January 2007

Protecting Sex Trafficking Victims: Establishing the Persecution Element

Calvin C. Cheung

Follow this and additional works at: https://scholarship.law.berkeley.edu/aalj

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38PS12

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Asian American Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Protecting Sex Trafficking Victims:
Establishing the Persecution Element

Calvin C. Cheung†

INTRODUCTION

On January 14, 2004, federal immigration and customs agents raided four brothels in a predominantly Asian neighborhood in San Francisco known as the Sunset District.1 Two days later, the agents arrested Yuen Ling Poon, a licensed haircutter whom authorities believed was one of the leaders in an apparent international smuggling operation.2 According to unsealed federal court documents, Poon smuggled undocumented women from Thailand, China, Korea, and Malaysia to be sex workers in her brothels.3 Agents also seized $31,500 in cash and 3,000 condoms from Poon’s house.4 Additionally, court papers indicated that the women were part of a trafficking circuit that rotated sex workers between Canada and major United States cities, including Los Angeles, Houston, Chicago, and New York.5

In a four-part special report beginning October 6, 2006, the San Francisco Chronicle reported sex trafficking as an $8 billion international business, with California, New York, Texas, and Las Vegas among its largest commercial centers.6 The special report centered on You Mi Kim, a sex trafficking victim from South Korea who was tricked into believing that leaving her family and working in America as a waitress would lead to

† Trial Attorney with the United States Department of Justice, Antitrust Division, National Criminal Enforcement Section. The views expressed herein are my own and do not represent the views of the United States Department of Justice or of any other individual employed by the United States Department of Justice.

I would like to thank Van Thuy Nguyen, an Articles Editor at the Asian American Law Journal, and her team of Hilary Kang, Kathleen Lu, Olivia Tran, and Christina Yang for their editing assistance that can only be described as exemplary.

2. Id.
3. Id.
4. Id.
5. Id.
financial stability for herself and her family. Instead, through a manipulative network of brokers, taxi drivers, and pimps operating in South Korea, Mexico, and the United States, Kim unwittingly landed in sex brothels in Los Angeles and San Francisco. When Kim wanted to escape her "owners," she faced seemingly insurmountable obstacles. Her trafficking debt was $12,000, she had no money to return to Korea, and she was in the United States illegally. Moreover, she lived under the fear of reprisal against her family in South Korea by criminal syndicates who were not afraid of using violence to protect the billions they generated. Another prostitute once warned Kim that "[i]f you go back, they will try to find you." Kim’s circumstances typify the plight of thousands of Asian women and children who are trafficked into the United States each year by promises of lucrative jobs as models or hostesses, only to be enslaved and sold to brothels, strip clubs, and outcall services and extorted into working off heavy “smuggling” debts. According to Kul Gautum, the Deputy Executive Director of the United Nations Children’s Fund, the trafficking of women and children across the Asia-Pacific region represents “the largest slave trade in . . . history.” Southeast Asia has the worst known record of human trafficking in the world, with teenage girls as its usual victims working in sweatshops or brothels.

Collecting accurate data on the numbers of trafficking victims smuggled globally and into the United States is problematic due to the clandestine nature of human trafficking and victims’ fear in reporting victimization. According to the United States Department of State, an estimated 600,000 to 800,000 people are trafficked annually across international borders, while approximately 14,500 to 17,500 victims are trafficked into the United States every year. Estimates show that 80% of

9. Id.
10. Id.
11. See May, supra note 6.
12. May, supra note 8.
14. Id.
trafficking victims are women and girls.\textsuperscript{18} The United States Department of Justice estimates that the majority of trafficking victims, approximately 5,000 to 7,000 annually, come from Asian countries, including Thailand, Vietnam, China, the Philippines, Korea, and Malaysia.\textsuperscript{19}

Historically, the United States response to trafficking victims has been lukewarm. According to Ivy Lee, staff attorney at the Asian Pacific Islander Legal Outreach and co-chair of the Bay Area Anti-Trafficking Task Force, "[t]here's a lot of public sentiment that these women came here and deserve this."\textsuperscript{20} However, "[t]he important thing for the public to start thinking about and communicating to their representatives and law enforcement [is] that these are victims of sex trafficking and indentured servitude, slavery," says Lee.\textsuperscript{21} On the Department of Justice website, sex trafficking is described under the Child Exploitation and Obscenity Section as nothing less than slavery: "When an offender takes a woman or girl against her will and forces her to engage in prostitution, that offender has stolen her freedom and dignity."\textsuperscript{22} These countervailing views beg the question: Will immigration courts ever grant Asian sex trafficking victims asylum relief?

Since trafficking victims are illegally in the United States, immigration laws have always treated them as illegal aliens. Prior to 2000, the Immigration and Nationality Act ("INA") had no provision that afforded any special treatment to trafficking victims.\textsuperscript{23} Thus, courts have never granted trafficking victims asylum relief.\textsuperscript{24} Since the determination of refugee status is not a mechanical process,\textsuperscript{25} the evolving nature of asylum law may one day expand to afford trafficking victims protection as refugees.\textsuperscript{26}

The bleak outlook of human trafficking worldwide caught the attention of Congress and the Clinton administration, leading to the


\textsuperscript{21} Id.


\textsuperscript{26} See Tala Hartsough, Asylum for Trafficked Women: Escape Strategies Beyond the T Visa, 13 HASTINGS WOMEN'S L.J. 77, 114 (2002).
Trafficking Victims Protection Act of 2000 ("TVPA"). The TVPA created a special non-immigrant visa class in the INA for trafficking victims called the T-visa. In theory, T-visas endow trafficking victims with an assortment of benefits, including medical services and possibly lawful permanent residency after three years, similar to the benefits afforded to refugees. Despite these statutory benefits, T-visas remain a limited option for trafficking victims.

First, the court must find that the trafficking victim is a "victim of a severe form of trafficking in persons." This renders disqualified a victim who initially agreed to be smuggled into the United States. Secondly, trafficking victims must assist investigators in the prosecution of her traffickers, unless she is under the age of fifteen. Therefore, only the limited few who investigators choose for assistance will qualify. Thirdly, the victim must show that she would suffer extreme hardship involving severe harm upon removal. Finally, the TVPA allows the Attorney General to grant only 5,000 T-visas a year, which, if applied to its maximum, would cover only one-third of victims in the United States annually. Since the creation of the T-visas in 2000, only approximately 1,000 have been issued to victims, even though 5,000 are available each year. This disparity is due in large part to the requirement that victims must testify against their captors in order to qualify for the T-visa. The stringent requirements to qualify for T-visas necessitate that trafficking victims seek asylum relief as an alternative to avoid harmful deportation.

