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Asylum Proceedings: A System Riddled with Deference

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Notes and Comments

Asylum Proceedings: A System Riddled with Deference

INTRODUCTION

*Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
"Keep, ancient lands, your storied pomp!" cries she
With silent lips. "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"¹*

The lines above, which are prominently affixed to the Statue of Liberty, profess America to be an immigrant nation with open doors. Nonetheless, we have found ourselves turning away the most vulnerable immigrants, those who come to America seeking asylum. Asylum applicants come to this country because they have suffered past persecution in their homeland and have a well-founded fear of future persecution if they were to stay in their

1. EMMA LAZARUS, *The New Colossus*, in *SELECTED POEMS AND OTHER WRITINGS* 233 (Gregory Eiselein ed., 2002).

country of origin.² America has a well-defined system of asylum that purports to offer a safe place for those who are the victims of persecution based on their “race, religion, nationality, membership in a particular social group, or political opinion.”³ However, in practice, we do not offer such a secure refuge.

In order to qualify for asylum, an applicant must present credible evidence that the applicant has a well-founded fear of future persecution.⁴ In order to refute the applicant’s well-founded fear of future persecution, the United States Bureau of Citizenship and Immigration Services (BCIS) is obligated to present evidence that shows an adverse credibility determination.⁵ Immigration judges and the Board of Immigration Appeals (BIA) have consistently held that presentation of a United States Department of State country report is sufficient to show changed country conditions capable of rebutting the applicant’s well-founded fear of future persecution.⁶ Instead of evaluating the individual claim, the asylum adjudicators search the country reports for buzzwords, such as “the government generally respected the human rights of its citizens,”⁷ and then conclude that it is unlikely that the applicant will be subject to future persecution.⁸

The immigration judges and the BIA are choosing to accept the legitimacy of the State Department country reports instead of the testimony of the asylum applicants, even when the country reports contain only generalized information about the status of the country and cannot possibly address the individual circumstances of all of the applicants. In doing this, the immigration judges and the BIA are turning away worthy asylum applicants because the testimony of a foreigner who is tired, scared and trying to overcome both language and cultural barriers cannot possibly stand up to a State Department country report that is stamped with the government seal of approval.

Admittedly, it is difficult to effectively administer a system with competing principles. However, there is room in the asylum

2. 8 C.F.R. § 208.13(b)(1) (2003).

3. 8 U.S.C. § 1101(a)(42)(A) (2001).

4. See 8 C.F.R. § 208.13(b)(1).

5. *Id.* § 208.13(b)(1)(i).

6. *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000).

7. 2001 U.S. DEP’T OF STATE COUNTRY REP. ON HUM. RTS. PRAC. (Bulgaria), <http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8238.htm>.

8. See *infra* Part V.

system to strike an effective balance. The two competing principles in asylum proceedings are: (1) the goal of protecting applicants that fear persecution and (2) deterring abuse of the system.⁹ If asylum adjudicators blindly accept the testimony of asylum applicants, the likelihood is that many immigrants who did not suffer the type of persecution that the United States has deemed worthy of the grant of asylum would be allowed access to citizenship in this country. However, many times the applicant's testimony is all that the applicant has to offer. Asylum seekers that flee their countries of origin often do not have corroborating documents to prove the validity of their respective testimonies. Without losing sight of this paradox, there are many suggestions available to improve the system, including: relying on cross-examination, training specialized adjudicators, subscribing to the safe third country principle, and using the State Department country reports only as a supportive analytical tool for asylum applicants.¹⁰

Part I of this Comment provides a background of asylum law. Part II examines a current example of where abuse of the asylum system is likely. Part III continues by explaining the standard of review in asylum proceedings and the deference given to the BIA. In addition, it will describe the deference given to the State Department country reports in asylum proceedings. Part IV provides a description of how the State Department compiles and publishes the country reports. Part V presents two examples of countries where the immigration judge and the BIA cited changed country conditions, based on State Department country reports, as the reason for denial of asylum. Part VI continues by giving the analysis of the Circuit Courts of Appeals in reviewing those cases illustrated in Part III. Finally, Part VII gives suggestions for improving the system to reflect an individualized analysis of asylum applications, rather than a reliance on State Department country reports.

9. See Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 589 (2000).

10. See *id.* at 606; David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1338 (1990).

I. BACKGROUND OF ASYLUM LAW

In order to be eligible for the discretionary grant of asylum, an applicant must first satisfy the statutory requirement for asylum by establishing that he or she is a refugee.¹¹ A refugee is defined as anyone who is outside the country of his or her nationality and is unwilling or unable to return to that country because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹² If the applicant's fear of future persecution is related to the persecution suffered in the past, then the applicant is presumed to also have a well-founded fear of future persecution.¹³ However, that presumption can be rebutted by showing that: (a) there has been a fundamental change in the individual circumstances of the applicant; (b) there has been a change in country conditions; or (c) the applicant could avoid persecution by relocating to a different part of the country.¹⁴ Once an applicant has shown that he or she has suffered past persecution, the burden is on the BCIS to establish by a preponderance of the evidence that one of the three conditions required to rebut the presumption of a well-founded fear of future persecution does in fact exist.¹⁵ The burden of proof is on the asylum applicant to establish that he or she does fit within the definition of a refugee.¹⁶ If credible, the testimony of the applicant may be sufficient to meet the burden of proof without corroboration.¹⁷ Although every effort should be made to obtain corroborating evidence, the applicant's testimony will suffice where the testimony is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his or her fear."¹⁸

The well-founded fear of future persecution standard used for asylum does not equate with the clear probability standard used for the withholding of deportation.¹⁹ The clear probability stan-

11. 8 C.F.R. § 208.13(a) (2003).

12. 8 U.S.C. § 1101(a)(42)(A) (2001).

13. 8 C.F.R. § 208.13(b)(1) (2003).

14. *Id.* § 208.13(b)(1)(i)(A)-(B).

15. *Id.* § 208.13(b)(1)(ii).

16. *Id.* § 208.13(a).

17. *Id.*

18. *In re Mogharrabi*, 19 I. & N. Dec. 439, 439 (B.I.A. 1987).

19. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

dard requires objective evidence that it is more likely than not that the alien seeking withholding of deportation will be persecuted upon return to his or her country of origin.²⁰ However, the well-founded fear requirement for an asylum applicant does not require a showing that persecution is more likely than not.²¹ Rather, an applicant with a 10 percent chance of future persecution satisfies the requirement for a well-founded fear of future persecution.²² There is no reason to conclude that “because an applicant only has a 10 percent chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening.”²³ The 10 percent figure is not a concrete threshold; instead, it is given as an example to show that a well-founded fear standard is not identical to a clear probability standard, which requires that the event is more likely than not.²⁴ The term ‘well-founded fear’ is ambiguous; therefore, case-by-case adjudication is necessary to give the term a concrete meaning.²⁵

II. ABUSE OF THE SYSTEM

Although asylum applicants are generally honest,²⁶ in many situations the applicant has an incentive to fabricate his or her testimony. The United States only grants asylum to those applicants that can establish persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²⁷ However, there are other reasons why individuals seek asylum. Recently, there has been an influx of migrants from Haiti that wish to be granted asylum.²⁸

Desperate to leave Haiti’s unending violence, hunger and poverty, Marie Ocean did not even ask where the small boat was

20. *Id.* at 430.

21. *Id.* at 449.

22. *See id.* at 440.

23. *Id.*

24. *Id.*

25. *Id.* at 448.

26. *See* Martin, *supra* note 10, at 1282 (stating that when the author interviewed participants in the asylum process, particularly government decision makers and INS trial attorneys, they frequently made comments indicating that the asylum system is saved by the admirable honesty of the applicants).

27. 8 C.F.R. § 208.13(b)(1) (2003).

28. *Migrants say difficulties in U.S. easier than Haiti*, PROVIDENCE J., Nov. 11, 2002, at A7.

headed when she squeezed aboard.²⁹ For nine days, she and 180 others drank salt water and had no way to protect themselves from the sun or rain.³⁰ The boat almost capsized, and Ocean vomited continuously throughout the journey last year from Port-Au-Prince to Florida.³¹ Still, she has no regrets. "I just had to leave Haiti," she said.³²

Some of the Haitian migrants will undoubtedly be able to establish a well-founded fear of persecution based on political opinion.³³ However, many others will be able to plead only economic hardship, which is not one of the justified reasons for the grant of asylum.³⁴ "Those who can only prove economic hardship will be ordered deported."³⁵ This gives the Haitian migrants an incentive to lie and say that they were persecuted in order to be granted asylum. The migrants are already in the United States, and the worst that could happen if they subject themselves to an asylum proceeding is that they will be deported, a result that is inevitable if they decide not to seek asylum.

The situation of migrants who come to the United States because of economic hardship shows how abuse of the asylum system is likely to occur. The Haitian migrants have a rational reason for leaving Haiti and attempting to establish themselves in the United States; however, it is not a justified reason according to the asylum system.³⁶ Therefore, the migrant has an incentive to fabricate his or her testimony to include an element of persecution. Even though this is a possible outcome of the asylum proceeding, preventing abuse of the system is only one of the fundamental goals of the asylum system.³⁷ The other primary goal is the protection of an asylum applicant who has a well-founded fear of persecution.³⁸ Because there are two competing principles,

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. "Before she left Haiti, Lorman said she saw people hiding in the woods, seeking shelter from then-President Jean-Claude Duvalier's secret police, who routinely quashed foes with violence." *Id.*

34. See 8 C.F.R. § 208.13(b)(1) (2003).

35. *Migrants say difficulties in U.S. easier than Haiti*, *supra* note 28.

36. See 8 C.F.R. § 208.13(b)(1).

37. See Martin & Schoenholtz, *supra* note 9, at 589.

38. See *id.*

the system needs to strike an effective balance. The asylum adjudicators have attempted to strike that balance by relying on State Department country reports to validate the claim by the applicant.³⁹ However, this has presented a situation where the scales are dramatically tipped toward the prevention of abuse of the system rather than protecting the interests of asylum applicants that genuinely do have a well-founded fear of persecution.⁴⁰

III. DEFERENCE IN ASYLUM PROCEEDINGS

There are two separate instances where deference is an issue in asylum proceedings. The first instance is the deference given by the Circuit Courts of Appeals to the immigration judge and the BIA.⁴¹ The first judicial actor to hear an asylum application is an immigration judge.⁴² The applicant may then appeal to the BIA, a division of the United States Department of Justice.⁴³ Legal determinations of the BIA are reviewed in accordance with the principles of deference to agency decisions outlined in *Chevron v. Natural Resources Defense Council*.⁴⁴ Factual determinations, however, are reviewed under a substantial evidence standard.⁴⁵ Credibility determinations, like other factual determinations, are reviewed under the substantial evidence standard.⁴⁶ Reversal of a BIA decision is warranted if the evidence would compel any reasonable factfinder to conclude that the requisite fear of persecution has been shown.⁴⁷ Although the substantial evidence standard is highly deferential, the BIA's decision must have support of "reasonable, substantial, and probative evidence on the re-

39. See *infra* Part III.

40. See *infra* Part VI.

41. See *Osorio v. INS*, 99 F.3d 928, 931 (9th Cir. 1996).

42. See *Martin*, *supra* note 10, at 1305-06.

43. See *id.* at 1313.

44. 467 U.S. 837 (1984). See *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000); *Martin*, *supra* note 10, at 1316. The Chevron deference doctrine outlines a two-part test for evaluating an agency's interpretation of a statute. *Chevron*, 467 U.S. at 842. The first inquiry is whether Congress has directly spoken on the issue, and the second is whether the agency's interpretation of the statute is based on a permissible construction of the statute. *Id.* at 842-43.

45. See *Navas*, 217 F.3d at 657; *Martin*, *supra* note 10, at 1316.

46. See *Osorio*, 99 F.3d at 931.

47. See *Navas*, 217 F.3d at 657.

cord considered as a whole."⁴⁸ If the BIA fails to make a legitimate adverse credibility determination, the applicant's testimony is accepted as the truth.⁴⁹ The importance of the BIA's factual determinations in the outcome of asylum adjudication gives rise to the second instance where deference plays an important role in asylum proceedings.

