No. 05-552

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

MICHELLE THOMAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-71656

MICHELLE THOMAS; DAVID GEORGE THOMAS; TYNEAL MICHELLE THOMAS; SHALDON WAIDE THOMAS, PETITIONERS

v.

ALBERTO R. GONZALES,* ATTORNEY GENERAL, RESPONDENT

Filed: June 3, 2005

Before: SCHROEDER, Chief Judge, REINHARDT, O'SCANNLAIN, RYMER, KLEINFELD, HAWKINS, SILVERMAN, GRABER, WARDLAW, PAEZ, and BEA, Circuit Judges.

WARDLAW, Circuit Judge:

Michelle, David, Shaldon, and Tyneal Thomas, natives and citizens of South Africa, appeal the decision of the Board of Immigration Appeals ("BIA"), summarily affirming the Immigration Judge's ("IJ's") denial of their application for asylum and withholding of removal.

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* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

We review this case en banc to reconcile our intra-circuit conflict on the question of whether a family may constitute a "particular social group" for the purposes of 8 U.S.C. § 1101(a)(42)(A). We hold that family membership may constitute membership in a "particular social group," and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship. We also overrule *Estrada-Posadas v. U.S. INS*, 924 F.2d 916 (9th Cir. 1991), and its progeny, to the extent that they hold that a family may not constitute a "particular social group"; we defer to the BIA's view of kinship ties as giving rise to social group membership, expressed in *In re Acosta*, 19 I. & N. Dec. 211, 1985 WL 56042 (BIA 1985), and elsewhere; and we join the univocal view of our sister circuits that a family may make up a particular social group.

We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(1). We grant the Thomases' petition and remand to the BIA for further proceedings.

I. BACKGROUND

We substantially adopt the factual recitation by the original panel majority in its now-withdrawn opinion.

Michelle Thomas, her husband David Thomas, and their two children, Shaldon Thomas and Tyneal Thomas, are citizens and natives of South Africa. They entered the United States as visitors at Los Angeles, California, on May 28, 1997. Within one year of their arrival, they filed requests for asylum pursuant to § 208 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158. Michelle Thomas is the principal asylum applicant; David, Shaldon, and Tyneal are derivative applicants.

At a hearing on December 2, 1998, the petitioners conceded their removability and requested asylum and withholding of removal. On May 12, 1999, the IJ held an evidentiary hearing. Michelle Thomas was the only petitioner who testified at the hearing.

The Thomases came to the United States to avoid threats of physical violence and intimidation to which they were subjected because of abuses committed by Michelle's father-in-law, "Boss Ronnie," who was a foreman at Strongshore Construction in Durban, South Africa. Boss Ronnie was and is a racist who abused his black workers both physically and verbally.

At the hearing, Michelle testified about a number of events that support the Thomases' fears. The first took place in February 1996, when the family dog was poisoned. At that time they did not connect the incident with Boss Ronnie's abusive and racist conduct. The next month, their car was vandalized and its tires slashed, though nothing was taken out of the car. The police came, took fingerprints, and patrolled the area but did nothing else. The Thomases told Michelle's father-in-law about the incident. Boss Ronnie told them that he had just had a confrontation with his workers and that the family should buy a gun.

In May 1996, human feces were thrown at the door of the Thomases' residence while they were at home. After hearing the noise, the Thomases saw people running away. Feces were also left outside their front and back gates at later times. The Thomases then had higher fencing installed and bars put on their windows; they got a guard dog and requested additional police patrols.

In December 1996, Michelle's life was threatened by a person wearing overalls bearing a Strongshore logo. In her words,

> I was sitting on the veranda the one evening with my children playing in the front yard and a Black man had come up to me and asked me if I knew Boss Ronnie which was David's father and he said to me he'[d] come back and cut my throat. At that stage I'd taken the kids inside. The kids were very upset and I said to him we don't know him, he's just drunk. Let's go inside. At this stage I was really, really fearing for my life and I had told David on a number of occasions, please speak to his father which he did, but he was not interested in what we had to say.

In March 1997, Michelle was outside of her gate, on the way to the store, when four black men approached her and tried to take her daughter from her arms. As she testified, "[T]hey surrounded me and the next thing I knew is that they were trying to get Tyneal out [of] my arms. I held her tight and fell to the ground with her. . . ." The men ran off after Michelle's neighbor came out of his house in response to Michelle's screaming. One of the men wore Strongshore overalls. After this incident Michelle was afraid that "they were going to come back and either kill one of us or take one of my children." It was at that point that Michelle decided that she needed to leave South Africa.

Michelle's brother-in-law had his house broken into and his car vandalized several times, and he and his family had received threats. Michelle believed that her family, rather than her father-in-law, had become the subject of attacks because her father-in-law owned

weapons and lived in what was essentially a "fortress," so the attackers could not get to him. In addition to the evidence of particular attacks on their family, the Thomases also submitted evidence of the widespread crime problem in South Africa.

The IJ did not make an adverse credibility finding,[1] but nevertheless denied the Thomases' request for asylum and withholding of removal, finding that Michelle failed to meet her burden of proving that she and her family suffered persecution in South Africa based "on any of the five statutory grounds, whether it is race or political opinion." Although the asylum application indicated both membership in a social group and political opinion as grounds for relief, and did not identify "race," the IJ did not expressly reference "membership in a particular social group." The BIA affirmed the decision of the IJ without opinion, and the Thomases petitioned for review. A divided three-judge panel held that the Thomases suffered past persecution as a result of their family membership, granted the petition, and remanded for further consideration of, among other things, whether the government was unable or unwilling to control the violence against the Thomases.

II. STANDARD OF REVIEW

We review the BIA's "factual determinations, including its finding of whether an applicant has demonstrated a 'well-founded fear of persecution,' . . . for substantial evidence." *Pedro-Mateo v. INS*, 224 F.3d 1147, 1150 (9th Cir. 2000) (quoting *INS v. Elias-*

[1] Because the IJ did not make an adverse credibility finding, we accept Michelle Thomas's testimony as true. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004).

Zacarias, 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992)). We also review the BIA's decision to withhold deportation for substantial evidence. *Kazlauskas v. INS*, 46 F.3d 902, 907 (9th Cir. 1995). "The substantial evidence standard of review is highly deferential to the Board." *Pedro-Mateo*, 224 F.3d at 1150 (quotations and citations omitted). "We review the BIA's determination of purely legal questions regarding the Immigration and Nationality Act de novo." *Kankamalage v. INS*, 335 F.3d 858, 861 (9th Cir. 2003) (citations omitted). However, "[t]he BIA's interpretation of immigration laws is entitled to deference." *Id.* at 862. Because the BIA summarily affirmed the IJ's decision, we review the IJ's decision as the final agency determination. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849 (9th Cir. 2003).

III. DISCUSSION

A. *Eligibility for Asylum and Withholding of Removal*

The Attorney General may grant asylum to an alien who is a refugee. 8 U.S.C. § 1158(b)(1). "A refugee is an alien who is unable to return to his home 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.'" *Ding v. Ashcroft*, 387 F.3d 1131, 1136 (9th Cir. 2004) (quoting 8 U.S.C. § 1101(a)(42)(A)).

To establish eligibility for withholding of removal, under 8 U.S.C. § 1231(b)(3)(A), a petitioner must establish a "clear probability," *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000), that the petitioner's "life or freedom would be threatened" upon return because of "race, religion, nationality, membership in a particular social

group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). An applicant has established a "clear probability" of persecution, and "is entitled to withholding of removal . . . if it is more likely than not that he or she will be persecuted based on one of the protected grounds if returned to the country of removal." *Wang v. Ashcroft*, 341 F.3d 1015, 1022 (9th Cir. 2003). Once the petitioner satisfies the standard, withholding of removal is mandatory. 8 U.S.C. § 1231(b)(3)(A). As in the context of asylum, "[a] determination of past persecution such that a petitioner's life or freedom was threatened creates a presumption of entitlement to withholding of deportation." *Rios v. Ashcroft*, 287 F.3d 895, 903 (9th Cir. 2002) (citations omitted).

B. *Exhaustion*

As a preliminary matter, we reject the government's contention that the Thomases' "family as a particular social group" claim was unexhausted at the agency level, depriving us of jurisdiction. Although the government correctly argues that a "court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right," 8 U.S.C. § 1252(d)(1), its view that the Thomases' failed to exhaust their family as social group claim is legally and factually mistaken.

To exhaust an asylum claim, an applicant "must first raise the issue before the BIA or IJ." *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 819 (9th Cir. 2003). The purpose of exhaustion "is to give an administrative agency the opportunity to resolve a controversy or correct its own errors before judicial intervention." *Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004) (citation omitted). For this reason, an asylum petitioner must "put the BIA on

notice" of the issue. *Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004) (per curiam). A petitioner is not required to discuss the issue in the briefs before the BIA, but may merely raise it in the notice of appeal. *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000). Of course, raising it in the briefs is also sufficient.

Michelle Thomas repeatedly put the IJ and the BIA on notice of the family-as-social-group basis for the Thomases' claim to refugee status. First, when asked to select the basis for her claim, Michelle checked the box on her asylum application marked "membership in a particular social group." Second, Michelle attached a written declaration to the asylum application, in which she explained that her family left South Africa in fear "because we were targeted by one or more of the construction workers working for David's father. . . . This happened to us, not because of anything we did but because of the racism of David's father." Both the application and the declaration were part of the record before the IJ. Moreover, Michelle raised the issue before the BIA in her notice of appeal, which attached and referred to the declaration as the basis for the appeal. In addition, Michelle's counseled brief before the BIA asserts that the Thomases "set forth the grounds of appeal by way of a Declaration by the lead Respondent, Michelle Thomas." The brief also argued in substance that the Thomases suffered because of their relationship to Boss Ronnie, stating that Thomas "feared that if [she and her family] were forced to return to South Africa they would be killed because certain black South Africans who worked under the supervision of lead Respondent's father-in-law held '*a grudge against her and her family*' because of abusive actions perpetrated by him."

