Pro Bono Training: The Essentials of Immigration Court Representation

Asylum, Withholding of Removal, and Protection Under the Convention Against Torture

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Three Forms of Relief

• Asylum
  – Must meet the INA’s definition of “refugee” -- a person who is unable or unwilling to return because of persecution on account of protected ground or well-founded fear of such persecution
  – Offers legal immigration status, derivative status for spouse & children, & path to lawful permanent residence and citizenship

• Withholding of Removal
  – Must show that “life or freedom would be threatened” in home country on account of race, religion, nationality, membership in a particular social group, or political opinion
  – Prevents return to country where such harm is more likely than not

• Convention Against Torture (CAT)
  – Must show that torture is more likely than not
  – Prevents return to country where face risk of torture; easier to terminate than withholding

• I-589, Application for Asylum or Withholding of Removal – one application for all three forms of relief
What is asylum? What are its benefits?

• Asylum is a form of immigration relief that provides protection from persecution.

• With a grant of asylum comes:
  – Legal status in the U.S.
  – Work authorization
  – Eligibility for certain benefits
  – Derivative status for spouse and children (can be included in application if in U.S. or can apply after asylum grant if not included in application (I-730))
  – Eligible to adjust status to become LPR after one year
**Definition of “Refugee”**


“Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

Key Elements of Asylum

• Past “persecution” or well-founded fear (WFF) of “persecution”
  – WFF has both a subjective and an objective component:
    • Is the fear genuine?
    • Is the fear a reasonable one?
  – Two routes for applicant to establish objective risk of future persecution
    • Reasonable possibility she will be singled out individually for persecution, or
    • There is a systematic pattern or practice of persecution against the group to which she belongs in her home country. (See, e.g., Knezevic v. Ashcroft, 367 F.3d 1206 (9th Cir. 2004))
      – 1 in 10 chance is sufficient to show WFF

• On account of (“nexus”)
• At least one of the five protected grounds
  – Race, religion, nationality, membership in a particular social group, or political opinion
Key Elements of Asylum (cont’d)

• By a State actor or a private actor
  – If persecutor is not a State actor, must show
government is unable or unwilling to control
• No WFF where there is a safe, reasonable internal
  relocation alternative
• Where there is no WFF, “humanitarian” asylum may
  be available, but only if there is past persecution and
  – Past persecution was “severe and atrocious,” or
  – Reasonable possibility of other serious harm
Key Elements of Asylum (cont’d)

• No bars to eligibility
  – Includes that application is filed within one year of most recent arrival in the U.S. or that exception to “one-year bar” applies

• Applicant is credible

• Corroboration
  – Examine whether claim is plausible and sufficiently corroborated

• Asylum is a discretionary form of relief
Elements of Asylum -- “Persecution”

• Not defined by statute; Ninth Circuit has generally characterized as “an extreme concept,” marked by “the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive”

• Must be serious to rise to level of persecution; not all discrimination and not all unjust, unlawful treatment will suffice, nor will civil strife

• Cumulative measures, taken together, can constitute persecution

• Subjective intent to harm or punish not required for a finding of persecution
Persecution (cont’d)

• Age, psychological and developmental factors, and other individualized factors may be considered

• Lower threshold for children – harm should be assessed from child’s perspective [Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (9th Cir. 2007)]

• Persecution of family members may be relevant [Mendoza-Pablo v. Holder, 667 F.3d 1308 (9th Cir. 2012) (considering harm to applicant as an in-utero child)]
Persecution -- Examples

• Rape and other sexual assault
• Physical abuse (e.g., beatings)
• Detention (depending on length & circumstances)
• Threats of death or violence
• Serious psychological harm
• Forced abortion or sterilization
• Female genital cutting (FGC/FGM)
• Deprivations of certain fundamental rights
• Severe economic deprivation
• Prosecution, under certain circumstances
Protected Grounds

• Race
• Religion
• Nationality
• Membership in Particular Social Group
• Political Opinion
Protected Grounds (cont’d)

• Harm may be committed on account of actual or imputed characteristic

• Race and nationality persecution often overlap; recent Ninth Circuit cases use “ethnicity,” which court regards as “somewhere between and within the protected grounds of race and nationality”

• Religion
  – Includes fervently held beliefs and those that persecutor believes are insufficiently devout
  – Not be required to practice one’s religion in secret


