San Diego Law Review

Volume 29 | Issue 4 Article 3

11-1-1992

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Political Asylum in the Ninth Circuit and the Case of *Elias-Zacarias*

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During the height of the Central American civil wars of the 1980s, the Ninth Circuit Court of Appeals established liberal precedent for granting asylum under the Immigration and Nationality Act to deportable aliens who had been threatened for resisting government or guerilla service in their native countries because of their political opinions (including neutrality), whether expressed, implied, or imputed to them by those who meant them harm. However, in INS v. Elias-Zacarias, *the Supreme Court reversed the Ninth Circuit and stated that an asylum applicant's political opinion may not be imputed to him by the actions of his alleged persecutors. In view of the Supreme Court's decision, and the Ninth Circuit's ambiguous reaction to it in its recent case law, the viability of the doctrine of implied and imputed political opinion in asylum cases remains problematic in our increasingly violent, Balkanized world.*

I. INTRODUCTION

In *INS v. Elias-Zacarias*,[1] the United States Supreme Court held that a Guatemalan guerrilla organization's attempt to coerce a person into its military services does not necessarily constitute "persecution on account of . . . political opinion" under section 101(a)(42) of the Immigration and Nationality Act (INA).[2] In so ruling, the Supreme Court reversed, or at least retarded, the recent trend in Ninth

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1. 112 S. Ct. 812 (1992).

2. *See* Immigration and Nationality Act (INA) § 101, 8 U.S.C. § 1101 (a)(42) (1988).

Circuit case law, begun in *Bolanos-Hernandez v. INS*,[3] to grant asylum to deportable aliens who have been threatened for resisting guerrilla service on account of their political opinions (including neutrality), whether expressed or implied.

The following is a discussion of the immigration laws on asylum, their application by the Ninth Circuit in cases of imputed political opinion and coercive recruitment, and the impact of the Supreme Court's decision in *Elias-Zacarias*. This discussion is not an attempt to foretell with certainty the future of asylum adjudications. Rather, it is an attempt to inspect the road already travelled and to signal possible routes ahead in the area of asylum.

II. The General Law of Asylum

A. Statutory and Regulatory Scheme

Section 208(a) of the INA provides that an "alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A)."[4] Section 101(a)(42)(A) of the INA defines "refugee" as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[5]

Pursuant to the Code of Federal Regulations, "Immigration Judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served notice of referral to exclusion proceedings under part 236 of this chapter, or served an order to show cause [and thusly placed in deportation proceedings] under part 242 of this chapter . . . ."[6] Immigration judges have therefore been delegated the Attorney General's authority in section 208(a) of the INA to adjudicate alien's asylum applications. "The burden of proof is on the applicant for asylum to establish that he is a refugee as defined in section 101(a)(42) of the Act."[7]

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3. 767 F.2d 1277 (9th Cir. 1984).
4. INA § 208(a), 8 U.S.C. § 1158(a) (1988).
5. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988). This provision was added to the INA by § 201(a) of the Refugee Relief Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).
6. 8 C.F.R. § 208.2(b) (1992).
7. 8 C.F.R. § 208.13(a) (1992).

B. Case Law Construction of "A Well-Founded Fear of Persecution"

In *INS v. Cardoza-Fonseca*,[8] the Supreme Court found that the definition of "refugee" in section 101(a)(42)(A) of the INA is derived from Chapter I, Article I, of the 1951 United Nations Convention Relating to the Status of Refugees.[9] The Convention states:

> the term "refugee" shall apply to any person who: . . . [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to, owing to such fear, is unwilling to avail himself of the protection of that country . . . .[10]

The Supreme Court found that "[t]he standard [of a well-founded fear] as it has been consistently understood by those who drafted it, as well as those drafting the documents that adopted it, certainly does not require an alien to show that it is more likely than not that he will be persecuted in order to be classified as a 'refugee.' "[11] "There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening."[12] Thus the Court grounded proof of an alien's refugee status less on an exclusively objective evaluation of his fear of prosecution and more on his subjective mental state.[13]

In *Cardoza-Fonseca*, the Court upheld a Ninth Circuit decision defining a "well-founded fear" as one that contained both objective

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8. 480 U.S. 421 (1987).

9. *Id.* at 437. The Court noted that "[a]lthough the United States has never been party to the 1951 Convention, it is a party to the Protocol [*i.e.*, the United Nations Protocol Relating to the Status of Refugees], which incorporates the Convention's definition in relevant part. *See* 19 U.S.T. 6225, T.I.A.S. No. 6577 (1968)." *Id.* at 438 n.21.

10. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

11. *Cardoza-Fonseca*, 480 U.S. at 438. By contrast, in INS v. Stevic, 467 U.S. 407 (1984), the Court pointed out that "in enacting the 1980 [Refugee] Act Congress did not amend the standard of eligibility for relief under § 243(h)." 480 U.S. at 430. The INA states that "[t]he Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1992). The Supreme Court in *Stevic* held that the requirement that "an applicant for withholding of deportation [under § 243(h)] to demonstrate a 'clear probability of persecution' upon deportation remained in force." *Cardoza-Fonseca*, 480 U.S. at 430.