The IJ's opinion indicates that the IJ understood the factual underpinning of the family's claim, if not its full legal significance. The IJ wrote that Michelle "alleges that if she is returned to South Africa she would be killed because Black workers in South Africa hold a grudge against her and her family." The IJ's opinion also recites Michelle's testimony that "the father-in-law is a racist who verbally and physically abused his Black workers," that "the Black workers were retaliating against her family because of the actions of the father-in-law," and that "the hostility that her family was subjected to was because the people were afraid or they could not direct it toward her father-in-law." Although the IJ read from the asylum application and quoted Michelle's testimony, she did not properly characterize the social group claim, instead describing it as a claim based on racial persecution that Michelle had not made.[2]

On appeal, the BIA had the record of Michelle Thomas's testimony and of the IJ's characterization of the factual basis for her claim that she and her family were targeted due to their relation to Boss Ronnie. The BIA had a full opportunity to review the record

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[2] In her oral decision, the IJ seemed to not fully comprehend that the facts recited by Michelle supported her claim of persecution on account of her familial relationship to Boss Ronnie. Instead, the IJ devoted most of that decision to discussing general crime and racial incidents in South Africa. However, Michelle did not select the "race" box on her asylum application. Moreover, the IJ correctly characterized Michelle's claim during the course of Michelle's testimony: "the workers weren't hurting you because of your race. . . . It's just that they hated [David Thomas's] father and wanted to come after you. . . . [Y]ou say that all these things happened to you because of your father-in-law." Michelle agreed with the IJ's characterization.

and the notice of appeal, which included Thomas's declaration, as well as to read her brief, before summarily affirming the IJ's decision. Therefore, we hold that the social group issue was in fact raised at the administrative level, notwithstanding the failure of the IJ and the BIA to fully analyze the Thomases' asserted ground for refugee status.

C. *Family as a "particular social group"*

The BIA has long and consistently held that "kinship ties" are the sort of common and immutable characteristic that give rise to a "particular social group" for the purposes of 8 U.S.C. § 1101(a)(42)(A). In the seminal case of *In re Acosta*, 19 I. & N. Dec. 211, 1985 WL 56042 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439, 441, 1987 WL 108943 (BIA 1987), the BIA first recognized that "kinship ties" may be the defining characteristic of a particular social group.

In *Acosta*, the BIA analyzed whether the persecution Acosta "fears at the hands of the guerrillas is on account of his membership in a particular social group comprised of [taxi] drivers and persons engaged in the transportation industry of El Salvador." *Id.* at 232. Noting that "Congress did not indicate what it understood this ground of persecution to mean," *id.*, the BIA conducted an exhaustive examination of the meaning of the phrase "particular social group."

First, the BIA explained that the phrase could be "of broader application" than the other four statutory groups. *Id.* The Board noted that in "add[ing] the elements in the definition of a refugee," Congress "intended to conform the Immigration and Nationality Act to the United Nations Protocol Relating to the

Status of Refugees, to which the United States had acceded in 1968." *Id.* at 219 (citations omitted). Accordingly, the BIA concluded, "it is appropriate for us to consider various international interpretations of that agreement." *Id.* at 220. By examining these "various international interpretations," the BIA decided that the "notion of a 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee." *Id.* at 232 (citing A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 219 (1966)).

Second, the BIA found that the words "particular social group" implied that there was some kind of link between the people in the group:

> A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity.

Id. at 232-33. Quoting the United Nations High Commissioner for Refugees, the BIA explained that "a 'particular social group' connotes persons of similar background, habits, or social status and that a claim to fear persecution on this ground may frequently overlap with persecution on other grounds such as race, religion, or nationality." *Id.* at 233 (citing Office of the United Nations High Commissioner for Refugees, *The Handbook on Procedures and Criteria for Determining*

Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees 19 (Geneva, 1979)).

Finally, the BIA concluded that the doctrine of *ejusdem generis*—the principle that "general words used in enumeration with specific words should be construed in a manner consistent with the specific words," *id.*—indicates an interpretation in harmony with the BIA's "international" and "linguistic" analyses. The BIA explained:

> The other grounds of persecution in the Act and the Protocol listed in association with 'membership in a particular social group' . . . describe [ ] persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.

Id. at 233 (citations omitted). Applying the doctrine to "membership in a particular social group," the BIA interpreted the phrase to mean persecution that is directed toward an individual "who is a member of a group of persons all of whom share a common, immutable characteristic, . . . [which] might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." *Id.* The BIA explained that only when persecution is directed toward a person on account of a truly innate or fundamental characteristic "does the mere fact of group membership become something comparable to the other four grounds." *Id.* However, because there may be many different "common characteristic[s]" that define a

group, the BIA refrained from attempting to delineate every possible characteristic *ex ante*, explaining that "the particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis." *Id.* The BIA nevertheless made its standard clear: the characteristic must be "one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

In *In re H-*, 21 I. & N. Dec. 337, 1996 WL 291910 (BIA 1996), the BIA clarified and affirmed its interpretation of "particular social group" articulated in *Acosta*. It concluded that the petitioner in *In re H-* was a "member of a particular social group" for the purposes of the refugee statute because, it found, the petitioner was persecuted on account of his membership in the Marehan clan in Somalia. *Id.* at 343, 345. To arrive at this conclusion, the BIA first cited *Acosta* for the proposition that a social group is characterized by "a group of persons all of whom share a common, immutable characteristic." *Id.* at 342. Then the BIA noted that the Immigration and Naturalization Service Basic Law Manual on asylum recognized that family ties are just such a common characteristic: "[the] Manual recognizes generally that clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties." *Id.* Finally, the BIA concluded that because the Marehan clan "share[s] ties of kinship" and "are identifiable as a group based on linguistic commonalities," the clan "can be characterized as a 'particular social group' within Somalia, of which respondent is a member." *Id.* at 343. The BIA made this determination

even though no other statutory factor was relevant: "victims were reportedly singled out for no reason other than their clan affiliation." *Id.* at 345 (quotations and citations omitted).[3]

The BIA has never departed from the principle enunciated in *Acosta* and *In re H-*. See *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997) (citing *Acosta* for the 'particular social group' test and *In re H-* for the proposition that shared ties of kinship warrant characterization as a social group); *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 365, 1996 WL 379826 (BIA 1996) (defining applicant's social group as "young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not had [female genital mutilation]").

Nor have any of the other circuits that have considered the question departed from the principle that a family may constitute a social group. The First Circuit has held that "[t]here can, in fact, be no plainer example of a social group based on common, identifiable

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[3] The BIA noted that the incidence of "clan warfare" was irrelevant to the validity of the petitioner's claim. Rather, the appropriate questions were whether the petitioner presented an "individualized claim," and whether the persecutors were motivated to persecute "on account of" a protected ground:

> That the applicant was persecuted in the context of clan warfare does not undermine his claim. The motivation of the persecutors reasonably appears to be, as the applicant contends, on account of his subclan affiliation. He presented an individualized claim which reflected that he became the object of harm and was physically abused simply because he was identified with the former ruling faction by being a member of the Marehan clan.

21 I. & N. Dec. at 345-46.

and immutable characteristics than that of the nuclear family." *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *see also Aguilar-Solis v. INS*, 168 F.3d 565, 571 (1st Cir. 1999) ("While the IJ might have drawn an inference that the FMLN targeted the petitioner because of his membership in a social group (i.e., his family), she chose to draw a contrary, equally plausible inference."). The Third Circuit, explaining that the BIA's interpretation of the phrase "membership in a particular social group" is entitled to deference, concluded that the BIA's statement in *Acosta* that "kinship ties" may constitute such membership is thus "a permissible construction of the relevant statutes, and we are consequently bound to accept it." *Fatin v. INS*, 12 F.3d 1233, 1239, 1240 (3d Cir. 1993). The Seventh Circuit, after conducting a thorough review, concluded that "[o]ur case law has suggested, with some certainty, that a family constitutes a cognizable 'particular social group' within the meaning of the law." *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (citing *Tzankov v. INS*, 107 F.3d 516, 520 (7th Cir. 1997); *Najafi v. INS*, 104 F.3d 943, 947 (7th Cir. 1997); *Sharif v. INS*, 87 F.3d 932, 936 (7th Cir. 1996)); *see also Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998) ("[W]e have indirectly treated the family relationship as a basis for identifying a 'particular social group.'") (citations omitted). In *Hamzehi v. INS*, 64 F.3d 1240, 1243 (8th Cir. 1995), the Eighth Circuit implicitly recognized family membership as a basis for refugee status by concluding that, to be eligible for refugee status, the petitioner "must show why these rather dated events provide an objectively reasonable basis for present fear of [persecution] . . . on the basis of her family's political opinions." We have found no out of circuit authority to the contrary.

Inexplicably, our circuit has generated two diverging lines of authority on whether family or kinship ties may give rise to a particular social group. At least two panel decisions have squarely held that a "family" cannot constitute a "particular social group" for the purposes of the refugee statute. In *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991), we held that the petitioner failed to show a well-founded fear of persecution on account of a ground specified in the INA even though she demonstrated persecution of her uncle, cousin, and mother's relatives:

> Estrada argues that persecution based on membership in her family should qualify as "persecution on account of . . . membership in a particular social group" under the Act. 8 U.S.C. § 1101(a)(42)(A). However, she cites to no case that extends the concept of persecution of a social group to the persecution of a family, and we hold it does not. If Congress had intended to grant refugee status on account of "family membership," it would have said so. Thus, Estrada has not shown that any persecution would be on account of her membership in any social group.

We recognized the breadth and significance of the *Estrada-Posadas* holding in *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 n.4 (9th Cir. 2000), where we said: "We have since held that a family cannot constitute a particular social group under 8 U.S.C. § 1101(a)(42)(A). See *Estrada-Posadas*. . . ."

We have also held the opposite: that a family is a cognizable social group in the asylum context. In *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986), we stated:

> Perhaps a prototypical example of a "particular social group" would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people. In *Hernandez-Ortiz* [*v. IN*S, 777 F.2d 509, 516 (9th Cir. 1985)], we regarded evidence of persecution directed against a family unit as relevant in determining refugee status, noting that a family was "a small, readily identifiable group."

Several of our more recent cases have affirmed this proposition. *See Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004) ("Like our sister circuits, we recognize that a family is a social group."); *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002) ("We have recognized that, in some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes.") (citations omitted); *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) ("Pedro-Mateo offers neither case law nor analysis to contradict our previous statement that the 'prototypical example' of a social group would be 'immediate members of a certain family.' ") (citations omitted); *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999) ("[W]e have held that a particular social group implies a collection of people closely affiliated with each other, with the prototypical example of a particular social group [ ] consisting of the immediate members of a certain family.") (internal citations and quotations omitted).

Reconciling these contrary lines of intracircuit authority is not possible. Therefore, consistent with the views of the BIA and our sister circuits, we hold that a family may constitute a social group for the purposes of the refugee statutes. We overrule all of our prior

decisions that expressly or implicitly have held that a family may not constitute a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A). Our holding defers to both the BIA's stated interpretation of the statutory phrase "particular social group," and the BIA's precedent.

D. *Harm inflicted on account of membership in a "particular social group"*

The IJ held that Michelle Thomas had not demonstrated eligibility for relief "on any of the five grounds." We disagree, and hold that the Thomas family constitutes a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A) because the family demonstrated that the harm they suffered was solely a result of their common and immutable kinship ties with Boss Ronnie.

