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You Can't Go Home Again: Analyzing an Asylum Applicant's Voluntary Return Trip to His Country of Origin

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You Can't Go Home Again: Analyzing an Asylum Applicant's Voluntary Return Trip to His Country of Origin

Cover Page Footnote

Brett C. Rowan is a Lecturer in Law at the William S. Richardson School of Law at the University of Hawai'i at Mānoa. He would like to thank Kori Weinberger for her helpful feedback.

YOU CAN'T GO HOME AGAIN: ANALYZING AN ASYLUM APPLICANT'S VOLUNTARY RETURN TRIP TO HIS COUNTRY OF ORIGIN

Brett C. Rowan⁺

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“You Can’t Go Home Again” is both a literal and figurative reality for aliens who are fleeing persecution.¹ Many aliens enter the United States without

⁺ Brett C. Rowan is a Lecturer in Law at the William S. Richardson School of Law at the University of Hawai’i at Mānoa. He would like to thank Kori Weinberger for her helpful feedback.

1. Susan J. Matt, *You Can’t Go Home Again: Homesickness and Nostalgia in U.S. History*, 94 J. AM. HIST. 469, 469 (2007) (quoting THOMAS WOLFE, *YOU CAN’T GO HOME AGAIN* 702 (1940)) (internal quotation marks omitted) (“You can’t go back home to your family, back home to your childhood . . . back home to a young man’s dreams of glory and of fame . . . back home to places in the country . . . back home to the old forms and systems of things which once seemed everlasting but which are changing all the time — back home to the escapes of Time and Memory.”). The colloquialism “you can’t go home again” has been interpreted to mean that a person is unable to return to his place of origin without being deemed a failure. Matt, *supra*, at 469–71. In the asylum context, aliens “can’t go home again” because they fear persecution.

authorization from the government and seek I-589 relief from removal because they fear persecution or torture in their country of origin.² These individuals request to remain within the United States' borders for protection from harm. An alien may file an asylum application affirmatively (before the start of removal proceedings), or defensively (after the start of removal proceedings), by filing the form I-589, *Application for Asylum and for Withholding of Removal*.³ This Article examines the process by which an immigration judge reviews these asylum applications.

The chronology of events material to an alien's claim for relief can be problematic in the adjudication of the asylum application.⁴ In situations in which the alien exited his⁵ country of origin following persecution, but later voluntarily returned to that country, I-589 applications have been regularly denied.⁶ However, some courts have recognized that further analysis is

2. See generally STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* (5th ed. 2009). An alien seeking protection based on a fear of future harm from his or her country of origin may simultaneously apply for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) by filing the form I-589, *Application for Asylum and for Withholding of Removal*. This Article refers only to removal proceedings. Before April 1, 1997, aliens were placed in either "deportation" or "exclusion" proceedings by the issuance of an "Order to Show Cause." After the enactment and passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), aliens are placed in removal proceedings by the issuance of a "Notice to Appear." Pub. L. No. 104-208, 110 Stat. 3009, 587-89, codified as amended at 8 U.S.C. § 1229 (2006). This Article uses the term "alien" when referring to a person who is not a native, citizen, or national of the United States.

3. See 8 C.F.R. § 208.30(e)(2) (2012) (explaining that an alien may seek asylum upon entry to the United States); see also 8 C.F.R. §§ 208.1(b), 1208.1(b) (2012) (explaining that, in the alternative, an alien may file an affirmative application with the U.S. Citizenship and Immigration Services (USCIS) division of the Department of Homeland Security (DHS)); 8 C.F.R. § 208.2(b) (giving jurisdiction to immigration courts over an alien's defensive request for I-589 relief, filed after he has been served with a notice to appear). An application for asylum is automatically deemed an application for withholding of removal. 8 C.F.R. § 208.3(b).

4. Any reference to an "asylum application," "asylum claim," or "I-589 claim" refers to the application filed on the form I-589, *Application for Asylum and Withholding of Removal*, which includes claims for asylum, withholding of removal, and relief under the CAT.

5. This Article will use male pronouns in reference to aliens whose gender is not defined.

6. See, e.g., *Sihombing v. Holder*, 581 F.3d 41, 46 (1st Cir. 2009) (finding that an alien's voluntary return to Indonesia undermined his claim of persecution); *Tanudjaja v. Mukasey*, 298 F. App'x 654, 655 (9th Cir. 2008) (finding that an alien "failed to demonstrate a well-founded fear of persecution because she voluntarily returned to Indonesia"); *Butt v. Keisler*, 506 F.3d 86, 91 (1st Cir. 2007) (finding that an alien failed to demonstrate eligibility for asylum after visiting the United States and then failing to seek asylum before voluntarily returning to Pakistan); *Rodriguez v. U.S. Att'y Gen.*, 244 F. App'x 927, 929-30 (11th Cir. 2007) (concluding that substantial evidence supported the determination that the alien "did not have an objectively reasonable fear of future persecution," based, in part, on his voluntary return to Colombia, his country of origin); *Carcamo-Recinos v. Ashcroft*, 389 F.3d 253, 258 (1st Cir. 2004) (upholding the immigration judge's conclusion that the alien's return to his home country of Guatemala was substantial evidence supporting the denial of his application for I-589 relief from removal); see

required when considering this type of asylum application,⁷ especially if the alien was compelled to return to his country of origin.⁸

This Article examines how courts have analyzed an asylum applicant's voluntary return to his country of origin. Part I explains the standards for I-589 relief from removal in the forms of asylum, withholding of removal, and protection under the Convention Against Torture (CAT). Part I also analyzes the adjudication of these claims in immigration courts, including an alien's burden of proof for I-589 relief and the evaluation of an alien's credibility under the REAL ID Act of 2005. Part II addresses the lack of consistency among administrative immigration courts, the Board of Immigration Appeals (BIA), and the federal circuit courts of appeals when considering the effect of an alien's voluntary return to his country of origin on his application for I-589 relief. Finally, Part III concludes that, although a voluntary return is properly considered in determining whether an alien has met his burden of proof, such trips should not be used to render an adverse credibility determination.

I. THE EVALUATION AND ADJUDICATION OF I-589 APPLICATIONS FOR RELIEF FROM REMOVAL FROM THE UNITED STATES

Asylum law is relatively new in international jurisprudence. The United Nations (U.N.) formulated the concept of asylum, and member states later adopted it in reaction to the horrors that were uncovered in the aftermath of World War II.⁹ In essence, the U.N. sought to create a system wherein refugees could seek protection from persecution in their country of origin based on immutable characteristics by traveling to a foreign country.¹⁰ The

also infra note 81 (listing additional cases in which courts have denied applications for relief based on voluntary return trips to the alien's country of origin).

7. *See infra* notes 82–109 (providing examples of courts holding that an alien's voluntary return to his country of origin is not dispositive in adjudicating an I-589 claim for relief).

8. *See, e.g.,* *Smolinakova v. Gonzales*, 422 F.3d 1037, 1043 (9th Cir. 2005) (considering the asylum application of an alien who returned to her country of origin to tend to her sick mother); *Derevianko v. Reno*, 55 F. App'x 609, 611–12 (3d Cir. 2003) (considering the asylum application of an alien who returned to his country of origin because of fraudulent criminal charges).

9. *See* Naomi S. Stern, *Evian's Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States*, 19 GEO. IMMIGR. L.J. 313, 316–25 (explaining the development of refugee and asylum law following World War II); Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees: Protocol Relating to the Status of Refugees*, 1–7, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf (providing the historical context of the U.N.'s 1951 Convention and 1967 Protocol, which established widely accepted international refugee guidelines).

10. Maryellen Fullerton, *A Tale of Two Decades: War Refugees and Asylum Policy in the European Union*, 10 WASH. U. GLOB. STUD. L. REV. 87, 121 (2011) (“The centerpiece of international refugee law, the 1951 Refugee Convention, privileges those uprooted due to persecution based on race, religion, nationality, political opinion, or membership in a particular social group.”). For a description of asylum law in the European Union, see Brett C. Rowan, *The*

United States did not adopt such a comprehensive scheme until 1968,¹¹ and it did not pass its own Refugee Act until 1980.¹²

In the United States, asylum law is distinct from refugee law.¹³ A “refugee” seeks admission and protection before he enters the United States, pursuant to section 207 of the Immigration and Nationality Act (INA).¹⁴ By contrast, an

Price of “European” Identity: The Negative Social and Economic Impact of Slovenian Migration Law, 31 LOY. L.A. INT’L & COMP. L. REV. 221, 229–31 (2009).

11. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 111 (2005) (explaining that the 1967 Protocol did not amend the 1951 Convention, but instead incorporated by reference the provisions of the 1951 Convention); IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 459 (12th ed. 2010) (explaining that, although the United States did not adopt the 1951 Convention, it did adopt the 1967 United Nations Protocol Relating to the Status of Refugees); Stephen H. Legomsky, *Refugees, Asylum and the Rule of Law in the USA*, in *REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES* 122, 124 (Susan Kneebone ed., 2009) (arguing that the failure to adopt the 1951 Convention “is of little consequence . . . because in 1968 the USA ratified the 1967 Refugee Protocol, thus binding itself derivatively to the [1951] Refugee Convention” (footnote omitted)).

12. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). The Refugee Act is the result of an amalgamation of immigration laws, beginning with the Immigration Act of 1882, 22 Stat. 214, and the Naturalization Act, 1 Stat. 103 (1790). Asylum and refugee laws were not included in the first U.S. immigration laws. The first Immigration and Nationality Act (INA) was passed in 1952 and established the basic structure of present immigration law. Pub. L. No. 82-414, 66 Stat. 163. Additional widespread immigration reforms were codified in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3527; the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009–546. Regulations promulgated by the U.S. Department of Justice assist in the interpretation of these laws. See 8 C.F.R. §§ 207–209 (2012) (governing refugees and asylum); see also 8 C.F.R. § 212.5 (2012) (governing parole of aliens); 8 C.F.R. § 235.3 (2012) (governing expedited removal of inadmissible aliens); 8 C.F.R. § 1208 (2012) (governing withholding of removal). The Department of State’s Foreign Affairs Manual (FAM) also provides guidance on immigration laws, particularly citizenship laws. See generally FOREIGN AFFAIRS MANUAL, available at <http://www.state.gov/m/a/dir/regs/fam/>.

13. See Sarah J. Steimel, *Refugees as People: The Portrayal of Refugees in American Human Interest Stories*, 23 J. REFUGEE STUD. 219, 221 (2010) (noting that the key distinction between an “asylee” and a “refugee” lies in “the individual’s location when application is made for asylum”); see also Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum Seekers*, 84 DENV. U. L. REV. 1121, 1127–36 (2007) (highlighting the differences between refugee resettlement and asylum seekers).

14. INA § 207, 8 U.S.C. § 1157(c) (2006). A “refugee” is defined as [A]ny 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. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006); see also HELPING REFUGEES: AN INTRODUCTION TO UNHCR 6 (2005), available at http://www.unhcr.org.au/pdfs/Helpingrefugees_000.pdf (noting that international law defines

“asylee” seeks admission and protection after he has fled his country of origin and already entered the United States, pursuant to section 208 of the INA.¹⁵

A. Standards for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture

1. Relief Through Asylum

Asylum is a discretionary form of relief,¹⁶ and the alien has the burden of establishing that he is entitled to such relief.¹⁷ To establish eligibility for asylum, an alien must show that he has either suffered past persecution or has “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” in his country of origin or last habitual residence.¹⁸ Although past persecution may be sufficient to establish eligibility for asylum, the INA requires immigration judges to exercise discretion and deny asylum in certain situations.¹⁹ Asylum may be

refugees as “people who are outside their countries because of well-founded fear of persecution based” on a protected ground).

15. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2006) (defining an asylee as “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)” who applies for asylum). Confusingly, however, an asylee is required to show that he also meets the definition of a “refugee” under the INA. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). After his application for asylum is granted, the alien may later adjust his status to that of a legal permanent resident. INA § 209(b), 8 U.S.C. § 1159(b) (2006).

