Center for Immigration Studies

AG: No 'Coercion or Duress' Exception to the Bar to Humanitarian Protection for Alien Persecutors

A 73-year-old question is answered (for now): 'As written by Congress, the [persecutor] bar is absolute'

By Andrew R. Arthur on October 27, 2025

On October 22, Attorney General (AG) Pam Bondi issued a decision in *Matter of Negusie*, holding the statutory and regulatory bars to asylum, "statutory withholding", and "CAT withholding" for aliens who "assisted, or otherwise participated in persecution" does not contain an exception for aliens who claim they only persecuted others under "coercion or duress". To be fair, Bill Barr — AG under Trump I — did all the heavy lifting. Get ready for a two-decade-plus odyssey through the courts and an opinion that answers a 73-year-old question — but it's not over yet.

The "Persecutor Bar" to Asylum and Statutory Withholding

The term "persecutor bar" describes various statutory and regulatory provisions that preclude aliens who have engaged in the persecution of others from receiving humanitarian protections in the United States.

The first is section 101(a)(42)(A) of the Immigration and Nationality Act (INA), which defines the term "refugee" as an alien "unable or unwilling to return to" his or her country of nationality or last habitual residence "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".

That provision continues, however, excluding from the definition of refugee "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of" any of those five factors.

Then, there's section 208(b)(2)(A)(i) of the INA.

It provides that even aliens who prove a "well-founded fear" of persecution on account of any of the five factors in section 101(a)(42)(A) (also the standard for asylum claims) are ineligible for asylum if they, again, "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of" one or more of those five grounds.

The withholding of removal provision in section 241(b)(3) of the INA, aka "statutory withholding", contains an identical bar in clause (B)(i).

By way of explanation, and as I've noted numerous times in the past, statutory withholding is similar to asylum, except statutory withholding provides fewer benefits and the burden of proof to receive statutory withholding is higher.

Specifically, instead of having to establish a "well-founded fear of persecution", applicants for statutory withholding must show a "clear probability" (i.e., that it's more likely than not) that they will be persecuted on account of one or more of those five factors if returned home.

And whereas a grant of asylum places an asylee on a path to a "adjustment" (i.e., a "green card") and U.S. citizenship, statutory withholding only prevents DHS from deporting an alien granted that protection to a designated country or countries.

The only reason aliens seek statutory withholding instead of asylum is that they're barred from receiving asylum, usually because they failed to seek that protection in a timely manner under the "one-year" bar in section 208(a)(2)(B) of the INA.

CAT Withholding and Deferral

The final persecutor bar applies to applicants for withholding of removal under the Convention Against Torture (CAT).

CAT is not actually included in the INA (hence why withholding of removal under section 241(b)(3) of the INA is called "statutory withholding") but instead flows from the United States's ratification of the U.N. Convention Against Torture on October 21, 1994, as executed by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA).

Like statutory withholding, CAT withholding doesn't place an alien granted such protection on a path to a green card and citizenship, and instead only bars DHS from removing the grantee to a designated country or countries.

The regulation implementing both statutory withholding and section 2242 of FARRA is 8 C.F.R. § 1208.16, and paragraph (d)(2) therein prevents any alien who would be barred from statutory withholding under section 241(b)(3)(B) of the INA, including the persecutor bar in clause (i) therein, from CAT withholding.

That said, even admitted persecutors (and all other reprehensible characters) can be granted deferral of removal under CAT (under 8 C.F.R. § 1208.17) if they can show that it's more likely than not that they'll be "tortured" (as defined in 8 C.F.R. § 1208.18) if removed.

But then, DHS is also free to detain aliens granted so-called "CAT deferral" indefinitely, under a specific carve-out in 8 C.F.R. § 1208.17(c), and pursuant to subsection (f) in that regulation, can deport an alien granted CAT deferral or CAT withholding to a designated country, provided the U.S. government receives "diplomatic assurances" that the alien won't be tortured there.

The Lengthy Judicial History

The respondent in *Matter of Negusie*, Daniel Girmai Negusie, is a national of both Ethiopia (through his mother) and Eritrea (through his father). Not to spoil the ending, but he received CAT deferral, and therefore everything that follows is an academic exercise in his case, but critical to future ones.

He was born and raised in Ethiopia but left that country for Eritrea in 1994 when he was 18 to see his mother and find a job.

