

Asylum Seekers

The Legal Aid Society

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Who We Are

The Legal Aid Society (LAS) was founded in 1876. At the time, it was the first legal office for low-income people in the nation. LAS is built on one simple but powerful belief: **that no New Yorker should be denied the right to equal justice.**

LAS created its Immigration Law Unit (ILU) to:

- provide immigration legal representation to low-income New Yorkers seeking relief for themselves and their families;
- assist those in detention and fighting unlawful deportations; and
- engage in affirmative litigation work to create large-scale impacts for immigrants.

Over the most recent year, ILU assisted in 7,018 individual legal matters benefiting 16,960 New Yorkers citywide.

In any asylum/withholding case, we are required to ask and answer the following questions:

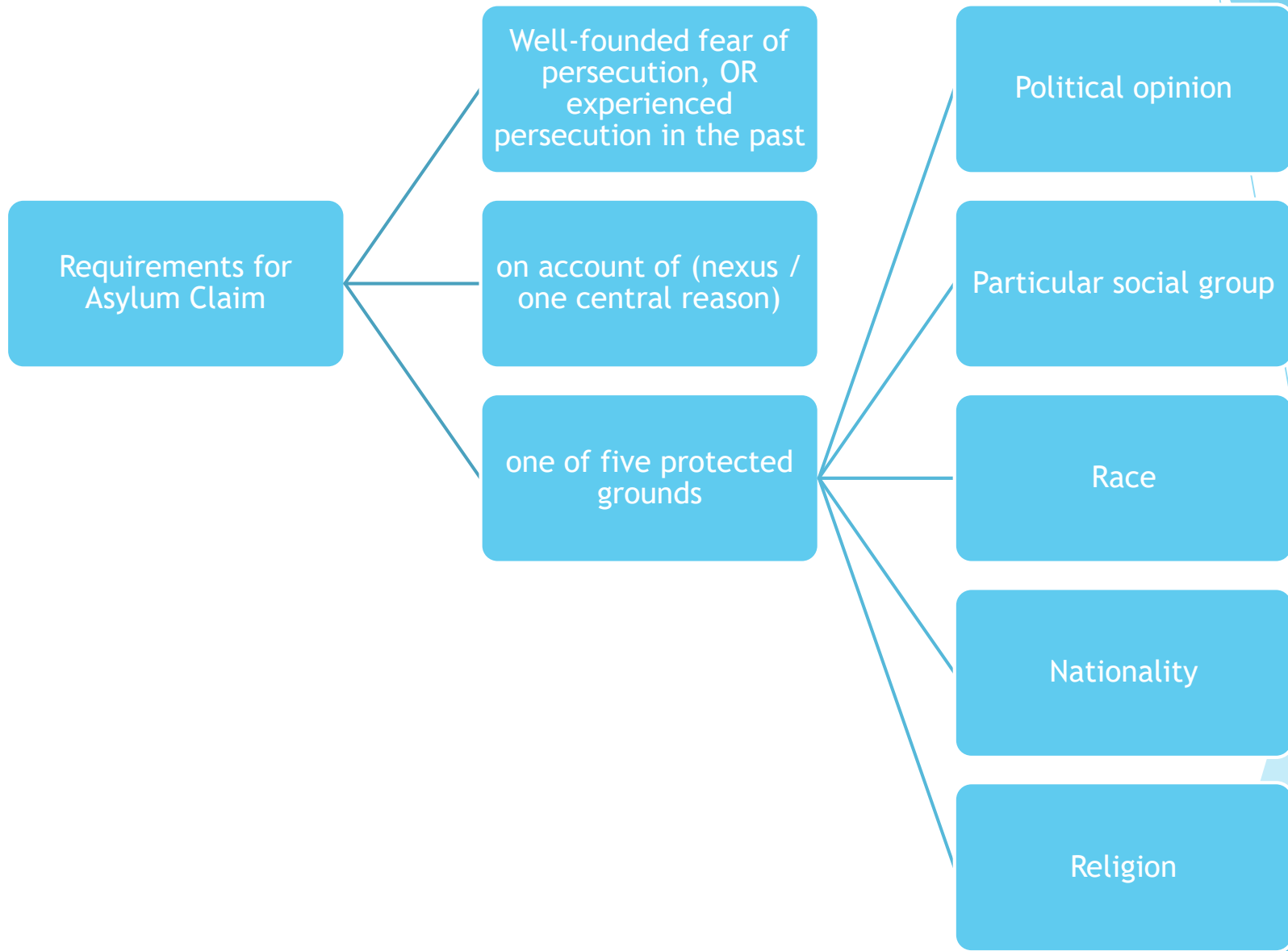
- ▶ WHAT is going to happen? (persecution)
- ▶ WHY is it going to happen? (nexus)
- ▶ WHO is going to do it? (government action requirement)
- ▶ WHERE will it happen? (internal relocation / existence of countrywide threat)

