

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
BUFFALO, NEW YORK

IN THE MATTER OF

IN REMOVAL PROCEEDINGS

\_\_\_\_\_

██████████

Case No: 0 ██████████

Respondent

\_\_\_\_\_

**CHARGES:** Section 212(a)(4)(A) of the Immigration and Nationality Act (INA), as amended, in that you are an alien who, in the opinion of the Attorney General at the time of application for admission, is likely at any time to become a public charge

**APPLICATIONS:** On Remand. Asylum under Section 208(a) of the Act; Withholding of Removal under Section 241(b)(3) of the Act; Withholding of Removal under the Convention Against Torture, pursuant to 8 C.F.R. § 1208.16(c).

**ON BEHALF OF RESPONDENT**

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**ON BEHALF OF THE GOVERNMENT**

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## DECISION AND ORDER OF THE IMMIGRATION JUDGE

### I. BACKGROUND

Respondent is a 22-year-old native and citizen of Pakistan. On May 14, 2001, he presented at Chicago O'Hare International Airport with a Pakistani passport issued to [REDACTED]. Questioning by agents at the airport revealed that the name on the passport was not his true name. Respondent was accompanied by an unrelated adult male who was placed separately in immigration proceedings and left via expedited removal. Immigration officials placed respondent into juvenile detention.

On October 12, 2001, respondent was released into the care of his maternal uncle, a United States citizen. His initial master calendar hearing before this Court, on February 4, 2002, was continued until November 13, 2002 so that a legal guardian could be named for the respondent. At the November 13<sup>th</sup> hearing, at which time the respondent admitted the allegations in the Notice to Appear, another continuance was granted so that respondent's attorney could complete the necessary paperwork for an asylum application.

Respondent through counsel submitted an I-589 application for asylum and withholding of removal on December 2, 2002, alleging that he faced persecution in his home country based on political opinion and membership in a social group.

At the merits hearing on May 25, 2004, respondent's counsel chose not to call respondent to testify in support of his application and instead relied solely on documentary evidence. This Court then denied respondent's asylum application in an oral decision on that date.

On appeal, the Second Circuit remanded for further analysis in light of more recent Circuit decisions, and permitted both parties to submit additional testimony and evidence to this Court so that respondent would have an opportunity to testify.

This Court now analyzes respondent's application in light of the new evidence with which it has been provided.

**i. Testimony of Respondent**

Respondent testified that he is the youngest child in his family and grew up in the Punjab province of Pakistan. He stated that he has three older sisters and one older brother, though his brother is missing and now presumed dead. His father died in Brooklyn before respondent left Pakistan; his mother passed away in June 2004. Respondent said that he used to attend the public high school in his town.

Respondent stated that in January of 2000, when he was thirteen, armed men from a local madressa, or private religious school, came to speak with his mother in an attempt to convince her to send respondent to the madressa and eventually become a jihadi, or fighter. He stated that his mother refused because her eldest son had been sent away to the madressa in 1993 and was never heard from again, and since the respondent's father was deceased respondent was the only remaining male in the family.

Respondent stated that the next month, in February, five to six armed men again came to the house and spoke to his mother. In his affidavit he stated that she was "convinced" at this time to send him, though in testimony he stated that she acquiesced due to threats that the men would kill respondent in front of her.

At the madressa, where respondent stated he lived for approximately nine months, he alleges that he received little food and would be slapped, hit, kicked, or hit with a club if he objected, or if he failed to pay attention or do what he was told. He stated that they spent the days

in prayer, reciting Quran, and listening to lectures against the “infidels.” Respondent said that they were constantly under armed guard, and that even during his half-day visit at home once a week an armed man would wait outside the house as an escort. He further stated that the lectures were “brainwashing” them to kill people in India to recover Kashmir and become martyrs.

He stated that he did not tell his mother or sisters what was occurring at the madressa because he did not want them to worry. He further said that he never sought medical treatment because of his treatment there, nor did he or his family complain to any authorities about the treatment.

Respondent alleges that after his eight or nine months in the madressa he was taken to a militant training camp run by Tehrik-e-Jihad in the mountains approximately one hour from his town. He stated that there they were told to exercise and train. At one point he refused to participate in the exercises and an individual respondent called the “Commander” began to yell at him. When respondent began to cry, the Commander slapped respondent, who fell down and began begging to go home.

