

## A Mentally Ill Alien's Challenge to Removal From the United States Under the Convention Against Torture

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### Deplorable Conditions in Mexican Mental Institutions Do Not Constitute Torture Under the Convention Against Torture, Without Evidence of Specific Intent to Inflict Harm on Patients

In *Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008), the United States Court of Appeals for the Ninth Circuit reviewed an order of the Board of Immigration Appeals (BIA) denying withholding of removal and relief under the Convention Against Torture (CAT) of a mentally ill Mexican citizen who was convicted of second degree robbery. The court found that the existence of deplorable conditions within Mexican mental institutions alone was not sufficient to merit relief under the CAT.

#### *Facts of the Case*

Gilbert Villegas, a Mexican citizen, was admitted into the United States as a permanent resident in June 1990. In 1996, Mr. Villegas, during a period of noncompliance with his medications for bipolar disorder, robbed a man with a screwdriver. He was charged with second-degree robbery, as defined by the California Penal Code. Mr. Villegas pled guilty and was sentenced to two years in prison. Thereafter, the government charged that he was removable from the United States as an alien convicted of an aggravated felony in accordance with 8 U.S.C. § 1227(a)(2)(A)(iii).

Mr. Villegas sought to prevent his removal but was unable to convince the government to exercise its prosecutorial discretion. He subsequently conceded removability but sought relief through withholding of removal and protection under the CAT. He claimed that if extradited to Mexico, he would be unable to afford his psychiatric medications, leading to deterioration of his mental condition, with the

likely result of his indefinite confinement in a Mexican mental institution under subhuman conditions.

The Immigration Judge (IJ) admitted evidence about the conditions in Mexican mental institutions, including expert testimony, the transcript of an ABC television program "20/20", and a National Public Radio program transcript, describing the deplorable conditions in those facilities. Ultimately, the IJ was not swayed by the evidence and concluded that Mr. Villegas had been convicted of "a 'particularly serious crime' that precluded withholding of removal" (*Villegas*, p 986). Regarding the request for protection under CAT, the IJ ruled that CAT relief requires "specific intent to inflict harm," and absent such intent, "indefinite confinement under subhuman conditions in a Mexican mental facility did not amount to torture" (*Villegas*, p 987). The BIA summarily affirmed the IJ's decision. The matter was then appealed to the Ninth Circuit.

#### *Ruling and Reasoning*

The Ninth Circuit Court of Appeals dismissed the petition for withholding of removal due to lack of jurisdiction and denied the petition for protection under the CAT, holding that the IJ "correctly construed 'torture' to require specific intent to inflict harm" (*Villegas*, p 985).

Regarding the claim for withholding of removal, the appellate court found that it lacked jurisdiction to review the IJ's decision. It noted that withholding of removal is not available if the attorney general determines that "the alien, having been convicted . . . of a particularly serious crime, is a danger to the community of the United States" (8 U.S.C. § 1231(b)(3)(B)(ii)). It found that such a determination is discretionary and therefore was not reviewable by the court.

Regarding the IJ's denial of CAT relief, Mr. Villegas made two arguments: first that the IJ should not have required a showing that Mexican officials had "specific intent" of harming mentally disabled people and should have included situations in which the officials' intentional actions had the foreseeable result of inflicting harm; and second that even if specific intent was the proper standard, his evidence was sufficient to support his claim for relief. Addressing these arguments, the Ninth Circuit began by acknowledging that federal regulations provide that the United States will not "expel, extradite, or otherwise effect the involuntary return of any person to a coun-

try in which there are substantial grounds for believing that the person would be in danger of being subjected to torture” (*Pub. L. No. 105-277, div. G, subdiv. B, title XXII, § 2242, 112 Stat. 2681-822 (1998)*).

In considering whether “specific intent” was required, the appellate court first reviewed the U.S. Code of Federal Regulations which defined torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity [8 C.F.R. § 1208.18(a)(1)].

The court also found that the regulations provided that “to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering” (8 C.F.R. § 1208.18(a)(5)). Further, it noted that the IJ relied on *In re J-E-*, 23 I. & N. Dec 291 (BIA 2002), a case in which specific intent was required for CAT relief for a Haitian petitioner who faced similar deplorable conditions if removed. Finally, reviewing other circuit court decisions, it found unanimously that “torture” under the CAT requires specific intent to inflict harm.

The Ninth Circuit, while recognizing the deplorable conditions of Mexican mental health facilities, found no evidence that Mexican officials created the conditions with the specific intent of inflicting harm on its mentally ill patients. It further noted that the Mexican government had granted access to human rights organizations and had taken various steps to improve its mental health system. It viewed this as evidence of a desire to improve the conditions and as contrary to the view that harm was specifically intended. Accordingly, the Ninth Circuit found that, although deplorable, the conditions did not “amount to torture within the meaning of the CAT” and relief was thus denied.

#### Discussion

Torture falls within *jus cogens* norms, or rights that cannot be derogated for any reasons regardless of circumstances. The definition of torture, however, as reflected in *Villegas v. Mukasey*, may be narrower than one may think at first blush.