Trafficking victims who can establish coercion into the sex trade deserve the protections of United States asylum relief. Given that almost four out of every ten trafficking victims originate from an Asian country, the humanitarian assistance of asylum relief for Asian women and children would be enormous. This article addresses a narrow, yet contentious, aspect of asylum relief as it affects trafficking victims—the essential element of proving persecution or a "well-founded fear of persecution." Part I provides a backdrop for legal analysis by discussing the requirements and purpose of asylum relief. Part II discusses the jurisprudential evolution of

30. See Hartsough, supra note 26, at 101.
36. Id.
37. See Bureau of Int’l Info. Programs, U.S. Dep’t of State, supra note 19.
“persecution” and a “well-founded fear of persecution.” Part III broaches the ways practitioners can tackle evidentiary issues related to the elusive persecution prong. Finally, Part IV argues that with recent court interpretations of the persecution element, Asian trafficking victims will likely obtain asylum relief under refugee laws.

I. VICTIMS’ ADVOCATES V. BORDER DEFENDERS

Refugee law is the vehicle by which individuals fleeing persecution may seek asylum in the United States. Under certain circumstances, a trafficking victim may apply for asylum relief. In order to obtain asylum relief, a trafficking victim must qualify as a “refugee” under the definition found in 8 U.S.C. § 1101(a)(42). To qualify as a refugee, an applicant must prove that she is unable or unwilling to return to her country of nationality or last residence 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.39 The traditional definition of persecution is “the infliction of suffering or harm upon persons who differ in a way regarded as offensive.”40 The persecutor must also be the state itself or an entity that the state is unable or unwilling to control.41 Upon determination that a trafficking victim meets the definition of a refugee, the Secretary of Homeland Security or the Attorney General may grant asylum to the applicant.42

Although immigration courts have never granted trafficking victims asylum, the protections of asylum relief still present a more attractive option for trafficking victims than T-visas. First, under 8 U.S.C. § 1184(o)(2), the Secretary of Homeland Security and the Attorney General are only allowed to grant 5,000 T-visas each year. Under refugee law, there are no such limitations for asylum relief. Second, obtaining a T-visa is dependent on whether a victim will cooperate with authorities to prosecute traffickers.43 This presents a daunting task for victims who must testify against their captors. The San Francisco Chronicle reported that oftentimes trafficking victims are more afraid of their captors than the authorities.

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to 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.
Id. (emphasis added).
40. Desir v. Ilchert, 840 F.2d 723, 726-27 (9th Cir. 1988) (citing Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)).
41. Hartsough, supra note 26, at 112.
because of the threat of reprisal. In contrast, asylum relief does not require any form of assistance to law enforcement. Finally, in order to qualify for a T-visa, an applicant must either be a victim of a "severe form of trafficking," or be under the age of eighteen and have performed commercial sex against her will. This requirement unfairly disqualifies many victims who are older than eighteen and unwittingly agree to be smuggled into the United States. There is no such requirement under refugee law.

Despite the simplicity in defining "refugee," the element of persecution or a well-founded fear of persecution has been enigmatic in its formulation. There is no universally accepted definition of persecution or a well-founded fear, and various attempts to formulate one have met with little success. Before discussing why a concrete definition of persecution has been so elusive, it would be helpful to frame the pressures underlying refugee law as it pertains to asylum.

The purpose of asylum is to protect asylees who are fleeing harm or danger from another country. Motivated by moral and humanitarian obligations, refugee law provides a process whereby those who qualify as refugees obtain protection from further harms. The category of individuals advocating for the expansion of refugee law, for the purpose of this discussion, will be referred to as "Victims' Advocates."

In contrast, those who oppose the application of refugee law to trafficking victims are referred to as "Border Defenders." This group believes that if refugee law were expanded to cover trafficking victims, the pillars of our nation would be at serious risk. An asylum law without limitations would be laughable and create a host of potential problems, including a lack of public support for a law subject to abuse, loopholes facilitating terrorism, and an influx of cheap labor to supplant underground sweatshops.

Non-governmental organizations ("NGOs") and attorneys for trafficking victims side with Victims' Advocates while the United States Citizenship and Immigration Services (USCIS) has historically aligned

44. See May, supra note 6.
45. See Hartsough, supra note 26, at 93.
46. See UNHCR, Refugee Status Handbook, supra note 25.
49. See Martin & Schoenholtz, supra note 47, at 589.
50. See Hearing, supra note 48, at 3.
51. USCIS was formerly known as the Immigration and Naturalization Service, before it was placed under the control of the United States Department of Homeland Security in March 2003.
itself with Border Defenders. Within this framework, each adjudicator of asylum applications must weigh the conflicting concerns of Victims’ Advocates and Border Defenders. Ultimately, each asylum adjudicator must maintain the legitimacy of the United States asylum response to deserving asylees, while preserving the integrity of our borders.\footnote{52}

Although qualifying for refugee status requires that a number of elements be met, this article seeks only to explore the element of proving persecution, a significant hurdle for trafficking victims applying for asylum. Despite the unfavorable history of asylum relief for trafficking victims, it is this same history that will educate Victims’ Advocates about what is required to overcome the hurdle of proving persecution. Only then may the vision and efforts of Victims’ Advocates lead to the necessary protections of asylum for trafficking victims.

II. THE PERSECUTION ELEMENT: WHERE ARE WE NOW?

Refugee status, on the universal level, is governed by the United Nations 1951 Convention and the 1967 Protocol (the “Protocol”) relating to the Status of Refugees.\footnote{53} However, it is incumbent upon each state where an applicant seeks asylum to determine the status of a refugee. In 1968, the United States acceded to the Protocol.\footnote{54} Congress passed the Refugee Act of 1980 twelve years later, thereby conforming the INA to the Protocol.\footnote{55} Since Congress intended the definition of “refugee” under 8 U.S.C. § 1101(a)(42)(A) to conform to the Protocol, the courts have often resorted to the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the “Handbook”) in determining whether someone qualifies as a refugee.\footnote{56}

The Office of the United Nations for the High Commissioner for Refugees (“UNHCR”) published and regularly updates the Handbook. These edits and revisions serve as a practical guide for relevant authorities of contracting states of the United Nations in determining refugee status. The Handbook is not a treatise but a compilation of expert knowledge gathered by the Office of the High Commissioner on refugees over the last twenty-five years, the practices of the Contracting States, and the views exchanged between the Office of the High Commissioner and the

\footnote{52. See Daugherty, supra note 47, at 633.}
\footnote{53. See UNHCR, Refugee Status Handbook, supra note 25, at ¶ 1 (foreword to the handbook); see also Raghu, supra note 24, at 167.}
\footnote{54. See Raghu, supra note 24, at 167.}
\footnote{56. See also Rodriguez-Roman v. INS, 98 F.3d 416, 425 (9th Cir. 1996) (noting that “the Supreme Court and this court have looked to the Handbook in determining refugee status, and consider it to be authoritative on the subject”).}
Contracting States. The Handbook is frequently cited by adjudicators in the United States.

This section analyzes the element of persecution, or harm, by exploring the different avenues of proof along with the obstacles to legally demonstrating harm. Subsection A discusses the current legal definition of persecution and what an applicant must prove in order to obtain asylum. Subsection B then suggests two ways an applicant can show sufficient harm to warrant asylum—by proving the persecution element through evidence of (1) past persecution or (2) a well-founded fear of persecution.

