Practice Pointer: BIA Addresses the "Unable or Unwilling" Standard in *Matter of C-G-T-*

By the AILA Asylum and Refugee Committee[1]

In demonstrating eligibility for asylum, an applicant must show that the persecution suffered or feared is by the government or a group or actor that the government is "unable or unwilling" to control.[2] Following the Attorney General's now-vacated decisions in *Matter of A-B- I* and *Matter of A-B- II*, there was increasing debate over the proper legal standard for evaluating private actor persecution.[3] However, in *Matter of A-B- III*, the Attorney General vacated those decisions, indicating that "unable or unwilling" remains the correct standard over the alternative "completely helpless or condoned" standard.[4] Recently, the BIA reiterated the "unable or unwilling" standard as the correct legal standard in its 2023 precedent decision, *Matter of C-G-T-*, which specifically discussed that standard and provided additional guidance on how it can be met in the context of nonstate actor persecution.[5]

In *Matter of C-G-T-*, the BIA considered the asylum and withholding of removal application of a gay, HIV-positive applicant from the Dominican Republic, who had been physically and verbally abused by his father on account of his sexual orientation.[6] The BIA addressed several issues, including the one-year filing deadline, nexus to a protected ground, whether the applicant had a well-founded fear of future persecution on account of his sexual orientation, and whether the government was unable or unwilling to protect the applicant. The BIA affirmed the IJ's decision that the application was untimely, and thus, affirmed the denial of the asylum application. However, the BIA reversed the IJ on the other issues on appeal.

First, the BIA disagreed with the IJ's nexus determination. The IJ had concluded that the applicant's father did not know he was gay when he was abusing the applicant because the applicant had never told his father he was gay. Therefore, according to the IJ, the father had not abused the applicant on account of his sexual orientation. However, the BIA noted specific testimony and evidence in the record that the applicant's father called him a girl, frequently expressed animus toward gay people, and singled the applicant out for abuse because he believed the applicant to be gay.

Second, the BIA disagreed with the IJ's finding that the applicant would not be harmed in the Dominican Republic because no one knew he was gay or HIV-positive. The BIA stated that an applicant for asylum should not be forced to hide his sexual orientation in order to remain safe, and

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[2] *See* INA §101(a)(42)(A) (defining a refugee as a person who is "unable or unwilling to avail himself or herself of the protection of [their] country"); INA §208(b)(1).

[3] *Matter of A–B–*, 27 I&N Dec. 316, 337 (A.G. 2018) (stating that the "applicant must show that the government *condoned* the private actions 'or at least demonstrated a *complete helplessness* to protect the victim") (emphasis added), *vacated Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021). *But see Matter of A–B–*, 27 I&N Dec. 316, 320 (A.G. 2018) (also referencing the "unable or unwilling" standard in stating, "Generally, claims by aliens pertaining to … non-governmental actors will not qualify for asylum… . [I]n practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is *unable or unwilling* to address.") (emphasis added), *vacated Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

[4] *See Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

[5] *Matter of C-G-T-*, 28 I&N Dec. 740 (BIA 2023) (examining whether the government was unable or unwilling to protect the Dominican respondent, where he failed to report the harm inflicted upon him as a child).

[6] *Id.* at 741.

that adjudicators should not expect respondents to conceal their sexual orientation if removed to their home countries. This, of course, is not a new holding, but an important reminder for adjudicators that applicants should not be required to conceal or change their protected traits in order to remain safe and avoid persecution.

Third, and perhaps most importantly in this decision, the BIA addressed the IJ's finding that the applicant failed to show that the government was unable or unwilling to protect him from harm. In doing so, the BIA provided useful guidance on the application of the "unable or unwilling" standard for nonstate actor persecution. In finding that the applicant failed to show the government was unable or unwilling to protect him, the IJ had emphasized the respondent's failure, as a child, to report the harm he suffered at the hands of his father to the police. The BIA found this problematic for several reasons, including the applicant's young age and the fact that reporting his father's harm to the police may have made the child's circumstances worse.

