Practice Alert
Litigation Update in Negusie v. Holder:
The Board of Immigration Appeals Nears Decision on the Persecutor Bar

October 2017

Background:

In Negusie v. Holder, the U.S. Supreme Court reviewed whether the statutory bars to asylum and withholding of removal for individuals who otherwise qualified as refugees but had engaged in the persecution of others should be interpreted to contain an exception for conduct performed under duress. Immigrant advocates, international law scholars, and religious groups, filed amici briefs with the Court describing how vulnerable groups are often forced to persecute others as part of the persecution perpetuated against them and how the United Nations and many other countries interpret the U.N. Convention and Protocol Relating to the Status of Refugees to include a duress exception. The Court’s 2009 decision rejected the Board of Immigration Appeals’ position that any conduct that had the objective effect of assisting in the persecution of others disqualified an applicant from protection—regardless of circumstance, knowledge, or choice.

The Court did not however provide its own interpretation of the persecutor bar. Instead, citing Chevron, it remanded the case to the Board to reconsider the meaning of the bar in light of its history, text, and the United States’ obligations under international refugee treaties. Specifically, the Court instructed the Board to consider the relevance of “motive and intent” as well as “coercion and duress” in deciding whether a more comprehensive definition of persecution that “anticipat[es] . . . a wide variety of potential conduct” is required.

After years of fits and starts, the Board is now poised to determine the scope of the persecutor bar in the United States’ refugee provisions. In 2016, the Board requested briefs from the parties and invited amici curiae to address whether there is “an involuntariness or duress” exception to the persecutor bar and if so, what standard should govern the exception. After another year of briefing, Negusie’s case was heard by the Board on September 8, 2017.

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1 Written by Kate Evans, Associate Professor and Director of the Immigration Clinic at University of Idaho College of Law. This Practice Alert identifies substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens may face in seeking refugee protection and relief from removal. It reflects the legal research and opinions of the amici curiae discussed here. The Practice Alert does not replace independent legal advice provided by an attorney or representative familiar with a client’s case.
4 Links to the merits and amici briefs are available at http://www.scotusblog.com/case-files/cases/negusie-v-mukasey/
5 555 U.S. at 517 & 522-23, 524.
6 Board of Immigration Appeals, Amicus Invitation No. 16-08-08.
Given the length of time the Board may take to issue its interpretation and the potential for further federal court review, this alert outlines arguments practitioners can advance and preserve in cases implicating the persecutor bar. The Alert reviews the initial position of the Department of Homeland Security (DHS) alongside the contrary position taken by DHS under the Trump Administration. DHS is likely to advance its new position in immigration cases throughout the country. The Alert then summarizes the arguments asserted by Negusie and various amici in support of a duress exception, which practitioners can draw on in their own cases. It also provides links to the briefs filed with the Board. The Alert concludes with a checklist of arguments and supporting authority for practitioners to consider when challenging the application of the persecutor bar.

**The Department of Homeland Security’s Shifting Statutory Interpretation:**

Initially, DHS agreed on remand that the persecutor bar in U.S. asylum and withholding statutes should be read to include an exception for duress. DHS’s first brief cited the concerns raised by the U.S. Supreme Court regarding the Board’s blanket bar. It then stated that the principles embodied in the U.N. Convention and Protocol Relating to the Status of Refugees and congressional intent in passing the Refugee Act supported this exception. The Department explained that culpability, and thus moral condemnation, is absent in the context of duress. Consequently, an exception to the persecutor bar for conduct committed under duress served a humanitarian goal and was consistent with the purpose of the Refugee Act and similar principles in U.S. criminal and civil law.

This first DHS brief asserted a test for duress that required an imminent threat of death or serious bodily injury; no alternative to avoiding the threatened harm; a direct causal relationship between the action taken and the harm threatened; that the applicant had not negligently or recklessly placed himself at risk of the threat. The Department argued that the exception should be narrow and rare: Each element was to be judged objectively, an applicant would have to prove by a preponderance of the evidence every element for every instance of harm to someone else, and she had to disclose facts related to duress at the first opportunity for the exception to apply.