A. The Definition of Persecution

As discussed above, an asylum applicant must prove either harm or persecution, usually in one of two ways: (1) the applicant suffered past persecution, or (2) the applicant has a well-founded fear of future persecution. Let us first discuss the definition of persecution.

Since the INA does not define “persecution,” courts have generally deferred to the Bureau of Immigration Appeals’ (BIA) interpretations of persecution unless they are “arbitrary, capricious, or manifestly contrary to the statute.” However, the Circuit Courts’ prior opinions interpreting the Act also bind the BIA.

The BIA has defined “persecution” as the “infliction of harm or suffering . . . to overcome a characteristic of the victim.” In Pitcherskaia v. INS, the asylum applicant, Pitcherskaia, was repeatedly arrested by the Russian authorities because of her associations with homosexuals. The authorities again arrested Pitcherskaia after concluding that she was a lesbian, thereby forcing her to undergo clinical treatment for her sexual orientation. After “therapy” sessions and a diagnosis for “slow-going schizophrenia,” she was arrested again for associating with gay friends. In 1992, she arrived in the United States and applied for asylum. The BIA

57. See UNHCR, Refugee Status Handbook, supra note 25, at Foreword.
58. See, e.g., Rodriguez-Roman, 98 F.3d at 425-26.
59. The author recognizes that in addition to proving persecution, the persecution must also be on account of one of the five grounds enumerated in the definition of refugee in 8 U.S.C. § 1101(a)(42). However, this article will focus only on proving the persecution element of an asylum claim. For a more detailed discussion of satisfying one of the five grounds for a trafficking victim, see Hartsough, supra note 26, at 103-11.
60. 8 U.S.C. § 1101(a)(42)(A) (2001); see also Pitcherskaia v. INS, 118 F.3d 641, 645 (9th Cir. 1997).
61. Pitcherskaia, 118 F.3d at 646 (quoting Romero v. INS, 39 F.3d 977, 980 (9th Cir. 1994)).
62. See Fisher v. INS, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (reviewing de novo the BIA’s legal interpretations of the INA).
64. See Pitcherskaia, 118 F.3d at 644.
65. Id. at 644.
66. Id. at 643, 645.
denied her petition.\textsuperscript{67}

The BIA concluded that Pitcherskaia did not suffer past persecution because the intent of the involuntary psychiatric treatments was to "cure" her, not to punish her or force her to overcome a characteristic.\textsuperscript{68} Since there was no intent to punish, the BIA held that the militia's actions did not amount to "persecution" within the meaning of the INA.\textsuperscript{69} Although the BIA's interpretations are generally entitled to deference,\textsuperscript{70} the Ninth Circuit held that the BIA erred\textsuperscript{71} in holding that an asylum applicant must prove a subjective intent to punish as a requirement for persecution.\textsuperscript{72} The Ninth Circuit confirmed that the determination of persecution was an objective determination based on the resulting effects of the harm, rather than the subjective intent of the persecutor.\textsuperscript{73}

The Handbook and courts have also drawn a distinction between mere economic or personal disadvantage and persecution.\textsuperscript{74} While the Handbook distinguishes a refugee from an economic migrant who leaves her native country for economic change or other personal reasons,\textsuperscript{75} the Sixth\textsuperscript{76} and Seventh Circuits\textsuperscript{77} have held that harassment or discrimination alone does not rise to the level of persecution. The Tenth Circuit has also held that persecution requires more than just restrictions or threats to life and liberty.\textsuperscript{78}

While generalized economic disadvantage does not pass the threshold of persecution, the Handbook acknowledges several exceptions to this principle.\textsuperscript{79} First, the resulting effects of discrimination may rise to the level of persecution where "economic measures destroy the economic existence of a particular section of the population."\textsuperscript{80} Therefore, legal advocates must evaluate the effects of negative economic measures from an

\begin{itemize}
\item \textsuperscript{67} Id. at 645.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id. With regard to finding "persecution" within the meaning of the INA, BIA Chairman Schmidt dissented from the BIA majority's legal holding that an applicant must prove a persecutor's subjective "intent to punish" to establish persecution. \textit{Id}.
\item \textsuperscript{70} See Almaghzar v. Gonzales, 457 F.3d 915, 920 (9th Cir. 2006).
\item \textsuperscript{71} See Pitcherskaia, 118 F.3d at 646.
\item \textsuperscript{72} Id. at 647.
\item \textsuperscript{73} Id.; see also \textit{In re Kasinga}, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (BIA holding that although "many of our past cases involved actors who had a subjective intent to punish their victims... this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution").
\item \textsuperscript{74} See UNHCR, \textit{Refugee Status Handbook}, supra note 25, at \textit{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{|}}}}}}}}} 62-64; Zehatye v. Gonzales, 453 F.3d 1182, 1185-86 (9th Cir. 2006); Musabelli v. Gonzales, 442 F.3d 991, 994 (7th Cir. 2006); Li v. Gonzales, 405 F.3d 171, 177 (4th Cir. 2005).
\item \textsuperscript{75} See UNHCR, \textit{Refugee Status Handbook}, supra note 25.
\item \textsuperscript{76} See Sako v. Gonzales, 434 F.3d 857, 862 (6th Cir. 2006).
\item \textsuperscript{77} See Mitreva v. Gonzales, 417 F.3d 761, 764 (7th Cir. 2005); Liu v. Ashcroft, 380 F.3d 307, 312 (7th Cir. 2004).
\item \textsuperscript{78} See Hadjimehdigholi v. INS, 49 F.3d 642, 646 (10th Cir. 1995).
\item \textsuperscript{79} See UNHCR, \textit{Refugee Status Handbook}, supra note 25, at \textit{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{\textsuperscript{|}}}}}}}}} 62-64.
\item \textsuperscript{80} Id.
\end{itemize}
individual micro and a broad macro level. The Handbook also recognizes that although an applicant may have been subjected to various measures that do not in themselves amount to persecution, a combination of such measures and other adverse factors (e.g., civil unrest) may rise to persecution on cumulative grounds.\textsuperscript{81} Consequently, the Handbook admonishes Contracting States to determine persecution based on the totality of the alleged circumstances.\textsuperscript{82}

Since no immigration court has ever granted asylum to a trafficking victim, there is no model to use as a benchmark to measure whether a victim’s circumstances rise to the level of persecution. Certainly, given the realities of trafficking as “the largest slave trade in . . . history,” it is undisputed that the suffering inflicted upon trafficking victims is “offensive.”\textsuperscript{83} The daily rigor of sexual slavery, physical confinement, and the risk of contracting AIDS amounts to persecution.

In terms of future persecution, Victims’ Advocates should look no further than the threat of harm by the criminal syndicates who operate sex trafficking rings.\textsuperscript{84} The San Francisco Chronicle reported that women have legitimate reasons to be scared of coming forward, as those who have assisted investigators in the past have been burned with acid, disappeared, or had their homes ransacked and their families harmed in their home countries.\textsuperscript{85} The United Nations has also stated that criminal syndicates in foreign countries flourish because of the corruption among government officials.\textsuperscript{86} As You Mi Kim was warned by a fellow prostitute, if women tried to escape, they would be tracked down.\textsuperscript{87} Such a looming threat amounts to a well-founded fear of persecution.

