In August 1993, Fredy Orlando Ventura, a citizen of Guatemala, crossed the Mexico-United States border into Texas and entered the United States without inspection. He applied for asylum in the United States, asserting a subjective fear and presenting objective evidence that he would be killed by guerrillas in Guatemala because of his political opinion or the opinion imputed to him by these guerrillas. In October, 1994, he was notified by the Immigration and Naturalization Service that it intended to deny his request for asylum, and in 1995, the Attorney General began deportation proceedings against him.

At a deportation hearing before an Immigration Judge conducted in 1998, Ventura testified that he had received threats of death or harm unless he joined the guerrilla army, that his family members had close ties to the Guatemalan military, and that, in his view, the guerrillas consequently believed he held “inimical political opinions.” Specifically, he both testified and stated in his asylum application that “because members of his family are in the military, the guerrillas perceive him to be their enemy, and for that reason they have threatened him.” He testified that on three occasions between 1992 and 1993, a Guatemalan guerrilla group had left threatening spray painted messages on the outside wall of his home, reading, “‘Fredy Ventura, you must join us, or your family will suffer the consequences.’”

Although Ventura testified that he was not familiar with the guerrillas’ ideology, he stated in his asylum application that he sympathized with the military and not with the guerrillas. Moreover, Ventura’s explained that he and his cousin Oswaldo Ventura, a lieutenant with twelve years service in the army, grew up together, and that Oswaldo stayed at Ventura’s house during his monthly leave. Furthermore, Ventura testified that his uncle, Arnoldo Ventura, is a Military Commissioner, responsible for recruiting Guatemalan men to join the army.

Approximately five years before Ventura fled Guatemala, Arnoldo was nearly killed by guerrillas, who attacked him with machetes. Another of Ventura’s cousins, Lorenzo Ventura, who was in the army, was killed by guerrillas in 1988, while walking in a village out of uniform. In addition, Ventura’s friend, Martin Contreras, was murdered by guerrillas after receiving threats similar to those Ventura received, demanding that he join the guerrillas.

However, that was before December, 1996, when Guatemalan peace accords were signed.

Despite the fact that Ventura had personally received three threatening messages, and that family members and friends close to him had been killed or persecuted by the guerrillas, the Supreme Court decided in a per curiam decision, without the benefit of oral argument, that the case should have been remanded. The Supreme Court concluded that the United States Court of Appeals for the Ninth Circuit exceeded its legal authority when it decided that “changed circumstances” in Guatemala resulting from the peace accords did not minimize Ventura’s risk of future persecution on account of an imputed political opinion. The Court ruled that “[A]fter examining the record, we find that well-established principles of administrative law did require the Court of Appeals to remand
the ‘changed circumstances’ question to the BIA,”¹⁰ and summarily reversed the Ninth Circuit’s decision not to remand.

In this article, I examine the opinions leading up to and including the Supreme Court’s determination in INS v. Ventura. In the course of doing so, I consider three critical issues that are essential to smart-lawyering: what constitutes past persecution, what evidence is required to rebut a presumption of future persecution, and which body is ultimately responsible for determining asylum eligibility?

The Immigration Judge’s Decision

The Immigration Judge denied Ventura’s asylum application, finding that he “failed to present adequate objective evidence to show that his fear is based on one of the protected statutory grounds,”¹¹ and that his claim was controlled by the Supreme Court’s decision in INS v. Elias-Zacarias.¹² She also concluded that “in view of changing country conditions,” even if the guerrillas had an interest in him in the past, Ventura failed to demonstrate a well-founded fear of persecution in the future.¹³ In particular, she questioned whether the guerrillas would “continue to have motivation and inclination to persecute him in the future.”¹⁴

The Immigration Judge’s decision was based principally on factual determinations, ie, that Ventura failed to provide persuasive objective evidence, and that changes in country conditions undermined the currency of Ventura’s claim. However, she also concluded that, as matter of law, under INS v. Elias-Zacarias, Ventura could not be said to have a well-founded fear of persecution on a statutorily protected ground.

