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Lost in the Maze of Appeals: The Eleventh Circuit's Review of Decisions by the Board of Immigration Appeals

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LOST IN THE MAZE OF APPEALS: THE ELEVENTH CIRCUIT'S REVIEW OF DECISIONS BY THE BOARD OF IMMIGRATION APPEALS

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ABSTRACT

The Eleventh Circuit reviews decisions made by the Board of Immigration Appeals with a very lenient substantial evidence test that incorporates the idea of compulsion. In other words, the record must compel an opposite conclusion for a decision to be overturned as opposed to merely being unsupported by substantial evidence. This article details the job of the Board of Immigration Appeals, the types of claims it hears, and the types of review applied to it by the Eleventh Circuit. A study of 251 cases from 1990 through 2008 suggests that the Eleventh Circuit hardly ever overturns the Board of Immigration Appeals. This complex intersection of administrative and immigration law leaves aliens struggling for relief often lost in the maze of appeals.

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I. INTRODUCTION

Standards of review are the cornerstone of modern administrative law. It is critically important to understand why certain standards of review are selected and implemented by federal courts in general, but it is especially critical when it comes to a court's review of agencies. Scholars and citizens of the United States alike need to understand how agencies are governed and controlled by administrative law, and how courts review agency decisions by using certain standards to say whether or not an agency has acted out of turn.

Immigration is a controversial and compelling issue that has garnered much of the current media attention. Aliens are fighting to stay in this country and citizens are on both sides of the battle, some fighting to keep others out and some fighting to let others in. These struggles are vehement. On an individual level, aliens are pleading their cases before Immigration Judges; if they are denied, they may seek an appeal before the Board of Immigration Appeals and eventually before a federal court of appeals. To better understand this procedure in the context of how courts review agencies, it is necessary to look at a small part of the puzzle. Taking one circuit, in this case the Eleventh Circuit, and analyzing how that circuit performs a review of the Board of Immigration Appeals will inform and enlighten the study of administrative law in the context of immigration.

To begin this examination, this article describes the job of the Board of Immigration Appeals, and follows with a description of the kinds of cases the Eleventh Circuit hears on appeal from that Board, what standards of review the court uses, and how the court reviews those cases. Although all standards of review that are implemented are discussed, special attention is paid to the concept of the substantial evidence test. To conclude, this article addresses whether such review is justified and queries the implications of this type of review in the immigration context.

II. WHAT IS THE BOARD OF IMMIGRATION APPEALS?

The Board of Immigration Appeals hears appeals based on the decisions of Immigration Judges [hereinafter IJ].[1] According to the website maintained by the Department of Justice, the Board of Immigration Appeals [hereinafter BIA or Board] is the highest administrative body for

1. Executive Office for Immigration Review, Board of Immigration Appeals, http://www.usdoj.gov/eoir/biainfo.htm (last visited Jan. 27, 2009).

interpreting and applying immigration laws.[2] The Board is an administrative appellate body that is part of the Executive Office for Immigration Review within the Department of Justice.[3] There are eleven members on the Board,[4] who sit at its headquarters in Falls Church, Virginia.[5] Most lay people might assume that a board of appeals would actually hear oral arguments for appeals, but the Board mostly conducts a paper review of cases and hears oral arguments only on very rare occasions.[6]

The Board has nationwide jurisdiction to hear appeals from certain decisions rendered by IJs and by District Directors of the Department of Homeland Security in many proceedings in which the government of the United States is one party and the other party is an alien, a citizen, or a business firm.[7] The Board is also responsible for the recognition of organizations and accreditation of attorneys and representatives who want to practice before the Department of Homeland Security, the Immigration Courts, and the Board itself.[8]

Decisions rendered by the Board are legally binding on all IJs and officers of the Department of Homeland Security, unless those decisions are modified or overruled by the Attorney General or a federal court, and all Board decisions are subject to judicial review in federal courts.[9] The majority of appeals reaching the Board involve orders of removal and applications for relief from removal.[10] Other cases involve the status of aliens, fines imposed upon those who violated immigration laws, and motions to reopen or reconsider cases previously decided.[11]

The Executive Office for Immigration Review was created on January 9, 1983, through an internal Department of Justice reorganization which combined the BIA with the IJ function previously performed by the former Immigration and Naturalization Service.[12] This 1983 reorganization

2. *Id.*

3. Executive Office for Immigration Review, Background Information, http://www.usdoj.gov/eoir/background.htm (last visited Jan. 27, 2009).

4. News Release, Executive Office for Immigration Review, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), *available at* 2002 WL 1943761.

5. Board of Immigration Appeals, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. E. WILLARD MILLER & RUBY M. MILLER, UNITED STATES IMMIGRATION: A REFERENCE HANDBOOK 124 (1996).

12. Background Information, *supra* note 3.

established the Executive Office for Immigration Review as a separate agency within the Department of Justice and also made the Immigration Courts independent from the Immigration and Naturalization Service (the agency charged with the enforcement of federal immigration laws).[13] The Immigration and Naturalization Service is now part of the Department of Homeland Security.[14]

In August 2002, Attorney General John Ashcroft released a final rule meant to reform the BIA's procedures.[15] The Attorney General accused the BIA of having become a "bottleneck in the system," undermining United States immigration law enforcement.[16] By February of 2002, the BIA had developed a "massive backlog" of more than 56,000 cases.[17] Ten thousand of these cases had been pending for three years or more.[18] Under the new regulations of the Attorney General, the BIA was required to stick to more reasonable time limits.[19] Rather than considering factual situations *de novo*, the BIA would be forced to only address legal issues *de novo* and to defer to the factual findings of immigration judges.[20] Those factual findings would, of course, be reviewed by the BIA with a standard of "clearly erroneous."[21] Rather, if an IJ's factual findings were "clearly erroneous," the BIA could overrule its factual conclusions. Before this rule, the BIA had routinely addressed factual issues *de novo*.[22] John Ashcroft also cut the number of Board members from nineteen to eleven, so that more consensuses could be reached, and directed that more decisions be made by individual board members with three-member panels only handling more complex cases with novel questions.[23]

The BIA has successfully implemented the restructuring regulation, handling new cases and reducing its backlog of cases to only 28,000 by January 2006.[24] The Department of Justice's Office of Immigration

13. *Id.*

14. *Id.*

15. News Release, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures, *supra* note 4.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. News Release, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures, *supra* note 4.

22. *Id.*

23. *Id.*

24. News Release, Executive Office for Immigration Review, BIA Restructuring and Streamlining Procedures (Mar. 9, 2006), http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf (last visited Jan. 27, 2009).

