An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings
By Annie Chen – July 14, 2014

An “unaccompanied alien child” (UAC) is a minor who has no lawful immigration status in the United States, and has no parent or legal guardian in the country present or available to provide care. Homeland Security Act of 2002, § 279(g)(2). The U.S. Department of Health and Human Services projected that in Fiscal Year 2014, approximately 60,000 unaccompanied children (also UAC) would be apprehended at the U.S. border and turned over to the custody of the Office of Refugee Resettlement (ORR). HHS Budget in Brief, Fiscal Year 2015. Current trends indicate that the numbers will continue to increase. This is an unprecedented “surge” that caps a growing trend: 13,625 UAC entered U.S. custody in Fiscal Year 2012 and 24,668 in Fiscal Year 2013. Unaccompanied Alien Children Program, December 2013. UAC are placed in removal proceedings in which they face deportation. Most are released by ORR if they have family or an adult in the United States able to care for them, after which they continue to fight their deportation in immigration court, often without an attorney. For a detailed description of the path UAC follow through the immigration system, see Flow of Unaccompanied Children through the Immigration System, Vera Institute of Justice, 2012.

This article discusses the challenges that UAC face in the immigration system and their urgent need for access to counsel in light of the complex web of U.S. immigration laws. First, a general overview of the most common forms of relief available to UAC explains the difficulties of obtaining legal status, which becomes nearly insurmountable without the assistance of competent legal counsel. This article then surveys the growing consensus for reform—such as appointing government-funded counsel for UAC and other eligible children—as well as broader proposals to create a more “child-friendly” immigration system that ensures the rights of the most vulnerable.

Running the Gauntlet
Many UAC have legitimate claims that would grant them legal status under U.S. immigration law if they could navigate the country’s complex web of immigration laws. For example, approximately 40 percent of UAC in ORR custody in 2010 were potentially eligible for some kind of relief from deportation. Vera Report. Depending on where a UAC is released, local legal services organizations and private law firms may be available to provide representation to some children. But these meager resources are already stretched beyond capacity—the current surge in numbers will stretch them even further, meaning that more and more UAC will go without legal representation.

Moreover, unlike other court systems, immigration courts do not accord special treatment to children. UAC are not entitled to representation at government expense, so they must defend themselves against trained government attorneys who bring evidence against the child in court. Arrayed against children are a myriad of challenges: they must testify under oath, plead to government charges, tell the judge what forms of relief they wish to pursue, file applications for relief and supporting documents in English, testify, and call witnesses with no knowledge of the legal norms and customs. In addition, they almost always do not speak English and must communicate through an interpreter. Faced with this daunting task, the existing protections and remedies offered by the laws of the United States are rendered meaningless if these children do not have access to an attorney.

Available Forms of Relief
The most common forms of relief that unaccompanied children are eligible for are (1) special immigrant juvenile status (SIJS) for children who have been abused, abandoned, or neglected by their parents; and (2) asylum for children fleeing persecution in their home countries. Approximately 23 percent of unaccompanied children are potentially eligible for SIJS and 17 percent for asylum and related protections. Vera Report. Other potential forms of relief include the T visa for individuals who have been a victim of certain serious crimes in the United States, and the U visa for victims of severe forms of human trafficking including for any child under the age of 18 engaged in commercial sex acts. For a detailed treatment of these forms of relief and the associated challenges, see the February 2014 report by Kids in Need of Defense (KIND) and the Center for Gender and Refugee Studies (CGRS), A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System. This article focuses on SIJS and asylum and describes the challenges that children who are eligible face in obtaining these forms of relief. Without adequate assistance of counsel, the complexity of these forms of relief can doom an otherwise viable claim.

