Comment
INS v. Zacarias: Is There Anyone Out There?[*1]

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1. Introduction

In *Elias-Zacarias*, the U.S. Supreme Court, in an opinion written by Justice Antonin Scalia, held that the Court of Appeals for the Ninth Circuit had no proper basis to set aside the Board of Immigration Appeals (BIA)'s denial of asylum[1] to a Guatemalan youth who fled his country after armed and masked guerrillas came to his home in an attempt to recruit him to join their forces. When Elias-Zacarias resisted them, the guerrillas urged him to 'think it [over] well.' They also threatened to return for him and indeed did so after he fled his country.[2] At his deportation hearing, Elias-Zacarias testified that he refused to be recruited because he did not want to go 'against the

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[1] Under INA 208(a), an alien is eligible for asylum if he or she meets the definition of 'refugee' under 101(a)(42)(A). The term 'refugee' means any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

[2] *Elias-Zacarias v. INS*, 908 F.2d 1452, 1454, 1458 (9th Cir. 1990); above, Case Abstract **IJRL/0114**.

government' and believed the guerrillas would 'take me and kill me' if he persisted in his refusal to join with them when they returned.[3]

The Court focused on Elias-Zacarias' failure to present sufficient evidence of his reasons for refusal to collaborate with the guerrillas, that is, evidence that he was motivated by opposition to the guerrillas' cause as opposed to, for example, a desire not to be killed. Further, the Court held that the 'ordinary meaning' of the statutory phrase 'persecution on account of political opinion' is 'persecution on account of the *victim's* political opinion.'[4] The guerrillas' overall political goals and objectives are insufficient evidence, the Court found, of persecution *on account* of political opinion; an applicant must provide some direct or circumstantial evidence of the persecutor's motive. Since the record in this case did not establish that the feared retaliation by the guerrillas would be based on Elias-Zacarias' politically-inspired opposition, the Court held that the court of appeals' reversal of the BIA's decision was not warranted.

The Court's three dissenters called the majority's view of the statute 'narrow and grudging'[5] and others have expressed alarm about its implications for asylum cases based on imputed political opinion or for those applicants fleeing forcible conscription practices in many countries. But this reaction to *Elias-Zacarias*, in many respects, exaggerates the scope of the opinion. *Elias-Zacarias* was a narrow opinion based on its facts. The central conclusion of the decision was that there was *insufficient evidence* presented in *this particular case* to warrant reversing the BIA's denial of relief. The brevity of the opinion, only six pages, and the Court's constrained approach to legal interpretation results in significant ambiguity, with major issues left unresolved. The opinion does not provide, nor is it clear that Justice Scalia intended it to provide, much guidance for future adjudications by the administrative agencies, or for review of similar questions of law by the courts.

2. A Narrow Decision

The Supreme Court's opinion in *Elias-Zacarias* was, by its own terms, narrowly based on the facts of the case. The Court did not articulate any major legal principles to guide the interpretation of the key statutory term at issue—'persecution on account of political opinion.' This form of judicial abdication, and the Court's implicit, limited

[3] See *Elias-Zacarias*, 112 S. Ct. at 817 (Stevens, J., dissenting). Elias-Zacarias also testified that he feared retaliation by the government against him and his family if he were taken by the guerrillas; ibid., 814–15. See above, Case Abstract **IJRL/0115**.

[4] Ibid., 816 (no emphasis in original).

[5] Ibid., 818 (Stevens, J., dissenting).

view of its own role, may be foreboding, but it is important not to stretch this particular opinion beyond what it 'facially' holds.

2.1 Coerced recruitment not *per se* political persecution

The Supreme Court's opinion initially describes '[t]he principal question presented by this case as whether a guerrilla organization's attempt to coerce a person into performing military service *necessarily* constitutes 'persecution on account of . . . political opinion' under section 101(a)(42) of the Immigration and Nationality Act'[6] The Court's negative answer to this question is not, in and of itself, controversial. Certainly few would argue that guerrilla recruitment, without more, always constitutes political persecution within the meaning of the refugee definition.[7]

The majority's decision in *Elias-Zacarias* clearly refused to create a presumption that forced recruitment by the guerrillas constitutes politically-based persecution. The Court opined that, '[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of reasons — fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few.'[8] The determination of motive to refuse recruitment, then, essentially is a factual one. The Court ruled that '[t]he record in the present case . . . failed to show a political motive on Elias-Zacarias' part.'[9] On this point, the record in the case was extremely sparse, consisting of limited testimony that arguably was confusing on the issue of Elias-Zacarias' political motive and more generally on his political opinions.

