



## Immigration Update

by Alicia Triche

# The Difficult Case of Edward Snowden Highlights the Political Perils of Refugee Law

### On Aug. 1, 2013, Russia granted one-year asylum

status to U.S. citizen Edward Snowden, whose case by then was very well known. For almost two months, the U.S. and international media had carried riveting stories of Snowden's plight, starting with his exposure of extremely sensitive, high-level information regarding the practices of the National Security Administration and other agencies. As it turned out, Snowden had been the exclusive source behind several articles in *The Guardian*—articles exposing large-scale U.S. data-mining techniques in which cell phone and e-mail transmission records were secretly monitored on a massive scale.<sup>1</sup> Snowden, who gave up a well-paying position in Hawaii to make his disclosure, had initially fled to Hong Kong, but later became stuck for some time at a Moscow airport when the United States revoked his passport and demanded his return.

In the United States, Snowden now stands charged under several provisions of U.S. criminal law, including theft of government property under 18 U.S.C. § 641, unauthorized communication of national defense information under 18 U.S.C. § 793(d), and willful communication of classified communications intelligence information under 18 U.S.C. § 798(a)(3).<sup>2</sup> The official U.S. position is that, far from being a human rights defender, Snowden is a common criminal—someone who “broke the law and has to be held accountable.”<sup>3</sup>

In Russia, Snowden has now been granted the status of refugee. That dichotomy highlights one of the most well-traversed legal questions in modern immigration law: Exactly who *is* a refugee? As with any asylum application, the decision is ultimately in the eye of adjudicator, who is tasked with the important duty of properly determining the legal confines of the “refugee” definition.<sup>4</sup> As discussed below, the Snowden case raises fascinating issues regarding that definition, particularly regarding the nature of persecution, nexus, and political opinion.

Article 1A(2) of the United Nations Convention Relating to the Status of Refugees,<sup>5</sup> which is commonly referred to as the CSR or the Refugee Convention, defines “refugee.” The CSR was drafted in the aftermath of the atrocities of World War II and as part of the initial birth of international human rights law. It resulted from a collective, long-term effort—an “expression of conviction by the comity of nations”<sup>6</sup>—which was designed from the start with both

refugee *and* state protection in mind. Indeed, the definition of “refugee” passed through several hoops before reaching its final form, ending ultimately with unanimous approval at a Conference of Plenipotentiaries in Geneva in July 1951.<sup>7</sup> A convention refugee is a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion...is unable or...owing to such fear, is unwilling to return” home.<sup>8</sup> The U.S. definition, found at 8 U.S.C. § 1101(a)(42),<sup>9</sup> is substantially similar to the CSR, and, according to the Supreme Court, should be interpreted consistently with international law whenever our own law so permits.<sup>10</sup>

Under refugee law, the threshold question is whether Snowden *deserves* to apply. Article 1F of the CSR (reflected at 8 U.S.C. § 1158(b)(2)) describes numerous circumstances under which treaty drafters believed an application was undesirable—in essence, not deserving of refugee protection.<sup>11</sup> One of those is the commission, at home, of a “serious non-political crime.”<sup>12</sup> Goodwin-Gill and McAdam recount the unverified view of the late Altle Grahl-Madsen that this category may have been *originally* designed to include simple “fugitives from justice,” but no longer is restricted to that criteria.<sup>13</sup> In the United States, the Board of Immigration Appeals instructs in *Matter of E-A-* that an assessor “should balance the seriousness of the criminal acts against the political aspect of the conduct” to determine whether a crime was both serious and non-political.<sup>14</sup>

The next question would be whether the government *acts* that Snowden fears constitute persecution. Broadly speaking, persecution is defined as the infliction of “suffering or harm” that is severe enough to warrant refugee protection.<sup>15</sup> In the United States and other countries, application of the persecution standard has varied widely, but it is generally accepted that torture, severe beating, and extrajudicial killing fit the bill. Thus, if what Snowden claimed during his June 9, 2013, video interview is demonstrably true—that is, that the CIA could be planning to render him or have him killed—that would certainly constitute an act of persecution. If his sentence is disproportionate, Snowden might also have a claim; indeed, in Europe (though not in the United States), infliction of the death penalty is explicitly considered persecution.<sup>16</sup> Even simply enforcing

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domestic law is *sometimes* considered persecution—if that law is believed unjust.<sup>17</sup> For example, at U.S. statutory law, enforcement of China's one-child policy, if feared, is a grounds for refugee status.<sup>18</sup> However, in most cases, the enforcement of state law is considered to be a sovereign right, and an applicant who seeks relief based upon it is said to fear “prosecution versus persecution.” Professor Geoff Gilbert, who edits the *International Journal of Refugee Law*, has publically stated his firm opinion that Snowden falls in this category.<sup>19</sup>

If the acts he fears are held to constitute persecution, then Snowden would next have to demonstrate said persecution would be on account of a protected grounds—which, in his case, might be either particular social group<sup>20</sup> or political opinion. In 2011, the Board of Immigration Appeals ruled that “[o]pposition to state corruption” may indeed constitute a “political opinion.”<sup>21</sup> Likewise, in a highly persuasive opinion, the Ninth Circuit recently held that “the whistle blowing doctrine extends to an asylum petitioner who faces retaliation from a notorious criminal who is protected by corrupt government officials.”<sup>22</sup> There really can be little doubt that Snowden has expressed the very public and, in essence, very political opinion that U.S. surveillance policies are unjust. His difficulty lies in demonstrating that U.S. prosecution for theft and espionage is based *upon* those grounds, and, as noted above, that the prosecution would contain a disproportionate penalty or other characteristics morally egregious enough to constitute persecution.