In February 2017, DHS filed a request with the Board to hold Negusie’s case in abeyance while it decided whether to assert a new position. In April 2017, DHS filed notice that it was withdrawing its former position and submitted a new, substitute brief.

Under the Trump Administration, DHS asserts that the persecutor bar has no exceptions. It argues that international refugee agreements do not support an exception, that a bright-line rule would avoid protecting culpable persecutors by mistake, that the origins of a duress exception in criminal law make it inappropriate for immigration law, that adjudicators would face significant additional burdens with an exception, and that neither the statutory text, legislative history, nor Supreme Court precedent supports an exception. In contrast to DHS’s initial view that a duress exception served a humanitarian purpose, the Department now concludes that a categorical bar to refugee protection is “reasonable and just” regardless of whether the applicant’s conduct was coerced.
A Contrary View from Former Immigration Judges and Board of Immigration Appeals Members:

A group of former immigration judges and Board of Immigration Appeals members took issue with DHS’ new position on the administrative burdens a duress exception would create and the capacity and competency of adjudicators to make the assessments required.

The former IJs and Board members explained that the backlog in immigration court is due to the Department of Homeland Security and Department of Justice’s own failure to expand the courts to match the increased caseload, their policies to eliminate enforcement priorities which had slimmed court dockets, and decisions to send judges away from their home courts where backlogs were larger and than at their temporary posts.

The former adjudicators described their authority and competency to make the complex legal and factual assessments required by a duress exception. They noted that (1) eligibility determinations for asylum and withholding of removal already require consideration of many of the same facts that would underlie a duress defense, (2) they routinely rely on criminal law principles and sources in immigration court, and (3) the application of other bars and waivers is similarly complex. Additionally, the former IJs and Board members explained that the persecutor bar is only implicated in a small number of cases. Moreover, according to the former adjudicators, justice demands concern for duress as the asylum applicant has otherwise demonstrated the high stakes of being turned away.

The United States’ Obligations under International Refugee Agreements and the Historical Standard for Duress:

Seven leading international refugee law scholars refuted DHS’ arguments that neither the international refugee treaties, the practice of other countries, nor the Refugee Act’s legislative history support a duress exception to the persecutor bar. To the contrary, the scholars described how the U.N. refugee agreements balance the need for protection against the need for accountability by requiring culpability for a disqualifying act. They explain how duress serves as a test for culpability—in line with DHS’ initial position and the authorities DHS acknowledged at the time. The brief further describes the practice of other countries and guidance from the UN, which recognize a duress exception in the international treaties. Amici also recount the legislative history of the Refugee Act and the Holtzman Amendment, in which Congress describes the meaning of the term “persecution,” the fact that the persecutor bar is co-extensive with the exclusions contained in the U.N. Refugee Convention and Protocol, and its intent to mirror the scope of those agreements in U.S. law. Together these sources require the U.S. to recognize a duress exception to the persecutor bar.

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77 Attorneys Thomas MacWright, Ana Maria Arias, Kulani Jalata, Misha Ross, and Hazel Thakkar of White & Case LLP represented these amici.
8 See the Hon. Jeffery Chase’s description of the issue here.
9 These amici were represented by Kate Evans at the University of Idaho College of Law and Sabrineh Ardalan at Harvard Law School with Harvard students Zoe Egelman, Cristina Azcoitia, Preston Brasch, and Danielle Hampton.
The scholars explained that a duress exception in the international refugee agreements was not only well-established at the time the Refugee Act was passed, but so too was its standard. Tracing the practice of other countries and the influence of World War II’s international military tribunals, these amici relate the three-part test duress has historically required: (1) a threat of imminent death or continuing serious bodily harm to oneself or another; (2) that the actions were reasonable and necessary to avoid that threat, and (3) that the harm caused was not disproportionate to the harm avoided. Further, these factors were assessed comprehensively, across the entire course of conduct, and taking into account the subjective perspective of the person seeking protection. Consequently, the test for duress should be applied holistically to the applicant’s actions rather than requiring unique and distinct proof for each act of persecution.  