"[P]ersecution 'on account of' membership in a social group . . . includes what the persecutor perceives to be the applicant's membership in a social group." *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (9th Cir. 2003); *see also Popova v. INS*, 273 F.3d 1251, 1258 (9th Cir. 2001) ("To establish a correlation between [petitioner's] persecution and her political opinion and religion, she must show, by direct or circumstantial evidence, her persecutors' motive.") (citations omitted); *Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997) ("In establishing an imputed political opinion, the focus of inquiry turns away from the views of the victim to the views of the persecutor.").

The perpetrators of the threats to and abuse of the Thomas family tied that abuse to the Thomas family's relationship to Boss Ronnie. In one incident, the perpetrator asked Michelle if she knew Boss Ronnie.

The perpetrator then proceeded to threaten that he would "come back and cut [her] throat." In two other incidents, Michelle noticed that some of the attackers wore overalls bearing the logo of Strongshore Construction—the company for which her father-in-law worked as the cruel and racist foreman. Also, each attack or threat occurred after a confrontation of some sort at Strongshore Construction. Michelle's brother-in-law, son to Boss Ronnie, also suffered threats and attacks. His house was broken into, his car repeatedly vandalized, and his family repeatedly threatened. The perpetrators targeted the Thomas family because Boss Ronnie himself was impossible to reach directly. Boss Ronnie's house was like a "fortress," with large impenetrable gates. Moreover, Boss Ronnie owned weapons with which to protect himself.

The government argues that the threats and violence against the Thomases were merely retaliation for personal conduct or a result of the country's high crime rate. The IJ held, somewhat inartfully, that the harmful conduct was a manifestation of random crime, which in turn sometimes had racial overtones, and rejected the Thomases' alternative explanations, including the link to the animus toward Boss Ronnie on the part of his employees. However, as explained above, the record compels the conclusion that the harm suffered by the Thomases was not the result of random crime, but was perpetrated on account of their family membership, specifically on account of the family relationship with Boss Ronnie. Furthermore, the reason for the animosity toward Boss Ronnie that led to the harm to the family is not relevant; what is critical is that the harm suffered by the Thomases was on account of their membership in a protected group.

We decline to hold, as the government urges, that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with one of the other four grounds enumerated in 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3)(A). It is true that for kinship ties to be "recognizable and discrete" such that "would-be persecutors could identify [individuals] as members of the purported group," those ties often will be linked to race, religion, or political affiliation. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *see also In re H-*, 21 I. & N. Dec. at 342 (citing *Gomez*). Nonetheless, there is nothing in the statute itself, nor in the BIA's interpretation of the relevant provisions, to suggest that membership in a family is insufficient, standing alone, to constitute a particular social group in the context of establishing eligibility for asylum or withholding of removal. We agree with the First Circuit that we must "follow[ ] the language of the statute in recognizing that social group persecution can be an independent basis for refugee status." *Gebremichael*, 10 F.3d at 35 n.20.

The government also argues that recognizing a family as a particular social group will confer refugee status on all victims of vendettas or feuds that have swept in the family of the initial target, and all victims of "street wars" between rival criminal families. In view of the statutory mechanism as a whole, that concern is unfounded. Once an asylum applicant demonstrates persecution on account of kinship ties, she must still show that the persecution is at the hands of the government or persons or organizations that the government is unable or unwilling to control. *Sangha*, 103 F.3d at 1487. Further, any presumption of a well-founded fear of future persecution may be rebutted by

showing that the alleged persecution may be avoided by relocation within the country or by a showing of changed circumstances. 8 C.F.R. § 1208.13(b)(1)(i).

Accordingly, only when the alleged persecution precludes relocation and exceeds the government's ability or will to control can a claim of persecution based on membership in a particular family lead to eligibility for asylum. It is, of course, far more likely that persecution will reach those proportions when kinship ties are mingled with political, religious, racial, or ethnic affinities. However, we see no reason to erect artificial barriers to asylum eligibility merely to address a concern that is more properly resolved elsewhere in the analysis of a particular claim of asylum. Again, we are confident that the statutory mechanism as a whole is capable of separating meritorious claims of persecution on the ground of kinship ties from claims based on mere personal retribution or generalized crime.

We therefore hold that the Thomases were targeted on account of their shared, immutable characteristic, namely, their familial relationship with Boss Ronnie. The Thomases were attacked and threatened because they belong to the particular social group of "persons related to Boss Ronnie," for the purposes of § 1101. Therefore, the IJ's conclusion that the attacks and threats the Thomas family suffered did not take place "on account of" one of the five statutory grounds is not supported by substantial evidence.

IV. CONCLUSION

Because the IJ and the BIA erroneously concluded that the Thomases failed to connect the alleged persecution to one of the five statutory grounds, the agency did not determine whether the threats and

attacks directed at the Thomases rose to the level of persecution. As required by *INS v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002), we remand the case to the BIA so that it can make that determination—as well as decide any additional issues, such as whether the government of South Africa was unwilling or unable to control the persecution, whether the Thomases have a well-founded fear of future persecution, and the ultimate issue of whether the Thomases are eligible for asylum—in the first instance.

PETITION GRANTED; REMANDED.

RYMER, Circuit Judge, with whom O'SCANNLAIN, KLEINFELD, and BEA, Circuit Judges, join, concurring in part and dissenting in part:

I part company with the majority's holding that the Thomas family constitutes a "particular social group" under 8 U.S.C. § 1101(a)(42)(A),[1] because the issue whether a nuclear family, without more, is a "particular social group" has never been vetted by the Board of Immigration Appeals (BIA).

I agree with the majority that our law on whether a family can be a "particular social group" for purposes of refugee status is in disarray. I also agree that, having taken the case en banc, we should wipe the slate clean. And I agree that, in light of the BIA's decision in *Matter of Acosta*, 19 I. & N. Dec. 211, 1985 WL 56042 (BIA 1985), *overruled on other grounds by Matter of*

[1] Section 1101(a)(42)(A) defines a "refugee" as any person who is unable or unwilling to return to, or avail herself of the protection of, the country in which she last resided because of persecution or a well-founded fear of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."

Mogharrabi, 19 I. & N. Dec. 439, 441, 1987 WL 108943 (BIA 1987), and in the absence of more specific guidance from the BIA, a family should not be foreclosed from being a "particular social group."

However, I disagree that we should go further than to hold that a family *may* be a "particular social group." The BIA has never considered whether a family such as the Thomas family *is* a "particular social group." It did not do so in this case, no doubt because Thomas's appeal failed to focus on this ground. The question is important, and has profound implications. We have no business deciding such a question without the BIA's having first addressed it because we owe deference to the BIA's interpretation and application of the immigration laws. *INS v. Ventura*, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002) (per curiam), makes this clear. Instead, having settled our law and established that, in accord with existing BIA precedent, a family *may* be a "particular social group," I would remand for the BIA to say under what circumstances a family *is* a "particular social group" and whether, under whatever test the BIA adopts, the Thomas family qualifies.

Accordingly, I join the majority's decision that a family *may* be a particular social group, but dissent from its remaining discussion.

I

Michelle Thomas, her husband David, and their two children, Tyneal and Shaldon, are natives and citizens of South Africa who entered the United States on May 28, 1997 as visitors. They applied for asylum within a year, but their requests were denied.

The Thomases lived in Durban, where David was a firefighter. The evidence at the hearing on their re-

newed request for asylum and withholding of removal showed that Michelle's father-in-law was a foreman at Strongshore Construction, a large South African company, who was known as "Boss Ronnie." Boss Ronnie was a racist and abusive to his black workers. Michelle Thomas testified that Strongshore workers were retaliating against her family because of Boss Ronnie. She recounted five incidents that had occurred: In February of 1996 the family dog died, probably from poison. Thomas reported this to the police, but the police said they had too many serious crimes to deal with to make a report. On March 4, 1996, the Thomases' car was vandalized. The police were called, showed up in 10 minutes, and patrolled the area but found no one. In May of 1996 human feces were found at the door of the Thomases' house. In December of 1996 a Strongshore worker threatened to come back and cut Michelle's throat. And in March of 1997 four men, who included someone wearing Strongshore overalls, tried to kidnap Tyneal. It is not clear whether either of these incidents was reported to the police. Boss Ronnie retired in February 1998.

Although she checked the box for persecution on account of "membership in a particular social group" on her asylum application, Thomas argued to the immigration judge (IJ) that she was persecuted partly "on account of political opinion" and partly "on account of race." The IJ's decision noted that Thomas's position was that she and her family were being attacked because of their race. The IJ found that they were suffering from personal retaliation, that there was no government-sponsored violence of blacks against whites, and that Thomas's personal problems were not on account of the proffered ground of race, or political

opinion. Thus, the IJ concluded that Thomas failed to carry her burden of proving that she and her family suffered persecution "based on any of the five statutory grounds whether it is race or political opinion."

Thomas appealed to the BIA. She sought review for four reasons: (1) the IJ improperly rejected testimony; (2) the IJ failed to give sufficient weight to documentary evidence; (3) the IJ misconstrued the documentary evidence by failing to conclude that the government is unable to protect its citizens from violent crime; and (4) the IJ improperly concluded that Thomas's testimony was not credible. Her premise was that "[t]he record established that the Respondents suffered from past persecution on account of their race," and her claim of error was that the IJ failed to recognize that "[t]he issue is not whether the government is an active participant in the violence against whites, but rather its transparent inability to protect white South Africans from violent crime and lawlessness." The BIA affirmed the results of the IJ's decision.

II

Exhaustion of administrative remedies is a prerequisite to jurisdiction, 8 U.S.C. § 1252(d)(1); *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004), and there is a question whether the requirements are met in this case. On the one hand, Thomas did not specify membership in a particular social group as a basis of her appeal to the BIA, which we expect petitioners to do in order to exhaust. *See Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004). Clear notice of the basis for appeal is important because the purpose of exhaustion "is to give [the] . . . agency the opportunity to resolve a controversy or correct its own errors before judicial

intervention." *Id.* at 931. On the other hand, reasonable minds can differ about what the record shows in this case, as it does refer to "membership in a particular social group" and Thomas's fear of harm from black South Africans "who held a grudge against her and her family" because of Boss Ronnie's abusive actions. Accepting my colleagues' conclusion that the issue is technically exhausted, we nevertheless do not have license to go beyond what is necessary to align our law with *Matter of Acosta*. We have accomplished this by saying that a family *may* be a "particular social group"; beyond this, we should remand for the BIA to determine whether the Thomas family *is* a "particular social group."

This is so for a number of reasons. Even if the issue whether the Thomas family is a "particular social group" were raised, there is no question that it was not ruled upon. Neither the immigration judge nor the BIA discussed this ground at all. The agency's focus, like Thomas's, was on race. In these circumstances we cannot infer from the IJ's conclusion that Thomas failed to carry her burden of proving persecution "based on any of the five statutory grounds whether it is race or political opinion" that the IJ, or the BIA, actually considered the ground of membership in a particular social group. When this is the case, we are obliged to remand rather than determine the claim ourselves. *Ventura*, 537 U.S. at 14, 123 S. Ct. 353.