12. *Cardoza-Fonseca*, 480 U.S. at 440.

13. *Id.* at 430.

and subjective components.[14] The Ninth Circuit has expounded on these components as follows: "A 'well-founded fear' contains both a subjective component, requiring the fear to be genuine, and an objective component, which 'requires a showing, by credible, direct, and specific evidence in the record, of facts that would support a *reasonable* fear that the petitioner faces persecution.' "[15]

Like the Court in *Cardoza-Fonseca*, the Ninth Circuit viewed the phrase "a well-founded fear of persecution" in light of United Nations pronouncements on the subject of asylum.[16] Like the Ninth Circuit, the United Nations High Commissioner for Refugees cautioned asylum adjudicators that "[t]he term 'well-founded fear' contains a subjective and an objective element, and you must consider both in determining refugee status."[17]

III. Ninth Circuit Views of "Persecution on Account of . . . Political Opinion"

Just as the Supreme Court and Ninth Circuit broadened the borders of asylum with their definition of "a well-founded fear," so the court of appeals expanded the reach of refugee status with its interpretation of the phrase "persecution on account of . . . political opinion" contained in section 101(a)(42)(A) of the INA.

The court of appeals reached and grasped hold of the case of Expectation Bolanos-Hernandez, a deportable Salvadoran who both an immigration judge and the United States Board of Immigration Appeals (BIA) concluded was not entitled to political asylum even though he had been threatened by guerilla forces in his native country when he refused to join their numbers.[18] Although Bolanos had indicated " 'his desire to remain neutral and not be affiliated with any [Salvadoran] political group' . . . the Immigration Judge, however, determined that Bolanos had not shown that any danger he

14. *See* Cuadras v. INS, 910 F.2d 567, 570 (9th Cir. 1990) (citing Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452-53 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987)).

15. Rebollo-Jovel v. INS, 794 F.2d 441, 443 (9th Cir. 1986) (quoting Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986) (emphasis added)). In *In re Mogharrabi*, the Board of Immigration Appeals—which under 8 C.F.R. § 3.1(b) (1992) reviews the decisions of immigration judges before the Circuit Courts of Appeals—ruled "that an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." 19 I. & N. Dec. 439, 445 (BIA 1987). In *Cuadras v. INS*, the Ninth Circuit determined that the "*Mogharrabi* 'reasonable person' analysis is not inconsistent with the two-pronged test created by *Cardoza-Fonseca* . . . in that it includes both the subjective and objective inquiries required by *Cardoza-Fonseca*." 910 F.2d at 570.

16. *See* Barraza Rivera v. INS, 913 F.2d 1443, 1451 n.10 (9th Cir. 1990) (quoting Hernandez-Ortiz v. INS, 777 F.2d 509, 514 n.3 (9th Cir. 1985)); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1280 n.2 (9th Cir. 1984).

17. United Nations High Commissioner on Refugees, Determination of Refugee Status 6 (1989).

18. Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984).

might be subject to would be because of his political opinion."[19]

The court of appeals disagreed:

> Choosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction. Just as a nation's decision to remain neutral is a political one, *see, e.g.*, Neutrality Act of 1939, 22 U.S.C. §§ 441-465 (1982), so is an individual's. When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice *is* a political choice. A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980--to provide protection to all victims of persecution regardless of ideology.[20]

The court of appeals also rejected the legal relevancy of the government's suggestion that Bolanos may have chosen neutrality for nonpolitical reasons:

> The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.[21]

Accordingly, the Ninth Circuit decided that Bolanos did possess a well-founded fear of persecution on account of political opinion. It therefore reversed the BIA and granted the Salvadoran asylum in the United States.[22]

The author of the Ninth Circuit's decision in *Bolanos-Hernandez* was Judge Stephen Reinhardt. In the subsequent case of *Hernandez-Ortiz v. INS*,[23] Judge Reinhardt continued to advance the argument that neutrality—or even opposition by forbearance, whether actual or merely perceived—constitutes a political opinion cognizable under the INA.

Hernandez-Ortiz was a political opponent of the Salvadoran regime whose noncombatant brother and sister-in-law were killed by Salvadoran security forces, whose grandparents were robbed by Salvadoran soldiers, and whose brother-in-law's wife was abducted and harassed by Salvadoran national guardsmen.[24] In 1983, Hernandez-

19. *Id.* at 1280.
20. *Id.* at 1286.
21. *Id.* at 1287.
22. *Id.* at 1288. The court of appeals also concluded that there was "a clear probability that Bolanos would be subject to political persecution if he returned to El Salvador." *Id.* The court therefore reversed the BIA and granted Bolanos a withholding of his deportation pursuant to § 243(h) of the INA. *Id.*
23. 777 F.2d 509 (9th Cir. 1985).
24. *Id.* at 512.