Litigation, which handles immigration case appeals to the federal courts, indicated that the affirmance, reversal, and remand rates have not changed significantly since the implementation of this restructuring regulation.[25] In fact, more than ninety percent of decisions from the BIA continued to be affirmed in federal court.[26]

Appeals from an IJ go the BIA and may be made by either the alien or a Department of Homeland Security representative.[27] Appeals from the BIA to a federal court may only come from the alien.[28] The Department of Homeland Security, which is the other party to the case, may not file for an appeal.[29] If the Department of Homeland Security wishes to appeal the decision, the case may be certified or referred to the Attorney General for review.[30] This means that federal courts *never* see cases in which an alien has been granted relief.[31] However, the number of appeals to federal courts has been steadily rising since 2002, from five percent of BIA decisions before 2002 to approximately thirty percent in 2005.[32] The third largest circuit in terms of appeals is the Eleventh Circuit, which had 229 appeals filed in 2002, but 572 filed in 2005.[33] The number of appeals continues to rise despite a firm refusal to overturn the new regulations. It is possible that the new streamlined approach of the BIA encourages aliens to find a new way to postpone deportation by appealing to a federal court.[34] In turn, federal courts dealing with larger caseloads might loathe to do more than summarily affirm the BIA.[35]

25. *Id.*

26. *Id.*

27. News Release, Executive Office for Immigration Review, Immigration Court Process in the United States (Apr. 28, 2005), *available at* 2005 WL 3541986.

28. News Release, BIA Restructuring and Streamlining Procedures, *supra* note 24.

29. *Id.*

30. News Release, Immigration Court Process in the United States, *supra* note 27.

31. News Release, BIA Restructuring and Streamlining Procedures, *supra* note 24.

32. *Id.*

33. *Id.*

34. *Id.*

35. Opinions issued by the court in response to these appeals have followed a similar progression. Of the cases collected, there were only 19 relevant cases available from 1990 through 2004. In 2005 alone there were 63 cases, followed by 78 in 2006, but only 51 in 2007, and 40 in 2008.

III. THE ELEVENTH CIRCUIT'S REVIEW OF THE BOARD OF IMMIGRATION APPEALS

The Eleventh Circuit is unique. It contains districts in Alabama, Florida, and Georgia, and was split from the Fifth Circuit on October 1, 1981. The Eleventh Circuit must not only consider its own precedent, but also precedent inherited from the Fifth Circuit predating 1981. Like all other circuits, however, the Eleventh is in a position to review the actions of the Board of Immigrations Appeals. In order to better understand how the Eleventh Circuit has dealt with the BIA in cases where the court had to directly review BIA action, a search generated 251 cases to study.[36] These cases were selected to review the decisions of the Eleventh Circuit from 1990 until the more recent cases of 2008.[37] This research was performed in order to ask questions such as: what types of claims has the court considered, what standards of review did the court use to review these claims, and what general position has the Eleventh Circuit taken with regard to the BIA?

A. The Types of Claims Considered

First, the federal court reviews alien claims of BIA error. But what kinds of mistakes do aliens claim have been made by the BIA? The most frequent types of claims from aliens are that the BIA has erred in denying a particular request: applications for asylum, withholding of removal due to the Immigration and Nationality Act [hereinafter INA], withholding of removal due to the United Nations Convention Against Torture [hereinafter CAT], and motions to reconsider or reopen an individual case.[38]

The most dominant claim from an alien wishing to stay in the United States is that he/she is eligible for asylum. There is a process that an alien must go through if he/she wishes to pursue an application for asylum.[39] An

36. This search was done using the Westlaw service, and used the search terms "standard of review" with "immigration" and "board of immigration" or "BIA." Westlaw returned 270 cases from the 11th Circuit. The desired time period was Jan. 1, 1990 to Dec. 31, 2008, 19 cases were cut for being irrelevant. Thus, the final number of cases to be considered was 251.

37. A number of cases were listed as not having been selected for publication in the Federal Reporter. In this article, all such cases are noted with "(not selected for publication)." Rule 36-2 of the Eleventh Circuit states, "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11TH CIR. R. 36-2. This article is a reflection of the actions of the court and takes these cases into account for its analysis.

38. *See* cases cited *infra* Part III.

39. *See* Sandoval v. U.S. Att'y Gen., 212 F. App'x 893, 894-95 (11th Cir. 2006) (not selected for publication) (providing a helpful description of what is necessary in a claim for asylum).

alien who comes to or is already present in the United States may pursue an asylum application.[40] The Attorney General has discretion to grant asylum if the alien meets the INA's definition of a "refugee."[41] A "refugee" is legally defined as any person who is unwilling to return to his/her home country or to avail himself/herself of that country's protection "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 . . . ."[42] To utilize this definition, the alien must set out to prove that he or she is worthy of the statutory "refugee" status. The individual applicant carries the burden of first proving this status.[43] The applicant may satisfy this burden by demonstrating, with specific and credible evidence either: (1) past persecution on account of a statutorily listed factor or (2) a "well-founded fear" that his/her statutorily listed factor will cause future persecution.[44]

The first part of this test involves past persecution. An applicant may establish past persecution by proving "(1) that he/she was persecuted and (2) that the persecution was on account of a protected ground."[45] If persecution did exist, but it was not because of race, religion, nationality, membership in a particular social group, or political opinion, asylum cannot be granted. The applicant must present specific, detailed facts showing a good reason to fear that he/she was singled out for persecution on account of a statutory factor.[46] The Eleventh Circuit has held that persecution is an "'extreme concept,' requiring 'more than a few isolated incidents of verbal harassment or intimidation,' and that 'mere harassment does not amount to persecution.'"[47]

If the alien is able to establish past persecution, the court will presume that his/her life or freedom would be threatened upon return to the country of removal. This is held to be true unless the government shows by a preponderance of the evidence that the country's conditions have changed

40. *See* Immigration and Nationality Act § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2006).

41. *See* Immigration and Nationality Act § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2006).

42. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

43. *See* Al Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001); Immigration Regulations, 8 C.F.R. § 208.13(a) (2008).

44. *See Al Najjar*, 257 F.3d at 1287; Immigration Regulations, 8 C.F.R. § 208.13(a)-(b) (2008).

45. Silva v. U.S. Att'y Gen., 448 F.3d 1229, 1236 (11th Cir. 2006); Henrys v. U.S. Att'y Gen., 184 F. App'x 822, 826-27 (11th Cir. 2006) (nexus between persecution and status was not achieved and petition was denied).

46. *Al Najjar*, 257 F.3d at 1287.

47. Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1231 (11th Cir. 2005) (quoting Gonzalez v. Reno, 212 F.3d 1338, 1355 (11th Cir. 2000)).

such that the applicant's life or freedom would no longer be threatened or that the alien could relocate within the country and it would be reasonable to expect him/her to do so.[48] The government will be unable to prove this if the alien "has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution," or that "there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country."[49] The burden of proof switches at this point from the applicant to the government, which must prove that circumstances have changed and past persecution does not imply future persecution upon return to the country in question.[50]

An alien who has not shown past persecution may still be entitled to asylum if he/she can demonstrate a fear of future persecution on account of a statutorily protected ground.[51] In order to establish eligibility for asylum based on a well-founded fear of future persecution, the applicant must prove "(1) a 'subjectively genuine and objectively reasonable' fear of persecution that is (2) on account of a protected ground."[52] If an applicant satisfies these requirements, he/she must then show that the "persecution cannot be avoided by relocating within the subject country."[53]

In order to determine if an applicant has met the requirements for asylum, the IJ must perform a factual inquiry into whether or not this past or future persecution actually exists.[54] The first place to look for this information is almost always from the applicant himself/herself. Occasionally, there is more corroborating evidence besides an applicant's testimony that persecution has existed or will exist, such as documentation: e.g., medical records or police reports.