2.2 Focus on the victim's political opinion

The heart of the Court's limited legal conclusion was its 'ordinary meaning' analysis of the statutory language. The Court stated that, '[i]n construing statutes, "we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." '[10] Although the Court contended that the statutory language has a self-evident meaning, its terse attempt to unravel that meaning demonstrates the inherent unclarity of that language.

According to the Court, 'the ordinary meaning of the phrase "persecution on account of . . . political opinion" . . . is persecution on account of the *victim's* political opinion, not the persecutor's.'[11] The

[6] Ibid., 814 (emphasis in original).
[7] Cf. *Rodriguez-Rivera v. INS* 848 F.2d 998 (9th Cir. 1988).
[8] 112 S.Ct. at 815–16.
[9] Ibid., 816. But note the Court's statement later in the opinion that it was not deciding whether Elias-Zacarias held a political opinion.
[10] Ibid. (citations omitted).
[11] Ibid. (emphasis in original).

Court rejected the Ninth Circuit's emphasis on the overall political goals and motivations of the guerrilla persecutors as relevant to the determination of political persecution, and shifted the focus to whether Elias-Zacarias had a political opinion. The Court, however, neither explained what constitutes a cognizable political opinion nor decided whether Elias-Zacarias himself had one, as a way of providing an example of what would constitute a political opinion.[12]

Since, according to the Court, all that was required was a meditation on language — eschewing any extraneous references to the historical development of the refugee definition, to its underlying international law origins or to contemporary interpretations of the definition's provisions — it provides no grand 'political opinion' theory.[13] In fact, the Court said very little about the content of the term 'political opinion,' and seemed to choose not to define it. For example, on the issue of neutrality as a political opinion, previously considered by some courts of appeals,[14] the Court stated simply, 'Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so.'[15] But since no court has held that the mere passive act of not taking sides in a civil conflict constitutes a neutral or any other type of political opinion,[16] the Court's pronouncement here, in dicta, illuminates very little.

2.3 Evidence of the persecutor's political motive

After ostensibly directing the legal inquiry to the victim's political opinion, the Court did not fully decide the issue confronting it. Instead, the Court ruled that Elias-Zacarias 'had to establish that the record compels the conclusion he has a 'well-founded fear' that the guerrillas will persecute him *because of* that political opinion, rather than because of his refusal to fight with them.'[17] The Court thus returned to the place it began and the focus it supposedly rejected — the perspective of the persecutor. But the Court only rejected the

[12] Ibid. '[W]e need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion.'

[13] The Court in fact has to add language to make the ordinary meaning clear, namely, 'the *victim's* political opinion.' It also refers to (but does not elaborate) an historical example—the Nazi persecution of Jews: 112 S. Ct. at 816.

[14] See, for example, *Novoa-Umania v. INS*, 896 F.2d 1 (1st Cir, 1990); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989); *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984).

[15] 112 S.Ct. at 816. The Court did not decide whether an asylum claim may be based on an opinion imputed to the victim, but simply held that there was insufficient evidence present in this case: 'Nor is there indication (assuming *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias's refusal was politically based.' 112 S. Ct. at 815 (emphasis in original).

[16] See Anker, D., *The Law of Asylum in the United States*, (2nd ed., 1991), 128–31.

[17] 112 S. Ct. at 816. (emphasis in original).

notion that the 'mere existence of a generalized "political" motive underlying the guerrillas forced recruitment' would be adequate to demonstrate persecution on account of political opinion. The Court emphasized that 'the statute makes [the persecutor's] motive critical.' Thus the Court's holding was limited to its discussion of the evidentiary burden on proof of motive. The Court clearly stated that it does not require direct proof of motives, but only 'some evidence of it, direct or circumstantial.'[18] Again, the Court provided no guidance as to what type of evidence it had in mind, but merely restated the decision's recurrent theme: whatever unspecified evidence might be required, Elias-Zacarias had not presented it, at least not sufficiently to compel the reversal of the administrative decision.

