Winning Asylum Cases Against All Odds:

Lessons Learned from 3 “Exotic” Asylum Cases
for Detainees from the El Paso Processing Center

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What is Asylum

• Extraordinary legal relief granted on a case by case determination;

• In order to prevail in an asylum case, the applicant must meet the definition of a refugee which is defined in §101 (a)(42) of the Immigration & Nationality Act (INA);

• As a practical matter, seeking asylum should only be considered as a legal relief of last resort;

• Not intended as legal relief for the masses.
Legal Elements of an Asylum Claim

• Applicant must prove by clear and convincing evidence that s/he is unable or unwilling to return to his or her country of nationality 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. (See generally § 208 in the INA and 8 U.S. C. 1158)

• If an asylum application- the I 589- is filed after May 11, 2005, the REAL ID Act of 2005, Div. b. Pub. L. No 109 13, 119 Stat. 231, 305 (codified in INA §208(b)) governs the proceedings.
Past Persecution or a Well Founded Fear of Future Persecution

• No universal definition of persecution exists but it is more than mere discrimination; (See Tesfamichael v. Gonzales, 469 F.3d 109,119 (5th Cir. 2006);

• It should demonstrate “threat to life” or “freedom” or “infliction of suffering or harm that is regarded as offensive” on account of 1 of the 5 protected classes. (See Matter of Acosta, 19 I & N Dec. 211,222 (BIA 1985) where the Board set out 4-pronged test identifying a “well founded fear of persecution”, overruled on other grounds by Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987).
Persecution Further Explained


- “Excessive” or “arbitrary” confinement may equal persecution (See Abel-Masieh, 73 F.3d at 584 (1996);

- The persecution or fear of persecution may be the result of one reason or from a combination. (See the United Nation High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status § 66(1992).)
Source of Persecution

• Must be by the government or forces that the government is unwilling or unable to control; (Adebisi v. INS, F.2d 910,914 (5th Cir. 1992)

• This link that the harm must be caused by the government is referred to as the “Nexus” argument and is critical to prove in order to win an asylum case;

• The harm one suffers must be linked to 1 of the 5 protected groups; i.e. “on account of”

• Mere harm without proof of nexus and membership in 1 of the 5 protected groups does not allow one to win an asylum case.
Bars to Asylum

- A grant of asylum is discretionary and certain bars exist which preclude the IJ from granting asylum;
- A conviction of an aggravated felony is a particularly serious crime and bars an applicant from receiving asylum; (this applicant may qualify for withholding of removal or CAT); (208(b)(2)(A)(ii) & (b)(2)(B)(i) of the INA);
- Failure to apply for asylum within one year of being present in the US bars a grant of asylum unless extraordinary conditions exist. (See 8 C.F.R § 1208.4(a)(2); however see Asylum Officer’s Handbook for definition of extraordinary circumstances http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/One-Year-Filing-Deadline-31aug10.pdf)
Country Conditions/Internal Relocation

• Once an applicant for asylum proves persecution on account of one of the 5 protected groups then depending on the country from where s/he has fled; the applicant may have to prove that s/he attempted to relocate in the country prior to fleeing.

• Typically, the IJ relies heavily on U.S. State Department Reports however other country reports may be introduced into evidence at the hearing to rebut the U.S. government reports. Expert witnesses may also be helpful.
Asylum Hearing Procedure

• Each IJ has discretion over his/her own cases and conduct the asylum hearing differently. Usually there are at least 2 master hearings prior to the individual hearing. All IJs require the applicant submit a completed I-589 along with supporting documentation. The documentation should include the applicant’s detailed declaration, sworn affidavits of witnesses and or friends/family, police reports and country conditions to corroborate all of the allegations contained in the I 589.

• For exotic cases such as those from Africa, the applicant is typically the only witness and at the initial master a translator that speaks the native language should be requested.

• The Applicant’s credibility is a critical factor; so preparation prior to the hearing is critical. Applicants are not at all familiar with the oral hearing process and must be prepared from the cross examination from the Trial Attorney.
Overview of 3 Asylum Cases:

Case 1

• Applicant 1, is a 27 year old professional soccer player who is a native and citizen of Ghana who applied for admission into the U.S. on January 23, 2014 at the Bridge of the Americas Port of Entry in El Paso, Texas.

• Applicant’s mother & father were murdered December 1, 2011 and his fiancée (mother of his young baby girl) was murdered in September 2012.

