

**Immigration Court: BIA****Case:** *Matter of O-F-A-S-*, 27 I&N Dec. 709 (BIA 2019)**Date:** Dec. 6, 2019**Adjudicated by:** Board Panel Malphrus, Mullane, and Creppy**Opinion:** Malphrus**Tags:** Immigration, CAT, public official, torture, color of law, rogue official, civil rights parallel**Questions Presented:**

1. Does CAT cover torture inflicted by a public official NOT acting in his or her “official capacity”?
2. When is a public official who tortures someone acting in his or her “official capacity”?

**Holdings:**

1. CAT only covers public officials torturing in their *official capacity*. (Otherwise it’s a “rogue official” and the torture doesn’t count for CAT.)
2. An official is torturing in his or her “official capacity” if:
  - a. s/he is on duty at the time, and
  - b. s/he has access to information (identity, whereabouts of victim), and
  - c. s/he uses the power of her/his office to carry out the torture, and
  - d. probably some other things too, but not probably whatever you think up.

**Rationale:**

- It’s just like civil rights law! Abuse by a police officer only counts as a Section 1983 violation if the LEO used his/her official position to carry out the abuse. Same here.
- Simply having a uniform and regulation weaponry doesn’t count. Anybody can fake that sort of thing.
- “In sum, the key consideration in determining if a public official was acting under color of law is whether he was able to engage in torturous conduct because of his government position or if he could have done so without any connection to the government.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 718 (BIA 2019).

**Facts:**

- Guatemalan national was extorted, threatened, and finally physically attacked in his home by men wearing police uniforms. Came to U.S. EWI, missed the one-year mark to apply for asylum, asked for CAT protection.

**History of the Case:**

- IJ denied asylum (not timely) and withholding of removal (nothing that amounted to persecution) and CAT—because there was no proof that those were really police officers,

and Respondent was just speculating that the real police wouldn't have helped him. (And even if they WERE really police officers, Respondent didn't prove that they were acting in their official capacity. They could have just been personally greedy for gain.)

### Appeals to Statute & Precedent:

- ***Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2013)**: there is no “rogue official” exception to CAT. (BIA disagrees vehemently with this decision.)
- ***Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270, 285 (A.G. 2002)**: “official capacity” = “under color of law”
- ***Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009)**: adopts civil rights language “under color of law” in immigration context; abuse happens when a public official “misuses power possessed by virtue of . . . law and made possible only because he was clothed with the authority of . . . law.” *Ramirez-Peyro*, 574 F.3d at 900 (alterations in original) (citations omitted). Here, Mexican gov't officials got info about victim because of their official position.
- ***Garcia v. Holder*, 756 F.3d 885, 891 (5th Cir. 2014)**: offender's ability to extort victim was enhanced by his official status, which gave him access to victim's whereabouts and financial status, so he was acting “in his official capacity.”
- ***United States v. Picklo*, 190 F. App'x 887, 889 (11th Cir. 2006) (per curiam)**: gov't official was acting under color of law because he made use of badge and used his official status to get victim to follow directions. (Civil rights case)
- ***Miah v. Mukasey*, 519 F.3d 784, 788 (8th Cir. 2008)**: elected official “was a ‘rogue’ official because his actions fell outside of his official duties.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 716 (BIA 2019).
- ***Barna v. City of Perth Amboy*, 42 F.3d 809, 816-19 (3d Cir. 1994)**: police officer in uniform and using nightstick did not act under color of law because he was off-duty when he beat the victim. (Civil rights case)
- ***U.S. v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991)**: assault by LEO was under color of law because officer boasted of his ability to harm victim because of his official capacity. (Civil Rights case)
- ***Almand v. DeKalb County*, 103 F.3d 1510, 1515 (11th Cir. 1997)**: rape of woman while officer was in uniform was NOT under color of law, because he was off-duty at the time. (“It was . . . an act that any ‘ruffian’ could have done.”) (Civil rights case)

### Relevant U.S. History:

- Parallels drawn with **civil rights cases**, in which police officers did heinous things, sometimes in uniform, but were deemed not to be acting “under color of law” and so the civil rights claim went nowhere.

