NOTE

Paripovic v. Gonzales: Defining Last Habitual Residence for Stateless Asylum Applicants

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INTRODUCTION

Former Supreme Court Chief Justice Earl Warren once said, "Citizenship is man's basic right for it is nothing less than the right to have rights."[1] As articulated by Warren, when an individual is rendered stateless, specific problems arise as to which laws, if any, protect his or her fundamental rights.[2] Absence of nationality is particularly problematic for an asylum applicant.[3] Asylum applicants must establish that they cannot return to their country of nationality because of past persecution or a well-founded fear of future persecution.[4] Alternatively, stateless asylum applicants must establish that they cannot return to their last habitual residence in order to be eligible for asylum.[5] Often, refugees who flee persecution live in several countries en route to the United States.[6] In such cases, courts

[1] Carol A. Batchelor, *Stateless Persons: Some Gaps in International Protection*, 7 INT'L J. REFUGEE L. 232, 235 (1995) (quoting INDEP. COMM'N ON INT'L HUMANITARIAN ISSUES, WINNING THE HUMAN RACE? 107 (1988)) (discussing legal gaps in protecting stateless individuals).

[2] *Id.* at 235 (stating that if rendered stateless, "one is stripped of even the right to have rights, there being no foundation from which other rights might reasonably flow" and that "[t]he stateless person is denied the vehicle for access to fundamental rights, access to protection, and access to expression as a person under the law").

[3] *See infra* Part III (discussing case where court struggled in evaluating stateless individual's asylum claim); *see also* Paripovic v. Gonzales, 418 F.3d 240, 241-42, 245 (3d Cir. 2005) (illustrating case where asylum applicant's statelessness resulted in court's decision to deny asylum), *amended by* 2005 U.S. App. LEXIS 18577 (3d Cir. Aug. 29, 2005); Elian v. Ashcroft, 103 F. App'x 78, 80 (9th Cir. 2004) (illustrating case where court failed to determine whether West Bank or Jordan was stateless refugee's last habitual residence); Ouda v. INS, 324 F.3d 445, 449-50 (6th Cir. 2003) (demonstrating conflicting lower court and appellate court decisions concerning stateless asylum applicant's last habitual residence).

[4] *See* 8 U.S.C. § 1101(a)(42)(A) (2007) (setting forth refugee definition). Section 1101(a)(42)(A) defines the term "refugee" as:

> [A]ny 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.

Id.

[5] *Id.*

[6] *See, e.g.*, *Ouda*, 324 F.3d at 447 (describing stateless Palestinian refugee who was born in Kuwait and subsequently lived in Bulgaria and Egypt before entering

struggle to determine stateless refugees' last habitual residences.[7] *Paripovic v. Gonzales* illustrates this struggle.[8]

In *Paripovic*, the Third Circuit Court of Appeals concluded that Serbia (where the asylum applicant, Zeljko Paripovic, had lived as a refugee), rather than Croatia (Paripovic's native country), was Paripovic's last habitual residence.[9] In reaching its conclusion, the Third Circuit disregarded Paripovic's lack of intent to remain in Serbia.[10] Rather, the court upheld the immigration court's finding that intent is *not* a factor in determining last habitual residence.[11] Further, the Third Circuit determined that two years was quantitatively sufficient to designate Serbia as Paripovic's last habitual residence.[12]

This Note argues that courts should adopt a more qualitative evaluation to determine a refugee's true last habitual residence.[13] Specifically, this Note asserts that the Third Circuit erred in basing its decision on a quantitative amount of time in residence.[14] Instead, courts should include qualitative considerations in their last habitual residence analysis, such as intent to remain in a certain country.[15] Part I sets forth the definitions, standards, and judicial procedures used in asylum and withholding of removal cases.[16] Part II discusses the facts, holding, and rationale of *Paripovic*.[17] Part III argues that the Third Circuit erred in discounting Paripovic's intent when it determined his last habitual residence.[18]

United States).

[7] *See id.*; *Paripovic*, 418 F.3d at 241, 244-45 (illustrating case where ambiguity of stateless refugee's last habitual residence posed problem for court); *infra* Part III (discussing Third Circuit's attempt to define "last habitual residence" in *Paripovic*).

[8] 418 F.3d 240; *infra* Part III (discussing *Paripovic* case).

[9] 418 F.3d at 245.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See infra* Part III (arguing *Paripovic* court erred in failing to consider qualitative factors in determining last habitual residence).

[14] *See infra* Part III.

[15] *See infra* Part III.

[16] *See infra* Part I (setting forth "asylum" and "withholding of removal" definitions, standards, and procedures).

[17] *See infra* Part II (discussing factual background, procedure, holding, and rationale of *Paripovic*).

[18] *See infra* Part III (arguing Third Circuit erred by disregarding principles of statutory construction, overlooking analogous law, and ignoring public policy considerations).

I. BACKGROUND

Modeled after the 1951 Convention Relating to the Status of Refugees, the 1980 Refugee Act (the "1980 Act") set forth the United States' first comprehensive refugee policy.[19] The policy's central component is relief from persecution, which courts may provide through asylum and withholding of removal ("withholding").[20] The 1980 Act established the standard for relief from persecution.[21] To receive this legal relief, an asylum or withholding applicant must first qualify as a "refugee" under the Immigration and Nationality Act's ("INA") statutory definition.[22]

[19] STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 862 (2002) (discussing Refugee Act of 1980); *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 427, 436-47 (1987) (discussing 1980 Act's new statutory procedure for granting asylum to refugees); Marincas v. Lewis, 92 F.3d 195, 198 (3d Cir. 1996) (stating that purpose of 1980 Refugee Act, which amended Immigration and Nationality Act, was "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States" (citing Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980))); *see also* 8 U.S.C. § 1158(a) (2007) (setting forth authority to apply for asylum, conditions for granting asylum, asylum status, and asylum procedure).

The 1980 Refugee Act also adapted U.S. law to conform with the United States' treaty obligations under the 1967 U.N. Protocol Relating to the Status of Refugees [hereinafter 1967 Protocol]. INS v. Stevic, 467 U.S. 407, 421, 427-28 (1984) (discussing sections of 1980 Refugee Act that adopted 1967 Protocol provisions); LEGOMSKY, *supra*, at 862 (stating that 1980 Refugee Act paralleled 1951 U.N. Convention Relating to Status of Refugees as amended by 1967 Protocol); *see* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (conforming with 1967 Protocol); United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (amending 1951 U.N. Convention Relating to the Status of Refugees); *see also* United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, *available at* http://www.unhchr.ch/html/menu3/b/o_c_ref.htm; LEGOMSKY, *supra*, at 859, 861-62 (discussing 1967 Protocol and 1980 Refugee Act).

[20] *See* Refugee Act of 1980 § 101 (stating purpose of 1980 Act is to respond to persons subject to persecution in their homelands); LEGOMSKY, *supra* note 19, at 872 (discussing asylum and withholding of removal).

[21] *See* Refugee Act of 1980 § 201 (defining "refugee" and setting forth persecution standard for asylum and withholding); LEGOMSKY, *supra* note 19, at 862 (stating that 1980 Act is principle domestic statute governing refugees and asylum applicants).

[22] 8 C.F.R. § 208.13(a) (2007) ("The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the [INA]."); Krastev v. INS, 292 F.3d 1268, 1270 (10th Cir. 2002) (stating that asylum applicant must first establish that he or she is "refugee" (citing Woldemeskel v. INS, 257 F.3d 1185, 1188 (10th Cir. 2001) ("First, the [asylum] applicant has the burden [of proving] her statutory eligibility . . . by establishing [refugee status]."))); *see* 8 U.S.C. § 1101(a)(42)(A) (2007) (defining refugee standard). Section 1101(a)(42)(A) codified the refugee standard set forth by the 1980 Refugee Act. § 1101(a)(42)(A);

Once classified as a refugee, a person may apply for asylum or withholding if the U.S. government tries to remove him or her from the country.[23] A court assesses the conditions in the applicant's country of nationality to determine the merit of an asylum or withholding claim.[24] In particular, the court evaluates whether the individual was, or could be, persecuted in his or her country of nationality.[25] Alternatively, the refugee definition specifies that courts should consider a stateless refugee's asylum claim in the context of his or her last habitual residence.[26] The refugee definition does not, however, specify how to determine a stateless refugee's last habitual residence.[27] Moreover, subsequent case law has not clarified the last habitual residence refugee standard, and courts have applied the term inconsistently.[28]

A. Refugees

Section 101(a)(42) of the INA sets forth the statutory definition of a "refugee," which is codified at 8 U.S.C. § 1101(a)(42).[29] Section 1101 defines a refugee as a non-citizen who is unable or unwilling to return to his or her country of nationality or last habitual residence.[30] The non-citizen must be unwilling or unable to return because he or she experienced persecution or has a well-founded fear of future

LEGOMSKY, *supra* note 19, at 862 (stating that 1980 Act's refugee definition appears in section 101(a)(42) of Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1101(a)(42)).