The IJ will first consider testimony from the alien, but the judge may make what is called an "adverse credibility determination" or an "adverse credibility finding."[55] This means that the credibility of the alien is in question, often due to inconsistencies in testimony or between testimony and other documents or evidence. If there is no other available evidence of

48. Immigration Regulations, 8 C.F.R. §§ 208.13(b)(1)(i)-(ii), 208.16(b)(1)(i)-(ii) (2008).

49. Immigration Regulations, 8 C.F.R. § 208.13(b)(1)(iii) (2008).

50. 8 C.F.R. § 208.13(b)(1)(ii).

51. Immigration Regulations, 8 C.F.R. § 208.13(b)(2)(i)(A) (2008).

52. Silva v. U.S. Att'y Gen., 448 F.3d 1229, 1236 (11th Cir. 2006) (citing Al Najjar v. Ashcroft, 257 F.3d 1262, 1289 (11th Cir. 2001); *Sepulveda*, 401 F.3d at 1230-31).

53. *Sepulveda*, 401 F.3d at 1231; *see also* Immigration Regulations, 8 C.F.R. § 208.13(b)(2)(ii) (2008).

54. *See, e.g.*, *Silva*, 448 F.3d at 1235 (describing the IJ's finding, based on the applicant's testimony, that neither past nor a well-founded fear of future persecution existed).

55. *See* Drejaj v. U.S. Att'y Gen., 192 F. App'x 847, 854 (11th Cir. 2006) (not selected for publication).

persecution besides the alien's testimony, an adverse credibility determination alone may be enough to support the denial of an asylum application.[56] Conversely, uncorroborated but credible testimony may be sufficient to sustain an applicant's burden of proving eligibility for asylum.[57] However, the Eleventh Circuit has said, "the weaker an applicant's testimony, . . . the greater the need for corroborative evidence."[58] Once an adverse credibility determination has been made, the burden is on the alien to show that the IJ's decision was not supported by "specific, cogent reasons" or was not supported by substantial evidence.[59] In the case of *Uribe v. U.S. Attorney General*, the court explicated that the IJ had made an explicit adverse credibility determination, but had given "specific, cogent reasons" for his finding.[60] Even a single inconsistency may be sufficient to support an adverse credibility finding if the inconsistency relates to the alien's basis for his/her fear and goes to the heart of his/her asylum claim.[61] A determination by the IJ of adverse credibility does not absolve the judge from considering all of the applicant's evidence.[62] Everything available *must* be considered. However, the IJ's determination that corroborative evidence was not available may not be overturned unless the court finds that it is compelled to do so.[63]

There are times when the IJ or the BIA makes statements about credibility, but no explicit or "clean" decision about credibility is made. A lack of credibility determination frustrated the court in *Niftaliev v. U.S. Attorney General*, but it concluded that because the IJ's analysis focused on the insufficiency of the evidence as a whole, the court could conclude that any implicit credibility determination made was not dispositive to the outcome of the case.[64] In other words, because the adverse credibility finding was not the focus of the case or the reason for the decision, the court did not need to focus on the sufficiency of reasoning behind that determination. Determinations of credibility by the IJ (reviewed by the

56. Uribe v. U.S. Att'y Gen., 217 F. App'x 889, 893 (11th Cir. 2007) (not selected for publication) (citing Forgue v. U.S. Att'y Gen., 401 F.3d 1282, 1287 (11th Cir. 2005)).

57. *Drejaj*, 192 F. App'x at 854 (11th Cir. 2006).

58. *Id.* (citing Yang v. U.S. Att'y Gen., 418 F.3d 1198, 1201 (11th Cir. 2005)).

59. Sanchez-Castaneda v. U.S. Att'y Gen., 212 F. App'x 865, 867 (11th Cir. 2006) (not selected for publication) (citing *Forgue*, 401 F.3d at 1287).

60. *Uribe*, 217 F. App'x at 893.

61. Safad-Hamade v. U.S. Att'y Gen., 192 F. App'x 917, 921 (11th Cir. 2006) (not selected for publication).

62. *See* Gomez v. U.S. Att'y Gen., 198 F. App'x 884, 891 (11th Cir. 2006) (not selected for publication).

63. *Id.*; Immigration and Nationality Act § 242(b)(4), 8 U.S.C. § 1252(b)(4) (2006).

64. Niftaliev v. U.S. Att'y Gen., 213 F. App'x 850, 854 (11th Cir. 2007) (not selected for publication) (citing Yang v. U.S. Att'y Gen., 418 F.3d 1198, 1201 (11th Cir. 2005)).

BIA) are part of his/her fact-finding duty, and the federal court may not substitute its own judgment for that of the fact-finder with respect to items such as credibility findings.[65]

An alien making a plea to stay in the United States will usually make this plea under more than one statutory basis. An alien may seek withholding of removal under the INA.[66] As in the previous case of asylum applications, an alien seeking withholding of removal under the INA must make a similar showing that his/her life or freedom would be threatened on account of "race, religion, nationality, membership in a particular social group, or political opinion."[67] An applicant bears the burden of demonstrating that he/she "more-likely-than-not would be persecuted or tortured upon his return to the country in question."[68] This standard is more stringent than the "well-founded fear" standard for asylum claims.[69] If an alien cannot make the claim for asylum because he/she has not met that standard, it is nearly impossible that he/she will be able to make a claim for withholding of removal under the INA. Again, determining whether or not, or to what extent, persecution may take place is a factual inquiry to be determined by the IJ and subsequently reviewed by the BIA.

An alien may also try to withhold removal by making a claim under the United Nations CAT.[70] In making out a claim under the CAT, "[t]he burden of proof is on the applicant . . . to establish that more likely than not he or she would be tortured if removed to the proposed country of removal."[71] Relief under the CAT invokes the mandatory remedy of withholding of removal.[72] "Torture," for the purposes of the CAT is defined as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her

65. *See* Sandoval v. U.S. Att'y Gen., 212 F. App'x 893, 895 (11th Cir. 2006) (citing Vasquez-Mondragon v. INS, 560 F.2d 1225, 1226 (5th Cir. 1977)).

66. *See* Moreno v. U.S. Att'y Gen., 208 F. App'x 697, 703 (11th Cir. 2006) (not selected for publication) (providing a helpful description of what is necessary in a claim for withholding of removal under the INA).

67. Immigration and Nationality Act § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1287 (11th Cir. 2003).

68. *Mendoza*, 327 F.3d at 1287.

69. D-Muhumed v. U.S. Att'y Gen., 388 F.3d 814, 819 (11th Cir. 2004) (citing Al Najjar v. Ashcroft, 257 F.3d 1262, 1293 (11th Cir. 2001)).