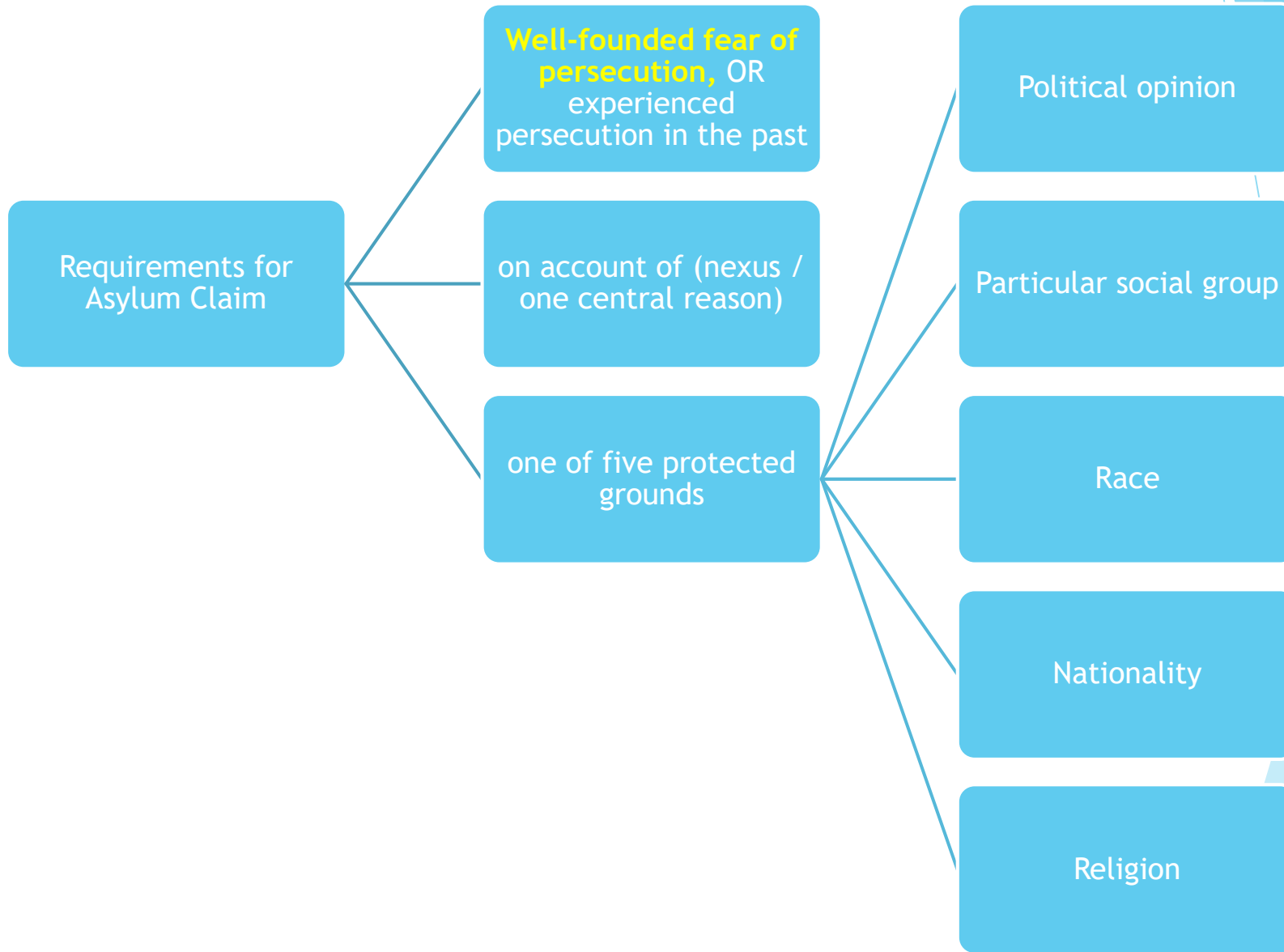
Asylee vs Refugee

- ▶ Refugees are **outside** the US
 - ▶ Special humanitarian concern to the US
 - ▶ Processed by Office of Refugee Resettlement
 - ▶ Arrive as refugees, with resettlement assistance
- ▶ Asylum seekers are **within** the US
 - ▶ Must apply within one year of arriving
 - ▶ Can come from any country
 - ▶ Manner of entry doesn't matter (EWI, parole, admission all fine)

The Fundamentals

- ▶ Establish a **well founded fear** of future **persecution on account of a** protected ground:
 - ▶ Race
 - ▶ Religion
 - ▶ Nationality
 - ▶ Political Opinion
 - ▶ Membership in a Particular Social Group
- ▶ A protected ground must be “one central reason” for the persecution
- ▶ Applicant must testify credibly and corroborate material elements of their claim
- ▶ Persecution is perpetrated by the government or an individual or organization that the government is unable or unwilling to control
- ▶ Must file within one year of arrival (day of arrival = day 0)





The WHAT: Persecution

The harm must be sufficiently severe in order to constitute persecution!