Ortiz requested the BIA to reopen her deportation proceedings and grant her political asylum.[25] The BIA refused to do so, as summarized by the Ninth Circuit:

> [T]he Board concluded that she failed to demonstrate that any threat to her life or freedom was related to her political opinion. The Board based this conclusion on the fact that Hernandez-Ortiz did not allege that she or any of her relatives was a member of any political groups or 'had ever participated in the current conflict in El Salvador.'[26]

Writing for a unanimous three-person panel of the court of appeals, however, Judge Reinhardt disagreed:

> A government does not under ordinary circumstances engage in political persecution of those who share its ideology, only of those whose views or philosophies differ, at least in the government's perception. It is irrelevant whether a victim's political view is neutrality, as in *Bolanos-Hernandez*, or disapproval of the acts or opinions of the government. Moreover, it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does . . . . [W]hen through legally cognizable inferences or otherwise, an alien establishes a *prima facie* case that he is likely to be persecuted because of the government's belief about his views or loyalties, his actual political conduct, be it silence or affirmative advocacy, and his actual political views, be they neutrality or partisanship, are irrelevant; whatever the circumstances, the persecution is properly categorized as being "on account of . . . political opinion."
>
> Hernandez-Ortiz has satisfied her burden of establishing for *prima facie* case purposes, that the threat to her life or freedom constitutes political persecution.[27]

The Ninth Circuit thus reversed the BIA and reopened Hernandez-Ortiz's deportation case for consideration of her asylum case.[28]

In his opinion in *Hernandez-Ortiz*, Judge Reinhardt repeatedly cited with approval the 1979 *Handbook on Procedures and Criteria*

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25. Originally, Hernandez-Ortiz had requested the BIA to reverse the August 1980 decision of an immigration judge deporting her. In October 1982, the BIA dismissed her appeal. She then petitioned the court of appeals on November 1, 1982 for review of the BIA's decision. However, on November 5, 1982, while her petition for review (which automatically stayed the BIA's order) was pending, Hernandez-Ortiz was erroneously deported to El Salvador by the United States Immigration and Naturalization Service (INS). The INS then agreed to arrange and pay for her return to the United States. *Id.*

In her case before the court of appeals, Hernandez-Ortiz contended, and the Ninth Circuit accepted, that she had not been "allowed to leave [El Salvador] until she paid a Salvadoran immigration official approximately $200. According to Hernandez-Ortiz, she [had] now come to the particular attention of the Salvadoran authorities and they regard her as a traitor." *Id.* (footnote omitted).

The court of appeals did not specifically identify Hernandez-Ortiz's unlawful deportation or the difficult circumstances of her return to the United States as a reason for reopening her deportation case in 1985. Each fact is mentioned in the court's decision, however, and each may have played a role in persuading the Ninth Circuit that there existed a prima facie basis that the threats to Hernandez-Ortiz's life or liberty were related to political opinion and thus that they should prevent or at least postpone her second, lawful deportation.

26. *Id.* at 516.

27. *Id.* at 517 (citations omitted).

28. *Id.* at 519.

for Determining Refugee Status of the United Nations High Commissioner for Refugees,[29] which he wrote "provides us with some assistance in understanding many concepts related to our immigrations laws."[30] Judge Reinhardt reminded the reader that the Refugee Relief Act of 1980, including its asylum provisions, "amended our immigration laws so as to bring United States law into conformity with international law."[31] Just as the Supreme Court in *Cardoza-Fonseca* relied on United Nations pronouncements to broaden the scope of "a well-founded fear of persecution," so the Ninth Circuit in *Hernandez-Ortiz* relied on the same to enlarge the concept of "persecution on account of . . . political opinion."[32]

Bolanos-Hernandez and *Hernandez-Ortiz* greatly eased the requirement of showing "persecution on account of . . . political opinion" in order to obtain asylum in Ninth Circuit deportation cases. For example, in *Turcios v. INS*,[33] a Salvadoran national arrested and beaten by his country's national police was asked at his deportation hearing, " 'Is it correct to say that you would consider yourself neutral as far as the guerrillas and the Government?' Turcios said 'yes.' "[34] The court of appeals found Turcios's testimony to constitute "an overt manifestation of a political opinion" and remanded his case to the BIA to exercise its discretion regarding Turcios's section 208(a) asylum claim.[35] Then, shortly after *Turcios*, in *Lazo-Majano*

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29. The *Handbook on Procedures and Criteria for Determining Refugee Status* (*Handbook*) included the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577, which the Supreme Court used to construe § 101(a)(42)(A) of the INA in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

30. *Hernandez-Ortiz*, 777 F.2d at 514 n.3.