Further, we are convened en banc primarily for the purpose of curing an intra-circuit conflict. *See* Fed. R. App. P. 35(a)(1) (establishing uniformity as a basis for rehearing en banc). As the majority opinion explains, some of our decisions have held that a family cannot constitute a "particular social group," while others have

indicated the opposite. Resolving this inconsistency has evident value given the huge number of asylum cases that depend upon clarity in the law of this circuit. However, uniformity can be achieved by holding that a family "may" be a "particular social group" for purposes of § 1101(a)(42)(A), as the majority does. Maj. op. at 1187. I have no quarrel with this because it follows from what the BIA said in *Matter of Acosta* that a family which has "kinship ties," *may* be a "particular social group." Put differently, to clarify that a family is not foreclosed from being a "particular social group" simply—and properly—brings this circuit into line with the BIA's own interpretation of § 1101(a)(42)(A) and, to this extent, is faithful to the principle that "a judicial judgment cannot be made to do service for an administrative judgment." *Ventura*, 537 U.S. at 16, 123 S. Ct. 353 (quoting *SEC v.* Chenery Corp., 318 U.S. 80, 88, 63 S. Ct. 454, 87 L. Ed. 626 (1943)). But to go further, as the majority does by holding that the Thomas family *is* a "particular social group," transgresses this principle by going further than the BIA has ever gone.

The BIA has never addressed whether a nuclear family is a "particular social group." It has held that taxi drivers are not a particular social group, *Matter of Acosta*, 19 I. & N. Dec. 211, 1985 WL 56042 (BIA 1985); that young women of the Tchamba-Kunsuntu Tribe of northern Togo who did not undergo female genital mutilation as practiced by that Tribe are a particular social group, *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 1996 WL 379826 (BIA 1996); that the Marehan, a subclan of the Somalian Darood clan who share ties of kinship and linguistic commonalities, are a particular social group, *In re H-*, 21 I. & N. Dec. 337, 342-43, 1996 WL 291910 (BIA 1996); and that homosexuals in Cuba

are a particular social group, *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 1990 WL 547189 (BIA 1990). It is not immediately obvious that an ordinary family, albeit a social group, is a *particular* social group akin to a clan or tribe for purposes of § 1101(a)(42)(A). It may be, or it may not be without other indicia of societal recognition. In its considered judgment the BIA may believe that family-*plus* is required for an ordinary family to qualify, or it may not. However, these are matters for the BIA, not for us, to sort out in the first instance.

The law entrusts the agency to make basic asylum eligibility decisions. *See*, *e.g.*, 8 U.S.C. § 1158(a); *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). We owe Chevron deference to the BIA's interpretation of the immigration laws. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). And the Supreme Court has made it clear as can be that "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context." *Ventura*, 537 U.S. at 16-17, 123 S. Ct. 353. In this case as in *Ventura*,

> every consideration that classically supports the law's ordinary remand requirement does so here. The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.

Id. at 17, 123 S. Ct. 353.

For all these reasons we should refrain from deciding ourselves if the Thomas family is a "particular social group." The majority remands for the BIA to determine whether the threats and attacks against the Thomases rose to the level of persecution and for consideration of other issues such as whether the government of South Africa was unwilling or unable to control the alleged persecution, and whether the Thomases have a well-founded fear of future persecution. There is no logical or practical reason for not also remanding the unaddressed issue of whether the Thomases *are* a "particular social group."

Accordingly, I would remand now that we have clarified the law of the circuit that a family *may* be a "particular social group." We should not substitute our judgment for the agency's before it has had an opportunity to draw on its expertise and exercise its discretion. I therefore dissent from the majority's holding, without prior BIA consideration, that the Thomas family *is* a "particular social group."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-71656

MICHELLE THOMAS; DAVID GEORGE THOMAS; TYNEAL MICHELLE THOMAS; SHALDON WAIDE THOMAS, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL, RESPONDENT

Filed: Mar. 2, 2004

Before: PREGERSON, FERNANDEZ, and BERZON, Circuit Judges.

OPINION

PREGERSON, Circuit Judge.

This matter comes to us from the Board of Immigration Appeals ("BIA"). The petitioners seek review of the BIA's denial of their application for asylum and withholding of deportation. For the reasons discussed below, we grant the petition and remand.

FACTUAL AND PROCEDURAL HISTORY

Michelle Thomas, her husband David Thomas, and their two children, Shaldon Thomas and Tyneal Thomas, are citizens and natives of South Africa. They entered the United States as visitors at Los Angeles, California on May 28, 1997. Apparently within one year of their arrival, they filed requests for asylum pursuant to § 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158. Michelle Thomas is the principal asylum applicant; David, Shaldon, and Tyneal are derivative applicants.

At a hearing on December 2, 1998, the petitioners conceded their removability and requested asylum and withholding of removal. On May 12, 1999, the Immigration Judge ("IJ") held an evidentiary hearing. Michelle Thomas was the only petitioner who testified at the hearing.

Michelle testified that the petitioners came to the United States to avoid threats of physical violence and intimidation they were subjected to because of abuses committed by Michelle's father-in-law. Michelle's father-in-law, "Boss Ronnie," was a foreman at Strongshore Construction in Durban, South Africa. He allegedly was and is a racist who abused his black workers both physically and verbally.

At the hearing, Michelle testified about a number of events that support the petitioners' fears. The first took place in February 1996, when their dog was apparently poisoned. At the time of that incident they did not connect it with the conduct of Michelle's father-in-law. The next month, the petitioners' car was vandalized, and its tires were slashed, though nothing was taken out of the car. Apparently the police came, took

fingerprints, and patrolled the area but did not do anything else. Michelle testified that the petitioners told her father-in-law about the incident, and that he told them he had just had a confrontation with his workers and that the petitioners should buy a gun.

In May of 1996, human feces were thrown at the door of the petitioners' residence while they were at home. After hearing the noise, the petitioners saw people running away. Apparently feces were left outside their front and back gates at other times after that. The petitioners then had higher fencing installed and bars put on their windows; they got a guard dog and requested additional police patrols.

In December 1996, Michelle's life was threatened. She describes the incident as follows:

> I was sitting on the veranda the one evening with my children playing in the front yard and a Black man had come up to me and asked me if I knew Boss Ronnie . . . and he said to me he's come back and cut my throat. At that stage I'd taken the kids inside. The kids were very upset. . . . At this stage I was really, really fearing for my life.

Apparently the individual who approached Michelle was wearing overalls bearing a Strongshore logo.

Next, in March of 1997, Michelle was apparently outside of her gate, on the way to the store, when four black men approached her and tried to take her daughter from her arms. "[T]hey surrounded me and the next thing I knew is that they were trying to get Tyneal out my arms. I held her tight and fell to the ground with her. . . ." The men apparently ran off after Michelle's neighbor had come out of his house in response to Michelle's screaming. Michelle testified

that one of the men wore Strongshore overalls. She testified that, after this incident she was scared that "they were going to come back and either kill one of us or take one of my children." It was at that point that Michelle decided that she needed to leave.

In a declaration, Michelle also testified that her brother-in-law had his house broken into and his car vandalized several times, and that he and his family had received threats. She speculated that her family, rather than her father-in-law, was the subject of attacks because her father-in-law lived in what was essentially a "fortress." In addition to the evidence of particular attacks on their family, the petitioners also submitted evidence of the widespread crime problem in South Africa.

On August 30, 1999, the IJ denied the petitioners' request for asylum and withholding of removal. The IJ determined that the respondent was fearful for her life and the lives of her family "because she believes as a White citizen of South Africa that she is subject to persecution by Black citizens of South Africa. . . . The respondent's position is that she and her family are being attacked because of their race." In a decision that is somewhat imprecise, the IJ made a number of relevant statements. The IJ noted that South Africa has a high crime rate, but that "[i]t appears . . . that the incidents of crime, attacks on individuals is not restricted to Blacks committing crimes against Whites." The IJ also noted that there is nothing to indicate that the South African government is "sponsoring or promoting or condoning violence of Whites against Blacks or Blacks against Whites or any other group of people." The IJ also appears to have believed that there was nothing political in the attacks against the petitioner:

"It does not say anything about the father-in-law's political position or the political position of the people who are allegedly persecuting them or committing these offenses against them."

While the IJ apparently accepted Michelle's statements as credible for certain purposes, the IJ noted that she did not find Michelle's testimony to be totally credible.

> There were some inconsistencies regarding some of the incidents. For example, there was confusion over whether the report of the vandalism was made to the police or not. Also, in her application for political asylum, in her declaration, it appeared that they were not clear as to the actual cause of death of the dog. That at one point the veterinarian said it looks like the dog had been poisoned, but even that in the declaration was not clear. It is still puzzling to the Court as well that the family would be targeted because of the father-in-law had been the foreman of this company for such a long period of time. . . . [T]he father-in-law has held these attitudes from years back and, therefore, he was probably as racist in 1986 as he was in 1996, so there is no explanation as to why these attacks against her family suddenly began in 1996.

The IJ concluded: "Therefore, . . . the Court finds that the respondent has failed to meet her burden of proving, of demonstrating that she and her family suffered persecution in South Africa based on any of the five statutory grounds whether it is race or political opinion."

The petitioners filed a timely appeal to the BIA. On May 16, 2002, the BIA affirmed the decision of the IJ

without opinion. The petition for review was filed with this court on June 11, 2002.

STANDARD OF REVIEW

We review the BIA's decision that an alien has not established eligibility for asylum or withholding of removal to determine whether it is supported by substantial evidence. *Wang v. Ashcroft*, 341 F.3d 1015, 1019-20 (9th Cir. 2003); *see also Monjaraz-Munoz v. I.N.S.*, 327 F.3d 892, 895 (9th Cir. 2003) ("We review the BIA's findings of fact, including credibility findings, for substantial evidence and must uphold the BIA's finding unless the evidence compels a contrary result."). While purely legal issues are reviewed *de novo*, the BIA's interpretation of immigration laws is entitled to deference. *Kankamalage v. I.N.S.*, 335 F.3d 858, 861-62 (9th Cir. 2003). Where, as here, the BIA affirms the results of the IJ's decision without issuing an opinion, *see* 8 C.F.R. § 1003.1(a)(7), we review the IJ's decision. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003).

ANALYSIS

A. *Relevant Legal Standards*

1. *Asylum*

The Attorney General may grant asylum to an alien who qualifies as a refugee, that is, one who is unable or unwilling to return to her home 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." 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1). Persecution is "'the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as

offensive.'" *Prasad v. I.N.S.*, 47 F.3d 336, 339 (9th Cir. 1995) (quoting *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9th Cir. 1988)). The "heavily fact-dependent" issue of persecution can be framed as follows: "looking at the cumulative effect of all the incidents Petitioner has suffered, [does] the treatment she received rise[ ] to the level of persecution[?]" *Singh v. I.N.S.*, 134 F.3d 962, 967 (9th Cir. 1998). "Persecution need not be directly at the hands of the government; private individuals that the government is unable or unwilling to control can persecute someone" for purposes of asylum. *Id.* at 967 n. 9; *see also Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1097 (9th Cir. 2000) ("Geovanni must show that the persecution he suffered was inflicted either by the government or by persons or organizations which the government is unable or unwilling to control.") (quotation marks omitted).

