Asylum Law 101

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Overview of Asylum

Common Claims for Children

Child Specific Guidance
Sources of Law

- Statute
  - INA § 208

- Regulations
  - 8 C.F.R. § 208.13

- Case Law
  - Administrative decisions
  - 5th Circuit Court decision
  - Supreme Court decisions

- Persuasive Authorities
  - Other Circuit Court decisions
  - UNHCR Handbook
  - International Law
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)
  - Exceptions
    - 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
ASYLUM: LEGAL PROTECTION FOR A PERSON WHO IS UNABLE OR UNWILLING TO RETURN TO THEIR COUNTRY OR AVOID THEMSELVES OF THE COUNTRY’S PROTECTION BECAUSE THEY HAVE SUFFERED...

Past persecution or Well-founded fear of future persecution

On account of 5 protected grounds

<table>
<thead>
<tr>
<th>Race</th>
<th>Religion</th>
<th>Nationality</th>
<th>Political opinion</th>
<th>Particular social group</th>
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A project of the American Bar Association funded by the Vera Institute of Justice and the Texas Access to Justice Foundation.
Unable or Unwilling to Return or Avail Oneself of Protection

- Unable or unwilling to return
  - Must be in relation to country of nationality
  - Returning to country of nationality may indicate willing 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

- Harm of a serious nature- threats to life or freedom, genocide, torture, rape/sexual assault, slavery
- Serious physical harm
  - Absence of physical harm can be a consideration
- Serious threats
  - See AOBTC factors
- Cumulative harm
  - Harm should be considered in the aggregate
- Psychological harm
- Harm to family members
- Economic harm, if deliberately imposed and severe
- Harassment and discrimination
Source of Persecution

The government
- Agents such as police or military

Person or group that the government is unable or unwilling to control
- Law vs. enforcement
- Reporting requirement?
Past Persecution

- If past persecution is established, then 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, or
    - Internal relocation
- “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)
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 (Moghrabi 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

“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

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

- The burden of proof is on the applicant to establish that he or she:
  - Is eligible to apply for asylum;
  - Is a refugee within the meaning of INA 101(a)(42)(A); and
  - Merits asylum as a matter of discretion
Standard of Proof

- Preponderance of the Evidence:
  - More likely than not
  - More than 50% chance

- Asylum:
  - Well-Founded Fear
  - Reasonable possibility

- Withholding of Removal:
  - More likely than not
  - Clear probability
**Evidentiary Standard:**
REAL ID Act of 2005, codified at § 208(b)(1)(B)

<table>
<thead>
<tr>
<th>Testimony</th>
<th>Credibility</th>
<th>Corroboration</th>
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</table>
| • May be enough, on its own, if:  
  • Credible  
  • Persuasive  
  • Refer to specific facts | • Totality of the circumstances  
  • Based on several factors including demeanor, candor, responsiveness, inherent plausibility, consistency between oral and written statements | • Request must be reasonable  
  • Corroborating evidence should be provided unless:  
    • Not available; and  
    • Cannot reasonable be obtained |
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)
  - In re 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
Protected Grounds

Five Protected Grounds

Immutable or fundamental status or belief (actual or imputed)

- Race
- Religion
- Nationality
- Political opinion
- Membership in a particular social group
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
Particular Social Group (PSG)

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

- Social visibility → Social distinction
- Social distinction refers to whether a group is perceived and recognized as a distinct entity by society.

- 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.
Crafting a Cognizable Social Group

Find the appropriate characteristics why was the applicant targeted?

- Age/childhood/youth
- Nationality
- Gender
- Race/ethnicity
- Resistance or refusal to conform or submit
- Family
- Shared past experience
- Disability
- Marital status
- Lack of familial protection
- Sexual Orientation or Gender Identity
Particular Social Group (PSG)

**DO NOT DEFINE THE GROUP BY THE HARM SUFFERED**

- Honduran women beaten by their domestic partner
- Women from El Salvador raped by gang members
- Guatemalan children abused by their parents
- Children from Mexico forced to traffic drugs for the cartels

Exception: Past harm may establish immutable characteristic for well-founded fear of future persecution
Overview of Asylum

Common Claims for Children

Child Specific Guidance
Common Asylum Claims for Children

- Family-based Claims
- Child Abuse Claims
- Gender-based Claims
- Gang-based Claims
Family-based Claims

- Quintessential particular social group
  - Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)

- Harm to family due to:
  - Gang membership
  - Gang violence or extortion
  - Informant or witness claims
  - Sexual violence or stalking
  - Domestic violence

- PSG Formulation:
  - Family members of X
  - Children of X
  - The X nuclear family
Family-based Claims