31. *Id.*

32. The Ninth Circuit's reliance on the *Handbook* continued in Barraza Rivera v. INS, 913 F.2d 1443, 1451 (9th Cir. 1990) in which the court found

> ample support for the conclusion that persecution can result from resisting conscription for reasons of conscience or refusing to comply with military orders after induction because they violate standards of human decency . . . . According to paragraph 167 of the *Handbook*, punishment for desertion or draft evasion, in itself, does not constitute persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. But disproportionately severe punishment on account of any of these factors does constitute persecution . . . . Most important for our purposes, the *Handbook* also advises that an alien may qualify for refugee status after either desertion or draft evasion if he or she can show that military service would have required the alien to engage in acts "contrary to basis rules of human conduct."

The *Handbook* became the Ninth Circuit's preferred instrument for applying international law to the asylum provisions of the INA.

33. 821 F.2d 1396 (9th Cir. 1987).

34. *Id.* at 1401.

35. *Id.* at 1401, 1403 (citing Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286-87

v. INS,[36] the Ninth Circuit lifted entirely from the alien's shoulders the burden of manifesting something of a political opinion in order to obtain relief from deportation under the asylum and withholding of deportations statutes:

> Even if she [the alien] had no political opinion and was innocent of a single reflection on the government of her country, the cynical imputation of political opinion to her is what counts under both statutes. In deciding whether anyone has a well-founded fear of persecution or is in danger of losing life or liberty because of a political opinion, one must continue to look at the person from the perspective of the persecutor. If the persecutor thinks the person guilty of a political opinion, then the person is at risk.[37]

In *Beltran-Zavala v. INS*,[38] the court of appeals cited *Lazo-Majano* for the proposition that a Salvadoran possessed a well-founded fear of political persecution because of the threats to him by his country's death squads, even though he himself did not hold a political opinion:

> What is determinative here is not that Beltran holds a political opinion, but rather that the Salvadoran government or, at least, the uncontrollable death squad has imputed an opinion to Beltran and has persecuted him for that reason. Political persecution may be based on a political opinion imputed to the alien.[39]

Finally, in *Aguilera-Cota v. INS*,[40] Judge Reinhardt, writing for the majority of a three-person panel, applied the doctrine of imputed political opinion to the case of an employee of El Salvador's Central Board of Elections, with no expressed partisan views, who had received an anonymous note warning him to "quit his job or pay the consequences."[41] Judges Reinhardt and Norris concluded that "Aguilera's status as a government employee caused the opponents of the government to classify him as a person 'guilty' of a political opinion."[42] They also concluded that "Aguilera's inability to identify the precise source of the threat [did not] render his fear of prosecution less justifiable; in fact, an anonymous note may cause even greater anxiety than a signed one, since in the case of an anonymous threat one cannot identify the potential source of harm . . . ."[43]

In dissent, Judge Stephen Trott agreed with the immigration judge and the BIA below that Aguilera's story of receiving an anonymous note was less than credible.[44] Judge Trott also rejected the application of the doctrine of implied political opinion, concluding

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(9th Cir. 1984)).

36. 813 F.2d 1432 (9th Cir. 1987).
37. *Id.* at 1435.
38. 912 F.2d 1027 (9th Cir. 1990).
39. *Id.* at 1030 (citations omitted).
40. 914 F.2d 1375 (9th Cir. 1990).
41. *Id.* at 1379.
42. *Id.* at 1380.
43. *Id.*
44. *Id.* at 1385 (Trott, J., dissenting).

that "Aguilera-Cota has not shown that his 'predicament is appreciably different from the dangers faced by all his countrymen.' "[45]

As is apparent from Judge Trott's dissent in *Aguilera-Cota*, chinks in the armor of expansive protection afforded asylum applicants in the Ninth Circuit under the doctrine of imputed political opinion did appear before the Supreme Court decision in *Elias-Zacarias*. Sometimes, a more conservative court of appeals panel applied the traditional rule that "persecution on account of . . . political opinion" can only occur after the affirmative expression of a political opinion. Thus in *Diaz-Escobar v. INS*,[46] Judges Wallace, Goodwin, and Choy indicated that the "mere failure to take sides or even open and vigorous advocacy of neutrality rarely triggers retribution. That is why nations often find it advantageous to remain neutral."[47] In *Arriaga-Barrientos v. INS*,[48] Judge Wallace, while writing for the court, was even more derisive of the *Bolanos-Hernandez* line of cases:

> We have held that political neutrality is a political opinion, or in other words, that the absence of a political opinion is a political opinion . . . . Other circuits have declined to follow . . . . Although we have recently considered the limits appropriate to this potentially expansive theory . . . our precedent allows Arriaga-Barrientos to argue that his complete lack of an articulated political opinion threatens him with political persecution.[49]

On behalf of the court, Judge Wallace held that "Arriaga-Barrientos [had] not shown an actual or imputed political opinion for the purposes of asylum eligibility."[50]

Nevertheless, the doctrine of imputed political opinion, including actual and imputed neutrality, continued as the rule in the Ninth Circuit. The doctrine was applied to the case of an alien fleeing guerilla service in El Salvador and applying for asylum in the United States in *Arteaga v. INS*[51] and *Maldonado-Cruz v. Department of Immigration and Naturalization*.[52] In *Arteaga*, the Ninth Circuit considered the case of a Salvadoran who had been visited by a group of guerrillas at his home who urged him to join them.[53] "When

