

Memorandum: Refugee Credibility and Trauma

I. Background: Mental Illness and Trauma in Refugee Law

A. Mental Illness and Trauma in the Law

It is a basic precept of the American approach to criminal justice that it is fundamentally unfair to prosecute and punish someone whose mental illness prevents them from understanding the charges against them. In the capital criminal context, mental illness is implicated throughout the legal process, from interrogation to sentencing, and defendants with mental illness face unique challenges at every stage.¹ The Supreme Court of the United States has recognized that the states' interest in protecting child witnesses from trauma is compelling enough to justify an alternative procedure to the conventional physical face-to-face confrontation required by the Sixth Amendment.²

Like the criminal justice system, the U.S. immigration system is fraught with obstacles for the mentally ill, yet this fundamental principle of fairness is less well integrated, raising questions about the system's judicial integrity, ability to provide due process, and honor human rights.³ For example, individuals with mental illness may "not understand what is happening to them, or what is at stake in the hearings they must attend. ...Individuals with mental disabilities also risk making statements in court and to immigration officers that are against their interests, without the ability to understand or mitigate the consequences."⁴ The Immigration and Nationality Act ("INA") merely provides that the Attorney General must provide certain "safeguards" for individuals whose participation in immigration proceedings would be affected by their "mental incompetency." 8 U.S.C. § 1229a(b)(3). In the asylum context, an applicant's failure to file her application on a timely basis may be excused on the basis of "extraordinary circumstances" such as mental disability or impairment. See discussion, *infra* Part V.

Post-Traumatic Stress Disorder ("PTSD") is a mental illness that has been increasingly recognized as significant in the legal arena.⁵ PTSD is defined as a type of anxiety disorder "characterized by the reexperiencing of an extremely traumatic event accompanied by symptoms of increased arousal and by

¹ American Civil Liberties Union ("ACLU"), Mental Illness and the Death Penalty, (May 5, 2009), <http://www.aclu.org/capital-punishment/report-mental-illness-and-death-penalty>.

² *Maryland v. Craig*, 497 U.S. 836 (1990).

³ Human Rights Watch ("HRW") and ACLU, Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System, (July 26, 2010), <http://www.aclu.org/human-rights/deportation-default-mental-disability-unfair-hearings-and-indefinite-detention-us-immig>.

⁴ *Id.* at 25-6.

⁵ Liza Gold, "The Role of PTSD in Litigation," (Dec. 1, 2005) *Psychiatric Times*.

avoidance of stimuli associated with the trauma.”⁶ Symptoms include flashbacks, feeling “emotionally numb,” and having angry outbursts.⁷

The federal government has begun to acknowledge and address the significance of PTSD in various contexts. For example, in 2007, Congress passed a law recognizing the significance and danger of PTSD among veterans.⁸ Likewise, the Veterans Administration has in recent years increased funding to the National Center for PTSD and developed an *Iraq War Clinician Guide* to address the unique concerns of veterans returning from Iraq.⁹

Because refugees are, by definition, people fleeing from persecution, refugee populations are at high risk for PTSD as well as other mental health issues. In international law, a refugee is any person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.”¹⁰ Similarly, the INA defines a “refugee” as “any person who is outside any country of such person’s nationality ...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.” 8 U.S.C. § 1101(a)(42)(A).

Refugees face many traumas and stressors, thus placing them at high risk for mental health problems, chiefly depression, anxiety, and PTSD.¹¹ According to the United Nations High Commissioner for Refugees (“UNHCR”) Resettlement Handbook, PTSD among refugee groups occurs at rates ranging from 39 to 100 percent, compared to 1 percent in the general population.¹² In addition to life-threatening trauma that occurs prior to flight, refugees also face chronic stress after displacement.¹³

Refugees with PTSD are likely to experience serious challenges in recalling and reciting traumatic events and details that may be necessary to describe accurately in order to establish refugee eligibility. UNHCR advises that in making refugee status determinations, “consideration should ...be given to the fact that, due to the applicant’s traumatic experiences, he/she may not speak freely.”¹⁴ Nevertheless,

⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (2002).

⁷ National Institute of Mental Health, “What are the symptoms of PTSD?”, (Jan. 21, 2009), <http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/what-are-the-symptoms-of-ptsd.shtml>.

