Representing Asylum Seekers

Part I: Asylum Law & Procedure 101

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www.immigrantjustice.org
# Asylum Program – Pro Bono Support Team

## Training Presenters

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- **Dalia Fuleihan,** Staff Attorney

## Primary Points of Contact

- **General Client & Procedural Questions:**
  
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National Immigrant Justice Center (NIJC)

- Legal Services for 10,000+ noncitizens
- National & Local Advocacy & Education
- Federal Litigation
- 5 offices across the U.S.!
- 2000+ pro bono attorneys

NIJC
National Immigrant Justice Center
Pro Bono Opportunities at NIJJC

Asylum
- Adults
- Families
- Kids
- Detained immigrants

CLINICS:
- DACA
- Naturalization
- Asylee/Refugee Family Petitions
- Asylee/Refugee Adjustment

Special Immigrant Juvenile Status
Predicate Orders

VAWA and U Visa Relief

STOP DOMESTIC VIOLENCE
How NIJC’s *Pro Bono* Programs Work

An immigrant contacts NIJC and needs an attorney.

NIJC staff conduct an in-depth case screening and assessment.

If case is accepted, NIJC signs a retainer with the client and begins to look for *pro bono* placement.

A *pro bono* attorney team accepts the case. NIJC remains of counsel and provides attorney support, document review, and technical assistance throughout the life of the case.
Why are Pro Bono Attorneys Important for Immigrants?

Non-citizens do not have the right to appointed counsel.

Percent of cases where immigrants obtained relief 2005-2010

74% with representation

13% without representation
Representing an Asylum Seeker through NIJC Helps More than Just Your Client

- **One for One:** Representing an NIJC asylum client allows us to accept new asylum cases for representation.

- **Reuniting families:** Asylees can petition for family members and are on the road to permanent status.
THE BASICS OF ASYLUM LAW

Ashley Huebner
1) Cristopher is a teenager from Venezuela. Police beat him and held a gun to his head after seeing him leave a neighborhood where an anti-government protest was ongoing. After he reported the attack to a police station, pro-government militias spray-painted “traitor” on his home and stalked him when he went to school. Cristopher’s mother sent him to the United States fearing things would worsen if he remained.

2) Norma grew up in an abusive home in El Salvador. When she was 14, she moved in with a 30-year-old man named Carlos who said he would take care of her. She became pregnant at 15 and Carlos began to abuse her. Norma had no means to support herself and depended entirely on Carlos for money. When Norma tried to leave Carlos, he threatened to take their child. When she was 25, Carlos witnessed a gang murder and the gang started threatening him, Sandra, and their child. They fled the country soon after.
An individual is eligible for asylum if she meets the definition of a refugee.
- Immigration & Nationality Act (INA) § 208(b)(1)(A).

A refugee is “any person who is outside any country of such person’s nationality . . . 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.”
- INA § 101(a)(42)(A)
- Definition based on international law: UN Protocol Relating to the Status of Refugees, Art I(2)
Asylum Legal Sources:

**INA**
- § 208
- §101(a)(42)

**8 CFR**
- § 208: AO
- §1208: EOIR

**CASE LAW**
- BIA binding unless 7COA rejected
- 7COA has rejected A LOT
- 7COA is your friend; avoid other COA law
INA § 241(b)(3)(A):

“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.”
8 C.F.R. § 1208.16(c): The burden of proof is on the applicant . . to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.

8 C.F.R. § 1208.18(a)(1): Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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.
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<thead>
<tr>
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</thead>
<tbody>
<tr>
<td><strong>Asylum</strong></td>
<td>Yes</td>
<td>Reasonable possibility (&gt; 10%)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>W/Holding</strong></td>
<td>No</td>
<td>More Likely than Not (&gt;50%)</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>CAT Relief</strong></td>
<td>No</td>
<td>More Likely than Not (&gt;50%)</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
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</table>
BREAKING IT DOWN:
THE ELEMENTS OF ASYLUM
1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
5. – Race
   – Religion
   – Nationality
   – Political Opinion
   – Membership in a Particular Social Group

These elements are SEPARATE!
1. “Well-Founded Fear”

