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# *The Level Of Severity Needed For Humanitarian Asylum: A Comparative Study Of Canadian And American Immigration Laws*

***Abstract***

*What is humanitarian asylum? This principle emerged as a way to prevent victims who suffered severe persecution while living in their home country from being forced to return. International law reasons that even if a victim had no rational reason to fear persecution again, forcibly removing that victim to the origin country of persecution would be inhumane. The United States and Canada are two countries that endorse this principle and implement this belief in their immigration laws. However, both countries differ in their interpretation and implementation of humanitarian asylum.*

*In comparing the United States' Immigration and Nationality Act to Canada's Immigration and Refugee Protection Act, it is clear that there are major differences in terms of each country's standard and approach to humanitarian asylum. The threshold question in determining whether humanitarian asylum is granted to a refugee is whether the infliction suffered constitutes persecution in the first place. If deemed persecution, then one must determine if the persecution is severe enough to warrant humanitarian asylum. In comparing the United States and Canada, it is clear that Canada's approach is more restrictive and strict, focusing on appalling and atrocious physical harm and only considering psychological harm when a refugee provides sufficient physical, objective documentation. The United States, on the other hand, attempts to broaden the scope of its immigration laws by considering harm other than persecution and allowing testimony as a means to demonstrate psychological harm.*

***Annotasiya***

*Humanitar sığınacaq nədir? Bu prinsip şəxsin qaytarılmalı olduğu ölkədə ağır əziyyətlə üzləşəcəyi halda onu qorumaq üçün meydana gəlmişdir. Beynəlxalq hüququn mövqeyinə görə şəxsin ağır əziyyətə məruz qalacağından qorxmaq üçün rasional səbəb olmasa belə, şəxsi məcburi şəkildə əzab-əziyyət çəkdiyi ölkəyə göndərmək insani deyildir. ABŞ və Kanada bu prinsipi dəstəkləyən və öz immiqrasiya hüquqlarına tətbiq edən ölkələrdir. Lakin bu ölkələr prinsipi bir-birlərindən fərqli təfsir və tətbiq etməkdədirlər. ABŞ-ın İmmiqrasiya və Vətəndaşlıq Aktını Kanadanın İmmiqrasiya və Qaçqınların Müdafiəsi Aktı ilə müqayisə etdikdə humanitar sığınacağa ölkələrin müəyyən etdiyi standart və yanaşmalar arasında böyük fərqlər olduğu aydın olur. Burada həlledici sual əzab-əziyyətin səviyyəsinin dözülməzliyindən, yaxud sığınacaq verilməsi üçün kifayət etməsindən ibarətdir. Müqayisələr göstərir ki, Kanadanın yanaşması daha ciddidir və şəxsin göndəriləcəyi ölkədə ağır əzab-əziyyətin gözlədiyini sübut etməsi üçün əsaslı sənədlər tələb olunmaqdadır. ABŞ isə immiqrasiya qanunlarında genişləndirmə apararaq ziyanı əziyyət, igəncədən ayırmağa və şahidlik institutu vasitəsilə psixoloji ziyanın göstərilməsini tətbiq etməyə çalışır.*

## Introduction

In 1951, the United Nations ("UN") outlined and implemented a way in

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which refugees who feared persecution could be granted sanctuary in another country.[1] This "post-Second World War instrument" and "centerpiece of international refugee protection" became known as the United Nations Convention relating to the Status of Refugees ("1951 Convention").[2] One of the core principles at the center of the 1951 Convention was that of *non-refoulement*, which specifies that "no one shall expel or return a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom."[3] According to the 1951 Convention, a "refugee" is referred to as someone who is "unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[4] In other words, in order to be granted asylum, an applicant needed to prove a well-founded fear of future persecution based on one of the five particular social groups ("PSGs").[5]

However, in cases of particularly severe past persecution, the UN incorporated an exception – initially only intended for Holocaust survivors[6]: the well-founded fear of future persecution element did not need to be proven if the applicant suffered severe past persecution.[7] In other words, the requirement of demonstrating a well-founded fear of future prosecution would essentially be waived.[8] In implementing this exception, the UN reasoned that forcing victims who suffered severe persecution to return to their home country – the origin of such harsh persecution – would be inhumane even if the victim had no rational reason to fear persecution again.[9]

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[1] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[2] United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223 (entered into force Oct. 4, 1967). *See also* U.N.G.A. Res. 2198 (XXI), Convention and Protocol Relating to the Status of Refugees, at 2 (Dec. 16, 1966), http://www.unhcr.org/3b66c2aa10.html.

[3] U.N.G.A. Res. 2198, *supra* note 1 at 3.

[4] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, art. 1(A)(2). *See also* U.N.G.A. Res. 2198, *supra* note 2 at 14-16.

[5] *Id.*

[6] Karen Musalo et al., Refugee Law And Policy: A Comparative And International Approach 788, 204-05 (2d ed. 2002).

[7] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, art. 1(C)(5) (exception for applicants "who [are] able to invoke compelling reasons arising out of previous persecution for refusing to avail himself [or herself] of the protection of the country of nationality"). *See also* U.N.G.A. Res. 2198, *supra* note 2 at 16.

[8] *Id.*

[9] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, para. 136, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), http://www.unhcr.org/4d93528a9.pdf.

The 1992 United Nations High Commissioner for Refugees ("UNHCR") handbook ("UN Handbook") states:

It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.[10]

This exception – referred to as "humanitarian asylum" – initially pertained to only "persons fleeing events occurring before January 1, 1951 and within Europe."[11] However, the UNHCR removed these limitations in the Protocol Relating to the Status of Refugees ("1967 Protocol"), allowing a more broad and universal coverage to any victim of severe and extreme persecution.[12]

This general humanitarian principle was recognized and adopted by many signatories of the 1951 Convention and/or the 1967 Protocol.[13] The United States- a signatory to the 1967 Protocol,[14] and Canada - a signatory to both the 1951 Convention and the 1967 Protocol,[15] are two countries that follow this humanitarian belief. Although both countries endorse the idea laid out in this international agreement, Canada and the United States differ in the interpretation and implementation of humanitarian asylum.