To prove the persecution element, it will not be enough to assert that the employers or the government marginalized trafficking victims in their native country, or that the victims feared a general societal disadvantage upon their return. Legal advocates must ensure that the proffered evidence demonstrates not only harm that would be offensive to a reasonable person, but one that rises above the “garden-variety harm.” Courts are sending a message that the harm must have a substantial shock value to pass muster. The immigration community is still waiting to see what it will take for the United States to grant asylum relief for trafficking victims.

\textsuperscript{81} Id. at ¶ 51-53.
\textsuperscript{82} Id.
\textsuperscript{83} See Agence France-Presse, supra note 13.
\textsuperscript{84} See May, supra note 10; see also Kelly Hyland, Protecting Human Victims of Trafficking: An American Framework, 16 BERKELEY WOMEN’S L.J. 29, 43 (2001).
\textsuperscript{85} See May, supra note 10.
\textsuperscript{87} See May, supra note 10.
B. Proving the Necessary Harm

In order to satisfy the harm element of asylum, the applicant must either prove past persecution or a well-founded fear of future persecution. A rebuttable presumption of well-founded fear of future prosecution arises if an applicant establishes proof of past persecution. The burden shifts to the USCIS to rebut this presumption, with a preponderance of the evidence, by showing that there is little likelihood of future persecution due to a change in the conditions of her native country. Alternatively, the USCIS may rebut the presumption by demonstrating that there is a fundamental change in circumstances such that the alien no longer has a well-founded fear of persecution in his country of nationality or a practicable means of avoiding future persecution by relocating to another part of his country of nationality. Advocates, in representing their clients, should first establish past persecution to raise a rebuttable presumption of future persecution. Given the clandestine nature of procuring victims and the false pretenses surrounding procurement, there will likely be little documentation of the procurement and it will be difficult for most victims to prove a history of persecution in their native country before arriving in the United States.

If the applicant is unsuccessful in proving past persecution, the applicant may also satisfy the element of persecution by proving a well-founded fear of persecution. An applicant bears the burden of proving a well-founded fear of persecution. Consider the following guidance on evaluating a well-founded fear, as set forth in the Handbook:

The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed.

In other words, the Handbook suggests both a subjective and objective component in evaluating an applicant’s claim of well-founded fear. Courts have generally aligned with the Handbook’s criteria in evaluating well-founded fear. In the Seventh Circuit, the court held that “[t]he test for determining whether an asylum applicant has a well-founded fear of persecution has both subjective and objective elements . . . not just a subjective fear, but also that a reasonable person in his shoes would fear

88. See 8 U.S.C. § 1101(a)(42)(A); see also Pitcherskaia v. INS, 118 F.3d 641, 645 (9th Cir. 1997).
89. See Pitcherskaia, 118 F.3d at 646.
90. See id.; see also Prasad v. INS, 101 F.3d 614, 617 (9th Cir. 1996) (holding that proving past persecution raises the rebuttable presumption of a well-founded fear of persecution and makes the applicant statutorily eligible for asylum).
91. See Orelien v. Gonzales, 467 F.3d 67, 71 (1st Cir. 2006); Toure v. Att’y Gen. of U.S., 443 F.3d 310, 317 (3d Cir. 2006); Bushira v. Gonzales, 442 F.3d 626, 631 (8th Cir. 2006).
92. See 8 U.S.C. § 1101(a)(42)(A); see also Pitcherskaia, 118 F.3d at 645.
To satisfy the subjective component, an applicant is required to have a genuine concern of persecution. Any documentation, including publications supporting the assertion that the other state has harmful practices, will help to establish the subjective component. The objective component requires that the applicant establish a reasonable fear of persecution by credible, direct, and specific evidence. The Supreme Court has ruled that asylum applicants are required only to show that there is "a reasonable possibility" of persecution upon return to their native country, not a "clear probability."

The applicant may either (1) prove past persecution and consequently raise a rebuttable presumption of a well-founded fear of persecution, or (2) prove independently a well-founded fear of persecution. Regardless of which method the applicant chooses, the more credible, direct, and specific the evidence an applicant can provide, the stronger the case will be for asylum.

III. EVIDENCE OF PERSECUTION

Knowing the evidentiary threshold to establish persecution is only half the battle. The other half consists of actually proving the requisite harm through credible, direct, and specific evidence. Victims' Advocates should keep in mind that more often than not, an asylum application will turn on the issue of credibility. Asylum officers evaluate hundreds of asylum applications in a very short period of time. Most asylum applications will present an objectively "offensive" circumstance, bringing their cases within the possibility of asylum relief. However, since asylum officers must concern themselves with border integrity, they cannot grant asylum to every applicant who alleges offensive actions. An asylum officer's determination will come down to the credibility of the applicant. This section discusses the strategies helpful to consider when applying for asylum for a trafficking victim.

A. Proving Past Persecution

Throughout the application process, Victims' Advocates should remember that "persecution," or a "well-founded fear," are probably not a part of the victims' vocabulary. This is especially important because, in...
many cases, an applicant may not even be aware that he or she has experienced persecution. The facts of persecution may be embedded somewhere in an applicant's personal history. It is imperative for an advocate to expend all efforts to uncover every relevant fact in an applicant's past in order to present the best asylum claim possible. A lack of diligence could amount to irreversible error.

The Handbook recognizes this inherent difficulty in proving past persecution, as it cautions Contracting States that "[i]n most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." The applicant's testimony alone may establish persecution. However, without corroborating evidence, the asylum officer must extract all information, including past persecution and personal history, directly from the applicant's testimony. This results in stricter scrutiny of the testimony regarding personal and family histories, social affinities, and political beliefs. Trafficking victims must be prepared to discuss any topic that may arise under intense scrutiny, including seemingly innocuous topics.

Although testimony alone may be statutorily sufficient, the USCIS may still require objective evidence if reasonable. For instance, if a trafficking victim attained freedom after the police arrested her captors, an asylum officer may reasonably expect to see documentation, such as a routine police report, to substantiate her claims of imprisonment by her captors. Advocates may also gather publicly available records, including newspaper articles and government-sponsored information regarding issues and activities taking place in a foreign country.

Given the unpredictability of an asylum officer's decision-making process, it would be naïve to speculate about whether it is reasonable to provide objective evidence. Considering the frequency of denied asylum claims based on the failure to provide reasonable evidence, Victims' Advocates must aim to defuse this "credibility bomb" by playing "devil's advocate." It will be prudent to assume that an applicant's testimony alone will be insufficient, and to focus on the universe of objective evidence available to support a claim of past persecution.