⁸ Stephen Barlas, “Vets’ Mental Health Bill Becomes Law,” (Dec. 1, 2007) *Psychiatric Times*, <http://www.psychiatrictimes.com/display/article/10168/55166>.

⁹ Kelly Kennedy, “VA adds \$2 million for PTSD center,” (May 2, 2008) *Army Times* http://www.armytimes.com/news/2008/05/military_ptsd_funding_050208w/. See also National Center for PTSD, <http://www.ptsd.va.gov/index.asp>.

¹⁰ 1951 Geneva Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150.

¹¹ Andrés J. Pumariega, Eugenio Rothe, and JoAnne B. Pumariega, “Mental Health of Immigrants and Refugees,” 41 *Community Mental Health Journal* 581, 588 (2005).

¹² UNHCR, *Resettlement Handbook*, (2002) Chapter 3.1, 233.

¹³ Elisa E. Bolton, Ph.D., “PTSD in Refugees,” <http://www.ptsd.va.gov/professional/pages/ptsd-refugees.asp>.

¹⁴ UNHCR, “Note on Burden and Standard of Proof in Refugee Claims,” (Dec. 16, 1998) at paragraph 9.

the U.S. government has been slow to provide much-needed mental health screenings and services to incoming refugees.¹⁵ Likewise, the U.S. immigration system is ill-equipped to even identify individuals with mental illness, let alone provide mentally ill refugee and asylum applicants with special procedural safeguards.¹⁶

A. Refugee Status Determinations and Asylum Law

Refugee status determinations are administrative adjudications generally made with little or no elaboration, but which are greatly influenced by asylum law, since both decisions concern establishing legal eligibility as a refugee. This memorandum discusses the law as it has been explained and applied in asylum cases, under the theory that the same law should apply in refugee status determinations.

Generally, refugee status is applicable where the applicant is not yet in the country of resettlement (in this case, the United States), while asylum applies where the applicant is already in the U.S. 8 U.S.C. § 1158. Refugee status applications and asylum decisions both require the applicant to prove that she meets the legal definition of “refugee,” as set out in the INA. Likewise, the exclusion and inadmissibility criteria for refugee status adjudication and asylum are identical.

Despite the identical applicable legal requirements, the procedures applied in adjudicating refugee status and deciding asylum cases are substantially different. Applying for refugee status entails filing an I-590 form with U.S. Citizenship and Immigration Services (“USCIS”) and then appearing before a USCIS officer for an individual interview. 8 C.F.R. 207.2. The regulations provide that there is no direct judicial review of USCIS’ adjudication of an I-590. 8 C.F.R. 207.4. However, in the asylum context, denied applicants can appeal a negative decision from an Immigration Judge (“IJ”) to the Board of Immigration Appeals (“BIA”). Decisions of the BIA are explicated in written opinions, and are subject to review by the federal Courts of Appeal. Thus, substantive judicial interpretation of the INA’s refugee provisions generally only occurs in the asylum context.

The case law developed in the asylum context is thus not only the best, but the *only* objective source of jurisprudence for interpreting the legal standards that apply to refugee status determinations. Generally, asylum cases are the only cases in which the INA’s definition of “refugee” is interpreted by a judge. Aside from asylum cases, the only other applicable source of interpretive guidance for refugee status determinations is the USCIS’ own regulations. Further, since the legal standards that apply in both the asylum and refugee status determination contexts are essentially identical, there is no apparent reason that asylum case law would *not* be appropriate.

¹⁵ U.S. Department of Health and Human Services, A Comprehensive Refugee Health Screening Program, (1999) Pub. Health Rep. 1999; 114; 469-477.

¹⁶ HRW and ACLU, *supra* note 3, at 27-39 and 43-49.

II. Legal Standards for Credibility in Asylum and Refugee Cases

B. Credibility Defined

In practice, a positive credibility finding is critical to successful refugee status determinations and asylum applications.¹⁷ “Credibility” is described in the USCIS Adjudicator’s Field Manual (“AFM”) as “involv[ing] a witness’ trustworthiness and believability.” AFM § 11.1. According to the BIA, a credibility determination “apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Matter of Lugo-Guadiana*, 12 I&N Dec. 726, 729 (BIA 1968) *quoted in In re A- S-*, 21 I&N Dec. at 1119 (Schmidt and Guendelsberger, dissenting). In the asylum context, the trier of fact is the Asylum Officer or IJ (depending on whether the proceedings are affirmative or defensive), who determines whether the witness’ testimony is credible. In the refugee context, the credibility determination is made by a “circuit rider” (typically an asylum officer temporarily conducting interviews abroad) from the Department of Homeland Security.