Part I of this note provides a brief comparison and overview of the Canadian and American standards for humanitarian asylum, as adopted from international law. Part II of this note discusses what Canada and the United States perceives to be persecution, which is the threshold inquiry in determining whether the past persecution experienced by a refugee was severe. Part II of this note will also compare the level of severity needed in both countries in order to be granted humanitarian asylum on the basis of past persecution. Part III of this note will highlight the main difference between

[10] *Id. See also* United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, at 16, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html (although the exact wording referenced was removed in the newer version of the Handbook, the United Nations still recognizes that humanitarian asylum should be granted to those who are able to invoke compelling reasons).

[11] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, art. 1(B)(1). *See also* U.N.G.A. Res. 2198, *supra* note 2 at 14-15.

[12] *Id.*

[13] U.N.G.A. Res. 2198, *supra* note 2 at 6.

[14] *Id. See also* 8 C.F.R. § 208.13(b)(1)(iii)(A) (2005) (noting that a claimant may be granted asylum in the absence of a well-founded fear of persecution if "the applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution") and United Nations High Commissioner for Refugees, State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, (Apr. 2015), http://www.unhcr.org/en- us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

[15] *Id.*

the Canadian and American humanitarian asylum standard: The United States' implementation of the "other serious harm" provision. Lastly, this note will conclude with a summary of findings and highlight that Canada is stricter than the United States in its immigration laws.

# I. Standard For Humanitarian Asylum

## A. United States

The Immigration and Nationality Act ("INA"), created in 1952, is the "basic body of immigration law" in the United States.[16] Derived from and similar to that of the 1951 Convention and 1967 Protocol definition, the INA defines a refugee[17] as 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 habitually resided, and who 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.[18]

In other words, asylum is granted if an applicant can prove a well- founded fear of future persecution based on one of the five PSGs listed.[19] The well-founded fear element is satisfied if the applicant fulfills both the objective and subjective prong[20] of the INA[21]. In other words, the applicant must have a subjective, genuine fear of persecution that when viewed objectively, it is logical to believe that a reasonable person in similar circumstances would also fear persecution.[22] One of the ways an applicant can establish a well-founded fear of future persecution, is by demonstrating past persecution.[23] When

[16] U.S. Citizenship and Immigration Services, *Immigration and Nationality Act* (Sept. 10, 2013), https://www.uscis.gov/laws/immigration-and-nationality-act.

[17] *See* Komarenko v. INS, 35 F.3d 432, 436 (9th Cir. 1994) (noting that humanitarian asylum is a "broad delegation of power, which restricts the Attorney General's discretion to grant asylum only by requiring the Attorney General to first determine that the asylum applicant is a 'refugee'").

[18] 8 U.S.C. § 1101(a)(42)(A)(2005).

[19] *Id.*

[20] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, at 11, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html ("The term 'well-founded fear' contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration").

[21] *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (demonstrating that in order to establish a well-founded fear of return, an asylum claimant must illustrate a subjective and objective fear of returning to their country of origin).

[22] *Supra* note 14, § 1208.13(b)(1). *See also Singh v. INS,* 63 F.3d 1501, 1508-10 (9th Cir. 1995).

[23] *Id.. See also Singh v. INS,* 63 F.3d 1501, 1508-10 (9th Cir. 1995).

showing past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.[24] However, the government can rebut this presumption via preponderance of the evidence by demonstrating that the applicant could reasonably relocate to another part of their country of origin and avoid persecution, or by demonstrating that circumstances causing the well-founded fear no longer exists and/or have fundamentally changed.[25] Nevertheless, even if this presumption is rebutted, an applicant may still have a chance of getting asylum if they can demonstrate that the severity of the past persecution is a "compelling" enough reason for the applicant to be unable or unwilling to return to his or her country of origin and thus asylum is warranted, or arguably necessary.[26] If the applicant's reason is found "compelling," the applicant would be granted asylum on a humanitarian ground – hence humanitarian asylum.[27]

Accordingly, humanitarian asylum can be granted if the applicant can demonstrate: "compelling reasons for being unable or unwilling to return to his or her country of origin due to the severity of the past persecution."[28] However, this is not the only way in which humanitarian asylum can be granted. A second way in which an applicant can receive asylum on humanitarian grounds is if the applicant can demonstrate "a reasonable possibility that he or she may suffer serious harm if removed to that country."[29] According to the Board of Immigration Appeals ("BIA"),[30] "other serious harm" does not need to be based on one of the five protected grounds, but must be serious or severe enough to amount to persecution.[31] Usually, "other serious harm" derives from one of the four categories: "(1) economic deprivation; (2) civil strife; (3) emotional harm; and (4) mental/physical

[24] *Id.* § 208.13(b)(1) (2005).
[25] *Id.* § 208.13(b)(1)(i)(A)-(B) (2005).
[26] *Id.* § 1208.13(b)(1)(iii) ("Grant in the absence of well-founded fear of persecution. An applicant may be granted asylum in the exercise of the decision-maker's discretion, if: (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of past persecution; or (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country").
[27] 8 C.F.R. § 1208.13(b)(1)(iii).
[28] ILRC STAFF ATTORNEYS, A GUIDE FOR IMMIGRATION ADVOCATES, at 14-14 (20th ed. 2016).
[29] *Id.* See also 8 C.F.R. § 1208.13(b)(1)(ii)(B).
[30] The United States Department of Justice, *Board of Immigration Appeals* (Oct. 2, 2017), https://www.justice.gov/eoir/board-of-immigration-appeals ("The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws").
[31] ILRC STAFF ATTORNEYS, A GUIDE FOR IMMIGRATION ADVOCATES, at 14-14 (20th ed.
2016).

health."[32]

## B. Canada

The Immigration and Refugee Protection Act ("IRPA"), enacted in 2001, is the center of immigration law in Canada.[33] As the United States, Canada derives its refugee definition from the 1951 Convention and 1967 Protocol.[34] The IRPA defines a refugee as a person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, is unwilling to avail themselves of the protection of each of those countries, or

(ii) not having a country of nationality, is outside their country of former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[35]

As the United States, Canada also adopts UN's interpretation of "well-founded" fear to include an objective and subjective prong to determine if the claimant has good grounds for fearing prosecution in the future.[36] However, unlike the United States, Canada's test[37] to determine if a fear is well-founded is more "forward looking."[38] What this means is that past persecution in and of itself is not sufficient to establish a fear of future persecution.[39] In *Fernandopulle, Eomal v. M.C.I.*, the court rejected the argument that there is a rebuttable presumption under Canadian law that a person who has been the

[32] U.S. Department of Homeland Security, *Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm* (Aug. 24, 2015), https://www.dhs.gov/hot-topics-asylum-examination-particular-social-group-and-other-serious-harm.