Finally, the scholars outlined how DHS fundamentally misperceives the origins of the persecutor bar and associated Supreme Court precedent. Indeed, the persecutor bar in its original form was never applied to victims of persecution and its first adjudicators required indicia of culpability in order to exclude an applicant from protection. The Supreme Court likewise distinguished victims from their persecutors when considering a version of the persecutor bar contained in a precursor to the Refugee Act. Moreover, Congress referenced the military tribunals that gave the duress exception its form when it propagated the bar in other refugee provisions. A duress exception would therefore restore harmony among the U.S.’ international obligations, congressional intent in passing the Refugee Act, and the historical sources of the bar in U.S. law. 

**Procedural Protections Created by U.S. Statutes, Regulations, and Board Precedent:**

U.S. immigrant advocacy groups addressed the procedural protections that attach to an asylum and withholding applicant in the context of the persecutor bar. Here, amici laid out the predicate findings, rooted in our *non-refoulement* responsibilities and the statutory and regulatory structure, necessary for the bar to apply. This group urged the Board to provide a detailed procedural framework and instructions that would clearly guide adjudicators in administering the persecutor bar to the “wide range of potential conduct” the Supreme Court described in *Negusie*. 

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10 *Amici* Advocates for Human Rights, American Immigration Lawyers Association, Americans for Immigrant Justice, Center for Gender & Refugee Studies, Centro Legal de la Raza, Community Legal Services in Palo Alto, East Bay Community Legal Center, National Justice for our Neighbors, National Immigrant Justice Center, Pangea Legal Services, Public Counsel, the Refugee and Immigrant Center for Education and Legal Services, Tahirih Justice Center, and U.C. Davis School of Law Immigration Clinic advanced substantially similar tests in their respective briefs to the Board.

11 The international sources and analysis supporting this argument can be found in Kate Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. Rev. 453 (2016).

12 *Amici Advocates for Human Rights, American Immigration Lawyers Association, National Justice for our Neighbors, and National Immigrant Justice Center* were represented by Abdus Samad Pardesi of Ropes & Gray LLP, Sarah Brenes of Advocates for Human Rights, Charles Shane Ellison of Justice for our Neighbors, Lisa Koop and Ashley Huebner of NIJC, and Benjamin Casper Sanchez of the University of Minnesota Law School’s James H. Binger Center for New Americans, and Mark Barr of Lichter Immigration.

In response to DHS’s withdrawal of its 2016 position and new position that the persecutor bar has no exceptions, *amici* Advocates for Human Rights and National Immigrant Justice Center submitted a reply brief, refuting the administrability and doctrinal arguments advanced by DHS. *Amici* American Immigration Lawyers Association and National Justice for Our Neighbors submitted a separate reply brief further elaborating on the procedural framework and substantive protections that must apply before an applicant is banned from safety and addressing other intervening Board precedent.

13 *Negusie*, 555 U.S. at 524.
First, adjudicators should make a threshold determination that the applicant is eligible for asylum or withholding of removal. Without such a finding there is no occasion to consider the bar. Additionally, the facts underlying eligibility are often relevant to the application of the persecutor bar and a duress defense.

Next, an adjudicator must find: (1) an act sufficiently severe to constitute persecution, (2) a nexus between that act and a protected characteristic of the victim, and (3) the act provided genuine assistance to or participation in the persecution of others, and (4) the applicant either intended this result or had knowledge of it. Each of these findings must be supported by a preponderance of the evidence.

Finally, if these preliminary findings are made, the applicant must then be given notice and an opportunity to either rebut the findings or show that she performed these acts under duress, and thus was not subject to the bar.