[23] *See* 8 U.S.C. §§ 1101, 1158 (2007) (defining refugee and asylum standard and procedure); *Krastev*, 292 F.3d at 1271 ("Once an applicant has established his or her 'refugee' status and thus eligibility for asylum, the Attorney General [via the immigration court system] exercises discretionary judgment in either granting or denying asylum." (citing *Woldemeskel*, 257 F.3d at 1189; Kapcia v. INS, 944 F.2d 702, 708 (10th Cir. 1991))). When an individual applies for asylum, the court will automatically consider the applicant for withholding of removal. *See* LEGOMSKY, *supra* note 19, at 872 (discussing differences between asylum and withholding of removal, or "nonrefoulement").

[24] *See* 8 U.S.C. § 1101(a)(42)(A) (defining refugee standard used to determine asylum eligibility).

[25] *Id.*

[26] *Id.*

[27] *Id.*; *see also infra* Parts I.C, II (discussing *Paripovic* and relevant case law).

[28] *See infra* Part I.C.2 (discussing analogous case law with varying results).

[29] 8 U.S.C. § 1101(a)(42)(A).

[30] *Id.* I use the word "non-citizen" in place of the INA's use of the word "alien" throughout this article. For a discussion on use of the term "alien," see Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996).

persecution.[31] Further, the alleged persecution must be on account of the individual's race, religion, nationality, membership in a particular social group, or political opinion.[32] To qualify for asylum or withholding, the non-citizen must first establish that he or she is a refugee under the statutory definition.[33]

Under § 1101(a)(42)'s "refugee" definition, an individual with a nationality must establish that he or she suffered past persecution or has a well-founded fear of future persecution.[34] A stateless applicant must meet the same statutory standard to qualify as a refugee and, in turn, receive asylum or withholding.[35] A stateless applicant, however, must establish past or future persecution where he or she last habitually resided, not in his or her country of nationality.[36] This alternative — evaluating stateless applicants' cases in the context of their last habitual residences — can pose problems.[37] For instance, where a person flees his or her home country and temporarily resides in several other countries, the person's last habitual residence is not always clear.[38] The stateless individual may have spent an equal amount of time in multiple locations.[39] Further, § 1101's refugee determination often turns on the country where the applicant alleges persecution.[40] The stateless refugee's country of last habitual residence is significant, as it is easier to show persecution in some countries over others.[41] The country that a court designates as one's

[31] 8 U.S.C. § 1101(a)(42)(A).

[32] *Id.* (defining "refugee" as one unable or unwilling to return to his 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").

[33] *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2007) (stating that burden of proof is on asylum applicant to establish that he or she is refugee within meaning of § 1101(a)(42)(A)); Krastev v. INS, 292 F.3d 1268, 1270 (10th Cir. 2002) (citing Woldemeskel v. INS, 257 F.3d 1185, 1188 (10th Cir. 2001)) (noting that asylum applicant must first demonstrate refugee status); 8 C.F.R. § 208.13(a) (2007) (stating that asylum applicant bears burden of establishing refugee status under INA section 101(a)(42) definition).

[34] *See* 8 U.S.C. § 1101(a)(42)(A).

[35] *Id.*

[36] *Id.*

[37] *See infra* Part II (discussing *Paripovic*, where asylum claim turned on court's definition of "last habitual residence").

[38] *See infra* Part II.

[39] *See, e.g.*, *infra* Part I.C.2 (discussing *Ouda v. INS* and *Elian v. Ashcroft*, where stateless asylum applicants temporarily lived in multiple locations).

[40] *See infra* Part II.

[41] *See infra* Part II.

last habitual residence, therefore, greatly impacts a stateless individual's eligibility for refugee status and, in turn, asylum.[42]

B. Asylum and Withholding of Removal: Definitions, Standards, and Procedures

A stateless individual who illegally enters the United States may apply for relief from removal through either asylum or withholding of removal.[43] An applicant who is awarded asylum is granted permission to remain in the United States.[44] Alternatively, withholding prevents the U.S. government from forcibly removing an applicant to the country where he or she was persecuted.[45] A court may still, however, remove an individual who qualifies for withholding to another country where he or she would not be persecuted.[46] The procedures for asylum and withholding are essentially identical and generally begin with a hearing before an immigration judge ("IJ").[47] The applicant may then appeal the IJ's decision to the Board of Immigration Appeals ("BIA") and, subsequently, to a federal appellate court.[48] Although courts automatically consider asylum applicants for withholding, the two remedies require different burdens and afford different privileges.[49]

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[42] *See infra* Part II; *see also* 8 U.S.C. § 1158(b)(1)(A) (2006) (defining requirements for asylum).

[43] *See, e.g.*, LEGOMSKY, *supra* note 19, at 872 (discussing persecution remedies of asylum and withholding of removal). Although an applicant who applies for asylum is automatically considered for withholding of removal, the two standards grant varying degrees of relief. *Id.*

[44] *Id.* Alternatively, withholding of removal provides a narrower remedy than asylum. *Id.*

[45] *Id.*

[46] *Id.*

[47] *See id.* at 1007-09 (discussing asylum and withholding procedures); *see also infra* Part I.B.3 (same).

[48] *See* LEGOMSKY, *supra* note 19, at 1008-09 (describing typical asylum and withholding procedures); *see also infra* Part I.B.3 (explaining immigration court and BIA appellate processes).

[49] *See id.* at 872 (discussing different remedies granted by asylum and withholding); *see also* 8 C.F.R. § 208.3(b) (2007) ("An asylum application shall be deemed to constitute at the same time an application for withholding of removal . . . ."); EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK INDEX pt. 1, ch. 6.V.B.6.a, e (2001), *available at* www.usdoj.gov/eoir/statspub/benchbook.pdf [hereinafter IMMIGRATION JUDGE BENCHBOOK] (stating that withholding burden is higher than asylum and that withholding confers no immigration benefit, unlike asylum); *infra* Part I.B (addressing differences between asylum and withholding standards and procedures).

1. Asylum

Any non-citizen who is present within the United States, regardless of his or her legal status, may apply for asylum within one year of arrival.[50] The asylum applicant bears the burden of proving that he or she is eligible for legal relief from persecution.[51] Specifically, the applicant must first establish that he or she qualifies as a "refugee" under § 1101(a)(42)(A)'s statutory definition.[52] Thus, the applicant must show past persecution or a well-founded fear of future persecution on account of race, religion, nationality, social group membership, or political opinion.[53]

The BIA has held that an asylum applicant satisfies the well-founded fear standard if a reasonable person would fear persecution under the same circumstances.[54] Courts have further defined "persecution" as an infliction of harm or suffering upon a person who differs in a way that is regarded as offensive.[55] Because asylum law inevitably involves foreign nationals or residents, asylum standards reflect foreign policy considerations.[56] Specifically, the potential harm to a foreign national

[50] 8 U.S.C. § 1158(a)(1), (a)(2)(B) (2007) (setting forth general authority to apply for asylum and time limit); *see* Reyes-Reyes v. Ashcroft, 384 F.3d 782, 786 (9th Cir. 2004) (citing § 1158(a)(1), (a)(2)(B)); United States v. Chen, 324 F.3d 1103, 1104 (9th Cir. 2003) (citing § 1158(a)(2)(B) rule that applicant file for relief within one year of entry into United States).

[51] *See* 8 U.S.C. § 1158(b)(1)(B)(i) (2007) (stating burden of proof is on asylum applicant); Matter of Acosta, 19 I. & N. Dec. 211, 215 (B.I.A. 1985) (stating that non-citizen bears burden of proving persecution); *see also* Xiang Xing Gao v. Gonzales, 467 F.3d 33, 37 (1st Cir. 2006) (stating that non-citizen bears burden for establishing eligibility for asylum); Ouk v. Gonzales, 464 F.3d 108, 111 (1st Cir. 2006) (same); Mehilli v. Gonzales, 433 F.3d 86, 91 (1st Cir. 2005) (same).

[52] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch. 6, pt. V.B.6.b (citing requirement for asylum eligibility); *see also* 8 U.S.C. § 1101(a)(42)(A) (2007) (setting forth refugee standard); *id.* § 1158(b)(1)(B)(i) (citing § 1101(a)(42)(A) refugee standard as asylum applicant's burden of proof); *supra* Part I.A (discussing refugees).

[53] *See* 8 U.S.C. § 1101(a)(42)(A); IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch. 6, pt. V.B.6.b.

[54] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch. 6, pt. V.B.6.a (citing Matter of Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987)).

[55] *Id.* pt. V.B.6.b (citing Kovac v. INS, 407 F.2d 102 (9th Cir. 1969)).

[56] *See, e.g.*, Batchelor, *supra* note 1, at 236 ("The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; *it depends on the development of international relations*.") (emphasis added). Such foreign policy implications have significantly influenced the development and execution of U.S. asylum policies. *See generally* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (discussing foreign policy considerations in development of U.S. immigration law and 1980 Act). Further, these political considerations have

in his or her home country must justify the U.S. government intervening in that country's relationship with its citizen.[57] Consistent with this principle, a showing of general civil strife, violence, or upheaval in the applicant's country of residence fails to constitute persecution.[58] Moreover, mere discrimination on the basis of race or religion also typically falls short of satisfying the persecution standard.[59] Instead, an asylum applicant must present specific evidence that he or she, as an *individual*, faces significantly more danger than the country's other citizens.[60]

Even where an applicant succeeds in satisfying the refugee definition — thus, establishing statutory eligibility for asylum — the reviewing court retains discretion to deny legal relief.[61] Thus, an asylum applicant must satisfy the dual burdens of proving statutory persecution and that such persecution warrants relief.[62] Where a court ultimately denies asylum, however, an applicant may still gain relief through withholding of removal.[63]

justified the executive branch's near-exclusive jurisdiction over immigration policy. *Id.* In fact, the allocation of control over asylum between the executive branch and Congress was thoroughly debated prior to the 1980 Act's passage. *Id.* at 34-37.