The second instance where deference is an issue in asylum proceedings is when the immigration judge or the BIA gives deference to the State Department country reports. In order to be eligible for asylum, the applicant must show a well-founded fear of future persecution.⁵⁰ To show a well-founded fear of future persecution, the applicant does not need to prove that the chances of persecution are more likely than not, but rather, an applicant is held to a lesser standard where a showing of even a ten percent chance of persecution will suffice.⁵¹ If the applicant presents evidence that he or she suffered persecution in the past, then the applicant is presumed to also have a well-founded fear of future persecution.⁵² While corroboration of the applicant's testimony adds strength to his or her claim, corroboration is unnecessary, and the applicant's testimony alone can establish that persecution did in fact occur.⁵³ If the applicant offers testimony that shows that past persecution did occur and the presumption of a well-founded fear of future persecution attaches, then the burden shifts to the government to show by a preponderance of the evidence that the country conditions have changed such that the applicant would no longer have a well-founded fear of future persecution if he or she were to return to the country.⁵⁴ Generalized statements are insufficient to rebut the applicant's testimony.⁵⁵

Although these guidelines are expressly stated in numerous judicial opinions, in practice, the guidelines are not followed.⁵⁶ Both the immigration judge and the BIA give extreme deference to

48. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

49. *Lim v. INS*, 224 F.3d 929, 933 (9th Cir. 2000).

50. 8 C.F.R. § 208.13(b) (2003).

51. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). *See supra* Part I.

52. 8 C.F.R. § 208.13(b)(1).

53. *In re Mogharrabi*, 19 I. & N. Dec. 439, 439 (B.I.A. 1987).

54. 8 C.F.R. § 208.13(b)(1)(i).

55. *Garrovillas v. INS*, 156 F.3d 1010, 1013 (9th Cir. 1998).

56. *See infra* Part VI.

the country reports prepared by the State Department.⁵⁷ A country report only gives generalized conditions of the evaluated country and does not provide a sufficient individualized analysis to rebut the presumption that an applicant has a well-founded fear of future persecution.⁵⁸

Although the Supreme Court has not taken up the issue, all of the Circuits that produce substantial decisions in the area of immigration law have recognized the problems of relying on a general report of country conditions and have required an individualized analysis to rebut the presumption of a well-founded fear.⁵⁹ The Ninth Circuit in *Chand* stated that the “presumption

57. *Id.*

58. The following is an excerpt of a country report, prepared by the United States Department of State, on Bulgaria:

The Government generally respected the human rights of its citizens; however, while there were improvements in some areas, its human rights record was poor in other areas. Members of the security forces were responsible for some killings. Security forces commonly beat suspects and inmates and beat and mistreated minorities. Arbitrary arrest and detention were problems. Security forces harassed, physically abused, and arbitrarily arrested and detained Romani street children. Problems of accountability persisted and inhibited government attempts to address police abuses. Conditions in many prisons and detention facilities were harsh. There remained some instances of prolonged pretrial detention, although the Government has continued to improve its performance in preventing defendants' periods of pretrial detention from exceeding the statutory limit of 1 year. The Government infringed on citizens' privacy rights. The Government exerted undue influence on the media. There were limits on freedom of association. The Government restricted freedom of religion for some non-Orthodox religious groups. Constitutional restrictions on political parties formed along ethnic, racial, or religious lines effectively limit participation in government for some groups. Violence and discrimination against women remained serious problems. Conditions for children in state institutions were poor, and because of a lack of funds, the social service system did not assist homeless and other vulnerable children adequately, notably Romani children. There was some discrimination against persons with disabilities. Societal discrimination and harassment of “nontraditional” religious minorities persisted, but were less frequent than in the past year. Discrimination and societal violence against Roma were serious problems. Child labor was a problem. Trafficking in women and girls was a serious problem.

2001 U.S. DEPT OF STATE COUNTRY REP. ON HUM. RTS. PRAC. (Bulgaria), <http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8238.htm>.

59. See *Chand v. INS*, 222 F.3d 1066 (9th Cir. 2000); *Krastev v. INS*, 292 F.3d 1268 (7th Cir. 2002); *Toptchev v. INS*, 295 F.3d 714 (10th Cir. 2002).

can be overcome only by an individualized showing that because of the change that has occurred, the particular individual no longer has reason to fear that he would be subjected to persecution if he returned to the country he fled.⁶⁰ However, this has not stopped the immigration judges and the BIA from relying mainly on the country reports in making a determination as to the validity of an applicant's well-founded fear.⁶¹ In order to strike an effective balance between the two competing goals in asylum adjudication, abuse of the system and the protection of an applicant who has a well-founded fear of persecution, the immigration judges and the BIA need to require the BCIS to present an individualized analysis during the initial proceedings to rebut the presumption of a well-founded fear. If the immigration judges and the BIA do not require an individualized analysis during the initial review of the asylum claim, it is substantially harder for the applicant to succeed in an appeal because of the deference given by the Circuits to the decisions of the immigration judges and the BIA.⁶²

IV. PREPARATION OF COUNTRY REPORTS

The State Department is required by statute to provide annual reports on human rights conditions in all foreign countries.⁶³ The information published in the country reports is compiled from many sources, including U.S. and foreign government officials, victims of human rights abuse, academic and congressional studies, and reports from the press, international organizations, and nongovernmental organizations concerned with human rights.⁶⁴ The reports must be submitted to Congress by February 25, and, in order to comply with this deadline, drafts are submitted in September and October.⁶⁵ The State Department acknowledges that "[b]ecause of the preparation time required, it is possible that yearend developments may not be reflected fully, [however], [w]e make every effort to include reference to major events or signifi-

60. *Chand*, 222 F.3d at 1073.

61. *See Rios v. Ashcroft*, 287 F.3d 895 (9th Cir. 2002); *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002).

62. *See Toptchev*, 295 F.3d at 720.

63. *See* 22 U.S.C. § 2151n(d) (1988).

64. 2002 U.S. DEP'T OF STATE COUNTRY REP. ON HUM. RTS. PRAC app. A, <http://www.state.gov/g/drl/rls/hrrpt/2002/19161.htm>.