45. *Id.* (citation omitted).
46. 782 F.2d 1488 (9th Cir. 1986).
47. *Id.* at 1494.
48. 937 F.2d 411 (9th Cir. 1991).
49. *Id.* at 413-14 (citations omitted).
50. *Id.* at 414.
51. 836 F.2d 1227 (9th Cir. 1988).
52. 883 F.2d 788 (9th Cir. 1989). The erroneous characterization of the INS as a cabinet-level department appears in the title of the *Maldonado-Cruz* decision. It is decidedly not the creation of this author.
53. *Arteaga*, 836 F.2d at 1228.

Arteaga refused, stating his intention to remain neutral, the guerrillas said to him: 'Even if you don't come, we'll get you.' "[54] The court therefore concluded that "Arteaga was threatened with kidnapping or conscripting by the guerrillas if he did not agree to join them voluntarily."[55] The court also concluded that the threats made against Arteaga were acts of persecution, notwithstanding that they had been issued by insurgent rather than government forces. "The threat of persecution need not come from the government, but may also come from groups, including anti-government guerrillas, which the government is 'unwilling or unable to control.' "[56] Finally, the court of appeals determined that Arteaga's refusal to join the guerrillas relected his "non-support" for their cause which in turn constituted an expression of political neutrality—a political opinion under section 101(a)(42)(A) of the INA.[57]

In *Maldonado-Cruz*, the alien, a former agricultural worker with no history of political activities or utterances, had been impressed into service at a guerrilla camp from which he escaped; at his deportation hearing, he claimed political neutrality and expressed fear that if he returned to El Salvador, he would be killed by either insurgent or military forces.[58] In a two-to-one opinion (with Judge Wallace dissenting in part),[59] the court of appeals panel stated:

> This case presents the following legal question: If an alien is forced to join a band of guerrillas, but escapes, and the alien then fears persecution by the guerrillas and by the foreign government's military, is the fear of persecution on account of "political opinion" within the meaning of 8 U.S.C. § 1101(a)(42)(A)? The BIA answered this question in the negative. We disagree and reverse.
>
> It is true that Maldonado had not aligned himself politically with either the guerrillas or the military. But we have already noted that "[c]hoosing to remain neutral is no less a political decision than is choosing to affiliated with a particular political faction." *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1286 (9th Cir. 1984); *see also Turcios v. I.N.S.*, 821 F.2d 1396, 1401 (9th Cir. 1987).
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> We hold that Maldonado's fear of persecution by the guerrillas was based on political opinion. The guerrillas are a political entity. Maldonado's refusal to join them was a manifestation of his neutrality, which is a recognized political opinion. *Del Valle v. I.N.S.*, 776 F.2d 1407, 1413 (9th Cir. 1985); *Bolanos-Hernandez*, 767 F.2d at 1286. Hence, any persecution by the guerrillas is a result of Maldonado's expression of his political opinion, which falls within the meaning of 8 U.S.C. § 1101(a)(42)(A).[60]

Even the Ninth Circuit placed limits on the generous construction of "a well-founded fear" of "persecution on account of . . . political

54. *Id.*
55. *Id.* at 1231.
56. *Id.* (quoting McMullen v. INS, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981)).
57. *Id.*
58. *Maldonado-Cruz*, 883 F.2d 788, 789-90 (9th Cir. 1989).
59. Judge Wallace dissented from the majority's factual determinations regarding Maldonado's credibility. *Id.* at 793 (Wallace, J., dissenting).
60. *Id.* at 791.

opinion" expressed in cases like *Arteaga* and *Maldonado-Cruz*. For example, the court of appeals repeatedly held that a government's effort to recruit or even to conscript its citizens into military service generally does not amount to political persecution.[61] Also, the court stated that in assessing a threat against an alien from guerrilla forces, it would evaluate " 'whether the group making the threat ha[d] the will or the ability to carry it out.' "[62] Nevertheless, the court of appeals also stated that under *Cardoza-Fonseca*,[63] "a one-in-ten chance of the feared event occurring would make the fear well-founded."[64]

IV. THE CASE OF *ELIAS-ZACARIAS*

A. The Ninth Circuit Decision

Elias-Zacarias v. INS[65] was a decision substantially, if not also directly, descendant from *Bolanos-Hernandez*. Like Bolanos, a Salvadoran, Jairo Jonathan Elias-Zacarias was a Central American who fled his native Guatemala after armed guerrillas had approached him about joining their ranks.[66] Elias refused their advances, and the guerrillas replied that he should "think it [over] well" after which they would return.[67] Elias, at age eighteen, then entered the United States without immigration inspection; he was subsequently apprehended by the Immigration and Naturalization Service and placed in deportation proceedings.[68]