[33] Immigration and Refugee Protection Act, R.S.C., ch. 27 (2001) (Can.). The IRPA replaced Canada's previous immigration act. *See* Immigration Act, R.S.C., ch. 1-2. (1985) (repealed 2001) (Can.).

[34] Immigration and Refugee Protection Act, R.S.C., ch. 27, s. 96 (2001) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 1.3 Convention Refugee Definition (Jan. 7, 2016), http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef01.aspx#n13.

[35] Immigration and Refugee Protection Act, R.S.C., ch. 27, s. 96 (2001) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 1.3 Convention Refugee Definition (Jan. 7, 2016), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef01.aspx#n13.

[36] Immigration and Refugee Board of Canada, *Legal References*, ch. 5.3.1 Establishing the Subjective and Objective Elements (Nov. 23, 2015), http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx#n531.

[37] *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (Can. C.A.).

[38] Immigration and Refugee Board of Canada, *Legal References*, ch. 5.1 Well-Founded Fear Generally (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx#n51.

[39] *Id.*

victim of persecution in the past has a well-founded fear of persecution.[40] The test Canadian law follows asks if there is "a reasonable chance that persecution would take place were the applicant returned to his country of origin?"[41] Thus, unlike the United States, the humanitarian asylum analysis does not potentially come up in this particular line of inquiry. Since the United States accepts the notion of a "rebuttable presumption," the humanitarian asylum inquiry would arise as a defense if the presumption of a well-founded fear of future persecution based on past persecution is rebutted.

Being that Canada does not follow this exact line of analysis, it is unlikely that humanitarian asylum would arise in this particular regard. However, the IRPA allows for humanitarian asylum to surface in another way. Section 108 of the IRPA lays out the circumstances in which a claim for refugee protection will be rejected under the test, one of which, under paragraph (1)(e) is: "the reasons for which the person sought refugee protection have ceased to exist."[42] This ties into the "well-founded fear" element in regards to the fact that an objective prong is used in determining if the applicant has a "well-founded fear." Logically, a well-founded fear does not exist if changed circumstances do not warrant such a fear. Canada carves out a humanitarian exception to this in section 108(4) of the IRPA:

Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of any previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.[43] Such a provision is interpreted as requiring the Canadian government to recognize refugee status on humanitarian grounds.[44] In other words, humanitarian asylum can be granted to "those who have suffered such appalling persecution that their

[40] *Fernandopulle, Eomal v. M.C.I.* (F.C., no. IMM-3069-03), Campbell, [2004] FC 415, at para. 10 (Can. C.A.). The ruling was confirmed by the Federal Court of Appeal in *Fernandopulle, Eomal v. M.C.I.* (F.C.A., no. A-217-04), Sharlow, Nadon, Malone, [2005] FCA 91 (Can. C.A.).

[41] Immigration and Refugee Board of Canada, *Legal References*, ch. 5.2 Test – Standard of Proof (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx#n52.
*See also Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, 683 (Can. C.A.).

[42] Immigration and Refugee Protection Act, R.S.C., ch. 27, s. 108(1) (2001) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 1.3 Convention Refugee Definition (Jan. 7, 2016),
http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef01.aspx#n13.

[43] *Id.* at 108(4).

[44] Legal Services Immigration And Refugee Board, Consolidated Grounds In The Immigration And Refugee Protection Act, at 56 (May 15, 2002), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Documents/ProtectTorture_e.pdf.

experience alone is compelling reason not to return them, even though they may no longer have any reason to fear further persecution."[45] So, in the Canadian analysis, the compelling reasons inquiry arises only when the reasons for which the person has sought refugee status has ceased to exist, in which case courts are automatically obligated –unlike the United States which allows the inquiry to be raised as a defense – to consider these reasons and determine if they are compelling when there is a change in country conditions and past persecution was suffered.[46] Accordingly, depending on the severity of past persecution and whether the persecution arises to the level of compelling, an applicant may be granted humanitarian asylum. Unlike the United States, Canada's statutory law does not further expand this provision to allow for the approval of humanitarian asylum on the basis of "other serious harm" unrelated to persecution.[47]

Canada instead focuses on persecution, torture, mistreatment, etc.[48]

## II. Severity of Past Persecution

### A. Is it Persecution?

Before one can determine if the past persecution is severe enough to invoke humanitarian asylum, one must first establish that the origin of the applicant's suffering even constitutes persecution to begin with. Thus, the threshold question of humanitarian asylum is whether the mistreatment suffered is regarded as persecution.

According to the UN Handbook, "there is no universally accepted definition of persecution."[49] However, it is inferred that serious violations of human rights or a threat to life or freedom on account of one of the PSGs is always persecution.[50] Prejudicial actions or threats could be considered persecution depending on the circumstances.[51] Furthermore, an applicant can

[45] *Id. See also Canada (Minister of Employment and Immigration) v. Obstoj,* [1992] 2 F.C. 739, 748 (Can. C.A.) (in considering "compelling," one may analyze the word in conjunction with case law that interpreted the previously repealed Immigration Act. "Given substantially similar language used, no substantial change to the interpretation of the provisions is envisaged").

[46] Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721.

[47] Legal Services Immigration And Refugee Board, Consolidated Grounds In The Immigration And Refugee Protection Act, at 56 (May 15, 2002), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Documents/ProtectTorture_e.pdf.

[48] *Id.*

[49] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, at 51-53, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html.