[57] *See* Batchelor, *supra* note 1, at 236 ("The right of a State to use its discretion is . . . restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law." (quoting Tunis and Morocco Nationality Decrees, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 4, at 24 (Nov. 6))).

[58] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at Part II ("Asylum Law Paragraphs") (citing Mendez-Efrain v. INS, 813 F.2d 279 (9th Cir. 1987)); *see also* Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Lopez v. INS, 775 F.2d 1015 (9th Cir. 1985); Matter of T-, 20 I. & N. Dec. 571, 578 (B.I.A. 1992); Matter of Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987); Matter of Pierre, 15 I. & N. Dec. 461 (B.I.A. 1975).

[59] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at Part II ("Asylum Law Paragraphs") ("Persecution is an extreme concept which ordinarily does not include 'discrimination on the basis of race or religion, as morally reprehensible as it may be.'" (quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995))).

[60] *See* Debab v. INS, 163 F.3d 21, 27 (1st Cir. 1998) (noting limit in granting asylum where widespread violence affects all citizens in country).

[61] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at Part II ("Asylum Law Paragraphs") (citing Matter of Pula, 19 I. & N. Dec. 467 (B.I.A. 1987); Matter of Shirdel, 19 I. & N. Dec. 33 (B.I.A. 1984); Matter of Salim, 18 I. & N. Dec. 311 (B.I.A. 1982)).

[62] *Id.*

[63] *See* LEGOMSKY, *supra* note 19, at 872, 874-75 (stating that where court denies relief through asylum, court will automatically evaluate claim as application for withholding).

2. Withholding of Removal

Withholding of removal affords a lesser remedy than asylum and places a higher burden of proof on the applicant.[64] Unlike asylum's discretionary element, however, 8 U.S.C. § 1231(b)(3) mandates that courts grant withholding relief to applicants who meet the statutory standard.[65] Further, 8 C.F.R. § 208.3(b) provides that courts shall automatically consider an asylum application to also be a withholding of removal application.[66] While asylum and withholding provide distinctly different remedies, substantial overlap also exists between the two forms of relief.[67]

Section 241(b)(3) of the INA (codified at 8 U.S.C. § 1231(b)(3)) sets forth the requirements for withholding.[68] Specifically, the U.S. government may not remove anyone to a country where his or her life or freedom will be threatened.[69] As in proving asylum eligibility, the applicant must establish that the foreign government will persecute him or her if removed to that country.[70] This potential persecution must also be on account of race, religion, nationality, social group membership, or political opinion.[71] Unlike asylum, however, the

[64] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch. 6, pt. V.B.6.a, e (stating that withholding burden is higher than asylum burden and that withholding merely prohibits deportation to particular country).

[65] *See id.* ch 6, pt. V.B.6.e (stating that withholding is mandatory form of relief for those who are statutorily eligible); *see also* 8 U.S.C. § 1231(b)(3) (2007) (setting forth mandatory withholding requirement).

[66] *See* Njuguna v. Ashcroft, 374 F.3d 765, 769 (9th Cir. 2004) ("Every asylum application is deemed to include a request for a withholding of removal."); 8 C.F.R. § 208.3(b) (2007) (stating that asylum application will also be considered application for withholding); LEGOMSKY, *supra* note 19, at 872 (stating that application for asylum is automatically treated as application for withholding).

[67] *See, e.g.*, CHARLES GORDON ET AL., 3-33 IMMIGRATION LAW & PROCEDURE § 33.05 (2006) (discussing similarities and differences between asylum and withholding).

[68] *See* 8 U.S.C. § 1231(b)(3) (2007). Section 1231(b)(3) states: "[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." *Id.*

[69] *Id.*

[70] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 429-30 (1987) (discussing withholding standard); Lim v. INS, 224 F.3d 929, 935 (9th Cir. 2000) ("To effect a well-founded fear, a threat need not be statistically more than fifty-percent likely; the Supreme Court has suggested that even a one-tenth possibility of persecution might effect a well-founded fear." (citing *Cardoza-Fonseca*, 480 U.S. at 430; Arteaga v. INS, 836 F.2d 1227, 1233 (9th Cir. 1988))).

[71] *See* § 1231(b)(3) (prohibiting removal to life-threatening conditions on account of race, religion, nationality, membership in particular social group, or political

applicant must present a *clear probability* of potential persecution — a higher burden of proof.[72] Specifically, § 1231(b)(3) requires the non-citizen to establish that removal to a certain country would threaten his or her life or freedom.[73] Thus, courts have interpreted this provision to require that the applicant show that persecution is *more likely than not* to occur.[74]

Withholding also differs from asylum in that it does not preclude deportation to another, more hospitable country.[75] For example, a court might determine that a refugee is eligible for withholding of removal to country *X*.[76] This finding, however, would not prevent the court from removing the refugee to country *Y*, or to any non-threatening country that will accept him or her.[77] In addition, the withholding provision does not include last habitual residence language for stateless refugees.[78] Rather, eligibility for withholding turns on whether the court-designated removal country poses life-threatening conditions.[79]

3. Procedure of Asylum and Withholding Cases

Asylum and withholding cases are administrative proceedings and generally begin with a hearing before an IJ.[80] The Office of the Chief

opinion).

[72] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch.6, pt.V.B.6.a (citing INS v. Stevic, 467 U.S. 407 (1984)) (stating that U.S. Supreme Court has indicated that withholding burden requires clear probability of persecution).

[73] *See* § 1231(b)(3) (setting forth withholding burden); *see also* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch.6, pt.V.B.6.a (quoting § 1231(b)(3)) .

[74] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch.6, pt.V.B.6.a (citing *Stevic*, 467 U.S. 407).

[75] *See* LEGOMSKY, *supra* note 19, at 872 (stating that withholding does not prohibit removal to third country).

[76] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6 (1987) (discussing withholding's country-specific standard); Matter of Lam, 18 I. & N. Dec. 15, 18 (B.I.A. 1981) (stating that withholding remedy only bars deportation to specific country of persecution).

[77] *See Cardoza-Fonseca*, 480 U.S. at 428 n.6; *Lam*, 18 I. & N. Dec. at 18 (discussing withholding remedy).

[78] *See* § 1231(b)(3) (lacking provision for individuals with no nationality).

[79] *Id.*; *see also Cardoza-Fonseca*, 480 U.S. at 428 n.6 (quoting Matter of Salim, 18 I. & N. Dec. 311, 315 (B.I.A. 1982)) (explaining withholding of removal's country-specific nature).

[80] *See* LEGOMSKY, *supra* note 19, at 632, 636 ("[If there is] prima facie evidence that the arrested alien is in the United States in violation of law . . . the INS issues a Notice to Appear, serves it on the alleged non-citizen, and files it with the 'immigration court.' The service of the Notice to Appear officially commences

Immigration Judge ("OCIJ") — a component of the U.S. Department of Justice's Executive Office for Immigration Review ("EOIR") — oversees the nationwide immigration court system.[81] Section 240(b)(1) of the INA (codified at 8 U.S.C. § 1229a) grants IJs power to conduct removal proceedings.[82] IJs also possess the authority to adjudicate applications for legal relief, such as asylum and withholding, and to rule on non-citizens' deportability.[83] An asylum or withholding applicant may appeal an IJ's decision to the BIA.[84]

Like the immigration court system, the EOIR oversees the BIA.[85] Section 1003.1 of the *Code of Federal Regulations* sets forth the BIA's organization, jurisdiction, and powers.[86] The BIA possesses broad authority over appeals from IJs.[87] All orders rendered by the BIA are final unless the BIA itself, the U.S. Attorney General, or a federal court overrules the decision.[88]

An asylum or withholding applicant has the right to appeal the BIA's

removal proceedings and vests jurisdiction in the immigration judge."); *see also* Administrative Procedures Act, 5 U.S.C. § 556 (2007) (stating general procedures for administrative agencies engaged in adjudication).

[81] EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 2 (2004), *available at* http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf [hereinafter BIA PRACTICE MANUAL] (discussing role of immigration courts); *see also* 8 C.F.R. § 1003.14 (2007) (discussing immigration courts, judges, and jurisdiction). In contrast, typical federal judicial proceedings are heard before Article III judges, whose appointments are subject to confirmation by the U.S. Senate. *See* LEGOMSKY, *supra* note 19, at 637 (stating that IJs are not Article III judges).