70. *See* De Aviles v. U.S. Att'y Gen., 212 F. App'x 823, 831 (11th Cir. 2006) (not selected for publication) (providing a helpful description of what is necessary in a claim for withholding of removal under the CAT).

71. Immigration Regulations, 8 C.F.R. § 208.16(c)(2) (2008).

72. Immigration Regulations, 8 C.F.R. § 208.16(c)(4) (2008).

> for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[73]

Whether or not evidence has been presented by the applicant to indicate future torture is also a factual inquiry. When the court finds that the alien cannot establish a case for asylum, it will often not consider other claims such as withholding of removal under the INA or the CAT because those claims invoke higher standards.[74]

If the BIA denies an alien's application for asylum, denies withholding of removal under the INA, denies withholding of removal under the CAT, or simply reaffirms an IJ's order of removal, that alien may appeal to the BIA to reopen or reconsider his/her case.[75] Motions to reopen are generally disfavored, especially in a removal proceeding, because "as a general matter every delay works to the advantage of the deportable alien who wishes . . . to remain in the United States."[76] These motions must state new facts to be proven at the hearing and must be supported by affidavits or other evidentiary material.[77] A motion to reopen must not be granted unless it appears to the BIA that the evidence sought to be offered is material in nature, and was not and could not have been available at the previous hearing.[78]

It is important to note that the federal court is only reviewing the actions of the BIA. The only reason the court would consider the actions of the IJ as well is that sometimes the BIA will affirm the IJ's orders without an opinion or will expressly adopt the opinion of the IJ.[79] At that point, although the court reviews only the decision of the BIA, it will also review

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73. Immigration Regulations, 8 C.F. R. § 208.18(a)(1) (2008).

74. *See* Sanchez-Castaneda v. U.S. Att'y Gen., 212 F. App'x 865, 866 n.1 (11th Cir. 2006) (citing *Al Najjar*, 257 F.3d at 1292-93).

75. Immigration Regulations, 8 C.F.R. § 1003.2(a) (2008) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board.").

76. Ali v. U.S. Att'y Gen., 443 F.3d 804, 808 (11th Cir. 2006) (quoting Abdi v. U.S. Att'y Gen., 430 F.3d 1148, 1149 (11th Cir. 2005)).

77. *Ali*, 443 F.3d at 808; Immigration and Nationality Act § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B) (2006).

78. *Ali*, 443 F.3d at 808; Immigration Regulations, 8 C.F.R. §1003.2(c)(1) (2008).

79. *See* Morehodov v. U.S. Att'y Gen., 270 F. App'x 775, 777 (11th Cir. 2008) (not selected for publication) ("The BIA affirmed without opinion the IJ's decision and adopted it as the final agency determination.").

the decision of the IJ to the extent that decision was expressly adopted by the BIA.[80] If there is a summary affirmance by the BIA of the IJ, then the IJ's decision is treated as the final agency determination, ripe for review.[81] If the BIA chooses to adopt the opinion of the IJ and provide additional reasoning, then both the BIA's and the IJ's decisions will be reviewed.[82] If for some reason the BIA and the IJ disagree, the standards of review will remain the same; the reviewing court may not choose between the two interpretations, but must defer to the BIA if its decision meets the standard of review.[83] The task of the federal court is to review the BIA, and not the IJ, unless the BIA agrees with him/her.

B. Standards of Review

It would be nearly impossible to understand the significance of the standards of review implemented by federal courts to review the BIA if it were not clear what kind of impact different standards of review would make. Once the federal court has decided to review actions of the BIA for possible errors or mistakes, it must choose the suitable standard of review for each type of action. A standard of review is not matched up by claim, but rather to the types of action undertaken by the BIA. The federal court does not determine the standard of review because an alien is making an asylum claim as opposed to a motion to reopen. Instead, the court seeks to understand what type of action has occurred: Has the BIA made a finding of fact or have they engaged in a legal conclusion? Are they interpreting a statute or engaged in a discretionary decision? The format of administrative law governs this type of inquiry. The appropriate standards of review for BIA decisions are assertedly well-settled in the Eleventh Circuit.[84]

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80. Irabor v. U.S. Att'y Gen., 219 F. App'x 964, 965-66 (11th Cir. 2007) (not selected for publication) ("Here, the BIA did not expressly adopt the IJ's decision, and we review the BIA's decision.").

81. *See* Guerrero-Gomez v. U.S. Att'y Gen., 218 F. App'x 921, 922 (11th Cir 2007) (not selected for publication) (citing Immigration Regulations, 8 C.F.R. § 1003.1(e)(4)(ii) (2008)).

82. *See* Rodriguez v. U.S. Att'y Gen., 213 F. App'x 947, 948 (11th Cir. 2007) (not selected for publication).

83. Martinez-Benitez v. INS, 956 F.2d 1053, 1055 (11th Cir. 1992) (finding, however, that the BIA should have considered the IJ's determination that the petitioner possessed less cocaine than his indictment alleged).

84. Soetendal v. Gonzales, 209 F. App'x 913, 917 (11th Cir. 2006) (not selected for publication) (citing Mazariegos v. Office of the U.S. Att'y Gen., 241 F.3d 1320, 1323 (11th Cir. 2001); Al Najjar v. Ashcroft, 257 F.3d 1262, 1283 (11th Cir. 2001) (citing *Mazariegos*, 241 F.3d at 1323).

Legal conclusions made by the BIA or the IJ are reviewed in federal court *de novo*.[85] However, if interpretations of statutes are made, the court will defer to those interpretations if they are reasonable.[86] For example, when the BIA determined that non-criminal informants working against a particular Colombian cartel did not qualify as a "particular social group" and thus did not qualify for asylum under the statute, the court had to defer to this interpretation.[87] Although the court found the circumstances of the petitioner to be "very sympathetic," its *Chevron*-informed deference to the BIA had to stand.[88]

When an action taken by the BIA is discretionary, the court will review this with the abuse of discretion standard.[89] The most common use of the abuse of discretion standard in this context is for motions to reopen or reconsider a case, as these motions are left up to the discretion of the BIA.[90] Abuse of discretion occurs when the decision is reached in an arbitrary or irrational manner.[91] The Eleventh Circuit has also described abuse of discretion as providing "no rational explanation," being "devoid of any reasoning," or the giving of "only summary or conclusory statements."[92] For example in the case of *Finlayson-Green v. U.S. Attorney General*, the court explicitly said that it reviewed a denial by the BIA of a motion to reopen a case for abuse of discretion and was limited to "determining whether there has been an exercise of administrative discretion and whether the matter of exercise has been arbitrary or capricious."[93] Motions to reconsider are also reviewed for abuse of discretion.[94] *Finlayson-Green* involved a Jamaican woman appealing the denial by the BIA of her motion to reopen.[95] The federal court reviewed the administrative record and the

85. Mockeviciene v. U.S. Att'y Gen., 237 F. App'x 569, 573 (11th Cir. 2007) (not selected for publication) (citing D-Muhumed v. U.S. Att'y Gen., 388 F.3d 814, 817 (11th Cir. 2004)).

86. *See* Garcia v. U.S. Att'y Gen., 217 F. App'x 855, 857 (11th Cir. 2007) (not selected for publication).

87. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1199 (11th Cir. 2006).

88. *Id.*

89. *See* Anin v. Reno, 188 F.3d 1273, 1276 (11th Cir. 1999) (citing INS v. Doherty, 502 U.S. 314, 323-24 (1992)).

90. *See Anin*, 188 F.3d at 1276.

91. *See* Jimenez v. U.S. Att'y Gen., 238 F. App'x 422, 423 (11th Cir. 2007) (not selected for publication).

92. Hua Wang Lin v. U.S. Att'y Gen., 210 F. App'x 931, 932-33 (11th Cir. 2006) (not selected for publication).

93. Finlayson-Green v. U.S. Att'y Gen., 228 F. App'x 919, 920 (11th Cir. 2007) (not selected for publication) (quoting Ali v. U.S. Att'y Gen., 443 F.3d 804, 808 (11th Cir. 2006)).

94. *Finlayson-Green*, 228 F. App'x at 920 (citing Assa'ad v. U.S. Att'y Gen., 332 F.3d 1321, 1341 (11th Cir. 2003)).

95. *Finlayson-Green*, 228 F. App'x at 920.

parties' briefs to conclude that no error had been committed and the BIA had not abused its discretion.[96]

When the BIA or IJ makes a factual determination, the court reviews such a finding under the substantial evidence test. This test was first explicitly adopted by the Eleventh Circuit court in *Chavarria v. U.S. Department of Justice* in 1984.[97] The INA was amended in 1980 and prior to this amendment withholding of deportation or removal was at the discretion of the Attorney General.[98] The new language of the statute mandated a replacement of the abuse of discretion standard with the substantial evidence test.[99] In other words, rather than finding that the BIA was irrational or arbitrary and capricious, the court would have to find that the factual conclusions of the BIA either were or were not supported by substantial evidence. The definition used for the substantial evidence test is that factual findings will be upheld if they are "supported by reasonable, substantial, and probative evidence on the record as a whole."[100] Under this test, the record is viewed in the light most favorable to the BIA's decision and all reasonable inferences are drawn in favor of that decision.[101] The substantial evidence test is highly deferential and does not require the court to re-weigh the evidence from scratch.[102] The mere fact that information in the record may support a contrary conclusion is not enough to justify a reversal; rather, a reversal may only occur "if the evidence presented by the applicant is so powerful that a reasonable fact finder would *have* to conclude otherwise."[103]

An argument exists that this definition was supplemented by the *INS v. Elias-Zacarias* decision, and the court has recently said of the substantial evidence test, "[W]e will affirm the IJ's decision unless the evidence

96. *Id.* at 921.

97. Chavarria v. U.S. Dep't of Justice, 722 F.2d 666, 670 (11th Cir. 1984).

98. *Id.*

99. The substantial evidence test is normally used to scrutinize administrative agencies because they are using formal proceedings, and section 706 of the Administrative Procedure Act requires this particular standard of review to be used by courts when agencies conduct formal proceedings. 5 U.S.C. § 706(2)(E) (2006). However, Congress may always invoke the substantial evidence test through legislation as well.

100. Garcia v. U.S. Att'y Gen., 217 F. App'x 855, 857 (11th Cir. 2007) (quoting INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992)).

101. Niftaliev v. U.S. Att'y Gen., 213 F. App'x 850, 853 (11th Cir. 2007) (quoting Adefemi v. Ashcroft, 386 F.3d 1022, 1027 (11th Cir. 2004)).

102. Rodriguez v. U.S. Att'y Gen., 213 F. App'x 947, 948 (11th Cir. 2007) (quoting Mazariegos v. Office of the U.S. Att'y Gen., 241 F.3d 1320, 1323 (11th Cir. 2001).

103. De Aviles v. U.S. Att'y Gen., 212 F. App'x 823, 827 (11th Cir. 2006) (invoking the substantial evidence test reasoning without using the word compel).

'compels' a reasonable fact finder to find otherwise."[104] The court is now bound by this test, and unless it can say the record *compels* a contrary result, it may not overturn the factual findings of the BIA.[105] The Supreme Court decided *Elias-Zacarias* in 1992,[106] and the question persists as to whether this decision was part of a natural outgrowth of case law concerning the substantial evidence test or if it announced an entirely new standard of review.[107] Included in a footnote to the case is the language that for those seeking asylum to prevail in federal court, they must show that evidence not only supports a conclusion for reversal, but compels it.[108] The Court did not draw any attention to this additional language. In a law review article, Stephen Knight accuses the Eleventh Circuit, among others, of seizing on the Court's sweeping, conclusory language to employ a new standard for factual findings that sounds more like an abuse of discretion standard.[109] There is a definite ambiguity to the addition of the compulsion aspect to the substantial evidence test. On one hand, it could be seen as making the test almost insurmountable for an asylum applicant—he/she must not only show that the IJ/BIA decisions were not based on "substantial evidence," but also that an opposing conclusion is "compelled" by the record. On the other hand, it may be a natural outgrowth that if the IJ/BIA determinations are not supported by substantial evidence, this in and of itself would compel an opposite finding of fact.

The court itself states that it would be compelled to overturn an IJ or the BIA in only very rare circumstances. The court explains in *Silva v. U.S. Attorney General* that:

> It is a rare case that will compel reversal of the Immigration Judge for one fundamental reason: the Immigration Judge is in a superior position to make findings of fact. We do not reweigh the evidence presented to an Immigration Judge for sound reasons. Immigration Judges, not we, actually see and hear the applicants for asylum testify. Immigration Judges, not we, have personal encounters with applications for asylum . . . who . . . suffer real threats of violence. Immigration Judges, not we, are on the front lines everyday deciding whether the persecution suffered by an applicant for asylum meets the requirement of Congress that it be based

104. *Garcia*, 217 F. App'x at 857 (citing Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1230 (11th Cir. 2005) (quoting *Elias-Zacarias*, 502 U.S. at 481 n.1)).

105. *See* Meza v. U.S. Att'y Gen., 226 F. App'x 863, 866 (11th Cir. 2007) (not selected for publication).

106. *Elias-Zacarias*, 502 U.S. 478.

107. Stephen M. Knight, *Shielded From Review: The Questionable Birth and Development of the Asylum Standard of Review Under* Elias-Zacarias, 20 GEO. IMMIGR. L.J. 133, 138 (2005).

108. *Elias-Zacarias*, 502 U.S. at 481 n.1.

109. Knight, *supra* note 107, at 143.

> on a protected ground. Our standard of review reflects the wisdom that Immigration Judges are in a better position to make that judgment call.[110]

Recognizing the superior placement of the IJ to see and handle the facts lends credence to the substantial evidence test as not being unnecessarily strong in invoking the compulsion aspect given by the Supreme Court. The question remains if the Eleventh Circuit is being more or less aggressive in application of this standard than Congress and the Supreme Court demand.

