Introduction to Children’s Asylum Claims

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Sources of Law

• Statute
  • INA § 208 (Refugee Act of 1980)

• Regulations
  • 8 C.F.R. § 208.13

• Case Law
  • BIA decisions
  • 5th Circuit Court decision
  • Supreme Court decisions

• Persuasive Authorities
  • Other Circuit Court decisions
  • International Law- treaties
  • UNHCR Handbook & Guidelines
INA § 208: Authority & Eligibility

• Must be physically present in the United States and meet the definition of a refugee under INA § 101(a)(42)(A)
  • Grounds of ineligibility
    • Safe third country (not applicable to UAC)
    • One-year deadline (not applicable to UAC)
      • Unless there are changed or extraordinary circumstances
    • Previous asylum application
      • Unless there are changed circumstances

• Bars to relief
  • Persecution of others
  • Particularly serious crime
  • Serious nonpolitical crime
  • Danger to U.S. security
  • Terrorism-related grounds
  • Firm resettlement
Asylum Bans (Bars to Asylum)

- Asylum ban 1.0 - Presidential Proclamation issued on November 9, 2018 declared that people who enter without inspection are ineligible for asylum. Federal district court issued preliminary injunction on December 19, 2018 in the Northern District of CA which blocks implementation.

- Asylum ban 2.0 - Interim final rule issued July 16, 2019 to bar asylum protection for people who cross through another country before reaching the southern border without seeking asylum in that country first. On September 11, 2019, the Supreme Court ruled the could go into effect while litigation continues.
  - Exceptions: (a) applied for but were denied asylum in a country of transit; (b) are victims of severe forms of trafficking; or (c) did not pass through any country that is a signatory to the Refugee Convention, Refugee Protocol, or CAT.
Asylum: Legal protection for a person who is unable or unwilling to return to their country and avail themselves of the country’s protection because of...

- Past persecution
- Well-founded fear of future persecution

On account of 5 protected grounds:

| Race | Religion | Nationality | Political opinion | Particular social group |
|------|----------|-------------|-------------------|------------------------|------------------------|

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Unable or Unwilling to Return and Avail Oneself of Protection

• Unable or unwilling to return
  • Must be in relation to country of nationality
  • Returning to country of nationality may indicate willingness to return
    • Factors to consider
      • Length of visit
      • Circumstances surrounding the visit
      • Problems faced upon return

• Unable or unwilling to avail oneself of protection
  • Applying for asylum should be sufficient proof
Persecution

• Matter of Acosta: threat to life or freedom to punish an individual for possessing a belief or characteristic the persecutor seeks to overcome.

• Serious violation of human rights- genocide, torture, rape/sexual assault, slavery, repression of freedom of thought/conscience/religion.

• Can include:
  • Physical harm
  • Serious threats
  • Cumulative harm
  • Psychological harm
  • Harm to family members
  • Economic harm, if deliberately imposed and severe
  • Harassment and discrimination
Past Persecution

• If past persecution is established, then \textit{presumed} to have a well-founded fear of persecution
  • Burden shifts- government can rebut the finding by showing by a preponderance of the evidence:
    • A fundamental change in circumstances
      • Should only include changed country conditions, not personal changes
    • Internal relocation
      • Must be reasonable
“Humanitarian” Asylum

• Otherwise knows as, “asylum in the absence of a well-founded fear of future persecution.”

• If the government rebuts the presumption, applicant can request
  • “Humanitarian asylum”- Past persecution alone can establish eligibility for asylum if:
    • The harm was severe and atrocious (Matter of Chen), or
    • Reasonable possibility of other serious harm (Matter of L-S-)

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# Well-founded Fear of Persecution

**Two elements:**
- Subjective: genuine fear
- Objective: reasonable possibility
  - 5th Circuit: a reasonable person in similar circumstances would fear persecution

**Four basic criteria (Mogharrabi test):**
- Possession: applicant possesses or is believed to possess a characteristic the persecutor seeks to overcome
- Awareness: reasonable possibility that the persecutor is aware or could become aware of the characteristic
- Capability: persecutor has the capability to persecute the applicant
- Inclination: persecutor has the inclination to persecute the applicant
Well-founded Fear of Persecution

- Internal relocation
  - Whether applicant could relocate to another part of the country to avoid persecution
  - Whether it would be reasonable to expect the applicant to do so
  - Burden is on the applicant unless the persecutor is the government

- Specific threat of harm
  - May not be enough for past persecution, but should be considered for future persecution

- Remaining in the country
  - Factors include amount of time applicant remained, reason for delay, location/activity during that time
Well-founded Fear of Persecution

- Possession of travel documents
  - May be an issue if government is the persecutor
- "Pattern or practice"
  - No need to show applicant will be singled out if:
    - There is a pattern or practice of persecution against a group or category of persons similarly situated to the applicant; and
    - The applicant belongs to or is identified with the persecuted group
- Persecution of family/friends
  - Lack of harm or mistreatment may mean fear is not well-founded unless applicant was singled out
Nexus

- Relationship between persecution and protected ground
- Motive - prove by direct or circumstantial evidence
  - Country condition reports
  - Persecutor’s statements
- Mixed motives
  - One central reason standard- INA § 208(b)(1)(B)(i)
  - Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007) - protected ground must be one central reason for persecutor’s actions and cannot be tangential or incidental to the persecutor’s motivation

Persecution

Because of

Protected Ground
Protected Grounds

Five Protected Grounds

- Race
- Religion
- Nationality
- Political opinion
- Membership in a particular social group

Immutable or fundamental status or belief (actual or imputed)
Particular Social Group (PSG)

1. Identification of a group
2. Determination of whether applicant is a member of that group
3. Determination of whether persecutor is motivated to harm because of membership
Immutable or Fundamental Characteristic

• UNHCR Guidelines
  • “A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of human rights.”

• Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)
  • “Persons all of whom share a common, immutable characteristic”
  • “Members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”
Particular Social Group (PSG)

- Immutable or Fundamental Characteristic
- Social Distinction
- Particularity
Social Distinction & Particularity

• Social distinction refers to whether a group is perceived and recognized as a distinct entity by society.
  • Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014)

• Particularity refers to the group being sufficiently distinct that it would constitute a discrete class of person with definable boundaries. Must not be amorphous, overbroad, diffuse, or subjective.
  • Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014)
Source of Persecution

The government

- Agents such as political leaders, police, or military
- No need to seek protection from gov. entity

Person or group that the government is unable or unwilling to control

- Government shares/tolerates persecutor’s opinion
- Government is helpless to protect the victim
Evidentiary Standard: REAL ID Act of 2005, codified at § 208(b)(1)(B)

**Testimony**
- May be enough, on its own, if:
  - Credible
  - Persuasive
  - Refer to specific facts

**Credibility**
- Totality of the circumstances
- Based on several factors including demeanor, candor, responsiveness, inherent plausibility, consistency between oral and written statements

**Corroboration**
- Request must be reasonable
- Corroborating evidence *should* be provided unless:
  - Not available; and
  - Cannot reasonable be obtained
Tips for Children’s Asylum Claims

• Become an expert on the asylum basics!
• Understand the procedural posture of the case.
• Use storytelling techniques as part of your litigation strategy.
• Look at other protected grounds, not just PSG.
• Ask that the adjudicator apply children’s asylum guidelines.
• Distinguish your case from negative case law.
• Preserve all arguments and build a strong record.
Applying at the Asylum Office

• Initial jurisdiction of UAC application with asylum officer ("Affirmative Asylum")
  • 8 U.S.C. §1158(b)(3)(C), INA § 208(b)(3)(C)

• Kim Memo, May 28, 2013
  • USCIS will accept a prior designation of UC status as long as it was not affirmatively terminated.

• Lafferty Memo, May 31, 2019
  • States that USCIS will make a new factual inquiry, independent of any prior designation by an agency other than EOIR, to determine whether the asylum applicant is a UAC at the time of filing of the asylum application.

• On August 2nd, a U.S. District Court in Maryland issued a temporary restraining order in J.O.P. v. DHS, 8:19-cv-1944 (D. Md. Aug. 2, 2019) and restored the "Kim Memo."
Crafting a Cognizable Social Group

• Always start with **NEXUS** - why was the applicant targeted?
• Consider possible characteristics
  • Nationality
  • Gender
  • Race/ethnicity
  • Age/childhood/youth
  • Resistance or refusal to conform or submit
  • Family
  • Shared past experience
  • Disability
  • Marital or relationship status
  • Sexual Orientation or Gender Identity
When Possible, Avoid “Novel” PSGs

• Recognize that Asylum Officers have limited ability to grant “novel” PSGs
• All “novel” PSGs have to be approved by HQ
• Look for ways to frame your case based on one of the other four grounds or as an “established” PSG
  • Family members of X
  • Sexual minorities in X country
  • X nationality women who are subject to gender-related cultural norms
  • Former police or military
  • X nationality individuals with a certain medical or mental health diagnosis

Information shared with the Texas UC Asylum Working Group by a former Asylum Officer.
scheduling and derivative determinations only. Asylum Officers should bear in mind that an applicant who is above the age of 18 at the time of the asylum interview, but whose claim is based on experiences that occurred while under the age of 18, may exhibit a minor’s recollection of the past experiences and events.

Girls and young women, in many cases, may be more comfortable discussing their experiences with women Asylum Officers, particularly in cases involving rape, sexual abuse, prostitution, and female genital mutilation (FGM). To the extent that personnel resources permit, Asylum Offices may have women Asylum Officers interview these cases. See, Gender Guidelines, at pg. 5.

The harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution. Given the "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." UNHCR Handbook, supra note 18, at ¶ 52. The types of harm that may befall children
In considering the asylum claim of a child who has filed a separate asylum application, the
nexus requirement may be particularly difficult to determine because a child may express fear or
have experienced harm without understanding the persecutor’s intent. A child’s incomplete
understanding of the situation, coupled with the child’s vulnerability and the possibility that the
child may not have the language skills to explain the persecution, may make it difficult to
identify the protected characteristic. *Fuentes*, 19 I&N Dec. at 662. When a child applicant is involved,
the child may be unable to identify all relevant motives, but a nexus can still be found if the
objective circumstances support the child’s claim that the persecutor targeted the child based on
one of the protected grounds.

Squad”); *Matter of V-T-S-*, Int. Dec. 3308 (BIA 1997).”” The fact that a child did not
specifically seek protection does not necessarily undermine his or her case, but instead the
adjudicator must explore what, if any, means the child had of seeking protection. Depending on
the age and maturity of the child, he or she may be able to contribute some personal knowledge
of the government’s ability to offer protection, but it is far more likely that the adjudicator will
have to rely on objective evidence of government laws and enforcement. Special attention should
be paid to government efforts to address criminal activities relating to children.
Please visit our website:

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Thank you!