[82] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at pt. 1, ch. 7.I.C. (describing IJs' authority under INA section 240(b)(1)). In particular, section 240(b)(1) permits IJs to conduct proceedings, administer oaths, receive evidence, interrogate, examine the applicant and witnesses, issue subpoenas, impose sanctions through monetary civil penalties, and render final administrative decisions and orders. *Id.*

[83] *See* BIA PRACTICE MANUAL, *supra* note 81, at 2, 10 (describing IJs' authority).

[84] *See* LEGOMSKY, *supra* note 19, at 1008-09; *see also* Elnager v. INS, 930 F.2d 784, 787 (9th Cir. 1991) ("[T]he BIA has the power to conduct a *de novo* review of the record, to make its own findings, and independently to determine the legal sufficiency of the evidence."); Matter of Burbano, 20 I. & N. Dec. 872, 873 (B.I.A. 1994) (discussing BIA's independent standard of review).

[85] *See* BIA PRACTICE MANUAL, *supra* note 81, at 2 (discussing location of BIA within federal government); *see also* 8 C.F.R. § 1003.0(a) (2007) (granting EOIR supervision over BIA).

[86] 8 C.F.R. § 1003.1 (2007); *see also* BIA PRACTICE MANUAL, *supra* note 81, at 6-8 (discussing BIA's jurisdiction and authority).

[87] *See* 8 C.F.R. § 1003.1(b); BIA PRACTICE MANUAL, *supra* note 81, at 6-8, 10 (setting forth comprehensive list of IJ decisions that Board has authority to review).

[88] *See* BIA PRACTICE MANUAL, *supra* note 81, at 8 (citing 8 C.F.R. §§ 1003.1(d)(3), (f), (g) (2007)) (discussing BIA decisions).

final decision to a federal court of appeals.[89] Typically, the applicant must appeal to the federal appellate court for the circuit where his or her deportation hearing occurred.[90] Further, the applicant must first exhaust all administrative remedies, including BIA appeals, before filing with a federal court of appeals.[91] The reviewing appellate court evaluates the BIA's legal conclusions de novo, with deference to the BIA's statutory interpretations.[92] In contrast, the reviewing court must affirm the BIA's factual determinations unless the facts would compel a reasonable adjudicator to reach a contrary conclusion.[93]

Where either the IJ, the BIA, or a federal appellate court grants asylum, the non-citizen may remain in the United States.[94] Further, after one year, the individual may apply to adjust his or her legal status to permanent resident.[95] Alternatively, a court's decision to

[89] *See* 8 U.S.C. § 1252 (2007) (setting forth criteria for judicial review of orders of removal); LEGOMSKY, *supra* note 19, at 1007-09 (describing typical asylum and withholding procedure as hearing before IJ, appeal to BIA, and right of judicial review); *see also* BIA PRACTICE MANUAL, *supra* note 81, at 11 (stating that BIA decisions are reviewable in federal courts).

[90] 8 U.S.C. § 1252(b)(2) (2007) ("The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."); *see also* LEGOMSKY, *supra* note 19, at 641 (citing INA § 242(b)(2)) (discussing judicial review of removal orders). In addition, the federal appellate court cannot review the removal order unless it is administratively final. *See* 8 U.S.C. § 1252(a)(1) (providing for judicial review of final removal orders); *see also* LEGOMSKY, *supra* note 19, at 641 (citing INA § 242(a)(1)). A petitioner must also file for review within 30 days of the final removal order. *See* 8 U.S.C. § 1252(b)(1) (2007) ("The petition for review must be filed not later than 30 days after the date of the final order of removal."); *see also* LEGOMSKY, *supra* note 19, at 641 (citing INA § 242(b)(1)).

[91] *See* 8 U.S.C. § 1252(d)(1) (2007) (providing that court may only review final removal order if petitioner has exhausted all administrative remedies); *see also* LEGOMSKY, *supra* note 19, at 641 (citing INA § 242(d)(1)) (discussing conditions for filing petitions for review).

[92] *See* Paripovic v. Gonzales, 418 F.3d 240, 243 (3d Cir. 2005) (citing Abdulai v. Ashcroft, 239 F.3d 542, 551-52 (3d Cir. 2001)) (discussing court's deference to BIA findings). This standard of review conforms with general administrative law principles. *Id.*

[93] *See id.* at 243-44 ("[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." (citing 8 U.S.C. § 1252(b)(4)(B) (2007))); *see also* Abdille v. Ashcroft, 242 F.3d 477, 484 (3d Cir. 2001) ("The BIA's finding must be upheld unless the evidence not only supports a contrary conclusion, but compels it."); Chang v. INS, 119 F.3d 1055, 1060 (3d Cir. 1997) (citing INS v. Elias-Zacarias, 502 U.S. 478, 480 (1992)) (stating that court will reverse BIA's factual determinations only if reasonable fact-finder would conclude otherwise).

[94] *See* 8 C.F.R. § 208.22 (2007) ("An alien who has been granted asylum may not be deported or removed . . . .").

[95] *See* CHARLES GORDON ET AL., 1-1 IMMIGRATION LAW & PROCEDURE § 1.03[5][d]

grant withholding of removal does not necessarily allow the non-citizen to remain in the United States.[96] Rather, the non-citizen merely acquires the privilege of not returning to a country where he or she will be persecuted.[97]

When a court denies an individual asylum and withholding, typically, the non-citizen has sixty days to voluntarily depart the United States.[98] In some cases, however, the court does not grant voluntary departure.[99] Instead, the court orders the government to remove the non-citizen from the United States within ninety days.[100] Non-citizens who fail to promptly designate a removal country waive their right to determine which country the U.S. government will send them to — the court itself selects the removal country.[101] Thus, an individual's statelessness proves critical in both the merit of his or her case, as well as in its procedure.

C. Stateless Refugees and Last Habitual Residence

A court's decision to grant asylum or withholding often turns on the applicant's country of nationality or last habitual residence.[102] The reviewing court must evaluate an asylum or withholding claim in the context of the country where the alleged persecution occurred.[103] Thus, a country's social and political climate directly affects the court's decision.[104] Further, when a refugee is stateless, determining which

(citing INA § 209(b), 8 U.S.C. § 1159(b)) (noting that individuals granted asylum may apply for lawful permanent resident status one year after designated as asylee).

[96] *See id.* § 1.03[5][e] (noting that unlike asylum, withholding remedy permits court to remove non-citizen to other non-threatening country).

[97] *Id.*

[98] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch. 6, pt.VI.A.2 (citing INA § 240B(b)) (stating judge may grant voluntary departure at conclusion of removal proceeding).

[99] *See, e.g.*, Joseph v. Attorney Gen., 421 F.3d 224, 226 (3d Cir. 2005) (illustrating case where IJ ordered individual removed involuntarily under INA section 241(a)(1)(A)).

[100] *Id.*; *see also* INA, ch. 477, 66 Stat. 163, § 241(a) (1952) (codified at 8 U.S.C. § 1231) (setting forth removal provisions).

[101] *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 49, at ch. 7, pt. I.C.15 (citing INA § 241(b)) (discussing removal proceedings under INA section 240).

[102] 8 U.S.C. § 1101(a)(42)(A) (2007) (setting forth asylum standard); *see also infra* Part II (discussing *Paripovic*).

[103] *See* 8 U.S.C. § 1101(a)(42) (2007) (providing for evaluation of asylum claim in context of country of nationality or, where no nationality, last habitual residence).

[104] *See infra* Part II (discussing *Paripovic* and illustrating impact of country conditions on asylum determination).

country to evaluate is critical, as different internal country conditions can yield different legal outcomes.[105] To date, when an asylum or withholding case involves a stateless person, courts have approached last habitual residence determinations inconsistently.[106]

1. Statelessness

An individual who is not a national of any state is deemed stateless.[107] A person can either be born stateless or, most commonly, can become stateless later in life.[108] Upon birth, nationality is typically determined either by a person's birthplace, *jus soli*, the nationality of one's parents, *jus sanguinis*, or both.[109] A person becomes stateless after birth through expulsion or flight from his or her original country of nationality, or by a change of national sovereignty.[110] Although less common, a lack of coherence in a country's nationality laws, or conflicting laws between countries, might render a person stateless at birth.[111] For example, a person might be born in country *A*, *jus sanguinis*, whose parents are both citizens of country *B*, *jus soli*.[112] The child's birth country might only grant citizenship through descent, whereas the parents' country of nationality only grants citizenship through birth in the territory.[113] In such a case, the child has no nationality.[114] Any of the above circumstances might render an individual a stateless refugee.[115]

The 1980 Refugee Act first recognized stateless refugees in U.S. asylum law.[116] The law dictated that courts evaluate a stateless

[105] *See* discussion *infra* Part II.

[106] *See infra* Part I.C.2 (discussing inconsistencies in cases involving stateless asylum applicants).

[107] *See* Batchelor, *supra* note 1, at 232 (defining "stateless" as "[a] person who is not considered as a national by any State under the operation of its law").

[108] *See* LEGOMSKY, *supra* note 19, at 1222.

[109] GORDON ET AL., *supra* note 67, § 91.01[3][e].

[110] *Id.*

[111] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 cmt. g (1987).

[112] *See* LEGOMSKY, *supra* note 19, at 1222.