16. See INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (giving the Secretary of Homeland Security and the Attorney General discretion to grant asylum).

17. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (explaining that it is the burden of the applicant to establish grounds for relief); *Matter of J-Y-C-*, 24 I. & N. Dec. 260, 262–65 (BIA 2007) (discussing the applicant’s burden to provide credible evidence); 8 C.F.R. §§ 1208.13(a), 1240.11(c)(3)(iii), 1240.49(c)(4)(iii) (2012) (requiring the applicant to prove that he qualifies as a refugee or asylee under the proper definitions). This Article applies to asylum applications made on or after May 11, 2005, following the changes imposed by the REAL ID Act of 2005, Pub. L. No. 109-13, § 101(h)(2), 119 Stat. 302, 305.

18. INA § 208(b)(1)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (explaining that an asylum applicant must establish that he qualifies as a refugee under INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006)).

19. 8 C.F.R. § 1208.13(b)(1) (explaining that “[a]n applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim,” but that the presumption is rebuttable). An alien is ineligible for asylum if he “ordered, incited, assisted, or otherwise participated in the persecution of others.” INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (providing examples of individuals who do not qualify as refugees). Aliens convicted of particularly serious crimes are also ineligible for asylum. INA § 208(b)(2)(A)(ii) (considering aliens “convicted by a final judgment of a particularly serious crime . . . a danger to the community in the United States”); see also *Kankamalage v. I.N.S.*, 335 F.3d 858, 864 (9th Cir. 2003) (noting that the definition of a serious crime was adjusted in 1997 to include aggravated felonies). Similarly, aliens who have committed serious, nonpolitical crimes outside the United States, *Pronsvikulchai v. Gonzales*, 461 F.3d 903, 905 (7th Cir. 2006), and those who are considered terrorists or who pose a danger

denied following “a fundamental change in circumstances such that the [alien] no longer has a well-founded fear of persecution.”²⁰ The alien may rebut this determination by demonstrating “compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,” or by establishing “a reasonable possibility” of “other serious harm.”²¹ To establish asylum eligibility based on the possibility of future persecution, an alien must show both a subjective fear of persecution and that his fear is “objectively reasonable.”²² A fear is objectively reasonable if there is a “discernable chance of persecution,” no matter how slight.²³

An alien must file an asylum claim within one year after arriving in the United States, unless he provides evidence of either “changed circumstances which materially affect [his] eligibility for asylum[,] or extraordinary circumstances relating to the delay in filing an application.”²⁴

to U.S. security, *Matter of S-K-*, 23 I. & N. Dec. 936, 941–42 (BIA 2006), are ineligible. See INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A) (listing grounds of ineligibility). Additionally, an alien who “was firmly resettled in another country before arriving in the United States” may not apply for asylum. INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi); see also *Maharaj v. Gonzales*, 450 F.3d 961, 971 (9th Cir. 2006) (noting that an offer of permanent residence in another country establishes resettlement, and therefore renders the asylum applicant ineligible for I-589 relief). Finally, an immigration judge may deny asylum as a matter of discretion, even if a person is statutorily eligible for relief. *Matter of A-H-*, 23 I. & N. Dec. 774, 780 (A.G. 2005) (explaining that the INA uses equivocal language, such as “may,” which affords discretion in awarding relief).

20. 8 C.F.R. § 1208.13(b)(1)(i)(A); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 & n.11 (1987) (explaining that a fear is well-founded if there is a one in ten chance that the alien will face persecution).

21. 8 C.F.R. § 1208.13(b)(1)(iii)(A); see also *Matter of S-A-K- and H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008) (finding that two victims of female genital mutilation established a compelling reason for refusing to return to Somalia, and were therefore granted asylum); *Matter of Chen*, 20 I. & N. Dec. 16, 17–18 (BIA 1989) (articulating the same standard).

22. *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004) (delineating a two-prong definition of the “well-founded fear of persecution” requirement in establishing asylum based on future harm). *Jorgji v. Mukasey*, 514 F.3d 53, 58–59 (1st Cir. 2008), provides an example of an alien who was able to meet only the subjective prong of the test. The court found that an Albanian applicant who saw people being executed as a child may have a subjective fear of returning to her country of origin, but she did not have an objectively reasonable basis for her fear because the events occurred fifteen to thirty-five years before, under a Stalinist government that no longer existed. *Id.*

23. *Diallo v. I.N.S.*, 232 F.3d 279, 284 (2d Cir. 2000) (citing *Cardoza-Fonseca*, 480 U.S. at 431).

24. INA § 208(a)(2)(B), (D), 8 U.S.C. § 1158(a)(2)(B), (D); 8 C.F.R. § 208.4(a)(4)–(5) (2012) (defining “changed circumstances” for the purpose of filing deadlines). Compare, e.g., *Vahora v. Holder*, 641 F.3d 1038, 1042–43 (9th Cir. 2011) (finding that religious violence beginning after the applicant left his home country of India excused his late application for asylum under the “changed circumstances” exception), with *Toj-Culpatan v. Holder*, 612 F.3d 1088 (9th Cir. 2010) (rejecting the alien’s late asylum application because his inability to speak English was not an “extraordinary circumstance” warranting a time extension).

2. *Relief Through Withholding of Removal*

Withholding of removal is a form of relief that prevents the removal of an alien to a country that poses a significant risk of persecution.²⁵ Withholding of removal requires the alien to show a likelihood that his “life or freedom would be threatened in the proposed country of removal” because of his “race, religion, nationality, membership in a particular social group, or political opinion.”²⁶ A past threat to life or freedom creates a presumption of a future threat, but this presumption may be rebutted by evidence of a fundamental change in circumstances.²⁷ Although a request to withhold removal need not be filed within one year of arrival in the United States,²⁸ withholding of removal does not provide a basis to become a lawful permanent resident.²⁹

25. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006) (indicating that the Attorney General “may not” remove an alien qualifying for withholding of removal because of the risk of harm in his country of origin); *Ramsameachire*, 357 F.3d at 178 (explaining that “the Attorney General *must* grant withholding of removal to aliens who have established the necessary elements” (emphasis added)). Unlike asylum, the alien is actually ordered to be removed from the United States by the immigration judge; however, his or her removal is “withheld” upon the granting of the application for withholding of removal. See *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 433 (BIA 2008).

26. 8 C.F.R. § 1208.16(b)(1)(i) (2012). An alien must establish his eligibility for withholding of removal by a “clear probability.” *Li v. Ashcroft*, 356 F.3d 1153, 1157 (9th Cir. 2004). The adjustments to the standards for the alien’s burden of proof, credibility, and corroborative evidence under the REAL ID Act also apply to applications for withholding of removal, filed on or after May 11, 2005. See INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4) (2006) (detailing the evidence the applicant must provide to be eligible for relief).

27. 8 C.F.R. § 208.16(b)(1)(i) (2012). An applicant is ineligible to receive withholding of removal if he has committed a “particularly serious crime,” as defined under INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii). 8 C.F.R. § 1208.16(d)(2). That provision of the INA explains that a person “convicted by final judgment of a particularly serious crime is a danger to the community of the United States.” INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii). Although the statute considers an aggravated felony a “serious crime,” INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B), the BIA has explained that the definition is not limited to aggravated felonies, *Matter of N-A-M-*, 24 I. & N. Dec. 336, 337–39 (BIA 2007). Similarly, an alien is ineligible for withholding of removal if he committed a “serious nonpolitical crime before [he] arrived in the United States.” INA § 241(b)(3)(B)(iii), 8 U.S.C. § 1231(b)(3)(B)(iii). Additionally, an alien is ineligible for withholding of removal if he “ordered, incited, assisted or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group or political opinion.” INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i); *Matter of A-H-*, 23 I. & N. Dec. 774, 783–85 (A.G. 2005). Finally, the Attorney General will decline to halt removal proceedings if “there are reasonable grounds to believe that the alien is a danger to the security of the United States.” INA § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv).

28. Compare 8 C.F.R. § 208.4 (establishing a one-year time limit for asylum applications), with 8 C.F.R. 208.16 (imposing no time limit for an application for withholding of removal).

29. See INA § 209(b), 8 U.S.C. § 1159(b) (2006) (allowing for the adjustment of the status of *asylum* applicants); 8 C.F.R. § 209.2 (2012) (same). The consequences for being granted withholding of removal rather than asylum are substantial, as an alien who is granted withholding of removal does not become a legal permanent resident, the alien may not file a visa petition for his family members to immigrate to the United States, and withholding of removal does not

3. Relief Under the Convention Against Torture

Withholding or deferral of removal under the CAT are also forms of relief that depend on a likelihood of harm in an alien's country of origin.³⁰ However, rather than requiring persecution based on certain characteristics, as is required for asylum and withholding of removal, CAT relief requires the alien to show that he would "more likely than not be tortured" if forced to return to his country of origin.³¹ Under the CAT, removal can be either withheld or deferred.³² The difference between the two forms of relief is in the protections afforded and the classes of aliens barred from relief.³³ Withholding under the CAT has discretionary eligibility requirements,³⁴ but deferral under the CAT is mandatory and available to anyone who meets the standard.³⁵

provide a basis for citizenship. Although an alien granted withholding of removal relief does not gain residency or citizenship, he may apply for employment authorization. 8 C.F.R. § 274a.12(a)(10) (2012).

30. See 8 C.F.R. § 1208.16(c) (basing CAT relief on the likelihood of torture in the alien's country of origin). Like withholding of removal, CAT relief does not have a one-year application deadline. See *id.* (providing no time limit). However, as with withholding of removal, an alien remaining in the United States under the CAT may not apply for permanent residency. See *supra* note 29 (referring to the INA and Code of Federal Regulations provisions that allow for the adjustment of the status of an alien and indicating that these provisions specifically refer only to aliens who have been granted asylum).

31. Compare 8 C.F.R. § 1208.16(c) (listing past torture, the ability to relocate to other parts of the country, and human rights violations as factors to consider when determining whether the alien is eligible for CAT relief), with 8 C.F.R. § 1208.13(b)(1) (2012) (requiring persecution based on "race, religion, nationality, membership in a particular social group, or particular opinion" to be eligible for asylum). See also *Tun v. I.N.S.*, 445 F.3d 554, 571 (2d Cir. 2006) (reversing the immigration judge's rejection of the alien's application for CAT relief because neither his political beliefs nor the basis for the government's torture were relevant to his CAT claim). Relief under the CAT is mandatory for an alien who sustains his burden of proof. *Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004) (explaining that "Article 3 of the CAT expressly prohibits the United States from returning any person to a country in which it is more likely than not that he" will be tortured).

32. 8 C.F.R. § 208.16(d) (allowing for withholding of removal); 8 C.F.R. 208.14 (allowing for deferral of removal).

33. Compare 8 C.F.R. § 208.16(d) (providing the criteria for withholding of removal under the CAT), with 8 C.F.R. § 208.14 (providing the criteria for deferral of removal under the CAT).

34. 8 C.F.R. § 208.16(d). Withholding of removal has both mandatory and discretionary eligibility requirements, similar to withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006). KURZBAN, *supra* note 11, at 560.

35. 8 C.F.R. § 208.17(a) (2012). Unlike withholding of removal, deferral of removal under the CAT "does not consider any of the bars to withholding under INA § 241(b)(3)(B)." KURZBAN, *supra* note 11, at 560. An alien is eligible for deferral of removal under the CAT even if he "was involved in the persecution of others," KURZBAN, *supra* note 11, at 560 (citing *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004)), or if the applicant is considered to be a terrorist or has "supported terrorist activity," KURZBAN, *supra* note 11, at 560 (citing *Hosseini v. Gonzales*, 471 F.3d 953, 957-61 (9th Cir. 2006)).