The Board of Immigration Appeals’ Decision

In a per curiam decision, the Board of Immigration Appeals indicated that it had conducted a de novo review of the decision of the Immigration Judge. The Board found that Ventura’s fears that the guerrillas threatened him on account of his contacts and associations with the Guatemalan army were little more than the product of his own speculation.

The Board rejected Ventura's “on account of” argument, stating that it agreed with the IJ's decision that Ventura had failed to make the required showing that he was persecuted on account of a statutorily protected ground.¹⁵ The Board did not address the issue of changed country conditions, and simply dismissed Ventura's appeal on the basis that he had not demonstrated that he was a refugee as defined in section101(a)(42)(A) of the INA.¹⁶

The Ninth Circuit’s Decision

The Ninth Circuit found that Ventura had been a victim of past persecution. The court concluded that, although “[n]either the BIA, the IJ, nor the parties addressed the question of whether the threats to Ventura rose to the level of past persecution. . . it is clear from the record that they did.”¹⁷
In reaching this conclusion, the Ninth Circuit panel invoked several legal principles that are well-established in Ninth Circuit asylum jurisprudence. First, the panel recognized that “[w]e will accept as true an applicant’s testimony when neither the IJ nor the BIA question the applicant's credibility.” Second, the panel reiterated that “because asylum cases are inherently difficult to prove, an applicant may establish his case through his [or her] own testimony alone.” Third, the panel noted that “[a] bald assertion that . . . credible testimony was ‘speculation’ is insufficient. Some evidence or support for that conclusion must be offered.” Fourth, the panel reiterated the Ninth Circuit’s view that “[D]eath threats and forced recruitment efforts by a revolutionary group constitute persecution.” And, fifth, the Ninth Circuit panel also recognized that “past political persecution of family members provides evidence of imputed political opinion of an asylum applicant.”

The panel looked to the Ninth Circuit’s earlier decision in Del Carmen Molina v. INS, in which past persecution was established on similar facts. There, the petitioner, whose family was involved in the military and who opposed the El Salvadoran guerrillas, received two notes from guerrillas threatening her family if she did not go talk to them.

In Del Carmen Molina, the notes gave no explicit indication that the guerrillas were motivated by the asylum seeker’s political opinion; rather, the notes stated that the guerrillas wanted to talk to her about her cousins and to take her with them. However, the petitioner’s credible and uncontradicted testimony was that the guerrillas threatened her because of her political opinion. Based on this evidence, the Ninth Circuit concluded that the BIA’s determination that the petitioner was not persecuted on account of actual or imputed political opinion was “not supported by reasonable, substantial, and probative evidence.”

Relying principally on Del Carmen Medina, the Ninth Circuit panel concluded that the record in Ventura’s case supported the conclusion that he had been subject to persecution. The panel rejected the INS’ argument that Ventura’s claim was more similar to that asserted in INS v. Elias-Zacarias than to either Del Carmen Molina or Shoafara. As the panel noted, in Elias-Zacarias, Guatemalan guerrillas attempted to recruit the petitioner, but he refused “because the guerrillas [were] against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas.” Accordingly, the Supreme Court held that “a threat of forced recruitment does not alone constitute persecution on the basis of political opinion.”

The panel found that “Ventura's circumstances are far different from those of the petitioner in Elias-Zacarias.” Specifically, in Elias-Zacarias, there was “no evidence that the petitioner had an actual or imputed political motive to resist recruitment,” and he “did not testify that he believed the guerrillas imputed any political opinion to him, that any family members had been persecuted in the past by guerrillas, or that he had any anti-guerrillas ties.”

In particular, unlike the asylum seeker in Ochave v. INS, “Ventura presented overwhelming evidence that his persecutors knew exactly who he was: the guerrillas came to his home and painted notes on the wall of his house three separate times, addressing the notes to him personally.” Moreover, there was “[n]o evidence in the record [that] contradicts Ventura’s credible testimony that the persecutors targeted him because they believed he held anti-guerrilla beliefs.” The panel also found Ventura’s
circumstances “different from the petitioner's in Molina-Morales v. INS, where there was no evidence that the attack on the petitioner was politically motivated, that the petitioner had any ties to an opposing political party, or that the persecutors had any reason to believe the petitioner opposed their views. Likewise, the facts in Ventura’s case were distinguishable from those in Arriaga-Barrientos v. INS, which “failed to demonstrate any reason for the persecutors to impute a political opinion to the petitioner.”