That turned out to be a bad choice, because a few months later he was conscripted into the Eritrean military while that country was at war against Ethiopia.

Negusie claims the Eritrean government locked him up for two years because he refused to fight, and abused him by beating him with sticks and forcing him to roll around on the ground in the hot sun for hours each day.

After two years he was released but then (somewhat remarkably) he was forced to work at the same prison he had been incarcerated in as a guard, on a rotating basis, for the next four years.

As AG Barr explained in his November 2020 decision in the case, also captioned *Matter of Negusie*:

> *The respondent's duties as a prison guard included preventing prisoners from escaping, taking showers, or obtaining fresh air. He also guarded prisoners who were being punished by exposure to the hot sun, one of whom subsequently died, and he knew that his supervisor tortured prisoners with electricity. The parties do not dispute that prisoners in the Eritrean prison were being persecuted on account of protected grounds under the INA.*

None of which Negusie claims he wanted to do. He asserts he ran away from the prison, stowed away in a cargo container, and ended up in a ship that docked in Louisiana in 2004, where his immigration case began.

The immigration judge who heard his case concluded Negusie was credible, but denied his applications for asylum, statutory withholding, and CAT withholding based on his interpretation of the various persecutor bars, while granting Negusie CAT deferral to Eritrea.

Negusie appealed to the Board of Immigration Appeals (BIA), which affirmed the immigration judge's decision with respect to both the denials and the CAT deferral grant, and then filed a petition for review under section 242 of the INA with the U.S. Court of Appeals for the Fifth Circuit.

Both the BIA and the Fifth Circuit concluded that under the Supreme Court's 1981 opinion in *Fedorenko v. U.S.*, Negusie's claim that he had been compelled to persecute other inmates in the Eritrean prison was immaterial to the restrictions under persecutor bar.

Briefly, in *Fedorenko* the justices held there was no "voluntariness" exception to the persecutor bar under the statute at issue there, the Displaced Persons Act of 1948 (DPA) — a key fact as it turns out.

Negusie then filed a petition for writ of certiorari with the Supreme Court, which issued an opinion in his case, *Negusie v. Holder*, in 2009.

Justice Kennedy, writing for the majority, concluded that both the Fifth Circuit and the BIA erred in relying on *Fedorenko*, because unlike Fedorenko (who had concealed his "service" as an armed camp guard at the Nazi death camp Treblinka) when he was admitted under the DPA, Negusie was seeking protection under completely different statutes, section 208 and 241(b)(3) of the INA.

Those protections were both added to the INA by the Refugee Act of 1980, which included the bar for persecutors in the refugee definition above as well as a persecutor bar for "withholding of deportation" (the pre-1996 version of statutory withholding). The specific persecutor bars to asylum and statutory withholding — and the regulatory CAT bar — came later.

Consequently, the Supreme Court remanded *Negusie* for the executive branch to determine, as a preliminary matter, whether duress or coercion are exceptions to the persecutor bars.

The Second BIA Decision

That kicked Daniel Negusie's case back to the BIA, which issued its own published decision in *Matter of Negusie* in June 2018.

The Board held that DHS bears the initial burden of showing the persecutory bar *may* apply, at which point an applicant could claim a limited "duress defense", requiring at a minimum that the applicant "acted under an imminent threat of death or serious bodily injury to himself or others", reasonably believed such harm would occur, couldn't reasonably avoid the harm, and didn't inflict any greater harm on others than the applicant faced.

Negusie, the BIA concluded, couldn't clear those hurdles, though BIA member Gary Malphrus dissented, finding a "faithful application of" the statute "did not create a duress exception to the persecutor bar".

AG Barr's Decision

AG Jeff Sessions thereafter directed the BIA to refer its June 2018 decision to him, but Sessions's tenure ended before he could consider the case.

Consequently, it wasn't until November 2020 that AG Barr issued his own opinion in *Matter of Negusie*.

Barr vacated the Board's decision, which he concluded "did not adopt the best interpretation of the persecutor bar viewed in light of its text, context, and history, as well as of longstanding [BIA] precedent and [DOJ] policies".

AG's Barr's analysis is lengthy, running 36 pages, but includes a review of every immigration statute that barred humanitarian protection to alien persecutors, including the DPA, a second persecutor bar added to the DPA in 1950, the original INA (enacted in 1952), the Refugee Relief Act of 1953 (RRA), the "1977 Act" (for refugees from Southeast Asia following the fall of Saigon), the "Holtzman amendment" of 1978 ("the immediate predecessor to the INA's modern persecutor bar"), the Refugee Act of 1980, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

All contained similar language, Barr noted, which Congress used notwithstanding the fact that courts repeatedly determined that the prior ones did not contain a "voluntariness" exception to the persecutor bar.