Protected Grounds -- Political Opinion

• Defined broadly; “encompasses more than electoral politics or formal political ideology or action”
  – Can include beliefs about rights (e.g., women’s rights, LGBT rights)
  – May be expressed through words or actions
  – A child may have a political opinion
  – Neutrality can be a political opinion, but must be result of affirmative decision to remain neutral, not mere apathy
  – Applicant must show an actual or imputed political opinion, and must show that the past or feared persecution is because of that political opinion.
Membership in a Particular Social Group (PSG)

Seminal case, Matter of Acosta, 19 I.&N. Dec. 211, 233 (BIA 1985), defined PSG as:

a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.
Examples of characteristics found to be immutable or fundamental:

- Gender
- Family or clan membership
- Sexual orientation
- HIV+ status
- Being a child
- Former member of national police
PSG (cont’d)

• Examples of recognized PSGs
  – Homosexuals required to register in Cuba
  – Mexican gay men with female sexual identities
  – Families
  – Former members of the El Salvador national police
  – Young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by the tribe, and who oppose the practice
  – Young girls in the Benadiri clan
  – Somali women

• Gender alone is usually not sufficient to define a PSG, but gender plus nationality may suffice for a country with a very high rate of violence against women and impunity for such violence.
  – Case to watch: Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010) (rejecting analysis underlying BIA’s finding that “women in Guatemala” could not constitute a cognizable social group, and remanding for BIA to consider under proper legal standards)
PSG (cont’d)

• Domestic violence cases often involve a PSG that has not yet been recognized in a precedential decision.
  – Groups recognized by DHS in L-R- are defined by gender + status in a domestic relationship:
    • Mexican women in domestic relationships who are unable to leave; and
    • Mexican women who are viewed as property by virtue of their positions within a domestic relationship.
PSG – The Cutting Edge of Asylum Law

• Law in this area is evolving

• Examples
  – Domestic / Family Violence
  – Children’s Claims
  – Gang-Based Asylum Claims
PSG -- Social Visibility & Particularity

• In recent years, BIA has added “social visibility” and “particularity” requirements to PSG analysis
• When these requirements are applied, the proposed PSG:
  – Generally must also be perceived as a group in a society.
  – Generally must be defined in a sufficiently distinct manner such that the group would be recognized in the society in question as a discrete class of persons.
• Whether a proposed group is a PSG typically involves a country-specific inquiry. The record is key; country conditions evidence is especially important.
• Groups perceived as being too loosely defined, too diffuse, or too amorphous have been rejected as PSGs.
PSG – Social Visibility & Particularity (cont’d)

• Key BIA Cases:

• BIA has offered varying definitions and applications of social visibility and particularity. Requirements have been widely criticized.

• Circuit split –
  – Third and Seventh have found requirements not to be reasonable; other courts (e.g., First, Tenth) have approved the requirements.
  – Ninth Circuit declined to rule on validity, but clarified requirements and expanded means to prove. Henriquez-Rivas v. Holder (9th Cir. 2013) (en banc)
Henriquez-Rivas v. Holder

- Social visibility is not a question of on-sight visibility
- Social visibility is a question of perception of the group by society or by persecutor
- Particularity is a question of clear boundaries to define the group
- Groups need not be homogenous or share common origin
Establishing Social Visibility

• Social visibility refers to the fact that the society at issue perceives the defined group in a certain way and accords group members different treatment on that basis. (DHS brief in L.R. (2009))

• Societal perceptions (including governmental norms) that accept abuse and reinforce abuser’s belief in right to abuse. This can be shown by:
  – Prevailing laws
  – Application of laws (lack of protection for group members, impunity for violation of laws)
  – Broad societal attitudes
Establishing Particularity

• Requires a showing that the group can be defined with sufficient specificity so that it is not vague and unclear who are members
  – Is the group clearly defined or is it amorphous?
  – Are the terms defining the group subjective or objective?
  – Look to legal definitions of particular terms (for example, in cases where the social group is defined in part by a domestic relationship, look to the INA’s definition of the crime of “domestic violence,” which defines a domestic relationship)
“Nexus” (on account of)

• Much show that persecution was “on account of” one of the protected ground
  – It is not enough that someone suffered persecution and has a political opinion or is a member of a social group – a “nexus” between the persecution and a protected ground must be shown.
  – Key case: INS v. Elias-Zacarias, 502 U.S. 478 (1992) (holding that guerrilla organization’s attempt to coerce person into performing military service does not necessarily constitute persecution on account of political opinion; fact that guerrillas had political motives not sufficient – persecution must be on account of the political opinion of the victim)
    • Nexus not established where show merely that victim was targeted for refusal to join; person might resist recruitment for a variety of reasons.
• Mixed motives on the part of the persecutor do not preclude asylum, but protected ground must be “at least one central reason” for the persecution. (REAL ID Act; Parussimova v. Mukasey, 555 F.3d 734 (9th Cir. 2009))
Nexus (cont’d)

Can be proven by either:

• **Direct evidence**: Evidence of reason for persecution can come from explicit words and actions of persecutor.