[113] *See id.*; *see also* UNITED NATIONS HIGH COMM'R FOR REFUGEES MEDIA RELATIONS AND PUB. INFO. SERV., THE WORLD'S STATELESS PEOPLE: QUESTIONS & ANSWERS 8 (2004), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=40e2da8c4 (listing ways in which people become stateless).

[114] *See* LEGOMSKY, *supra* note 19, at 1222.

[115] *See id.*

[116] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); *see also* Anker & Posner, *supra* note 56, at 10-12, 34-37

refugee's claim in light of his or her last habitual residence.[117] The 1980 Act and its legislative history did not, however, articulate a standard for determining last habitual residence.[118]

2. Last Habitual Residence

To date, courts have inconsistently applied the term "last habitual residence."[119] Most commonly, courts find that the non-citizen was not persecuted in any of the locations where he or she last habitually resided.[120] Therefore, courts typically do not reach the last habitual residence determination because they first find that the individual was not persecuted in any country.[121] As a result, courts have not articulated a universal standard for the term.[122] Relevant case law remains inconsistent.[123] Courts reach varying conclusions in determining stateless refugees' last habitual residences.[124] Further, courts differ in classifying last habitual residence as either a question of fact or law.[125] Two such cases are *Ouda v. INS* and *Elian v. Ashcroft*.[126]

In *Ouda*, the asylum applicant, Sahar Ouda, was a stateless Palestinian born in Kuwait in 1971.[127] In 1992, Ouda left Kuwait and lived in Bulgaria for two years.[128] Ouda subsequently entered the United States from Egypt in 1994.[129] Ouda filed for asylum after

(discussing history and evolution of 1980 Act); Edward M. Kennedy, *Foreword: Immigration and Nationality*, 19 SAN DIEGO L. REV. 1, 1-8 (1981) (discussing considerations in passing 1980 Act).

[117] 8 U.S.C. § 1101(a)(42)(A) (2007); Refugee Act of 1980 § 201.

[118] *See* Refugee Act of 1980 § 201 (lacking definition of last habitual residence); *see also* Anker & Posner, *supra* note 56, at 10-12, 34-37 (discussing 1980 Act).

[119] *See infra* Part I.C.2 (discussing *Ouda* and *Elian*).

[120] *See* discussion *infra* Part I.C.2.

[121] *See* discussion *infra* Part I.C.2.

[122] *See* discussion *infra* Part I.C.2.

[123] *See* discussion *infra* Part II.B.

[124] *See* discussion *infra* Part II.B.

[125] *See* discussion *infra* Part II.B. Such a distinction could prove determinative for an asylum applicant, as federal appellate courts may review legal conclusions but must defer to the BIA's factual determinations. *See supra* Part I.B.3 and text accompanying notes 87-89 (discussing reviewing appellate court's mixed standard of review).

[126] Elian v. Ashcroft, 370 F.3d 897, 897-901 (9th Cir. 2004), *supplemented by* 103 F. App'x 78, 78-81 (9th Cir. 2004); Ouda v. INS, 324 F.3d 445, 447 (6th Cir. 2003); *see infra* Part I.C.2 (discussing *Elian* and *Ouda*).

[127] *Ouda*, 324 F.3d at 447.

[128] *Id.*

[129] *Id.*

overstaying her visa, claiming that she would face persecution in Kuwait or Egypt if forced to return.[130]

In evaluating Ouda's claim, the IJ initially indicated that it was unsure whether to consider Ouda's asylum claim in the context of Kuwait or Bulgaria.[131] The U.S. government argued that Bulgaria, where Ouda lived immediately prior to entering the United States, was her last habitual residence.[132] Ouda, however, asserted that Bulgaria was not her last habitual residence because she was never a Bulgarian citizen.[133] She also argued that Bulgaria would not allow her to re-enter the country.[134] The IJ held that Bulgaria constituted Ouda's last habitual residence and denied her application for asylum and withholding.[135]

On appeal to the BIA, Ouda contended the IJ erred in designating Bulgaria as her last habitual residence.[136] The BIA concluded that even assuming Kuwait was Ouda's last habitual residence, the treatment she received in Kuwait still did not amount to persecution.[137] The Sixth Circuit Court of Appeals affirmed the BIA's evaluation of Ouda's claim in the context of Kuwait. Unlike the BIA, however, the Sixth Circuit found that Ouda was persecuted in Kuwait.

Ouda is significant because the IJ, BIA, and Sixth Circuit all reached varying conclusions about Ouda's last habitual residence. Such conflicting decisions imply that *either* an individual's birth country (Kuwait in Ouda's case), *or* a country where an individual had merely resided for two years (Bulgaria for Ouda), could arguably constitute one's last habitual residence.[138] The three courts' inconsistency in *Ouda* exemplifies the difficulty that judges have had in determining a non-citizen's last habitual residence.

Similarly, in *Elian v. Ashcroft*, the Ninth Circuit Court of Appeals evaluated a stateless refugee's birthplace in addition to his country of

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[130] *Id.*

[131] *Id.* at 448.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 449.

[136] *Id.*

[137] *Id.* at 450 ("For purposes of deciding this appeal, we will assume that the respondent is correct that she may consider Kuwait as the country where she last habitually resided. . . . Thus, having reviewed the entire record *de novo*, we find that she has not established past persecution in Kuwait.").

[138] *Id.*

temporary residence.[139] In *Elian*, the asylum applicant, Joseph Elian, was a stateless Christian Palestinian from the West Bank.[140] Elian left the West Bank and resided in Jordan for three months before traveling to the United States on a non-immigrant visa.[141] The court decided that Elian's last habitual residence was either the West Bank or Jordan and considered his asylum claim in both contexts.[142]

Ouda and *Elian* illustrate the need for a clear standard to determine stateless refugees' true last habitual residences.[143] Further, these two precedents highlight the fact that courts use factors such as birthplace, a nonquantitative consideration, in defining last habitual residence.[144] Following *Ouda* and *Elian*, the Third Circuit Court of Appeals attempted to clarify the last habitual residence determination in *Paripovic v. Gonzales*.[145]

II. *PARIPOVIC V. GONZALES*

In August 2005, the Third Circuit decided an issue of first impression in asylum law: how to define a stateless refugee's last habitual residence.[146] The stateless refugee, Zeljko Paripovic, was a minority in his own country — an ethnic Serb, born in a section of Yugoslavia where the ruling class aspired to turn the country into one for "ethnically pure" Croatians.[147] In October 1990, Croatian authorities detained Paripovic in a camp because he was a Serb.[148] He was tortured, harassed, and beaten.[149] Shortly thereafter, Croatian soldiers came to Paripovic's village and ordered Paripovic and other ethnic Serbs to leave the country.[150] Fearing for their lives, Paripovic

[139] Elian v. Ashcroft, 370 F.3d 897, 897-901 (9th Cir. 2004), *supplemented by* 103 F. App'x 78, 78-81 (9th Cir. 2004).

[140] *Elian*, 370 F.3d at 899.

[141] *Id.*

[142] *Elian*, 103 F. App'x at 79-80. The court found that Elian did not establish that he had a well-founded fear of persecution in either the West Bank or Jordan. *Id.*

[143] *See infra* Part I.C.2 (discussing *Elian* and *Ouda* and lack of last habitual residence standard).

[144] *See* discussion *infra* Part I.C.2.

[145] *See infra* Part II (discussing Third Circuit's interpretation of last habitual residence in *Paripovic*).

[146] *See* discussion *infra* Part II. Prior to *Paripovic*, no court had attempted to define last habitual residence. *See supra* Part I.C.2 (discussing last habitual residence). Courts had merely applied the term inconsistently. *See supra* Part I.C.2.

[147] Paripovic v. Gonzales, 418 F.3d 240, 242 (3d Cir. 2005).

[148] *Id.*

[149] *Id.*

[150] *Id.*

and his mother fled to Serbia in August 1991.[151] In Serbia, Paripovic and his mother lived in an old school house that was part of a refugee camp until December 1993.[152] During this time, Yugoslavia dissolved, rendering Paripovic stateless in 1992.[153] In January 1994, Paripovic fled Serbia to Puerto Rico to avoid conscription by military police who were recruiting refugees to fight in Croatia.[154]

The U.S. government instituted deportation proceedings against Paripovic shortly after his arrival in Puerto Rico.[155] Paripovic conceded that he was in the United States illegally, qualifying him for deportation, and he applied for asylum and withholding of removal.[156] The IJ denied Paripovic's applications, and Paripovic appealed the decision to the BIA.[157] In December 2000, the BIA remanded the case to the immigration court because portions of the record were missing.[158] The federal government then transferred Paripovic's case to an immigration court in Newark, New Jersey, where the judge decided to hear the case anew.[159] The IJ granted several of Paripovic's requests for a continuance, allowing him to locate expert witnesses.[160] In January 2000, the IJ denied Paripovic's final request for a continuance and heard the case.[161]

The immigration court held that Paripovic did not legally qualify as a refugee.[162] The IJ evaluated whether Paripovic, as a stateless individual, was or would be persecuted in his country of last habitual residence, pursuant to 8 U.S.C. § 1101(a)(42)(A).[163] Paripovic argued that his last habitual residence was not Serbia because he never intended to live there.[164] The IJ rejected Paripovic's argument and concluded that intent is not a factor in determining last habitual residence.[165] The IJ designated Serbia as Paripovic's last habitual

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* Paripovic remained in Puerto Rico until his case was transferred to an immigration court in Newark, New Jersey. *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 242-43.