3. Reconciling *Cardoza-Fonseca* and *Elias-Zacarias*

In spirit and its implicit vision of the role of the Court, the decision in *Elias-Zacarias* differs significantly from the Supreme Court's opinion, five years earlier in *INS v. Cardoza-Fonseca*.[19] The Court, in an opinion written by Justice John Paul Stevens, interpreted the meaning of the phrase 'well-founded fear' in the refugee definition and rejected the more narrow standard of proof advocated and implemented by the agency.[20] In so doing, the Court amplified our understanding of the statutory provision, 'well-founded fear,' by analyzing the statutory text and its legislative history and context.

By contrast, in *Elias-Zacarias*, the Court engaged in the most minimal statutory interpretation and made no firm commitment to the meaning of the statutory term under review. The issues were framed as narrow, evidentiary and factual. Unlike the Court in *Cardoza-Fonseca* which analyzed the historical evolution of the refugee definition, the Court in *Elias-Zacarias* failed to refer to the origins of the refugee definition, to the concept of 'political opinion' in the international law definition upon which U.S. law is based or to any other sources of law to clarify its meaning.

Although the dissent found the two decisions inconsistent,[21] the Court in *Elias-Zacarias* certainly did not overrule *Cardoza-Fonseca*. The majority cited *Cardoza-Fonseca* favourably on two occasions, and the two decisions clearly deal with separate and distinct parts of the refugee definition. *Cardoza-Fonseca* interpreted the meaning of the

[18] Ibid., 816–7.

[19] 480 U.S. 421 (1987).

[20] The agency had applied a 'clear probability' standard before the Court's decision. *INS v. Cardoza-Fonseca* 480 U.S. at 421.

[21] See *Elias-Zacarias*, 112 S.Ct. at 818 (Stevens, dissenting: 'The narrow, grudging construction of the concept of "political opinion" that the Court adopts today is inconsistent with the basic approach to this statute that the Court endorsed in *Cardoza-Fonseca*.')

'well-founded fear' standard, while *Elias-Zacarias* addressed the meaning of the 'persecution on account of political opinion' requirement. However, it illustrates the limitations and inadequacy of Justice Scalia's textualism that he made no effort to reconcile the evidentiary requirements, such as they are, in *Elias-Zacarias* with the 'reasonable possibility' standard of proof articulated in *Cardoza-Fonseca*. In this respect, the Court was disingenuous. Justice Scalia's own principles of statutory interpretation require 'horizontal coherence'[22] among different provisions of the same statute. But in its discussions of Elias-Zacarias' evidentiary failures, the Court never clarified the relationship between its ruling and the statute's 'well-founded fear' standard. *Elias-Zacarias* therefore leaves uncertainty about the future direction of judicial interpretation of the refugee definition.

4. Implications for Judicial Review

The Court began by reiterating the normal statutory standard of judicial review of administrative determinations under the Immigration and Nationality Act (INA): '[t]he BIA's determination that Elias-Zacarias was not eligible for asylum must be upheld if "supported by reasonable, substantial and probative evidence on the record considered as a whole." '[23] However, the Court peculiarly relied on a 1939 pre-Administrative Procedure Act Supreme Court decision, *NLRB v. Columbian Enameling & Stamping Co.*, for what appears at first to be a narrow interpretation of the substantial evidence standard under a different statute. The Court stated that reversal would only be warranted if the 'evidence presented by Elias-Zacarias was such that a reasonable fact-finder would have to conclude that the requisite fear of persecution existed.'[24] However, the Court did not advocate rubber-stamping agency decisions, but engaged in a factual review in the context of a limited legal ruling to determine if there was substantial evidence to support the BIA's decision. Moreover, neither the precedent cited by the Court nor subsequent Court decisions addressing the substantial evidence

[22] This is only one aspect of Justice Scalia's 'new textualism' which has been discussed by commentators. See, for example, Eskridge, 'The New Textualism,' 37 *U.C.L.A. L. Rev.* 621 (1990); Zeppos, 'Justice Scalia's Textualism: The "New" New Legal Process,' 12 *Cardoza Law Rev.* 1597 (1991); also Aleinikoff and Shaw, 'Costs of Incoherence: Plain Meaning, *West Virginia University Hospital Inc. v. Casey*, and Due Process of Statutory Interpretation,' *Vanderbilt L. Rev.* 1992 (forthcoming); Sunstein, 'Interpreting Statutes in the Regulatory State,' 103 *Harv. L. Rev.* 407 (1989); Aleinikoff, 'Updating Statutory Interpretation,' 87 *Mich. L. Rev.* 20 (1988).