"An alien's 'well-founded fear of persecution' must be both subjectively genuine and objectively reasonable." *Nagoulko v. I.N.S.*, 333 F.3d 1012, 1016 (9th Cir. 2003). An alien satisfies the subjective component by credibly testifying that she genuinely fears persecution.[1] *Id.* To satisfy the objective component, an alien must show that she has suffered from past persecution or that she has a "good reason to fear future persecution by adducing credible, direct, and specific evidence in the record of facts that would support a reasonable fear of persecution." *Id.* (quoting *Duarte de Guinac v. I.N.S.*, 179 F.3d 1156, 1159 (9th Cir. 1999)). "A finding of past persecution raises the presumption that an asylum-seeker has a well-founded fear of future persecution,

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[1] The subjective component is not at issue in this petition. The IJ found that "[t]he respondent is fearful for her life and the life of her family. . . ."

rebuttable by a showing, by a preponderance of the evidence, that conditions have changed sufficiently so as to overcome that presumption." *Rios v. Ashcroft*, 287 F.3d 895, 901 (9th Cir. 2002). In order to rebut this presumption,

> [t]he INS is obligated to introduce evidence that, on an individualized basis, rebuts a particular applicant's specific grounds for his well-founded fear of future persecution. Information about general changes in the country is not sufficient. If the INS has not met its burden of production, it is unnecessary to remand this case to the BIA for further findings on this issue.

Id. (citations and quotation marks omitted).

2. *Withholding of Deportation*

In order to qualify for withholding of deportation under 8 U.S.C. § 1231(b)(3)(A), the petitioner must establish a "clear probability," *Navas v. INS*, 217 F.3d 646, 655 (9th Cir. 2000), that her "life or freedom would be threatened" upon return because of her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). This "clear probability" standard, interpreted as meaning "more likely than not," is more stringent than asylum's "well-founded fear" because withholding of deportation is a mandatory form of relief. *Id.*; *see also Wang*, 341 F.3d at 1022 ("An applicant is entitled to withholding of removal under the INA if it is more likely than not that he or she will be persecuted based on one of the protected grounds if returned to the country of removal."). As in the context of asylum, "[a] determination of past persecution such that a petitioner's life or freedom was threatened creates a pre-

sumption of entitlement to withholding of deportation." *Rios*, 287 F.3d at 903.

B. *Credibility*

The government *does not* contend that the IJ's credibility determination was supported by substantial evidence. Instead, the government simply contends that, despite expressing concerns about Michelle's testimony, the IJ accepted the testimony as true for purposes of evaluating the petitioners' asylum claims.

The relevance of the IJ's concerns about Michelle's *credibility* is unclear. While the IJ apparently did accept the testimony as true for certain purposes, the IJ's concerns may nevertheless have played a role in her final determination. Therefore, we address the question whether the IJ's finding that Michelle's testimony was not "totally credible" is supported by substantial evidence.

"Although the substantial evidence standard is deferential, the IJ must provide 'a specific cogent reason' for the adverse credibility finding." *Gui v. I.N.S.*, 280 F.3d 1217, 1225 (9th Cir. 2002). In this case, the IJ pointed to three things: (1) alleged inconsistencies as to whether the vandalism was reported to the police, (2) lack of clarity about the cause of death of the dog, and (3) a question about why the attacks against the petitioners did not begin prior to 1996. The IJ's decision does not cite to specific portions of the transcript or record to support her concerns, and neither does the government.

As to the alleged inconsistencies regarding whether the vandalism was reported to the police: Michelle clearly stated at the hearing that the incident was reported to the police. Her declaration of October 5,

1998 also states that the petitioners reported the incident to the police. While certain testimony at the hearing only mentioned the filing of police reports with respect to the incident with the dog and the attempted kidnapping, that testimony was in response to questions from the government attorney that only pertained to those events. Absent more clarity by the IJ or *any* support by the government, this basis for the IJ's credibility concerns is insufficient.

Similarly, the IJ's concerns about the dog poisoning are not supported by the record. Michelle's declaration states that a veterinarian told the petitioners that "he believed that [the dog] had been poisoned." Michelle testified to the same effect at the hearing, using the phrase: "the vet determined that the dog had been poisoned." These statements are not inconsistent. Moreover, in expressing concerns, the IJ only stated that "it appeared that they were not clear as to the actual cause of death of the dog." So stated, this does not go to Michelle's *credibility* but rather the question of whether the dog's death was actually part of the scheme of persecution. Therefore, the IJ's concerns about the dog's poisoning cannot support an adverse credibility determination.

Finally, the IJ speculated as to why attacks on the petitioners had not begun prior to 1996. This speculation by the IJ cannot call into doubt the evidence in this case and serve as a basis for an adverse credibility determination. *See Paramasamy v. Ashcroft*, 295 F.3d 1047, 1052 (9th Cir. 2002) ("An immigration judge's personal conjecture' cannot be substituted for objective and substantial evidence.'") (quoting *Bandari v. I.N.S.*, 227 F.3d 1160, 1167 (9th Cir. 2000)).

Therefore, to the extent that such a determination is relevant to these proceedings, we find that any adverse credibility finding is not supported by substantial evidence.

C. *Past Persecution*

1. *"On account of race, religion, nationality, membership in a particular social group, or political opinion"*

In order to qualify for asylum or withholding of removal, the petitioners must establish that any persecution they suffered was on account of one of the five statutory grounds—race, religion, nationality, membership in a particular social group, or political opinion. Although far from clear in her ruling in this respect, the IJ apparently thought that the petitioners were claiming persecution based only on race or political opinion. Although the IJ refers to the five statutory grounds collectively, the IJ only explicitly referred to race and political opinion. The IJ wrote: "Therefore, . . . the Court finds that the respondent has failed to meet her burden of proving, of demonstrating that she and her family suffered persecution in South Africa based on any of the five statutory grounds *whether it is race or political opinion.*" (Emphasis added.) The original asylum application, however, noted that the petitioners had been mistreated or threatened on the basis of political opinion and membership in a particular social group. The box for "Race" was not checked.

Although the petitioners' briefs are a little vague at times and they submitted documentary evidence related to race-based crime in South Africa, the petitioners do not appear to contend seriously that their race or political opinion was the basis for their persecu-

tion.[2] Moreover, it is unclear precisely what "political opinion" the petitioners espouse or are thought to espouse as well as how any claim based on race would appreciably distinguish them from others in South Africa. *See Vides-Vides v. I.N.S.*, 783 F.2d 1463, 1469 (9th Cir. 1986) ("[T]he evidence should be specific enough to indicate that the alien's predicament is appreciably different from the dangers faced by the alien's fellow citizens."). Instead, the petitioners' best statutory ground—and the one they argue most forcefully—is membership in a particular social group, as relatives of Boss Ronnie. In the petitioners' words: "Respondent has ignored the overwhelming evidence showing that Petitioner Thomas and her family were persecuted by Black individuals, *precisely because of their familial relationship to her racist, white father-in-law.*" (Emphasis added).[3]

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[2] Consider, for instance, the following exchange, which took place during the hearing before the IJ:

> Q. And you're saying that the workers weren't hurting you because of your race or your religion or membership in a political party or, or a—or your political opinion or special interest group, is that correct?
>
> A. That's correct.
>
> Q. Or nationality?
>
> A. Yes.
>
> Q. Right. It's just that they hated his father and wanted to come after you—
>
> A. Yes.

[3] As the government points out, at one point Michelle appeared to deny that the persecution was based on membership in a particular social group. Nevertheless, she consistently stated that the persecution was based on her relationship to her father-in-law, and she should not be penalized for failing to recognize during questioning that that relationship can be articulated as one of the

The question whether family relations may constitute a particular social group is a question on which the case law had been somewhat unclear. *See Gebremichael v. I.N.S.*, 10 F.3d 28, 36 n.21 (1st Cir. 1993) (noting that the state of the law on this issue in the Ninth Circuit "is not entirely clear"). However, we recently clarified that a family may constitute a "particular social group" for purposes of asylum or withholding of removal. *Lin v. Ashcroft*, 356 F.3d 1027, 1039, 2004 WL 112637, No. 02-70662 (9th Cir. Jan. 26, 2004); *see also Molina-Estrada v. I.N.S.*, 293 F.3d 1089, 1095 (9th Cir. 2002) (noting that "[w]e have recognized that, in some circumstances, a family constitutes a social group for purposes of the asylum and withholding-of-removal statutes."); *Pedro-Mateo v. I.N.S.*, 224 F.3d 1147, 1151 (9th Cir. 2000) ("Pedro-Mateo offers neither case law nor analysis to contradict our previous statement that the 'prototypical example' of a social group would be 'immediate members of a certain family.'") (quoting *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986)); *Mgoian v. I.N.S.*, 184 F.3d 1029, 1036 (9th Cir. 1999) (we have held that a "'particular social group' implies a collection of people closely affiliated with each

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legally-recognized bases for relief from removal. Consider the following exchange:

> Q. So, you say that all these things happened to you because of your father-in-law—
>
> A. Yes.
>
> Q. —correct? Not because of your race, your religion, your membership in a social group, a political opinion, any of those reasons. Only because of your father-in-law—
>
> A. Father-in-law, yes.

Moreover, her application clearly states that her mistreatment was based on her membership in a particular social group.

other," with the "prototypical example of a 'particular social group' [ ] consist[ing] of the immediate members of a certain family. . . ." (quoting *Sanchez-Trujillo*, 801 F.2d at 1576). In *Lin*, we recognized that

> [w]here family membership is proposed as the "particular social group" status supporting a claim of refugee status, this prong of the test melds with the "on account of" prong. Where family membership is a sufficiently strong and discernible bond that it becomes the foreseeable basis for personal persecution, the family qualifies as a "social group."

356 F.3d at 1040.

In this case, the petitioners have demonstrated that the alleged persecution suffered was a result of the fact that they are related to Boss Ronnie. They are associated and identified with him by the perpetrators. The fact that Michelle's brother-in-law has also apparently suffered for the same reason lends support to this conclusion. Therefore, we find that the acts committed against the Thomases were sufficiently linked to their family membership so as to constitute alleged persecution on the basis of membership in a particular social group. In both *Lin* and the instant case, the petitioners' familial relations are a but-for cause of the alleged or feared persecution.

