

stance abuse. That they also relied heavily on several articles published in the *American Journal of Psychiatry* indicates the value the court placed on the field of psychiatry.

The overall message from this case is that there remains a wide gap between the knowledge of mental health practitioners and the understanding of lay persons. Greater efforts should be made to educate other professionals, especially those in the legal system, so as to foster a better understanding and greater appreciation of the work of psychiatric expert witnesses.

Asylum Eligibility

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Need for Well-Founded Fear of Persecution to be Eligible for Asylum

In *Ouk v. Alberto Gonzalez*, 464 F.3d 108 (1st Cir. 2006), the U.S. Court of Appeals for the First Circuit reviewed the decisions of the immigration judge (IJ) and the Board of Immigration Appeals (BIA), both of whom denied the petitioner's request for asylum. The appeals court considered and described the conditions under which a person should be granted asylum based on a "well-founded fear."

Facts of the Case

Southy Ouk, a native of Cambodia, entered the United States as a nonimmigrant visitor on February 7, 2003. She was permitted to remain until August 6, 2003, after which time her presence was unauthorized. On February 6, 2004, she applied for political asylum and withholding of removal based on "her political opinion and membership in a particular social group" (*Ouk*, p 109). In Cambodia, she had been a member of the Sam Rainsy Party, an opposition party to the majority Cambodian People's Party.

At her initial hearing before the IJ on November 19, 2004, Ms. Ouk described how she and her husband were identified as members in the Sam Rainsy Party during a protest that took place in March 1997. She reported that police beat members of opposition parties at that protest. She suffered only minor

bruises "as a result of crowd movement." Ms. Ouk also testified that her husband was killed in July 1997 because of his political opposition to the Cambodian People's Party. In addition, she reported that other members of her family, including her father and brother, had been arrested and killed for their political opinions. Following her husband's death, Ms. Ouk hid herself in the city of Phnom Penh for fear of personal persecution at the hands of the Cambodian People's Party.

In addition to her testimony, Ms. Ouk also introduced documentary evidence, including two expert witnesses who assigned a diagnosis of posttraumatic stress disorder (PTSD).

The IJ denied Ms. Ouk's application for asylum, stating that although he found her testimony "generally to be credible," several factors mitigated her contention that she had reason to fear for her well-being based on her political affiliation: (1) although her husband had been persecuted based on political affiliation, Ms. Ouk herself had experienced no such persecution; (2) Ms. Ouk had requested and received a visa for travel to the U.S.; (3) Ms. Ouk's brother and sister, also members of the Sam Rainsy Party, continued to safely live in Cambodia; (4) the most recent Cambodian election saw the Sam Rainsy Party win 24 seats in the National Assembly, and the Cambodian Constitution provides for the peaceful change of government "through periodic elections on the basis of universal suffrage" (*Ouk*, p 110).

Ms. Ouk appealed the decision to the BIA, who affirmed the IJ's ruling in February 2006. The BIA cited the fact that Ms. Ouk herself had never been seriously harmed and the continued presence of her family members in Cambodia as undermining the reasonableness of her fear of future persecution.

In this appeal, Ms. Ouk argued that: (1) she did have a well-founded fear of persecution based on her political beliefs; (2) the IJ and BIA did not recognize her emotional harm in evaluating her claim; and (3) the IJ and BIA did not consider her mental illness in their rulings.

Ruling

The U.S. First Circuit Court of Appeals affirmed the decisions of the IJ and the BIA, finding that Ms. Ouk did not have a well-founded fear of persecution based on her political affiliation with the Sam Rainsy Party and thus was not eligible for political asylum.

Reasoning

The court first reviewed the statutory definition of refugee status, 8 U.S.C. § 1158(b)(1)(A) (2004), which is a prerequisite for asylum eligibility. As defined, an alien must show that she has a well-founded fear of persecution “on account of race, religion, nationality, membership in a particular social group or political opinion” (8 U.S.C. § 1101(a)(42)(A) (2004)). In such cases, the alien bears the burden of proof for establishing her refugee status, and the substantial-evidence standard is applied. As applied in this case, said standard dictates that the court should uphold the decisions of the IJ and BIA “unless any reasonable adjudicator would be compelled to conclude to the contrary” (8 U.S.C. § 1252(b)(4)(B) (2004)).

The court found that under this standard, Ms. Ouk did not have substantial evidence to support a well-founded fear of persecution. Factors considered in the finding included: (1) Ms. Ouk had never been physically harmed as a result of her political affiliation with the Sam Rainsy Party, aside from minor injuries sustained as a result of crowd movement; (2) she had, in fact, interacted with the government on several occasions with no adverse consequences, including when she was granted a visa to travel to the U.S.; (3) according to the 2003 State Department Country Report on Cambodia, the Sam Rainsy Party holds 20 percent of the seats in the Cambodian national assembly; and (4) two of Ms. Ouk’s siblings and her son continued to live in Cambodia without incident. In *Aguilar-Solis v. INS*, 168 F.3d 565, 573 (1st Cir. 1999), the First Circuit found that “the fact that close relatives continue to live peacefully in the alien’s homeland undercuts the alien’s claim that persecution awaits his return.”

The court disagreed with Ms. Ouk’s claim that the IJ and BIA did not recognize her emotional harm in evaluating her claim. It agreed with the assertion of the IJ that she failed to demonstrate any relationship between psychological symptoms, such as PTSD, and past persecution directed at her. However, it did cite *Makhoul v. Ashcroft*, 387 F.3d 75, 80 (1st Cir. 2004), in which the First Circuit found that “under the right set of circumstances, a finding of past persecution might rest on a showing of psychological

harm” (*Makhoul*, p 80). The court simply felt that these circumstances were not met in this case. While the PTSD diagnosis did testify to the genuine nature of Ms. Ouk’s fear of persecution, it did not establish the fear as well founded.

Discussion

In *Ouk*, the court held that not all genuine fears are well founded and thus may not satisfy the requirements for those seeking asylum. Despite forensic testimony attesting to Ms. Ouk’s PTSD diagnosis, the court held that the “IJ was warranted in finding that she had not shown that it was related to any persecution directed at her” (*Ouk*, p 111). This distinction is an important one to consider in the forensic evaluation of those seeking refugee status. While seekers of asylum can suffer PTSD (with its very real symptoms) from witnessing harm done to others, it may be the case that they do not, in the court’s view, have any reason to fear for their own safety. These patients would not satisfy the well-founded fear criterion and thus would not be eligible for refugee status.

The court, however, acknowledged that this distinction may sometimes be blurred. In its citation of *Makhoul v. Ashcroft*, it grants that past psychological harm, “under the right set of circumstances,” may constitute persecution. In cases such as these, it would then seem possible to seek asylum based on psychological symptoms clearly caused by traumatic events, even if no actual threat of personal harm occurred. This interpretation of the law is more consistent with the current understanding of the etiology of PTSD, which allows that people may suffer psychological harm who witness “events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others” (emphasis added) (DSM-IV-TR, American Psychiatric Association 2000, p 467).

The forensic evaluation of those seeking refugee status should therefore carefully consider whether the asylum seekers themselves were the object of a real threat of persecution. If not, the evaluating psychiatrist should comment on the relationship between the trauma and psychological harm (i.e., PTSD), even if no actual threat to self was suffered.