65. *Id.*

cant changes in trends.⁶⁶ The country reports contain several sections that discuss different aspects of human rights conditions in the reported country.⁶⁷ The specific section headings are: (1) Arbitrary or Unlawful Deprivation of Life;⁶⁸ (2) Disappearance;⁶⁹ (3) Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;⁷⁰ (4) Arbitrary Arrest, Detention, or Exile;⁷¹ (5) Denial of Fair Public Trial;⁷² (6) Arbitrary Interferences with Privacy, Family, Home, or Correspondence;⁷³ (7) Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts;⁷⁴ (8) Freedom of Speech and Press;⁷⁵ (9) Freedom of Peaceful Assembly and Association;⁷⁶ (10) Freedom of Religion;⁷⁷ (11) Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation;⁷⁸ (12) Respect for Political Rights;⁷⁹ (13) Gov-

66. *Id.*

67. *Id.*

68. *Id.* Arbitrary or Unlawful Deprivation of Life documents government killings that are executed without due process of law. *Id.*

69. *Id.* Disappearance describes disappearances where political motivation was likely and where the victim is still missing or the perpetrators have not been identified. *Id.*

70. *Id.* Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment discusses acts of torture committed by the government or opposition groups, and also includes discussion of prison conditions. *Id.*

71. *Id.* Arbitrary Arrest, Detention, or Exile discusses cases where detainees are held without being charged or, if charged, are denied a judicial hearing within a reasonable time period. This section also discusses under what conditions a citizen is subjected to exile. *Id.*

72. *Id.* Denial of Fair Public Trial describes the court system and discusses whether trials are fair and public. *Id.*

73. *Id.* Arbitrary Interference with Privacy, Family, Home, or Correspondence discusses the "passive" right of individuals to be free from interference by the State. *Id.*

74. *Id.* Use of Excessive Force and Violations of Humanitarian Law in Internal Conflict discusses abuses that occur in internal armed conflict. *Id.*

75. *Id.* Freedom of Speech and Press evaluates whether freedom of speech and press exist. *Id.*

76. *Id.* Freedom of Peaceful Assembly and Association evaluates the ability to exercise these freedoms. *Id.*

77. *Id.* Freedom of Religion evaluates the ability to exercise freedom of religion free from government interference. *Id.*

78. *Id.* Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation evaluates these freedoms and includes discussion of forced resettlement. *Id.*

79. *Id.* Respect for Political Rights discusses whether citizens have freedom of political choice, and also discusses "whether elections are free and fair." *Id.*

ernmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights;⁸⁰ and (14) Discrimination Based on Race, Sex, Religion, Disability, Language, or Social Status.⁸¹

Despite the comprehensive structure of the country reports, there are numerous problems with the accuracy of the publications. There are "obvious problems associated with varying degrees of access to information, structural differences in political and social systems, and differing trends in world opinion regarding human rights practices in specific countries."⁸² In addition, optimal results are difficult to obtain when compiling multiple sources with various degrees of accuracy. In many instances the only witnesses to specific events are afraid to come forward.⁸³ Also, governments go to extraordinary lengths to conceal abuses of human rights, and, on the other hand, government opposition groups have incentive to fabricate those abuses.⁸⁴

V. COUNTRY PROFILES

This section considers two countries, Guatemala and Bulgaria, where the immigration judge and the BIA cited changed country conditions as the reason for the denial of asylum.⁸⁵

80. *Id.* Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights discusses whether human rights groups are permitted to function and publish their findings within the country, and whether the government cooperates with outside entities interested in human rights conditions in the country. *Id.*

81. *Id.* Discrimination Based on Race, Sex, Religion, Disability, Language, or Social Status discusses the types of discrimination mentioned and focuses on laws and practices that do not promote "equal access to housing, employment, education, health care, or other governmental benefits" for certain groups. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Ruano v. Ashcroft, 301 F.3d 1155, 1158 (9th Cir. 2002); Rios v. Ashcroft, 287 F.3d 895 (9th Cir. 2002); Toptchev v. INS, 295 F.3d 714 (7th Cir. 2002); Krastev v. INS, 292 F.3d 1268 (10th Cir. 2002). Guatemala and Bulgaria are only two of the many countries from which asylum applicants to the United States originate. *See, e.g.*, Gui v. INS, 280 F.3d 1217 (9th Cir. 2002) (asylum applicant originating from Romania); Cardenas v. INS, 294 F.3d 1062 (9th Cir. 2002) (asylum applicant originating from Peru); Chen v. INS, 266 F.3d 1094 (9th Cir. 2001) (asylum applicant originating from China); Abdille v. Ashcroft, 242 F.3d 477 (3d Cir. 2001) (asylum applicant originating from Somalia); Mendoza-Manimbao v. Ashcroft, 298 F.3d 852 (9th

A. Guatemala

There are two recent examples of asylum applicants originating from Guatemala in which the immigration judge and the BIA denied the application on the basis of changed country conditions.⁸⁶ In *Ruano v. Ashcroft*,⁸⁷ both the immigration judge and the BIA denied Ruano's asylum claim on account of changed conditions within Guatemala.⁸⁸ Edin Arcenio Ruano was a native and citizen of Guatemala.⁸⁹ Ruano was Assistant Secretary General of a political party in Guatemala known as the National Center Union (UCN).⁹⁰ After joining the UCN, Ruano received threatening letters continuously from 1985 to 1991 at his home and work that were signed by "Los Gavilanes," a guerilla organization within Guatemala.⁹¹ An excerpt from one of the letters read, "we've been observing that you are involved with the shit of a queer party as is UCN, we're giving you a time limit of 15 days so you get the hell out of here, you son of a bitch . . . if you don't leave we'll kill you right away."⁹² In addition to the letters, from 1987 to 1991 four armed men followed Ruano and tried to corner him on several occasions.⁹³ He evaded the men when they came to his home by running through neighbors' houses, he went out the back door when they came to his office and he began to take public transportation instead of his chauffeured government car.⁹⁴ After fleeing to the United States, the head of the Guatemala City chapter of UCN was killed by guerillas and Ruano's father disappeared; Ruano believed that he too was killed by guerillas.⁹⁵

The immigration judge denied Ruano's asylum claim on the basis of a State Department country report that stated that only

Cir. 2002) (asylum applicant originating from the Philippines); *Obianuju-Ezeagwuna v. Ashcroft*, 301 F.3d 116 (3d Cir. 2002) (asylum applicant originating from Cameroon), *vacated*, *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003).

86. See *Ruano*, 301 F.3d at 1158; *Rios*, 287 F.3d at 901-02.

87. 301 F.3d 1155 (9th Cir. 2002).