[50] *Id.*

[51] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria

claim persecution on cumulative grounds if he or she has been subjected to multiple measures not in themselves amounting to persecution.[52] In such situations, other adverse factors may also be considered.[53]

### *1. United States*

Like the UNHCR, the United States does not specifically define persecution in the INA. However, as endorsed in the UN Handbook, United States courts have held that a threat to life or freedom on account of one of the five protected grounds is always persecution.[54] Also, violations of fundamental human rights, such as rape[55], torture/inhuman treatment, etc. can constitute persecution if connected to one of the five PSGs.[56] Recurrently, many U.S. courts have interpreted persecution as "the infliction of suffering or harm upon those who differ in a way regarded as offensive"[57] or "objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm."[58] Usually, persecution is perceived as physical harm, but can also include emotional or psychological injury.[59] However, courts consider the absence of physical harm as relevant in

for Determining Refugee Status, at 51-53, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html.

[52] *Id.*

[53] *Id.*

[54] *See Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983).

[55] *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1097-98 (9th Cir. 2000) (finding that an applicant who was sodomized and forced to perform oral sex suffered harm rising to the level of persecution.

[56] U.S. Citizenship and immigration services – raio – asylum division, asylum officer basic training course asylum eligibility part i: definition of refugee; definition of persecution; eligibility based on past persecution, at 55-56 (Mar. 6, 2009), http://www.hanoverlawpc.com/class/Asylum%20officer%27s%20Guide%20to%20Approving%20Asylum%20applications.pdf.

[57] *See Korablina v. INS*, 158 F.3d 1038, 1043 (9th Cir. 1998) and *Miranda v. INS*, 139 F.3d 624, 626 (8th Cir. 1998).

[58] *Supra* note 56, 16.

[59] *See Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (the emotional trauma suffered by a native of Afghanistan living in Germany, was sufficiently severe so as to amount to persecution. The cumulative harm resulted from watching as a neighborhood foreign-owned store burned, finding her home vandalized and ransacked, running from a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the result of beatings her husband and children); Khup v. Ashcroft, 376 F.3d 898, 904 (9th Cir. 2004)(finding that a Burmese Christian preacher suffered past persecution based on death threats and anguish caused when a similarly-situated fellow minister was tortured, killed, and dragged through the streets of the town); and Mame Fatou Niang v. Alberto R. Gonzales, 492 F.3d 505 (4th Cir. 2007) ("persecution cannot be based on a fear of [potential] psychological harm alone," in fact, it must be accompanied by physical harm).

considering if a harm suffered rises to the level of persecution.[60] Purposefully imposing severe economic disadvantage on a person or depriving an individual of food, housing, employment, liberty, or other life essentials can be considered persecution as well.[61] The actions in which amount to persecution do not necessarily always have to be categorized as threats to life or freedom and may include less stricter treatment.[62] However, the "actions must rise above the level of mere 'harassment' to constitute persecution."[63] The Third Circuit held that "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."[64]

Identifying persecution is exceedingly dependent on the factual circumstances and is determined on a case by case basis.[65] Recognizing persecution is arguably just one of those things in which "[You] know it when [you] see it."[66] Although vague in definition, U.S. courts have consistently recognized certain types of conduct as persecution: (1) serious physical harm;

(2) coercive medical or psychological treatment; (3) invidious prosecution or disproportionate punishment for a criminal offense; (4) severe discrimination and economic persecution, and (5) severe criminal extortion or robbery.[67]

For example, the court in *Mihalev v. Ashcroft*, determined that Plaintiff Mihalev, an individual of Gypsy decent, did indeed incur harm that amounted to persecution on account of his ethnicity.[68] Mihalev was detained for a period of ten days by local Bulgarian police for "instigating Gypsy gatherings."[69] During those ten days, the police beat Mihalev daily with sand

[60] *See* Ruis v. Mukasey, 526 F. 3d 31, 37 (1st Cir. 2008) (the BIA can properly consider the absence of physical harm as a factor in determining whether the level of harm the applicant suffered was serious).

[61] *Supra* note 56.

[62] *Id.* at 17.

[63] *Id. See also* Tamas-Mercea v. Reno, 222 F.3D 417, 424, 426 (7th Cir. 2000) (holding that tapping phone lines, questioning ones wife, and opening one's mail is not persecution); *But see* Rios v. Ashcroft, 287 F.3d 895, 900 (9th Cir. 2002) (holding that death threats by anonymous callers were sufficient to find persecution).

[64] Fatin v. I.N.S., 12 F.3d 1233, 1240-1241 (3rd Cir. 1993).

[65] Immigration Equality, Immigration Equality Asylum Manual at 15 (Oct. 21, 2014), http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality_Asylum_Manual.pdf.

[66] Jacobellis v. Ohio, 378 U.S. 184 (1964) (The phrase "I know it when I see it" is an idiomatic expression by which an individual attempts to categorize an observable fact or event, although the category is subjective or lacks clearly defined parameters. United States Supreme Court Justice Potter Stewart used the phrase in *Jacobellis* to describe his threshold test for obscenity.)

[67] *Supra* note 65, at 15-16.

[68] Mihalev v. Ashcroft, 388 F.3d 722, 730 (9th Cir. 2004).

[69] *Id.*

bags and purposely avoided hitting Mihalev in the face.[70] Furthermore, the police obligated Mihalev to perform hard labor at a construction site.[71] Even though Mihalev did not suffer serious bodily injury, the court found that his experience was enough to constitute persecution.[72]

***2. Canada***

Like the UNHCR and the United States, the term "persecution" is not expressly defined in Canada's IRPA.[73] However, Canadian courts have recognized that for a particular mistreatment to amount to persecution, such a mistreatment must be serious.[74] The courts examine two factors in order to determine whether the harm suffered qualifies as serious: "(1) what interest of the claimant might be harmed; and (2) to what extent the subsistence, enjoyment, expression or exercise of that interest might be compromised."[75] This approach views "serious" as a grave compromising of interest intertwined with the crucial rejection of a fundamental human right.[76] In other words, in analyzing a refugee claim, the persecution evaluation must consider whether there was a violation of an essential human right. Such an idea was expressed and affirmed in many cases,[77] including *Canada (Attorney General) v. Ward*.[78] The court in *Ward* recognized that the Convention demonstrated an international commitment to the idea that all individuals are entitled to fundamental rights and freedoms without discrimination.[79] This recognition led Canadian courts to focus on "actions which deny human dignity."[80]

Thus, the accepted meaning of persecution is the "sustained or systemic[81]

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Immigration and Refugee Board of Canada, *Legal References*, ch. 3 Persecution (Nov. 24, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef03.aspx.

