F.3d 785 (7th Cir. 2007), discussed in 84 Interpreter Releases 1909, 1913 (Aug. 20, 2007) (citing to prior decisions regarding consideration of past persecution claims).

[FN46]. See *Kholyavskiy v. Mukasey*, 540 F.3d at 560.

[FN47]. See *id.* at 573.

[FN48]. See *id.* at 564.

[FN49]. See *id.* at 573.

[FN50]. See *id.*

[FN51]. See *id.* at 573-74 (noting that the evidence did not demonstrate that the unavailability of Mr. Kholyavskiy's medications in Russia was due to any attempt by the Russian government to harm Mr. Kholyavskiy or other individuals with mental illnesses and finding that substantial evidence supported the BIA's decision).

[FN52]. See *id.* at 574.

[FN53]. 8 CFR §§ 208.13(b)(1)(iii)(A), 1208.13(b)(1)(iii)(A).

[FN54]. 8 CFR §§ 208.13(b)(1)(iii)(B), 1208.13(b)(1)(iii)(B).

[FN55]. See *Matter of Chen*, 20 I. & N. Dec. 16, 19 (B.I.A. 1989), discussed in 66 Interpreter Releases 851 (July 31, 1989). Although the UNHCR Handbook is not considered binding, the U.S. Supreme Court has stated that it

“provides significant guidance” in interpreting and construing the 1967 Protocol Relating to the Status of Refugees. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 437-39 (1987), discussed in 64 Interpreter Releases 287 (Mar. 9, 1987); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999), analyzed in 76 Interpreter Releases 713 (May 10, 1999) (UNHCR Handbook is not binding on the Attorney General, the BIA, or U.S. courts); see also *Matter of Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985), discussed in 62 Interpreter Releases 220 (Mar. 11, 1985) (describing the UNCHR Handbook as a “useful tool”).

[FN56]. See *Matter of Chen*, 20 I. & N. Dec. at 19-21 (also noting that the noncitizen claimed to continue to suffer hearing loss and needed to wear hearing aids as a result of head injuries from the persecution during the Cultural Revolution).

[FN57]. See *id.* at 22.

[FN58]. See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 801 (9th Cir. 2005), discussed in 82 Interpreter Releases 609 (Apr. 11, 2005) (addressing female genital mutilation (FGM) as a possible form of severe past persecution for purposes of humanitarian asylum); *Brucaj v. Ashcroft*, 381 F.3d 602, 608-11 (7th Cir. 2004), discussed in 81 Interpreter Releases 1232, 1233 (Sept. 13, 2004) (remanding case to the BIA for explanation of the denial of humanitarian asylum); *Dobrota v. I.N.S.*, 195 F.3d 970, 974 (7th Cir. 1999) (rare case that past persecution is so severe that noncitizen merits humanitarian asylum); *Gonahasa v. U.S. I.N.S.*, 181 F.3d 538, 544 (4th Cir. 1999), discussed in 76 Interpreter Releases 1119 (July 26, 1999) (“most atrocious abuse” required for humanitarian asylum); *Acewicz v. U.S. I.N.S.*, 984 F.2d 1056, 1062 (9th Cir. 1993) (same); *Tokarska v. I.N.S.*, 978 F.2d 1, 2 (1st Cir. 1992) \*269 (same); *Vongsakdy v. I.N.S.*, 171 F.3d 1203, 1206-07 (9th Cir. 1999) (finding noncitizen suffered atrocious forms of persecution in labor camp in Laos); *Niang v. Gonzales*, 492 F.3d 505, 514, fn. 13 (4th Cir. 2007) (humanitarian asylum as an option where U.S.-citizen child may be subjected to FGM in Senegal); *Matter of B-*, 21 I. & N. Dec. 66 (B.I.A. 1995); *Matter of H-*, 21 I. & N. Dec. 337, 347-48 (B.I.A. 1996), discussed in Schmidt and Elliott, “Precedent Decisions of the Board of Immigration Appeals: An Update,” 73 Interpreter Releases 1101, 1106 (Aug. 19, 1996) (holding that compelling factors include “age, health, and family”).

[FN59]. See, e.g., *Lal v. I.N.S.*, 255 F.3d 998, 1002-10 (9th Cir. 2001), opinion amended on reh'g, 268 F.3d 1148 (9th Cir. 2001), discussed 78 Interpreter 1681 (Oct. 29, 2001) (reversing BIA's requirement that a noncitizen demonstrate an “ongoing disability” as a factor to be granted humanitarian asylum); see also *Matter of S-A-K-and H-A-H-*, 24 I. & N. Dec. 464 (B.I.A. 2008), discussed in 85 Interpreter Releases 770 (Mar. 10, 2008) (mother and daughter suffered a severe form of FGM with ongoing suffering of side effects of FGM); *Matter of N-M-A-*, 22 I. & N. Dec. 312 (B.I.A. 1998), discussed in 75 Interpreter Releases 1591 (Nov. 16, 1998) (denying humanitarian asylum to noncitizen who was tortured where severe psychological trauma was not demonstrated); cf. *Jalloh v. Gonzales*, 498 F.3d 148 (2d Cir. 2007), discussed in 84 Interpreter Releases 2038 (Aug. 31, 2007) (noncitizen did not prove persecution had long-lasting physical or mental effects); *Ngarurih v. Ashcroft*, 371 F.3d 182, 189-91 (4th Cir. 2004) (torture of noncitizen in prison did not warrant humanitarian asylum); *Woldemeskel v. I.N.S.*, 257 F.3d 1185, 1187-90 (10th Cir. 2001), discussed in 78 Interpreter Releases 1860 (Dec. 10, 2001) (past persecution not severe where noncitizen was detained and tortured but then married, had children and remained in the country for several years).