The Ninth Circuit panel reasoned that “[i]n contrast to Ochave, Molina-Morales, and Arriaga-Barrientos, Ventura's level of past persecution and his credible, uncontradicted testimony regarding his persecutors' motives compel the conclusion that he was persecuted on account of imputed political opinion.” The panel stated explicitly that Ventura is presumed to have a well-founded fear of persecution on account of imputed political opinion because he demonstrated past persecution on that protected ground.

The Ninth Circuit panel went on to determine that the record lacked adequate evidence to conclude that conditions in Guatemala had changed to the extent that there was no longer any basis for Ventura to have a well-founded fear of persecution, and granted Ventura asylum. The panel noted that although the INS presented evidence of changed country conditions to rebut the presumption of future persecution, the BIA did not address the issue only because it determined Ventura had not met his burden of establishing that he was persecuted on account of an imputed political opinion.

The Ninth Circuit specified that when the BIA does not reach the issue of whether changed country conditions rebutted the presumption of a well-founded fear of future persecution, it will generally remand to the BIA for it to consider the issue. The court stated, however, that it would not remand “when it is clear that we would be compelled to reverse the BIA’s decision if the BIA decided the matter against the applicant.” The court concluded that remand would be inappropriate because “the INS's evidence of changed country conditions clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted.”

The Supreme Court decision

The Supreme Court granted the government’s petition for certiorari, finding that the Ninth Circuit had committed clear error, as it “seriously disregarded the agency's legally mandated role” by “independently creating potentially far-reaching legal precedent about significant political change in Guatemala, a highly complex and sensitive matter.” The Court ruled that “[a]fter examining the record, we find that well-established principles of administrative law did require the Court of Appeals to remand the “changed circumstances” question to the BIA.”

The Supreme Court emphasized that “[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision here in question.” In such circumstances a “judicial judgment cannot be made to do service for an administrative judgment.”

Notably, the Supreme Court apparently accepted the Ninth Circuit’s determination that Ventura had been subjected to past persecution. As related by the Supreme Court, the record indicates that the Immigration Judge recognized (and the BIA
affirmed), that Ventura subjectively believed that the guerrillas’ interest in him was politically based, and that the IJ credited testimony showing (a) that Orlando Ventura’s family had many connections to the military, (b) that he was very close to one cousin, an army lieutenant who had served for almost 12 years, (c) that in 1987 his uncle, a local military commissioner responsible for recruiting, was attacked by people with machetes, and (d) that in 1988 his cousin (a soldier) and the cousin’s brother (a civilian) were both shot at and the soldier-cousin killed.

The Supreme Court specified that “[t]he Court of Appeals, reviewing the BIA’s decision, decided that this evidence ‘compelled’ it to reject the BIA’s conclusion” that the respondent had not shown persecution on account of a protected ground. The Supreme Court did not address, question or contradict this conclusion.

However, the Court ruled that “[n]o one disputes the basic legal principles that govern remand.” The Supreme Court acknowledged the government’s assertion that the Ninth Circuit’s determination not to remand to the agency constitutes a “‘recurring error [that] puts the Ninth Circuit in conflict with other courts of appeal, which generally respect the BIA’s role as fact-finder by remanding to the BIA in similar situations.” The Court specifically noted another petition for certiorari filed in an asylum case arising in the Ninth Circuit in which the government referred to “eight other recent decisions from the Court of Appeals for the Ninth Circuit, which, in the Government’s view, demonstrate this trend.”

The Supreme Court rebuffed what it viewed as the effort of an “appellate court. . .[to] intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” It found that “the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” The Court stated, correctly, that “remand could lead to the presentation of further evidence of current circumstances in Guatemala -- evidence that may well prove enlightening given the five years that have elapsed since the report was written.” Finding “clear error,” the Supreme Court emphasized the importance of giving the BIA the opportunity to address the matter of changed country conditions, or other circumstances bearing on the likelihood of persecution in the first instance, in light of the agency’s expertise.