C. Legal Standards for Credibility

In an asylum proceeding, an applicant’s testimony may be rejected on the basis of an adverse credibility determination if the trier of fact, considering the record as a whole and the totality of the circumstances, identifies a specific and cogent reason for disbelief.

The BIA reviews IJ decisions on a *de novo* basis but defers to the IJ’s credibility findings, unless clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *see* 67 Fed. Reg. 54,878, 54,902 (Aug. 26, 2002). The IJ’s credibility determination is afforded significant deference by reviewing bodies because only the IJ has had the opportunity to observe the witness give testimony and to evaluate her demeanor. *See In re A- S-*, 21 I&N Dec. 1106, 1109 (BIA 1998). On judicial review, the courts apply a substantial evidence standard to findings of fact, including the IJ’s credibility determinations. *See, e.g., Sepulveda v. United States AG*, 378 F.3d 1260, 1264 (11th Cir. 2004) (substantial evidence standard required for judicial review of orders of removal). In the immigration context, the substantial evidence standard means that “the administrative findings of fact are conclusive unless any reasonable adjudicator would be *compelled* to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B) (emphasis added). The reviewing court must also consider the record “as a whole.” *See, e.g., Zoarab v. Mukasey*, 524 F.3d 777, 780 (6th Cir. 2008) and *Zetino v. Holder*, 622 F.3d 1007, 1012 (9th Cir. 2010).

Although the IJ’s credibility findings are given substantial deference by the reviewing court, an adverse credibility finding must also be supported by a “specific, cogent reason.” *See, e.g.: Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) (“inconsistencies on which the IJ relied are not ‘significant and relevant’ and do not support an adverse credibility determination”); *Singh v. Gonzales*, 495 F.3d 553, 556-558 (8th Cir. 2007) (“[The IJ] must give reasons that are ‘specific’ enough that a reviewing court can appreciate the reasoning behind the decision.... But there is no additional requirement of specificity.”); *Forgue v. United States AG*, 401 F.3d 1282, 1287 (11th Cir. 2005) (specific, cogent reasons for finding the applicant not credible were his failure to mention certain political activities and attacks in

¹⁷ Michael Kagan, “Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination,” 17 *Geo. Immigr. L.J.* 367 (2003).

proceedings *prior* to the hearing); *Hoxha v. Gonzales*, 446 F.3d 210, 214-7 (1st Cir. 2006) (upholding IJ's adverse credibility finding, which accounted for effect of "traumatic occurrences distant in time and [which] can impair [applicant's] ability to provide chronologically cogent and persuasive testimony" but still found significant inconsistencies in testimony); and *Diallo v. Gonzales*, 445 F.3d 624, 628-31 (2d Cir. 2006) (upholding IJ's adverse credibility finding based on inconsistent statements which applicant had sufficient opportunity to reconcile).

Until 2005, inconsistencies supporting an adverse credibility finding were required to go to the "heart of the asylum claim." *Singh v. Ashcroft*, 301 F.3d 1109, 1111 (9th Cir. 2002) (citations omitted). The REAL ID Act of 2005¹⁸ amended the INA to establish "a uniform standard for credibility."¹⁹ Following the REAL ID Act, an adverse credibility finding considering "the totality of the circumstances" may be supported by any inconsistencies "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." 8 U.S.C. § 1158(b)(1)(B)(iii). Thus, these amendments to varying degrees overruled the circuits' various standards prohibiting the use of non-material or minor inconsistencies to support an adverse credibility finding.²⁰

III. Case Law and Guidance on Trauma and Assessing Credibility

A. Background and Guidance

Despite the widely documented prevalence of trauma among refugee applicants and asylum-seekers, there is little case law or agency guidance to help adjudicators assess the effects of trauma in deciding refugee status or asylum eligibility cases. Many asylum-seekers suffer from PTSD and related conditions characterized by "a numbing of responsiveness to, or reduced involvement with, the external world."²¹ Therefore, asylum-seekers who are survivors of trauma seem to be at particular risk for erroneous negative credibility findings, since the REAL ID Act requires that credibility findings be based on "the demeanor, candor, or *responsiveness*" of the applicant. 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). Applicants with PTSD are also likely to suffer intermittent forgetfulness or repressed memories, which suggests further running afoul of the REAL ID Act's lowered standard for supporting adverse credibility findings with non-material or minor inconsistencies.