In this regard, the government contends that the alleged persecution was simply retaliation for personal conduct or the result of the country's high crime rate, and that neither basis is sufficient for asylum or withholding of deportation. Personal retaliation is different from other persecution for purposes of asylum and withholding of removal *precisely because it is action not tied to one of the statutory bases*. *Grava v. INS*, 205

F.3d 1177, 1181 n.3 (9th Cir. 2000) ("Purely personal retribution is, of course, *not persecution on account of political opinion.*") (emphasis added). Here, however, there are no allegations that the actions taken against the petitioners were simply retaliation for personal conduct, i.e., unrelated to any of the five statutory grounds. Instead, the evidence indicates that the actions were taken against them because of their relationship with Michelle's father-in-law. Given our conclusion that the petitioners' family qualifies as a "particular social group," the acts constituting persecution were not purely personal retribution against the petitioners; instead, they were actions *on account of* one of the statutory grounds.

With respect to South Africa's crime rate, the petitioners need not (indeed, should not, *see Vides-Vides*, 783 F.2d at 1469) rely on any generalized crime trends to support their petition. Michelle consistently testified that the petitioners were subjected to personal attacks and threats based on their specific relationship to her father-in-law. While the petitioners also submitted evidence regarding general crime trends in South Africa, this evidence is unnecessary (as well as insufficient) to support their application. Therefore, we find the government's arguments insufficient to refute the contention that the persecution in this case was based on the petitioners' familial relations.

Based on the foregoing, we find that the alleged persecution suffered by the petitioners was on account of their membership in a particular social group. We find that substantial evidence does not support the BIA's determination that Michelle and her family did not suffer alleged persecution on any of the five statutory grounds.

2. *Persecution*

The Thomases must also demonstrate that the acts complained of constituted "persecution." The government contends that the incidents reported by the Thomases were not sufficiently extreme to constitute persecution. The government argues that "[s]everal of [the Thomases'] experiences could properly be described as harassment, and certain of the incidents may have qualified as crimes, but they were not persecution." We disagree.

Over the period of more than one year, the petitioners were subjected to an escalating scheme of intimidation and a real threat of physical violence. Their pet was killed. Their car and house were vandalized. In the presence of her children, Michelle was told that her throat would be cut. Their little girl was the target of a kidnapping.

We find that the cumulative effect of these events qualifies as an offensive suffering or harm. *See Prasad*, 47 F.3d at 339; *Singh*, 134 F.3d at 967. As noted above, the persecution inquiry is very fact-intensive. However, it has been held that "threats of violence and death are enough" to constitute persecution. *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 991 (9th Cir. 2000).[4]

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[4] Judge Fernandez's penchant for *sesquipedalia verba*—or perhaps more appropriately *verba obscura*—does little to cloak the flaws in his dissent. Consider the dissent's footnote seven. As the facts indicate, the comparison of this case to a single drive-by shooting is silly. The petitioners were faced with multiple, escalating attacks over a year-long period. We do not pretend to be "porphyrogenites" (*noun, obscure*: originally referring to one born of the imperial family in Constantinople, more generally referring to one born into a royal family) issuing our own "ukases" (*noun*: a proclamation, decree, or order of a final or arbitrary nature by a

Next we must consider the government's role in the persecution. Persecution need not be directly at the hands of the government; private individuals that the government is unable or unwilling to control can persecute someone. *Singh*, 134 F.3d at 967 n.9; *Navas*, 217 F.3d at 656, n.10 ("Government action is not necessarily required; instead, police inaction in the face of such persecution can suffice to make out a claim.").

The IJ did not mention this standard and did not apply it. Rather than considering whether the government was unable or unwilling to protect the Thomases, the IJ considered whether "the South African government is sponsoring or promoting or condoning [the] violence." The IJ noted that the violence was not "government sponsored." The IJ then concluded that "the Court does not find that any of these actions by these people is sponsored by the South African government." We therefore remand to the BIA to apply the proper standard and determine in the first instance whether the South African police were indeed unwilling or unable to protect the Thomases. *See INS v. Ventura*, 537 U.S. 12, 16-17, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002).

Russian emperor). Rather, we follow well-established law regarding persecution, and, as discussed below, we remand for further consideration regarding whether the actions in this case qualify as "persecution" because of the alleged failure of the government to control the perpetrators.

CONCLUSION

On the basis of the foregoing, we grant the petition for review and remand the case for further consideration.

FERNANDEZ, Circuit Judge, dissenting.

I dissent from the grant of the petition on multiple grounds.

First, in this circuit there is little authority for the proposition that a family, as such, is a social group,[1] and the use of that concept here shows just how poor an idea it is to extend social group status in that fashion.

Second, I see no basis for deciding that every blow or crime perpetrated against a person *is* persecutory, without any real consideration of who did it and why. If a disgruntled employee slugs his boss for cheating him out of his wages, that is decidedly not persecution. But, if the employee takes a cowardly swipe at his boss's daughter-in-law, that, according to the majority, is persecution. Of course, this is part and parcel of the anomaly wrought by the majority's decision that a family is a social group and, therefore, that the mem-

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[1] Indeed, our law has generally been quite the contrary. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 n.4 (9th Cir. 2000); *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991); *cf. Sangha v. INS*, 103 F.3d 1482, 1490-91 (9th Cir. 1997) (attack on son because of father's position was not political persecution). That said, I am aware of *Lin v. Ashcroft*, 356 F.3d 1027, 1039-41, 2004 WL 112637, No. 02-70662 (9th Cir. Jan. 26, 2004), which I disagree with. *Lin* went a long way toward saying that a family *is* a social group, but there, at least, the whole government family planning program was of a persecutory nature, and family planning is directed at families in a unique way.

bers ipso facto have a free-standing claim to refugee status.[2] It is also an emanation from the concept that just any wrongdoer can be dubbed a persecutor, which leads to the majority's next immigration law error.

Third, while we have said that persecution can be by groups, we have never, as far as I know, extended that concept to the point of saying that a few disgruntled employees, who attacked the hated boss's family, come within that group concept for asylum purposes.[3]

Fourth, there is no evidence that governmental authorities in South Africa are "unable or unwilling" to protect the Thomases, and others, from crimes committed against them. *See Singh v. INS*, 94 F.3d 1353, 1358-59 (9th Cir. 1996); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988). It should be pellucid that no government, no police force, can possibly solve every crime. That is especially true of anonymous crimes of petty vandalism and of crimes where the victims cannot, or will not, help to identify the perpetrator. In fact, the Thomases actively asked that an investigation of the final alleged crime not be conducted. I recognize that the IJ used infelicitous language in reaching what, until today, was an ineluctable decision to deny relief, and that, at least, leads to a remand rather than to issuance of an outright decision that the Thomases are eligible for asylum and entitled to withholding. Still, the brazen facts are clear; but for the other mickle

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[2] At least other family group cases have tended to involve situations where an attack on the family member has been for reasons that would constitute persecution if the primary "victim" had been attacked. *See supra* n.1. But this case shows what the sometimes attractive arguments in those cases can lead to.

[3] Here, as far as the record shows, this dastardly and uncontrollable group consists of five (or maybe only four) individuals.

mistakes of immigration law in the majority opinion, there would be no reason whatsoever to remand this case to the BIA.[4]

Finally, the record cannot support a determination that the Thomases could not protect themselves by moving to another city in South Africa, rather than by coming all the way to the United States.[5] Would those employees really leave their jobs and pursue the Thomases all over South Africa? There is no reason to think so.[6]

In short, this case expands and extends general language in our cases almost beyond recognition in order to foster a grant of asylum to people who are in no proper sense true refugees. *See* 8 U.S.C. § 1101(a)(42)(A). It makes a mockery of the serious concerns that lie behind the virtually universal desire to protect people who are truly being persecuted in their own countries. Really, on the theory of this case, hundreds of United States citizens are being subjected to persecution every year because of attacks by criminal groups and others.[7] If Congress had wished to

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[4] There is no need to remand where that would be a futile act. *See Valderrama-Fonseca v. INS*, 116 F.3d 853, 857 (9th Cir. 1997); *Chinnock v. Turnage*, 995 F.2d 889, 893-94 (9th Cir. 1993); *Tejeda-Mata v. INS*, 626 F.2d 721, 726-27 (9th Cir. 1980).

[5] I recognize that the IJ did not reach this point—he had no need to do so. I mention it because it is obvious from the record and serves to evidence the radical nature of the decision in this case.

[6] It is notable that the hated father-in-law had retired before the Thomases filed their petition for asylum—this further attenuates the possibility that the employees would seek out the Thomases.

[7] Consider, for example, the not unusual Southern California situation where there is an unsolved drive-by shooting by a street

extend immigration benefits to all those who have been injured by others and are displeased with the conditions in which they find themselves at home, it could have. In the meantime, because we are not porphyrogenites we should not be issuing our own ukases rather than abiding by the laws that Congress did adopt. In other words, the significant errors of immigration law in this case will be found in the majority opinion rather than in the decisions of the BIA or the IJ.[8]

Thus, I must respectfully dissent.

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gang into the family home or automobile of a rival gang member, who has crossed the gang in some way. Despicable and deplorable? Of course! Grounds for asylum for family members? Of course not! But it seems that the majority would say "yes."

[8] It is a pity that the majority has also fallen into floccinaucinihilipilification of my word choices.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A75-597-033 - Los Angeles Date: **MAY 16, 2002**

In re: THOMAS, MICHELLE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Horwitz, Errol I., Esq.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ illegible signature
FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A75-597-034 - Los Angeles Date: **MAY 16, 2002**

In re: THOMAS, DAVID GEORGE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Horwitz, Errol I.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ illegible signature
FOR THE BOARD

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A75-597-035 - Los Angeles Date: **MAY 16, 2002**

In re: THOMAS, TYNEAL MICHELLE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Horwitz, Errol I.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ illegible signature
FOR THE BOARD

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-597-036 - Los Angeles Date: **MAY 16, 2002**

In re: THOMAS, SHALDON WAIDE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Horwitz, Errol I.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ illegible signature
FOR THE BOARD

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No. A 75 597 033/034/035/036

August 30, 1999

IN THE MATTER OF: MICHELLE THOMAS; DAVID GEORGE THOMAS; TYNEAL MICHELLE THOMAS; SHALDON WAIDE THOMAS, RESPONDENTS

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act.

APPLICATIONS: Asylum, withholding of removal, voluntary departure.

ON BEHALF OF RESPONDENTS:
Helen A. Sklar
Attorney-at-law

ON BEHALF OF SERVICE:
Jo Ann Platel
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The lead respondent, Michelle Thomas, is a 31-year-old married female, native and citizen of South Africa. The second respondent, David thomas is a 30-year-old married male, native and citizen of South Africa. The third respondent, Shaldon Thomas, is an 11-year-old single male, native and citizen of South Africa. Tyneal

Thomas, respondent, is a five year old single female, native and citizen of South Africa. The United States Immigration and Naturalization (INS) has brought these removal proceedings against the respondents pursuant to the authority contained in Section 240 of the Immigration and Nationality Act (The Act). Proceedings were commenced with the filing of the Notice to Appear (NTA) with the Immigration Court. In each case, the Notice to Appear is marked into the record as Exhibit No. 1.