[FN60]. See *Kholyavskiy v. Mukasey*, 540 F.3d at 576-77.

[FN61]. See *id.* at 577.

[FN62]. See *id.*

[FN63]. The author continues to represent Mr. Kholyavskiy.

[FN64]. For an overview regarding working with medical providers and other expert witnesses, see Gallagher and Baldini-Potermin, *Immigration Trial Handbook* §§ 6:11, 6:12, 7:17, 7:18.

[FN65]. In the case of a detained noncitizen, medical records from the facilities where he or she has been held in custody can be quite helpful as they may contain information regarding the noncitizen's reactions to certain medications and/or the noncitizen's actions when his medications are changed or not provided by the detention facility. In the case of Mr. Kholyavskiy, the county jail officials did not administer the medications prescribed by his treating psychiatrist, with the resulting effect that Mr. Kholyavskiy suffered an acute psychotic breakdown during the first day of his individual hearing and his psychiatrist declared him incompetent to continue with the hearing. See *Kholyavskiy v. Mukasey*, 540 F.3d at 560-61. Counsel may want to consider asking the treating physician to be present at the immigration court during the entire individual hearing to address any changes in the noncitizen's mental condition, which may arise under the stress of the removal hearing.

[FN66]. This goes to the issue of whether a mental illness is immutable, that is whether medications and other medical treatment can control the mental illness so that it is not an immutable characteristic for the particular social group ground of asylum and for the "other possible harm" ground for humanitarian asylum. See, e.g., *Kholyavskiy v. Mukasey*, 540 F.3d at 572, fn. 18, 572-74, 578.

[FN67]. To find out whether a medication is available in a certain country, sources such as the Mosby Medical Yearbook or Martindale: The Complete Drug Reference can be consulted. Physicians may have access to the online versions for minimal charge or no charge. In addition, practitioners should be prepared to address whether a physician in the U.S. will ethically and legally be able to prescribe the necessary medication without repeated physical evaluation of the noncitizen and then whether family members or friends will be able to legally send the medication to the country designated for removal. See *Kholyavskiy v. Mukasey*, 540 F.3d at 574, fn. 20. Other factors to consider regarding the delivery of said medications to the noncitizen in the foreign country include: foreign laws prohibiting the importation of the said medications; corruption in the mail or postal system; corruption in the inspection of packages sent via private courier delivery service; and the availability of a person in the foreign country to receive the package on behalf of the noncitizen if he/she is mentally unable to do so, such as traveling to a designated office to sign for the package.

[FN68]. See *Kholyavskiy v. Mukasey*, 540 F.3d at 574, fn. 20 (finding no basis in the record that Mr. Kholyavskiy's treating psychiatrist in the U.S. could ethically prescribe the necessary medications without having ongoing supervision of Mr. Kholyavskiy).

[FN69]. See INA § 209(b) [8 USCA § 1159(b)]. A broad waiver of most grounds of inadmissibility exists under 8 USCA § 1159(c) for refugees and asylees applying for lawful permanent residence and the waiver may be granted for humanitarian purposes, family unity, and in the public interest.

[FN70]. Good moral character, a statutory requirement for naturalization, will need to be evaluated under INA § 101(f) [8 USCA § 1101(f)].

[FNal]. *Ms. Baldini-Potermin is in private practice in Chicago, Illinois. She and Anna M. Gallagher are co-authors of Immigration Trial Handbook, published by Thomson Reuters/West, which is a practical, step-by-step*

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*“how to” guide for practitioners who appear before the immigration courts. She is an active member of the American Immigration Lawyers Association (AILA) and currently serves as the vice-chair of the national AILA-EOIR Liaison Committee. Ms. Baldini-Potermin has worked with asylum seekers since 1990, beginning on the South Texas-Mexico border at the former INS' Port Isabel Service Processing Center. She was the recipient of two National Association for Public Interest Law (now Equal Justice Works) fellowships and also taught as an adjunct professor at the University of Minnesota Law School's Immigration Clinic. Ms. Baldini-Potermin has written extensively on the intersection of criminal and immigration law as well as other litigation-related topics and is a regular speaker at national CLE programs.*

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