Additionally, Victims' Advocates must remain aware that past persecution itself may be insufficient if the facts underlying the claim are no longer true. A finding of past persecution raises the rebuttable presumption that the applicant has a well-founded fear of persecution. However, the USCIS may rebut this presumption if there is a fundamental

---

100. See 8 C.F.R. § 208.13(a) (2007).
101. See Helton, supra note 98, at 229-30.
102. Id. at 229.
103. See Pitcherskaia, 118 F.3d at 646.
change in the conditions surrounding the harm.\textsuperscript{104} Victims’ Advocates must remain vigilant about proving that circumstances surrounding past persecution, such as the continued existence of the trafficking ring, continue to be a formidable threat to the victim. Such awareness will pre-empt the USCIS’s inevitable affirmative defense.

Given the plight of trafficking victims, preparing a claim of past persecution will be inherently difficult. The Handbook suggests that “[t]he requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.”\textsuperscript{105} According to the Handbook, when proving past persecution, a \textit{credible} applicant should be given the benefit of the doubt.\textsuperscript{106} Despite the BIA’s official endorsement of the Handbook, the BIA has been reluctant in granting asylum based on testimony alone.\textsuperscript{107} This suggests that it would be perilous to assume that documentation would be unnecessary.

\textbf{B. Proving Well-Founded Fear}

As noted above, an applicant may also satisfy the harm element by proving independently that she harbors a well-founded fear of persecution.\textsuperscript{108} Proving a well-founded fear consists of two prongs, an objective and a subjective component.\textsuperscript{109} For the subjective component, an applicant is required to have a genuine concern that she will be persecuted.\textsuperscript{110} Objectively, the fear must be reasonable, where a reasonable person in the circumstances would fear persecution.\textsuperscript{111} Finally, the Supreme Court has interpreted “well-founded fear” to mean that if the applicant proves, with subjective and objective evidence, that “there is a one in ten chance of the persecution happening, that is enough.”\textsuperscript{112}

The difference between proving past persecution and proving a well-founded fear is that, in the latter, the applicant must now show that a reasonable person would fear future persecution rather than show an actual suffering of persecution in the past. Because of this difference, and the two-prong requirement, multiple facets of the victim’s application will be

\begin{thebibliography}{99}
\item \textsuperscript{104} See Orelion v. Gonzales, 467 F.3d 67, 71 (1st Cir. 2006); Toure v. Att’y Gen. of U.S., 443 F.3d 310, 317 (3d Cir. 2006); Bushira v. Gonzales, 442 F.3d 626, 631 (8th Cir. 2006).
\item \textsuperscript{105} See UNHCR, \textit{Refugee Status Handbook}, supra note 25, at ¶ 197.
\item \textsuperscript{106} Id. at ¶ 196.
\item \textsuperscript{107} See Mark R. von Sternberg, 119 PLI/NY 239, 249 n.32.
\item \textsuperscript{108} 8 U.S.C. § 1101(a)(42)(A) (2001); \textit{see also} Pitcherskaia v. INS, 118 F.3d 641, 645 (9th Cir. 1997).
\item \textsuperscript{109} See Selimi v. Ashcroft, 360 F.3d 736, 740 (7th Cir. 2004); \textit{accord} Nagoulko v. INS, 333 F.3d 1012, 1016 (9th Cir. 2003).
\item \textsuperscript{110} See Chavarria v. Gonzales, 446 F.3d 508, 520 (3d Cir. 2006).
\item \textsuperscript{111} See Tolozo-Jimenez v. Gonzales, 457 F.3d 155, 161 (1st Cir. 2006).
\item \textsuperscript{112} INS v. Cardozo-Fonseca, 480 U.S. 421, 440 (1987) (stating that the standard for establishing a well-founded fear should not be confused with the higher standard involving withholding of deportation, which requires a showing of “clear probability”).
\end{thebibliography}
Subjectively, to prove a genuine concern, an applicant’s credible testimony about her genuine fear of persecution will often suffice. In order to establish genuine fear, Victims’ Advocates should focus on different aspects of the application and testimony, including the applicant’s personal history, the consistency of her entire testimony, and her ability to discuss traumatic experiences. Each element is discussed in more detail below.

First, the applicant’s personal history is important because the victim must show that in light of her own personal history, the fear is understandable and genuine. A victim who was coerced into procuring commercial sex should emphasize such events to show that she has a genuine fear that it would happen again, in contrast to a victim who was merely tricked into commercial sex. The fear factor of the coerced victim would differ from that of the victim tricked into sex trafficking. The lesson to be learned is that Victims’ Advocates must discover all pertinent facts in the applicant’s background to provide contextual support for the applicant’s genuine fear. Ultimately, the applicant must be prepared to convey her personal history to show that her fear of future persecution is a genuine one.

The establishment of credibility also hinges on the consistency of the applicant’s testimony. The importance of consistency lies in the rule that inconsistencies can be used to impeach the victim. Similar to proving past persecution, the advocate must ensure that the applicant’s testimony is internally consistent. The applicant must be able to accurately elaborate through testimony the facts alleged in the Form I-589. It will be helpful for Victims’ Advocates to review the Form I-589 with the victim to ensure that both accounts remain consistent. Further, the applicant’s own testimony will be evaluated for consistency in light of the objective evidence on the record, including personal documentation, news articles, and reports. It is therefore imperative for the advocate to ensure that the applicant’s testimony accurately reflects both the application and the objective evidence on the record. Victims’ Advocates must safeguard against inconsistency through calculated preparation.

Finally, the advocate must anticipate the difficulty and humiliation associated with revealing traumatic personal experiences to a complete stranger. The hesitancy to disclose embarrassing facts is real.

113. See, e.g., Hyland, supra note 84, at 31-43.
114. See von Sternberg, supra note 107, at 251.
115. See id.
116. However, incidental or minor inconsistencies, which are inconsequential to the application, will not be deemed to impeach an otherwise credible asylum claim. See Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986).
117. See UNHCR, Refugee Status Handbook, supra note 25, at ¶ 37-50 (general analysis of the “well founded fear of being persecuted”).
Nevertheless, obtaining asylum can save a life and the advocate must break down this hesitancy before the applicant testifies. The advocate should acknowledge the shame associated with disclosure and advise the applicant that withholding pertinent facts will be detrimental to her claim. It may very well be the humiliating fact that serves as the lynchpin to establishing a well-founded fear.

An applicant’s subjective fear only constitutes half of the well-founded fear requirement. In order to satisfy the harm requirement, the applicant must also “adduc[e] credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution.” The applicant must prove that a reasonable person in like circumstances would fear persecution. As in proving past harm, establishing reasonable fear often comes down to credibility.

Although the Handbook admonishes that testimony alone, or non-corroboration, may suffice to prove persecution, history has shown that the USCIS and the BIA have applied this “non-corroboration doctrine” only in the rare instances when it cannot reasonably expect objective evidence. Commonly, when the USCIS and the BIA find that proffering objective evidence is reasonable, failing to proffer objective evidence will create a basis for rejecting an asylum application for lack of credibility.