When considered as an application of the refugee definition, Russia's final decision seems to indicate an opinion that, even though Snowden's disclosures were crimes, the discretionary act of criminally prosecuting him amounts to persecution under the circumstances. *The New York Times* reported that a member of Russian parliament described Snowden as “a human rights defender, who speaks for the rights of millions and millions of people all over the world.”<sup>23</sup> As indicated above, there is certainly precedent for considering enforcement of the law to be persecution; but, in the United States at least, that decision is usually made when the law itself is considered to be unjust. Of course, from the U.S. standpoint, Snowden is a severe threat to national security, which is another grounds for denying refugee status under the convention.<sup>24</sup> But even when security is not such a strong consideration, refugee law can often prove vulnerable to its political context. ☉

## Endnotes

<sup>1</sup>Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN, June 6, 2013 available at [www.theguardian.com](http://www.theguardian.com).

<sup>2</sup>*Obama Rethinks Putin Summit After Snowden Granted Asylum*, REUTERS, [www.reuters.com](http://www.reuters.com) (Aug. 1, 2013).

<sup>3</sup>Ellen Barry and Andrew Roth, *Snowden Renews Plea for Moscow to Grant Asylum* N.Y. TIMES, [www.nytimes.com](http://www.nytimes.com) (Jul. 12, 2013).

<sup>4</sup>It should be noted that “asylum” refers generally to “protection granted to a foreign national” in the exercise of state sovereignty and is a separate concept from refugee protection. Guy S. Goodwin-Gill and Jane McAdam, *THE REFUGEE IN INTERNATIONAL LAW* (3d ed. 2007) 356.

<sup>5</sup>July 28, 1951, 189 U.N.T.S. 150. The United States is bound by Articles 2 through 34 as a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 (‘Protocol’).

<sup>6</sup>Nehemiah Robinson, CONVENTION RELATING TO THE STATUS OF REFUGES: ITS HISTORY, CONTENTS AND INTERPRETATION (1953) 6.

<sup>7</sup>Alicia Triche Naumik, *International Law and Detention of US Asylum Seekers*, 19(4) Int. J. Refugee L. 661, 662 (2007).

<sup>8</sup>CSR Art. 1A(2).

<sup>9</sup>According to U.S. law, a refugee is “[a]ny person who is outside any country of such person's nationality...and who is unable or unwilling to return to...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.” 8 U.S.C. § 1101(a)(42)(A).

<sup>10</sup>*Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 n.35 (1993), citing *Murray v. The Charming Betsy*, 2 Cranch 64, 117–18, 2 L. Ed. 208 (1804).

<sup>11</sup>*See, e.g.*, Goodwin-Gill and McAdam (n. iv) 175–76; James Hathaway and Colin Harvey, *Framing Refugee Protection in the New World Disorder* 34 CORNELL INTL. L. J. 257 (2001).

<sup>12</sup>CSR Art. 1F(b).

<sup>13</sup>Goodwin-Gill and McAdam (n. iv) 175.

<sup>14</sup>26 I&N Dec. 1 (BIA 2012). In *E-A-*, the board held that burning buses and other violent acts were out of proportion to any purported political objectives. *Id.* at 8–9.

<sup>15</sup>*Matter of Laipenieks*, 18 I&N Dec. 433, 456–457 (BIA 1983).

<sup>16</sup>*Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), ¶¶ 88-91 (1989).

<sup>17</sup>8 U.S.C. § 1101(a)(42)(B).

<sup>18</sup>In *Matter of Toboso-Alfonso*, for example, the United States essentially held that enforcement of official Cuban policy against gays was unjust enough to be a grounds for refugee status. 20 I&N Dec. 819 (BIA 1990).

<sup>19</sup>Geoff Gilbert, *Why Edward Snowden Never had a Right to Asylum*, [blog.oup.com/2013/07/why-edward-snowden-never-had-a-right-to-asylum](http://blog.oup.com/2013/07/why-edward-snowden-never-had-a-right-to-asylum) (Jul. 17, 2013).

<sup>20</sup>The concept of “particular social group” is one of the most hotly contested issues in modern immigration law. It should be noted, though, that there is some federal precedent for unchangeable past behavior—in particular, past gang membership—as constituting such a group. *Urbina-Mejia v. Holder*, 597 F.3d 360, 366–67 (6<sup>th</sup> Cir. 2009).

<sup>21</sup>*Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011).

<sup>22</sup>*Anotonyan v. Holder*, 642 F.3d 1250, 1252 (9<sup>th</sup> Cir. 2011).

<sup>23</sup>Ellen Barry and Andrew Roth, *Snowden Renews Plea for Moscow to Grant Asylum* N.Y. TIMES, [www.nytimes.com](http://www.nytimes.com) (Jul. 12, 2013).

<sup>24</sup>CSR Article 33(2) provides that international protection “may not ... be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is.”

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