At issue in this regard in Ventura is the 1997 State Department report on conditions in Guatemala. Although the Supreme Court cautioned that the agency should make the initial assessment of such evidence, the Court went on to note that the State Department report is, at most, ambiguous about the specific conditions in Guatemala today.

Referring to the 1996 peace agreement, the Court indicated that the “bulk of the report makes clear that considerable change has occurred.” At the same time, the Supreme Court recognizes that the report reflects that even “after the March cease-fire, guerrillas continued to employ death threats” and that “the level of crime and violence now seems to be higher than in the recent past.” Then, the Supreme Court notes that the report itself qualifies these statements by stating that: “[a]lthough the level of crime and violence now seems to be higher than in the recent past, the underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance,” i.e., not politics.

Although harshly worded, the Supreme Court’s reversal of the Ninth Circuit’s decision is extremely limited with respect to Ventura’s claim. Principally, it goes only to
what the Court finds to be a procedural error committed by the Ninth Circuit panel. Secondarily, it provides general commentary on the reports of country conditions in Guatemala, which is not dispositive of Ventura’s claim.

**Considerations for smart-lawyering**

So, what constitutes past persecution? What evidence is required to rebut a presumption of future persecution? And, which body is ultimately responsible for determining asylum eligibility?

The Supreme Court’s November 4, 2002 decision is as important for what it does not say in response to these inquiries, as for what it does hold. As noted above, the Court ruled that the Ninth Circuit should not have decided the issue of “changed circumstances,” but remanded to allow the BIA to address that matter.

Inasmuch as the Supreme Court emphasizes the agency’s primary role in making the “changed circumstances” determination, the weight to be given its commentary on country conditions in Guatemala as reported in the record should be limited. Apart from leaving open the question of “changed circumstances” for the agency to decide, the Supreme Court’s decision does not reach any of the other important substantive asylum issues decided by the Ninth Circuit in Ventura’s case. These legal principles remain binding on litigants and the agency.

**FOOTNOTES:**

1. See section 208(a)(1), 8 U.S.C. 1158(a)(1) (permitting “an alien who is physically present in the United States. . .irrespective of such alien’s status” to apply for asylum). With certain exceptions, the Office of International Affairs of the Immigration and Naturalization Service has initial jurisdiction over an asylum claim filed by an alien who is physically present in the United States or seeking admission at a port-of-entry. 8 C.F.R. 208.2.

2. See section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A). At the agency level, applications for asylum are considered to be sensitive matters, warranting confidentiality. See 8 C.F.R. 208. 6 (prohibiting disclosure to third parties other than those specified in the regulations). However, confidentiality is not preserved once an asylum seeker appeals the determination to a federal district court or circuit court of appeals.

3. Proceedings that commenced before April 1, 1997 are governed by the law in existence prior to April 1, 1997. 8 C.F.R. 240.40. See also 8 C.F.R. 240.49(c) (governing applications for asylum in deportation proceedings).


5. Ventura v. INS, 264 F.3d 1150, 1153 (9th Cir. 2001); 2001 U.S. App. LEXIS 19978.

6. Id. at 1153.
7. Id.

8. See Bureau of Democracy, Human Rights and Labor, United States Department of State, Guatemala -- Profile of Asylum Claims & Country Conditions 2 (June 1997) (1997 Profile). Following the December 1996 accords between the Guatemalan government and the Guatemalan National Revolutionary Party (URNG) (the umbrella guerrilla organization alliance), the URNG “dissolved itself to devote its efforts to legal political activity.” Ventura v. INS, supra, at 1157. Although this brought about a “marked improvement in the human rights situation,” the risk of persecution persisted as “even after the March cease-fire, guerrillas continue to employ death threats . . . .” Id.

9. 2002 U.S. LEXIS 8313, at *7 (“Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands”).