[74] *Id.*

[75] *Id.*

[76] Immigration and Refugee Board of Canada, *Legal References*, ch. 3 Persecution (Nov. 24, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef03.aspx#31.

[77] *See e.g.*, *Chan v. Canada (Minister of Employment and Immigration),* [1995] 3 S.C.R. 593, 635 (Can.) ("[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way").

[78] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 20 Imm. L.R. (2d) 85 (Can.).

[79] *Id.*

[80] *Id.*

[81] United States courts at one point suggested a similar definition for persecution in regards to Humanitarian Asylum. *See* Maradiaga v. INS, No. 95-70238, 1996 WL 473789, at *4 (9th Cir. Aug. 20, 1996) (suggesting that in order to qualify for humanitarian asylum, "systematic and continuous torture" was necessary). However, generally, U.S. courts refuse to "define 'the minimum showing of "atrocity" necessary to warrant a discretionary grant of asylum based on past persecution alone.'" Lopez-Galarza v. INS, 99 F.3d 954, 963 (9th Cir. 1996) (quoting Kaslauskas v. INS, 46 F.3d 902, 907 (9th Cir. 1995).

violation of basic human rights demonstrative of a failure of state protection."[82] This repetitious requirement approved in *Ward* was derived from *Rajudeen v. Canada*, which considered an ordinary dictionary definition of persecution since persecution was not defined in Canada's Immigration Act.[83] The dictionary defined persecution as "systematic infliction of punishment," "repeated acts of cruelty or annoyance," and "persistent injury."[84] Therefore, an isolated punishment "can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heat of persecution."[85] Such an exceptional case could, for instance, include female genital mutilation[86] – as this type of injury is unlikely to be repeated.[87] An example of another exceptional case could involve a persecutor killing an individual's family as a form of revenge against said individual – as this type of injury is a damage that cannot be repeated.[88] Regardless of the fact that both of these examples do not contain a repetitious element, the severity and atrocity of such an experience undisputedly can only be branded as persecution.[89]

Additionally, in requiring that the alleged mistreatment or harm suffered meet the "serious" standard, courts have differentiated between persecution and mere discrimination or harassment – with persecution considered the grimmer level of mistreatment.[90] Simply put, in order to distinguish persecution from sheer unfairness or unkindness, the degree of the seriousness of harm must be considered.[91] However, an act not normally considered persecutory may transform into an act of persecution depending on the circumstances – that is if the persecutor, in causing harm, abuses the

[82] *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689, 20 Imm. L.R. (2d) 85.

[83] *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), [1984] (Can.). Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* [1984], 55 N.R. 129 (Can. F.C.A.).

[84] *Id.*

[85] *Valentin v. Canada (Minister of Employment and Immigration),* [1991] 3 F.C. 390, 396 (Can. C.A.).

[86] *Annan v. Canada (Minister of Citizenship and Immigration),* [1995] 3 F.C. 25 (Can.) (describing female circumcision as a "cruel and barbaric practice," an "atrocious mutilation," and a "horrific torture").

[87] *See Murugiah, Rahjendran v. M.E.I. (*F.C.T.D., no. 92-A-6788) [1993], Noël, at 6 (Can.) and *Rajah, Jeyadevan v. M.E.I.* (F.C.T.D., no. 92-A-7341) [1993], Joyal, at 5-6(Can.).
*See also Muthuthevar, Muthiah v. M.C.I. (F*.C.T.D., no. IMM-2095-95), [1996], Cullen, at 5 (Can.) ("I think it is settled law that, in some instances, even a single transgression of the applicant's human rights would amount to persecution") and *Ranjha, Muhammad Zulfiq v. M.C.I. (*F.C.T.D., no. IMM-5566-01), [2003], Lemieux, FCT 637 at para. 42 (Can.) (commenting that the focus should be on whether an act is "a fundamental violation of human dignity" as opposed to an "exaggerated emphasis" on the repetitious element).

[88] *Id. See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 3 Persecution (Nov. 24, 2015),
http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef03.aspx#31.

[89] *Id.*

[90] *Naikar, Muni Umesh v. M.E.I.* (F.C.T.D., no. 93-A-120), [1993], Joyal, at 2 (Can.).

[91] *Id.*

fact that the targeted person suffers from a particular feebleness or ailment.[92] Also, like the United States, Canada recognizes that psychological violence may be considered persecution in some instances.[93]

## B. Is it Severe?

Once the threshold question of whether the mistreatment suffered constitutes persecution is answered, one can move on to the next inquiry for humanitarian asylum – that is, whether the alleged past persecution is severe enough to waive the well-founded fear requirement and invoke refugee status on humanitarian grounds.

### 1. United States

A noteworthy case that set forth a standard for granting humanitarian asylum is *Haregwoin Abrha v. Gonzales*.[94] The claimant in this case, Abrha, was a native of Ethiopia and a member of the Tigre ethnic group.[95] She alleged that the Mengistu regime, which was in power while she was in Ethiopia, persecuted her.[96] Abrha testified that her business in Ethiopia was closed by the Mengistu regime.[97] The Mengistu regime alleged that Abrha's shop was copying antigovernment pamphlets.[98] When Abrha attempted to reopen her establishment, the Mengistu authorities demanded information regarding her husband, who was a former Ethiopian army colonel and at the time imprisoned.[99] Abrha was detained for about two months on suspicions that Abrha, like her husband, was involved in a failed 1989 coup.[100] Abrha claimed she had been beaten and tortured.[101] Furthermore, after Abrha was released, she was ordered to report every three days and not to travel without government permission.[102]

In analyzing Abrha's claim, the court found that Abrha was unable to show a well-founded fear of future persecution since the Mengistu regime was no

[92] *Nejad, Hossein Hamedi v. M.C.I.* (F.C.T.D., no. IMM-2687-96), [1997], Muldoon, at 2 (Can.). *See also Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 747, 20 Imm. L.R. (2d) 85 (Can.) ("[t]he examination of the circumstances should be approached from the perspective of the persecutor") and *Liang, Hanquan v. M.C.I.* (F.C. no. IMM-3342-07), [2008], Tremblay-Lamer, FC 450 (Can.) (affirming that cumulative discrimination and harassment can be considered persecution in light of considerations such as a claimant's vulnerabilities – ex. health, age, finances – or personal circumstances).