The BIA noted that whether a government is unable or unwilling to protect an individual from persecution is a fact-specific inquiry. While the BIA acknowledged that failure to report harm is a relevant factor in that fact-specific inquiry, the BIA emphasized that it is also relevant to consider the reasonableness of *not* reporting the harm.[7] Quoting the First Circuit's decision in *Morales-Morales v. Sessions*, the BIA asserted that "'[a] failure to report mistreatment – even if based on the [respondent's] subjective belief that authorities are corrupt – is not, without more, sufficient to show that' the government is unable or unwilling to protect the respondent."[8] However – again quoting the First Circuit – the BIA emphasized that "failure to report harm is 'not necessarily fatal' to a claim of persecution if the applicant 'can demonstrate that reporting private abuse to government authorities would have been futile' or dangerous."[9] After setting forth this standard, the BIA then provided guidance for how IJs should analyze a failure to report harm, and whether such failure was reasonable.[10] The BIA stated that this was a "fact-based inquiry" that should consider "all evidence," including "the respondent's testimony, available corroborating evidence, and country conditions reports."[11] Thus, while there may be no per se reporting requirement, adjudicators must consider "the record as a whole," and there needs to be more evidence of the government's inability or unwillingness to protect than the applicant's "mere subjective belief" that reporting would be futile.[12]

In sum, there is no per se reporting requirement. If seeking protection from or reporting persecution to government authorities would be futile or would result in further abuse, the applicant is not expected or required to report abuse to government authorities.[13] However, this is a fact-specific inquiry, so

[7] *Matter of C-G-T-*, 28 I&N Dec. 740, 743 (BIA 2023).

[8] *Id.* (quoting *Morales-Morales v. Sessions*, 857 F.3d 130, 135 (1st Cir. 2017)).

[9] *Id.* (quoting *Rosales Justo v. Sessions*, 895 F.3d 154, 165 (1st Cir. 2018)).

[10] *Id.* at 744.

[11] *Id.*

[12] *Id.* ("A mere 'subjective belief" that reporting would be futile is not sufficient to establish that a government is unable or unwilling to provide protection.").

[13] *Matter of C-G-T-*, 28 I&N Dec. 740 (BIA 2023) (holding that a respondent's failure to report harm is not necessarily fatal to a claim of persecution if the respondent can demonstrate that reporting private abuse to government authorities would have been futile or dangerous); *Matter of S–A–*, 22 I&N Dec. 1327, 1333–35 (BIA 2000) (finding that testimony and country conditions indicated that it would be unproductive and possibly dangerous for a young female applicant to report her father's

practitioners should document why specifically it would have been futile or otherwise unreasonable for the applicant to report the harm to government officials. The applicant's testimony should not stand on its own, but should be supported by witness declarations, expert testimony, country conditions reports and articles, and other documentary evidence demonstrating that reporting the harm would have been futile or would have placed the applicant at greater risk.

abuse to government). *See also*, *e.g.*, *Portillo Flores v. Garland*, 3 F.4th 615 (4th Cir. 2021) (rejecting a per se reporting requirement because seeking government help may be futile or result in further abuse); *Orellana v. Barr*, 925 F.3d 145, 153 (4th Cir. 2019) (noting that the applicant is not required to "seek[] government assistance when doing so (1) 'would have been futile' or (2) 'would have subjected [him] to further abuse.'"); *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (finding credible testimony and evidence that reporting abuse is futile and potentially dangerous because Mexican police do not help LGBT individuals); Lopez v. *Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007); *Ortiz-Araniba v. Keisler*, 505 F.3d 39 (1st Cir. 2007); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1057 (9th Cir. 2006) (holding that reporting the harm to the government is not required if the applicant can establish that doing so would have been futile or would have subjected them to further abuse); *Surita v. INS*, 95 F.3d 814, 819–20 (9th Cir. 1996). *But see Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011) (finding that the applicant did not meet his burden of showing the government was unable or unwilling to control his attackers where he failed to report sexual abuse).