Third Circuit Court

Case: *Khan v. A.G.*, 691 F.3d 488 (3d Circuit 2012)
Date: August 14, 2012 **Panel:** Ambro, Chagares, Hardiman **Opinion:** Chagares

Tags: Immigration, asylum / WH / CAT, MTR, Changed Country Conditions, materiality, untimeliness, adverse credibility determination, PSG, persecution, premature petitions for review

Question(s) Presented: Did BIA err in denying MTR based on changed country conditions, even though the motion was past the 90-day deadline?

Holdings: The petitioners cannot avail themselves of the changed country conditions exception. Review denied.

- Also – change in personal circumstances is not the same thing as changed country conditions (member of ANP now instead of PPP)
- No cognizable PSG; no well-founded fear of persecution (for poor mental health care in Pakistan)

Rationale: They have not met the heavy burden of materiality because they had not addressed the IJ's finding that there was no credible evidence that the petitioners belonged to the PPP.

- "there is no cognizable social group of 'secularized and westernized Pakistanis perceived to be affiliated with the U.S.'" 498

Facts: Citizen of Pakistan entered on visitor visa 1990 and overstayed. After NTA sought asylum / WH / CAT because of fear of persecution for being part of Pakistan People's Party.

Procedural History:

- **2000: IJ:** denied application for relief because there was no credible evidence of past persecution or fear of future persecution. **2003: BIA:** affirmed.
- **2010: MTR**, emergency stay of removal within hours of deportation flight; petition with 3d Circuit (premature, but Court granted temporary stay)—claims evidence of increased anti-American sentiment in Pakistan. **2011: BIA:** MTR & emergency stay. 3d Circuit review.

Appeals to Statute & Precedent:

- **8 U.S.C. §1229a(c)(7)(C)(i):** MTR must be filed within 90 days of final order. (ii) exception to 90-day deadline: show materially changed country conditions.
- ***Kaur v. BIA*, 413 F.3d 232 (2d Cir. 2005):** changed country conditions must be sufficient, if proved, to change the result of their application, in order to meet the materiality requirement.
- ***Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006):** changed personal circumstances does not suffice as changed country conditions.
- ***Ahmed v. Holder*, 611 F.3d 90, 94 (1st Cir. 2010):** No PSG of "secularized and westernized Pakistanis perceived to be affiliated with the U.S." –calls for subjective value judgments and is thus not an easily definable group.

- ***Lizama v. Holder,* 629 F.3d 440, 447 (4th Cir. 2011):** "Americanization is not an immutable characteristic."
- ***Iztlilco-Morales v. Keisler,* 507 F.3d 651 (8th Cir. 2007):** inadequate health care for HIV+ individuals in MX is not an attempt to persecute those with HIV.

Discussion:

- Respondent offers evidence of changed country conditions that amount to increased extremist violence in Pakistan, but not anything that specifically addresses the holes in their application.
- "For the changed country conditions exception in 8 U.S.C. § 1229a(c)(7)(C)(ii) to apply, the petitioners must show that the new evidence they submit is material to their application for relief." 496
    - "To meet the materiality requirement, the petitioners must allege facts that " 'would be sufficient, if proved, to change the result' " of their application." 496
    - Then they need to prove prima facie eligibility for immigration relief, which the BIA can still deny in its discretion.
- Petitioners should have been working to reverse IJ's adverse credibility determination regarding whether they truly were members of the PPP. "Without credible evidence that the petitioners belonged to the PPP, the petitioners cannot prevail on an asylum claim based on membership in that group." 497
    - **It's possible to prove changed country conditions but miss rehabilitating your specific case.**
- Changed PERSONAL circumstances doesn't count as changed COUNTRY CONDITIONS.
    - "It is quite a different situation, however, where a petitioner is seeking to reopen his asylum case due to circumstances entirely of his own making after being ordered to leave the United States. . . The law is clear that a petitioner must show changed country conditions in order to exceed the 90–day filing requirement for seeking to reopen removal proceedings. A self-induced change in personal circumstances cannot suffice." (quoting *Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006) (citations omitted)) 498
- "The social group that the petitioners propose is too amorphous to support an asylum application." 498
- "The lack of access to mental health treatment alone, however, does not create a well-founded fear of persecution." 499 (*Ixtlilco-Morales v. Keisler*)

Commentary:

<u>Premature Petitions for Review</u>

- "There are differing views among our sister Courts of Appeals with regard to whether premature petitions for review can ripen upon a final decision by the BIA." 493
    - "We opt to follow the Court of Appeals for the Second Circuit and will not dismiss the petition on the basis that it was filed two weeks prematurely. We have held in civil cases that, where there is no showing of prejudice by the adverse party and we have not taken action on the merits of an appeal, " 'a premature notice of appeal, filed after disposition of some of the claims before a district court, but before entry of final judgment, will ripen upon the court's disposal of the remaining claims.' " 493
    - "This rule is referred to as the "Cape May Greene doctrine" after the case in which it was first recognized, Cape May Greene, Inc. v. Warren, 698 F.2d 179, 184–85 (3d Cir.1983)." 493