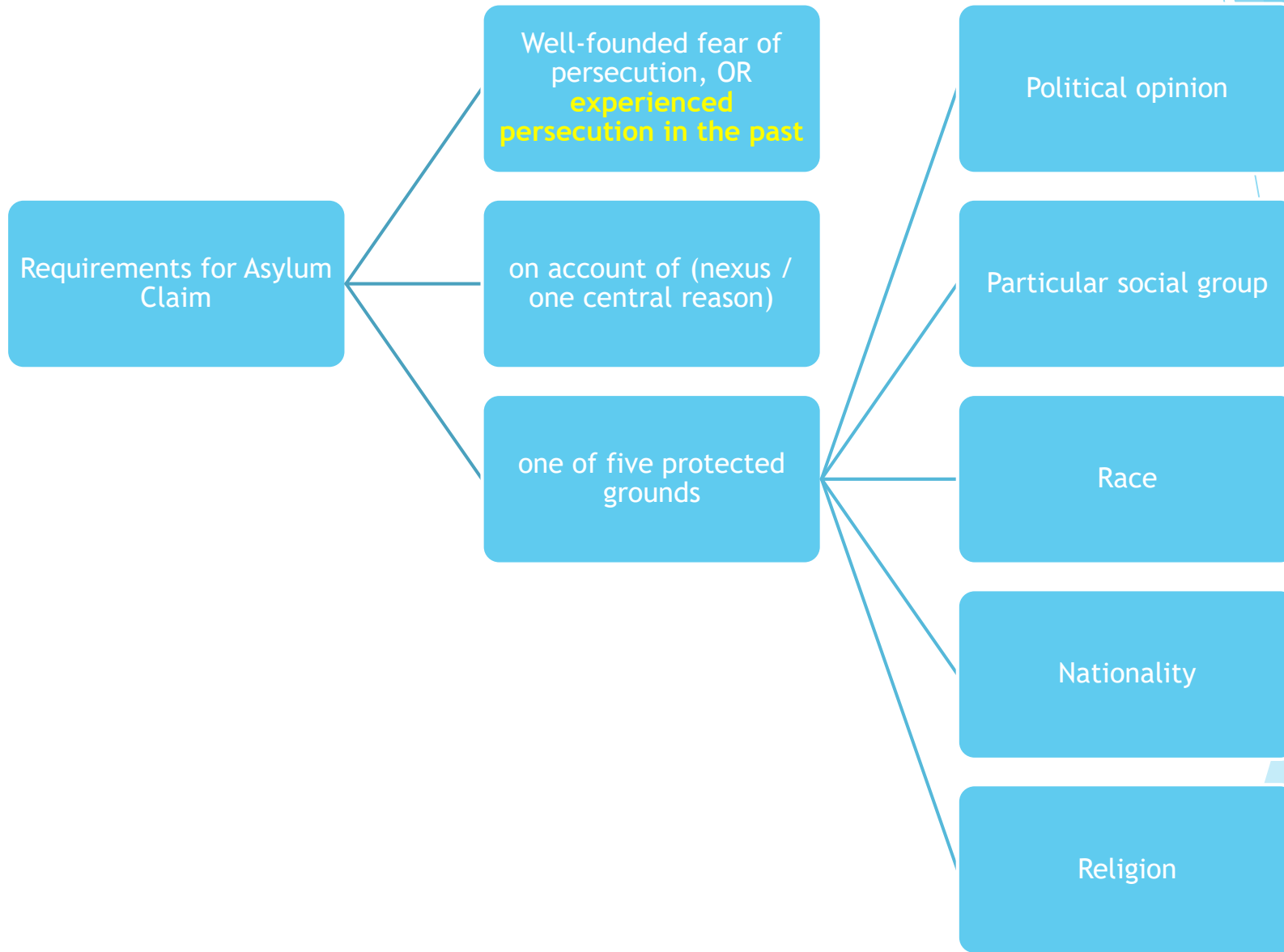
- Physical abuse, rape, kidnapping, confinement, non-life-threatening violence, on-going domestic violence
- Economic restrictions so severe that they constitute a threat to life or freedom
- Threats to life or freedom
- The harm must be considered **cumulatively** to properly analyze whether it rises to the level of persecution
- Age of the applicant at the time of the harm is an important factor in the persecution analysis, Jorge Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006)

Persecution

- ▶ Cumulative effect
 - ▶ Whether the combination of all incidents rise to the level of persecution
- ▶ Applicant's subjective opinions and feelings must be considered
 - ▶ Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary. (*UN Handbook*)
- ▶ Persecutor need not intend to harm the applicant
 - ▶ Might intend to help, or adhere to tradition (forced marriage; LGBTQ conversion therapy; FGM)

Well-Founded Fear

- Subjective fear
 - Does the client feel afraid?
- Objective fear
 - Is there a rational basis for the fear?
 - Credible, direct, and specific evidence



Past Persecution

Example: Salim is from Tunisia. From 2005 to 2009, the government imprisoned him because of his political beliefs and activities. He was never charged with a crime.

In 2011, the ruling party was overthrown and Tunisia held democratic elections, which completely changed the government.

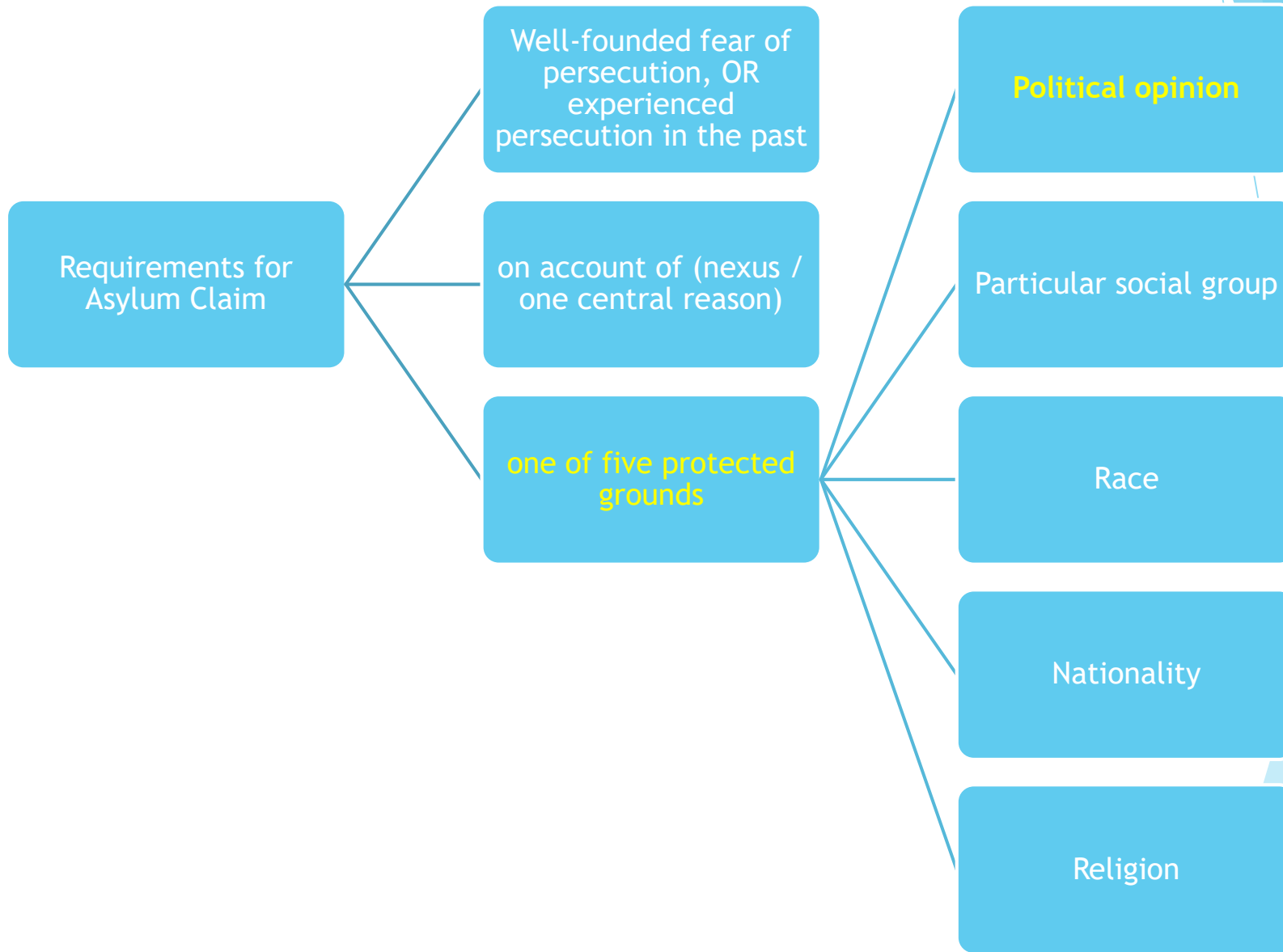
Salim does **not** fear persecution in Tunisia now. Therefore, although Salim can demonstrate past persecution, the government may be able to rebut the presumption of a fear of persecution in the future.