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61. *See, e.g.*, Rodriguez-Rivera v. United States Dep't of Immigration and Naturalization, 848 F.2d 998, 1005 (9th Cir.), *cert. denied*, 490 U.S. 1066 (1988); Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988); Kaveh-Haghigy v. INS, 783 F.2d 1321, 1323 (9th Cir. 1986). One of the Circuit Judges responsible for the *per curiam* opinion in *Kaveh-Haghigy* was the Honorable Anthony Kennedy, now an Associate Justice of the United States Supreme Court and a member of the majority in *Elias-Zacarias*. *See also* Alonzo v. INS, 915 F.2d 546, 548 (9th Cir. 1990). In *Alonzo*, the court allowed for the possibility that a government's move to draft a conscientious objector could constitute persecution under § 101(a)(42)(A) of the INA provided that (1) the punishment facing the evading alien was "disproportionately severe," and (2) "the alien . . . demonstrate[s] that the government knew of his political or religious beliefs and attempted to conscript him despite those beliefs." *Id.*

62. Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988) (quoting Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285-86 (9th Cir. 1984) (footnote omitted)).

63. 480 U.S. 421 (1987).

64. *Arteaga*, 836 F.2d at 1232-33. *See* Rodriguez-Riviera v. United States Dep't of Immigration and Naturalization, 848 F.2d 998, 1006 (9th Cir.), *cert. denied*, 490 U.S. 1066 (1988).

65. 908 F.2d 1452 (9th Cir. 1990), *rev'd*, 112 S. Ct. 812 (1992).

66. *Id.* at 1454.

67. *Id.* (alteration in original).

68. *Id.*

At his hearing, Elias conceded deportability and applied for asylum. Both an immigration judge and the BIA found testimony about why he had left Guatemala to be credible; they nevertheless denied him relief.[69] The BIA concluded, *inter alia*, that Guatemalan guerrillas did not pursue a policy of forced recruitment whatever Elias might have thought.[70]

The Ninth Circuit disagreed with the BIA and found Elias statutorily eligible for asylum.[71] First, the court cited a United States State Department advisory opinion in the record regarding Elias's asylum application[72] which referred to " 'forced recruitment by opposing armed forces' " in the Guatemalan civil conflict.[73] From this reference, the court concluded that the guerrillas had engaged in forced recruitment in Guatemala.[74] "Because nongovernmental groups lack legitimate authority to conscript persons into their armies, their acts of conscription are tantamount to kidnapping and constitute persecution."[75] The court of appeals then categorized the persecution as " 'on account of political opinion,' because the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out

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69. *Id.* at 1454 n.3.

70. *Id.* at 1457.

71. *Id.* at 1461. The court reversed the BIA's conclusion on the asylum issue, but it left undisturbed the Board's denial of Elias's request for a withholding of his deportation under § 243(h) of the INA. "To show that forced recruitment was more than a reasonable possibility, Elias needed to present more specific evidence concerning the extent of forced recruitment by the guerrillas, either in the country at large or as it affected him, members of his family or other people whom he knew. *Cf. Bolanos-Hernandez*, 767 F.2d at 1280." *Id.*

The court also affirmed the BIA's denial of Elias's motion to reopen his case on the basis of new evidence—*i.e.*, a letter from the alien's father, "saying that guerrillas had returned to the [family] house two times after Elias had fled (and after the time of the hearing) and that they had asked for Elias and his father both times." *Id.* at 1458-59.

The Ninth Circuit's decision in *Elias-Zacarias* was therefore less expansive than its grants of relief in *Bolanos-Hernandez*, *Arteaga*, and *Maldonado-Cruz*, in which the aliens were found eligible for both asylum *and* withholding of deportation. Nevertheless, it was in *Elias-Zacarias* that the Supreme Court reversed the Ninth Circuit and curtailed its generous interpretation of the asylum laws.

72. Pursuant to 8 C.F.R. § 208.11(a) (1992), the State Department's Bureau of Human Rights and Humanitarian Affairs "may comment on an application" for asylum it receives from INS or the immigration judge in the course of exclusion and deportation proceedings.

73. *Elias-Zacarias*, 908 F.2d at 1455.

74. *Id.*

75. *Id.* at 1456 (footnote and citations omitted). In *Elias-Zacarias*, the Ninth Circuit described as "legal error" the failure of the State Department in its advisory opinion to categorize the forced recruitment of persons by guerrilla forces as persecution. *Id.* at 1456 n.5. It was only one page earlier that the court had relied on that same advisory opinion to reverse the BIA's conclusion that the Guatemalan guerrillas did not engage in forced recruitment.

the kidnapping is political."[76] Once again, the Ninth Circuit employed the doctrine of imputed political opinion to find political persecution in an asylum case.