[164] *Id.* at 245.

[165] *Id.*

residence.[166] Thus, the court evaluated Paripovic's persecution claim based on his experiences as a refugee in Serbia, not Croatia.[167] Consequently, although the IJ conceded that Paripovic had probably faced persecution in Croatia, the judge concluded that Paripovic had not established persecution in Serbia.[168] The IJ, therefore, ordered Paripovic deported to Serbia.[169]

On appeal to the BIA, Paripovic argued that the IJ erred in denying his last request for a continuance to obtain a witness from Bosnia.[170] The BIA found Paripovic's contention meritless because Paripovic could have provided an expert affidavit in place of live testimony.[171] The BIA otherwise adopted the IJ's decision and dismissed Paripovic's appeal in September 2003.[172]

On appeal, the Third Circuit affirmed the IJ and BIA decisions.[173] Paripovic made two principle arguments before the Third Circuit.[174] First, Paripovic argued that he did not choose to live in Serbia, therefore, the court could not designate Serbia as his last habitual residence.[175] Second, Paripovic argued that he only lived in Serbia under duress.[176] Therefore, his duress negated any finding that his residence in Serbia was habitual.[177]

The court rejected Paripovic's first argument, that Serbia was not his last habitual residence because he did not choose to live there.[178] Rather, the court deferred to the IJ's finding that intent is not relevant to the analysis.[179] Further, the court concluded that Paripovic's argument merely used the word "choice" in place of its synonym, "intent."[180] Because this substitution was lexicological, rather than substantive, Paripovic's argument provided an insubstantial basis to reverse the IJ's finding — that choice, or intent, is irrelevant to the last

166 *Id.*
167 *Id.* at 243, 246.
168 *Id.* at 243.
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.* at 245.
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
179 *Id.*
180 *Id.*

habitual residence analysis.[181]

The court also rejected Paripovic's argument that Serbia was not his last habitual residence because he lived there under duress.[182] The Third Circuit did not explicitly state whether Paripovic had in fact lived in Serbia under duress.[183] The court did, however, emphasize the lack of evidence showing that Paripovic was prevented from leaving Serbia.[184] Thus, the Third Circuit concluded that Paripovic's duress argument was also insufficient to reverse the IJ's last habitual residence determination.[185]

In addition, the Third Circuit explicitly affirmed the IJ's interpretation of the term "habitual."[186] The IJ defined "habitual" as the amount of time an individual has spent in a certain location.[187] The Third Circuit reasoned that previous cases defined habitual as established by long use.[188] Based on this precedent, the court held that the IJ's construction was reasonable.[189] Consequently, the Third Circuit affirmed the IJ's determination that Serbia was Paripovic's last habitual residence.[190] Further, the court confirmed that Paripovic did not qualify for asylum or withholding of removal.[191]

III. ANALYSIS

The Third Circuit erred in defining last habitual residence quantitatively.[192] The court erred in basing Paripovic's last habitual residence solely on the number of years that he temporarily lived in a

[181] *Id.* (stating that distinction between choice and intent was "too similar to provide a basis for concluding that the immigration judge, given due deference, erred in [its] analysis").

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* ("Although the [IJ] does not expressly define 'habitual,' his reasoning makes clear that he understood this term to relate to the 'amount of time [Paripovic] spent there.' 'Habitual' may be defined as 'established by long use' or 'usual.'" (citing Chen v. Mayflower Transit, Inc., 315 F. Supp. 2d 886, 911 n.22 (N.D. Ill. 2004) (defining habitual as "[e]stablished by long use; usual"))). Thus, it was permissible (if not necessary) for the IJ to consider the duration of time Paripovic lived in Serbia.

[189] *Id.*

[190] *Id.* at 245-46.

[191] *Id.*

[192] *See infra* Part III.A-C.

Serbian refugee camp.[193] The court's disregard for Paripovic's intent to remain in Serbia violates canons of statutory construction, analogous areas of law, and public policy.[194] Courts must construe ambiguities in deportation statutes in favor of the non-citizen.[195] Further, the *Code of Federal Regulations* does not preclude consideration of intent in determining habitual residence.[196] Moreover, excluding intent to remain from the last habitual residence determination undermines public policy by decreasing stateless refugees' likelihood for legal protection.[197]

A. The Third Circuit's Interpretation of Last Habitual Residence Violates the Longstanding Principle That Courts Should Construe Ambiguous Statutes in Favor of the Non-Citizen

The Third Circuit's last habitual residence construction, excluding consideration of intent, disregards the longstanding principle that courts should interpret ambiguous statutes in favor of the non-citizen.[198] Ordinary canons of statutory construction require courts to look at a statute's plain meaning and legislative history to interpret ambiguous language.[199] Courts begin a statutory construction analysis by determining whether the language has a plain and unambiguous meaning.[200] To establish plain meaning, courts consider all known

[193] *See infra* Part III.A-C.

[194] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (discussing canons of statutory construction in context of asylum cases); 8 C.F.R. § 214.7(a)(4)(i) (2007) (setting forth habitual residence definition analogous to last habitual residence); Austl. Gov't Attorney-Gen.'s Dep't, *International Co-Operation in the Protection of Adults* ¶ 6.4 (Jul. 1999) (on file with author) (discussing Hague Conference on Private International Law's interpretation of habitual residence, and stating that "[i]f a person has been resident in a country for some time, authorities in that country are more likely to be able to ascertain the needs and best interests of the person"); *infra* Part III.A-C.

[195] *See Cardoza-Fonseca*, 480 U.S. at 449; INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *infra* Part III.A.

[196] *See infra* Part III.B; *cf.* 8 C.F.R. § 214.7(a)(4)(i) (defining habitual residence determination without prohibiting consideration of intent).

[197] *See infra* Part III.C.

[198] *See Cardoza-Fonseca*, 480 U.S. at 449; *Errico*, 385 U.S. at 225; *Costello*, 376 U.S. at 128; *Fong Haw Tan*, 333 U.S. at 10; *infra* Part III.A.

[199] *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 428, 431-32 (applying canons of statutory construction to interpret ambiguous deportation statute); *see also* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002); Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989).

[200] *See Barnhart*, 534 U.S. at 450 (stating all statutory construction cases begin with

understandings of a word, including the dictionary definition.[201] If a statute's plain meaning is clear, it is presumed to express Congress's original intent, and further inquiry is unnecessary.[202] If the language is still unclear, however, the court then examines the statute's legislative history to determine Congress's purpose.[203] In deportation cases, when a court cannot clarify a statute through its plain meaning or legislative history, the interpretation must favor the non-citizen.[204]

As highlighted by the *Paripovic* case, the statutory term "last habitual residence" is ambiguous.[205] No court has ever explicitly defined it.[206] Thus, the Third Circuit erred in ignoring canons of statutory construction and in failing to craft a definition favorable to the non-citizen.[207]

Opponents can argue that the plain meaning supports the Third Circuit's conclusion that last habitual residence does not include intent.[208] The dictionary defines "habitual" as "having the nature of a habit or being in accordance with habit; doing, practicing, or acting in

language of statute and its plain, unambiguous meaning); *Robinson*, 519 U.S. at 340 (stating that first step in interpreting statute is to look to plain meaning); *Ron Pair Enters.*, 489 U.S. at 240-41 (stating first step is to determine whether language at issue has plain and unambiguous meaning with respect to case at hand).

[201] *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.5 (2002) (illustrating court's use of dictionary definition to interpret ambiguous statutory language); *see* 82 C.J.S. *Statutes* § 321 (2005) ("If the statute does not sufficiently define a word used therein, the court may consider all known definitions of the word, including dictionary definitions."); *see also* United States v. Greenpeace, Inc., 314 F. Supp. 2d 1252, 1257 (S.D. Fla. 2004) (stating that it is accepted practice for courts to look to dictionary definitions to establish plain meaning).

[202] *See* United States v. Fisher, 289 F.3d 1329, 1338 (11th Cir. 2002) ("If the statute's meaning is plain and unambiguous, there is no need for further inquiry. The plain language is presumed to express congressional intent and will control a court's interpretation.").

[203] *See* Evergreen Forest Prods. of Ga., L.L.C. v. Bank of Am., 262 F. Supp. 2d 1297, 1303 (M.D. Ala. 2003) ("If a pure textual analysis does not reveal the meaning of a statutory term, courts must look to the purpose of the legislation." (citing Nat'l Wildlife Fed'n v. Marsh, 721 F.2d 767, 778 (11th Cir. 1983))). Further, courts must interpret statutory language "in a way that accomplishes the obvious purpose of Congress in enacting the statute." *Id.*

[204] *Cardoza-Fonseca*, 480 U.S. at 449 (citing INS v. Errico, 385 U.S. 214, 225 (1966)) (stating ambiguities in deportation statutes should be construed in favor of non-citizen); *see also* Costello v. INS, 376 U.S. 120, 128 (1964) (stating principle that courts must resolve statutory doubt in favor of non-citizen); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (interpreting ambiguous statute in favor of non-citizen).