The regulations governing refugee and asylum cases do not make any reference to trauma and its likely negative effects on applicants' testimony and credibility. For example, the provision on establishing asylum eligibility merely states that the applicant's testimony, "if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13. Neither the USCIS' AFM or the documents received as a result of a FOIA request to the Department of Homeland Security ("DHS")

¹⁸ Div. B. of Pub.L. No. 109-13, 119 Stat. 302 (codified at INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii)).

¹⁹ See H.R. Rep. 109-72, at 166-67 (2005).

²⁰ See Scott Rempell, "Credibility Assessments and the REAL ID Act's Amendments to Immigration Law," 44 Tex. Int'l L.J. 185, 195-208 (2009).

²¹ Peter Suedfeld, *Psychology and Torture* 21 (1990), quoted in Katherine E. Melloy, "Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers," 92 Iowa L. Rev. 637, 653 (2007). Melloy notes that "Lack of emotion can be much more detrimental to a woman's credibility than it is to a man's, due to cultural standards of engendered emotion." *Id.* at 654.

contain any further guidance on the matter.. The State Department's Foreign Affairs Manual is also silent on the subject.

BIA decisions have not provided direct guidance on assessing the credibility of asylum seekers in light of the effects of trauma, although some BIA reasoning has demonstrated at least implicit consideration of the issue. In *In re B-*, the BIA found that an applicant's inability to recall precise dates could not serve as the basis for the IJ's incredibility finding. 21 I&N Dec. 66, 70 (BIA 1995). Without characterizing the phenomenon as the result of trauma, the BIA noted that, considering the applicant's experiences of torture and imprisonment, it was "not altogether surprising that the applicant would have been disoriented about precise dates." *Id.*

In another BIA case, the vigorous dissents in *In re A-S-* criticized the majority opinion for its evaluation of the credibility of a traumatized asylum seeker as well as the overall system that so disadvantages trauma survivors. 21 I&N Dec. at 1113. In the first dissent, Schmidt and Guendelsberger observed: "Asylum applicants are entitled to a practical, deferential adjudication that recognizes both the frailties of the human mind and the chaotic, traumatic situations in which asylum claims arise. See, e.g., *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)." *Id.* at 1114. The dissenters also acknowledged that "[d]ifficulties in remembering dates are certainly a common problem with respect to victims of persecution." *Id.* at 1118. In a separate dissent, Rosenberg argued that the applicant's explanation for inconsistencies was "plausible in light of the fact that there is no evidence that the respondent normally has a razor sharp memory and is posing as having a bad memory to cover up bungling a fabricated claim. It also comports with what we know generally about the effects of trauma on memory." *Id.* at 1129. However, while these views are undoubtedly persuasive, they have no precedential effect; the majority upheld the IJ's adverse credibility determination: "[T]he respondent's testimony is marked by inconsistencies and omissions, and the Immigration Judge's finding regarding the substance of the respondent's testimony provide additional support for the reasonable conclusion that the respondent's testimonial demeanor called his credibility into doubt." *Id.* at 1112. However, the majority noted that the applicant failed to address the adverse credibility determination in his appellate brief; therefore, "the record still lacks a convincing explanation for the inconsistencies or omissions addressed in the Immigration Judge's decision." *Id.* at 1110. Thus, it is possible that specific evidence of the applicant's trauma as it related to his ability to provide credible testimony might have resulted in a different outcome.

B. Case Law

There is no well-developed case law that specifically instructs how to evaluate an asylum-seeker's credibility in light of the possible effects of trauma. For example, the Executive Office for Immigration Review's "Credibility Outline," compiled as part of the IJ Benchbook to help summarize credibility and corroborating evidence standards by circuit, contains no annotations or separate

category on the issue.²² However, the Courts of Appeal have begun to provide some direction in evaluating the credibility of asylum-seekers in light of the common effects of trauma on survivors.