B. The Supreme Court Decision

The Supreme Court in reversing the Ninth Circuit by a six-to-three vote did not regard Elias's plight as desperately or as politically as the court of appeals. This is seen from the statement of facts in the majority opinion of Mr. Justice Scalia, in which the findings of the immigration judge (who had denied asylum) were quoted, not paraphrased:

> The Immigration Judge summarized Elias-Zacarias' testimony as follows:
>
> "[A]round the end of January in 1987 [when Elias-Zacarias was eighteen], two armed, uniformed guerrillas with handkerchiefs covering part of their faces came to his home. Only he and his parents were there . . . . [T]he guerrillas asked his parents and himself to join with them, *but they all refused.* The guerrillas asked them why and told them that they would be back, and that they should think it over about joining them.
> "[Elias-Zacarias] did not want to join the guerrillas because the guerrillas are against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas. [H]e left Guatemala at the end of March [1987] . . . because he was afraid that the guerrillas would return."
>
> The Immigration Judge understood from this testimony that Elias-Zacarias' request for asylum and for withholding of deportation was "based on this one attempted recruitment by the guerrillas."[77]

The Supreme Court thus highlighted that (1) Elias's confrontation with the guerrillas was a non-violent, one-time event, (2) his political opinions (as distinct from his fear of government reprisals) were not evident from the record of his deportation proceedings, and (3) his parents (whose services were also solicited) remained alive and well during the pendency of those proceedings.[78] Given the view of the evidence presented in Mr. Justice Scalia's majority opinion, it is not

76. *Id.* at 1456 (citations omitted).
77. INS v. Elias-Zacarias, 112 S. Ct. 812, 814-15 (1992) (emphasis added).
78. It should be remembered that in his motion to reopen his deportation proceedings before the BIA, Elias offered the letter of his father—dated after the former's departure from Guatemala—describing another two visits by guerrillas to the family home. *See Elias-Zacarias*, 908 F.2d at 1458-59. *See also supra* note 71. Apparently, the Supreme Court majority considered the continued interest of the guerrillas in the Elias family less critical than the continued survival of the parents under those very circumstances.

surprising that the conclusions of the Supreme Court differed markedly from those of the Ninth Circuit:

> The Court of Appeals found reversal warranted. In its view, a guerrilla organization's attempt to conscript a person into its military forces necessarily constitutes "persecution on account of . . . political opinion," because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutors' motive in carrying out the kidnapping is political." 921 F.2d, at 850. The first half of this seems to us untrue, and the second half irrelevant.
>
> Even a person who supports a guerrilla movement might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few. The record in the present case not only failed to show a political motive on Elias-Zacarias' part; it showed the opposite. He testified that he refused to join the guerrillas because he was afraid that the government would retaliate against him and his family if he did so. Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal was politically based.
>
> As for the Court of Appeals' conclusion that the guerrillas' "motive in carrying out the kidnapping is political": It apparently meant by this that the guerrillas seek to fill their ranks in order to carry on their war against the government and pursue their political goals. See 921 F.2d, at 850 (citing *Arteaga v. INS*, 836 F.2d at 1227, 1232, n.8 (CA9 1988)); 921 F.2d, at 852. But that does not render the forced recruitment "persecution on account of . . . political opinion." . . . The ordinary meaning of the phrase "persecution on account of . . . political opinion" in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion, as § 101(a)(42) requires.
>
> Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so . . . .
>
> Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, direct or circumstantial . . . .
>
> The BIA's determination should therefore have been upheld in all respects, and we reverse the Court of Appeals' judgment to the contrary.[79]

In short, the Supreme Court majority dealt a firm, if not fatal, blow to the doctrine of imputed political opinion applied by the Ninth Circuit from the time of *Bolanos-Hernandez* and *Hernandez-Ortiz* (and the writings there of Judge Reinhardt) to the cases of *Arteaga*, *Maldonado-Cruz*, and, of course, *Zacarias*. No longer would a persecutor's inference (or a judicial inference, as Mr. Justice Scalia's opinion suggests) of political opinion suffice. An asylum applicant would have to demonstrate both some affirmative expression of political opinion on his part and a nexus between this and the

79. 112 S. Ct. at 815-17.

persecution he fears.[80]

Thus, in *Elias-Zacarias*, the Supreme Court adopted what had been minority views of Ninth Circuit Judge Wallace that the absence of an expressed position is not equivalent with political neutrality and that a "complete lack of an articulated political opinion" is not demonstrative of the manifestation of political opinion required by section 101(a)(42)(A) of the INA.[81]

In their dissenting opinion in *Elias-Zacarias*, Justices Stevens, Blackmun, and O'Connor defended Judge Reinhardt's Ninth Circuit majority opinion in *Bolanos-Hernandez* and with it the argument that opposition by forbearance is political opinion:

> A political opinion can be expressed negatively as well as affirmatively. A refusal to support a cause—by staying home on election day, by refusing to take an oath of allegiance, or by refusing to step forward at an induction center—can express a political opinion as effectively as an affirmative statement or affirmative conduct. Even if the refusal is motivated by nothing more than a simple desire to continue living an ordinary life with one's family, it is the kind of political expression that the asylum provisions of the statute were intended to protect.[82]