[205] *See supra* Part II.

[206] *See supra* Part I.B.2.

[207] *See supra* Part III.A.

[208] *See supra* Part III.A.

some manner by force of habit; or resorted to on a regular basis."[209] Further, the dictionary defines "residence" as "the act or fact of dwelling in a place for some time; the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn; a building used as a home; or the period or duration of abode in a place."[210] None of the dictionary definitions include intent.[211]

Even if the Third Circuit had examined the plain meaning definition, however, the term's application remains unclear.[212] The plain meaning does not preclude consideration of intent or other qualitative factors.[213] Rather, the dictionary definition uses such words as "some time" or "the period or duration of abode."[214] The dictionary definition does not elucidate which country is the true last habitual residence when a stateless person lived temporarily in multiple locations.[215] The essence of the problem is still how to define the amount of time or other qualities that make one place a last habitual residence over another.[216] Thus, examining the plain meaning of last habitual residence does not make the term any less

[209] Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/habitually (last visited Mar. 27, 2007).

[210] *Id.*, http://www.m-w.com/dictionary/residence (last visited Mar. 27, 2007).

[211] *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), *available at* http://www.bartleby.com/61/30/H00300.html (defining "habitual" as "[(1)] Being such by force of habit . . . ; [(2)] established by long use; usual"); THE AMERICAN HERITAGE DICTIONARY, *supra*, *available at* http://www.bartleby.com/61/49/R0174900.html (defining "residence" as (1) "The place in which one lives; a dwelling"; or (2) "The act or a period of residing in a place"); Online search, www.dictionary.oed.com, "habitual" (Feb. 12, 2007) (defining "habitual" as "[(1)] Belonging to the 'habit' or inward disposition . . . ; inherent or latent in the mental constitution; [(2)] Of the nature of a habit; fixed by habit; existing as a settled practice or condition; constantly repeated or continued; customary; or [(3)] Commonly or constantly used; usual, accustomed"); Online search, www.dictionary.oed.com, "residence" (Feb. 12, 2007) (defining "residence" as "[(1)] To have . . . one's usual dwelling-place or abode; to reside . . . ; to establish oneself; to settle; . . . [(2)] The circumstance or fact of having one's permanent or usual abode in or at a certain place; the fact of residing or being resident; . . . or [(3)] The place where one resides; one's dwelling-place; the abode [of] a person"); *supra* notes 209-10 and accompanying text (citing dictionary definitions for "habitual" and "residence").

[212] *See supra* notes 209-11 and accompanying text (citing dictionary definitions for "habitual" and "residence" that do not clarify standard for determining stateless refugees' last habitual residences).

[213] *See supra* notes 209-11 and accompanying text.

[214] *See supra* notes 209-11 and accompanying text.

[215] *See supra* notes 209-11 and accompanying text (demonstrating multiple dictionary definitions that do not clarify amount of time or other qualities that make one place last habitual residence over another).

[216] *See supra* notes 209-11 and accompanying text.

ambiguous.[217]

Because the plain meaning does not clarify last habitual residence, canons of statutory construction dictate that the reviewing court would next examine Congress's intent.[218] Congress, however, has never discussed how to interpret last habitual residence.[219] When neither plain meaning nor legislative history make a term less ambiguous, courts defer to a longstanding principle regarding deportation statutes — the court must interpret the law in the non-citizen's favor.[220] Courts justify this principle by acknowledging that deportation is a penalty, not a crime, and is sometimes a drastic measure equivalent to banishment or exile.[221]

Adhering to this principle, the Third Circuit erred in designating Serbia as Paripovic's last habitual residence.[222] The most favorable deportation country for a stateless refugee is one that presents the refugee with the greatest potential for assimilation and legal protection.[223] Thus, the interpretation of last habitual residence most favorable to Paripovic was not Serbia, but rather Croatia, where he lived most of his life.[224]

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[217] *See supra* notes 209-11 and accompanying text.

[218] *See supra* notes 200-04 and accompanying text (setting forth standard for interpreting ambiguous deportation statutes).

[219] *See* Costello v. INS, 376 U.S. 120, 130 (1964) (illustrating case where nothing in language of deportation statute suggested Congress's intent).

[220] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (citing INS v. Errico, 385 U.S. 214, 225 (1966)) (stating ambiguities in deportation statutes should be construed in favor of non-citizen).

[221] *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of that construction [favoring the non-citizen] because deportation is a drastic measure and at times equivalent of banishment or exile." (citing Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947))); GORDON ET AL., *supra* note 67, § 71.01 ("The concept that expulsion from the United States is a penalty, not a crime, has lead to the principle that deportation statutes must be strictly construed, and must be limited to the narrowest compass reasonably extracted from their language.").

[222] *See supra* note 221 and accompanying text (setting forth principle that courts must construe ambiguous statutes in favor of non-citizen).

[223] *See infra* Part III.C (discussing policy implications of deportation to country with no qualitative connections).

[224] *See supra* note 223 and accompanying text.

B. The Paripovic *Court's Interpretation Conflicts with the United States Code of Federal Regulations, Which Permits Consideration of Intent in Determining Habitual Residence*

The Third Circuit failed to consider an analogous section of the *Code of Federal Regulations*, which does not preclude courts from examining intent when analyzing habitual residence.[225] Title 8, § 214.7(4)(i) of the *Code of Federal Regulations* defines "habitual residence" for determining citizenship regarding United States territories and possessions.[226] Specifically, § 214.7(4)(i) defines "habitual residence" "as a place of general abode or a principal, actual dwelling place of a continuing or lasting nature."[227] Section 214.7(4)(i)'s habitual residence definition does not bar courts from considering intent to remain.[228] Further, the term "habitual residence" used in § 214.7(4)(i) is almost lexicologically identical to the refugee definition's "last habitual residence" phrase.[229] The refugee definition only differs by including the word "last."[230] Thus, the Third Circuit erred in overlooking the analogous definition from § 214.7(4)(i).

In addition, the Immigration and Naturalization Service ("INS") promulgated § 214.7(4)(i) to amend INS regulations concerning habitual residents' rights in U.S. territories.[231] The INS's intent behind § 214.7(4)(i), discussed in the *Federal Register*, was to require habitual

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[225] Paripovic v. Gonzales, 418 F.3d 240, 245 (3d Cir. 2005).

[226] 8 C.F.R. § 214.7(a)(4)(i) (2007). Section 214.7(a)(4)(i) states:

> Habitual resident means a citizen of the FAS who has been admitted to a territory or possession of the United States (other than American Samoa or the Commonwealth of the Northern Mariana Islands, as long as the Act is not applicable to them) pursuant to section 141(a) of the Compacts and who occupies in such territory or possession a habitual residence as that term is defined in section 461 of the Compacts, namely *a place of general abode or a principal, actual dwelling place of a continuing or lasting nature*.

Id. (emphasis added).

[227] *Id.*

[228] *Id.* (lacking inclusion of intent).

[229] *Compare id.* (using term "habitual residence"), *with* 8 U.S.C. § 1101(a)(42)(A) (2007) (containing phrase "last habitually resided").

[230] *See supra* note 229.

[231] *See* Habitual Residence in the Territories and Possessions of the United States, 65 Fed. Reg. 56,463 (Sept. 19, 2000) (codified at 8 C.F.R. pt. 214) (explaining purpose behind regulation).

residents to be self-supporting.[232] The *Federal Register* describes the term "self-supporting" as the "ability to financially be able to support oneself with regard to local conditions."[233] The regulation itself further defines self-supporting as "[h]aving a lawful occupation of a current and continuing nature that provides 40 hours of gainful employment each week."[234] This language strongly suggests that a habitual resident is more than a refugee who is temporarily stationed in a refugee camp.[235] Rather, the term "self-supporting" implies a degree of permanency and assimilation into local life.[236] The same agency, the INS, promulgated both this more qualitative definition of the phrase "habitual resident," as well as the refugee definition's last habitual residence language.[237] Thus, courts should consider § 214.7(4)(i)'s habitual residence definition when determining last habitual residence for stateless refugees.[238]

Opponents could argue that, while there is no standard definition of last habitual residence, the INA does define the term "residence."[239] The INA defines "residence" as "a place of general abode."[240] The INA further defines the phrase "place of general abode" as one's "principal, actual dwelling place in fact, *without regard to intent*."[241]

Courts acknowledge, however, that precluding any consideration of intent is difficult.[242] Some courts have, in fact, addressed "intent to

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[232] *Id.* at 56,465 (stating that "the rule would require that the nonimmigrant be self-supporting in order to establish and maintain habitual residence").

[233] *Id.* at 56,464.

[234] 8 C.F.R. § 214.7(a)(7)(i).

[235] 65 Fed. Reg. 56,463.

[236] *Id.*

[237] *Id.* (stating INS promulgated regulation).

[238] *See supra* text accompanying notes 232-37.

[239] 8 U.S.C. § 1101(a)(33) (2007) ("The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, *without regard to intent*.") (emphasis added).

[240] *Id.*

[241] *Id.* (emphasis added).