Past Persecution – Humanitarian Asylum

For **severe past** persecution, may be granted “humanitarian asylum” even without a well-founded fear of **future** persecution.

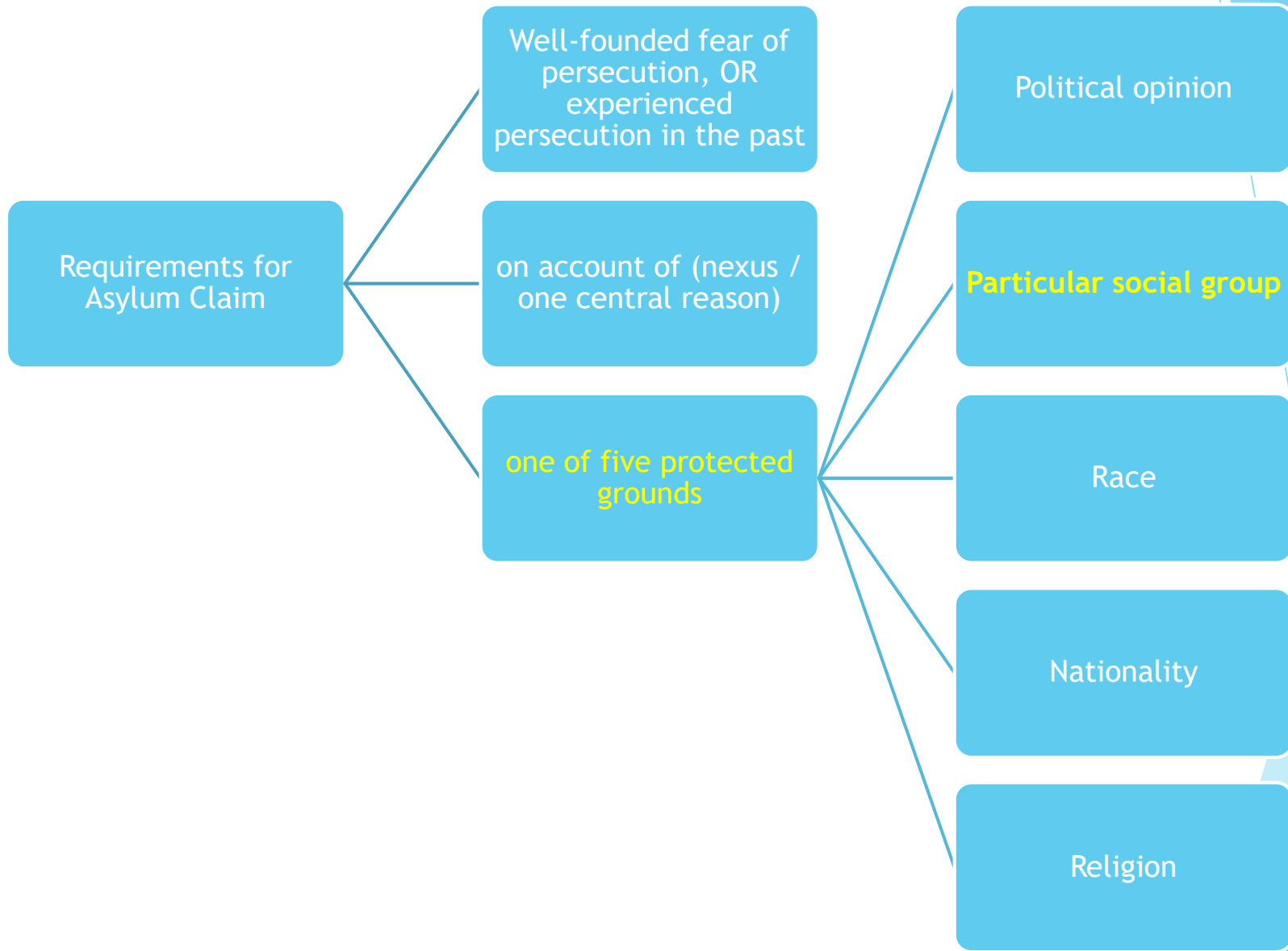
Need to demonstrate either:

1. Compelling reasons for being unwilling or unable to return to the country of persecution arising out of the severity of past persecution; **or**
2. A reasonable possibility of suffering **other serious harm** if removed to that country. The BIA has clarified that “other serious harm” need not be based on a protected ground, but must be serious enough to amount to persecution.



What is a political opinion?