Moreover, Barr found, "in other provisions in the INA, Congress has, in some instances, expressly delegated authority to create and apply new categories of waivers to certain immigration bars", based on coercion or duress.

Based on his analysis, AG Barr concluded:

> *For over seventy years the immigration laws of the United States have imposed an absolute bar on various forms of immigration benefits for those who have assisted in persecution. Decisions by both the Board and the courts have consistently reaffirmed that the various persecutor bars imply no exception for involuntary conduct, including conduct perpetuated under duress or coercion. Although the Supreme Court concluded that the Refugee Act is ambiguous, the current persecutor bar's place in the history of statutory provisions counsels strongly against recognizing an exception for duress or coercion.*

Similarly, Barr reviewed the international agreements underpinning the humanitarian protections in the INA and regulations and concluded that they "do not compel an interpretation of the INA's persecutor bar that includes an exception for duress or coercion".

Finally, he concluded that a coercion or duress exception would complicate immigration court fact-finding, "especially in those cases where DHS attempts to verify or counter claims of duress". Simply put, few persecutors tell immigration judges that they committed their acts willingly, and DHS is hard-pressed (given a lack of resources and access to information abroad) to prove otherwise.

Limited DHS and immigration court resources, Barr concluded, "should instead be directed towards applicants who have not persecuted others, even under duress or coercion", and "policy considerations" like those, the AG concluded, "strongly weigh against implying a duress exception to the persecutor bar".

That said, Barr did not minimize the harm aliens like Negusie have claimed to suffer, but as he noted, they can still seek CAT deferral.

Finally, AG Barr reversed the BIA's conclusion that DHS bears the initial burden of offering *prima facie* evidence an applicant for asylum or withholding may be barred as a persecutor, concluding that the burden is on applicants to show they're eligible for such protections — not on the government to show they aren't.

In so doing, he reversed a contrary conclusion in AG John Ashcroft's 2005 decision in *Matter of A-H-*, which also addressed the persecutor bar.

I was counsel of record for the government in *Matter of A-H-* and conceded (consistent with then-precedent) that I bore that initial burden. Even Homer nods.

AG Garland Calls Halt

AG Barr's conclusions in *Matter of Negusie* were the law, but only for 11 months. In October 2021, President Biden's AG, Merrick Garland, directed the BIA to refer the case to him. Under yet another case in which I was counsel (this one from 2001), that referral automatically stayed the decision.

Garland never acted, and the outcome of Daniel Negusie's case — and the question of whether there is a coercion or duress exception to the persecutor bar — remained unsettled for the next four years.

"As Written by Congress, the Bar Is Absolute"

Which brings me to October 22, when AG Bondi issued a brief, two-page opinion in *Matter of Negusie*, vacating AG Garland's stay and thus rendering AG Barr's decision in *Matter of Negusie* "the operative opinion".

"For clarity," she explained (helpfully given the lengthy judicial history), "as the now operative opinion explains, the INA's bar to asylum eligibility for aliens who have engaged or assisted in the persecution of another does not contain a duress exception."

"In other words," she continued "if an immigration judge finds an alien participated in the persecution of another as defined by the INA ... the alien cannot present evidence of coercion or duress to displace the bar and obtain eligibility for asylum or withholding of removal."

Bondi then put a pin in it, holding: "As written by Congress, the bar is absolute. [DHS] does not have any evidentiary burden regarding the persecutor bar."

Given that under section 103(a)(1) of the INA, "determination and ruling by the Attorney General with respect to all questions of law shall be controlling", that should be the end of the matter, but it won't be.

This is a much bigger precedent than you might imagine. In many areas abroad, the line between persecutor and victim quickly blurs. The decisions issued by AGs Bondi and Barr answer questions that have hung over humanitarian protection cases for the last 73 years, and many advocates won't be happy with the outcome.

Negusie has CAT deferral to Eritrea, but DHS logically could deport him instead to Ethiopia, his other country of nationality. For that reason, expect him or another alien to seek judicial review of whether there is a "coercion or duress" exception to the "persecutor bar". For now, however, that "bar is absolute".

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