Respondent stated that the Commander then beat him up and had his arms tied to an overhead pipe. He testified that the guards opened the pipe valve so cold water poured down on him. They would stop the water to ask if he would do what they told him to, and when he responded in the negative they turned the water back on. He stated he kept asking to go home and see his mother and refused to cooperate. Respondent alleges that they beat him with clubs on his back and the backs of his legs, and that they kicked him. He said that the treatment lasted approximately two hours until he thought he was going to die, at which point he agreed to cooperate. Respondent said he was let down from the pipe and forced to crawl back to his sleeping area.

Respondent alleges that this incident occurred in February.

He stated that approximately three weeks after the incident, he received word that an acquaintance from his town who was also at the camp had been killed after being sent to the “front line.” Respondent said that after hearing the news, he escaped during the night. He said that he took a blanket and wrapped himself in it, then crawled out of camp while the guards were clustered around a fire for warmth; he said he then jumped over the small wall surrounding the camp and ran home.

He stated that he never sought medical treatment for any injuries he sustained at the camp. He said that he had bruises from the beating but that he did not suffer any broken bones or permanent injuries.

Respondent testified that he hid in his mother’s house until she had him smuggled to the house of an acquaintance in Islamabad. He said he stayed in that house until arrangements were made to leave Pakistan for the United States, and that he did not know he was going to be sent to the United States until one or two days before the flight.

Respondent claimed he did not know the man who escorted him to the United States, but that he knew him only as a “doctor.” He stated that he was told to tell United States officials that he was in the country for a short visit to his uncle. The individual provided respondent with his fraudulent passport. Respondent testified that he was afraid of the individual and was afraid that he would be returned to Pakistan, so he agreed to lie to United States immigration authorities.

Respondent said his original intention was to stay in the United States for only a few months, but that after he was released into his uncle’s custody and heard from his mother he discovered that the men from Tehrik-e-Jihad had learned that respondent had left the country,

and that they had allegedly visited his mother's house and threatened to kill the respondent if he returned.

Respondent stated that he remains in touch with his sisters, though they have not had any contacts with Tehrik-e-Jihad regarding him.

He stated that he works at a convenience store and is attending a community college, with hopes of eventually going into International Business.

Respondent further stated that he has been having emotional difficulties for many years, and has been seeing a psychologist in the United States since February 2008. Initially respondent visited the psychologist once a week and now goes every two to three weeks. He stated that his condition worsened as the trial approached and that is why he sought treatment at that time.

Respondent stated he fears that if he is returned to Pakistan the men of Tehrik-e-Jihad would locate him and kill him, and that they would have a special interest in him because he escaped from their camp.

ii. Documentation – Letter from [REDACTED]

Respondent has submitted a letter dated May 21, 2008 from his psychologist, M [REDACTED] [REDACTED], from whom he has been receiving therapy approximately since February of this year. The letter relates a psychological diagnosis based on a diagnostic interview of unknown length between [REDACTED] and the respondent.

However, the letter also purports to identify respondent's past in Pakistan as the source of the respondent's psychological difficulties, and it does not provide the basis for some of its

conclusive statements. [REDACTED] did not testify before this Court and the Government did not receive an opportunity to pose questions to him in a cross-examination.

Counsel for respondent suggested that this Court accept the letter purely for evidence of respondent's current mental state. The suggestion is without merit. Even assuming, for the sake of argument, that the Court could overlook the other problems associated with admitting the letter into evidence, the respondent's current mental state has absolutely nothing to do with the asylum application except insofar as his problems may be caused by his fears of persecution. The psychologist, of course, has no personal knowledge of respondent's history or chances of persecution. The letter is simply an effort to have respondent testify through the mouth of a medical professional.

Consequently, this Court does not accept the letter into evidence.

## II. THE LAW & ANALYSIS

### A. Asylum

In an asylum adjudication, the applicant bears the burden to establish statutory eligibility, which requires a showing of past persecution or well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A); see also 8 C.F.R. § 208.13(b). If eligibility is established, asylum may be granted in the exercise of discretion. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

a. Credibility

In all applications for asylum, the Court must make a threshold determination of the alien's credibility. Matter of O-D-, 21 I. & N. Dec. 1079 (BIA 1998); Matter of Pula, 19 I. & N. Dec. 467 (BIA 1987). Credibility is determined by an examination of the "totality of the circumstances, and all relevant factors." INA § 208(b)(1)(B)(iii); Lin v. Mukasey, 534 F.3d 162 (2<sup>nd</sup> Cir. 2008). Such factors may include an applicant's or witness's demeanor, candor, responsiveness, internal consistency of statements, consistency between statements including any written statements, inaccuracies or falsehoods, and notable omissions. INA § 208(b)(1)(B)(iii).