Challenges to Obtaining Special Immigration Juvenile Status
SIJS is a unique hybrid of family and immigration law that requires findings from both state court and federal immigration court, as well as the United States Citizenship and Immigration Services (USCIS). Thus, the challenges are compounded. Although it is a form of relief under immigration law, a state court must first make certain factual findings, including that a child is unable to reunify with one or both parents because of abuse, neglect, abandonment, or some similar basis under state law, and that it is not in the child’s best interest to return to the home country. B. U.S.C. § 1101(a)(27)(J). An increasing number of state courts are familiar with this form of relief, but even with growing awareness, some state court judges are confused by the federal immigration laws related to SIJS and others are unaware that they have the authority to grant the special findings. As detailed below, many other barriers make obtaining SIJS a challenge:

First, a state juvenile court must issue the special findings order. State courts’ unfamiliarity with SIJS can make it difficult to initiate and file a claim, let alone to obtain the predicate order with the appropriate language acceptable for USCIS adjudication. Most state courts do not provide interpreters. In addition, the appropriate jurisdictional grounds for filing in state court are varied and depend on the individual state. Examples include a petition for legal guardianship, child custody, juvenile delinquency proceedings, or child dependency proceedings. Trained attorneys are familiar with the state laws and appropriate mechanisms but the complexity of navigating these processes is very intimidating for an immigrant child. Even if a child knows that he is eligible for SIJS, questions abound—which court should he file in, and what kind of proceeding is most appropriate to bring? Should the child start the claim, or the adult caring for the child?

Second, after the state juvenile court has issued its special findings order, the child must submit an application for SIJS to the immigration adjudication office at USCIS. An adjudications officer at USCIS may conduct an interview of the child to determine whether to grant or deny the child SIJS. This process can be very stressful and intimidating for a child proceeding pro se. An attorney would ensure that the child files the correct application and documents and that he is prepared to answer questions about his application.

Third and finally, if a child is in removal proceedings, the child must submit an application for lawful permanent residency (LPR) that is separate and distinct from the SIJS application. The LPR application is decided by an adjudications officer at USCIS after an interview or by an immigration judge after a hearing. An attorney would ensure that the client is prepared to answer any questions about his application before USCIS and to testify and be cross-examined by the government attorney in immigration court.

During all the steps of the SIJS process, the UAC must continue to appear in immigration court, explain the progress of the SIJS application, and request continuances from the judge. As described above, the complexity of multiple areas of law coupled with multiple legal venues makes SIJS particularly difficult to obtain on a pro se basis.

In addition, there is often time pressure: although SIJS is technically available until the age of 21, UAC often “age-out” of SIJS eligibility before that age because many state juvenile courts lose jurisdiction when a child turns 18.

Challenges to Obtaining Asylum

Many of the UAC arriving in the United States are fleeing some type of violence, such as drug wars, gang violence, or domestic violence. A recent report by the United Nations High Commissioner for Refugees estimated that approximately 58 percent of UAC from El Salvador, Guatemala, Honduras, and Mexico (from which 95 percent of UAC enter the United States) have suffered or face harm that indicates a potential need for international protection. **Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection**, UNHCR, 2014; **ORR Fact Sheet**. They may qualify for asylum or related protections under U.S. law. Unfortunately for children, asylum claims based on gang violence and domestic violence are among the most challenging to establish.

Asylum is a very complicated form of relief that requires a showing of a well-founded fear of persecution if returned to the home country. An asylum petition requires substantial legal research and briefing, as well as gathering of testimony, often including expert testimony and evidence. These are often challenging cases even when a child is represented and are particularly difficult to pursue pro se. While this article does not attempt a full treatment of the issues that can arise in an asylum claim, many asylum seekers are found ineligible because they cannot show that the persecution is on account of one of the five protected categories: race, religion, nationality, political opinion, or membership in a particular social group.

Most children’s claims fall within the “membership in a particular social group” category for protection, which is the most difficult to define and the subject of many legal arguments. A social group is an identifiable group of people sharing a common characteristic that is so fundamental to their individual identities that the members cannot or should not be expected to change it. Defining a social group requires careful lawyering so that the definition is broad enough to encompass a group of people but also narrow enough to be specific to the person. Further, the lack of clear legal standards gives USCIS adjudicators and immigration judges great latitude in determining whether a social group is protected.

