

**Immigration Court: BIA****Case:** *In re. N-M-A-*, 22 I&N Dec. 312 (BIA 1998)**Date:** Oct. 21, 1998**Adjudicated by:** BIA      **Opinion:** (Majority)**Concurring/Dissenting:** Rosenberg**Dissenting:** Guendelsberger & Schmidt

**Tags:** Humanitarian asylum, country conditions, well-founded fear, severity of past persecution, hints at (iii)(A), Afghanistan

**Question Presented:** Was applicant's past persecution severe enough to warrant discretionary humanitarian asylum (as per (iii)(A))?

**Holdings:** Possible discretionary humanitarian asylum denied, but case is remanded to IJ because applicant did bring up new country conditions that had developed in the meantime.

**Rationale:** Applicant failed to establish severity of past persecution: "applicant did not meet his burden of proving compelling reasons arising out of the severity of his past persecution for his unwillingness to return to Afghanistan, such that he may be granted asylum on the strength of past persecution alone." (314)

- "...given the **degree of harm suffered** by the applicant, the **length of time** over 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." (326)

**Facts:** Native and citizen of Afghanistan. Persecuted by Afghan communist regime in 1980s for political opinion. New evidence submitted with motion to remand: Taliban controls at least three-fourths of Afghanistan, with "swift and brutal adherence to its religious edicts and criminal codes" (316).

**History of the Case:**

- **1995:** IJ denied application for asylum because country conditions had changed and communists no longer posed a threat.

**Appeals to Statute & Precedent:**

- **8 C.F.R. §208.13(b)(1)(i):** "provides that an applicant who has established that he has suffered past persecution on account of a statutorily-protected ground will be presumed to have a well-founded fear of future persecution unless a preponderance of the evidence establishes that conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of future harm if he were to return." (313)
- **8 C.F.R. §208.13(b)(1)(ii):** This is as far as the Humanitarian Asylum regulation went at this time: it's the same as (iii)(A) – strength of past persecution.

- ***INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987)**: denial of relief if can't prove possibility of future persecution
- ***Kazlauskas v. INS*, 46 F.3d 902 (9<sup>th</sup> Cir. 1995)**: "atrocious" forms of persecution qualify a person for humanitarian asylum
- ***Marquez v. INS*, 105 F.3d 374 (7<sup>th</sup> Cir. 1997)**: asylum as prophylactic remedy; the past "serves as an evidentiary proxy for the future." (*Id.* at 379)

#### Relevant U.S./Immigration Law History:

- A person ceases to be a "refugee" if country conditions have changed so that he or she could reasonably appeal for help from their government.

#### Quotes:

- "Our analysis of the language of **8 C.F.R. §208.13(b)(1)(i)** leads us to the conclusion that the regulation serves as an evidentiary presumption founded on the probability of a past event being indicative of a future event." (317)
- "Asylum is a prophylactic protection for those who might face future persecution." (318)

#### Commentary:

- At this time, (iii)(B) wasn't a possibility yet: but the BIA notes that the applicant does have a point about the rise of the Taliban in Afghanistan in the meantime, and remanded the case back to the BIA to consider the new country conditions. Fear of "other serious harm" is not yet a thing in the law, but it's almost as if the BIA is anticipating the new rule with their remand here.

#### Concurring & Dissenting Opinion: Rosenberg

- "Distilled down to its basics, the majority opinion selectively invokes international refugee protection law in an effort to restrict granting asylum under domestic law." (327)
- Re. Country Conditions: "...Afghanistan today is no closer to a constitutional democracy, and there is probably less respect for human or civil rights and tolerance of religious freedom under the Taliban, than under the previous Soviet-supported government that persecuted the applicant." (328)
- **Anticipates need for (iii)(B)**: "Specifically, shall we restrict consideration for discretionary asylum and limit our duty not to return a victim of past persecution to those cases in which the identical agent of persecution and the identical event or threat that caused the refugee's flight continue to exist?" (329) (possibility of a NEW threat)
  - "In particular, there has been no legislative enactment specifying that the presumption of persecution is rebutted simply because there may have been a substitution of the refugee's original or specific persecutor." (332)
  - Bottom line: "The applicant faces persecution on the same basis that he did previously." (337)