• **Circumstantial evidence**: Can include evidence of country conditions including legal and social norms which reinforce the persecutor’s belief that he can persecute without “interference or reprisal” (DHS brief in L.R.)

• Nexus can be a particularly challenging issue in gang-based asylum cases. Can also be an issue for adjudicator in DV cases involving persecutor with alcohol or substance abuse problem.
The Persecutor

• Source of the persecution must be the government or person(s) or group(s) that the government is unwilling or unable to control.
  – Country conditions evidence is critical for showing “unable or unwilling to control”

• “Unable or unwilling” can be shown through:
  – The actual failure of the State to protect when help is sought (e.g., from police or courts);
  – “[D]emonstrating that a country's laws or customs effectively deprive the [applicant] of any meaningful recourse to governmental protection” or by “convincingly establish[ing] that [going to the authorities] would have been futile or would have subjected [the individual] to further abuse.”
  – “[E]stablishing that private persecution of a particular sort is widespread and well-known but not controlled by the government” or “showing that others have made reports of similar incidents to no avail.”

• Laws prohibiting the form of persecution at issue not necessarily the end of the matter (e.g., FGC)
Reporting Persecution By Private Actor

-- Not Required, But Important To Fill Resulting Gap

• Applicant need not have reported persecution to authorities if he can convincingly establish that doing so would have been futile or have subjected him to further abuse.

• Where possible, submit country conditions evidence showing that type of persecution is widespread and that the government fails to protect similarly situated individuals.
  – Castro-Martinez v. Holder, 674 F.3d 1073 (9th Cir. 2011)
Past Persecution

→ Presumption of WFF

• Past persecution on account of a protected ground entitles applicant to a presumption of well-founded fear of persecution and threats to life/freedom on the same ground

• Always examine if there are new/alternative grounds for WFF
Presumption Can Be Rebutted

• Burden is on the government to rebut
• Presumption can rebutted by evidence showing:
  – applicant can relocate safely and reasonably elsewhere in home country and thereby avoid persecution
  – fundamental change in circumstances such that applicant no longer has a well founded fear
• Relocation must be reasonable. Factors to consider include: age, civil strife, family ties, health, etc. 8 C.F.R. §208.13(b)(3)
• Relocation presumed to be unreasonable when government is persecutor
“Humanitarian” Asylum

• When presumption related to future persecution is rebutted, applicant can still be granted in the exercise of discretion if:
  – There are compelling reasons arising out of the severity of past persecution;
  OR
  – There is a reasonable possibility the applicant would suffer other serious harm upon removal.
    • Belishta v. Ashcroft, 378 F.3d 1078 (9th Cir. 2004); Kholyavskiy v. Mukasey, 540 F.3d 555 (7th Cir. 2008); Matter of L-S-, 25 I.&N. Dec. 705 (BIA 2012) (harm must rise to level of persecution)
Bars to Asylum

• Unaccompanied minors are exempt from some bars. When bars can be applied to children, factors such as the child’s developmental stage, individual culpability, duress, coercion, and defense of self or others should be considered, according to UNHCR.

• Persecutor of Others

• Convicted by final judgment of a particularly serious crime, and constitutes a danger
  – For purposes of asylum, all aggravated felonies are considered particularly serious crimes.

• Serious reasons for believing the individual committed a serious non-political crime outside the U.S.

• Reasonable grounds for considering individual to be a danger to security of the U.S.
Bars to Asylum (cont’d)

• Firm resettlement
  – 8 CFR 208.15
• May be removed to a safe third country, where asylum or temporary protection can be sought, pursuant to a bilateral or multilateral agreement
  – U.S. & Canada have negotiated such an agreement; bar will apply once final implementing regulations are instituted
• Prior application for asylum denied by EOIR, unless there has been a change in conditions that affect eligibility
• Note effect of prior removal order
Bars to Asylum --
One-Year Bar & Its Exceptions

• Application for asylum must be filed within one year of most recent arrival in the U.S. Applicant who misses this deadline is ineligible for asylum unless an exception applies.
  – Two categories of exceptions: (1) “changed circumstances” that materially affect eligibility, or (2) extraordinary circumstances” related to the failure to file within one year of arrival.
  – Applicant must still file within period of time that is “reasonable” for the circumstances.
  – One-year filing deadline does not apply to UACs. Otherwise applies to minors, but Asylum Office policy is that “extraordinary circumstances” exception applies.
“Changed Circumstances”
Exception to One-Year Bar

• Changed circumstances include:
  – changes in applicant’s country of nationality or, if the applicant is stateless, his country of last habitual residence;
  – changes in applicant’s circumstances that materially affect eligibility, including changes in U.S. law;
  – applicant had previously been a dependent included in a family member’s pending application, and qualifying relationship comes to an end.