[242] *See* Chan Wing Cheung v. Hamilton, 298 F.2d 459, 461 (1st Cir. 1962) ("Any concept of residence totally disregarding intent is something which courts may well find difficult."); Lum Chong v. Esperdy, 191 F. Supp. 935, 937 (S.D.N.Y. 1961) ("On general principles of fair play one might say that, where the departure was voluntary and without intent to constitute the execution of the deportation order, the United States should be deemed to remain the alien's actual dwelling place in fact."); Strupp v. Herter, 180 F. Supp. 440, 442 (S.D.N.Y. 1960) ("The determination of the 'residence' of a person 'without regard to intent' is difficult for courts whose thinking is conditioned by emphasis laid on the factor of the intent of the person when courts seek to determine his residence as that term is generally understood in the law.").

remain" in evaluating asylum claims, despite the INA's residence definition precluding intent.[243] Thus, examining qualitative characteristics with last habitual residence would reflect courts' inclinations to consider intent.[244] Moreover, analyzing qualitative factors furthers asylum law's goal of protecting non-citizens from persecution.[245]

C. The Paripovic *Court's Rationale Undermines Important Public Policy Considerations*

The essence of nationality is the legal bond between an individual and a state.[246] With this bond comes legal protection and access to fundamental rights.[247] Thus, the condition of statelessness raises particular policy concerns because no government is accountable for granting or enforcing even basic legal rights.[248] As such, courts should interpret the phrase "last habitual residence" to afford stateless refugees the most analogous relationship to nationality.[249] That is, courts should foster a relationship with the most potential for government protection.[250] The more significant a stateless refugee's connections are to a location, the more likely that he or she will receive some form of protection from local authorities.[251] Defining last

[243] *In re* Lee, 11 I. & N. Dec. 34, 36 (B.I.A. 1965) (finding that non-citizen's "principle dwelling place in fact," within meaning of 8 U.S.C. § 1101(a)(33) was not in United States because non-citizen did not maintain personal property, business, or financial interests, and further, had *intent to remain* in China); *see also Chan Wing Cheung*, 298 F.2d at 461; *Strupp*, 180 F. Supp. at 442 (addressing intent to remain).

[244] *See Chan Wing Cheung*, 298 F.2d at 461; *Strupp*, 180 F. Supp. at 442; *Lee*, 11 I. & N. Dec. at 36 (addressing intent to remain).

[245] *See infra* Part III.C (discussing policy justifications for considering qualitative characteristics in defining last habitual residence).

[246] *See* Batchelor, *supra* note 1, at 233 n.5 (describing effective link theory of nationality as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties").

[247] *Id.* at 235 (stating that stateless persons are denied vehicle for access to fundamental rights and legal protection).

[248] *Id.* ("If without legal existence, one is stripped of even the right to have rights, there being no foundation from which other rights might reliably flow.").

[249] *See infra* text accompanying notes 259-62; *see also* Universal Declaration of Human Rights, G.A. Res. 217A, at 15, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) ("Everyone has the right to a nationality.").

[250] *See infra* text accompanying notes 259-62.

[251] *See* Austl. Gov't Attorney-Gen.'s Dep't, *supra* note 194, ¶ 6.4 (discussing Hague Conference on Private International Law's interpretation of habitual residence and stating that, "[I]f a person has been resident in a country for some time, authorities in

habitual residence as a temporary location, where a stateless refugee never intended to settle, undermines this goal.[252]

In *Paripovic*, for example, the Third Circuit designated Serbia — Paripovic's temporary, unintended refuge — as his last habitual residence.[253] The court reached this conclusion in spite of Paripovic's argument that the Serbian government would likely deport him to Croatia.[254] Further, the court acknowledged that Paripovic had likely been persecuted in Croatia.[255] The fact that Serbia might promptly deport Paripovic exemplifies how stateless persons, with insignificant state connections, may have few, if any, legal rights.[256] Thus, courts should define last habitual residence as the country where a stateless refugee has the most qualitative *and* quantitative connections.[257] Ignoring qualitative factors threatens the primary policy rationale behind asylum law — to prevent returning individuals to governments that allow persecution.[258] A government is far less likely to protect an individual who has virtually no link to the state, aside from quantitative years in residence.[259] Courts can promote connections to

that country are more likely to be able to ascertain the needs and best interests of the person").

[252] *See, e.g.*, Paripovic v. Gonzales, 418 F.3d 240, 240-46 (3d Cir. 2005) (illustrating case where court defined last habitual residence as country where stateless refugee never intended to settle); *infra* Part II (describing *Paripovic*, where court found stateless refugee's last habitual residence to be location where he temporarily lived with no intent to remain).

[253] *Paripovic*, 418 F.3d at 245.

[254] *Id.* at 246.

[255] *Id.* at 242, 246 (stating IJ's determination that treatment of Serbs in Croatia "involved acts of persecution," and noting Paripovic's argument that "Serbia may forcibly remove him to Croatia").

[256] *See* Batchelor, *supra* note 1, at 235.

[257] *Cf. Paripovic*, 418 F.3d at 245 (illustrating case where court did not evaluate qualitative considerations and designated non-citizen to be deported to country where he had few state connections).

[258] *See* 8 U.S.C. § 1101(a)(42)(A) (2007) (requiring asylum applicant to establish past persecution or fear of future persecution in country of last habitual residence); *see also* United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, *available at* http://www.unhchr.ch/html/menu3/b/o_c_ref.htm (setting forth requirement for withholding of removal, codified by 8 U.S.C. § 1101, that no state "shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

[259] *See* Austl. Gov't Attorney-Gen.'s Dep't, *supra* note 194, ¶ 6.4 (stating that authorities are more likely to act in person's best interests if person has resided in

a state and increase the potential for state protection by evaluating the totality of a stateless refugee's claim.[260] This, in turn, may decrease the chance that the U.S. government would deport stateless refugees to life-threatening conditions.[261]

Valuing quantitative years in residence over all other considerations also raises additional social policy concerns.[262] Forcing a stateless refugee to relocate to a country where he or she has less qualitative connections often subjects him or her to additional social and economic burdens.[263] For example, the refugee might face new experiences of ethnic tension and discrimination as an outsider.[264] He or she might also lose kinship networks that provide critical information and support.[265] In addition, the refugee may be subject to new educational and language barriers.[266] Thus, accounting for qualitative connections to a state fosters stateless refugees' re-assimilation into society.[267] Overall, valuing factors beyond mere years in residence furthers the likelihood that stateless refugees will receive at least some legal protection.[268]

CONCLUSION

Nationality plays a crucial role in granting refugees relief from persecution.[269] Section 1101(a)(42)(A)'s last habitual residence provision, tailored to stateless refugees, reflects this importance.[270]

country for long time).

[260] *Cf. id.* ("The availability of evidence from relatives, friends, and business associates of an adult . . . are important considerations in this regard.").

[261] *Id.*

[262] *See* discussion *infra* Part III.C.

[263] *See generally* William B. Wood, *Forced Migration: Local Conflicts & International Dilemmas*, 84 ANNALS ASS'N AM. GEOGRAPHERS 607-34 (1994) (discussing problems arising from forced migration).

[264] *Id.* at 608 (listing factors affecting forcibly uprooted migrants).

[265] *Id.*

[266] *Id.* Additional problems arising from forced migration might include: "declining real incomes and large personal investments in the migration process, disparities of incomes and opportunities between place of national origin and potential destination . . . [loss] of traditional social status, . . . and weakening of traditional values in the face of powerful, foreign cultural forces." *Id.*

[267] *See supra* text accompanying notes 264-67.

[268] *See* Austl. Gov't Attorney-Gen.'s Dep't, *supra* note 194, ¶ 6.4 (stating that authorities are more likely to consider individual's best interest if person has resided in country for long time).

[269] *See supra* Introduction.

[270] *See supra* Part I; *see also* 8 U.S.C. § 1101(a)(42)(A) (2007); Refugee Act of

Case law, however, applies last habitual residence inconsistently.[271] In particular, the Third Circuit's last habitual residence determination in *Paripovic* directly conflicts with related precedent.[272] The *Paripovic* court erred in its analysis by disregarding canons of statutory construction, overlooking analogous law, and ignoring public policy.[273] The Third Circuit's approach does little to ensure that the U.S. government deports stateless refugees to countries where they have the best opportunity for legal protection.[274] Defining the phrase "last habitual residence" purely quantitatively will only foster the number of individuals with no nationality, and further, no country to call their home.[275]

1980, Pub. L. No. 96-212, 94 Stat. 102.

[271] *See supra* Part I.C (noting last habitual residence cases with conflicting analyses).

[272] *See supra* Parts I.C.2, II, and III (discussing case law, federal regulations, and policy that conflicts with *Paripovic* outcome). *Compare* Paripovic v. Gonzales, 418 F.3d 240, 245 (3d Cir. 2005) (defining last habitual residence as temporary location), *with* Elian v. Ashcroft, 103 F. App'x 78, 78-81 (9th Cir. 2004), *and* Ouda v. INS, 324 F.3d 445, 447 (6th Cir. 2003) (evaluating last habitual residence in context of both temporary location and birthplace).

[273] *See supra* Part III.

[274] *See supra* Part III.C.

[275] *See supra* Part III.C.