The Impact of a Categorical Persecutor Bar on Vulnerable Populations:

Key to the Supreme Court’s remand in Negusie was the fact that many victims of persecution would nonetheless be excluded from protection under a categorical bar. Amici non-profit organizations and law school clinics argued that a duress exception would avoid “treat[ing] entire classes of victims as persecutors.” These amici described the particular circumstances of children, individuals with intellectual disabilities, and survivors of trauma that limit culpability and support a duress exception to the persecutor bar.

Amici outlined the scientific literature documenting why children are more susceptible to threats and less able to consider and control their responses. Consequently, children are more easily intimidated, indoctrinated, and forced to harm others. Because of the biological and psychological vulnerabilities that make children prime targets for persecutors, great care is required before holding children accountable for these acts by barring them from protection.

The group performed the same review of the scientific literature on individuals with intellectual disabilities. They explain the deficiencies in understanding that undermine many of the assumptions underlying criminal liability. Likewise, these individuals are less able to resist coercion, assess risk, or understand the consequence of their actions when directed to persecute others. They are thus less culpable for their actions and in more need of protection.

Victims of trauma, including victims of domestic violence, also often experience hyperarousal that can manifest in violent or disruptive behavior. This heightened response to potential threats may better explain the reason a victim acts to persecute another than animus or persecutory intent. Because over 30% of refugees appear to be affected by PTSD, ignoring the impact of that trauma would improperly treat a large portion of applicants as persecutors instead of victims.

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14 Amici Non-Profit Organizations and Law School Clinics were represented by Ana Reyes and Eli Schlam of Williams & Connolly LLP, and Eunice Lee, Karen Musalo, and Blaine Bookey for the Center for Gender and Refugee Studies.

15 Negusie, 555 U.S. at 535 (Stevens J., concurring in part and dissenting in part).
Strategies for Practitioners and a Guide to Supporting Authority:

Depending on your client’s particular set of facts you may want to argue that the persecutor bar is not actually triggered and thus no exception is required. These arguments could include challenges to the procedures your client is afforded in immigration court and the failure of DHS to meet its burden. Or you may need to argue that an exception to the bar does exist and your client falls within it. Below is a breakdown of these arguments with references to the specific sections in the amici briefs that provide supporting citations and analysis.

Argue that the persecutor bar has not been triggered for one or more of the following reasons:

- **The adjudicator must first find that the applicant is otherwise eligible for protection.** See *Amici Br. AILA and National Justice for Our Neighbors*, pp. 2-3, for citations to immigration statutes. See *Amici Br. NIJC, AILA, Advocates for Human Rights, National JFON (2016)*, p. 5.
- **The acts committed did not rise to the level of persecution:** See *Amici Br. AILA and National Justice for Our Neighbors*, p. 7, and *Amici Br. NIJC, AILA, Advocates for Human Rights, National JFON (2016)*, pp. 6-7, for citations to Board precedent and federal case law.
- **The acts were not on account of a protected ground:** See *Amici Br. AILA and National Justice for Our Neighbors*, pp. 7-8, and *Amici Br. NIJC, AILA, Advocates for Human Rights, National JFON (2016)*, pp. 7-8, for citations to Board precedent, immigration statutes, and federal case law.
- **The acts were not active, purposeful or material such that they “assisted” or reflected “participation” in persecution; mere membership is not enough.** See *Amici Br. AILA and National Justice for Our Neighbors*, pp. 8-10, and *Amici Br. NIJC, AILA, Advocates for Human Rights, National JFON (2016)*, pp. 8-10, for citations to Board immigration statutes, and federal case law. See *Amici Br. Int’l Refugee Law Scholars*, pp. 17-20 for citations to international case law on the level of participation required for an exclusion to be triggered.
- **The applicant had no contemporary knowledge of the consequence of her acts:** See *Amici Br. AILA and National Justice for Our Neighbors*, pp. 10-11, and *Amici Br. NIJC, AILA, Advocates for Human Rights, National JFON (2016)*, pp. 10-11, for citations to federal case law.