[23] *Elias-Zacarias*, 112 S.Ct. at 815 (citing 8 USC 1105(a)(4) (1988)).

[24] Ibid., citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). The Court in *Elias-Zacarias* also referred to BIA decisions being justified unless 'the evidence was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.' 112 S. Ct. at 818.

standard justify the conclusion that the Court has articulated a new standard of heightened deference to the BIA.

The *Elias-Zacarias* Court's version of the substantial evidence standard might be read as diluting the standard to resemble the abuse of discretion standard of review, which generally is considered to be considerably more deferential to the agency.[25] However, the Court's language is based on the text of the statute and judicial opinions that do not give the agency exceptional deference, and its decision should not be read as rewriting the statute or overturning over fifty years of settled caselaw.

Until the last fifteen years or so, immigration law and the administrative agencies that implemented the statute's mandate developed in relative isolation, immunized from judicial review and basic principles of accountability.[26] With the emergence of a more responsible judiciary, the agencies and the law have matured, and practices, policies and administration have improved. One clear example is asylum law, with new regulations that in large part responded to the judicial and congressional scrutiny of the post-1980 Refugee Act period.[27] This has led to a new professional corps of asylum adjudicators, separate from the rest of the INS.

It would be unfortunate if the Court's decision were taken out of its limited, factually bound context and used to justify a return to an era of judicial abdication to the executive branch in immigration matters. Our legal history is replete with such examples: the horrendous treatment of the Chinese at the turn of the century;[28] the refusal of entry to

[25] See *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.), describing one version of abuse of discretion standard as meaning that 'discretion is held to be abused only when the action is arbitrary, fanciful or unreasonable, in which is another way of saying that discretion is abused only where no reasonable man would take the view under discussion'. Before he was appointed to the Court, Justice Scalia argued that the difference between the two standards was 'largely semantic.' See *Association of Data Processing Service Organizations (ADAPSO) v. Board of Governors*. 745 F.2d 677, 684 (D.C. Cir. 1984). Professor Davis makes the same argument; see 5 K. Davis, *Administrative Law Treatise* 29:7 (2d ed. 1984). Then-Judge Scalia, however, did note that even under an abuse of discretion standard an agency action may fail if, for example, 'it is an abrupt and unexplained departure from agency precedent.' 745 F.2d at 683.

[26] See, generally, Schuck, 'The Transformation of Immigration Law,' 84 *Colum. L. Rev.* 1 (1984).

[27] Several provisions in the new asylum regulations incorporate judicial interpretations. For example, the provision in 8 CFR 208.13 establishing that '[t]he testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration' is based on principles first articulated by the Ninth Circuit Court of Appeals. See, for example, *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1323 (9th Cir. 1984): finding sufficient, even under the 243(h) probability standard, the applicant's 'general evidence, newspaper articles that demonstrate the political and social turmoil in El Salvador. . .coupled with testimony about a specific threat to his life made by the guerrillas.'

[28] See Henkin, 'The Constitution and United States Sovereignty: A Century of *Chinese Exclusion* and its Progeny,' 100 *Harv. L. Rev.* 853 (1987).

Jews fleeing from Nazi Germany in the late 1930s and most recently the absolute executive control over the *refoulement* of thousands of Haitian asylum-seekers.[29] In each of these instances, the judiciary failed to fulfil its role as a check on the executive branch of our government.