- ▶ The obvious: political affiliation, electoral politics, party membership
- ▶ The less obvious: anti-corruption, anti-gang/narco
 - ▶ (1) **A larger purpose** – a challenge to the ruling regime motivated by something more than self interest
 - ▶ (2) **Resistance as political** when resisting an anti-government organization



What is a Particular Social Group?

(1) Defined by a *common immutable characteristic*

- Innate characteristic or shared past experience
- Something the applicant cannot change or should not be required to change

(2) Defined with *sufficient particularity*

- “well-defined boundaries” Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014)
- Terms used to describe the group have common accepted definitions within the society in question
- Is it sufficiently discrete, not overly broad or amorphous?

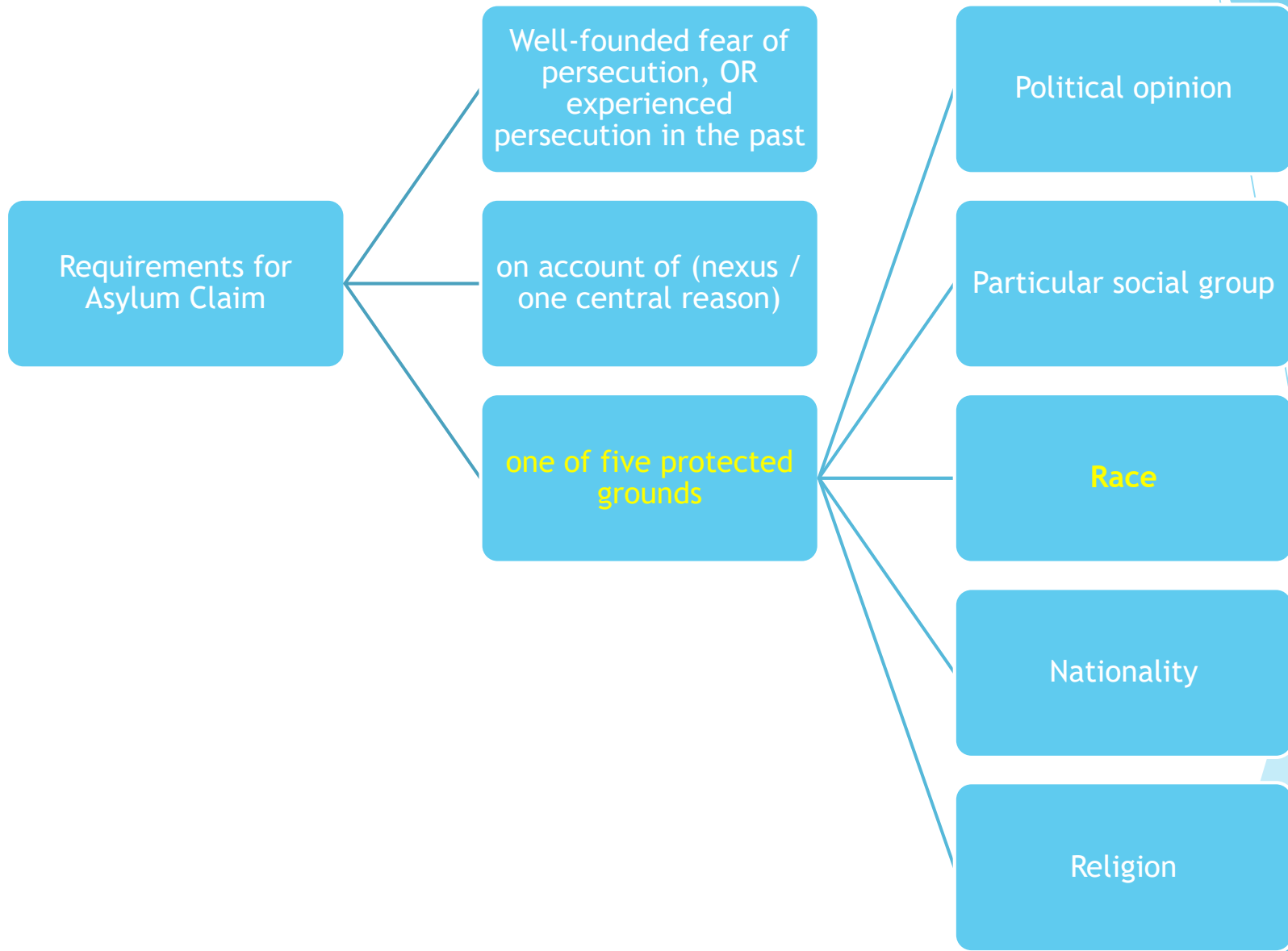
(3) Must be *socially distinct*

- “there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. Although the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.” W-G-R-, 26 I&N Dec. at 217.

Particular Social Group

Examples:

- ▶ Family-based groups (“the Adriene Holder family” or “immediate family members of Adriene Holder”)
- ▶ Cooperating witnesses
- ▶ Young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice
- ▶ Married Guatemalan women unable to leave a relationship
- ▶ LGBTQIA+
- ▶ Garifuna land defender