1. Published Cases

There are very few published asylum cases in the Courts of Appeal that discuss trauma and credibility. This section discusses the Circuit Court cases that deal most extensively with the issue.

In *Fiadjoe v. AG*, 411 F.3d 135 (3d Cir. 2005), the Third Circuit rejected the IJ's adverse credibility finding in the case of a Ghanaian survivor of rape, slavery, and incest. In *Fiadjoe*, the Third Circuit considered the applicant's psychologist-submitted evidence explaining the cultural and mental health barriers that negatively affected her credibility and made note of its consistency with the Immigration and Naturalization Service ("INS") guidelines for "Consideration for Asylum Officers Adjudicating Asylum Claims from Women." These guidelines provided, for example:

Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma ...may have a significant impact on the ability to present testimony. ...Trauma may also cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling.

...considerations of demeanor can be the products of trauma or culture, not credibility. Poor interview techniques/cross-cultural skills may cause faulty negative credibility findings.

Id. at 153-4. In rejecting the IJ's credibility finding, the Third Circuit cited the IJ's "failure to take into account the [applicant's suffered] abuses" and characterized the IJ's questioning as "hostile," "extraordinarily abusive," and "bullying," thus resulting in "faulty negative credibility findings." *Id.* at 154-5.

In *Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007), the IJ, BIA, and Court of Appeals all took notice of the applicant's PTSD diagnosis and report by a clinical psychologist, as well as the need, "in assessing credibility of aliens who are victims of trauma and consequently suffer from PTSD, [to] be mindful that serious memory problems are a common symptom of PTSD." *Id.* at 73 (citing amicus brief by Advocates for Survivors of Torture and Trauma). Nevertheless, the IJ's adverse credibility finding remained undisturbed throughout the appeals process, in part because the finding was based on inconsistencies in the record that were not sufficiently accounted for by the effects of PTSD, as interpreted by the clinical psychologist's written evidence.²³ *Id.* at 65-69.

²² "Asylum Credibility and Corroborating Evidence in the Federal Courts of Appeals and in the Board of Immigration Appeals Outline," http://www.justice.gov/eoir/vll/benchbook/resources/Credibility_Outline.pdf.

²³ The applicant's case also appears to have been procedurally undermined by her counsel's failure to initially challenge the IJ's adverse credibility finding on PTSD-related grounds, rather than "minor" memory lapses "due to the passage of time." 503 F.3d at 67.

The IJ's initial adverse credibility finding was reinforced by the applicant's failure to provide corroborating evidence as requested by the IJ. Without such evidence, the "entire body of medical evidence rested on the credibility of [the applicant's] reports to the doctor, but the IJ had, based on substantial evidence, found her not to be credible in her reporting of her history. Further, the basic PTSD diagnosis evidence was before the BIA in the prior appeal and had been considered." *Id.* at 69. The IJ found that the inconsistencies between the applicant's testimony to the IJ and her statements to the clinical psychologist undermined the overall credibility of the PTSD diagnosis. *Id.* at 65. This line of reasoning appears to present a difficult Catch-22 for asylum applicants with PTSD.

In contrast, the Ninth Circuit has demonstrated more deference to psychological evidence in evaluating the credibility of trauma survivors. In *Morgan v. Mukasey*, the Ninth Circuit rejected an adverse credibility finding that did not properly consider evidence relating to the applicants' PTSD and its effect on their memories of instances of past persecution. 529 F.3d 1202 (9th Cir. 2008). According to the court, the BIA's single-sentence dismissal of the psychological evidence "reflects no comprehension of [the psychological reports'] content or their bearing on a central issue," and constituted an "error of law." *Id.* at 1211.