[93] *Bragagnini-Ore, Gianina Evelyn v. S.S.C.* (F.C.T.D., no. IMM-2243-93) [1994], Pinard, at 2 (Can.).

[94] Haregwoin Abrha v. Gonzales, 433 F.3d 1072 (8th Cir. 2006).

[95] *Id.* at 1074.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

longer in power and was overthrown shortly after Abrha's departure.[103] However, the court stated that "Abrha might obtain a discretionary grant of asylum if she could demonstrate that the past persecution was so severe that repatriation would be inhumane."[104] In other words, if Abrha could demonstrate severe past persecution, the court could potentially grant Abrha humanitarian asylum.[105] The court further stated that in evaluating whether to provide a discretionary grant of humanitarian asylum, "factors which should be considered" - in determining severity – "include the degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma resulting from the harm."[106] In considering these factors, the court found that Abrha's past persecution did not meet the level of severity needed for humanitarian asylum.[107] Although Abrha was detained for a period of two months and was abused at times during those months, Abrha did not provide any evidence to demonstrate that she suffered any physical or psychological damage as a result of her detainment and/or treatment.[108]

The court in *Brucaj v. Ashcroft* shed light on what evidence is sufficient in determining lasting effects.[109] The court stated that precedent "did not set forth specific types of evidence necessary to substantiate a humanitarian asylum claim."[110] Furthermore, the court recognized that although the INA does not explicitly state that only certain types of evidence can be used, it strongly suggests that "objective or expert evidence is not necessary."[111] Testimony, if deemed credible, may be sufficient.[112]

Such a case is distinguished from *In re Chen*, where the court granted humanitarian asylum after finding that the past persecution was severe enough to allow for this discretionary act.[113] Chen's family was persecuted during the Chinese Cultural Revolution.[114] Because Chen's father was a Christian minister, Chen's family became a target of the Red Guards.[115] Chen's

[103] *Id.*

[104] *Id.* at 1076.

[105] *Id.*

[106] *Id. See also* Brucaj v. Ashcroft, 381 F.3d 602, 609 (7th Cir. 2004) (in addition to severe harm and long-lasting effects, BIA also considers variety of discretionary factors once these elements are met, including age, health, and family ties).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] In re Chen, 20 I&N Dec. 16, 18 (BIA 1989), https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3104.pdf.

[114] *Id.* at 19-20.

[115] *Id.*

father was forbidden from continuing his ministry and as a result his income was terminated.[116] The Red Guards ransacked Chen's home when Chen was only eight years old.[117] The Red Guards destroyed Chen's property such as walls and furniture.[118] They also confiscated personal effects.[119] Chen's father was taken prisoner where the Red Guards abused him, burned him, and dragged him through the streets over fifty times.[120] Chen's father died at the age of 46 while still enduring harsh treatment from the Red Guards.[121] Because of Chen's family connection, Chen was also atrociously abused and denied medical treatment.[122] At one point, Chen was locked in a room for six months with his grandmother where he was deprived of food and education.[123] During this time, the Red Guards bit him and kicked him whenever Chen cried.[124] When Chen was released and finally permitted to attend school, the abuse and humiliation continued.[125] On one occasion, rocks were thrown at Chen, causing long lasting detrimental injuries to his head that resulted in Chen wearing a hearing aid.[126] For years, starting from adolescence and continuing to adulthood, Chen endured a number of forced exiles designed to reeducate him.[127] Chen's experience resulted in Chen acquiring long term psychological issues, in which Chen was always fearful and anxious, as well as often suicidal.[128] Chen testified that if forced to return, he would kill himself.[129]

In considering Chen's horrific experience, the court granted Chen humanitarian asylum.[130] In its reasoning, the court stated that "while conditions in China have changed since [Chen's] persecute[ion], the basic form of government there has not changed, human rights are still sometimes abused, and there is little religious freedom".[131] Furthermore, the court indicated that although the regime in China is now different, the chance of

[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 12.
[131] *Id.*

persecution has not been completely eliminated.[132] Being that Chen suffered persecution for almost the full duration of his living in China, Chen's fear of returning was understandable.[133] Lastly, the court refused to define circumstances in which a humanitarian asylum claim should or should not be granted, indicating that Chen was to serve as guidance for future decisions as opposed to a minimum threshold.[134]

Consider also *In re N-M-A*, where the Afghani Applicant claimed to have suffered severe past persecution.[135] While living in Afghanistan, the communist secret police ("KHAD") kidnapped the Applicant's father in the middle of the night from his very home.[136] The Applicant had not seen his father since then and assumed that his father was dead.[137] Two weeks after his father's kidnapping, the KHAD returned in the middle of the night.[138] The KHAD told Applicant that they needed to search the residence as per routine.[139] However, Applicant discovered the next day that no other homes in the neighborhood had been searched.[140] The KHAD conducted another search sometime after and discovered an anti-communist flyer that the Applicant had been distributing.[141] Because of this, Applicant was "detained for approximately one month and was beaten periodically by the KHAD," resulting in bruises and a deep wound on his leg.[142] Furthermore, Applicant was deprived of food for three days at one point.[143] Because of the abuse, Applicant lost consciousness and was hospitalized.[144] He escaped from the hospital and fled to Pakistan, where he spent 6 weeks healing from his injuries before coming to the United States.[145] Applicant testified that he was "afraid to return to Afghanistan because of the ongoing fighting and because he is now culturally different from his fellow Afghans."[146] The court held:

given the degree of harm suffered by the applicant, the length of time over

[132] *Id.*

[133] In re Chen, 20 I&N Dec. 16, 19-20 (BIA 1989), https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3104.pdf.