88. See *id.* at 1158.

89. *Id.* at 1157.

90. *Id.*

91. *Id.*

92. *Id.* at 1157-58.

93. *Id.* at 1158.

94. *Id.*

95. *Id.*

high-profile activists were targeted, and that they were being targeted only in their home communities.⁹⁶ The BIA affirmed the decision of the immigration judge, stating that Ruano's application did not show a well-founded fear of persecution because he could avoid persecution by relocating to a different part of Guatemala.⁹⁷

Another recent case in which an applicant originating from Guatemala was denied asylum because of changed country conditions is *Rios v. Ashcroft*.⁹⁸ Julia Floridalma Rios and her son, natives and citizens of Guatemala, sought asylum on account of persecution based on their imputed political opinion.⁹⁹ Rios's husband was a colonel in the Guatemalan army and was causing the guerillas significant hardship in carrying out their activities.¹⁰⁰ Because of her husband's involvement with the Guatemalan military, in 1990 Rios was kidnapped at knifepoint by the guerrillas, blindfolded, and detained for three days.¹⁰¹ Early in 1991, the guerrillas also attempted to kidnap Rios's son, but were unsuccessful because guards rushed to his rescue.¹⁰² Following these incidents, on August 12, 1991, Rios's husband was abducted and killed by guerrillas.¹⁰³ In 1996, Rios's brother was killed by a bomb that exploded on an airplane he was piloting.¹⁰⁴ Rios was told that the guerrillas were responsible for the bombing.¹⁰⁵

The immigration judge found that conditions in Guatemala had changed "because a peace accord was signed by the Guatemalan National Revolutionary Unity Guerrillas in 1996' and because 'many of the guerrilla forces are now disarmed and members of a recognized legal political party, which is actively playing a part in the government of their country as a result of these peace accords.'"¹⁰⁶ The sole evidence of changed country conditions in Guatemala was a State Department country report submitted by the

96. *Id.*

97. *Id.* at 1159.

98. 287 F.3d 895, 899 (9th Cir. 2002).

99. *Id.* at 897.

100. *Id.* at 898.

101. *Id.*

102. *Id.*

103. *Id.* at 899.

104. *Id.*

105. *Id.*

106. *Id.* at 901-02 (quoting the opinion of the immigration judge below).

BCIS.¹⁰⁷ The BIA affirmed the decision of the immigration judge based on the same reasoning.¹⁰⁸

B. Bulgaria

Natives of Bulgaria, similar to those of Guatemala, have been denied asylum claims due to what the immigration judge and the BIA found to amount to changed country conditions.¹⁰⁹ One example of where changed country conditions in Bulgaria was cited as the reason for the denial of an asylum claim is *Toptchev v. INS*.¹¹⁰ Peter Toptchev and his wife Tania Toptcheva, natives of Bulgaria, sought asylum due to persecution based on their political and religious beliefs.¹¹¹ Toptchev was a famous professional soccer player in Bulgaria for twenty years.¹¹² He believed that his problems with the Bulgarian authorities began because he was a Catholic, the religious minority in Bulgaria, and because he was anti-totalitarian.¹¹³ Toptchev cited several incidents leading to his fear of persecution, including: state security police confiscating a Bible, a crucifix, and religious icons from his residence;¹¹⁴ state security police striking him in the face and detaining him at the police station for three days in 1967;¹¹⁵ security officials detaining him for fraternizing with foreign citizens in 1984;¹¹⁶ and threats on his life for testifying in a legal action on behalf of a friend in 1988.¹¹⁷ Toptchev's wife also cited examples of harassment by Bulgarian officials.¹¹⁸ In 1990, Toptcheva was visited by a regional security officer who forced his way into her apartment, grabbed her blouse and opened it.¹¹⁹ Later that year, she also lost her job of fourteen years because of "too many political problems."¹²⁰ In addition to

107. *Id.* at 901.

108. *Id.* at 899.

109. See *Toptchev v. INS*, 295 F.3d 714, 718-19 (7th Cir. 2002); *Krastev v. INS*, 292 F.3d 1268, 1275 (10th Cir. 2002).

110. 295 F.3d at 718-19.

111. *Id.* at 716.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 717.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

the harassment endured by both Toptchev and his wife, the Toptchevs' son was also the victim of harassment.¹²¹ In 1991, he was assaulted and left with a broken leg by whom petitioners believe was the same regional security officer that had visited Toptcheva in her home.¹²²

The immigration judge found that the likelihood of future persecution had not been established by the Toptchevs' asylum application.¹²³ He based the decision on a country profile of Bulgaria, prepared by the State Department.¹²⁴ The report stated that Bulgaria had made strides towards democracy with the overthrow of the communist dictator in late 1989 and that the mistreatment was likely to persist only on a local level, which could be avoided by relocation.¹²⁵ The BIA affirmed the decision, citing the State Department's country report on Bulgaria.¹²⁶ The BIA emphasized that the country report contained information that Bulgaria was a parliamentary republic in which the government was elected democratically and religious freedom was guaranteed.¹²⁷

A second example in which a native of Bulgaria was denied asylum based on changed country conditions is *Krastev v. INS*.¹²⁸ Emil Krastev and Neli Krasteva sought asylum because of alleged persecution in Bulgaria based on their political views.¹²⁹ Emil's family members had a history of confrontation with the Bulgarian government because they did not share Communist political opinions.¹³⁰ Both Krastev and Krasteva were members of the Union of Democratic Forces (UDF).¹³¹ Krastev cited many incidents of persecution by Communist military groups, including: he and his then wife were severely beaten, which resulted in his wife suffering a miscarriage; his garage where he stored produce for his fruit sales business and his UDF materials was set on fire; his mother was accosted and threatened with rape; and an acquaintance of

121. *Id.*

122. *Id.*

123. *Id.* at 718.

124. *Id.*

125. *Id.* at 718-19.

126. *Id.* at 719.

127. *Id.*

128. 292 F.3d 1268, 1270 (10th Cir. 2002).

129. *Id.* at 1271-73.

130. *Id.* at 1271-72.