B. Standards for Credibility and Burden of Proof Under the REAL ID Act in Immigration Courts

There are two main assessments that an immigration judge must render in adjudicating an asylum application. First, the immigration judge must determine whether the alien is credible.³⁶ Second, the immigration judge must determine whether the alien met his burden of proof.³⁷

1. Evaluating the Asylum Applicant's Credibility

An immigration judge's evaluation of an alien's credibility is "arguably the most crucial aspect of any asylum case," and is considered to be the most significant obstacle an asylum applicant must overcome.³⁸ For applications filed after May 11, 2005, the REAL ID Act applies. The REAL ID Act delineates a totality of the circumstances test that directs the judge to consider "all relevant factors."³⁹ Relevant factors include:

36. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (requiring the judge to make a credibility determination when adjudicating an application for asylum); *see also* INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C) (requiring the judge to make a credibility determination when adjudicating an application for withholding of removal). Related to a credibility determination, immigration judges must also determine whether the alien has filed a frivolous asylum application. *Matter of Y-L-*, 24 I. & N. Dec. 151, 157 (BIA 2007) (explaining that an analysis for frivolousness "is a preemptive determination which, once made, forever bars an alien from any benefit under the Act, except for withholding of removal"). A judge must find, by a preponderance of the evidence, that the applicant "knowingly and deliberately fabricated material elements of the claim." 8 C.F.R. § 1208.20 (2012) (requiring this determination to be made with consideration of the applicant's explanation for the claim).

37. *See* INA § 208(b)(1)(B)(i)–(ii), 8 U.S.C. § 1158(b)(1)(B)(i)–(ii) (detailing the burden the applicant must sustain and the information that the immigration judge may consider in determining whether the applicant has sustained his burden in applying for asylum); *see also* INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C) (charging the immigration judge with the task of determining whether the alien has sustained his burden of proof in applying for withholding of removal).

38. Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 *TEX. INT'L L.J.* 185, 186–87 (2008) (quoting Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 *HARV. J. ON LEGIS.* 101, 129 (2006)); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 *GEO. IMMIGR. L.J.* 367, 368 (2003) (internal quotation marks omitted); *see also* Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum Seekers*, 84 *DENV. U. L. REV.* 1121, 1136–42 (2007) (arguing that the REAL ID Act language regarding credibility and corroboration "obscures and confuses the legal principles contained in the case law"). A positive evaluation of credibility is paramount, as an alien's credible testimony "may be sufficient to sustain [his] burden of proof" alone. 8 C.F.R. § 1208.13(a); *Matter of Dass*, 20 I. & N. Dec. 120, 124 (BIA 1989) (explaining that an alien's uncorroborated testimony can sustain his burden of proof if it "is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his or her fear").

39. Pub. L. No. 109-13, § 101(a)(3)(B)(iii), 119 Stat. 302, 303 (codified at INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2006)). Evaluation of the credibility of an applicant who filed for relief before the passing of the REAL ID Act must be based on "specific,

[T]he demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim.⁴⁰

Although an immigration judge can rely on any inaccuracy or inconsistency in evaluating credibility, any adverse determination must be supported by the record.⁴¹ Generally, testimony is considered incredible if it is inconsistent or improbable, or the applicant's account conflicts with the current conditions in the country.⁴² One of an immigration judge's most difficult tasks in assessing credibility is determining the reliability of the evidence documenting country conditions.⁴³

cogent reasons" that "bear a legitimate nexus to the" evaluation and go to the heart of the claim. *Secaida-Rosales v. I.N.S.*, 331 F.3d 297, 307 (2d Cir. 2003) (quoting *Aguilar-Cota v. I.N.S.*, 914 F.3d 1375, 1381 (9th Cir. 1990)) (internal quotation marks omitted).

40. INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).

41. See *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 337 (2d Cir. 2006) (indicating that it is the responsibility of the immigration court to "adequately link its decision to the record evidence in a reasoned opinion that properly applies the law"); see also *Manzur v. U.S. Dep't of Homeland Sec.*, 494 F.3d 281, 289 (2d Cir. 2007) (explaining that a credibility evaluation will be affirmed only "if it is supported by evidence that is reasonable, substantial, and probative when considered in light of the record as a whole" (quoting *Jin Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 113 (2d Cir. 2005) (internal quotation marks omitted))); see also Rempell, *supra* note 38, at 193–94 (describing the process by which appellate courts review credibility evaluations and the standards required for an adverse determination to stand).

42. *Matter of S-M-J*, 21 I. & N. Dec. 722, 728–29 (BIA 1997); see, e.g., *Malkandi v. Holder*, 576 F.3d 906, 917–18 (9th Cir. 2009) (affirming the immigration court's adverse credibility determination because the alien's testimony was "highly implausible"); *Matter of J-Y-C*, 24 I. & N. Dec. 260, 263–64 (BIA 2007) (finding the applicant incredible because his testimony was inconsistent).

43. Diane Uchimiya, *A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Procedural Due Process for Asylum Seekers*, 26 PENN. ST. INT'L L. REV. 383, 404–19 (2007) (noting that the U.S. Department of State estimates a high incidence of fraud in asylum cases, based on interviews with applicants' relatives and the high number of fraudulent documentation, particularly in cases in which the alien's country of origin is Cameroon, China, or Ethiopia); Sam Dolnick, *Asylum Ploys Play off News to open Door*, N.Y. TIMES, July 12, 2011, at A1, A19 (quoting an immigration judge in Miami, who noted that "[f]raud in immigration asylum is a huge issue and major problem").

2. *Assessing Whether the Asylum Applicant Has Satisfied His Burden of Proof*

Congress enacted the REAL ID Act, in part, to create uniformity in the adjudication of asylum applications.⁴⁴ In order to sustain his burden under the REAL ID Act, an alien applying for asylum:

[M]ust comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.⁴⁵

From the alien's perspective, satisfying his burden of proof is one of the most difficult tasks in filing an asylum application.⁴⁶ However, because removal proceedings are administrative, the Federal Rules of Evidence do not apply.⁴⁷ This is beneficial for aliens because evidence that would have been excluded under the Federal Rules may be admissible. Courts and the

44. H.R. REP. NO. 109-72, at 166–67 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240, 292 (calling for a uniform standard of credibility because of inconsistent adjudication among the circuit courts of appeals); 151 CONG. REC. H2870 (daily ed. May 3, 2005); *see generally* Melanie A. Conroy, *Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 20–28 (2009) (explaining the REAL ID Act's legislative history and assessing its immediate consequences for asylum applicants).

45. INA § 240(c)(4)(B), 8 U.S.C. § 1229a(c)(4)(B) (2006).

46. *See* Rempell, *supra* note 38, at 191 (noting that aliens “fleeing persecution may lack sufficient time to gather probative evidence either in their possession or otherwise obtainable, or may fear traveling with any documentation adverse to repressive governments,” and that “[m]any countries have questionable record-keeping practices or do not keep paper trails of their abusive activities, calling into question the accuracy of provided documentation”); Susan K. Kerns, Note, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 201–03 (2000) (describing “the unique difficulties of proof” associated with applications for asylum).

47. *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (noting that the standard for admissibility is instead “whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law” (quoting *Bustos-Torres v. I.N.S.*, 898 F.2d 1053, 1055 (5th Cir. 1990) (internal quotation marks omitted))).

Department of Justice recognize the unique challenges of providing evidence of persecution and country conditions,⁴⁸ and consequently have attempted to create a system that ensures due process.⁴⁹

In removal proceedings, after the Department of Homeland Security (DHS) establishes removability, the alien seeking relief has the burden of establishing that he is eligible for relief and that relief should be granted in the court's discretion.⁵⁰ If the alien's application is subject to mandatory denial, "the alien shall have the burden of proving by a preponderance of the evidence that such grounds [for denial] do not apply."⁵¹

In assessing an alien's application for relief, the judge may require the alien to provide evidence corroborating his claim.⁵² The INA provides that "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."⁵³ If the judge determines that the applicant failed to meet his burden, the judge may require corroborative evidence, which the alien must provide unless he "does not have the evidence and cannot reasonably obtain the evidence."⁵⁴

48. See *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008) (noting that countries that oppress their citizens often do not keep adequate records); see also *Dawoud v. Gonzales*, 424 F.3d 608, 612–13 (7th Cir. 2005) (remarking that "[t]o expect [asylum applicants] to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face"); *Cordon-Garcia v. I.N.S.*, 204 F.3d 985, 992–93 (9th Cir. 2000) (acknowledging "the serious difficulty with which asylum applicants are faced in their attempts to prove persecution"); *Matter of S-M-J-*, 21 I. & N. Dec. 722, 726 (BIA 1997) (recognizing that the applicant's testimony may be the only evidence available).

49. See 8 C.F.R. § 242.14(c) (1997) (allowing the immigration judge to consider "any prior written statement, made by a respondent or by any other person, that is material and relevant to the issues in the case"); see also *Cordon-Garcia*, 204 F.3d at 992–93 (adjusting the standard of admissibility in recognition of the difficulties faced by asylum applicants); *Matter of Velasquez*, 19 I. & N. Dec. 377, 380 (BIA 1986) (explaining that "documentary evidence in deportation proceedings need not comport with the strict judicial rules of evidence; rather, in order to be admissible, such evidence need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law").

50. 8 C.F.R. § 1208.4(a)(2) (2012) (requiring the applicant to prove that he filed his application in a timely manner); 8 C.F.R. § 1240.8(d) (requiring the applicant to prove that he is eligible for relief). There is no discretionary element for deferral of removal under the CAT. 8 C.F.R. § 1208.17 (2012).

51. 8 C.F.R. § 1240.8(d) (2012).

52. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2006); *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008) (noting that "[t]he REAL ID Act clearly states that corroborative evidence may be required, placing immigrants on notice of the consequences for failing to provide corroborative evidence"); see also *Aden v. Holder*, 589 F.3d 1040, 1045 (9th Cir. 2009) (stating that an applicant "can be turned down for failing to provide corroboration where he does have it or could reasonably obtain it").

53. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

54. *Id.* § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii).

Failure to provide corroborating evidence may have a negative impact on the judge's credibility determination, despite the distinction between credibility and burden of proof in the statute. This is because "the absence of corroboration in general makes an applicant unable to rehabilitate testimony that has already been called into question."⁵⁵

Under these guidelines, the judge must determine whether the alien has proven that he is eligible for relief by a preponderance of the evidence.⁵⁶ Although there is no established definition of the term "preponderance of the evidence," the BIA has explained that "it is sufficient that the proof only establish that [the applicant's claim] is probably true."⁵⁷

Thus, for an alien to prevail on an asylum claim, he must demonstrate by a preponderance of the evidence, based on his own credible testimony, the credible testimony of any witnesses, and any reasonably available corroborative evidence, that he has a subjective fear of future persecution in his country of origin and that his fear is objectively reasonable.⁵⁸ The alien must

55. *Liu v. Holder*, 575 F.3d 193, 198 n.5 (2d Cir. 2009) (quoting *Yang v. Gonzales*, 496 F.3d 268, 273 (2d Cir. 2007) (per curiam)); see also *Diallo v. I.N.S.*, 232 F.3d 279, 285 (2d Cir. 2000) ("While consistent, detailed, and credible testimony may be sufficient to carry the alien's burden, evidence corroborating his story, or an explanation for its absence, may be required where it would reasonably be expected."). The applicant may present "both evidence of general country conditions and evidence that substantiates the applicant's particular claims." *Id.* at 288. Additionally, the judge may require evidence of the applicant's personal plight, but only in circumstances where this evidence is reasonable. *Id.* This evidence is necessary only "if it is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers." *Id.* at 288–89 (quoting *Matter of S-M-J*, 21 I. & N. Dec. 722, 726 (BIA 1997)) (internal quotation marks omitted).

56. *Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151, 155–56 (2d Cir. 2006).

57. *Matter of E-M-*, 20 I. & N. Dec. 77, 80 (BIA 1989).

58. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 & n.11 (1987). An alien may also be granted asylum based on past persecution alone. *Qu v. Gonzales*, 399 F.3d 1195, 1202 (9th Cir. 2005) (finding that "applicants who have suffered forced or involuntary sterilization necessarily have an inherent well-founded fear of future persecution because such persons will be persecuted for the remainder of their lives"). Although an applicant who successfully established past persecution will generally be presumed to have a well-founded fear of future persecution, that presumption can be rebutted if the DHS proves, by a preponderance of the evidence, a fundamental change in circumstances: either that the applicant no longer has a well-founded fear of persecution, or that the applicant could reasonably avoid future persecution by relocating to another part of the alien's country. 8 C.F.R. § 1208.13(b)(1) (2012); see also *Matter of D-I-M-*, 24 I. & N. Dec. 448, 450 (BIA 2008) (noting that the applicant's ability to relocate to a different area of the country is a mitigating circumstance); *Matter of N-M-A-*, 22 I. & N. Dec. 312, 313–14 (BIA 1998) (holding that the presumption of future persecution is unavailable when circumstances in the applicant's country of origin have changed). Internal relocation is presumed to be unreasonable "unless the Government establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3)(ii). Additionally, the presumption of future persecution is unavailable "if the applicant's fear of future persecution is unrelated to the past persecution." 8 C.F.R. § 1208.13(b)(1). If the DHS rebuts the presumption of future persecution, the applicant must either provide compelling reasons for his inability to return to his country of origin, or establish

also establish that any mandatory denial ground for asylum does not apply.⁵⁹ For an alien to prevail on a withholding of removal claim, he must establish, by a preponderance of the evidence and through credible testimony and corroborating evidence, that his life or freedom would more likely than not be threatened in his country of origin.⁶⁰ The alien must also establish that a mandatory denial ground for withholding of removal does not apply.⁶¹ Finally, an alien seeking relief under the CAT must demonstrate, by a preponderance of the evidence and through credible testimony and corroborating evidence, that he would more likely than not be tortured if removed to his country of origin.⁶²

II. IMMIGRATION JUDGES INCONSISTENTLY ANALYZE VOLUNTARY RETURN TRIPS IN EVALUATING I-589 APPLICATIONS FOR RELIEF FROM REMOVAL

In adjudicating asylum applications, immigration judges most often render their decisions orally.⁶³ In their decisions, immigration judges are required to

that there is a reasonable possibility that he may suffer other serious harm upon removal to that country. 8 C.F.R. § 1208.13(b)(1)(iii).

59. 8 C.F.R. § 1208.13(c)(2)(ii) (explaining that it is the applicant's burden to prove, by a preponderance of the evidence, that the ground for denial does not apply). For example, once the government presents evidence of the possibility of permanent resettlement in another country, the burden shifts to the applicant to show that the nature of his stay and ties were too tenuous, or the conditions of his residence too restricted, for him to be "firmly resettled." *See* *Maharaj v. Gonzales*, 450 F.3d 961, 964–69 (9th Cir. 2006) (recounting the history of the firm resettlement doctrine). A finding of firm resettlement is a factual determination for the trial court, and the standard of review by an appellate court is "substantial evidence." *Id.* at 967.

60. 8 C.F.R. § 1208.16(b) (2012). If the applicant can establish past persecution, "it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim." 8 C.F.R. § 1208.16(b)(1). The presumption may be rebutted if the DHS proves, by a preponderance of the evidence, that there has been a fundamental change in circumstances in the applicant's country of origin, or that the applicant can reasonably relocate within that country. *Id.*; *Matter of A-T-*, 24 I. & N. Dec. 617, 618–19 (A.G. 2008) (applying the presumption). Similarly, "[i]f the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm." 8 C.F.R. § 1208.16(b)(1)(iii).

61. 8 C.F.R. § 1208.16(d)(2)(ii) ("If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply."). Unlike asylum, withholding of removal does not require a subjective fear of persecution. *See* *Paul v. Gonzales*, 444 F.3d 148, 155–56 (2d Cir. 2006).

62. 8 C.F.R. § 1208.16(c)(2).

63. These oral decisions have been criticized by circuit courts of appeals. *See, e.g.*, *Gatimi v. Holder*, 578 F.3d 611, 614 (7th Cir. 2009) (referring to the immigration judge's ruling as "absurd" and stating that "the immigration judge lapsed into incoherence"); *Sinha v. Holder*, 564 F.3d 1015, 1023 (9th Cir. 2009) (noting that the immigration judge's decision was "not a model of coherent reasoning" and was "difficult to follow"); *Zheng v. Mukasey*, 552 F.3d 277, 285 (2d Cir. 2009) (finding the immigration judge's oral decision "very difficult to read"); *Figueroa v. Mukasey*, 543 F.3d 487, 498 (9th Cir. 2008) (observing that "large parts of the opinion [were] incoherent," and questioning whether the deficiencies in the opinion were caused by "antiquated recording equipment, an exceptionally heavy caseload, or some other reason"); *Chhay v.*

make factual findings, explain the relevant legal standards, assess credibility, evaluate questions of law, and render discretionary determinations.⁶⁴ Successful application of the law and delineation of these various steps can be especially difficult in oral rulings, as immigration judges render decisions under severe time constraints.⁶⁵ Delivering decisions orally, although timely, can lead to confusing factual and legal assessments. It is often unclear whether an immigration judge's specific finding was based on removability, credibility, eligibility for relief, burden of proof, mandatory denial, or discretionary grounds.⁶⁶

Mukasey, 540 F.3d 1, 7 (1st Cir. 2008) (advising immigration judges "to use more straightforward language").

Professor and noted immigration law scholar Stephen H. Legomsky has suggested that immigration judges should be required to issue written decisions. Stephen H. Legomsky, *An Asylum Seeker's Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. L.J. 619, 640 (2000). According to Professor Legomsky, written decisions are necessary for five reasons:

First, it is more difficult to reach a hasty conclusion when one has to articulate convincing reasons in writing. Hopefully the difficulties in explaining the decision will sometimes cause an adjudicator to reconsider. Second, the adjudicator who knows he or she will have to justify the decision in writing has greater incentive to consider the case carefully before reaching a decision. Third, without reasons, the losing party will often find the result even more difficult to swallow. Fourth, a written record of reasons assures the public that the process is serious and careful. And fifth, reasons will be necessary if, as recommended below, the decision is subjected to possible review.

Id.; see also Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 437 (2007) [hereinafter Legomsky, *Learning to Live*] (arguing that written opinions enhance consistency, promote deeper reasoning, and help to prevent "gut instinct and visceral reactions based on personal or political outlook").

64. See Legomsky, *Learning to Live*, *supra* note 63, at 434–45 (noting issues with immigration decisions including the complexity, volume, scope, and shifting burdens).

65. See Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 60 (2008) (finding that immigration "[j]udges reported more burnout than any other group of professionals to whom the CBI had been administered, including prison wardens and physicians in busy hospitals"); see also Scott Rempell, *Gauging Credibility in Immigration Proceedings: Immaterial Inconsistencies, Demeanor, and the Rule of Reason*, 25 GEO. IMMIGR. L.J. 377, 404–05 (2011) (explaining that the Seventh Circuit found that repeated "egregious failures of the immigration court and the Board to exercise care commensurate with the stakes in [immigration proceedings] can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate" (quoting *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (internal quotation marks omitted))).

66. See Rempell, *supra* note 65 (noting the difficulties appellate courts face in attempting to decipher and interpret oral opinions by immigration judges).

The Second Circuit's order in *Tek Lie Kwee v. I.N.S.*, 156 F. App'x 372 (2d Cir. 2005), demonstrates the difficulty in reviewing an immigration judge's oral decision where there are intersections of law and unclear findings regarding credibility, corroboration, and burden of proof. In this case, the Second Circuit remanded proceedings to the BIA based on the insufficient and confusing findings made by the immigration judge. *Id.* at 373–74. The court explained that the immigration judge "made numerous remarks about whether the evidence presented by Kwee was credible or worthy of belief," but that the judge "never made an explicit credibility finding."

These types of inconsistent and imprecise findings have been particularly true for analyses regarding an alien's voluntary return to his country of origin.⁶⁷ Immigration judges, the BIA, and courts of appeals have treated voluntary returns to an alien's country of origin differently in adjudicating claims for asylum, withholding of removal, and CAT relief. This lack of consistency endangers the lives of true asylees, undermines the integrity of the asylum application process, and reduces confidence in the courts' ability to ensure due process.⁶⁸

A. *Analyzing an Alien's Voluntary Return Trip in the Burden of Proof Context*

It is legally sound for an immigration judge to find that an alien's voluntary return to his country of origin undermines his fear of future persecution, especially in cases in which the alien did not suffer past persecution. Indeed, in *Restrepo v. U.S. Attorney General*, the Eleventh Circuit upheld the immigration judge's determination that the applicant failed to demonstrate that he had an objectively reasonable fear of returning to Colombia, in part,

which is required by Second Circuit precedent. *Id.* The court disagreed with the immigration judge's criticism of the quality and sufficiency of Kwee's evidence, concluding that Kwee's testimony "presented enough evidence to support his asylum and withholding of removal claims." *Id.* (noting that the immigration judge "found that Kwee offered no evidence to prove" his religious or ethnic background, that Kwee "failed to draw a connection between his persecution and racial unrest in Indonesia," his country of origin, and that "Kwee's asylum claim was dubious because he had left Indonesia and voluntarily returned several times"). However, because the immigration judge made no explicit ruling on Kwee's credibility, the court remanded the case. *Id.* at 374.

The Fourth Circuit has also struggled to review decisions that do not provide explicit evaluations of an applicant's credibility. For example, in *Tchaya v. Ashcroft*, 106 F. App'x 174, 177 (4th Cir. 2004), the applicant claimed that she was arrested and beaten twice on account of her political opinion, but voluntarily returned to Cameroon, her country of origin, twice before seeking asylum. Without explicitly delineating the grounds, the immigration judge denied Tchaya's application. *Id.* at 179. Although the immigration judge failed to make an explicit adverse credibility determination, the Fourth Circuit found that it was "clear that the immigration judge implicitly found Tchaya's testimony to lack credibility" and "questioned the claimed severity of her mistreatment in jail in light of the fact that Tchaya vacationed in the United States and voluntarily returned to Cameroon without seeking asylum three separate times after her first two arrests." *Id.* at 179–80. Relying on its interpretation of the immigration judge's holding, the court ultimately denied Tchaya's application for asylum, finding that "substantial evidence support[ed] the immigration judge's" conclusion. *Id.* at 180.

Additional complications can arise when the BIA alters the immigration judge's decision, declines to review portions of the immigration judge's decision, or completes its own review de novo. *See, e.g.,* *Rodriguez v. Holder*, 683 F.3d 1164, 1166, 1177 (9th Cir. 2012) (holding that the BIA "committed legal error by making its own factual determination and engaging in a de novo review of the [immigration judge's] factual findings" rather than applying a clearly erroneous standard); *Marquez v. I.N.S.*, 105 F.3d 374, 378 (7th Cir. 1997) (criticizing a decision by the BIA for its disorganization and lack of clarity).

67. *See supra* note 66 (providing examples of such cases); *see also infra* notes 80–81, 150 (same).