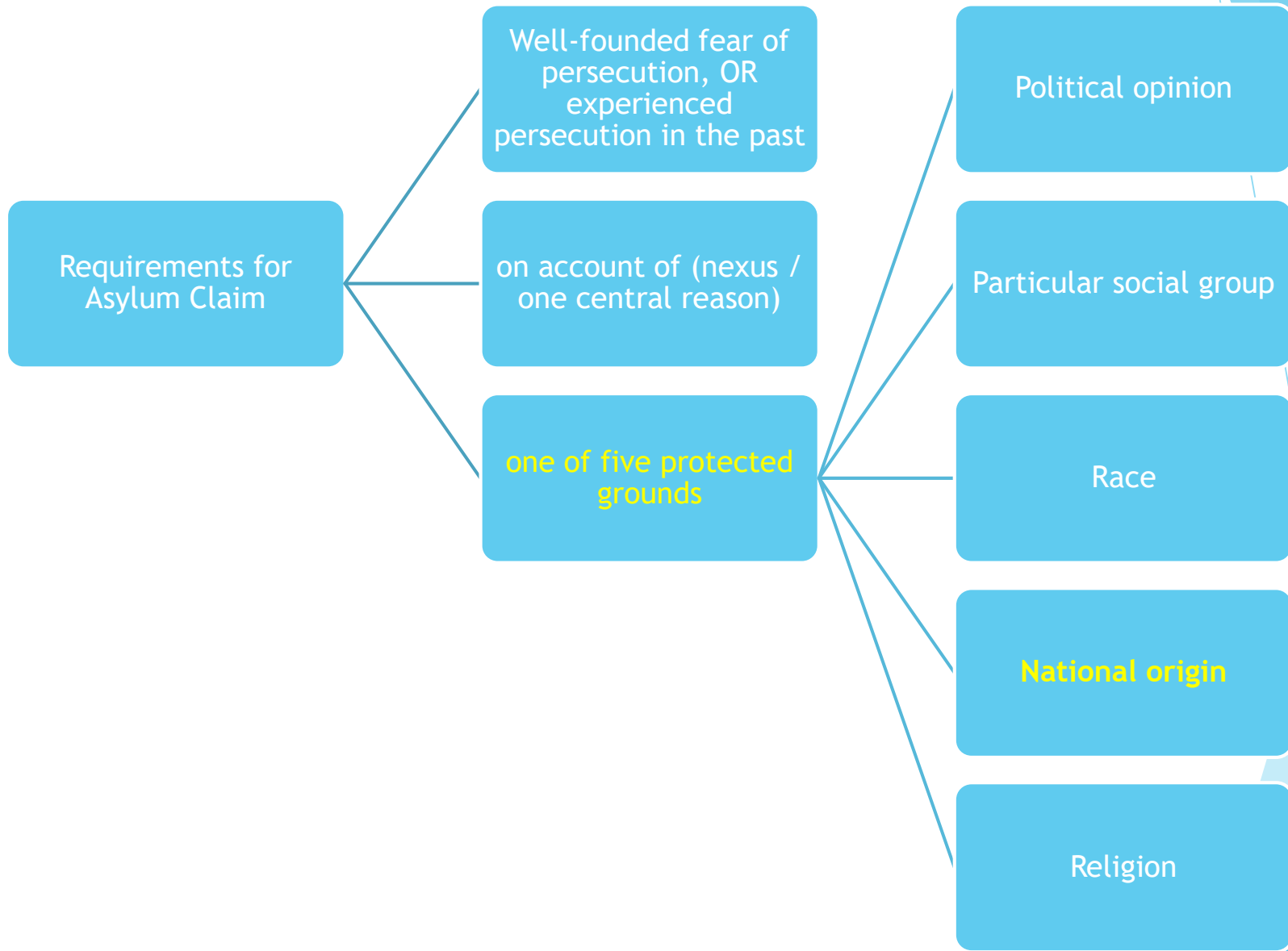
Race

UN Handbook:

- ▶ *“race ... has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as ‘races’ in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority within a larger population.”*
- ▶ *racial discrimination amounts to persecution if “a person’s human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences.”*

Race

- ▶ Relatively few cases granted solely on **race**
 - Overbroad; floodgates concern
- ▶ Maybe based on **ethnicity**
 - Indigenous Guatemalans
 - Indo-Fijians in Fiji