8 C.F.R.§208.4(a)(4)

• Vahora v. Holder, 641 F.3d 1038 (9th Cir. 2011) – increase in risk of persecution is a changed circumstance, even when there was previously a risk of persecution
“Extraordinary Circumstances”  
Exception to One-Year Bar

• Extraordinary circumstances include:
  – serious illness or mental or physical disability;
    • Involvement of mental health expert is VERY important in cases where PTSD or other mental health issues may warrant application of an exception to the one-year bar.
  – legal disability (e.g., unaccompanied minor, suffered from mental impairment);
  – ineffective assistance of counsel;
  – individual maintained TPS, lawful immigrant or non-immigrant status, or parole;
  – death or serious illness or incapacity of applicant’s legal representative or member of applicant’s immediate family.

8 C.F. R.§208.4(a)(5)
Discretion

• Applicant who is statutorily eligible for asylum may still be denied in the exercise of discretion, which involves a balancing of positive and negative factors.
  – Humanitarian factors, such as age, health, and family, should be considered.
  – “Danger of persecution should outweigh all but the most egregious adverse factors.”
Withholding of Removal

- More likely than not that applicant will be subject to persecution on one of the specified grounds
- If no bars apply, relief is mandatory
  - Bars: Nazi, persecutor of others, “particularly serious crime,” “serious non-political crime,” terrorist / danger to security
- Past persecution raises rebuttable presumption of eligibility for withholding
- Applicant who fails to meet the lower standard of proof for asylum necessarily fails to satisfy the more stringent standard for withholding of removal, but if denied asylum as a matter of discretion or due to asylum-only bar, applicant remains eligible for withholding.
Protect Under the CAT

• 2 forms: withholding of removal under 8 C.F.R. § 1208.16(c); deferral of removal under 8 C.F.R. § 1208.17(a)

• Applicant must establish that if removed to the proposed country of removal, “he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, but defeats the object and purpose of CAT”

• Both broader and narrower than asylum and withholding
CAT (cont’d)

• Torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”
  – Acquiescence found where public official, prior to the torture, has awareness of such activity and then breaches legal responsibility to intervene to prevent such activity; awareness plus willful blindness can suffice.

• Adverse credibility determination not necessarily a death knell to CAT protection, but where not credible, reports alone must compel conclusion that applicant is more likely than not to be tortured.
The Application Process

“Affirmative”

• Complete and mail I-589 with supporting documentation
  – Identity documents
  – Marriage/birth certificates, as appropriate
  – Passport-style photo
  – Declaration (or submit by interview)
• G-28
• Receive receipt, biometrics & interview notices
• Supplemental submission
• Interview at the Asylum Office
• Decision
  – Pick up at Asylum Office or receive by mail
  – If not granted and applicant is out of status, will be referred for removal proceedings
“Defensive”

• Applicant is “respondent” in immigration court
  – Referred by Asylum Office
  – Detained at or near border
  – Otherwise issued Notice to Appear

• Master calendar hearings followed by individual merits hearing

• Procedural differences between Asylum Office and Immigration Court
  – Adversarial proceeding
  – Application filed in court (may need to advance calendar to meet filing deadline)
  – Interpreter provided, but generally only for questioning of applicant/respondent
  – Consult Immigration Court Manual

• Review by BIA and Court of Appeals will be confined to record before IJ
Work Authorization
While Asylum Application is Pending

Asylum applicant may apply for employment authorization if:

• 150 days have passed since filing of complete asylum application, excluding any delays caused by applicant (such as a request to reschedule interview), and

• No decision has been made on application

• Some bars apply, and some may be exempt from the “clock.”

• Improvements expected with final approval of settlement of class action, A.B.T. et al. v. USCIS, et al.

• To apply for employment authorization, file a Form I-765, Application for Employment Authorization.
  – No fee to apply for first EAD if asylum application is pending.
Credibility

REAL ID Act of 2005:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base an adverse credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. §§ 1158(b)(1)(B)(iii) (asylum); 1231(b)(3)(C) (withholding of removal); 1229a(c)(4)(C) (other relief from removal).