Burden of Proof

reasonable possibility

“One in ten” chance of persecution

(INS v. Cardoza-Fonseca, 480 U.S. 421 at 431)

Established two ways:

1. All asylum elements as to past harm

2. Reasonable possibility that all asylum elements will occur in the future

Argue both whenever possible!
1. Well-Founded Fear Based on Past Persecution

Past persecution

+ All other asylum elements

Rebuttable presumption of future persecution

Rebutted by

- changed circumstances
- safe, reasonable internal relocation
1. Well-Founded Fear Based on Future Fear Only

Subjectively genuine fear

Objectively reasonable fear (w/all elements)

+ No safe, reasonable internal relocation

Well-founded fear of future persecution
Asylum on a Humanitarian Basis

Past persecution + all asylum elements

Severity of Past Persecution

Possibility of Other Serious Harm (No Nexus!)

Check the regs and case law (Matter of Chen; Matter of L-S-; Kholyavskiy).
2. “Persecution”: Look to Case Law

- **Stanojkova v. Holder**, 645 F.3d 943 (7th Cir. 2011)
  - Three types
    1. *Significant* physical force against a person’s body,
    2. the infliction of comparable physical harm without direct application of force . . . , or
    3. nonphysical harm of equal gravity.

- Harm constituting persecution can be less for a child than an adult.
  See USCIS Guidelines and 7th Circuit law.

- Must be considered cumulatively.
  **Nzeve v. Holder**, 582 F.3d 678 (7th Cir. 2009).
2. “Persecution”: What Facts are Important

1) Cristopher is a teenager from Venezuela. Police beat him and held a gun to his head after seeing him leave a neighborhood where an anti-government protest was ongoing. After he reported the attack to a police station, pro-government militias spray-painted “traitor” on his home and stalked him when he went to school. Cristopher’s mother sent him to the United States fearing things would worsen if he remained.

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## 3. The Persecutor

<table>
<thead>
<tr>
<th>Governmental Entity</th>
<th>Entity the Government is Unable OR Unwilling to Control</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>Gangs</td>
</tr>
<tr>
<td>Military</td>
<td>Paramilitary</td>
</tr>
<tr>
<td>Security Forces</td>
<td>Guerrilla Group</td>
</tr>
<tr>
<td>Presidential Guard</td>
<td>Family Members</td>
</tr>
<tr>
<td>Mayor</td>
<td>Vigilante Group</td>
</tr>
<tr>
<td>Village Chief</td>
<td>Opposing Political Party</td>
</tr>
<tr>
<td>Paramilitary?</td>
<td>Others?</td>
</tr>
<tr>
<td>Gangs?</td>
<td></td>
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</tbody>
</table>

**The persecutor does Not have to be the State**
4. Burden of Proof for Nexus

- Protected ground must be “at least one central reason” for the persecution. *Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007)*

- Persecutor can still have mixed motives. *J-B-N- & S-M-, 24 I&N Dec. at 211; Shaikh v. Holder, 702 F.3d 897 (7th Cir. 2012).*

- Circumstantial evidence can be sufficient to establish the persecutor’s motives. *Martinez-Buendia v. Holder, 616 F.3d 711 (7th Cir. 2010)*
4. “On Account of” a Protected Ground

Persecution

Nexus: On Account Of

Protected Ground
- Race
- Religion
- Nationality
- Membership in a PSG
- Political Opinion

Keep all 3 Elements Separate!
1. Race:
   - Broad meaning (Congolese Tutsis)

2. Religion
   - (Christian, Atheist)

3. Nationality:
   - Not just citizenship;
   can include ethnic or linguistic group.

4. Political Opinion:
   - Actual or Imputed (e.g. child of political activist, man who criticizes government’s military policy)

5. Membership in a Particular Social Group:
   - One of the most common and most complex bases for asylum
5. What is a Particular Social Group?

Based on a “common, immutable characteristic” that “members of the group either cannot change, or should not be required to change.”

- Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985)

<table>
<thead>
<tr>
<th>BIA Case Law</th>
<th>Seventh Circuit Case Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Can’t be overly broad</td>
<td>• Breadth is irrelevant</td>
</tr>
<tr>
<td>• Must be considered a group by society</td>
<td>• No social distinction test</td>
</tr>
<tr>
<td>• “Former” status/past experience is not enough</td>
<td>• “Former” status/past experience is enough</td>
</tr>
<tr>
<td>• Groups can’t be overly diverse</td>
<td>• Diversity not an issue</td>
</tr>
</tbody>
</table>

5. Protected Grounds: Which Apply?

1) Cristopher is a teenager from Venezuela. Police beat him and held a gun to his head after seeing him leave a neighborhood where an anti-government protest was ongoing. After he reported the attack to a police station, pro-government militias spray-painted “traitor” on his home and stalked him when he went to school. Cristopher’s mother sent him to the United States fearing things would worsen if he remained.

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New Options! Certain events in the client’s life may make her eligible for other relief

- Marriage, victim of a crime, etc
- Your client should not file applications for any other immigration benefits without consulting you first.

RED FLAGS! Other life changes may compromise eligibility

- Travel
- Marriage (in some cases)
- Crimes (even un-convicted crimes) here or abroad

Contact NIJC immediately if there are changes in your client’s life or if you think your client might be eligible for other relief!
Regulatory and Policy Changes

How has this administration affected asylum claims?

- Optics
- EAD eligibility
- Fees
- Travel bans
- AG & BIA case law
- Propose Rules
- Remain in Mexico
- Timing
The Asylum System

**AFFIRMATIVE**
For individuals who seek asylum and are NOT in deportation proceedings.

USCIS-Asylum Office

**DEFENSIVE**
Individuals who seek asylum as a defense to deportation proceedings

DOJ- Immigration Court

Board of Immigration Appeals

7th Circuit Court of Appeals
Who’s Involved in Asylum Adjudication

- EOIR
  - Immig Ct
  - BIA

- USCIS (AO)
  - ICE (OCC; ERO)
  - CBP

- DOJ

- DHS

- Asylum Seekers

- Families
- Attorneys

- ORR

- Unaccompanied Immigrant Children
First Steps

1) Review NIJC’s file: look for
   • Procedural posture
   • Deadlines
   • Forms to file

2) File your appearance

<table>
<thead>
<tr>
<th>If...</th>
<th>...Then</th>
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<tbody>
<tr>
<td>Your client is in removal proceedings</td>
<td>Complete e-registry and file form <strong>E28</strong> with the court</td>
</tr>
<tr>
<td>Your client has a pending asylum application with USCIS</td>
<td>File form <strong>G28</strong> with the Chicago Asylum Office</td>
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</tbody>
</table>
3) Calendar all deadlines:
   • Employment authorization, Court hearings

4) Check the EOIR automated system every other week to verify status: 1-800-898-7180/
   https://portal.eoir.justice.gov/InfoSystem

5) File a USCIS FOIA

6) Call your client and get started!
Thinking Through Case Preparation

- Brief
- Client affidavit/declaration
- Annotated index

Supporting documentation:

- Identity documents; proof of organizational or political membership; proof of prior employment as relevant to claim; police reports; etc.
- Witness (1\textsuperscript{st} and 2\textsuperscript{nd} hand) statements
- Country condition evidence
- Expert affidavits
COVID-19 & the Immigration System

June 2020
Asylum Office Resumes Interviews
Covid restrictions in place

July 2020
Non-Detained In-person Merits Resume in Chicago
Covid restrictions in place
No master (status) hearings

Present
- Still no master (status) hearings
- EOIR HQ restricts communication
- Hearings cancelled with little notice
- Backlog increases
Thursday: Part II: Working with Your Asylum Client and Presenting Your Case

- What to file for a successful asylum case
- Working with asylum seekers
- Best practices for case preparation during COVID-19
- What to expect at the immigration court and asylum office during the next year
THANK YOU!

For more information, contact
Anna Sears
312-660-1307
ansears@heartlandalliance.org

Other ways to support NIJC:
• Twitter: @NIJC
• Facebook: facebook.com/immigrantjustice

We love feedback! Use your phone to scan this QR code and complete a short evaluation regarding this training.