- BIA: "...we set forth a national standard based on the general import of civil rights law as relevant in the immigration context." *Matter of O-F-A-S-*, 27 I&N Dec. 709, 715 (BIA 2019)
- BIA also refers to these sources to back up its narrow reading of CAT regarding public officials acting "under color of law":
  - **Text of the Convention against Torture**
    - Torture "is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." (Article 1 of the Convention)
    - BIA interprets this as applying "only to torture that occurs in the context of governmental authority" (that is, NOT via private actors, or public officials when off duty). *Matter of O-F-A-S-*, 27 I&N Dec. 709, 713 (BIA 2019).
    - **The 9th Circuit**, however, takes that bolded ^^ part differently, interpreting it to mean that a public official is guilty of torture whether or not they are on duty, as is "any other person acting in an official capacity." See *Barajas-Romero v. Lynch* (9th Cir. 2017).
  - **Senate Committee's report on the Convention**, stating that "acts of torture committed by private individuals are excluded." S. Exec. Rep. No. 101-30, at 6.
  - **8 C.F.R. § 208.18(a)(1)**, incorporated Article 1 wording
    - BIA: "The regulation, like the treaty envisions that torture could be inflicted by a government official who is acting outside the rubric of the Convention, that is, in a personal capacity. The history and purpose of the treaty reflect that its protection was intended to apply only to torture that occurs in the context of governmental authority." *Matter of O-F-A-S-*, 27 I&N Dec. 709, 713 (BIA 2019).

### Discussion:

- "Thus, under the treaty and its implementing regulation, torturous conduct committed by a public official who is acting 'in an official capacity,' that is, 'under color of law' is covered by the Convention Against Torture, but such conduct by an official who is not acting in an official capacity, also known as a 'rogue official,' is not covered by the Convention." *Matter of O-F-A-S-*, 27 I&N Dec. 709, 713 (BIA 2019).
- "... in determining if a public official who engaged in torture was 'acting in an official capacity,' it is key to consider if he was only able to accomplish the acts of torture by virtue of his official status." *Matter of O-F-A-S-*, 27 I&N Dec. 709, 715 (BIA 2019).

- E.g., “whether government connections provided the officer access to the victim, or to his whereabouts or other identifying information.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 715 (BIA 2019).
- (See above for examples:) “In these cases, the person’s official capacity effectively provided the means to access, locate, or harm the victim.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 716 (BIA 2019).
- “Also relevant to the analysis is whether a law enforcement officer was on duty and in his official uniform at the time of his conduct. If so, it is more likely that he acted under color of law.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 716 (BIA 2019).
  - **“However, the use of an official uniform or service weapon is not dispositive of the issue, because those items can be obtained outside the normal channels of government operations, and they may not be necessary to the official’s ability to engage in torturous conduct.”** *Matter of O-F-A-S-*, 27 I&N Dec. 709, 716 (BIA 2019).
- “Moreover, in general, the higher a position in law enforcement that a person holds, the more likely his conduct will be under color of law, even if his actions are taken for personal gain.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 716 (BIA 2019).
- “It has been held that the use of government-issued equipment, such as a service weapon or handcuffs, to beat or restrain a victim does not automatically render the conduct under color of law. **Rather, an Immigration Judge should consider whether a private citizen could obtain the same weapons or restrain the victim in the same manner.**” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 717 (BIA 2019).
- “When making factual findings regarding a public official’s conduct, the Immigration Judge should not rely on unproven assumptions to find that the official acted under color of law.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 717 (BIA 2019).
- **Acquiescence**
  - Involves actual knowledge & willful blindness
  - Knowledge has to occur PRIOR TO the torture for it to count
  - If country conditions show that torture is the norm there within the criminal justice system, the IJ can “reasonably infer that higher-level officials either know of the torture or remain willfully blind to it and therefore breach their legal responsibility to prevent it.” *Matter of O-F-A-S-*, 27 I&N Dec. 709, 718 (BIA 2019).

**Commentary:**

- This decision greatly narrows what can be considered “torture” by a public official—with the exception of the 9th Circuit, the BIA’s interpretation limits “action under the color of law” to evidence that points to the abuser acting within his or her official capacity and with the power of that position.
- There is a higher bar now for CAT applicants to prove (a) the official capacity/under color of law piece and/or (b) the acquiescence piece. Somehow, they have to prove that the police knew about this torture ahead of time and still did nothing. Mere speculation that this is the case is not enough.
- From Aaron Hall (imm. atty in CO): “Question: If the officers were not on duty, what would be the purpose of all wearing the uniforms if not to rely ‘on their status as law enforcement officers’ to threaten and intimidate their victim?”
- From Matt Cameron (imm. atty in Boston):
  - “The Board of Imm. Appeals proved today that it is not only willing to openly violate our international treaty obligations, but that it really may not understand the basic concept of rogue cops operating with impunity in failed states.”
  - “Immigration judges and ICE attorneys tend to be extremely pro-law enforcement and generally want to believe that cops everywhere are good. This is one of the most galling of all of the many frustrations of trying to present messy, trauma-tinged, extremely human [#asylum](#) cases.”