Many determinations made by the BIA are factual determinations. A determination that an alien is ineligible for asylum is a factual determination.[111] Credibility determinations are also findings of fact to be reviewed under the substantial evidence test.[112] When discussing credibility determinations, the substantial evidence test takes on another dimension. The IJ or the BIA must offer specific, cogent reasons supported by substantial evidence in order for the federal court to uphold their decisions.[113] The court may point out how the IJ came to his/her conclusion about credibility by pointing to the identification by the judge of specific inconsistencies or omissions made by the applicant.[114] Inconsistencies supported by the record can be specific, cogent reasons which lead to the satisfaction of the substantial evidence test.[115]

Some issues exist where the federal court *may* not review the actions or decisions of the BIA. For example, with the filing of an asylum claim, there is a timeliness requirement.[116] Applications for asylum must be filed within one year of an applicant's arrival into the United States.[117] The only exception to this rule is if changed circumstances exist which materially affect an applicant's eligibility for asylum or there are extraordinary circumstances relating to the delay.[118] Courts do not have the jurisdiction to review determinations made with regard to this requirement.[119] Therefore,

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110. Silva v. U.S. Att'y Gen., 448 F.3d 1229, 1242 (11th Cir. 2006).

111. Uribe v. U.S. Att'y Gen., 217 F. App'x 889, 893 (11th Cir. 2007).

112. *Id.* (citing Ruiz v. U.S. Att'y Gen., 440 F.3d 1247, 1255 (11th Cir. 2006)).

113. *See* Sanchez-Castaneda v. U.S. Att'y Gen., 212 F. App'x 865, 867 (11th Cir. 2006).

114. *See* Hua Wang Lin v. U.S. Att'y Gen., 210 F. App'x 931, 932 (11th Cir. 2006).

115. *See* Drejaj v. U.S. Att'y Gen., 192 F. App'x 847, 855 (11th Cir. 2006); Palacio v. U.S. Att'y Gen., 188 F. App'x 919, 921 (11th Cir. 2006) (not selected for publication); Makharashvili v. U.S. Att'y Gen., 184 F. App'x 828, 831 (11th Cir. 2006) ("The IJ cited numerous inconsistencies and unbelievable testimony to support his adverse credibility finding .... [S]ubstantial evidence supports the IJ's adverse credibility finding.").

116. Sarmiento v. U.S. Att'y Gen., 223 F. App'x 861, 862 (11th Cir. 2007) (not selected for publication) (providing a helpful discussion of the timeliness requirements).

117. Immigration and Nationality Act § 208(a)(2)(B), (D), 8 U.S.C. § 1158(a)(2)(B), (D) (2006).

118. *Id.*

119. Immigration and Nationality Act § 208(a)(3), 8 U.S.C. § 1158(a)(3) (2006); *see also*

if it has been found that an application is not timely, it is not the court's job to inquire whether extraordinary circumstances exist nor to question a determination that no such circumstances existed.[120]

In addition to problems of timing, the court is also in a position to require an alien to have exhausted administrative remedies before asking the court for review. In other words, a court may only review a final order of removal if an alien has exhausted all administrative remedies available to him/her as of right.[121] For example, if an alien gets an order from an IJ denying his/her application for asylum and denying withholding of removal under the INA, but only submits the asylum question to the BIA on appeal, the question about denying withholding of removal under the INA has been abandoned. The alien cannot then submit to the federal court review on this question because he/she did not exhaust administrative remedies by appealing to the BIA. The arguments abandoned by the alien because of lack of exhaustion are outside the jurisdiction of the court; if a claim is not raised before the BIA then the court cannot review it, and if a claim is not raised before the federal court on appeal then it is also abandoned.[122]

C. *The Eleventh Circuit & Cases*

Of the 251 cases reviewed and surveyed for this article, the federal court only found error in the BIA's actions twenty-nine times.[123] However, it would not be fair to take these numbers entirely at face value due to the fact that more data exists for more recent years.[124] This distortion of representation of each year can most likely be explained by the number of unpublished cases as well as an increase in immigration litigation over time.

Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1287 (11th Cir. 2003). Jurisdictional provisions in the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 310 (2005), do not affect this jurisdictional rule. *See* Chacon-Botero v. U.S. Att'y Gen., 427 F.3d 954, 957 (11th Cir. 2005).

120. *See Sarmiento*, 223 F. App'x at 862; *Mendoza*, 327 F.3d at 1287.

121. Hippolyte v. U.S. Att'y Gen., 222 F. App'x 902, 905 (11th Cir. 2007) (not selected for publication) (citing Sundar v. INS, 328 F.3d 1320, 1333 (11th Cir. 2003)).

122. *See* Momin v. U.S. Att'y Gen., 218 F. App'x 848, 849-51 (11th Cir. 2007) (not selected for publication) (considering an abandoned argument).

123. *See supra* note 36 and accompanying text. Of these 29 cases, 2 involved an invalid statutory interpretation, 5 involved an abuse of discretion, and 22 involved problems with the evidence. Also, 6 were overturned in 2008, 9 in 2007, 5 in 2006, 3 in 2005, 2 in 2004, 1 in 2003, 1 in 1995, 1 in 1992, and 1 in 1990. There are three sets of cases where the court remanded to the agency twice for the same alien's case.

124. *See supra* note 36 and accompanying text. Forty cases were included from 2008, 51 from 2007, 78 from 2006, 63 from 2005, 7 from 2004, 2 from 2003, 4 from 2001, 1 from 2000, 1 from 1999, 2 from 1995, 1 from 1992, and 1 from 1990. An overall overturn rate of 11.6% would be indicated on these numbers.

The fact still stands that the federal court *overwhelmingly* supports the actions of the BIA and has only overturned its decisions on rare occasions.

To understand the implementation of the standard of review by the Eleventh Circuit, it might be more useful to analyze the few cases in which the standards professed by the federal court led to a finding of error. What sort of extreme circumstances, for example, provided no substantial evidence for a factual decision or abused the discretion of the BIA?

It is crucial to note that the substantial evidence test almost always supports the BIA. However, in the case of *Melo-Saganome v. U.S. Attorney General*, the court admitted that although it was unclear whether the BIA had considered the new evidence that had been submitted, the court was still able to conclude that the BIA had met its burden under the substantial evidence test.[125] In cases in which the substantial evidence test is used to review the actions of the BIA, the court will usually review the record and provide significant detail about the situations of a particular alien in supporting its claim that the BIA or the IJ did not err in their factual findings.[126]

Although the substantial evidence standard is considered to be highly deferential, sometimes the court will still say that the BIA has made a mistake and the conclusion of the BIA was not supported by substantial evidence. For example, in the case of *Ruiz v. Gonzales*, the court was forced to say that the record *compelled* the conclusion that the petitioner had suffered from past persecution.[127] Ruiz, a Colombian native, was the victim of beatings, threatening phone calls, and kidnapping, which the BIA said did not rise to the level of persecution.[128] The court argued that the BIA found Ruiz's testimony and corroborative evidence to be credible, and even concluded that these events occurred on account of his political opinion, which made him part of a statutorily protected group.[129] In light of those findings, Ruiz created a rebuttable presumption that his life or freedom would be threatened upon removal to Colombia, and the court remanded the case to the BIA.[130]

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125. Melo-Saganome v. U.S. Att'y Gen., 227 F. App'x 809, 815 (11th Cir. 2007) (not selected for publication).