[134] *Id.* at 22.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

which the harm was inflicted, and the lack of evidence of severe psychological trauma stemming from the harm, we conclude that the applicant has not shown compelling reasons arising out of the severity of the past persecution for being unable or unwilling to return to Afghanistan.[147]

In its reasoning, the court distinguished the Applicant's persecution from that of the claimant in *In Matter of B-*,[148] where the claimant had suffered three months' detention in KHAD facilities, ten months' detention in prison, and four months' involuntary military service.[149] Furthermore, the claimant in *In Matter of B-* suffered sleep deprivation, beatings, electric shocks, and the routine use of physical torture and psychological abuse.[150] There, the court granted humanitarian asylum even though there was a change of circumstances in Afghanistan.[151] However, the court in *In re N-M-A* found that although the facts vastly similar – both claimants were kept from the knowledge of their father's wellbeing and were beaten while being held captive – several factors differentiated them: the length of time detained and the fact that the applicant in *In re N-M-A* suffered no long term physical and/or psychological effects. In fact, the applicant was more so concerned with the fear of civil strife than being persecuted if he were to return to his country.

In considering the aforementioned cases, it is clear that for the most part United States courts consider the degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma/ physical damage resulting from the harm when determining the severity of persecution. The length of time needs to be adequate in comparison to the harm endured, the harm endured must be substantial and examples of substantial include intense beatings, deprivation of food, etc., and lastly there must be some type of long term effect[152] – such as depression, anxiety, physical impairment, etc. The fear of returning to one's country due to civil strife as opposed to fearing for one's own well-being due to past persecution can demonstrate that there has not been a long-term effect which would warrant humanitarian asylum. Once all elements are met, the court may consider other

[147] *Id.*

[148] Matter of B-, Interim Decision 3251, at 10 (BIA 1995).

[149] In re N-M-A, 22 I& N Dec. 312, 324 (B.I.A. Oct. 21, 1998).

[150] *Id.*

[151] *Id.*

[152] *See e.g.*, In *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008) (The BIA found that a mother and daughter who had been subjected to female genital mutilation - as well as rape - had severe and lasting health consequences that warranted asylum based on humanitarian grounds), https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3602.pdf. *See also* Lopez-Galarza v. INS, 99 F.3d 954 (BIA 1996) (recognizing that the severe and long-lasting psychological effects of rape are well-documented and are similar to those experienced by torture victims).

discretionary factors independently, such as age, family ties, etc. in determining whether to grant humanitarian asylum.[153]

**2. Canada**

In determining the severity of past persecution and whether such past persecution is a compelling enough reason to warrant humanitarian asylum, Canadian courts have held that one must "consider the level of atrocity of the acts included upon the applicant [and] the repercussions upon his physical and mental state.[154] This is similar to U.S.'s "degree of harm suffered" and "long term effects" requirement. Generally, the most well-known Canadian standard to determine severity is the "appalling and atrocious" test.[155] This test was described in *Alfaka Alharazim, Suleyman v. M.C.I.*, where it was stressed that humanitarian asylum should be confined to a "category of situations to those that in which there is prima facie evidence of 'appalling' or 'atrocious' past persecution."[156] If the past persecution is on its face characterized as such, a decision-maker is obligated to conduct the analysis; otherwise the decision-maker may exercise discretion in deciding to perform the assessment.[157] Courts have accepted the ordinary dictionary definitions of "atrocious" and "appalling," attributing these words to mean "an extremely wicked or cruel act, [especially] one involving physical violence or injury," unpleasant, shocking, savage, etc.[158] However, the "appalling and atrocious" test does not need to be used in every case and acts more of an interpretive aid.[159]

Various Canadian court decisions implement this idea one way or another.

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[153] *Supra* note 106.

[154] *Shahid, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-6907-93) [1995], Noël, (Can.).
Reported: *Shahid v. Canada (Minister of Citizenship and Immigration)* (1995), 28 Imm. L.R. (2d) 130 (F.C.T.D.) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721.

[155] *Alfaka Alharazim, Suleyman v. M.C.I.* (F.C., no. IMM-1828-09), [2010], Crampton, FC 1044 (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721.

[156] *Id.*

[157] *Id.*

[158] *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), [1993], McKeown, (Can.).
Reported*: Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.) (Can.).

[159] *Adjibi, Marcelle v. M.C.I.* (F.C.T.D., no. IMM-2580-01), [2002] Dawson, FCT 525 (Can.). See also *Suleiman, Juma Khamis v. M.C.I.* (F.C., no. IMM-1439-03), (2004), Martineau, FC 1125.
Reported: *Suleiman v. Canada (Minister of Citizenship and Immigration),* [2005] 2 F.C.R. 26 (F.C.) (Can.) ("The issue is whether, considering the totality of the situation, i.e., humanitarian grounds, unusual or exceptional circumstances, it would be wrong to reject the claim in the wake of a change of circumstances. Consideration should be given to the claimant's age, cultural background and previous social experiences").

Consider *Arguello-Garcia, Jacobo Ignacio v. M.E.I.*[160] In this case, the applicant was in detention for forty-five days.[161] During his detention, he had suffered serious physical and sexual abuse.[162] Furthermore, his relatives had been killed.[163] The court found that his circumstances were severe and compelling enough to warrant humanitarian asylum.[164] In *Lawani, Mathew v. M.C.I.*,[165] the applicant, while in detention, was brutally and severely mistreated. He was frequently hung upside down for long periods of time, burned, and whipped.[166] Furthermore, he was forced to expose his genitalia – in which the persecutors inserted broom sticks and needles.[167] This treatment was found to be sufficiently appalling and atrocious to warrant humanitarian asylum.[168] In contrast, the court in *Siddique, Ashadur Rahman v. M.C.I.* found that torture experienced during a fifteen-day detention during the early 1980s, did not constitute atrocious persecution.[169] Such a holding indicates that in order for persecution to be characterized as atrocious enough to be compelling, long term physical and mental repercussions must be considered – especially considering more than a decade has passed since the persecution. This, coupled with the observation that a fifteen-day detention – as opposed to a forty-five-day detention as seen in *Arguello-Garcia, demonstrates the Canada's analysis for humanitarian law, although on its face different, may not be as different from the U.S. analysis as it first appears.* However, the decision in many Canadian cases reveals that Canada may be less inclined to grant humanitarian asylum than the United States, seeing ass circumstances rejected as not meeting the high standard of "atrocious and appalling" would probably survive a U.S. analysis as demonstrated by the U.S. cases previously discussed.[170]

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[160] *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), [1993], McKeown, (Can.). Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.) (Can.).