Argue that your client is entitled to certain procedural protections:

- **The bar’s grave consequences to disqualify an applicant from asylum and withholding of removal demand procedural protections.** See *Amici Br. AILA and National Justice for Our Neighbors*, pp. 3-6, 13-18 for citations to Board precedent in support of procedural safeguards.
- **The government failed to show by a preponderance of the evidence that the bar may apply.** See *Amici Br. Non-Profit Organizations and Law School Clinics*, pp. 14-16, for support in Board precedent, EOIR Benchbook, federal case law on DHS’s burden. See *Amici Br. NIJC, AILA, Advocates for Human Rights, National JFON (2016)*, pp. 12-18 for citations to U.S. statutes, international law, and federal case law. See *Amici Br. AILA and National Justice for Our Neighbors*, pp. 18-23, for citations to Board precedent, U.S.
statutes, and federal case law on the location of the burden of proof and the standard for the burden of proof.

- The applicant must be given an opportunity to rebut the evidence that the bar may apply. See Amici Br. AILA and National Justice for Our Neighbors, pp. 24-26, for citations to Board precedent and federal case law.

- The adjudicator must conclude, in light of the government’s and applicant’s evidence, that a preponderance of the evidence shows that the applicant assisted in the persecution of others.

- 8 C.F.R. § 1240.8(d) does not supersede procedural protections required in the asylum and withholding context. See Amici Br. AILA and National Justice for Our Neighbors, pp. 26-31, for citations to federal case law, regulatory history, and statutory requirements that call the lower burden of proof applied in Matter of M-B-C-, 27 I&N Dec. 31 (BIA 2017), into question.

Argue that your client’s conduct is not encompassed by the persecutor bar because it was performed under duress:

- International law requires a duress exception. See Amici Br. Int’l Refugee Law Scholars, pp. 3-11, 14-17, for citations to treatises, commentary, international case law, and the international refugee agreements themselves for support.

- Duress is a fundamental tenet in U.S. criminal, civil, and administrative law. See Amici Br. NIJC and Advocates for Human Rights, pp. 12-14, for citations to U.S. treatises and case law.

- Congress intended the persecutor bar to mirror the exception in international law. See Amici Br. Int’l Refugee Law Scholars, pp. 12-14, for citations to the legislative history associated with the bar’s incorporation in the INA and the Refugee Act.


- Your client’s conduct was performed under duress as that term has been historically understood:
  - The applicant faced an imminent threat of death or serious bodily harm to herself or another. See Amici Br. Int’l Refugee Law Scholars, pp. 20-22, for support from U.N. historical documents, U.S. military tribunals, and international case law.
  - There was no reasonable means of escaping the threat. See Amici Br. Int’l Refugee Law Scholars, pp. 20-21, 22-23, for support from U.N. historical documents, U.S. military tribunals, and international case law.
  - The applicant intended to cause no more harm than the harm threatened against her. See Amici Br. Int’l Refugee Law Scholars, pp. 20-21, 23-24, for support from U.N. historical documents, U.S. military tribunals, and international case law.
  - These factors should be assessed comprehensively, and in light of the applicant’s subjective perspective, taking into account her special circumstances: See Amici Br. Int’l Refugee Law Scholars, pp. 24-26, for support from U.N. historical documents, U.S. military tribunals, and international case law. See Amici Br. Non-Profit Organizations and Law School Clinics, pp. 8-13, for

- The coercive scheme should be assessed as a whole so that the existence of duress at one point creates a presumption of duress throughout the applicant’s course of conduct. See *Amici Br. Non-Profit Organizations and Law School Clinics*, pp. 17-18, for support in social science literature on domestic violence and legal commentary on recruitment of child soldiers. See *Amici Br. NIJC, AILA, Advocates for Human Rights, National JFON (2016)*, p. 34, for citations to regulations, federal case law, and USCIS guidance.

- **Highlight the special characteristics of your client and other applicants that make coercion more difficult to resist and their acts in the face of that coercion less culpable.** See *Amici Br. Non-Profit Organizations and Law School Clinics*, pp. 20-30, for support in social science literature regarding susceptibility to force and diminished capacity to understand risks and consequences within different vulnerable populations.