68. *See Legomsky, Learning to Live, supra* note 63, at 423–28.

because of his voluntary return to the country.⁶⁹ Beginning in early 2000, Restrepo received a series of life-threatening phone calls from members of a terrorist group known as the Revolutionary Armed Forces of Colombia (FARC).⁷⁰ Within months, the FARC killed three of Restrepo's coworkers and seized the power plant where he worked and lived with his family.⁷¹ Restrepo quit his job and relocated with his family to another part of Colombia, but FARC members located him there and threatened to kill him.⁷²

Restrepo fled to the United States in 2001, temporarily residing outside of Colombia to avoid further danger from the FARC.⁷³ However, Restrepo did not apply for asylum while in the United States, and he voluntarily returned to Colombia later that year.⁷⁴ When he returned, the FARC continued to threaten him and, after six months, he returned to the United States and applied for asylum.⁷⁵ Restrepo appeared before an immigration judge who found that he failed to demonstrate that he suffered past persecution or had a well-founded fear of future persecution.⁷⁶

On appeal, the Eleventh Circuit explained that, although Restrepo was harassed by the FARC, he did not suffer past persecution because neither he nor his family members were ever physically harmed.⁷⁷ Accordingly, the court concluded that Restrepo was not entitled to a presumption of a well-founded fear of future persecution.⁷⁸ In denying Restrepo's petition for relief, the court explained that "[w]hile [his] subjective fear of persecution may be genuine, there is substantial evidence to support the finding that it is not objectively reasonable," due, in part, to Restrepo's subsequent return to Colombia.⁷⁹ The

69. 184 F. App'x 926, 929–30 (11th Cir. 2006).

70. *Id.* at 927 (explaining that the FARC targeted Restrepo because he was employed by the Colombian government and provided medical treatment to the Colombian military).

71. *Id.* at 927–28.

72. *Id.* at 928. Restrepo and his family moved to Medellin, Colombia, where he continued to work for the government. *Id.*

73. *Id.* (noting that Restrepo "hop[ed] that conditions would 'cool off' in Colombia if he moved away for a while").

74. *Id.* (explaining that Restrepo never intended to remain in the United States permanently "because his wife and children remained [in Colombia], he owned property there, and he enjoyed the job he had left behind").

75. *Id.* The FARC continued to threaten Restrepo over the phone, even though he changed his phone number several times. *Id.* (noting that Restrepo received nine phone calls in six months).

76. *Id.* In the alternative, the immigration judge found Restrepo's testimony that the FARC continued to threaten him implausible. *Id.* The BIA upheld the immigration judge's findings on appeal. *Id.* at 928–29.

77. *Id.* at 929 (explaining that phone calls and threats "d[id] not rise to the level of past persecution").

78. *Id.* at 930.

79. *Id.* (noting also that Restrepo's family continued to reside in Medellin without harm).

Eleventh Circuit continued to apply this rationale in a number of decisions involving aliens who were harassed by the FARC.⁸⁰

Other circuit courts of appeals have upheld similar denials of relief in situations where the applicant voluntarily returned to his country of origin.⁸¹ Some courts have recognized limitations on this analysis, however, cautioning that an alien's return trip to his country of origin does not *automatically* support the denial of an asylum application and that each situation should be

80. See, e.g., *Santos v. U.S. Att'y Gen.*, 230 F. App'x 901, 902–05 (11th Cir. 2007) (holding that threats from paramilitary groups did not constitute persecution and that Santos' voluntary return to Colombia precluded a finding that his fear of future harm was objectively reasonable); *Vasquez v. U.S. Att'y Gen.*, 255 F. App'x 349, 350–51 (11th Cir. 2007) (finding that the FARC's threatening phone calls to Vasquez and his family were insufficient to establish past persecution, and that the nature of the calls and his voluntary return to Colombia before seeking asylum in the United States were insufficient to establish a well-founded fear of future persecution).

81. See, e.g., *Vasili v. Holder*, 442 F. App'x 203, 207 (6th Cir. 2011) (holding that an applicant's voluntary return to his country of origin does not support a finding of persecution, and consequently denying Vasili's application for relief because he and his wife returned to Albania, their country of origin, twice before seeking asylum); *Patel v. Holder*, 397 F. App'x 695, 696 (2d Cir. 2010) (concluding that the "[BIA] reasonably determined that the fact that Patel's father voluntarily returned to India from abroad, and resumed his political activities without suffering any significant harm, diminished the objective reasonableness of Patel's fear of future persecution"); *Haile v. Mukasey*, 303 F. App'x 510, 511 (9th Cir. 2008) (finding that "substantial evidence support[ed] the IJ's finding that Haile [did] not have a well-founded fear of persecution because she did not seek asylum during the five year period she lived in Thailand, she voluntarily returned to Ethiopia for two months in 2001, without incident, and left her son there, and State Department reports on Ethiopia indicate somewhat improved conditions for Eritreans"); *Wijaya v. Gonzales*, 201 F. App'x 791, 793–95 (1st Cir. 2006) (explaining that, although Wijaya had a subjective fear of future persecution based on religious harassment and the bombing of several Christian churches and schools in Indonesia, she did not have an objectively reasonable fear of returning to Indonesia because she "left Indonesia in 2000 and voluntarily returned, which undermine[d] her claim of fear"); *Tolozá-Jiménez v. Gonzáles*, 457 F.3d 155, 161 (1st Cir. 2006) (concluding that the applicant failed to satisfy the subjective prong of the well-founded fear test by returning home to Colombia after traveling twice to the United States); *Ayoub v. U.S. Att'y Gen.*, 170 F. App'x 238, 240 (3d Cir. 2006) (upholding the BIA's denial of Ayoub's asylum application because her claim was "undermined by the fact that Ayoub voluntarily returned to Egypt in 1999 and hoped to persuade her husband to live there as well; when she could not persuade him, she came to the United States and applied for asylum"); *Ngarurih v. Ashcroft*, 371 F.3d 182, 189 (4th Cir. 2004) (holding that the applicant's return to his country of origin demonstrated that he was not "a person unable or unwilling to return to his home country due to a well-founded fear of persecution"); *Ambati v. Reno*, 233 F.3d 1054, 1061 (7th Cir. 2000) (denying an Indian man's asylum application because his wife and daughter voluntarily returned to India, which precluded the finding that "his fears [we]re 'objectively reasonable'"); *Mendez-Fuentes v. I.N.S.*, 230 F.3d 1363, No. 99-3813, 2000 WL 1517063, at *1 (8th Cir. Oct. 13, 2000) (affirming the BIA's denial of an asylum application because the applicant "failed to show his fear of future persecution was objectively reasonable: he voluntarily returned to El Salvador after allegedly leaving to escape persecution, and was able to obtain a passport and visa; he presented no evidence that his family remaining in El Salvador has been harmed since he left"); *Sarhangzadeh v. I.N.S.*, 86 F.3d 1163, No. 95-70026, 1996 WL 266496, at *3 (9th Cir. May 17, 1996) (holding that "the fact that Sarhangzadeh left Iran in 1985, visited the United States, and voluntarily returned to Iran for three more years before seeking asylum strongly supports the BIA's decision" denying the alien's asylum application).

analyzed individually to discourage the “rubber stamping” of cases in which an alien has returned to his country of origin.

For example, the Eleventh Circuit reconsidered its analysis of return trips in *De Santamaria v. U.S. Attorney General*, holding that a Colombian alien’s voluntary return to Colombia in the wake of FARC harassment did not negate her well-founded fear of future persecution.⁸² The court clarified that merely because Santamaria had voluntarily returned to Colombia was insufficient to overcome her credible testimony that she subjectively feared future persecution.⁸³ The court distinguished its ruling from that in *Restrepo* because of the unique facts of Santamaria’s case.

Santamaria became a “political target” of the FARC because of her involvement in democratic and social justice organizations, as well as her support for the anti-FARC mayor of Mosque, Colombia.⁸⁴ The FARC threatened Santamaria’s life because of her political involvement.⁸⁵ In November of 1998, FARC “rebels” assaulted her, overtook her car, pulled her out of the vehicle by her hair, and threw her to the ground.⁸⁶ The rebels warned her that she was an “enemy of the people” and threatened her life.⁸⁷ Consequently, Santamaria traveled to the United States to evade the FARC.⁸⁸ Despite visiting the United States three times to escape the FARC, Santamaria did not seek asylum, and she eventually returned to Colombia to continue her work.⁸⁹ Following additional threats to her life, the torture and murder of her family’s groundskeeper, and a beating, Santamaria again traveled to the United

82. 525 F.3d 999, 1010–12 (11th Cir. 2008).

83. *Id.* at 1011 (“[W]e do not endorse the principle espoused by the IJ—that a voluntary return to one’s home country always and inherently negates completely a fear of persecution.”).

84. *Id.* at 1003 (noting that Santamaria was a member of the Colombian Liberal Party and “various other political and social groups,” had been married to the Colombian ambassador to Peru, was a member of the New Democratic Force, which promoted democratic government in Colombia, founded the “Help With Love” organization, which provided assistance to the poor, and spoke to teenagers to discourage them from joining the FARC).

85. *Id.* The FARC threatened Santamaria “by mail and telephone, warning her that [they] would retaliate if she did not end her political activities.” *Id.*

86. *Id.* at 1003–04. The rebels threw Santamaria to the ground face-first and stepped on her back. *Id.*

87. *Id.* at 1003 (explaining that the man leading the assault identified himself as a commander of a division of the FARC and specifically referenced Santamaria’s work with the Colombian government). Following this incident, Santamaria moved to a different apartment and had a bullet-proof door installed; changed her speaking schedule; and used different transportation so that she would not be identified. *Id.* Despite her efforts, the FARC continued to threaten Santamaria by phone and graffiti messages; on one occasion, FARC rebels painted “Death to Help With Love” on her parents’ home. *Id.*

88. *Id.* (noting that Santamaria suffered from anxiety because of her fear of the FARC).

89. *Id.*

States.⁹⁰ She returned to Colombia once more, but after the FARC again threatened her life, she applied for asylum in the United States.⁹¹

The immigration judge denied Santamaria's asylum application, reasoning that her voluntary returns to Colombia "significantly negate[d] any subjective fear of persecution if she were to return at this time."⁹² The Eleventh Circuit overturned the immigration judge's decision, explaining that "most of Santamaria's travels to the United States occurred *before* the most severely persecutory acts occurred."⁹³ The court noted that Santamaria returned to Colombia only *once* after the most severe persecution took place.⁹⁴ The court explained that "[v]oluntary returns to a home country may weaken or undermine an applicant's claim of persecution," but emphasized that an applicant's voluntary return is not dispositive.⁹⁵ The court applied a totality of the circumstances test, considering "the reasons for the asylum applicant's return, whether the return was without incident, and whether the applicant's family members continue to live in the home country without incident."⁹⁶ In considering the circumstances in Santamaria's case, the court concluded that her return to Colombia did not prevent her from establishing a subjective fear of harm, or that her fear was objectively reasonable.⁹⁷

Like the Eleventh Circuit, the Ninth Circuit has adopted a nuanced approach in evaluating the effect of an alien's return to his country of origin on his I-589 application for relief from removal.⁹⁸ The Ninth Circuit requires immigration judges to consider both the context and the "voluntariness" of an alien's return to his country of origin.⁹⁹

90. *Id.* at 1004–05. FARC rebels beat Santamaria with the butts of their guns and abducted her, indicating that they going to execute her. *Id.* at 1004. Santamaria was freed only after a confrontation between the FARC and the Colombian military, when a soldier found her in the FARC's van. *Id.*

91. *Id.* at 1004 (noting that, after several more threatening phone calls, Santamaria's family urged her to flee to the United States permanently).

92. *Id.* at 1005–06 (denying similar claims for withholding of removal and relief under the CAT). The immigration judge seemed to focus on Santamaria's subjective fear, not on the objective reasonableness of her fear given her past persecution.

93. *Id.* at 1010.

94. *Id.* Importantly, unlike Restrepo, Santamaria suffered past persecution and was entitled to a presumption of a well-founded fear. *See supra* note 19 (detailing the presumption afforded to an alien who suffered persecution in the past).

95. *De Santamaria*, 525 F.3d at 1011.

96. *Id.* 1011–12 (detailing the factors considered to determine whether Santamaria's fear of persecution was objectively reasonable).

97. *Id.* at 1012.