The respondents admit as alleged in the Notices to Appear that they entered the United States on or about May 28, 1997 at or near Los Angeles, California. The respondents further concede that they are inadmissible as charged under Section 237(a)(1)(B) of the Act in that after admission as nonimmigrants under Section 101(a)(15) of the Act, they have remained in the United States for a time longer than permitted.

On the basis of the respondents admissions, the Court finds the respondents' removability has been established.

The respondents declined to designate a country of removal and South Africa was directed. The respondents applied for relief from removal in the form of asylum under Section 208(a) of the Act. Applications for asylum shall also be considered as applications for withholding of removal under Section 241(b)(3) of the Act. The respondents request voluntary departure under Section 240B(b) of the Act in the alternative. It has been established that the respondents have filed their application for political asylum within one year of their last arrival. At the time of filing the application for political asylum, the respondents were also advised

of the consequences of knowingly filing a frivolous application for asylum. *See* 8 C.F.R. Section 208.18.

The respondents Form I-589, Application for Asylum, is contained in the record as Exhibit No. 2 in each case. Prior to admission of the applications, the respondents confirmed in Court that they knew the contents of their applications and they swore that the contents of the applications and the supplementary documents and attachments were all true and correct to the best of their knowledge and belief. The following documents were also admitted into evidence. Admitted into evidence as Exhibit No. 3 were supporting documents for the applications for political asylum. Exhibit No. 4 was the Department of State *Country Report on Human Rights and Practices* for South Africa for 1998. Exhibit No. 5 was a section from the code of civil procedure. Exhibit No. 6 was the approval notice for the request for a visa extension. Those constitute the six pieces of documents marked into evidence.

FACTS

The evidence at the hearing consisted of the respondent's written asylum application, the testimony of Michelle Thomas, her supplementary declaration attached to her asylum application, the State Department *Country Report on Human Rights Practices* dated 1998 and the supplementary documents submitted as Group Exhibit 3 by the respondent.

WRITTEN APPLICATION

In her written application, the lead respondent stated she was seeking asylum on the grounds of race because as a White family in South Africa, they are being targeted for persecution by Black South Africans. She

alleges that if she is returned to South Africa she would be killed because Black workers in South Africa hold a grudge against her and her family. In response to question no. 3 on her application, the respondent has listed herself and members of her family as being members of the White race. The respondent stated that she was never arrested, detained, interrogated, convicted or sentenced or imprisoned. It also states that no one in her family was arrested, detained, interrogated, convicted or imprisoned.

In May 1997, the respondents departed South Africa and traveled to the Netherlands where they remained for approximately four hours en route to the United States.

TESTIMONY

The respondent testified as follows: The respondent testified that her father-in-law was a foreman at a factory and that the father-in-law is a racist who verbally and physically abused his Black workers. She testified that the Black workers were retaliating against her family because of the actions of the father-in-law. She testified that the first incident occurred in February 1996. This incident involved the poisoning of her dog. She testified that the veterinarian determined that the dog had been poisoned and she testified that at the time they did not link the poisoning of the dog to the father-in-law. She testified that in March 1996 her car was vandalized. She testified that the police were called and they responded right away. They took fingerprints, but no one was ever arrested. She testified that the father-in-law told the respondent to buy a gun to protect yourself. In her asylum application, the respondent indicated that nothing was taken from the car and that is what caused them to be suspicious of the

vandalism. In May 1996 respondent testified that human feces were thrown at the door of their home. In December 1996, some Black men appeared at her house and asked for Boss Ronnie. Boss Ronnie is the father of her husband. She testified that these Black men threatened to cut her throat. This incident occurred while she [was] seated on her veranda of her house. She testified that the workers for her father were badly treated by her father-in-law and the father-in-law who was a foreman use to abuse these workers and have them work at his home and he was constantly making racial comments about his workers and also bragged about the mistreatment of his workers. The respondent testified that after the veranda incident she was fearful of her life. She testified that the hostility that her family was subjected to was because the people were afraid or they could not direct it toward her father-in-law because the father-in-law's house was more secure than her house, the father-in-law's house was fortified with fences, high walls, two vicious dogs and the ownership of a gun by the father-in-law. The respondent further testified that she and her family increased security around their home by putting up bars, fences and alarms. She testified that on or about sometime during March 1996, four Black men tried to take her daughter from her arms. When asked how the workers knew she was related to Boss Ronnie, she replied that they saw him [Boss Ronnie] coming to the respondent's home. The respondent testified that she knew that these workers were employees of her father-in-law because one of them was wearing overalls with the name of the company Strong Shore. One of the kidnappers was wearing overalls with this name on the overalls.

On cross-examination, she gave greater details about this kidnapping or attempted kidnapping. She testified that she was on her way to the store and she was holding her daughter Tyneal in her arms when four Black men approached her outside of her home. She testified that the men walked up to her and surrounded her and tried to take Tyneal from her arms. She testified that she reported this incident to the police. On cross-examination, she testified that she reported the incident to the police, however, on direct examination it appears that she testified that she did not report the attempted kidnapping to the police because she did not want the police to get involved in the case. She testified that South Africa has a very high crime rate and that she was afraid that if she reported this to the police that the men with the overalls would come back to get her and her family. She also testified that the police patrolled the area and saw no one so they gave up the case. So, it is not quite clear whether this reported to the police or not. She testified that her husband David was a fireman from 1991 to 1997 and that before he was a fireman, he was a construction worker. She testified that before these incidents began that she and her family were very happy living in South Africa. She testified that they left South Africa approximately two months after the attempted kidnapping. The respondent says she holds her husband's father, that is, her father-in-law responsible for the trouble of the family. The respondent also testified that if she were to return to South Africa she would be killed by these workers. She said that the Strong Shore construction company was involved in building schools and shopping malls and that her father-in-law was a foreman for quite some time. The father-in- law's name is R.J. Thomas and that he retired from this position in February 1998.

She testified that she and her family could not move to another location to live and that there were no further incidents between March 1997 and May 1997. She testified that there were no incidents regarding these workers from 1986 to 1996. When asked if she had proof that her dog had been poisoned, the respondent responded by saying that she tried to get proof from the police department, but she was unable to do so. The respondent testified that the father-in-law had been foreman of this company from 1986 to 1998 when he retired. The respondent testified that they have relatives here in the United States. One of the relatives, a person by the name of Glenn, has returned to South Africa at the time of the hearing, it was two months earlier because he had some heart problems. She testified that she was fearful of returning to South Africa because the people who held a grudge against her and her family were still dangerous and that they were still after her because of the physical and mental abuse they suffered at the hands of her father-in-law.

STATEMENT OF THE LAW

The burden of proof is on the respondent to establish that she is eligible for asylum or withholding of removal. To qualify for asylum pursuant to Section 208 of the Act, the respondent must show that she is a refugee within the meaning of Section 101(a)(42)(A) of the Act. *See* Section 208(a) of the Act. The definition of refugee includes a requirement that the respondent demonstrate either that she has suffered past persecution or that she has a well-founded fear of future persecution in her country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group or political opinion. The alien must show that she has a subjective fear of

persecution and that the fear has an objective basis. The objective basis of a well-founded fear of future persecution is described in the regulation as a reasonable possibility of actually suffering such persecution if the alien were to return to her home country. *See* 8 C.F.R. Section 208.13(b)(2). The objective component must be supported by credible, direct and specific evidence in the record. *See DeValle v. INS*, 901 F.2d 787 (9th Cir. 1990). The alien must also be both unable and unwilling to return to or avail himself of the protection of his home country because of such fear. Finally, an applicant must also establish that he merits asylum in the exercise of discretion. *See Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).

To qualify for withholding of removal under Section 241(b)(3) of the Act, the respondent's fact[s] must show a clear probability that her life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership in a particular social group or political opinion. *See INS v. Stevic*, 467 U.S. 407 (1984). This means that the respondent's facts must establish it is more likely than not that she would be subject to persecution for one of the grounds specified.

The regulations further provide that in evaluating a claim of future persecution, the Immigration Judge does not have to require the alien to provide evidence that she would be singled out individually for persecution if the alien establishes that there is a pattern or practice in her home country of persecution of group of person [sic] similarly situated to the applicant on one of the five enumerated grounds and that the alien is included or identified with such group. 8 C.F.R. 208.13(b)(2).

The regulations also note that with respect to past persecution, an alien who establishes she suffered past persecution within the meaning of the Act shall be presumed also to have a well-founded fear of future persecution. The presumption may be rebutted if a preponderance of the evidence establishes that since the time the persecution occurred, conditions in the applicant's home country have changed to such extent that the applicant no longer has a well-founded fear of being persecuted if she were to return. An alien who establishes past persecution, but not ultimately a well-founded fear of future [persecution] will be denied asylum unless there are compelling reasons for not returning him or her which arise out of the severity of the past persecution. 8 C.F.R. Section 208.13(b)(1).

The well-founded fear standard required for asylum is more generous than the clear probability standard of withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). We first, therefore, apply the more liberal well-founded fear standard when reviewing the respondent's application because if he fails to meet this test it follows that he necessarily would fail to meet the clear probability test required for withholding of removal.

ANALYSIS AND FINDINGS OF THE COURT

The respondent is fearful of her life and the life of her family because she believes as a White citizen of South Africa that she is subject to persecution by Black citizens of South Africa. The respondent submitted voluminous material on the high crime rate of South Africa. The documents indicate that there is a problem with respect to the crime rate in South Africa, however, the documents do not indicate that this is any different

from the crime rate in the South Africa of the apartheid era. As a matter of fact, the document[s] indicate that part of the reason for the increase is better reporting of the crimes. The respondent testified that the problem her family suffered was due to the racism of her father-in-law and that the people, since they could not attack the father-in-law, attacked the family. The respondent in her testimony indicated that neither she nor her family members were involved in politics. She testified that her father-in-law was the foreman of this construction company from approximately 1986 to 1998, but her problems began with the Black workers in February 1996. The reports that the respondent submitted certainly indicate that South Africa has a serious crime problem. There is a report in here on the incidents of serious crime. Under rape it says, as in the case of any other crime, the increase rate figure may be due to an increase in the reporting of the specific crime to the police and/or an increase in the number and intensity factors conducive to the occurrence of rape. Under assault it says the increase in the incidents of serious assaults may also linked to an increase in the reporting of this crime especially while a large proportion of the cases relating to this crime occurs within the domestic sphere of child-battering, wife-battering and retaliatory battering where it had been previously kept a family secret. This goes on, this same language basically is applied to each one of the crime specified. The respondent's position is that she and her family are being attacked because of their race. In fact, the reports that she submitted does indicate that there are still problems between Blacks and Whites in South Africa. The farmers are complaining that they are being attacked by Black workers and there is a photograph in one of the submission, a newspaper photo-

graph of the former president Mandela consoling a White woman whose husband had been killed. President Mandela was kissing this woman's hand. It is a photograph that shows Mandela kissing this woman's hand and consoling her for the loss of her husband. On the other hand, in this same package of documents, there is an article about a White farmer shooting a nine year old girl in her back and the nine year old girl was carrying an infant on her back. The infant was killed and the nine year old girl was seriously injured. This nine year old girl was the daughter of the servant of this White farmer. After the killing of the infant and the injuring of the child, the servant who was earning approximately $40 a month and working seven days a week was fired by the White owner of the land and the police officers, who were both Black and White, mishandled the nine year old girl while she was in the hospital recuperating from her injuries.