5. Lessons for the Assessment of Asylum Claims

There are other troubling aspects of the Court's decision in *Elias-Zacarias*. In large part because of its 'plain meaning' approach to statutory meaning, the Court never grappled with the difficult evidentiary burden on people who flee their homelands. In *Elias-Zacarias* it never once mentioned the notorious record of human rights abuses in Guatemala during the many years of civil conflict.[30] Nor did the Court specifically explain *how* a claimant might provide evidence of the intent of sinister, and not infrequently irrational, persecutors who are short on words and rarely state their true intent. Only in the rarest of cases is direct evidence of the intent of persecutors available to the asylum-seeker, and it is important, therefore, that the Court explicitly recognize that such circumstantial evidence can be considered. Reports from reputable organizations, such as Amnesty International and Americas Watch that guerrilla organizations persecute those who refuse service in their forces because they view them as government sympathizers may be sufficient to meet the Court's requirements.[31]

In general, then, the Court's discussion of the need to establish the persecutor's intent should not be read too broadly. The Court's requirement that Elias-Zacarias demonstrate that his well-founded fear of persecution was *because of* his political opinion is not equivalent to a requirement that the applicant show that the persecutor was motivated to persecute that particular individual because of the individual's political opinion.

Similarly, a victim can not be required to engage in the suicidal gesture of telling potential persecutors why he or she refuses to collaborate with them or why he or she is opposed to their cause. Further, the Court cannot mean that only those people who have elegantly expressed political views can be at risk because of their

[29] *Haitian Refugee Center v. Baker*, No. 91–6099 and 91–6118 (11th Cir. 1992), cert. den. 60 U.S.L.W. 3577 (Feb. 24, 1992).

[30] See, for example, Americas Watch/Physicians for Human Rights, 'Guatemala: Getting Away with Murder' (Aug. 1991); Americas Watch, 'Messengers of Death: Human Rights in Guatemala' (Mar. 1990).

[31] The regulations specifically permit circumstantial evidence of the persecutor's motive. See 8 CFR 208.13(b)(2)(i)(A), providing that the applicant may meet his or her burden by submitting evidence that 'there is a pattern or practice. . .of persecution of groups of persons similarly situated to the applicant.'

political opinion. On the other hand, one of the important lessons of the decision in *Elias-Zacarias* must be the reaffirmation of a careful presentation of the claim. Because of the Court's emphasis on the asylum-seeker's political opinion, that opinion (or the belief that the persecutor imputed an opinion to him or her) must be established in the record of proceedings.[32] The Court's emphasis on the applicant's evidentiary burden reinforces the responsibility of asylum officers and immigration judges, in cases in which the applicant is unrepresented, affirmatively to elicit testimony from the applicant and assist him or her in finding and presenting relevant evidence.[33]

6. Conclusion

The decision in *Elias-Zacarias* comes during a Supreme Court term in which four other cases have already been decided adversely for aliens.[34] All these cases make access to the administrative process more burdensome by heightening evidentiary burdens, restricting the ability to present claims, limiting the availability of counsel, or raising the spectre of prolonged detention or prolonged unemployment for those who wish to pursue their right to a deportation hearing.

Elias-Zacarias fits well within the current trend. The Court myopically focused on the statute's language without considering an interpretive context which must include the international law origins of our national refugee law, relevant jurisprudence and the specific circumstances of human rights abuses and political repression in Guatemala.

The bottom line, however, is that we know little more than before *Elias-Zacarias* was decided, about the meaning of 'persecution of account of political opinion' and its application to concrete cases, except that Elias-Zacarias failed to provide sufficient evidence to support his claim. The administrative agencies and the courts of appeals thus will continue in a process that already has consumed the past ten years, with little meaningful guidance provided by the Supreme Court.

[32] For example, the victim may have conveyed his or her political views to other family members or to a neighbour, outside of the context of the particular confrontation with the persecutor. Additional relevant evidence may be that informal or formal spy networks exist in the community through which the victim's opposition or unsupportive views may have become known.

[33] See 8 CFR 208.9(b) (placing the responsibility on the asylum officer to 'elicit *all relevant and useful information*') (emphasis added); INS, *Basic Asylum Law Manual*, at 57 (Mar. 1991).

[34] *INS v. Doherty*, 112 S. Ct. 719 (1992); *Ardestani v. INS* 112 S.Ct. 515 (1991); *Department of State v. Ray*, 112 S.Ct. 541 (1991); *INS v. National Center for Immigrants' Rights*, 112 S.Ct. 551 (1991).