98. *See Rojo v. Holder*, 408 F. App'x 73, 75 (9th Cir. 2011) (explaining that "the BIA's reliance on [the applicant's] return trip to Chile [wa]s particularly misplaced" because the record clearly explained "the absence of persecution during" his visit).

99. *See infra* notes 100-07 (referencing several Ninth Circuit decisions involving voluntary returns).

For example, in *Smolniakova v. Gonzales*, the appeals court reversed an immigration judge's determination that the alien would not reasonably face future persecution in Russia.¹⁰⁰ The court held that Smolinakova's return to Russia did not preclude relief because she returned to tend to her dying mother.¹⁰¹ Similarly, in *Yan v. Holder*, the court held that the immigration judge erred in finding that Yan did not have a well-founded fear of persecution because the court failed to consider that Yan had "returned [to China] in order to tie up personal and financial matters," and that he "was under police surveillance" for the duration of the trip.¹⁰²

The Ninth Circuit has reached similar conclusions in analyzing the effect of voluntary returns in past persecution cases. In *Pena-Torres v. Gonzales*, Pena-Torres, a native citizen of Mexico, testified that Mexican police violently beat him because of his homosexuality.¹⁰³ He explained that the police "indicated a continuing interest in him by threatening that they knew where he lived and would harm his family should he report them."¹⁰⁴ The immigration judge determined that, even if Pena-Torres demonstrated that he suffered past persecution, his return to Mexico rebutted any presumption of future persecution.¹⁰⁵

The appellate court disagreed, holding that an applicant's voluntary return to his country of origin is only one factor to consider in rebutting the presumption of future persecution.¹⁰⁶ The court concluded that "the mere fact that Pena-Torres returned to Mexico several times [did not] demonstrate[] [the] fundamental change in circumstances" required to rebut the presumption.¹⁰⁷

Following the lead of the Eleventh and Ninth Circuits, other courts have recognized that legitimate circumstances and explanations exist for an alien to return to his country of origin before seeking asylum. For example, in

100. 422 F.3d 1037, 1054 (9th Cir. 2005) (concluding that the applicant, Smolinakova, "ha[d] suffered past persecution on account of her religion and has a well-founded fear of future persecution").

101. *Id.* at 1050 (finding that it was reasonable for Smolinakova to return to take care of both her mother and her family); *accord* Karouni v. Gonzales, 399 F.3d 1163, 1176 (9th Cir. 2005) (concluding that the applicant's return to his home country of Lebanon to visit his dying parents was not "substantial evidence that his fear of persecution was not well-founded").

102. 330 F. App'x 684, 685 (9th Cir. 2009) (noting the importance of the fact that Yan did not suffer persecution during his return to China).

103. 128 F. App'x 628, 631 (9th Cir. 2005) (explaining that the officers accosted Pena-Torres after he left a "gay bar").

104. *Id.*

105. *Id.* at 632.

106. *Id.* (cautioning that "return trips are a factor" in rebutting the presumption of future persecution, but that an applicant's voluntary return alone is insufficient to do so).

107. *Id.* at 633 (internal quotation marks omitted); *accord* Boer-Sedano v. Gonzales, 418 F.3d 1082, 1091-92 (9th Cir. 2005) (holding that the immigration judge erred in failing to properly consider the alien's explanation for his return trip, which was to gather enough funds to flee permanently because of continuing persecution of homosexuals in Mexico, and noting that return trips alone cannot rebut presumption of past persecution).

Derevianko v. Reno, the Third Circuit found that the immigration judge's denial of the alien's asylum application was particularly unreasonable because the judge failed to consider the circumstances of the alien's return trips and noted that reports from the State Department and Amnesty International described substantial violence in his country of origin.¹⁰⁸ Similarly, in *Cooke v. Mukasey*, the Eighth Circuit held that a Liberian's failure to seek asylum during a previous trip to the United States did not undermine his claim for relief because he returned to Liberia to help his three minor children escape.¹⁰⁹

B. Analyzing an Alien's Voluntary Return Trip in the Credibility Context

Immigration judges have also rendered adverse credibility determinations based on an alien's return to his country of origin. It is unclear why courts began assessing an alien's return trip to his country of origin in the credibility context rather than in the burden of proof context. For example, in *Wensheng Yan v. Mukasey*, the Second Circuit found that it was reasonable for an immigration judge to find an asylum claim "implausible" in the credibility context where the alien continually returned to China, his country of origin.¹¹⁰ The court explained that the immigration judge properly found the alien incredible because "it was implausible that a person seeking to flee from repression . . . would have repeatedly put himself in situations where he encountered legal authorities checking his identity and, possibly, his illegal status."¹¹¹

Despite some of its more nuanced decisions, the Ninth Circuit has also used evidence of an alien's voluntary return to his country of origin to uphold adverse credibility determinations. In *Loho v. Mukasey*, the Ninth Circuit found that an immigration judge was correct in considering Loho's voluntary

108. 55 F. App'x 609, 615–16 (3d Cir. 2003). Derevianko explained that he was recruited to be an informant for the KGB while a university student in Ukraine, but that he eventually became an enemy of the Ukrainian KGB chief. *Id.* at 610–11. In the early-1990's, the KGB repeatedly threatened Derevianko in person and by phone, two men attempted to kidnap him, and his father died suspiciously at his home. *Id.* at 611. In May 1996, Derevianko testified as the primary witness in an inquiry into the KGB chief's corrupt practices. *Id.* As a consequence, the KGB threatened his life and, in September 1996, fraudulent criminal charges were brought against him. *Id.* at 611–12. Derevianko subsequently traveled between the United States for short business and personal trips, and Ukraine, to address the charges against him. *Id.* at 612. Additionally, Derevianko took two trips to the Dominican Republic in January 1998 to renew his immigration status, and he took a four-day trip to Hungary to consult with an attorney about criminal charges against him in Ukraine. *Id.* Derevianko then filed for asylum in the United States. *Id.* at 612–13.

109. 538 F.3d 899, 905–06 (8th Cir. 2008) (noting that "three armed men had been coming nightly to the house where [his children] were staying" in Liberia, compelling him to return to bring them to the United States).

110. 509 F.3d 63, 68 & n.2 (2d Cir. 2007) (finding that Yan's testimony about his trips to and from China "raise[d] serious doubts as to whether [he] was ever subjected to persecution").

111. *Id.* at 68 n.2.

return to her country of origin in evaluating her credibility.¹¹² Although previous Ninth Circuit decisions had considered an alien's return to his home country only in assessing whether he had met his burden of proof for I-589 relief from removal, the court concluded that the immigration judge's consideration of Loho's voluntary return was appropriate in evaluating her credibility.¹¹³ The court reasoned that, although it had never explicitly held that voluntary return was relevant to credibility, its previous decisions indicated that considering voluntary return in this context would be permissible.¹¹⁴ This is an incorrect interpretation of Ninth Circuit precedent. Four years before *Loho*, the Ninth Circuit in *Ding v. Ashcroft* overturned an immigration judge's adverse credibility finding that relied on the conclusion that the alien "was unable or unwilling to explain why she did not seek refuge in another country nor why she voluntarily returned to the country where she claimed to have been persecuted."¹¹⁵ This case does not "imply" that a voluntary return may be considered in rendering an adverse credibility determination, as was suggested by the court in *Loho*.¹¹⁶

Like the Eleventh and Ninth Circuits, the First, Sixth, and Seventh Circuits have approved of an immigration judge's consideration of an alien's voluntary return to his country of origin in evaluating his credibility.¹¹⁷

112. 531 F.3d 1016, 1018 (9th Cir. 2008). In *Loho*, the alien explained that she "twice was attacked by assailants uttering racial slurs, that her house was robbed by indigenous Indonesians, and that her workplace and church were damaged during riots aimed at Indonesians of Chinese ancestry." *Id.* at 1017. She also testified that she travelled to the United States to visit family twice during the period of persecution and harassment, but she did not seek asylum during those trips. *Id.* She explained to the immigration judge that she failed to apply because she was not familiar with the process and did not have enough time to educate herself. *Id.* When asked about her trip, Loho explained that she was afraid to return to Indonesia, but did so regardless because she had to work. *Id.* The Ninth Circuit upheld the immigration judge's adverse credibility finding, explaining that the evaluation was justified because "after leaving her home country for the safety of the United States, Loho took minimal steps to investigate the availability of some means of avoiding a return to the country she claims to have feared." *Id.* at 1018–19.

113. *Id.* at 1018–19.

114. *Id.* (discussing *Ding v. Ashcroft*, 387 F.3d 1131, 1139–40 (9th Cir. 2004)) (explaining that the court in *Ding* rejected an immigration judge's adverse credibility evaluation based on the applicant's voluntary return to her country of origin).

115. *Id.* (internal quotation marks omitted).

116. Compare *Loho*, 531 F.3d at 1018, with *Ding*, 387 F.3d at 1139–40. In *Ding*, the Ninth Circuit admonished the immigration judge for failing to give adequate weight to evidence that *Ding* was compelled to return to her country of origin and that she was unaware that she could apply for asylum in the United States. 387 F.3d at 1139–40.

117. See, e.g., *Bleta v. Gonzales*, 174 F. App'x 287, 292 (6th Cir. 2006) (concluding that the alien's three voluntary return trips to Albania supported the BIA's adverse credibility determination); *Dab v. Ashcroft*, 397 F.3d 35, 42 (1st Cir. 2005) (holding that the applicant's three short return trips to Egypt supported the immigration judge's adverse credibility finding regarding subjective fear); *Balogun v. Ashcroft*, 374 F.3d 492, 500–01 (7th Cir. 2004) (upholding the immigration judge's adverse credibility determination that was based, in part, on the applicant's failure to seek asylum during previous trips to the United States).

III. IMMIGRATION JUDGES SHOULD NOT USE VOLUNTARY RETURN TRIPS TO SUPPORT AN ADVERSE CREDIBILITY DETERMINATION

To remedy the inconsistent treatment of an alien's voluntary return to his country of origin, immigration judges should consider an alien's return to his country of origin only in determining whether he has satisfied his burden of proof. Voluntary returns should not be used to support an adverse credibility determination, because it leads to inaccurate, overreaching, and illogical decisions and the denial of due process.

Consistency throughout the judicial process is imperative. Perhaps the most compelling argument for consistency "is the principle of equal treatment—the notion that inconsistent outcomes are substantively unfair."¹¹⁸ Additionally, immigration judges and circuit courts should strive for consistent adjudication to achieve certainty and predictability in the law, which will enhance stability and efficiency.¹¹⁹ Finally, a consistent approach is generally acceptable to both the parties and the public, "a central concern of every adjudication process."¹²⁰

Kocheleva v. Holder offers an example of a troubling credibility determination based on an alien's voluntary return trip.¹²¹ In *Kocheleva*, the Ninth Circuit upheld an immigration judge's adverse credibility determination, despite concluding that it "[did] not find substantial evidence to support all of the reasons given by the IJ [immigration judge] for finding Kocheleva not credible."¹²² The court upheld the adverse credibility determination based only on Kocheleva's voluntary return to her home country of Russia after traveling to Spain and Greece.¹²³ Although the immigration judge could have properly considered Kocheleva's voluntary return to Russia in the burden of proof context, the judge inappropriately denied her application on credibility grounds, finding the entirety of her testimony not credible because she traveled abroad twice.

The Second Circuit recognized the faults in utilizing an alien's return trip to evaluate credibility in *Kone v. Holder*.¹²⁴ In *Kone*, the court reviewed the asylum application of an alien who had travelled between the Ivory Coast and

118. Legomsky, *Learning to Live*, *supra* note 63, at 425 (stressing the principle that "[w]hen two people are situated identically in all legally relevant aspects, the law should treat them the same").

119. *Id.* at 426 (explaining that judicial resources are necessary to remedy inconsistent rulings and to accommodate the resulting increased litigation).

120. *Id.* at 427 (noting that inconsistent outcomes are commonly perceived to be unfair and impractical).

121. 336 F. App'x 664, 665–66 (9th Cir. 2009).