It appears, therefore, that the incidents of crime, attacks on individuals is not restricted to Blacks committing crimes against Whites. As a matter of fact, in this incident of the farmer murdering the infant and injuring the nine year old girl, other White farmers complained that Nelson Mandela visited the family of the Black children, but did not visit the family of the White family. As mentioned earlier, there is a photograph in the submissions showing Mandela consoling a White woman whose husband had been murdered. The South African police service is in charge of maintaining security in South Africa. Both the *Country Reports* and all other reports indicate that there are still police brutality and incidents of police brutality and this brutality is directed against people, Black and White, by officers who are both Black and White. Under the

apartheid system there were a number of killings of people in police custody. At this time, the government has given amnesty to some of the worse offenders. One person even admitted that he was given direction by the then president P.W. Botha to blow up a Black church which was done and this person is also being given amnesty. So, as indicated earlier, South Africa does have a crime problem, however, we must look to see if this is government sponsored persecution against these individuals. South Africa has created a South African Institute of Race Relations and they are studying the problems of the crime Black against White, so there is every indication that the government is trying to solve this problem which is quite serious, but South Africa has been notorious for having a high crime rate even under the apartheid system. So, therefore, this crime is not brought about strictly because of the transitional government. Under the apartheid system there were many extra judicial killings and a very high rate of imprisonment of various people. Again, the reports indicate that the increase could possibly be the result of better reporting of crime. There is nothing in any of these documents, and the Court has gone through all of these documents, as a matter of fact the case was put over to give the Court an opportunity to carefully go through all of these documents and there is nothing in any of these documents to indicate that the South African government is sponsoring or promoting or condoning violence of Whites against Blacks or Blacks against Whites or any other group of people.

When it comes to crime, there is no country in this world that can offer its citizen 100% protection from retaliation by any members of a society, organized crime or unorganized crime. *See Barteshehi-Lay v.*

INS, 9 F.3d 819 (10th Cir. 1993). The respondents in this case seem to be suffering from personal retaliation of workers who worked for the father-in-law who abuses them. Personal problems without worth [sic] cannot be the basis of a claim for asylum. *See Matter of Y-G-*, Int. Dec. 3219 (BIA 1994). In general, general conditions in a country such as anarchy, civil war or mob violence will not ordinarily support a claim of persecution. *See Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988). Counsel for the respondent informed the Court of a case, *Tarubac v. INS*, which is in the Daily Journal dated July 13, 1999, No. 97-70964 at page 7105 which holds that it is erroneous to deny asylum based upon evidence that there is a nonpolitical motive. This is a 9th Circuit case. In this case, the Court does not see any political motive in the incidents, if they in fact existed and that is another point. The respondent testified that the family is nonpolitical. She testified that she blames her father-in-law for the problems of the family. That it is the father-in-law's racist attitudes and his abuse of his Black workers that is causing them to retaliate against her family. She testified that they are retaliating against her and her family because they are easier targets than the father-in-law. It does not say anything about the father-in-law's political position or the political position of the people who are allegedly persecuting them or committing these offenses against them.

The constitution of South Africa prohibits discrimination on grounds of race, religion, ethnicity, disabilities, sex, color, culture, pregnancy, marital status, age, et cetera. Despite this, women are still subjected to a high rate of violence, however, this is not government sponsored. There is no evidence that the attacks on

White farmers by Blacks is part of any organized political conspiracy. One would have to look into the history of South Africa to determine why that land is being fought over and perhaps why the Blacks, if they are attacking these White farmers, if one looks into the history of how the farmers got the land, perhaps there would be an explanation for the attempt of the Black South Africans to reclaim that land.

While it is very unfortunate that the country is suffering such a high incidence of crime, this is something that the government is attempting to correct. It is unfortunate that the solution cannot come faster, but crime exists in all countries including the United States and just as in the United States, there are steps being taken to bring people to justice.

All of the above statements are taken in the light of assuming that the respondent was totally credible. The Court did not find the respondent's testimony to be totally credible. There were some inconsistencies regarding some of the incidents. For example, there was confusion over whether the report of the vandalism was made to the police or not. Also, in her application for political asylum, in her declaration, it appeared that they were not clear as to the actual cause of the death of the dog. That at one point the veterinarian said it looks like the dog had been poisoned, but even that in the declaration was not clear. It is still puzzling to the Court as well that the family would be targeted because of the father-in-law when the father-in-law had been the foreman of this company for such a long period of time. That if in fact the motive was strictly racial based because of the behavior of the father-in-law, it appears that these attacks would have begun shortly after the transition from the apartheid regime to the regime of

Nelson Mandela. These attacks did not begin, according to the respondent, until 1996, so that would be a number of years after the transition and there was no explanation as to why there was this delay in time especially considering that this father-in-law apparently has not changed his attitude. There was no indication that his attitude changed after 1991 towards his Black workers or that the attitude changed in 1996 towards his Black workers that would certainly cause them to retaliate against the respondent and her family. From what the respondent has said, the father-in-law has held these attitudes from years back and, therefore, he was probably as racist in 1986 as he was in 1996, so there is no explanation as to why these attacks against her family suddenly began in 1996.

Again, when the Court looks at who is the persecutor in this case, the Court does not find that any of these actions by these people is sponsored by the South African government. As indicated earlier, it appears that the government is taking steps to solve its crime problem through research, through studies and through various agencies. The government is aware of the crime problems and crimes of all nature and involving all members of the South African society. The crimes are not restricted to Whites. There is a large incidents also of Black on Black crimes and there is certainly incidents of White on Black crimes, therefore, all of the people are being subject to this high crime rate in South Africa.

Therefore, based on the documents submitted and the testimony and the evidence presented, the Court finds that the respondent has failed to meet her burden of proving, of demonstrating that she and her family suffered persecution in South Africa based on any of

the five statutory grounds whether it is race or political opinion.

VOLUNTARY DEPARTURE

Pending before this Court is also the respondent's request to depart the United States without expense to the Government in lieu of removal pursuant to Section 240B(b) of the Act. To qualify for voluntary departure, the respondent must establish that she has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served; she or he has been a person of good moral character for at least five years immediately preceding such application; that he or she is not deportable under Section 237(a)(2)(A)(iii) or 237(a)(4) of the Act; that he or she establish by clear and convincing evidence that he or she has the means to depart the United States and intends to do so; and, that he or she shall be required to post a voluntary departure bond. In addition, the respondents must be [in] possession of a travel document that will assure their lawful re-entry into their home country.

Discretionary consideration of an application for voluntary departure involves a weighing of factors including the respondent's prior immigration history, the length of his or her residence in the United States and the extent of his or her family business and societal ties in the United States.

The Court finds that the respondents are eligible and deserving of this minimal form of relief of voluntary departure.

There are no other issues raised by the INS that would further negatively affect the respondent's eligibility for this minimal form of relief. The Court finds

the respondents statutorily eligible and deserving of this relief in the exercise of discretion.

UN CONVENTION AGAINST TORTURE RELIEF

The Court acknowledges that as of March 22, 1999, UN Convention Against Torture relief became available for those individuals who could establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. *See* 8 C.F.R. Section 208.16. Although the respondents have not specifically requested UN torture convention protection, this Court has carefully considered their eligibility for a claim and finds that because they have failed to establish their eligibility for asylum, they have also failed to do so for torture convention relief. As a result, the Court finds the respondent is ineligible for relief under the UN Torture Convention. Accordingly, the following orders are entered:

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum in the case of Michelle Thomas, David Thomas, Shaldon Thomas and Tyneal Thomas be denied.

IT IS HEREBY ORDERED that the respondent's application for withholding of removal to South Africa for the respondents Michelle Thomas, David Thomas, Shaldon Thomas and Tyneal Thomas be denied.

IT IS FURTHER ORDERED that all the respondents be granted voluntary departure in lieu of removal and without expense to the United States Government on or before October 29, 1999.

IT IS FURTHER ORDERED that the respondents shall post a voluntary departure bond in the amount of $500 each with the Immigration and Naturalization Service on or before September 7, 1999.

IT IS FURTHER ORDERED that if required by the INS the respondents shall present to the INS all necessary travel documents for voluntary departure within 60 days.

IT IS FURTHER ORDERED that if the respondents fail to comply with any of the above order, the voluntary departure order shall without further notice or proceeding vacate the next day and the respondents shall be removed from the United States to South Africa on the charge contained in the Notice to Appear.

WARNING TO THE RESPONDENTS: Failure to depart as required means you could be deported. You may have to pay a civil penalty of $1,000 to $5,000 dollars and you would become ineligible for voluntary departure, cancellation of removal and any change or adjustment of status for ten years to come. Also, if you fail to depart as required and then fail to comply with the removal order, you could also be fined $500 for each day of non-compliance. *See* Section 274(d) of the Act. In addition, if you are removable for being deportable under Section 237 of the Act and you fail to comply with your removal order, you shall face additional fines and/or could be imprisoned for up to two months and in some cases up to ten years. *See* Section 243(a) of the Act.

ROSALYND K. MALLOY
Immigration Judge

APPENDIX H

1. 8 U.S.C. 1101(a)(42) provides in pertinent part:

§ 1101. Definitions

(a) As used in this chapter–

* * * * *

(42) The term "refugee" means (A) 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a

person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * * * *

2. 8 U.S.C. 1158 provides:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has

previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which ma terially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is inadmissible under subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 1182(a)(3) (B)(i) of this title, the Attorney

General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(c) Asylum status

(1) In general

In the case of an alien granted asylum under subsection (b) of this section, the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum

Asylum granted under subsection (b) of this section does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) of this section owing to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2) of this section;

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section[1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney

[1] So in original. Probably should be "sections".

General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) of this section. The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments.

Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application

At the time of filing an application for asylum, the Attorney General shall—

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures

The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Auto-

mated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under section 1229a of this title, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under section 1229a of this title, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

3. 8 U.S.C. 1231(b)(3) provides in pertinent part:

§ 1231. Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

* * * * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is

a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.