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Lawani, Mathew v. M.C.I.* (F.C.T.D., no. IMM-1963-99), [2000], Haneghan, (Can.).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Siddique, Ashadur Rahman v. M.C.I.* (F.C.T.D., no. IMM-4838-93), [1994], Pinard (Can.) (although the court recognized that the torture suffered was abhorrent, the court found it was not sufficient to grant humanitarian asylum).

[170] See *R.E.D.G. v. M.C.I.* (F.C.T.D., no. IMM-2523-95), [1996] F.C.J. No. 631 (Can.) (claim rejected for applicant who had been abducted, beaten and raped); *Nallbani, Ilir, v. M.C.I.* (F.C.T.D., no. IMM-5935-98), [1999], MacKay (Can.) (claim rejected for applicant who had been detained on five occasions, beaten, tortured, deprived of food and drink, and his life threatened); *Nwaozor, Justin Sunday v. M.C.I.* (F.C.T.D., no. IMM-4501-00), [2001] FCT 517 (Can.) (claim rejected for applicant whose father was killed not in applicant's presence, his

Like the United States, Canada considers psychological harm in its humanitarian asylum analysis. However, Canada differs in its burden to produce evidence indicating such harm. As discussed previously, the United States generally finds that testimony is enough to sustain an alleged psychological harm.[171] Canada on the other hand, requires more in-depth evidence and documentation – usually in the form of a medical report or psychological assessment.[172] In order to fulfill the atrocity and appalling burden, the applicant must demonstrate present psychological and emotional suffering.[173] Such a demonstration shows that the past persecution had long lasting effects, as the applicant still continues to suffer.[174] Evidence of such, or evidence of its absence, is significant in determining if the applicant maintains compelling reasons for seeking humanitarian asylum. For example, in *Hitimana, Gustave v. M.C.I.*,[175] the applicant was not granted humanitarian asylum.[176] Although he alleged that his experiences of witnessing the murder and disappearances of close family members resulted in trauma, neither the applicant nor an expert authenticated this claim.[177] Furthermore, the court found that the applicant demonstrated that he could adapt well and was resourceful.[178] Because of this, it was not unreasonable for them to conclude that the applicant was not suffering from any psychological trauma that amounted to a compelling reason.[179]

## III. Severity of Other Serious Harm

As mentioned previously, the United States, unlike Canada, has a statutory provision that allows an applicant to get humanitarian asylum on the basis of

brother shot by unknown persons, and the applicant plus other family members had been beaten and harassed by the Nigerian army on three occasions over a 6-month period). *But see* Matter of B-, Interim Decision 3251, at 10 (BIA 1995) (claim granted for applicant who presumed his father murdered, suffered sleep deprivation, beatings, electric shocks, and the routine use of physical torture and psychological abuse).

[171] *Supra* note 106, at 609-610.

[172] Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721. *See also Mongo, Parfait v. M.C.I.* (F.C.T.D., no. IMM-1005-98), [1999], Tremblay-Lamer (Can.).

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Hitimana, Gustave v. M.C.I.* (F.C.T.D., no. IMM-5804-01), [2003] Pinard, (Can.).

[177] *Id.*

[178] *Id.*

[179] *Id.*

other serious harm.[180] Such a relatively new provision – added in 2001 – allowed an individual to get humanitarian asylum another way instead of being limited to the restrictive "compelling reasons" standard.[181] This standard is forward looking, rather than backwards looking and the serious harm does need not be inflicted on account of one of the five PSGs – race, religion, nationality, membership in a particular social group, or political opinion.[182] Furthermore, there is no requirement that the other serious harm even be in connection with the past persecution; however, it must be so serious that it equals the severity of persecution.[183] Although what constitutes "other serious harm" is made on a case-by-case basis, the BIA decision in *Matter of L-S-* provides a series of examples of circumstances that might suffice.[184] Also, in 2005, the Ninth Circuit held that internal relocation was not available to a gay Mexican man living with HIV who would face "unemployment, a lack of health insurance, and the unavailability of necessary medications in Mexico to treat his disease," because he would likely experience other serious harm.[185]

## Conclusion

As one can clearly see, although both Canada and the United States endorse the idea laid out in the 1951 Convention, both differ in some retrospect in the interpretation and implementation of humanitarian asylum. Particularly, Canada's approach is more restrictive and strict. Whereas the United States incorporates a provision allowing for an applicant to obtain humanitarian asylum on the basis of "other serious harm," Canada does not, and instead is limited to severe past persecution that is particularly focused on torture and other physical harm. Furthermore, after an analysis of United States and Canadian case law, it appears that Canada's "appalling and atrocious" test is

[180] *Supra* note 14.

[181] Immigration Equality, Immigration Equality Asylum Manual at 25 (Oct. 21, 2014), http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality_Asylum_Manual.pdf. *See also* Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed Jun. 11, 1998) (Supplementary Information).

[182] *Id.*

[183] *Id.*

[184] Matter of L-S-, 25 I&N Dec. 705, 710 (BIA 2012), https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3742.pdf, stating examples: (extreme circumstances of inadequate health care. *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011)); (mental anguish of a mother who was a victim of female genital mutilation having to choose between abandoning her child or seeing the child suffer the same fate. *Kone v. Holder*, 596 F.3d 141, 152-53 (2d Cir. 2010)); or (unavailability of psychiatric medication necessary for the applicant to function. *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008)).

[185] Boer-Sedano v. Gonzales, 418 F.3d 1082, 1090-91 (9th Cir. 2005).

a more higher and difficult burden for applicants than factors used by the United States – degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma resulting from the harm – to establish whether the past persecution suffered was severe enough to arise to a level of compelling reasons in granting humanitarian asylum. Lastly, Canada has stricter requirements in regards to demonstrating psychological harm suffered. Whereas the United States generally deems testimony as sufficient, Canada requires documentation or more tangible and objective evidence – such as a psychological evaluation or certification by a professional regarding an applicant's mental state. In considering all of these factors, it is rational to conclude that Canada is stricter in granting humanitarian asylum to an applicant while the United States for the most part attempts to broaden its applicability.