122. *Id.* at 665 (noting that one factor—Kocheleva's voluntary return to Russia—was sufficient to uphold the immigration judge's holding).

123. *Id.* at 665–66 (grounding its determination on Kocheleva's failure to articulate a "legitimate reason" for her return).

124. 596 F.3d 141, 150–51 (2d Cir. 2010).

the United States.¹²⁵ Kone was subjected to female genital mutilation as a child and, as an adult, was incarcerated because of her political affiliation.¹²⁶ Although Kone faced death threats and feared additional punishment for her political ties, she “was optimistic that the political and ethnic strife in the country would resolve.”¹²⁷ Kone traveled to the United States several times upon her release from prison, but she did not seek asylum.¹²⁸ While in the United States on one of these occasions, Kone’s political opponents killed her father.¹²⁹ Kone returned to the Ivory Coast once more, but she was there for only a few “weeks when the government bombed Dioula towns, killing more than 250 people.”¹³⁰ Following the bombings, Kone finally decided to flee to the United States permanently to seek asylum.¹³¹

The immigration judge denied Kone’s asylum application, finding that, although her claims of genital mutilation were corroborated by expert medical evidence, she was not credible overall because she voluntarily returned to the Ivory Coast.¹³² The BIA upheld this adverse credibility determination.¹³³

On appeal, the Second Circuit found that “return trips *alone* are insufficient to establish a lack of credibility,” noting that “a more nuanced consideration of the circumstances surrounding such returns is required.”¹³⁴ The court relied on

125. *Id.* at 144.

126. *Id.* Kone testified that, when she was eight years old, two elderly women and her grandmother pushed her to the ground, held her hand, and “cut [her] private parts with a knife,” causing pain “so severe that [she] passed out.” *Id.* Kone stated that she continues to suffer physically and emotionally from the procedure. *Id.* When she was an adult, Kone was arrested for her membership in the RDR political opposition party; government officials arrested several rank-and-file members of the party—including Kone—after finding their RDR membership cards. *Id.*

127. *Id.* While Kone was in prison, the guards denied her water, beat her daily, and attempted to rape her. *Id.* After she was released, “the guards warned [her] that they would catch and kill her if she continued to support the RDR.” *Id.*

128. *Id.* at 144–45 (noting that Kone traveled to the United States once before her arrest, and traveled between the United States and the Ivory Coast at least four more times before applying for asylum).

129. *Id.* at 144 (“Kone’s father was killed while praying at a mosque in Abidjan that was stormed by armed supporters of the Côte d’Ivoire’s president.”).

130. *Id.* at 144–45 (noting that Kone returned to the Ivory Coast several months following her father’s murder).

131. *Id.* at 145. Kone explained that she fled to the United States permanently because of the bombings in Dioula communities and because her daughter, who was born in the United States during one of her trips there, would soon be old enough to undergo genital mutilation. *Id.* at 144–45.

132. *Id.* at 145 (finding that “Kone’s voluntary return trips to the Côte d’Ivoire rebutted the presumption of future persecution” to which Kone was entitled after providing evidence of past persecution).

133. *Id.* (noting that the BIA addressed and affirmed the immigration judge’s credibility evaluation specifically).

134. *Id.* at 150–51 (emphasis added) (concluding that the immigration judge made an error of fact by finding that Kone worked for a government agency, which the immigration judge also

the Seventh Circuit's decision in *Tarraf v. Gonzales*, explaining that "[t]here well may be circumstances when a person who legitimately fears persecution nevertheless might elect to return temporarily to his home country."¹³⁵ The *Tarraf* court explained that "health conditions of family members and other major life events might drive a person to choose to take certain risks and return home, while doing his best to mitigate them."¹³⁶ Similarly, Kone explained that she had traveled to the United States for the health of her child, and that she had returned to the Ivory Coast in the hope that conditions in the country were improving; however, the immigration judge did not credit her explanations.¹³⁷ Under Second Circuit precedent, the immigration judge would not be required to consider such an explanation in the credibility context.¹³⁸ The appellate court's reconsideration of Kone's explanation

relied on in finding Kone not credible). The Second Circuit has followed its dicta in *Kone* in subsequent decisions in order to provide more appropriate, detailed findings. *See, e.g.*, *Fnu v. Holder*, 381 F. App'x 17, 19 n.1 (2d Cir. 2010) (stating that despite the holding in *Kone*, the immigration judge properly "considered Fnu's return trip to Indonesia among numerous other findings, including a detailed analysis of country conditions, in denying his asylum application").

135. *Kone*, 569 F.3d at 150 (quoting *Tarraf v. Gonzales*, 495 F.3d 525, 534 (7th Cir. 2007)) (internal quotation marks omitted). *Tarraf*, a native citizen of Lebanon, explained that his brother was killed by Hezbollah in 1990. *Tarraf*, 495 F.3d at 528–29. After his brother's death, although *Tarraf* lived and worked primarily in the Ivory Coast, he returned to Lebanon almost every year until 2000. *Id.* In 1994, while returning to Lebanon to visit his ill mother, Hezbollah threw a grenade at him and shot him in the leg and back. *Id.* He was treated at a Hezbollah clinic, where he was coerced into agreeing to assist Hezbollah. *Id.* *Tarraf* subsequently retreated to the Ivory Coast, but returned to Lebanon in 1997 to get married. *Id.* When he returned, Hezbollah was looking for him. *Id.* *Tarraf* traveled between Côte d'Ivoire, France, Lebanon, Mexico, and Syria in 1998. *Id.* at 529. He also attempted to travel to the United States, but, when he was unable to enter the country, he returned to Lebanon for a year and a half. *Id.* Upon his return, Hezbollah arrested him and detained him for one month before he managed to escape and flee to the United States via Mexico. *Id.* *Tarraf* applied for asylum, explaining that, since arriving in the United States, Hezbollah had confiscated his apartment in Lebanon and killed his twenty-one-year-old nephew. *Id.* *Tarraf* stated that Hezbollah continued to look for him, and even questioned his seven-year-old daughter about his whereabouts. *Id.* The immigration judge found *Tarraf* incredible, relying, in part, on *Tarraf*'s voluntary return trips to Lebanon following his brother's murder. *Id.* at 530–31. The Seventh Circuit admonished the immigration judge's finding, explaining that "[a] proposition that *any* voluntary return to one's home country renders any claim regarding past and future persecution incredible would be far too broad a proposition to serve as a working rule for assessing an alien's testimony," and noting that "each case must be considered in light of its own specific facts." *Id.* at 534. Ultimately, however, the Seventh Circuit found that the alternate discrepancies in *Tarraf*'s testimony on which the immigration judge relied to render an adverse credibility determination were sufficient to uphold that determination as supported by substantial evidence. *Id.*

136. *Id.* at 534.

137. *Kone*, 596 F.3d at 144, 151 n.9 (noting that the immigration judge's adverse credibility determination was based, "in substantial part," on Kone's return trips to the Ivory Coast).

138. *See, e.g.*, *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (indicating that the Second Circuit had "never required that an IJ, when faced with inconsistent testimony of an asylum applicant, must always bring any apparent inconsistencies to the applicant's attention and actively solicit an explanation").

highlights why it is best for immigration judges to consider an alien's voluntary return to his country of origin in the burden of proof context, and not the credibility context.

Kone also demonstrates the importance of considering the circumstances surrounding an alien's return trip. *Kone*, who suffered long-term harm, may not have felt a legitimate, subjective fear until her last trip to the Ivory Coast.¹³⁹ Thus, it is imperative for courts to provide an alien the opportunity to explain why he has a subjective fear of future persecution. During her final trip, *Kone* witnessed bombings that targeted her ethnic group, and her family pressured her to subject her daughter to genital mutilation; these circumstances motivated *Kone* to leave the Ivory Coast and seek protection in the United States.¹⁴⁰ Providing *Kone* with the opportunity to clarify the circumstances surrounding her return would have improved the court's analysis.

Immigration judges should consider an alien's voluntary return to his country of origin carefully, especially in light of the importance of the right to travel without negative consequences.¹⁴¹ Even in permitting restrictions on travel, courts have maintained that the right to free travel is part of a basic conception of liberty.¹⁴² Asylum applicants have an especially compelling interest in international travel, which helps "to maintain their familial, associational, and cultural ties."¹⁴³ For example, asylum applicants may return

139. See *Kone*, 596 F.3d at 149 (noting that *Kone* was persecuted beyond the genital mutilation that she suffered as a child; some of the harm she suffered did not take place until her final trip to the Ivory Coast). Importantly, immigration judges are required to consider the cumulative effect of past harm in assessing whether an asylum application has suffered past persecution. See *Poradisova v. Gonzales*, 420 F.3d 70, 79–80 (2d Cir. 2005). This provides insight into how immigration judges should consider an alien's circumstances and explanation for his voluntary return: judges should consider the cumulative effect of the alien's circumstances in determining the alien's subjective fear, as the alien may not have feared additional persecution until he returned to his country of origin and witnessed or experienced an event that triggered his fear. This appears to be true in both *De Santamaria* and *Kone*, in which an occurrence during each applicant's final return to her country of origin triggered a subjective fear of future harm and provided the impetus for filing the asylum application. See *De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999, 1004–05 (11th Cir. 2008) (noting that, despite continuing violence and threats to her life, *Santamaria* ultimately fled to the United States permanently following a beating by FARC rebels); see also *Kone*, 596 F.3d at 145 (indicating that *Kone* was prompted to apply for asylum after the bombing in Dioula areas).

140. *Kone*, 596 F.3d at 145.

141. Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Noncitizens*, 21 GEO. IMMIGR. L.J. 201, 222 (2007) (noting the Supreme Court's recognition of the value of international travel and the "right to travel [as a] part of the 'liberty' protected by the Constitution").

142. *Id.* at 222 & n.87 (citing *Haig v. Agee*, 453 U.S. 278, 310 (1981); *Zemel v. Rusk*, 381 U.S. 1, 15 (1965)) (noting governmental justifications for some restrictions on travel, such as national security and foreign policy).

143. See *id.* at 223. The DHS recognizes the importance of international travel for asylum applicants by providing such aliens with a means of applying for travel documents while their applications are pending. See 8 C.F.R. § 212.5(f) (2012) (permitting a limited right to travel for

to their country of origin—despite any risk of harm—in order to visit a seriously ill family member or to attend a funeral.¹⁴⁴ Returning to a potentially dangerous country to attend a funeral may be especially important because of the alien's religious beliefs.¹⁴⁵

The issue of whether an alien should return to his home country has both personal and legal effects. On the one hand, an alien's return to his country of origin for a funeral, because it is integral to his religious observance, may cause an immigration judge to find that his fear of future harm lacks credibility.¹⁴⁶ On the other hand, failure to return may cause an immigration judge to doubt the sincerity of the alien's religious beliefs.¹⁴⁷ This potential quandary is alleviated if courts consider the circumstances surrounding and the explanations for the alien's return trip in evaluating his objective and subjective fear of future harm, rather than focusing on how the return trip affects the alien's credibility.¹⁴⁸

Although providing an asylum applicant with the opportunity to explain his circumstances is important, an immigration judge is not necessarily required to provide an alien the opportunity to explain an inconsistency under the REAL

asylum applicants). Although an applicant may receive advance parole permitting him to travel, one that “returns to the country of claimed persecution shall be presumed to have abandoned his or her application, unless the applicant is able to establish compelling reasons for such return.” 8 C.F.R. §§ 208.8(b), 1208.8(b) (2012).

144. Morawetz, *supra* note 141, at 226 (stating that those who decide not to travel for an event, such as a funeral, “may feel deep moral pain at not having made the effort to be with family”).