An applicant's own testimony may be sufficient to meet his burden of proving his asylum claim if the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. Matter of Dass, INA § 208(b)(1)(B)(i), 124 (BIA 1989); 8 C.F.R. § 1208.13(a) (2005). In addition, an applicant may be given the "benefit of the doubt" if there is some ambiguity regarding an aspect of his asylum claim. Matter of Y-B-, 21 I. & N. Dec. 1136, 1139 (BIA 1998). In some cases, an applicant may be found to be credible even if he has trouble remembering specific facts. See, e.g., Matter of B-, 21 I. & N. Dec. 66, 70-71 (BIA 1995) (finding that an alien who has fled persecution may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception).

The use of fraudulent documents may not impact credibility if the applicant has reasons "fully consistent with the claim of asylum" such as "to escape persecution by facilitating travel." Matter of O-D-, 21 I. & N. Dec. 1079, 1083 (BIA 1998). In general, however, the use of fraudulent documents may lead to a general finding that the applicant is not credible. Id.; see also Borovikova v. U.S. Dept of Justice, 435 F.3d 151 (2<sup>nd</sup> Cir. 2006).



While minor and isolated discrepancies in the applicant's testimony need not be fatal to credibility, omission of events coupled with numerous inconsistencies may lead to a finding that the applicant is not credible, even if the omissions do not go to the heart of the applicant's claim. Lin, 534 F.3d at 167. In Lin, an omission in Lin's asylum application of an alleged 12-hour detainment, an omission from her father's letter of the purported bribe which ended the alleged detainment, and an omission in a friend's letter about the friend allegedly hiding from government persecution were sufficient for an adverse credibility finding under the totality of the circumstances. Id.

Ultimately, the credibility determination is based on whether the totality of the circumstances "could have reasonably convinced the immigration judge that [the applicant's] story of persecution was fabricated." Id. at 167. The Court must state precisely what factors it considered when making an adverse credibility finding and articulate why those factors lead it to believe the respondent is not credible. Balachova v. Mukasey, --- F.3d ---, 2008 WL 4865970 (2<sup>nd</sup> Cir. 2008).

Respondent used a fraudulent passport to gain entry to the United States. However, this may be of little weight under Matter of O-D-. There is no indication he had any other motive for procuring or using the passport other than leaving the country where he was allegedly at risk of persecution. Furthermore, he admitted it was not his passport as soon as he was questioned at Chicago O'Hare.

When questioned regarding his purpose in coming to the United States, respondent stated he wished to enter the US to visit his uncle for a few months. To an extent, that statement conflicts with his testimony in Court that he left to avoid being killed. Yet the existence of the

uncle was not fabricated, and respondent was ultimately released to his uncle's care. Further, respondent's explanation – that he initially left with the hopes that his alleged persecutors would stop looking for him and then he could return – is plausible.

His failure to mention at the airport interview that he feared returning to Pakistan can only have limited weight as an omission in this case, because the interviewer never directly asked him if he felt harm would come to him if he returned. Further, respondent may not have completely understood some of the questions being asked – at one point he was asked if his parents had ever been to the United States and he answered “No.” However, his father was a legal permanent resident who died in Brooklyn, New York. There is no logical reason why the respondent would have withheld this information from immigration authorities, so it is reasonable to give only moderate weight to anything respondent said in the airport interview.

Government has submitted a letter from respondent's original attorney, dated May 31, 2001, while respondent was still in immigration detention, stating that the respondent would seek voluntary departure. That does seem to indicate he did not fear returning to the country as he now claims. However, the letter suggests it was respondent's uncle – using a blanket authority letter from respondent's mother which was very broad in its grant of authority – who was the individual in primary contact with the attorney and acting for the respondent. This Court notes that at the time of the letter the respondent had only recently arrived in the United States and was still in detention, so it is difficult to determine whether respondent had received much opportunity to let his uncle and attorney know his circumstances.

It would be difficult to argue, based solely on these factors, that respondent's entire story must be fabricated.

Moreover, despite the seven year history of this case, respondent's claims have retained remarkable consistency, yet his testimony lacked the alternating precision and evasion which characterizes a memorized tale.