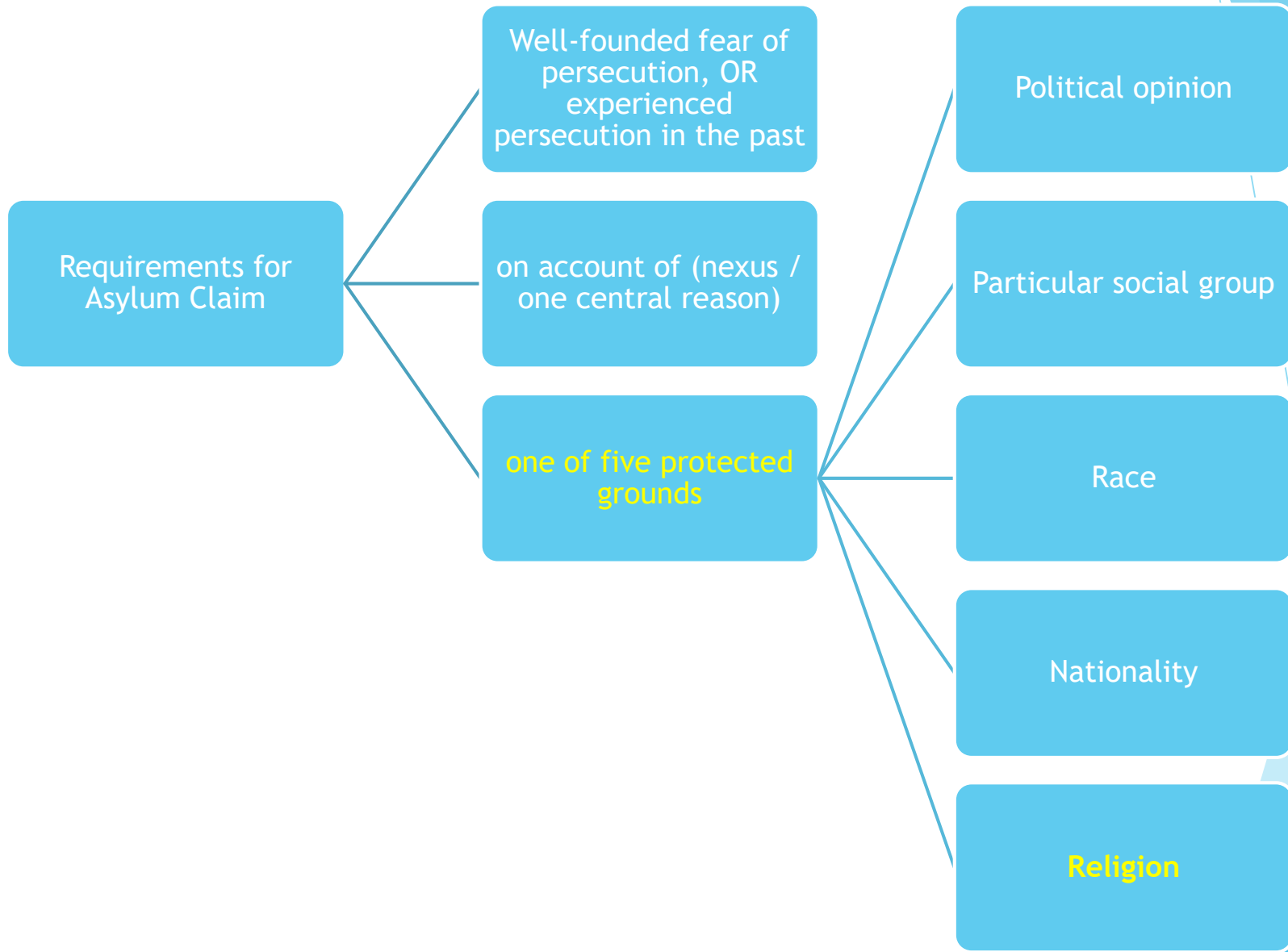
Nationality and Political Opinion

UN Handbook states:

“The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecutions for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific ‘nationality.’”

Example of convergence nationality and political opinion:

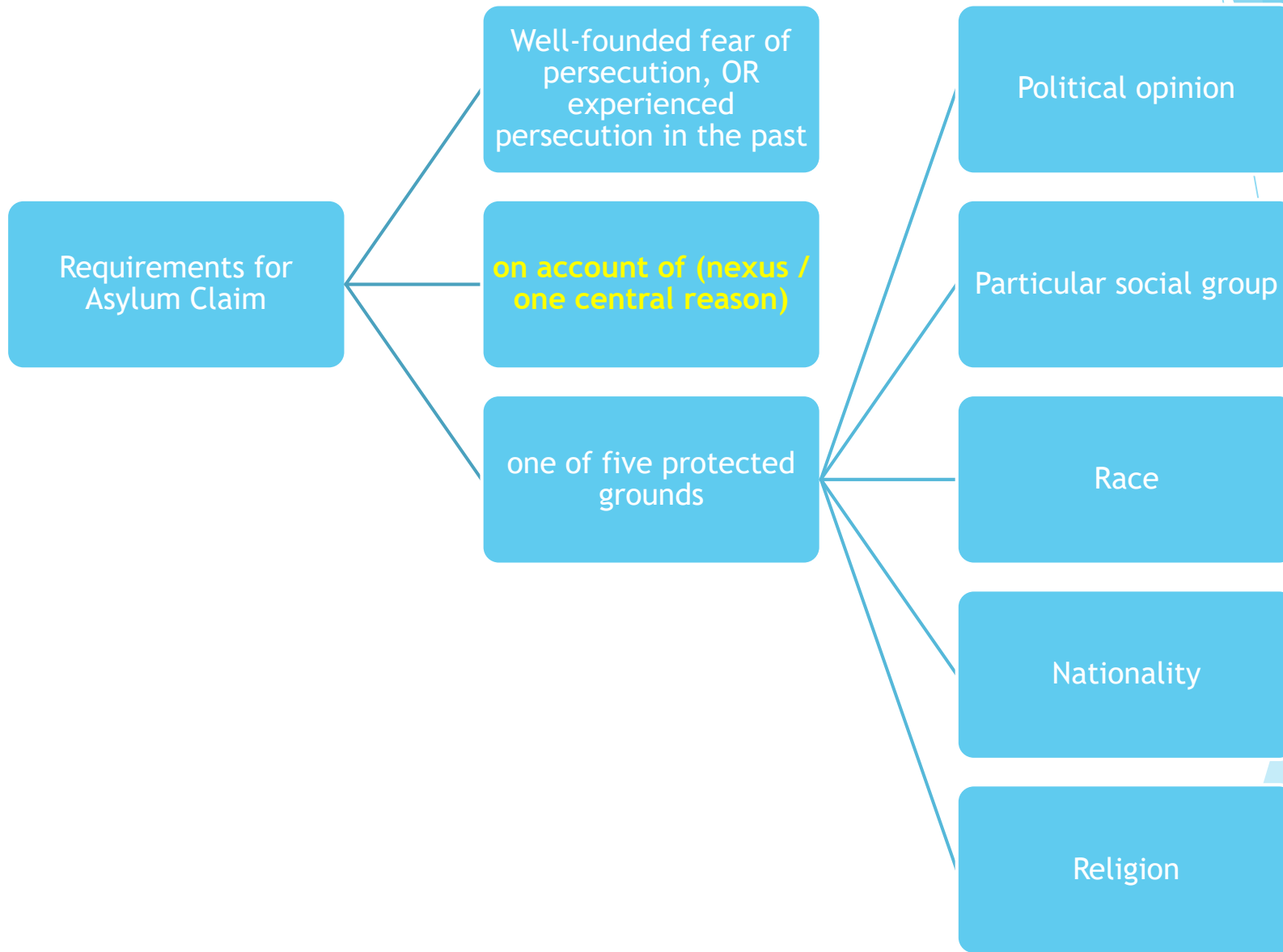
- ▶ Kurds from Iraq or Turkey, Tamils in Sri Lanka, Uyghurs in China, Sikhs in India, Ethiopians in Eritrea, and ethnic Hungarians.