2. Unpublished Cases

In addition to the above cases, there are several other instances where the Circuit Courts have considered trauma and credibility in asylum cases in unpublished opinions. For example, in *Saanon v. Holder*, the Sixth Circuit was not compelled to reverse the IJ's adverse credibility finding because the petitioner failed to explain how proper consideration of his PTSD "would have impacted the IJ's specific credibility-related findings." 338 Fed. Appx. 103, 105-6, 2009 U.S. App. LEXIS 16886, 5 (6th Cir. 2009). In addition, trauma is taken into account when considering whether an applicant qualifies for discretionary, humanitarian asylum. *See, e.g., Abra v. Gonzales*, 433 F.3d 1072, 1075 (8th Cir. 2006) ("Factors which should be considered include ...evidence of psychological trauma resulting from the harm."). Courts and immigration officials also assess the impact of trauma in determining whether an applicant has suffered past persecution, or has a well-founded fear of future persecution. *See, e.g., Mohammed v. Gonzales*, 400 F. 3d 785, 795 (9th Cir. 2005).

IV. Uses of Expert Psychological Witnesses in the Asylum Context

A. Admissibility and Qualification as an Expert

A mental health expert like a psychologist, psychiatrist, therapist or social worker may be able to provide valuable insights on a traumatized applicant's mental state that could help an IJ more accurately evaluate the applicant's credibility. However, the availability of such testimony depends on whether the psychologist's testimony is admissible in the asylum proceeding.

In general, immigration proceedings loosely follow the same evidentiary standards for expert witness testimony as in federal trials. The asylum regulations provide that applicants may "submit affidavits of witnesses and other evidence," 8 C.F.R. § 1208.9(b), and that the asylum officer

shall consider evidence submitted by the applicant together with his or her asylum application, as well as any evidence submitted by the

applicant before or at the interview. As a matter of discretion, the asylum officer may grant the applicant a brief extension of time following an interview during which the applicant may submit additional evidence.

8 C.F.R. § 1208.9(e).

The AFM provides that “[g]enerally, any evidence that would be admissible under the Federal Rules of Evidence [“FRE”] should be admitted in administrative proceedings. But so also, generally, should any oral or documentary evidence that is relevant and material be accepted into the administrative record.” AFM § 11.1(a). Expert witnesses are permitted to give opinions “involving scientific, technical, or other specialized knowledge” as long as they are properly qualified by “knowledge, skill, experience, training or education.” AFM § 11.1(i).

Despite the foregoing guidance, however, the IJ is not necessarily bound to follow the FRE and the legal standards established by the courts in interpreting it. *See, e.g., Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003) (“[The] Federal Rules of Evidence do not apply in asylum proceedings.”) and *Niam v. Ashcroft*, 354 F.3d 652, 659 (7th Cir. 2004) (“Administrative agencies are not bound by the hearsay rule or any other of the conventional rules of evidence, but only by the looser standard of due process of law.”). Nevertheless, while *Daubert* and similar legal standards regarding the qualification of expert witnesses do not apply in asylum proceedings, the 7th Circuit at least has held that “the spirit of *Daubert* ...does apply.” *Niam*, 354 F.3d at 660.

Assuming the psychologist is permitted to testify as an expert, the weight afforded to expert witnesses – as with any evidence – is largely at the IJ’s discretion. Notwithstanding the ability of the BIA and reviewing courts to reject the IJ’s credibility determination, as described *supra* in Part I, the IJ’s weighing of expert testimony may not be reversed simply because the reviewing body would have weighed the evidence differently. *In re R-S-H-*, 23 I&N 629, 637 (BIA 2003).

In *Zeru*, discussed in Part II *supra*, the applicant submitted evidence from not only her treating psychologist but other mental health experts, including a “literature review” from a forensic psychologist that cited studies and provided science-based explanations for how the applicant’s PTSD accounted for the inconsistencies in her testimony. 503 F.3d at 68. This evidence, however, was submitted after a denial by the BIA, at the Motion to Reopen stage of the case, at which point the IJ’s initial adverse credibility finding already demanded significant deference and only new, previously unavailable factual evidence could compel review. Further, the First Circuit took particular issue with the fact that none of the psychologists treated the applicant personally, in the therapeutic sense, and that much of their testimony concerned abstracted generalities about PTSD rather than how PTSD affected the particular applicant’s ability to recall facts and credibly give testimony. For example, in denying the Motion to Reopen, the BIA noted that one psychologist, “who said the disorder Zeru was suffering ‘often has as symptoms’ memory problems and amnesia for aspects of traumatic experiences, did not say that Zeru suffered those symptoms. The BIA stressed that [another, forensic psychologist] did not even conduct a direct examination of Zeru.” *Id.* at 68. A “supplementary psychological

assessment” submitted at the same time by a treating psychiatrist was similarly dismissed: “[the psychiatrist] wrote that ‘what can sometimes happen with trauma patients is that they may dissociate’ and that their memories ‘may be repressed.’ The supplemental assessment does not explicitly ascribe such symptoms to Zeru.” *Id.* at 67.