This Court finds that respondent's testimony appears credible.

**b. Timeliness**

Applications for asylum generally must be filed within one year of the applicant's initial entry into the United States. INA § 208(a)(2)(B). An exception may be granted where an applicant can demonstrate either changed or extraordinary circumstances which caused a delay in filing. INA § 208(a)(2)(D). Changed circumstances refer only to circumstances which materially affected the applicant's eligibility for asylum, such as changes in the applicant's home country or change in the applicant's own personal circumstances. 8 C.F.R. § 208.4(a)(4). Extraordinary circumstances includes only specific events or factors which directly relate to an applicant's failure to meet the one-year deadline, such as serious illness; legal disability; ineffective assistance of counsel; valid status as a lawful immigrant, non-immigrant, parolee, or person with Temporary Protected Status; a previously pending asylum application which was filed within the one-year deadline but which was rejected for correction; or the death or incapacity of a member of the applicant's immediate family or applicant's legal representative. 8 C.F.R. § 208.4(a)(5).

Respondent has three separate theories which excuse his failure to file within one year. The first is a claim of extraordinary circumstance based on the allegation that his previous attorney's assistance was ineffective. The second is that there were changed conditions within Pakistan. The third is that there were extraordinary circumstances arising from respondent's detainment and status as a minor. Each of these theories will be dealt with separately.

## **1. Ineffective Assistance**

For a valid ineffective assistance of counsel claim, a respondent must (1) file an affidavit “setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard”; (2) inform counsel of the allegations and allow him or her an opportunity to respond; and (3) file a complaint against counsel “with appropriate disciplinary authorities” or explain why he has not done so. 8 C.F.R. § 208.4(a)(5)(iii); see also Ivanishvili v. Dept. of Justice, 433 F.3d 332, 338 (2<sup>nd</sup> Cir. 2006).

Respondent stated he told his previous attorney that he feared to return to Pakistan as soon as she was retained. Because she did not begin preparing to file an asylum application until far beyond that date, respondent alleges ineffective assistance of counsel. However, respondent’s failure to file a complaint disallows any argument that ineffective assistance of counsel constituted an extraordinary circumstance leading to the delay.

## **2. Changed Conditions**

Respondent stated that his original intention was to return to Pakistan after a few months because he was the only male figure left in the family. According to respondent, however, in 2002 members of Tehrik-e-Jihad came to his mother’s house and threatened him with death if he should return to Pakistan. He further said that she told him other children in the village had been killed. Respondent argues that these constituted changed conditions, and that his fears regarding his past and likely future persecution were increased because of this information.

However, respondent testified that individuals from the camp were already looking for him prior to when he left Pakistan; indeed, he stated that men came to his mother's house looking for him shortly after he escaped from the camp.

The information related to later occurrences may have been new to respondent, but neither the quality nor the severity of the threatened harm was any different.

Consequently, respondent has failed to demonstrate that there were changed conditions sufficient to excuse an untimely filing.

### **3. Detainment, Status as Minor**

The regulation expressly mentions the situation of an unaccompanied minor as one which might involve extraordinary circumstances. However, this Court is "not required to excuse the respondent's tardy filing merely because the regulation includes unaccompanied minor status as a possible extraordinary circumstance." In re Y-C-, 23 I. & N. Dec. 286, 288 (BIA 2002). The key is whether a respondent, "through his or her own action or inaction," intentionally created the circumstances which led to his failure to meet the filing deadline. 8 C.F.R. § 208.4(a)(5). In addition, the respondent must not have unreasonably delayed filing after the extraordinary circumstances ended. Id.

Where an unaccompanied minor was held by the Service for the entire one-year period, and he filed his application within one year of his release, the Board held that the alien had shown extraordinary circumstances. In re Y-C-, supra.

In this case, the respondent was released approximately five months after his initial entry. His application was filed fourteen months from that time, which does not place him in the same footing as the applicant in In re Y-C-.

However, an additional factor is present in respondent's case, which is that he did not have a legal guardian appointed until after the one-year mark had passed. As this Court noted at the initial hearing in February 2002, the rights of children are of great concern, and we stressed to respondent's counsel that the Court desired a copy of a court order granting guardianship at the next hearing before proceeding.