Religion

- ▶ Increasingly common due to rise of anti-religious or fundamentalist societies
- ▶ Apostasy (conversion out of dominant religion)
- ▶ Gender equality and objection to customary practices
- ▶ Religion and political opinion

Example: Rose is a Christian living in northern Nigeria, where violence and attacks by Boko Haram have displaced over a million people. She has been denied employment in local government, the justice system is limited to sharia courts, and members of Boko Haram have attacked moderate Muslims and Christians in the area. Recently, the church that she and her family attend was set on fire.



The WHY: Protected Characteristics

- The harm **arises from** the protected characteristic. Castro v. Holder, 597 F.3d 93, 100 (2d Cir. 2010) (“an asylum applicant must demonstrate that the persecution arises from his [protected characteristic], actual or imputed.”); see also Ivanishvili v. U.S. Dep’t of Justice, 433 F.3d 332, 341 (2d Cir. 2006)
- **Cannot be tangential or inconsequential**
- Malice not required. Pitcherskaia v. INS, 118 F.3d 641, 646-48 (9th Cir. 1997) (Russian government’s attempt to “cure” lesbian applicant established persecution)

The WHY: Protected Characteristics

Persecution is NOT:

- Harm to family members (exception “zone of risk”)
- Generalized violence
- Harm associated with criminal behavior or personal vendettas

The WHY: Mixed Motives – One Central Reason

- Persecuted for multiple protected grounds (“**multiple** motive”)
 - Eg, particular social group and imputed political opinion
 - Should apply for asylum on all applicable grounds
- Persecuted for a protected ground and nonprotected reason (“**mixed** motive”)
 - Eg, imputed political opinion and targeted because wealthy, or personal animosity
- Protected characteristic must be “**at least one central reason**” motivating the perpetrator of harm (INA 208(b)(1)(B)(i)) – mixed motives are contemplated by the statute and it is reversible legal error to fail to engage in a mixed motive analysis.
Archaya v. Holder, 761 F.3d 289 (2d. Cir. 2014).

The WHO: government action required

- ▶ Harm directly by government or a private actor/organizations and government is unable or unwilling to protect
 - Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000) (applicant demonstrated that seeking help would have been **futile** and would have subjected her to **increased risk of harm**)
 - Futile in light of societal and religious mores (fathers exercise complete control over daughters)
 - Increased risk because victims of DV are returned to their homes to suffer more abuse
 - Aliyev v. Mukasey, 549 F.3d 111 (2d Cir. 2008) (repeated attempts to gain police protection but police did nothing but make reports + evidence of widespread corruption among police and other government officials)
 - See also Matter of O-Z- and I-Z-, 22 I&N Dec. 23 (BIA 1998) (applicant made 3 police reports but police did not take any action beyond writing the report)

No reporting requirement

- ▶ Pan v. Holder, 777 F.3d 540 (2d Cir. 2015) (failure to report some acts of harm to the government is *not* fatal to the claim where there is evidence of corruption and state ineffectiveness in protecting similarly-situated people)

The WHERE: Internal Relocation

- ▶ Past persecution creates a rebuttable presumption of a well-founded fear of future persecution
- ▶ Two prongs - (1) safe relocation within country?; (2) reasonableness of relocation
 - ▶ Internal relocation presumed not possible where persecutor is government
 - ▶ Present country conditions evidence about (1) countrywide existence of threat and/or (2) other factors that make relocation unreasonable
 - ▶ Particularly relevant consideration where persecutor is a specific person or small group

Asylum vs. Withholding of Removal

- ▶ Asylum: 10% likelihood of persecution, path to LPR/citizenship, ability to petition for spouse/children
 - ▶ One-year filing deadline
 - ▶ Criminal bars
 - ▶ **Discretionary** factors; not mandatory
 - ▶ “at least one central reason”
- ▶ Withholding: 50+% likelihood of persecution, protection from removal but little else
 - ▶ “a reason” vs “one central reason” – an open question
 - ▶ Matter of C-T-L- 25 I&N Dec. 341 (BIA 2010)
 - ▶ Barajas Romero v. Lynch, 846 F.3d 351 (9th Cir. 2017); Guzman Vasquez v. Barr, 959 F.3d 252 (6th Cir. 2020).
 - ▶ **Mandatory**, not discretionary

Convention against Torture

- More likely than not would be tortured if removed (50+% possibility)
- **No nexus requirement**
- Evidence of:
 - Past torture
 - Possibility of internal relocation
 - Gross, flagrant, mass human rights violations
 - Other relevant country conditions information
- **Government acquiescence/Willful Blindness**
- **Mandatory**, not discretionary

CAT – Government Action Required

- Torture requires only that government officials *know of or remain willfully blind* to an act and *thereafter breach their legal responsibility* to prevent it.” Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004).
- Corruption and collusion between government officials and non-state torturer is relevant
- Overall inability of the government to prevent torture is relevant

Asylum and Employment Authorization

- ▶ Can apply for Employment Authorization Document (EAD, or work permit) 150 days after filing for asylum
- ▶ Cannot be issued until 180 days after applying for asylum
- ▶ Asylum EAD clock stopping: any adjournments or other delays attributed to noncitizen can stop the EAD clock

Asylum and Adjustment of Status

- ▶ Can apply for adjustment of status after one year in asylum status
- ▶ Adjustment under INA § 209
- ▶ INA § 245(c) ineligibility grounds do not apply
- ▶ Some INA § 212(a) inadmissibility grounds do not apply
 - ▶ Public charge, working without authorization, lacking valid visa or passport
- ▶ Most other INA § 212(a) inadmissibility grounds can be waived
 - ▶ But not INA § 212(a)(2)(C) or § 212(a)(3)(A),(B),(C), or (E)
- ▶ No adjustment from withholding of removal or from CAT

Credits

Slides 3, 5, 8-10, 15, 18, and 27-35 are based on a presentation by Rebecca Press, Esq., Co-Counsel.

Slides 12-13, 20-21, 23, and 25 are based on “A Guide for Immigration Advocates,” Immigrant Legal Resource Center, 23rd Edition (March 2022).

Questions?