131. *Id.* at 1272-73.

his who was a member of UDF was killed and his home was burned to the ground.¹³² Krasteva also cited incidents of persecution by military groups with Communist views.¹³³ First, her father was imprisoned for membership in an anti-Communist group and died after he was beaten by police.¹³⁴ Second, she was unable to attend the University because her parents were not members of the Communist Party.¹³⁵ Third, her husband was beaten to death because of his affiliation with an organization known as Defense of Human Rights and Freedoms.¹³⁶ Fourth, a police captain threatened that if Krasteva did not end her political activities she would be raped and her children would be forced into prostitution.¹³⁷

The immigration judge denied the asylum claim because the State Department's country report stated that Bulgaria appeared firmly committed to democracy and that mistreatment was currently local.¹³⁸ The BIA affirmed the denial of asylum, holding that the evidence of changed conditions in Bulgaria was sufficient to rebut the presumption that the applicants had a well-founded fear of future persecution.¹³⁹

VI. REVIEW BY THE CIRCUITS

The four cases described in Part V illustrate the problem of allowing the immigration judge and the BIA to make adverse credibility determinations based solely on the State Department country reports. The country reports do not provide an individualized basis to rebut the presumption that the applicant has a well-founded fear of future persecution. Reliance on the country reports results in the deportation of applicants that may have a valid claim and forces those applicants to return to their country of origin with the risk of further persecution. In three of the four aforementioned cases, the Circuit Court of Appeals reversed the decision of the BIA.

132. *Id.* at 1272.

133. *Id.* at 1273.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1274-75.

139. *Id.*

In *Ruano*, the Ninth Circuit reversed the BIA because it found that the State Department country report was insufficient to establish that there has been a fundamental change in circumstances in Guatemala.¹⁴⁰ The relevant part of the country report stated:

“Members of legal political parties in Guatemala, especially members of the [UCN and the MLN], occasionally complain of threats and violence by guerrilla forces, police or military personnel, or members of opposing parties. In our experience, only party leaders or high-profile activists generally would be vulnerable to such harassment, and usually only in their home communities.”¹⁴¹

The court indicated that the report does not provide any insight into Ruano’s individual circumstances or any specific information regarding Los Gavilanes, the group that threatened Ruano.¹⁴² Moreover, the court hypothesized that Ruano may in fact have been a high-profile activist, given the fact that he drove a UCN vehicle and organized a UCN protest.¹⁴³ The court stated, “Given all that the report lacks, we think that if anything the report *corroborates* Ruano’s fear of persecution from his UCN membership.”¹⁴⁴ The Ninth Circuit recognized that the State Department country report was insufficient to discredit Ruano’s testimony.¹⁴⁵ The court even found language that supported Ruano’s contentions.¹⁴⁶

The Ninth Circuit also reversed the BIA’s decision in *Rios*.¹⁴⁷ Again, the only evidence of Guatemala’s changed conditions was a State Department country report on human rights practices in Guatemala.¹⁴⁸ The court found that the observations in the report did not rebut Rios’s well-founded fear of future persecution on an individualized basis.¹⁴⁹ The court stated:

140. *Ruano v. Ashcroft*, 301 F.3d 1155, 1161 (9th Cir. 2002).

141. *Id.* at 1161-62 (quoting a State Department country report placed in the record).

142. *Id.* at 1162.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Rios v. Ashcroft*, 287 F.3d 895, 903 (9th Cir. 2002).

148. *Id.* at 901.

149. *Id.* at 902.

The immigration judge merely speculated that guerrillas will not persecute petitioners if they return because a peace accord was signed and guerrillas have become members of a legal political party. Contrary to the [immigration judge]'s conclusion that conditions in Guatemala have changed, the record reflects that Ricardo [Rios's brother] was murdered by guerrillas in the same year that the peace accord was signed, and Rios declared that guerrillas continue to exist in Patin, where her husband Hector headed the military command. Moreover, the 1998 Country Report that was produced as evidence of changed country conditions by the BCIS reported that "lynchings, mob attacks and unsolved killings continued, and the Government frequently was unable to prosecute the perpetrators."¹⁵⁰

In *Krastev*, the Tenth Circuit reversed the decision of the BIA because no reasonable factfinder could have concluded that the conditions in Bulgaria had changed to the extent that petitioners no longer had a well-founded fear of future persecution.¹⁵¹ The BIA relied on a portion of a country report that indicated that there were no reports of politically motivated disappearances and that the government in Bulgaria generally respected citizens' rights.¹⁵² However, the Tenth Circuit noted that those two observations did not shed light on petitioners' particular circumstances.¹⁵³ Petitioners' claim did not rise out of persecution by the Bulgarian government, but from local officials.¹⁵⁴ The court further emphasized that the country reports for 1990-1994, the period during which petitioners claim they were persecuted, contain the same language about a lack of politically motivated disappearances.¹⁵⁵ The court held, "[a]s a result, this language provides no support for the proposition that a material change in conditions occurred between February 11, 1994, and the time the report was issued in April 1996."¹⁵⁶ In coming to its decision, the Tenth Cir-

150. *Id.*

151. *Krastev v. INS*, 292 F.3d 1268 (10th Cir. 2002).

152. *Id.* at 1276.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

cuit adopted language from a Ninth Circuit opinion requiring an individualized analysis to rebut the presumption of an applicant's well-founded fear of future persecution.¹⁵⁷ The Court quoted *Chand*: "the determination of whether or not a particular applicant's fear is rebutted by general country conditions information requires an individualized analysis that focuses on the specific harm suffered and the relationship to it of the particular information contained in the relevant country reports."¹⁵⁸

The Seventh Circuit in *Toptchev* did not overturn the decision of the lower level adjudicators, unlike the Ninth Circuit and the Tenth Circuit in the previously discussed opinions.¹⁵⁹ The Seventh Circuit upheld the decision of the immigration judge and the BIA and denied petitioners' asylum claim.¹⁶⁰ The Seventh Circuit held that petitioners were unsuccessful in establishing that they were likely to experience persecution upon their return to Bulgaria because of the length of time that they were away and because of Bulgaria's move toward democracy.¹⁶¹ The Seventh Circuit stated:

The [immigration judge]'s conclusion was based in significant part on the State Department's 1994 Profile of Asylum Claims and Country Conditions in Bulgaria, along with the petitioners' failure to present any evidence rebutting the State Department's assessment or otherwise suggesting that the "political landscape" in Bulgaria remained unchanged. As this court has noted repeatedly, the Board reasonably may rely upon the State Department's assessment of current country conditions as they relate to the likelihood of future persecution, given the Department's expertise in international affairs.¹⁶²

The court affirmed the decision of the immigration judge and the BIA, while acknowledging the deference that was given to the State Department country reports.¹⁶³ The court also acknowledged that the BIA was required to conduct an individualized analy-

157. *Id.* at 1277.