Asylum also requires providing a nexus or required causal link between persecution and one or more of the protected grounds by establishing evidence of a persecutor’s motive. This causal nexus is especially difficult for children because they may have limited knowledge or understanding of the context in which their persecution occurs, or have difficulty articulating what understanding they do have.

Critically, asylum adjudicators must decide if an applicant is credible. This determination is made based on the child’s testimony before a USCIS adjudicator or an immigration judge. Some adjudicators or immigration judges do not consider age and developmental factors that may make a child’s story seem inconsistent or lacking in detail. As a result, they may interpret a child’s testimony or inability to corroborate claims as lack of credibility. These challenges are but some that face unaccompanied children seeking asylum and related protections in the United States. The stakes are high—if a child is deported, he will return to the violence and danger he initially fled.

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[8](http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0... 8/8/2016)
Consensus on Need for Reform and Recommendations for the Way Forward

There has been an increasing call for improving access to counsel for immigrant children, which would give UAC a much better chance of accessing the legal rights and relief to which they are already entitled under the law. The New York Times recently ran an op-ed by Pulitzer Prize-winning journalist Sonia Nazzario, “Child Migrants, Alone in Court,” calling for unaccompanied children to be entitled to public defenders who are experts in immigration law and for Congress to include money to hire lawyers for all unaccompanied minors as part of any comprehensive immigration reform. Elected officials are also joining in the call for appointed counsel. Both the Senate comprehensive immigration reform bill, S. 744, approved in 2013, and the House of Representatives’ companion bill, H.R. 15, include a provision that would mandate counsel for UAC. Organizations that advocate for immigrant children’s rights have long supported similar recommendations as well as further reforms. See KIND and CENSUS Report.

While these efforts are critical steps in the right direction, improving access to counsel will go only so far if it is not accompanied by a more fundamental re-think of how the immigration system should address the needs of children. In March 2014, the Los Angeles Times ran an editorial, “Young, alone and in court,” urging that the federal government ensure access to counsel or access to experienced child advocates. In fact, both attorneys and child advocates are needed. In addition to access to counsel, appointing independent child advocates (analogous to guardians ad litem) for each child in removal proceedings would ensure that the child’s best interests are heard and considered in the legal process, while the child’s attorney represents his expressed wishes and ensures the child’s legal rights are protected. Currently, the government appoints child advocates only in a very limited number of cases for particularly vulnerable UAC. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(c)(6). Few UAC have the benefit of child advocates even though they face deportation to unsafe countries.

Even in the few cases where a child advocate is appointed, the law does not require that adjudicators and judges even consider the child's best interests. Therefore, a “best interests of the child” standard should be incorporated into all procedures and decisions concerning children in immigration proceedings. This way, immigration adjudicators are required to take into account whether it is in the best interests of the child to be deported to potentially unsafe conditions. Incorporating a “best interests” standard would bring immigration law in line with standards in family law in which courts consider the best interests of the child in matters of adoption, child custody, guardianship, and visitation, among other issues.

Fundamentally, the immigration system needs to recognize that because of age and developmental factors, children should be treated differently from adults. Creating a more child-friendly system along with government-funded access to counsel will ensure that the entire immigration system will better protect children’s special needs. 

Note: On July 9, 2014, the American Civil Liberties Union, American Immigration Council, Northwest Immigrant Rights Project, Public Counsel, and K&L Gates LLP filed a nationwide class-action lawsuit on behalf of children challenging the federal government’s failure to provide them with legal representation in deportation proceedings. The complaint charges the U.S. Department of Justice, Department of Homeland Security, U.S. Immigration and Customs Enforcement, Department of Health and Human Services, Executive Office for Immigration Review, and Office of Refugee Resettlement with violating the U.S. Constitution’s Fifth Amendment Due Process Clause and the Immigration and Nationality Act’s provisions requiring a “full and fair hearing” before an immigration judge and seeks to require the government to provide children with legal representation in their deportation hearings.

Keywords: litigation, children’s rights, unaccompanied alien child, immigration, juvenile system, best interests, deportation

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