By the next hearing on November 13<sup>th</sup>, the family court had not yet granted the order because respondent's birth certificate was misplaced and a new copy needed to arrive from Pakistan before the family court could proceed. At that time, this Court did take pleadings with respondent's maternal uncle – who was to be appointed as legal guardian, and who had papers from respondent's mother to that effect – present in the courtroom.

At the merits hearing on December 2<sup>nd</sup>, once respondent's uncle had been appointed legal guardian, the respondent submitted an application for asylum. Consequently, after the respondent received a legal guardian he filed his application for asylum within one month.

As the Court's concern at the February 2<sup>nd</sup> hearing suggested, it would have been improper for the Court to accept any pleadings or applications prior to receiving assurances that the minor's rights were appropriately protected through a legal guardian. Respondent's lack of legal guardianship constituted an extraordinary circumstance, particularly since the Court would not have accepted an I-589 filed without such protection for his interests.

In addition, according to testimony the respondent did not know to file for asylum until after communicating his experiences to his uncle, at which point they decided to pursue an asylum claim rather than voluntary departure as respondent's attorney had suggested. This indicates that the respondent was not capable of pursuing his own legal defense with only the

assistance of an attorney, and if this Court had permitted him to go forward without a legal guardian the respondent's interests may have been prejudiced.

Finally, because the respondent filed his application less than one month after the extraordinary condition was removed, this Court finds that there was no unreasonable delay in his filing.

Respondent's late filing is not excused either by the alleged incompetence of his previous attorney or by the additional threats made against respondent after his departure from Pakistan.

However, respondent's status as an unaccompanied minor who did not have an appointed legal guardian constituted an extraordinary circumstance related to his ability to file a timely asylum application. He filed within a reasonable time after the extraordinary circumstance had ended. Therefore his application is not time-barred.

**c. Statutory Eligibility**

In an asylum adjudication, the applicant bears the burden to establish statutory eligibility, which requires that the applicant comply with all proper procedures and demonstrate he qualifies as a "refugee." INA § 208(b)(1)(A). If eligibility is established, asylum may be granted in the exercise of discretion. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

To demonstrate that an applicant is a "refugee," he must demonstrate a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). Credible testimony may be sufficient to prove subjective fears. Id.; see also Abankhwah v. INS, 185 F.3d 18, 22 (2<sup>nd</sup> Cir. 1999). A finding that an applicant has a subjective fear also "may be based on the applicant's reaction to events that



impinge on him personally.” Melendez v. U.S. Dept. of Justice, 926 F.2d 211, 215 (2<sup>nd</sup> Cir.1991).

In addition to showing a subjective fear, an applicant must demonstrate that his fear is objectively reasonable – he must present credible, specific and detailed evidence that a reasonable person in his position would fear persecution. Id. See also Abankwah, 185 F.3d at 22. An applicant may show objective reasonableness by providing evidence of past persecution on account of the protected ground, which raises a presumption that the applicant has a well-founded fear. 8 C.F.R. § 1208.13(b)(1). An applicant may also meet this burden by demonstrating that he has a belief or characteristic which the persecutor would hope to overcome or punish, that the persecutor is or could easily become aware that the applicant has that characteristic, and that the persecutor has both the capability and the inclination to punish the applicant. Matter of Acosta, 119 I & N Dec. 211, 226 (BIA 1985).

If the Court determines that an applicant should provide evidence to corroborate otherwise credible testimony, then an applicant must provide that evidence unless he does not have it and cannot reasonably obtain it. INA § 208(b)(1)(B)(ii); § 240(c)(4)(B). Failure to provide such evidence may cause an applicant to fail to meet his burden of proof. Id.; see also Diallo v. INS, 232 F.3d 279 (2<sup>nd</sup> Cir. 2000). To find that an applicant has failed to meet his burden, there must be “substantial evidence” in the record that the corroborating evidence was reasonably available to the petitioner. Kyaw Zwar Tun v. INS, 445 F.3d 554 (2<sup>nd</sup> Cir. 2006); Qui v. Ashcroft, 329 F.3d 140, 153 (2<sup>nd</sup> Cir. 2003).

Respondent seeks asylum based on persecution due to his political opinion and membership in a particular social group. He alleges past persecution based on his political



opinion and his identity as a member of a group of young Muslim males who do not agree with the terrorist tactics of jihadi; because this group appears to be defined primarily by its members' shared political opinion of opposition to jihadi terrorism, this Court will instead analyze respondent's claims in light of the ground of political opinion. He also alleges that he faces likely future persecution based on membership in a particular social group of individuals who have escaped from jihadi camps. For purposes of analytical clarity, and to better focus on the stipulations from the Circuit, this Court will first deal with the issue of respondent's alleged past persecution.