126. *See* Barrera Castrillon v. U.S. Att'y Gen., 221 F. App'x 863, 866 (11th Cir. 2007) ("A *thorough review of the record* convinces us that substantial evidence supports the findings that petitioner failed to show past persecution." (emphasis added)); Wibowo v. U.S. Att'y Gen., 205 F. App'x 743, 746 (11th Cir. 2006) ("After reviewing the record and reading the parties' briefs, we conclude that substantial evidence supports the BIA's and IJ's determination . . . .").

127. Ruiz v. Gonzales, 479 F.3d 762, 765-67 (11th Cir. 2007).

128. *Id.* at 763, 766.

129. *Id.* at 766.

130. *Id.* at 766-67.

It is difficult to ascertain what is required in order for unpleasant events such as harassments or beatings, which occur because of a statutorily protected status, to rise to the level of persecution. For instance, while *Ruiz* created a rebuttable presumption of persecution, threatening telephone calls and vandalism were not enough to show persecution in the case of another alien, Castellanos.[131] The court said what happened to Castellanos did not amount to more than simple harassment.[132] However, the court's conclusion here lends itself to the idea that the court is more likely to defer on pure factual questions of whether or not there is enough evidence to prove a certain thing, such as persecution, but the court may be mildly harsher if the BIA or IJ asserts that only the nexus between *credible* testimony of persecution and statutorily protected status remains too tenable for relief.[133]

In fact, *Ruiz v. Gonzales* has been used to jumpstart relief in other cases where the IJ/BIA finds credible testimony, but a supposedly fragile nexus between that testimony and what is necessary for relief. The court now allows for collective incidents to culminate in a conclusion of persecution. In *De Santamaria v. U.S. Attorney General*, the court recounts a scenario in which the IJ rejected a claim for asylum because the alien had not suffered past persecution.[134] The IJ did not make an adverse credibility finding against De Santamaria, who alleged that she had:

> (1) received numerous death threats from members of [the Revolutionary Armed Forces of Colombia (hereinafter FARC)], (2) was assaulted near her home, dragged by her hair out of her vehicle, and struck by individuals identifying themselves as members of FARC, (3) was traumatized by FARC's torture and murder of her family groundskeeper who refused to give information on her whereabouts, and finally (4) was kidnapped by members of FARC and beaten with the butts of their guns, after witnessing one person's murder.[135]

The IJ asserted that because De Santamaria had gone back to Colombia several times, she was unafraid of persecution there.[136] The court said that although De Santamaria had suffered no significant physical attacks, these events constituted "extreme mistreatment" and the court was able to find

131. Castellanos v. U.S. Att'y Gen., 216 F. App'x 959, 962 (11th Cir. 2007) (not selected for publication).

132. *Id.*; *see also* Barrios v. U.S. Att'y Gen., 196 F. App'x 865, 868 (11th Cir. 2006) (not selected for publication) (stating that being the target of harassment and intimidation was not evidence which compelled the finding of persecution.).

133. *Barrios*, 196 F. App'x at 867-69.

134. De Santamaria v. U.S. Att'y Gen., 525 F.3d 999, 1003 (11th Cir. 2008).

135. *Id.* at 1008-09.

136. *Id.* at 1010.

with "little difficulty" that past persecution had occurred, which granted De Santamaria a rebuttable presumption that future persecution would also occur.[137]

Even if the IJ wants to find someone to be not credible, he/she must state some specific, cogent reasons for doing so. The *Morehodov v. U.S. Attorney General* case gives an illustration of a couple that was attacked in the Ukraine for their Christian beliefs.[138] Although the IJ found them to be "overall credible" for persecution purposes, he did not believe they were persecuted *because* of their beliefs.[139] However, the IJ stated no reasons for this belief. Therefore, the court was forced to conclude that the Morehodovs were fully credible on this count.[140]

In *Mezvrishvili v. U.S. Attorney General*, the court said the BIA and the IJ found the petitioner to be credible as far as the definition of persecution, but questioned his commitment to his purported religion.[141] The court found this kind of reasoning unacceptable because the issue for his asylum was whether or not he suffered religious persecution, not how well he could display knowledge of his religion.[142] The court said that the BIA/IJ failed to give "reasoned consideration" or make "adequate findings," causing the court to be unable to review the case without a remand.[143] Again, this is a conclusion faulting the analysis governing the nexus between persecution and protected status. The *Tan v. U.S. Attorney General* case is another example of the federal court saying to the BIA/IJ, "If you find the petitioner credible, you have to be clear about why his/her credibility does not extend to the granting of asylum or withholding of removal."[144] The court alleges that the IJ did not give reasoned consideration or make adequate findings for a number of reasons.[145] The *Garcia-Valderrama v. U.S. Attorney General* case provides that the IJ committed reversible error because the record compelled the conclusion that the petitioner experienced persecution at least in part because of his political opinion.[146] The court in *Gashi v. U.S. Attorney General* charged the IJ with a failure to consider all the evidence

137. *Id.* at 1009.

138. Morehodov v. U.S. Att'y Gen., 270 F. App'x 775, 776 (11th Cir. 2008).

139. *Id.* at 780 n.2.

140. *Id.*

141. Mezvrishvili v. U.S. Att'y Gen., 467 F.3d 1292, 1294-96 (11th Cir. 2006).

142. *Id.*

143. *Id.* at 1295 (citing Tan v. U.S. Att'y Gen., 446 F.3d 1369, 1375 (11th Cir. 1006)).

144. *Tan*, 446 F.3d at 1376 (holding that because Tan's account of persecution was credible, the IJ should have explained why he found it was not based on her race).

145. *Id.* at 1375.

146. Garcia-Valderrama v. U.S. Att'y Gen., 130 F. App'x 434, 436 (11th Cir. 2005) (not selected for publication).

before him.[147] Because the IJ did not make any clear or cogent finding with regard to past persecution, reversible error was found.[148] The IJ found that persecution existed, but would not tie this persecution to statutorily protected status.[149]

In the *Martinez-Benitez v. INS* case, the court found that the BIA acted arbitrarily by failing to consider the finding of the IJ that the petitioner possessed less cocaine than his indictment alleged.[150] Although the stated test was that of substantial evidence, the court rested its conclusion on the fact that the Board acted arbitrarily and left some evidence unconsidered. This case seems like good semantic support for the concept that the Eleventh Circuit is really using an abuse of discretion standard rather than the substantial evidence test for reviewing factual inquiries. The court chose to say that the BIA had behaved "arbitrarily" and left evidence unconsidered concerning Martinez-Benitez without saying whether that evidence was crucial to an answer supported by substantial evidence.[151] Even more compelling is the fact that this case was decided on March 30, 1992, just a few months after *Elias-Zacarias* was decided by the Supreme Court on January 22, 1992.[152] Over time, the substantial evidence test would enmesh with the language of compulsion, but originally it seems the court was reverting back to the abuse of discretion standard.