With regard to the type of background material that should be considered, it would be prudent, at the very least, for the applicant to provide evidence regarding the prevailing conditions in the home country. Given that most sex trafficking victims come from Asian countries known as sources of trafficking, this should not be a problem for the majority of Asian trafficking victims. The applicant should also provide newspaper articles, public reports, or governmental information regarding trafficking-related information. Documentation illustrating the laws of the native country and the manner in which they are applied will also be relevant.

An applicant should also provide any evidence relating to the applicant’s personal history. For instance, in Matter of Y-B-, the Board denied asylum in light of the claimant’s failure to provide proof of

118. Gu v. Gonzales, 454 F.3d 1014, 1019 (9th Cir. 2006); Yan v. Gonzales, 438 F.3d 1249, 1251 (10th Cir. 2006).
120. See von Sternberg, supra note 107.
121. In January 1997, the BIA set forth general guidelines regarding circumstances where corroboration may be required and the manner in which they may be proffered. See Matter of S-M-J, 21 I. & N. Dec. 722 (B.I.A. 1997).
122. See Helton, supra note 98, at 230; von Sternberg, supra note 107, at 248-49.
123. See Helton, supra note 98, at 229-230.
124. ld. at 230.
125. ld. at 229.
residency in a refugee camp in Senegal. In a Public Broadcasting Service ("PBS") documentary about asylum officers, aired on June 5, 2000, an asylum officer stated the following about rejecting a claim for asylum:

I think that the woman’s telling the truth, and I think Algeria’s a dangerous place, but she didn’t establish a well-founded fear of future persecution to me. She had lived there for a significant length of time since her last trouble. There was confusion over dates, which I couldn’t get past. And basically I didn’t think that she established a well-founded fear.

The Algerian applicant could have provided documentation, such as affidavits from family members, vouching for her residency in Algeria, to assist the adjudicator in believing her testimony. The lesson to take away is that there can never be too much objective evidence in an asylum application.

In theory, where the applicant’s claim is based on circumstances that cannot be reasonably verified with objective evidence, objective evidence will not be required. The Handbook has recognized this inherent difficulty and the BIA has technically endorsed the non-corroboration doctrine. The circuit courts have also recognized that when applicants provide credible, direct, and specific facts through testimony alone, objective evidence is not required.

The Supreme Court has also lowered the evidentiary burden by holding that if “there is a one in ten chance of the persecution happening, that is enough.” Nonetheless, recent USCIS and BIA decisions illustrate that ideology and practical reality are two different things.

IV. RELEVANT ISSUES

If there is a universal truth about legal questions, it is that answers are the same on one level: “it depends.” The issue of whether refugee status will be extended to trafficking victims is no different. Whether an asylum officer will ever extend asylum relief to a trafficking victim will depend not only on the victim’s individual circumstances, but also on the ability of Victims’ Advocates to persuade Border Defenders to expand such

126. Matter of Y-B-, 21 I&N Dec. 1136 (B.I.A. 1998); see also In re M-D-, Int. Dec. 1180 (B.I.A. 1998) (finding that the applicant was not credible based on a lack of identity documents, documents showing residency in a refugee camp in Senegal, and affidavits from family members still residing in the refugee camps corroborating the applicant’s identity, arrest, and detention, as well as the family’s coerced expulsion from Mauritania).
128. See von Stemberg, supra note 107, at 249.
129. See id.
130. See D-Muhumed v. U.S. Att’y General, 388 F.3d 814, 819 (11th Cir. 2004).
humanitarian assistance. Since asylum determinations operate on a case-by-case basis, it would be an exercise in futility to take any one hypothetical claim and advocate for asylum relief. Instead, this section will address relevant issues that resonate thematically throughout asylum jurisprudence.

A. A Change in Perspective: Past Persecution

When one thinks about the sex trafficking trade in the United States, it is hard not to focus on the morbid imagery of trafficking victims performing sexual acts and living in dilapidated conditions without seeing the light of day. The horrors are undisputed and one cannot help but question the social mores of our country for allowing such human suffering to flourish. Such degrading subjugation has become a popular rallying cry for Victims' Advocates. Given the humanitarian purpose of refugee law—to protect asylees fleeing past persecution in their home country—the question arises: Should the determination of past persecution turn on what happened to a trafficking victim in her native country or on her suffering on American soil?

Border Defenders argue that if refugee law was meant to protect asylees fleeing persecution from their native government, or from a group the native government is unable or unwilling to control, then the determination of refugee status should focus on events in the home country. It seems illogical to focus on acts of trafficking in the United States to establish past persecution since the native government cannot protect trafficking victims once they reach American soil. Intuitively, this makes sense because focusing on the trafficking, rather than the procurement of trafficking in the native country would amount to holding a native government accountable for activities beyond its control.

From the standpoint of a Victim Advocate, such a narrow focus in determining past persecution is inconsistent with a humane response to refugees. If the purpose of asylum is to prevent further violations of human rights, then it should be irrelevant whether the harm justifying protection occurred in the native country or in the United States.

To reconcile these countervailing views, one can resort to the notion of determinism. Determinism dictates that one must also look at the activities leading up to the trafficking. In other words, trafficking does not occur in a vacuum, but results from harmful activities attributable to traffickers overseas. It follows that if traffickers procure victims in other countries before smuggling them into the United States, the cause of

---

132. See UNHCR, Refugee Status Handbook, supra note 25, at ¶ 52 (noting variations in the psychological makeup and circumstances of each applicant).
133. See Raghu, supra note 24, at 173 ("[s]exual slavery is 'harm or suffering'... to subordinate women and exploit their sexuality for the pleasure and power of men"); Hartsough, supra note 26, at 109 ("[t]rafficking and life in brothels constitute a threat to freedom, as women may be imprisoned 'with bars on the windows and remote-operated front gates' ").
trafficking can be traced back to a native government’s inability or unwillingness to control traffickers’ efforts.

If determinism is accepted, the Border Defenders’ control argument crumbles. With the amount of attention afforded to trafficking on the international scale, it is undisputed that native governments can foresee the harm from their inability or unwillingness to crack down on traffickers. The theory of determinism permits asylum officers to find past persecution by focusing not only on the trafficking in the United States, but also on the negligence of native governments for allowing traffickers to flourish.

B. Sexual Slaves v. Aliens

Commentators routinely refer to sex trafficking as “sexual slavery” or a “slave trade.” It is undisputed that the conditions themselves resemble slavery on a superficial level. If slavery is no longer an accepted form of human treatment in the United States, why has the United States not responded in a more humanitarian way to “sexual slavery”?

One obvious answer is that the USCIS believes trafficking victims are merely exploited like other aliens who have chosen to be employed in America. As Ivy Lee puts it, many in the public believe that because Asian women and children came here, they deserve this. The key notion in this rationale is the focus on “choice,” which subtly distinguishes trafficking from slavery. “Slavery” is the “[t]he state of one bound in servitude as the property of a slaveholder or household.” “Exploitation,” on the other hand, is the “[u]tilization of another person or group for selfish purposes.” Although it is unclear from these definitions where the dividing line lies, there is clearly a difference between involuntary servitude and exploitation that is compelling Border Defenders to reject asylum claims by trafficking victims. It would be helpful to compare slavery with the pornography industry to explore this subtlety.