To succeed in his claim based on past persecution, respondent must demonstrate both that the conduct described was on account of a protected ground and that the mistreatment alleged was severe enough to constitute persecution.

### **1. Whether Conduct Alleged Was on Account of Political Opinion**

For persecution to be on account of a political opinion, an individual must demonstrate that he actually holds a political opinion. INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992). Further, an applicant must demonstrate that the persecution was in some way precipitated by that political opinion. Id.; see also Osoorio v INS, 18 F.3d 1017, 1032 (2<sup>nd</sup> 1994).

The Supreme Court has held that threats to recalcitrant conscripts by a guerrilla group made solely out of a desire to increase their ranks are not "on account of" an imputed political opinion based on an applicant's apolitical decision to not fight, regardless of the guerrilla group's ultimate political purpose or motives. INS v. Elias-Zacarias, supra. In that case, however, the Supreme Court noted that the alien said that he refused to join the guerrillas "because he was

afraid that the government would retaliate against him and his family”. Id. at 482. The Court specifically noted that the alien had not expressed any political opinion or showed that his actions in refusing to fight had a political motive. Id. at 483.

Similarly, in Matter of R-O-, the BIA found that a guerrilla supporter who later ceased involvement and sought to avoid recruitment did not establish persecution “on account of” political opinion, because he stated his new opposition to the guerrilla group was “because he worried about being detected by the Government.” Matter of R-O-, 20 I. & N. Dec. 455, 456 (BIA 1992). Again, the alien had not demonstrated he opposed recruitment by the group out of any political opinion of his own.

Consequently, the findings in both cases are not completely on all fours with the case presently before this Court, in which the respondent stated his refusal to participate was due to his disagreement with the Tehrik-e-Jihad’s use of terrorism to gain reunification with Kashmir rather than any fear of the fighting itself. This Court must therefore determine, based on the specific facts in the record, whether this respondent’s objection to the use of terrorism constituted a political opinion and whether he was persecuted “on account of” that opinion.

The determination must be made based on whether “the persecutor’s motive to persecute arises from the applicant’s political belief.” Zhang v. Gonzales, 426 F.3d 540, 545 (2<sup>nd</sup> Cir. 2006) (citing Elias-Zacarias, supra, at 483). A victim of persecution “must provide direct or circumstantial evidence of the persecutor’s motive,” including the political context of the conflict between the persecutor and the victim. Osorio v. INS, 189 F.3d at 1025 (citing Elias-Zacarias, supra, at 483). In Osorio, the Second Circuit held that the government’s opposition to unions – for which the alien was an organizer – was at least in part politically motivated because the unions constituted a threat to the government’s authority. Id. at 1029. The Second Circuit

specifically dismissed the BIA's finding that the "dispute [...] was economic and not political," stating that the BIA should have considered "the political context of the dispute." Id.

Moreover, an applicant's political opinion need not be the initial cause of the dispute so long as the later revelation of the opinion caused further harm or danger to the applicant. Where a kidnapping victim who was sought for her computer skills refused to cooperate with the kidnappers because she disagreed with the use of murder to further political ends, the Second Circuit held that she had a well-founded fear persecution on account of political opinion, even though the original kidnapping was not politically motivated. Delgado v. Mukasey, 508 F.3d 702 (2<sup>nd</sup> Cir. 2007).

The Second Circuit has explicitly held that an individual may be eligible for asylum based on political opinion if he is fleeing punishment for refusing to join a "military force condemned by the international community." Islami v. Gonzales, 412 F.3d 391, 396 (2<sup>nd</sup> Cir. 2005) (adopting language from Vujisic v. INS, 224 F.3d 578, 581 (7<sup>th</sup> Cir. 2000)) (overruled in part on other grounds by Shi Liang Lin v. US Dept of Justice, 494 F.3d 296 (2<sup>nd</sup> Cir. 2007)). The individual must be able to show that he had a conscientious objection to serving in the military. Id. (citing Mekhoukh v. Ashcroft, 358 F.3d 118, 126 (1<sup>st</sup> Cir. 2004)). Islami involved the case of a conscription-aged male who fled Yugoslavia because he feared he would be ordered to participate in unlawful campaigns against ethnic Albanians. Id. at 391.