158. *Id.* (quoting *Chand v. INS*, 222 F.3d 1066, 1079 (9th Cir. 2000)).

159. *See Toptchev v. INS*, 295 F.3d 714 (7th Cir. 2002).

160. *Id.*

161. *Id.* at 722.

162. *Id.*

163. *Id.*

sis.¹⁶⁴ “The [BIA] was free to take administrative notice of [the country report] as evidence of improved conditions in the petitioner’s homeland, so long as the [BIA] did not neglect to undertake a particularized review of the petitioner’s case.”¹⁶⁵ However, the court found that the BIA did conduct an individualized analysis by making observations about the petitioners’ testimony in addition to utilizing the country report.¹⁶⁶

VII. SUGGESTIONS FOR INDIVIDUALIZED ANALYSIS

The two competing principles in asylum adjudication, protecting the persecuted and preventing abuse of the system, require an accurate credibility determination of the applicant to decide whether he or she is one who needs protection or one who should be prevented from manipulating the system to work in his or her favor.¹⁶⁷ Hence, in order to evaluate an asylum application, the factfinder must make a credibility determination.¹⁶⁸ Since it is unlikely that the factfinder has any personal connections or experience with the applicant’s country of origin, the easiest way to determine the truthfulness of the applicant is to require corroboration of the applicant’s testimony.¹⁶⁹ However, documented corroboration is not a requirement because of the impracticality of requiring an applicant who has suffered persecution and fled to the United States to obtain sufficient documentation.¹⁷⁰ Because of this impracticality, the immigration judge and the BIA have based their credibility determinations on the State Department country reports.¹⁷¹ However, the circuit courts have recognized the prob-

164. *Id.* at 723.

165. *Id.*

166. *Id.* The BIA took into consideration six observations made by the immigration judge when making its decision. *Id.* at 718. The six observations were that (1) petitioners were able to obtain graduate degrees, (2) petitioners were successfully employed in Bulgaria, (3) petitioners were never charged with any offense, (4) there was no evidence to support a claim of persecution on account of their religious beliefs, (5) their experiences with the police captain did not amount to persecution and they did not show that relocation to avoid contact with him was infeasible, and (6) petitioners were given permission to leave Bulgaria. *Id.*

167. *See* Martin & Schoenholtz, *supra* note 9, at 589.

168. *See* 8 C.F.R. § 208.13(b)(1)(i) (2003).

169. *See In re Mogharrabi*, 19 I. & N. Dec. 439, 439 (B.I.A. 1987).

170. *See id.*

171. *See supra* Part V.

lems this has caused and have required an individualized showing to rebut the presumption that the applicant has a well-founded fear of persecution.¹⁷² The State Department's country reports are insufficient to support an individualized analysis.¹⁷³ This Comment does not stand for the proposition that State Department country reports are useless and should never be consulted; it only addresses the reality that the immigration judge and the BIA need to require the BCIS to make an individualized analysis in addition to relying on the country reports to provide general information about the present composition of the country. This Comment also does not advocate for individualized field checking in every asylum case. Individualized field checking is impractical, and many times impossible, for the same reasons that it is impractical to require an applicant to obtain corroborating evidence.¹⁷⁴ However, there are other practical ways to improve the asylum system so that an asylum applicant is not denied based solely on a generalized analysis of his or her country of origin.

One way to make an individualized analysis is to rely on the traditional use of cross-examination. Once an applicant has given his or her testimony, allow the BCIS to cross-examine the applicant. The BCIS will be able to point out contradictions between the applicant's testimony and the application that he or she submitted. Although small contradictions are not enough, by themselves, to rebut an applicant's well-founded fear of future persecution, large contradictions, or small contradictions coupled with other information contrary to the applicant's testimony, may be enough.¹⁷⁵ The BCIS attorney will also be able to attack the applicant's testimonial qualities. Factfinders are required to make credibility determinations in all areas of the law based on the witness's ability to overcome the problems of narration, sincerity, memory, and perception. In addition, most asylum applicants have been regarded as admirably honest,¹⁷⁶ so the BCIS attorney

172. See *Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000).

173. See *supra* Part VI.

174. See *Martin*, *supra* note 10, at 1281 (stating that field checking is impractical and that it only makes sense where the information is reasonably accessible, such as in the case of a famous person).

175. See *In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987).

176. See *Martin*, *supra* note 10, at 1282 (stating that when he interviewed participants in the asylum process, specifically government decision-makers

should be able to effectively cross-examine the applicants to expose the few who are being dishonest.

Cross-examination on its own, however, will not deter all abuses of the asylum system. Applicants that come from countries experiencing economic hardship will still have an incentive to lie and cross-examination may not be able to disclose the real reason that the applicants are seeking asylum. In addition, most applicants come from countries where government officials and lawyers are distrusted,¹⁷⁷ so it may be difficult to get applicants to open up and answer questions during cross-examination. There are also problems that arise out of the language barriers that many applicants face. While it might be relatively easy to find a Spanish or Chinese interpreter, it may be impossible to find a translator for other more obscure languages and dialects.

Another suggestion for reform of the asylum system is to employ specialized adjudicators.¹⁷⁸ The system could train adjudicators to specialize by region or by country.¹⁷⁹ The adjudicators would have personal knowledge of the regions or countries in which they specialize and they would be able to establish connections within the region or country who could provide information in a case where the adjudicator was unable to make a credibility determination based on the adjudicator's own knowledge. The American asylum system could also have adjudicators concentrate on areas with large numbers of asylum applicants, such as Central America and the Caribbean.¹⁸⁰ The adjudicators' time would be better spent if they obtained detailed information about regions that produce large numbers of asylum seekers, rather than relying on general information prepared for every country.

Again, there are problems associated with specialized adjudicators. First, the system may not be able to bear the cost of training specialized adjudicators. Second, although the adjudicators would be able to establish intimate connections with the region in

and INS trial attorneys, they frequently made comments indicating that the asylum system is saved by the admirable honesty of the applicants).