145. *See id.* (discussing the significant role religious beliefs play in funerals and asserting that such “religious interests find separate protection in international treaties”). In *Kalaj v. Gonzales*, 185 F. App'x 468, 473–74 (6th Cir. 2006), the Sixth Circuit conducted a thorough analysis of an alien who voluntarily returned to his country of origin for a funeral. Despite permitting the alien's return to Albania by granting him advance parole, the DHS argued that he was ineligible for asylum on account of his voluntary return. *Id.* at 473. The Sixth Circuit rejected this argument, noting that Kalaj returned for his sister's burial and funeral service. *Id.* at 473–74.

146. *See, e.g.,* *Kone v. Holder*, 596 F.3d 141, 150 (2d Cir. 2010) (discussing how the immigration judge rendered an adverse credibility determination based in part on Kone's voluntary return trips); *Kalaj*, 185 F. App'x at 471 (noting that the immigration judge concluded Kalaj lacked credibility based on his voluntary return to Albania to attend his sister's funeral).

147. *See, e.g.,* *Tek Lie Kwee v. I.N.S.*, 156 F. App'x 372, 373 (2d Cir. 2005) (stating that the applicant provided no evidence of religious beliefs and therefore he was not credible).

148. *See supra* notes 107–09, 116 and accompanying text. Because situations exist in which it may be understandable, or even necessary, for an alien to return to his or her country of origin, such a return should not cause his or her application to be automatically denied, as suggested in *De Santamaria*. *See De Santamaria v. U.S. Att'y Gen.*, 525 F.3d 999, 1011 n.9 (11th Cir. 2008).

The Second Circuit has noted that determinations based on a voluntary return trip are problematic when the alien is not given an opportunity to explain. *See Juncaj v. I.N.S.*, 158 Fed. App'x 316, 317 (2d Cir. 2005) (“[T]he IJ's reliance on Juncaj's previous departure from Montenegro is questionable, given that Juncaj was given little opportunity to explain these departures at her hearing.”).

ID Act.¹⁴⁹ This can lead to troubling decisions.¹⁵⁰ A negative credibility determination may destroy *all* of an alien's testimony. A single inconsistency may render all testimony incredible, even if the alien proves that portions of his testimony are true.¹⁵¹ Under the REAL ID Act, any inconsistency, despite its relationship with the heart of the alien's claim, can support an adverse credibility determination.¹⁵² An immigration judge's credibility determination can be overreaching, and it may not be an accurate assessment of the alien's full testimony. As such, adverse credibility determinations should be limited.¹⁵³ Where there is instructive case law outlining the procedure for the consideration of an alien's voluntary return trip in the burden of proof context, there is no need to expand the already-problematic case law governing credibility determinations.

149. See *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (explaining that an immigration judge may rely on a significant inconsistency without first soliciting an explanation from the asylum applicant and that the judge is not compelled to accept an applicant's explanations for the inconsistency unless it would be obvious to a reasonable fact-finder (citing *Wu Biao Chen v. I.N.S.* 344 F.3d 272, 275 (2d Cir. 2003); *Secaida-Rosales v. I.N.S.*, 331 F.3d 297, 307 (2d Cir. 2003))). An immigration judge is not required to analyze "each and every one of [an applicant's] purported explanations for testimonial inconsistencies or evidentiary gaps." *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 336–37 n.17 (2d Cir. 2006).

150. See *Sonkeng v. Holder*, 459 F. App'x 378, 379 (5th Cir. 2012). In *Sonkeng*, the Fifth Circuit, despite recognizing flaws, upheld a denial of asylum relief that was based solely on the immigration judge's adverse credibility determination and noted that "it is questionable whether Sonkeng's testimony regarding her arrest history was inconsistent with the statement made in her visa application." *Id.*

151. See Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L L.J. 61, 93 (2009) (noting that "any inconsistency, no matter how insignificant or tangential, may result in a finding of incredibility").

152. See Conroy, *supra* note 44, at 34–36 (arguing that demeanor, candor, and responsiveness should not be utilized in support of adverse credibility determinations); see also Tania Galloni, *Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1057 (2008) (arguing that adverse credibility determinations are inappropriate when they are based on selective consideration of evidence because selective consideration is inconsistent with the "totality of the circumstances" language in the statute); *supra* note 38.

153. See Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 390–97 (2003) (explaining that sometimes flawed applicant testimony should be considered credible because, although vagueness, evasiveness, and inconsistency may indicate fabrication, these findings may also be a result of cultural confusion, fear of authority, traumatic experience, or failed memory); see also *Tang v. U.S. Att'y Gen.*, 578 F.3d 1270, 1276–81 (11th Cir. 2009) (finding the immigration judge's REAL ID adverse credibility ruling not cogent); *Castilho de Oliveira v. Holder*, 564 F.3d 892, 899–900 (7th Cir. 2009) (determining that the immigration judge's decision was based on speculation and irrelevancies that gave the impression that the judge had made up his mind before the hearing began); *Li v. Holder*, 559 F.3d 1096, 1103 (9th Cir. 2009) ("The IJ's scatter-shot justifications for his adverse credibility determination . . . are riddled with speculation"); *Tewabe v. Gonzales*, 446 F.3d 533, 539–41 (4th Cir. 2006) (remanding a case where the immigration judge failed to provide specific, cogent reasons for an adverse credibility finding).

Although one may argue that immigration judges could consider an alien's voluntary return to his country of origin in both the burden of proof and credibility contexts, erroneous adverse credibility determinations may also infect the burden of proof findings. The failure to recognize this on appeal can end in negative results for asylum applicants.¹⁵⁴ Courts have found that immigration judges increasingly "conflate[] an adverse credibility finding with an adverse decision on the merits."¹⁵⁵

For example, in *Kumar v. Gonzales*, the immigration judge found the lead alien incredible.¹⁵⁶ On appeal, the BIA affirmed the immigration judge's decision without opinion, but included a footnote stating that it did not uphold the adverse credibility determination, a violation of its own regulations.¹⁵⁷ This confused review on appeal before the Ninth Circuit. Rather than allow the BIA to remedy its own problematic decision, the Ninth Circuit affirmed the denial of the aliens' asylum applications, based, in part, on one applicant's voluntary return to Fiji, with no consideration of the applicant's explanation for the trip.¹⁵⁸ The dissent noted that the majority "muddle[d] the process required when an adverse credibility finding is rejected" and that the "decision to pretend that the IJ's holding on the merits was unaffected by its erroneous adverse credibility finding" resulted in "grave consequences" for the applicants.¹⁵⁹

If immigration judges render adverse credibility determinations based on an alien's voluntary return to his country of origin, it discourages applicants from being forthcoming with such testimony, which might otherwise provide clarity for immigration judges as to the totality of the alien's experience.¹⁶⁰ Although the DHS may be able to provide evidence of an alien's formal admissions into the United States, many aliens enter the United States without inspection. Without evidence from the DHS, the only way an immigration judge would be aware of an alien's previous entry into the United States and return to their country of origin would be for the alien to testify honestly.¹⁶¹ However, an immigration judge could, in turn, find the alien incredible because of his honest testimony about his return. This dilemma may lead to inaccurate testimony or inaccurate decisions.¹⁶² These issues are resolved by analyzing

154. See *supra* notes 132, 150, 153; see also *infra* notes 155, 159.

155. See, e.g., *Meihua Huang v. Mukasey*, 520 F.3d 1006, 1008 (9th Cir. 2008).

156. 439 F.3d 520, 523 (9th Cir. 2006).

157. *Id.*

158. *Id.* at 524.

159. *Id.* at 526, 638 (Silverman, J., dissenting).

160. See *supra* notes 77–80 and accompanying text.

161. See generally W.D. Reasoner, *Deportation Basics*, CTR. FOR IMMIG. STUD. (July 2011), <http://www.cis.org/deportation-basics>.

162. See *supra* notes 63, 153 and accompanying text (discussing how credibility determinations can be overreaching and therefore inaccurate). Immigration judges have been cautioned consistently to render appropriate, thoughtful decisions that are not based on assumptions. See, e.g., *Marynenka v. Holder*, 592 F.3d 594, 601–02 (4th Cir. 2010) (rejecting

voluntary return trips only in the context of whether the alien met his burden of proof that his fear is well founded rather than using the trips as support for an adverse credibility determination.

Although the standards for withholding of removal and relief under the CAT would seem to avoid some of the subjectivity problems of asylum claims,¹⁶³ an adverse credibility determination based on a voluntary return trip may also devastate these claims for relief. An adverse credibility determination may destroy an alien's claim for withholding of removal or relief under the CAT because both claims fail if the alien is unable to show the required objective likelihood of persecution or torture.¹⁶⁴ Thus, if the only evidence of a threat to the alien's life or freedom depended upon the alien's testimony, an adverse credibility finding will necessarily preclude success for withholding or CAT relief.¹⁶⁵

Even if the applicant provides independent evidence to establish an objective fear of future harm, an immigration judge may rely on an adverse credibility determination based on the applicant's voluntary return to his country of origin to deny the withholding of removal and CAT claims, without consideration of the applicant's corroborative evidence.¹⁶⁶ This disparity further demonstrates that, given the complex nature of applications for relief and the multiple forms of relief available, immigration judges should not use evidence of an alien's return trip to his country of origin as support for an adverse credibility determination.

and criticizing the immigration judge's assumption that a rape victim would seek immediate hospitalization); *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009) (finding that "[t]he IJ's homosexual stereotyping preclude[d] meaningful review"); *Huang v. Gonzales*, 453 F.3d 142, 147 (2d Cir. 2006) (rejecting the immigration judge's finding that a confrontation with village authorities was not credible "because an 'uneducated villager' would not refer to human rights in confronting local authorities").

163. Distinct from asylum, withholding of removal and relief under the CAT do not require that the alien have a subjective fear of returning to his country of origin. See *Toloza-Jimenez*, 457 F.3d 155, 161 (1st Cir. 2006); see also *supra* note 81. Immigration judges have denied asylum claims, finding that, despite the frivolous warnings, *supra* note 36, an alien who submitted an asylum application but did not have a subjective fear of returning to his country of origin on account of his voluntary return trip there. See *Toloza-Jimenez*, 457 F.3d at 155, 161; see also *supra* notes 81, 92.

164. See *Paul v. Gonzales*, 449 F.3d 148, 155–56 (2d Cir. 2006).

165. A finding, however, that the petitioner is not credible as to his subjective fear of persecution will not preclude a grant of withholding if the immigration judge believes some aspect of the petitioner's claim. See *id.* at 155–57 (remanding for the agency to consider the risk of future persecution where the immigration judge found the alien's claim of past persecution not credible but nonetheless credited his testimony that he was a Christian).

166. See *supra* Part II.B (explaining that an immigration judge may deny I-589 relief from removal on either credibility grounds or because the applicant failed to meet his burden of proof).

IV. CONCLUSION

Aliens fleeing from persecution in their countries of origin “can’t go home again.”¹⁶⁷ However, they should be entitled to a proper review of their asylum applications, even after voluntarily returning to their countries of origin. Judicial evaluation of an alien’s voluntary return to his country of origin is inconsistent, which is both problematic and unnecessary. Immigration judges should analyze an alien’s voluntary return trip to his country of origin in the burden of proof context. In doing so, the judge must consider the circumstances and explanations for the alien’s return trip to assess whether the alien has a well-founded fear of future persecution. In assessing whether the alien is entitled to withholding of removal or CAT relief, immigration judges should also consider evidence of an alien’s voluntary return to his country of origin to determine whether it is likely that the alien will face future persecution or torture. However, immigration judges should not use an alien’s voluntary return trip to his country of origin in support of an adverse credibility determination because such findings lead to confusing, illogical, and inaccurate determinations. When there is already accurate, instructive case law regarding voluntary return trips in the context of an alien’s burden of proof, judges should not consider an alien’s voluntary return to render an adverse credibility determination. This practice has only expanded troubling case law. Considering voluntary returns only in the burden of proof context will ensure greater consistency in the adjudication of asylum applications, protect aliens in danger of persecution, and increase confidence in the courts’ ability to administer due process.

167. Matt, *supra* note 1.