Applies to applications filed on or after May 11, 2005.
Credibility Factors

• Demeanor

• Candor, or responsiveness of the applicant

• The inherent plausibility of the applicant’s or witness’s account

• Consistency: of each statement, between written and oral statements, and between statements and other evidence of record

• Any inaccuracies or falsehoods in statements, without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.
Factors Impacting Credibility

• Psychological: effect of trauma on memory and affect
• Sensitivity regarding the form and nature of persecution (including gender issues)
• Circumstances of airport interviews
• Cultural: the concept of “cross-cultural misunderstandings”
• Fear upon arrival
• Translation or interpretation problems
• Childhood
Corroboration

REAL ID Act altered Ninth Circuit standards for when corroboration can be required:

– Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

– However, the testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.

Preparing the Case

- Review Intake Memo
- Initial Country Conditions Research
- USCIS & CBP FOIA, FBI & CA DOJ records request
- Approaching sensitive topics with client
  - Inconsistencies
  - Effects of trauma
  - Role of culture
- Develop theories re: basis or bases for eligibility
- Draft declaration
- I-589 Application
  - Include family members in application
- Meet with client to review declaration and application in client’s native language
Corroborating Evidence

Identify/gather/create/compile documents to support application

• Identity documents
• Certificates of birth +/- or marriage; other personal documents
• Country conditions documentation / experts
• Psychological & medical evaluations
• Other corroboration – e.g., police reports, news articles of incident, hospital records, witness statements, letters of support
• Translations
After filing of application

Biometrics notice

Prepare for Asylum Interview

• Explain roles of officer, attorney, interpreter, & monitor

• Mock interviews—practice, practice, practice
Asylum Interview

• Submit additional evidence
• Attend Asylum Office Interview
• Decision

• Next Steps (if asylum is granted): EAD, Social Security Card, CA DL or ID, I-730, I-485
Special Considerations in Detained Cases

• Detainee may lack access/information; pro bono counsel can make a significant difference in the outcome of the case
• Detainee location may vary
• Detained docket at 630 Sansome St. Court
• If represent pro bono, can request ICE to transfer client for meetings
Special Considerations in Detained Cases

• Expedited schedule
  – Deadline for evidence submission shorter
  – Start and finish case in compact timeframe

• Prepare confidentiality waivers

• Work with non-detained family members/friends to gather evidence

• Communication by mail/phone, which can present challenges, especially for indigent clients
Resources

• United Nations High Commissioner for Refugees (UNHCR) -- unhcr.org
  – *Handbook on Procedures and Criteria for Determining Refugee Status*
  – Guidelines and Notes on subjects such as membership in a particular social group, gender-related persecution, gang-based asylum claims, child asylum seekers, application of Refugee Convention to trafficking victims or persons at risk of being trafficked, exclusion clauses (i.e., bars to eligibility), internal flight or relocation alternative, & other topics
Resources (cont’d)

• Asylum Officer Basic Training Course Lesson Modules
• Ninth Circuit Immigration Outlines (under Relief from Removal)
• Immigration Court Practice Manual
• AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure by Regina Germain
• USCIS Affirmative Asylum Procedures Manual
• Essentials of Asylum Law, ILRC
• “Useful Documents for Attorneys Representing Asylum Seekers,” NIJC
• Kurzban’s *Immigration Law Sourcebook*
Resources (cont’d) -- Country Conditions

- U.S. State Department Human Rights Reports
- UNHCR
  - Refworld
- Office of the High Commissioner for Human Rights (OHCHR)
- Freedom House, Amnesty International, Human Rights Watch & other reputable NGOs
- In-country news sources
- In-country experts
- Center for Gender & Refugee Studies
- Immigration Equality
Questions?
Interested in representing a refugee in need of protection?

Since its founding in 1983, LCCR’s Asylum Program has successfully assisted thousands of individuals fleeing persecution in more than 40 countries. Your representation of an asylum seeker can make all the difference!

LCCR offers training, resources, and other support for pro bono attorneys, who are paired with experienced mentors and volunteer interpreters.

Contact Dave Rorick (drorick@lccr.com) or Paul Chavez (pchavez@lccr.com) to learn more.
Request Assistance from CGRS

CGRS provides a wide range of technical assistance to attorneys representing asylum seekers across the U.S. Including legal advice, country conditions evidence and expert witness affidavits.

To request assistance from CGRS, go to http://cgrs.uchastings.edu/assistance.