Delgado and Islami both suggest that opposition to terrorist tactics or use of murder as a political tool may constitute a political opinion. Respondent's use of the term "brainwashing" to describe the lectures in which they were taught to kill non-Muslims in Kashmir and his repeated

statements that terrorist activities are against his beliefs suggests he holds such a political opinion.

Further, respondent made the individuals in the jihadi camp aware of his opinion; immediately prior to the February incident with the pipe, the respondent told the Commander he did not want to train because of his beliefs.

Even if he had not made them aware of why he did not want to participate, however, the persecution would likely have been “on account of” political opinion. In Elias-Zacarias, the alien’s avoidance of forced conscription was not due to any political opinion he held against the guerrillas or against the tactics they employ; rather, he simply feared for his life. Any harm he faced due to the refusal could not, as a matter of definition, be “on account of” a political opinion he did not possess, and the guerrilla’s political goals were irrelevant to that fundamental fact.

In respondent’s case, however, his political opinion was the reason for his refusal. Consequently, under Osorio and Delgado we have to consider the political context of the persecution. If the persecutor’s goal was ultimately political, and the victim’s opposition to the persecutor was based on a political opinion, and the persecution was based on that opposition, then the persecution was “on account of” political opinion even if the persecutor did not know the precise reasons for the opposition.

Further, though the holding in Islami specifically referred to individuals who refuse to comply with their country’s mandatory conscription laws, the case is easily analogized to the one before this Court. Respondent attempted to avoid his conscription into a para-military organization which engages in terrorist activities, based on his beliefs that the group’s terrorist tactics were abhorrent. Consequently, any harm he suffered or may suffer as a result of that refusal to cooperate constitutes persecution on account of political opinion.

That respondent was beaten during periods when he refused to cooperate, but did not relate that he was ever beaten during periods when he was cooperative, demonstrates that the actions taken against him were not randomly administered or related to some other factor.

Deliberate harm caused to respondent after his refusal to sanction or participate in terrorist activities was “on account of” his political opinion.

## **2. Whether Conduct Alleged Rose to Level of Persecution**

The purpose of persecution is to “punish [an individual] for possessing a belief or characteristic a persecutor seeks to overcome.” Matter of Acosta, 19 I. & N. Dec at 223).

“Persecution” has generally been interpreted to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. See Matter of Acosta, 19 I. & N. Dec at 222. It may also include “non-life[-]threatening violence and physical abuse,” Chen v. INS, 359 F.3d 121, 128 (2<sup>nd</sup> Cir. 2004), or non-physical harm such as “the deliberate imposition of a substantial economic disadvantage.” Guan Shan Liao v. US Dept of Justice, 293 F.3d 61, 67 (2<sup>nd</sup> Cir. 2002). In contrast, it does not include “harassment”, or activities done simply “to vex, trouble, or annoy continually or chronically.” Ivanishvili v. US Dept of Justice, 433 F.3d 332, 341 (2<sup>nd</sup> Cir. 2006) (citing Webster’s 3d New Int’l Dictionary 1031 (1981)). The difference between harassment and persecution “is necessarily one of degree.” Id.

When determining if an applicant suffered persecution, all of the events must be considered cumulatively rather than in isolation. Poradisova v. Gonzales, 420 F.3d 70-79-81 (2<sup>nd</sup>

Cir. 2005). However, a single incident of harm may constitute persecution if it is sufficiently severe. See e.g., Lumaj v. Gonzales, 462 F.3d 574, 577 (6th Cir. 2006).

Respondent does not allege that the forced conscription itself constituted persecution, but rather that the beatings and other physical mistreatment he suffered after his refusals to participate constituted persecution.

The most significant incident was one in which respondent was tied to a pipe above his head, had cold water poured down on him from the open pipe, and was kicked and beaten across his back and legs with a club for approximately two hours, while the guards repeatedly asked him if he would cooperate in the training. He stated they would turn off the water to ask the question, and they would turn it back on when he continued to refuse. When he finally agreed to cooperate, the beating stopped. Respondent testified that at the time he feared he was going to die. He did not suffer any broken bones, but he stated that he still had painful bruising several weeks later.

The physical harm that the guards inflicted on the respondent – who at the time was fourteen years old – was directly linked to his statements that he would not participate. From the testimony, the beating does not sound as if it was purely an effort to punish some slight or the result of rage or anger; rather, it appears to have been systematically designed to overcome the respondent's beliefs.