10. Id. at *6.

11. Id. See also Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals for the Ninth Circuit, at 7.


13. See Ventura v. INS, supra. at 1153-54.

14. Id.

15. The literal language of the statute provides that “the term refugee means (A) any person . . . because of persecution ro a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.....” Section 101(a)(42)(A) of the Act (emphasis added).

16. Apparently, the Board did not consider Ventura’s brief in reaching its decision because it was untimely filed. See Ventura v. INS, supra (citing In re Fredy Orlando Ventura, A72 688 860 (Board of Immigration Appeals Feb. 24, 1999) (interim order).

17. Ventura v. INS, supra, at 1154. At the same time, the court recognized that “[w]hen the BIA conducts its own review of the record, our review is limited to its decision.” Ventura v. INS, supra, at 1153 (citing Singh v. INS, 94 F.3d 1353, 1358 (9th Cir.1996)).

18. Ventura v. INS, supra, at 1154 (citing Kamla Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995)).

19. Id. (citing Shoafera v. INS, 228 F.3d 1070, 1075 (9th Cir. 2000))(internal citations omitted).
20. *Id.* at 1155 (quoting *Shoafera v. INS, supra*, at 1075).

21. See *Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); see also *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988) (“Forced recruitment by a revolutionary army is tantamount to kidnaping, and is therefore persecution.”).

22. *Del Carmen Molina v. INS*, 170 F.3d 1247, 1250 (9th Cir. 1999). See also *Ventura v. INS, supra*, at 1154 (citing *Ramirez Rivas v. INS*, 899 F.2d 864, 868-71 (9th Cir. 1990)). “In such cases, “the trier of fact must examine how close a relationship exists between the persecution of family members and the situation of the applicant.”” *Sangha*, 103 F.3d *supra*, at 1489 (citing *Arriaga-Barrientos v. U.S. INS*, 937 F.2d 411, 414 (9th Cir. 1991)).


25. *Id.*


27. *Id* at 1155-56 (quoting *Elias-Zacarias*, 502 U.S. at 480).

28. *Id.* at 1156 (citing *Elias-Zacarias, supra*, at 482-83).

29. *Id.*

30. *Id.*

31. *Id.* (contrasting Ventura’s situation to that of the petitioner in *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001)).

32. *Id.*

33. *Id.* (citing 237 F.3d 1048, 1050-52 (9th Cir. 2001)).

34. *Id.* (citing 937 F.2d 411 (9th Cir. 1991)).

35. *Id.* at 1156-57.

36. *Id.* at 1157 (citing 65 Fed. Reg. 76,121, 76,133 (Dec. 6, 2000) (to be codified at 8 C.F.R. § 208.13(b)(1))).

37. *Id.* (citing *Navas v. INS*, 217 F.3d 646, 662 (9th Cir. 2000); see also *Gafoor v. INS*, 231 F.3d 645, 656 n. 6 (9th Cir. 2000)).
38. Id. at 1157.


40. Id. at *6.

41. Id. at *6-7 (citing Elias-Zacarias, 502 U.S. at 481; INS v. Aguirre-Aguirre, 526 U.S. 415, (1999)).

42. Id. (citing SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)).

43. Id. at *4 (citing 264 F.3d at 1154 (emphasis added)).

44. INS v. Ventura, supra, at *6-7.

45. Id at *5-6 (citing Pet. for Cert. 11).


47. Id.

48. Id. at *7 (citing SEC v. Chenery Corp., supra, at 196).

49. Id. at *9 (citing 8 C.F.R. §§ 3.1, 3.2 (permitting the BIA to reopen the record and to remand to the Immigration Judge as appropriate)).

50. Id. at * 8.

51. Id.

52. Id.

53. Id. at * 8/ p. 4 (emphasis in Supreme Court decision). The Court also notes that the report suggests “[in] our experience,” that “only party leaders or high-profile activists generally would be vulnerable to such harassment and usually only in their home communities.” Id. at 8-9 (“This latter phrase “only in their home communities” is particularly important in light of the fact that an individual who can relocate safely within his home country ordinarily cannot qualify for asylum here. See 8 C.F.R. § 208.13(b)(1)(i) (2002)”).