A theoretical difference between slavery and the pornography industry is that there is a different degree of coercion involved. If we compare an example of each situation, it is readily apparent that the coercion involved with slavery is more arbitrary than the coercion involved with pornography. Before abolition, African slaves were rounded up by native governments and sold to plantation owners in the New World as property. These slaves

---

134. See Agence France-Presse, supra note 13.
135. Id.
137. See Kim, supra note 20.
were not given a choice about accepting slavery as a lifestyle. The arbitrariness involved was blatant and obvious.

In pornography, producers advertise for new performers by touting money and fame. Naive young women succumb to their hopes for stardom by responding to these advertisements. However, the true rigors of the pornography industry are not exposed until actresses actually perform. Assuming that pornography workers end up in conditions as degrading as slavery, the relevant difference between slavery and pornography lies in the events leading up to the subjugation. While slaves were never confronted with a choice to be relegated to a piece of property on a plantation, there is an element of choice involved in pornography. The notion that pornography stars have chosen their situations has eroded public sympathy for any tribulations they must endure. Border Defenders have adopted this same rationale in treating trafficking victims.

Despite slave-like conditions in sex trafficking, the rationale that undermines a more humane response to sex trafficking is the presence of volition, a “conscious choice or decision.”141 It is well documented that traffickers, like pornographers, recruit naive profit-seeking individuals through personal and written solicitations.142

However, it can also be argued that such a “choice” or “decision” is irrelevant. Although some trafficking victims may have responded to solicitations, they certainly did not choose to live and work in slave-like conditions and expose themselves to sexually transmitted diseases. Currently, the view that a trafficking victim should be treated like any other alien fulfills a conservative immigration policy rather than a rational humanitarian response. This is akin to saying that a woman who agrees to enter a hotel room on the first date and is coerced into performing unwanted sexual acts does not deserve the same empathy as a woman who was drugged and raped. Such a distinction is unconscionable and should not extend to distinguishing trafficking victims from slaves.

C. Sex Victims’ Future Fear

In 1996, the applicant in Kasinga was able to persuade the BIA that a reasonable person in her shoes would harbor a well-founded fear of female genital mutilation (“FGM”). Given that this case involved the

142. See Hartsough, supra note 26, at 84-85 (“Some women are ‘completely duped,’ others learn ‘half-truths’ but find themselves doing work they did not agree to, and still others are informed of the work they will be doing but then are kept in debt bondage with no financial alternatives.”).
143. See, e.g., Hyland, supra note 84, at 39.
persecution of women, and that the BIA designated it as a noteworthy
decision for publication, it makes sense to view Kasinga as a guide for
claims of well-founded fear.\textsuperscript{145} Victims’ Advocates should compare the fate
of a deported trafficking victim to the applicant in Kasinga and ask: \textit{What is it about FGM that differentiates it, on the scale of persecution, from
ostracism or reprisals by traffickers upon a victim’s return?}

FGM deserves more protection than the speculation of ostracism or
reprisal simply because the latter involves only speculation. If asylum relief
were granted based on speculation of persecution, the integrity of our
immigration policy would be undermined. However, in \textit{Kasinga,}\textsuperscript{146} the BIA
was presented with objective evidence showing that FGM was a genital
ritual in Togo and that “few African countries have officially condemned
female genital mutilation and still fewer have enacted legislation against
the practice.”\textsuperscript{147} Such certainty of persecution ensures that the applicant’s
fear is “well-founded” and is consistent with an asylum process reserved
for asylees fleeing persecution.

If the BIA’s designation of \textit{Kasinga} as precedent means that an
asylum applicant must offer the same degree of material evidence as proof
of a well-founded fear, then it will likely shut out many deserving
trafficking victims from serious consideration of asylum relief because
documented proof of future persecution is an evidentiary rarity.\textsuperscript{148}
Requiring such a burden of proof would be unfair for those who harbor a
genuine fear of suffering when they re-enter their native country, but
cannot point to a single publication to support it.

It is difficult to reconcile the evidentiary standard set by \textit{Kasinga} with
the common difficulties trafficking victims have in providing objective
evidence. Given the numbers of aliens who attempt to cross the border each
day, it is understandable that the USCIS would be careful in granting
asylum. The concern for fraudulent claims is a credible one.

Unfortunately, most trafficking victims do not even have identification
or the material support to verify their claims. Threats of ostracism or
reprisals by vengeful traffickers are not routinely documented. Trafficking
victims should not be penalized for this disparity in information. The
Handbook points out that “it is hardly possible for a refugee to ‘prove’
every part of his case and, indeed, if this were a requirement the majority of
refugees would not be recognized.”\textsuperscript{149} Therefore, the USCIS should relax
the evidentiary burden when it is apparent that it is unreasonable to expect

\textsuperscript{145} Accord Pitcherskaia \textit{v.} INS, 118 F.3d 641, 646 n.7 (9th Cir. 1997).
\textsuperscript{146} See \textit{Kasinga,} 21 I&N Dec. 357.
\textsuperscript{147} Id. at 361.
\textsuperscript{148} See Hartsough, \textit{supra} note 26, at 113 (“The clandestine nature of trafficking and the fact that
procurement occurred in [another country] ensure that there is little or no documentation or other
evidence of trafficking when the women reach the United States.”).
\textsuperscript{149} See UNHCR, \textit{Refugee Status Handbook, supra} note 25, at ¶ 203.
material support.

Resolving these pressures is not an easy task for anyone. It is clear that objective evidence plays a major role in the determination of a genuine fear of future persecution. In the long run, it may be more prudent for Victims' Advocates to invest the time to document the improprieties victims endure upon deportation as corroborative evidence for future asylum claims.

D. Credibility Determinations

As discussed, when the applicant’s claim is based on circumstances that cannot be reasonably verified with objective evidence, the Handbook has suggested that objective evidence should not be required. However, the BIA has continued to deny asylum applications based on failures to meet stringent evidentiary standards. In response, both the Second Circuit and the Ninth Circuit have reined in the BIA’s stringent standards, by affirming that credible testimony is sufficient without corroboration. In Well-Founded Fear, a PBS documentary aired on June 5, 2000, the determination of well-founded fear was shown to rest on haphazard judgments about credibility.