The court will sometimes break up the satisfaction of the substantial evidence test into two semantic pieces. For example, in *Rodriguez v. U.S. Attorney General* the court says, "Substantial evidence supports the BIA's and IJ's denial of withholding of removal. The record does not compel an opposite conclusion."[153] If compulsion is an integrated part of the substantial evidence test, these sentences are redundant. However, if compulsion is an added element that causes the substantial evidence test to be more stringent in its current incarnation than in the past, that is important to analytically understand. The court views its job as considering only "whether there is substantial evidence for the findings made by the BIA, *not* whether there is substantial evidence for some *other* finding that could have, but was not, made."[154] Even if the evidence could support multiple

147. Gashi v. U.S. Att'y Gen., 182 F. App'x 950, 953 (11th Cir. 2006) (not selected for publication).

148. *Id.* (holding that the IJ should have considered petitioner's claim of persecution based on religion and ethnicity instead of religion alone).

149. *Id.*

150. Martinez-Benitez v. INS, 956 F.2d 1053, 1055-56 (11th Cir. 1992).

151. *Id.* at 1056.

152. *Id.* at 1053; INS v. Elias-Zacarias, 502 U.S. 478, 478 (1992).

153. Rodriguez v. U.S. Att'y Gen., 213 F. App'x 947, 949-50 (11th Cir. 2007).

154. Adefemi v. Ashcroft, 386 F.3d 1022, 1029 (11th Cir. 2004) (quoting Mazariegos v.

conclusions, the court must affirm the BIA unless there is no reasonable basis for that decision.[155]

What about when the court finds that the BIA has abused its discretion? Most commonly, this standard is used to review motions sent to the BIA to reopen or reconsider an alien's case.[156] In some cases, however, the court's findings are indistinguishable from a substantial evidence case. In *Damato-Sifontes v. U.S. Attorney General*, the court clearly spelled out that the standard of review was abuse of discretion,[157] but remanded the case to the BIA because it had erred by finding there was no evidence at all to support the alien's claim.[158] In other cases, the BIA discounted evidence and encountered a disapproving reaction from the court, but only when this evidence was unusually strong.[159]

IV. IS AGGRESSIVE REVIEW JUSTIFIED?

Either the Eleventh Circuit is actually adhering the black letter standards given by Congress and the Supreme Court or it is implementing those standards only nominally and actually using a different type of review. As demonstrated in the previous section, it is likely that the Eleventh Circuit is using the substantial evidence test as a shield for a more lenient standard of review, namely abuse of discretion. By implementing the compulsion language of the Supreme Court, the Eleventh Circuit is free to say that they must be *compelled* to overturn the BIA, when in reality they must only find that the BIA did not support its conclusion with substantial evidence. Is this kind of lenient review justified? Or would a more aggressive and stringent type of review be more appropriate?

It is understandable that the federal court would want to defer, as much as possible, to the IJ and the BIA. The IJ especially deals most closely with the petitioner and reviews the documents and testimony at length. The BIA

Office of the U.S. Att'y Gen., 241 F.3d 1320, 1324 (11th Cir. 2001)).

155. *Adefemi*, 386 F.3d at 1030 (finding that even though ambiguities existed in documentary evidence, those ambiguities did not compel a finding that the BIA was unreasonable).

156. *See* INS v. Abudu, 485 U.S. 94, 96 (1988).

157. Damato-Sifontes v. U.S. Att'y Gen., 300 F. App'x 708, 711 (11th Cir. 2008) (not selected for publication).

158. *Id.* In reality, the BIA overlooked certain pieces of evidence that the court wanted it to use in its decision making process. This sounds a lot more like a substantial evidence problem then an abuse of discretion problem, but this is tied partially to the fact of what the court is reviewing, be it a motion to reopen or a claim for relief.

159. *See* Yan Lu Xiu v. U.S. Att'y Gen., 294 F. App'x 591, 596 (11th Cir. 2008) (not selected for publication) (noting that the BIA had discounted evidence from Xiu, who was credible, because it had discounted similar evidence from incredible aliens in the past).

is slightly more hampered because it no longer may engage in *de novo* factual review and almost always agrees with what the IJ has pronounced, but it is another layer of appeal for the alien. Once the federal court is reached, and the only cases to ever reach the federal court are those in which the alien has been denied relief, the easiest course to follow is to defer to the "immigration experts." In fact, this concept is one of the cornerstones of *Chevron* deference—deference to experts is preferred to getting the courts involved. However, immigration is not special in that it deserves more or less deference than other agencies. The Supreme Court and Congress must make clear exactly what kind of review they want taking place in the courts of appeals, and then they must enforce that decision. The Supreme Court may have inadvertently used the compulsion language in 1992, but it has since let it stand over time and not overturned circuits that follow it zealously. Congress has implemented the language into immigration laws, as is clear from the statutory citations in the previous section. Although circuits may differ on the application of the substantial evidence test, it is no longer unusual for the test to require an element of compulsion.

Is this a negative outcome? What sort of implications will come from this kind of action where federal courts choose to apply more deference than was originally intended? The good news is the bifurcation seen in the Eleventh Circuit—the court hardly ever overturns an adverse credibility finding, but will sometimes overturn when the IJ/BIA cannot set out logic for why they admit the petitioner's credibility but still deny relief. In other words, the court does not engage in the process of laying out all the pieces, but rather leaves that to the IJ who directly handles testimony and evidence. The court only admonishes when those pieces do not fit logically together, and if there is not enough evidence to support a conclusion, the court must be compelled to overturn that line of thought.

The only major policy question is how this impacts immigration law. If one assumes that this extremely lenient standard creates an insurmountable barrier to aliens requesting review then this type of review essentially slows down immigration. Some may cheer this result, pointing out that the standard needs to be high in this final level of federal court review to allow the IJ and the BIA to do their jobs. Others may find fault with this standard being unreasonably high, but the remedy is for the Supreme Court or Congress to clarify that compulsion is not a requirement to the substantial evidence test or to change something else in the system to facilitate immigration.

V. CONCLUSION

Immigration is a very complex and layered subject that almost cannot be fully understood by a modern culture caught up in sound bites and quick slogans. This article has reviewed only a small piece of the immigration puzzle: how does the Eleventh Circuit review the BIA? When it comes to legal conclusions or statutory interpretations, the court reviews it *de novo* and conducts the inquiry all over again, deferring to the BIA if it was reasonable. When it comes to matters of discretion such as motions to reopen or reconsider a case, the court reviews this action for abuse of discretion. And when it comes to matters of fact finding, the court relies on the substantial evidence test. If there is no substantial evidence to support the conclusion of the BIA/IJ, the court is *compelled* to find the opposite conclusion that the BIA has erred and must be overturned. This standard as implemented by the Eleventh Circuit is perhaps more lenient towards the agency than the black letter of substantial evidence might initially suggest, but it is not overly lenient in the context of administrative review. In fact the concept of compulsion may fit easily into the black letter case law of substantial evidence, for if no evidence can support a conclusion, any reasonable finder of fact would be compelled to reject it.