Further, respondent's belief that he was likely to die aside, the guard's decision to repeatedly douse him under cold water in February could have resulted in respondent's death. Due to the severity and duration of the beating at the jihadi camp, it alone could constitute past persecution.

Additionally, the beating was not the only event which respondent reportedly experienced. He further testified that at both the madrassa and the camp he was slapped, kicked, or hit with clubs if he expressed resistance to their teachings or the training.

Consequently, respondent has demonstrated that he suffered past persecution.

In the event that a respondent demonstrates past persecution, the Government then has the burden of demonstrating either that conditions in the country have changed such that respondent no longer needs to fear persecution or that respondent can reasonably relocate elsewhere in his country of origin. In the case of this particular respondent, Government has not directly addressed the issue, preferring to rest chiefly on analogizing INS v. Elias-Zacarias. This Court will nevertheless analyze the issue based on the record before it.

Government submitted the International Religious Freedom Report on Pakistan for 2007 and the Country Reports on Human Rights Practices on Pakistan for 2007. The government during argument made much of statements in the Country Reports on Human Rights Practices that “the vast majority” of madrassas treat students well in an effort to undermine respondent’s credibility, but the government did not comment on the fact that only five paragraphs later the State Department detailed religious militants’ forced recruitments of child soldiers. This suggests that these groups are still present and active in the country.

In addition, while the government did ban a number of religious extremist and terrorist groups, the Country Report on Human Rights Practices states that many of the groups simply changed their names and continued operating. Both the International Religious Freedom Report for 2007 and the Report for 2008 – of which the Court is taking judicial notice – indicate that



there are a variety of religious extremist groups throughout the country which engage in kidnapping and open murder.

The Government has not met its burden of showing changed country conditions or that respondent can reasonably relocate within Pakistan.

Moreover, the submitted documents indicate that the government of Pakistan would be unable to prevent the respondent from taking harm at the hands of Tehrik-e-Jihad members. The Country Reports mention an incident in March 2007 where officials at a high school resisted militants' efforts to recruit students and police forces arrived; the militants later kidnapped the school's principal and attacked the police. The International Religious Freedom Report for 2008 lists four instances where militant groups attacked individuals in broad daylight in the past year for perceived slights to Islam; presumably their ability to attack or kidnap individuals is not lessened when their motive is political or retaliatory rather than religious. The Pakistani government appears unable to control the religious extremist groups.

Consequently, this Court finds that the respondent has a well-founded fear based on past persecution, and that the government of Pakistan would be unable to prevent any future persecution.

**d. Discretion**

An alien who establishes statutory eligibility for asylum still bears the burden of demonstrating that he merits a grant of asylum as a matter of discretion. See INA § 208(b)(1); Cardoza-Fonseca, 480 U.S. 421. In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered. Matter of Pula, 19 I. & N.



Dec. at 473. Humanitarian factors, such as age, health, or family ties, should be considered in the exercise of discretion. In re H-, 21 I. & N. Dec. 337 (BIA 1996) (citing Matter of Pula, 19 I. & N. Dec. 467). The danger of persecution should outweigh all but the most egregious adverse factors. Matter of Pula, 19 I. & N. Dec. at 474.

Respondent used a fraudulent passport to enter the United States, and he testified that before arriving he intended to identify himself by the name on the passport. That is the sole stain on his record before us.

While this Court looks very seriously on the knowing use of a fraudulent document and respondent's original intention to lie to United States immigration officials, by itself that single adverse factor is not enough to overcome the standard articulated in Matter of Pula.

Therefore this Court holds that respondent merits a favourable exercise of discretion.

### III. CONCLUSION

Respondent's asylum application is not time-barred due to the extraordinary circumstance of being an unaccompanied minor without legal guardianship.

In addition, respondent is statutorily eligible for asylum and merits a favorable exercise of discretion.

Because respondent is eligible for asylum, this Court does not need to consider his claims for withholding or withholding of removal under the Convention Against Torture.

### ORDER

IT IS HEREBY ORDERED that respondent's application for asylum is GRANTED.

IT IS FURTHER ORDERED that respondent's applications for withholding, and withholding of removal under the Convention Against Torture, are PRETERMITTED.

**DONE and ORDERED** this 17th day of November, 2008 at Buffalo, New York.



Philip J. Montante, Jr.  
U.S. Immigration Judge