Given that Border Defenders may require objective evidence when it is “reasonable,” the flexibility of this criterion conveniently allows Border Defenders to say that a claim lacks credibility because there was insufficient objective evidence. The flexible standard of “reasonable” allows the USCIS and BIA to deny asylum based on lack of corroborative evidence while still enabling technical compliance with the courts. This is a gray area in the evidentiary standard and Border Defenders are exploiting it

---

150. See von Sternberg, supra note 107, at 249.
151. See von Sternberg, supra note 107.
152. See Diallo v. INS, 232 F.3d 279, 285-86 (2d Cir. 2000).
153. See Ladha v. INS, 215 F.3d 889, 899-900 (9th Cir. 2000).
154. See also Well-Founded Fear, (PBS television broadcast June 5, 2000).
155. See Hing, supra note 127, at 850-52. Excerpted statements of various asylum officers:
And I know in the beginning, as I said earlier, that I used to grant a whole lot more, but after you do this for awhile you become much more critical, and you become much more, very aware of inconsistencies, and I hope that’s what it is, right? I mean I know that it could just be the fact that you’re just very jaded. And how do you know where one begins and the other ends? If I admitted that I was jaded, wouldn’t I then be saying that I shouldn’t be doing this job anymore? So I say that I have a more acute understanding of credibility issues. Id. at 851.
How do you decide whether someone is telling the truth or not? It’s not simple. You’re never sure, that’s the problem. If you are pretty sure that’s it’s not the truth, then at least you’re in the comfortable position that the decision is based on something that’s real. But, in a case like this when it’s just plain fuzzy, I have to talk to somebody else about it, to get another perspective. That’s life, it’s real life. We’re dealing with real people, in real situations. Yes, they stay fuzzy forever. And we still have to make a decision, based on fuzziness. Id.
I think that the woman’s telling the truth, and I think Algeria’s a dangerous place, but she didn’t establish a well-founded fear of future persecution to me. She had lived there for a significant length of time since her last trouble. There was confusion over dates, which I couldn’t get past. And basically I didn’t think that she established a well-founded fear. That combined with a lack of past persecution made me refer the case. Id.
with impunity.

This means Victims' Advocates must be risk-averse when discovering and presenting an asylum claim by incorporating maximum corroborative evidence. However, it seems that more needs to be done to resolve this nuance than merely rallying behind the idea of presenting the USCIS with more corroborative evidence. Such complacency is not enough when it involves the subtle defiance of the Supreme Court by an administrative agency. Victims' Advocates must form a better understanding of why the USCIS has often cited credibility as the basis for rejecting asylum claims. Only then will Victims' Advocates be able to anticipate what needs to be done to ensure a consistent application of the non-corroboration doctrine.

To illustrate the dynamic of credibility determinations, it helps to look into the world of asylum officers. In Well-Founded Fear, the reflections of asylum officers show that credibility determinations are applied haphazardly and based on irrational factors. For instance, one asylum officer stated that it was unexplainable why he assessed credibility differently from one case to another:

But, you know, that inconsistency again, if that was in another case, maybe I wouldn’t have clung onto it. I may have saw past it. But for some reason, in this case, I didn’t. That’s because I found him not to be credible. . . . This may be the 450th time that I’ve interviewed a similar case, because I’ve had this experience, I’m seeing it totally different. . . . And I know in the beginning, as I said earlier, that I used to grant a whole lot more, but after you do this for awhile you become more critical, and you become much more, very aware of inconsistencies, and I hope that’s what it is, right?\footnote{156}

Rejections of asylum claims based on a lack of credibility have become routine. Since an asylum officer can always demand more corroborative evidence or cite to an information gap as an inconsistency in one's application, the convenience of rejecting asylum based on a lack of credibility is undisputed. However, does this convenience alone render scrutiny of credibility improper?

It should not, and it does not appear that Victims' Advocates believe so either. Bill Ong Hing, a professor of Asian American Studies at the University of California, Davis, states that although it is a truism that the USCIS has focused on credibility more than people would like, it still seems “like a reasonable thing.”\footnote{157} On this point, Hing is correct. A credibility determination is a necessary and reasonable process; without it, refugee law would be laughable. The goal is not to eliminate credibility determinations, but to ensure a consistent application based on case law and the tenets of the Handbook.\footnote{158}

\footnote{156. See Hing, supra note 127, at 850-51.}
\footnote{157. See Hing, supra note 127, at 852.}
\footnote{158. See, e.g., id. at 851-52 (arguing that “[t]he officers demonstrate absolutely no understanding
In essence, we are asking asylum officers to become more sensitive to the individual circumstances of each applicant so that credibility determinations, and the application of the non-corroboration doctrine, are based on the right factors.\(^{159}\) Is it possible for an asylum officer to sustain a critical level of sensitivity for the 450th applicant, whose circumstances are similar to those of the first applicant? This is analogous to asking whether we can realistically expect a sentencing judge to sympathize with another convicted felon who discovered religion in prison. Since people naturally become desensitized to circumstances encountered on a routine basis, Victims' Advocates must contend with the tendencies of human nature when dealing with asylum officers who evaluate applicants in droves. Although the courts have admonished the USCIS and the BIA to become more sensitive to an applicant’s ability to provide corroborative evidence, demanding more sensitivity from asylum officers who have reached this level of desensitization seems daunting.

Recognizing this dynamic is important because it suggests that a more effective resolution may require a broader change in the process. Hing suggests that the USCIS should adopt a burden-shifting scheme used in employment discrimination cases, where the burden shifts to adjudicators to rebut a showing of persecution after applicants meet a lower burden of proof.\(^{160}\) Certainly, lowering the current burden of proof is a step in the right direction. Is the step big enough? Given that the USCIS is more resourceful when it comes to verifying information, it seems right that the burden should shift at some point. However, \textit{when} it shifts depends on another credibility determination, and that is when it becomes obvious that there is no simple answer to this process.

**CONCLUSION**

According to San Francisco Mayor Gavin Newsom, “[g]irls are being forced to come to this country, their families back home are threatened, and they are being raped repeatedly, over and over.”\(^{161}\) The cycle of deceit and sexual violence is infinite. The United Nations’ Kul Gautum believes that a combination of poverty, globalization, organized crime and discrimination against women fuels the trade.\(^{162}\) Moreover, ending the trade in humans is virtually impossible given the corruption among government officials.\(^{163}\)

---


\(^{160}\) See Hing, \textit{supra} note 127, at 852.

\(^{161}\) See May, \textit{supra} note 6.

\(^{162}\) See BBC NEWS, \textit{supra} note 86.

\(^{163}\) \textit{Id.}
“In some countries, police, who are supposed to stop these crimes, are involved in crimes by offering protection to criminals. Pimps and middlemen get protection from the police,” says Gautum.164

The joint effect of the burgeoning Asian sex trade and the U.S. government’s renewed commitment to combat trafficking will be to increase the volume of asylum claims for trafficking victims in the coming years. Immigration policies have grown more conducive to recognizing trafficking victims as refugees rather than illegal aliens. From the creation of T-visas to the BIA’s official endorsement of the Handbook, we are witnessing a trend towards a stronger humanitarian response to trafficking victims.

However, satisfying the persecution element for trafficking victims depends not only on the thorough preparation of the victims’ applications, but on an understanding of the tendencies of the USCIS and its asylum officers. Victims’ Advocates must realize that there is a gap between what the courts demand of asylum adjudications and the brutal reality of the process. Bridging this gap will be a critical step toward obtaining asylum for the thousands of Asian women and children victimized today.

164. Id.