177. *See id.* at 1286 (stating that because many asylum applicants come from countries where the population inherently distrusts government officials and lawyers, the applicants are hesitant to open up about highly sensitive events).

178. *See id.* at 1338.

179. *See id.* at 1341.

180. *See id.* at 1342.

which they specialize, they still may not be able to obtain individualized information about certain claims of an applicant. And third, adjudicators are supposed to make objective decisions, but if they are given specialized training about current country conditions they may be predisposed to decide a certain way.

Another suggestion that has been proposed in order to deter abuse of the asylum system is the principle of a safe third country.¹⁸¹ The idea behind the principle is that by requiring an asylum seeker to apply for asylum in the first safe haven that he or she encounters will prevent asylum "shopping."¹⁸² A broadening of that principle allows for an applicant to seek asylum in this prioritized order:

(1) The state where the applicant has a close family member with refugee status; (2) The state issuing a residence permit or entry visa, or if more than one, the state issuing the permit or visa with the longest validity or the latest expiration date; (3) If a transit visa was issued, the responsibility rests with either the destination state or the state where the application is lodged, depending on particular circumstances; (4) In cases of demonstrable illegal entry, the first entry state will usually be responsible unless an asylum application is made in another state where the applicant stayed for longer than six months; (5) In cases of legal entry, the state that waived the requirement for a visa or; (6) If none of the above criteria apply, the state where the application is lodged.¹⁸³

The third country principle may cut down on "asylum shopping," but it has other drawbacks. The system would impose greater costs on those countries that border countries with political unrest. Accordingly, the system would shelter those countries that were surrounded by developed, democratic states. In addition, while it may deter abuse, it does nothing to protect the asylum applicant once he or she has applied for asylum in the appropriate country.

In addition to the already suggested measures, there is another way to improve the asylum system in order to reflect a more individualized approach. The asylum adjudicators could use the

181. See Martin & Schoenholtz, *supra* note 9, at 606.

182. *Id.*

183. *Id.*

State Department country profiles as a way of corroborating the applicant's testimony in order to expedite the proceedings when an applicant can be found to be a per se refugee.¹⁸⁴ A per se refugee is one who originates from a country with such a high level of political unrest that any individual who migrates from that country will be able to show a well-founded fear of future persecution.¹⁸⁵ The country profiles would be used only to the advantage of the applicant and would be used only when specific information in the reports corroborates the applicant's testimony. This process would expedite the asylum proceedings for per se refugees and allow asylum adjudicators to spend more time processing asylum applicants who are not per se refugees, thus providing time for adjudicators to perform an individualized analysis.

While none of these suggestions for individualized analysis, on its own, will solve the problem of having to rely on generalized country reports to make a credibility determination, utilizing a combination of the suggestions will drastically improve the system. By using the safe third country principle, the number of asylum applicants to the United States will be reduced. In addition, using the country reports to corroborate the testimony of per se refugees will expedite the asylum proceedings for those applicants. Both of the aforementioned suggestions will allow more time for asylum adjudicators to focus on an individualized analysis for the rest of the applicants. The system will then be able to rely on cross-examination to flesh out inconsistencies in the applicant's testimony and make a credibility determination. The system will also have the advantage of specialized adjudicators who will be able to use their specialized knowledge to help make credibility determinations.

CONCLUSION

The American asylum system in its current capacity is not functioning to effectively protect victims of persecution abroad. America professes to open her doors to the tired, the poor and the hungry, but she has closed her doors to the battered, the tortured and the persecuted. An asylum applicant comes to this country because he or she is unable to return to his or her country of origin

184. See Martin, *supra* note 10, at 1358.

185. *Id.*

due to past persecution, which gives rise to a well-founded fear of future persecution.¹⁸⁶ In order to rebut the presumption of a well-founded fear of future persecution, the BCIS is required to present testimony that contradicts the applicant's testimony.¹⁸⁷ All of the circuits that regularly decide asylum cases have required an individualized analysis to rebut the presumption of a well-founded fear, and they have held that the State Department country reports are insufficient.¹⁸⁸ However, the immigration judges and the BIA continue to give deference to the country reports, making it harder for applicants to be eligible for asylum.¹⁸⁹ Once the immigration judge and the BIA have made a credibility determination, the circuit court reviews the decision under a substantial evidence standard and will only overturn the decision if no reasonable fact-finder could have come out the way that the immigration judge or the BIA did.¹⁹⁰ This gives significant weight to the decisions of the immigration judges and the BIA, and when the immigration judges and the BIA make decisions based solely on the generalized information compiled in a country report, the system fails.

The asylum system is burdened with the presence of two competing goals: the goal of protecting individuals who have a well-founded fear of future persecution and the goal of preventing abuse of the system. While abuse of the system is a justifiable concern, as demonstrated by looking at the Haitian migrants who have an incentive to manipulate the system, asylum adjudicators cannot lose sight of the goal of protecting individuals who do have a legitimate fear of future persecution.¹⁹¹ The asylum adjudicators have tried to strike a balance between the two goals by allowing the BCIS to use State Department country reports to rebut the presumption that the applicant has a well-founded fear of future persecution; however, this has caused many applicants who do have a well-founded fear of persecution to be deported to their countries of origin.¹⁹² Currently, the asylum system is concentrat-

186. 8 C.F.R. § 208.13(b)(1) (2003).

187. *Id.* § 208.13(b)(1)(i).

188. *See Chand v. INS*, 222 F.3d at 1066, 1079 (9th Cir. 2000); *Krastev v. INS*, 292 F.3d 1268, 1276-77 (10th Cir. 2002); *Toptchev v. INS*, 295 F.3d 714, 723 (7th Cir. 2002).

189. *See supra* Part III.

190. *See Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000).

191. *See Martin & Schoenholtz, supra* note 9, at 589.

192. *See supra* Part VI.

ing much of its energy on preventing abuse of the system, while forgetting the other principle goal of asylum: to protect the persecuted. Instead of overcompensating for abuse, the judiciary needs to recognize the history that shows that asylum applicants are generally honest, and adopt other principles to deter abuse rather than relying on country profiles.¹⁹³

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193. See *supra* Part VII.