For the Supreme Court majority, however, the aim of "living an ordinary life" did not differentiate Elias from the rest of the Guatemalan population. Thus, his predicament was not appreciably different from the dangers faced by his fellow countrymen, and therefore not a proper basis for granting political asylum.[83]

V. POLITICAL ASYLUM IN THE NINTH CIRCUIT AFTER *ELIAS-ZACARIAS*[84]

The uncertain effect of *Elias-Zacarias* on future Ninth Circuit adjudications in political asylum cases may be gleaned from the

80. For example, a communist citizen of a country under rightist or non-communist rule who was arrested on a criminal charge and tortured in prison would have to show that he had been disproportinately mistreated by the authorities *because of* his political opinion. He would therefore have to demonstrate that his communist views were known and important to the authorities at the time of his mistreatment. *See* Blanco-Lopez v. INS, 858 F.2d 531 (9th Cir. 1988).

81. *See* Arriaga-Barrentos v. INS, 937 F.2d 411, 413-14 (9th Cir. 1991). *See supra* notes 48-50 and accompanying text.

82. 112 S. Ct. at 818 (Stevens, Blackmun, & O'Connor, JJ., dissenting).

83. *See* Aguilera-Cota v. INS, 914 F.2d 1375, 1385 (9th Cir. 1990) (Trott, J., dissenting). *See supra* note 45 and accompanying text.

84. The BIA quickly embraced and reiterated the Supreme Court's *Elias-Zacarias* decision in *In re R-O-*, 20 I. & N. Dec. 3170 (1992). According to the BIA, the victim of forced guerrilla recruitment "must show that he is being persecuted on account of his political opinion, and that his persecution is not solely the result of the guerrillas' aim in seeking to fill their ranks in order to carry out their war with the government and pursue

matter of *Canas-Segovia v. INS*.[85] In its 1990 ruling, the court of appeals reversed the conclusions of the BIA and an immigration judge, that El Salvador's policy of mandatory military service for all males ages eighteen to thirty years old amounted to "persecution on account of . . . religion . . . and political opinion" under the INA when applied to Jehovah's Witnesses.[86] On the question of political opinion, the Ninth Circuit in 1990 declared that "[t]he Canases' refusal to do military service because of their religious beliefs also necessarily places them in a position of political neutrality in the Salvadoran civil conflict."[87]

In its July 1992 decision, the Ninth Circuit conceded that "[i]n light of *Elias-Zacarias*'s adoption of a motive requirement, Canas-Segovia can no longer prove religious persecution."[88] However, the court of appeals stubbornly sought to reconcile its finding of political persecution in *Canas-Segovia* with the reversal it suffered in *Elias-Zacarias*:

> Imputed political opinion is still a valid basis for relief after *Elias-Zacarias*. The [Supreme] Court made clear that evidence of motive is required, but imputed political opinion, by definition, includes an element of motive. A persecutor falsely attributes an opinion to the victim, and then persecutes the victim because of that mistaken belief about the victim's views . . . .
>
> We held in the original opinion that the Canas-Segovias were entitled to relief based on the theory of imputed political opinion. Nothing in *Elias-Zacarias* changes our analysis. Jose [Canas] is entitled to relief on this basis.[89]

The Ninth Circuit's 1992 decision in *Canas-Segovia* is a curious one. On one hand, it denies that draft resisters who had a credible record of practicing the faith of Jehovah's Witnesses and who faced imprisonment for their conscientious objection were the victims of religious persecution. On the other hand, the court of appeals found that these same religious dissidents were the victims of political persecution, notwithstanding that they have no history of political activity. It is problematic whether in deciding *Elias-Zacarias* Mr. Justice

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their political goal, their political motive being irrelevant." *Id.* slip op. at 6 (citation omitted).

85. 970 F.2d 599 (9th Cir. 1992), *remanding* 902 F.2d 717 (9th Cir. 1990).

86. *Canas-Segovia*, 902 F.2d at 720, 727-28. In its 1990 decision, the Court of Appeals criticized the BIA for requiring "the Canases to demonstrate intent or motive to persecute on the part of the Salvadoran government." *Id.* at 727. The court cited the *Handbook*, at paragraph 197, for suggesting "that the 'requirement of evidence should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.' " *Id.* at 727 n.20. By contrast, the Supreme Court, in its decision in *Elias-Zacarias*, never once relied on the *Handbook*.

87. *Id.* at 728 (citing Bolanos-Hernandez v. INS, 749 F.2d 1316, 1324-25 (9th Cir. 1984) (footnote omitted)).

88. *Canas-Segovia*, 970 F.2d at 601.

89. *Id.* at 601-02 (citations omitted).

Scalia and company intended to have the effect they did on the outcome of a case like *Canas-Segovia*. It is also problematic whether the Ninth Circuit's most recent ruling in *Canas-Segovia* will withstand appeal to the Supreme Court, should one be taken by the United States Department of Justice. Finally, it is highly problematic indeed whether we at the bar and bench have heard the last word in the debate over defining "persecution on account of . . . political opinion" under the INA.