  - Long-awaited decision on family as PSG.
  - Did not create “double nexus.”
  - The BIA confirmed membership in an immediate family unit qualifies as a cognizable particular social group.
    - 1) Establish his membership in the family; and
    - 2) Demonstrate that the family relationship is at least one central reason for the claimed harm.
- LEA’s claim failed on nexus.
  - Actions were not “because of,” or “on account of” his family membership.
  - LEA was primarily targeted to achieve the cartel’s business objectives; LEA’s family membership was “tangential” or “incidental” to the profit-related motives.
Child Abuse or Maltreatment Claims

- Forms of child specific harm:
  - Child abuse and/or neglect
  - Child sexual abuse or incest
  - Child labor, sale, or marriage
  - BIA recognized “married women in Guatemala who are unable to leave their relationship” as a PSG

- PSG Formulation
  - Age/childhood/youth +/- Gender +/- Nationality
    - Unable to leave the familial relationship
    - Viewed as property
    - Lack of familial protection
    - Family membership
Gender-based Claims

- Forms of gender-based harm:
  - Female genital mutilation/cutting
  - Rape or sexual assault
  - Honor killings
  - Forced marriage/relationship
  - Sex trafficking or forced prostitution
  - Domestic violence

- PSG Formulation
  - Age/childhood/youth +/− Gender +/− Nationality
    - Family membership
    - Status in a marriage or domestic relationship
    - Lack of familial protection
    - Opposition to social norms or customs
    - Resistance to being sexually exploited or becoming “property”
    - Sexual orientation
Gender-based Claims

- Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)
  - The BIA found that gender alone may form the basis for a PSG.

  - The BIA found that sexual orientation may form the basis for persecution on account of a PSG.

  - The BIA found that gender, along with other characteristics, may form the basis for a PSG. The BIA recognized “Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice” as a PSG.

  - BIA recognized “married women in Guatemala who are unable to leave their relationship” as a PSG.
Gang Violence Claims

- Common claims:
  - Resistance to gang recruitment
  - Extortion, targeting affluent individuals/business owners
  - Witness or informant
  - Family members
  - Tattooed youth
  - Former gang membership
  - Women and girls labeled as gang property
  - Individuals that actively oppose gangs

- PSG formulation:
  - Age/childhood/youth +/- Gender +/- Nationality
    - Family membership
    - Lack of familial protection
    - Shared past experience
    - Resistance to being sexually exploited or becoming “property”
  - Also look at political opinion or religion as another protected ground
Overview of Asylum

Common Claims for Children

Child Specific Guidance
Special Rules for Unaccompanied Children

- Section 235(d) of the TVPRA of 2008
  - Safe third country exception does not apply to UAC
  - One year filing deadline does not apply to UAC
  - Initial jurisdiction of UAC application with asylum officer (“Affirmative Asylum”)
    - 8 U.S.C. § 1158(b)(3)(C), INA § 208(b)(3)(C)
    - Memorandum from Ted Kim, Acting Chief, Asylum Division, U.S. Citizenship and Immigration Services, Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children (May 28, 2013)

- However, Sept. 19 EOIR memo allows judges to re-determine UAC status and take away some of these protections.
Initial Jurisdiction

- If the child was designated a UAC, initial jurisdiction lies with the Asylum Office of USCIS (AO)
  - Regardless of current reunification
  - Regardless of age
  - *Unless, ICE or ORR took affirmative steps to terminate that status

- If the AO does not grant, they will refer the case back to the Immigration Court
  - IJ considers asylum de novo and also considers withholding of removal and CAT relief if requested
  - If the IJ denies relief, the case may be appealed to the Board of Immigration Appeals (BIA) and then on to the Circuit Court
Standard for Children

- Failure of state to protect
  - Child may not have ability to report
- Persecution
  - Harm a child has suffered or fears can be less than that of an adult and still constitute persecution
  - Children may not be fully aware
  - Types of harm may be different than for an adult
- Well-founded fear of persecution
  - Child may lack maturity to form a well-founded fear
  - Child may not be able to articulate their fears in the same way as adults
  - Internal Relocation
    - Generally not reasonable to expect a child to relocate
- Nexus
  - Child may not understand the persecutor’s intent
  - Child may have incomplete understanding of the situation
Child’s Credibility & Corroboration

- **Credibility**
  - Should be evaluated in light of the child’s developmental and cultural context
    - Demeanor
    - Detail, chronology
    - Consistency
    - Trauma
    - Understanding

- **Corroboration**
  - Rely more heavily on objective evidence
  - Evidence from family members
    - But consider
      - Complicated relationships
      - Undocumented status
      - Different motives
Before You File

- Know the facts!
  - Draft an affidavit/declaration with the child
  - Meet several times to develop rapport and trust with the child
- Develop the legal theory
  - Is there past persecution?
  - What is the protected ground?
  - What is the PSG?
- Be prepared to file the I-589 and all submissions quickly
Sources and Other Resources

- Asylum Officer Basic Training Course, 2009
- AILA’s Asylum Primer, Seventh Edition
- National Immigrant Justice Center (NIJC), Particular Social Group Practice Advisory
- Immigrant Legal Resource Center (ILRC), Essentials of Asylum Law
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