B. Psychological Witnesses as Corroborators

Expert psychological witnesses can also be useful in the asylum context as providers of evidence, including corroborating evidence, of the applicant’s asylum eligibility. For example, in *Mukamusoni v. Ashcroft*, 390 F.3d 110 (1st Cir. 2004), the First Circuit found that the BIA “unreasonably evaluat[ed] the record” and “excessively demand[ed] corroborative evidence” despite the admission into the record of a psychologist’s detailed medical evaluation of the applicant, which corroborated the applicant’s testimony of past persecution. *Id.* at 120. In *Mukamusoni*, the reviewing court found that the BIA erred in “not adequately considering the medical records... as corroborative.” *Id.* at 124. In an unpublished case from the Fourth Circuit, affidavits from a psychologist and physician testifying to the applicant’s PTSD and history of persecution were cited as sufficient evidence to establish the applicant’s asylum eligibility, regardless of his adverse credibility determination. *Curumi v. Ashcroft*, 119 Fed. Appx. 468, 474, 2005 U.S. App. LEXIS 429, 16-18 (4th Cir. 2005).

On the other hand, in an unpublished case from the Sixth Circuit, a psychiatrist’s letter attesting to the applicant’s traumatized state was found to be insufficiently corroborative due to its limited relevance to the applicant’s claim of past persecution. *Perlaska v. Holder*, 361 Fed. Appx. 655, 663, 2010 U.S. App. LEXIS 856, 25, (6th Cir. 2010) (doctor had no personal knowledge of acts of persecution). *Cf. Tadesse v. Gonzales*, 492 F.3d 905, 911 (7th Cir. 2007) (IJ inappropriately rejected evidence from therapist that corroborated applicant’s claims of past persecution).

After the REAL ID Act, the IJ now has greater leeway to demand that applicants provide corroborative evidence supporting their allegations. 8 U.S.C. § 1158(b)(1)(B)(ii). Although the courts have not yet addressed this issue with regard to the corroborative value of expert psychological evidence, it seems likely that asylum-seekers affected by trauma may be unduly burdened by IJ requests for corroborating evidence.²⁴

V. Other Implications: Exception to Asylum Application Deadline

The effects of trauma are also implicated in determining whether an asylum application filed after the statutory time limit fall under the regulatory exception for extraordinary circumstances. *See* 8 U.S.C. § 1158(a)(2)(D). 8 C.F.R. § 208.4(a)(5)(i) provides that such extraordinary circumstances include “[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival.” Thus, asylum-seekers suffering from PTSD and other trauma-related problems may be able to successfully file applications after the one-year statutory bar has lapsed, as they should likely be able to establish that the extraordinary circumstances

²⁴ See Jill Streja, “The REAL ID Act: Denying Protection to the World’s Most Vulnerable,” 23 *Geo. Immigr. L.J.* 569, 578-580 (2009).

exception applies. In the First Circuit at least, PTSD has been held to constitute an extraordinary circumstance that may excuse a late filing of an asylum application. *Mukamusoni*, 390 F.3d at 117.

Judicial review may be difficult to obtain if the IJ finds that the extraordinary circumstances exception is inapplicable; following the REAL ID Act, courts have limited jurisdiction to review the IJ's decision "unless it implicates constitutional claims or questions of law." *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 180 (2d Cir. 2006) (citations omitted). *See also Manani v. Filip*, 552 F.3d 894, 899 (8th Cir. 2009). On the other hand, in an unpublished decision, the Ninth Circuit found that the IJ erred in failing to consider whether an asylum-seeker's PTSD symptoms, caused by his past persecution in Guatemala, constituted extraordinary circumstances that would excuse him from the one-year asylum application filing deadline. *Ajqui Munoz v. Holder*, 2010 U.S. App. LEXIS 26501, 2-3 (9th Cir. 2010).