In this case, the Ninth Circuit considered whether the involuntary removal of a mentally ill alien, who may be subjected to inhumane conditions within Mexican psychiatric facilities, amounted to acquiescing in torture, as prohibited by federal regulations implementing the United Nation’s Convention Against Torture. The critical question weighed by the court was whether “torture” requires the specific intent to cause harm or if mere foreseeability of harm (i.e., likely exposure to the deplorable conditions of foreign psychiatric facilities) triggers federal protection. It is clear from the court’s analysis that, while the horrendous environment in which some Mexican patients receive psychiatric treatment is undeniable, that fact alone does not necessarily amount to torture. The court found that the foreseeability of potential harm is not sufficient for a finding of torture in the absence of specific intent by Mexican officials to inflict the harm.

*Villegas v. Mukasey* brings to light an important question of morals and ethics: Does an inadequate mental health care system marred by human rights violations represent torture? The Ninth Circuit found that the subhuman conditions in Mexican psychiatric institutions were not created with the express intent of inflicting harm on patients, but instead are the result of negligence and ignorance regarding the nature of mental illness. Despite the court’s legal analysis regarding the definition of torture, the existence of such deplorable conditions resulting from negligence or ignorance should not be dismissed.

Ethically, as psychiatrists and physicians, our participation in activities that assist or promote torture is tantamount to complicity. The American Psychiatric Association (APA), in a joint resolution with the American Psychological Association, released its position statement (198506) condemning torture and declaring its support of the CAT in December 1985. In May 2006, the APA reiterated this position (200601) and further prohibited the participation of psychiatrists in activities involving the interrogation of detainees. It called for its members to have no involvement in such activities and required prompt reporting of any commission or planning of torture. It further stressed the importance of patient advocacy in circumstances in which psychiatrists provide medical care to individual detainees.

As forensic psychiatrists, our services may be sought to assist courts in immigration matters, in-

cluding those with national security repercussions. We must show special diligence when our recommendations may be used to subject an individual to torture or interrogation procedures. Such diligence and advocacy, however, must be conducted within the boundaries of the ethics-based objectivity required of forensic psychiatrists. While foreign government officials may not specifically intend to subject their mentally ill citizens to “deplorable conditions,” it is clear that such conditions exist in Mexican institutions, commonly referred to as “granjas” or “farms.” Whether through specific intent, negligence, or ignorance, such treatment of mentally ill patients represents egregious violations of human rights and has been condemned by our profession.

## Workers’ Compensation Claim for Mental Injuries Stemming From Work with Aggressive Patients

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### **A Nurse Is Entitled to Workers’ Compensation Benefits for Emotional Stress Related to Employment on a Special Needs Unit Treating a Mixed Population of Aggressive and Passive Patients**

In *Jane Doe v. South Carolina Department of Disabilities and Special Needs*, 660 S.E.2d 260 (S.C. 2008), the South Carolina Supreme Court reviewed a lower court’s affirmation of the denial of workers’ compensation benefits to a nurse claiming stress-related mental injuries. The nurse alleged that her injuries were secondary to extraordinary conditions of employment on a special needs unit that treated a mixed population of aggressive and passive patients. The court found that there was no substantial evidence to support the denial of workers’ compensation benefits in this case.

### *Facts of the Case*

In 1979, the claimant, “Jane Doe,” began employment as a licensed practical nurse for the South Carolina Department of Disabilities and Special Needs (Department). She provided basic patient care in a Department facility that housed patients on various units. In 1997, the Department began downsizing the facility, resulting in a patient population change on Ms. Doe’s unit. As higher functioning patients were moved to community homes, the remaining units were consolidated. Consequently, Ms. Doe’s unit, which previously treated a passive patient population, changed to treating a mixed group of passive and aggressive patients.

Thereafter, the unit experienced a dramatic increase in violence. Aggressive patients attacked passive patients and Ms. Doe was forced to intervene. Injuries to both staff and patients rose sharply, and the number of incidents on the unit increased from 11 in March 1997 to 128 in May 1997. Ms. Doe suffered numerous minor physical injuries, including having feces smeared in her face. She began to complain of depressive symptoms following the spring of 1997. Eventually, she received medication and electroconvulsive therapy for depression and was hospitalized for psychiatric care in 1998. A medical expert opined that her severe depression was caused by her work situation.

Ms. Doe filed for workers’ compensation benefits, alleging that she had suffered stress-related mental injury as a result of the change in work environment. Initially, the commissioner denied the claim; and on review, the appellate panel of the Workers’ Compensation Commission upheld the commissioner’s findings. However, the circuit court reversed the decision, holding that the commission’s findings were unsupported by substantial evidence. Thereafter, the court of appeals reversed the circuit court’s decision and reinstated the commission’s denial of benefits. The matter was appealed to the South Carolina Supreme Court.

### *Ruling and Reasoning*

The South Carolina Supreme Court reversed the court of appeals’ decision upholding the commission’s denial of benefits and remanded the matter to the commission to award disability benefits for Ms. Doe’s mental injury. The major question facing the court was whether there was substantial evidence to