• Applicant fled Ghana in January 2013 and went to Panama. Stayed in Panama for 10 months; was threatened in Panama once someone from Ghana exposed his location and applicant fled to US. Entered the U.S. as an arriving alien requesting asylum.

• Applicant alleged corrupt uncle was working in collaboration with Chinese businessmen interested in stealing Applicant’s family cocoa farm in order to mine gold. Applicant alleged uncle was responsible for the 3 murders and the police were not able to protect him.
Case 1 Evidence

- Evidence submitted in support of asylum claims is of critical importance since it should corroborate Applicant’s testimony; A finding of an Applicant’s credibility is the initial finding of all IJ’s in asylum proceedings; (Chun v. INS, 40 F.3d 76,79 (5th Cir. 1994);
- Submitted 3 separate submissions to the Court in support of Applicant 1’s asylum claim;
- First submission- Fully completed I 589 & detailed Applicant’s Declaration Government issued ID of Applicant, Affidavit of Applicant's soccer coach, articles on illegal gold mining in Ghana and articles on country conditions in Ghana;
- Second Submission is a Response to Produce Biographic Information;
- Third Submission- 9 Sworn Affidavits from individuals in Ghana familiar with Applicant’s case including a police report where it was stated the police could protect Applicant.
Case 1 Merits Hearing

- IJ Ruhle was presiding Judge; and reads everything submitted to him prior to the hearing and initially asks all of his own questions;
- When he is finished asking questions, IJ Ruhle passes to Applicant’s Attorney; then the Trial Attorney is given an opportunity to ask questions;
- Applicant 1’s legal position was that he was a member of a particular social group; “Ghana landowners that the Government could not or would not protect from Chinese businessman.”
Case 1 Conclusion

- Applicant’s oral testimony completed in 4 hours;
- Oral argument supporting the membership in a particular social group followed; IJ Ruhle stated “land ownership without more is a non-starter!” Was able to prove that Applicant had a public reputation as a professional soccer player and since Ghana is the size of Oregon, Applicant could be identified and there was no where Applicant could relocate safely (submitted police report helped prove this allegation); IJ Ruhle agreed to grant asylum as long as TA would support it and waive appeal;
- Asylum granted on April 30, 2014 and Applicant released from detention on April 31, 2014.
Case 2

- Applicant 2 is a 22 year old native and citizen of Somalia who applied for admission to the U.S. on December 3, 2013 at the Bridge of the Americas Port of Entry in El Paso, Texas.

- Applicant was an English teacher at a private school in Kismayo, Somalia where he taught beginning English to Muslim students, male and female ranging in age from 13-35. Applicant’s father was a well known political activist who routinely spoke out against Al Shabaab.

- Al Shabaab is recognized by the U.S. State Department as a terrorist organization

- Applicant’s father was murdered on June 28, 2012 by members of Al-Shabaab and soon thereafter, members of Al Shabaab arrested and detained Applicant 2. He escaped from the prison, fled to Kenya in July 2012 and after a long and arduous travel on land from Brazil presented himself at the El Paso POE.
Case 2 Evidence

- Applicant 2’s legal claim consisted of political opinion and membership in a particular social group, “former English teachers in Somalia”;
- Applicant 2’s presiding Judge was Judge Gonzalez. Similar to IJ Ruhle, she also reads all submission prior to the oral hearing;
- Applicant 2 submitted 28 Exhibits which included Applicant’s detailed declaration, sworn affidavits from Applicant's U.S. citizen relatives, maps, genealogical table of Somali clans, letter from Library of Congress listing Mayors of Mogadishu, numerous news articles and country condition reports about Somalia, Applicant’s birth certificate, forensic report and written closing arguments.
Case 2 Hearing

• Applicant 2 had 4 Master Hearings; his Individual Merits Hearing was initially scheduled for June 9, 2014 where he gave oral testimony for 8 hours and the continuation of the Merits Hearing was held on July 15, 2014. IJ Gonzalez ordered written closing arguments;

• IJ Gonzalez granted asylum on August 7, 2014 wherein she issued a 20 page opinion;

• Critical legal issue for Applicant 2 was proving that he was indeed a member of a particular social group, “former English teachers in Somalia”;

• IJ Gonzalez recognized that prior to this case, neither the 5th Circuit of the Board recognized this group as a viable particular social group under the Act.

• A “particular social group” is a group of people united by a shared characteristic that is either immutable or so fundamental to the members’ identity that they should not be required to change it. This group must be defined with particularity and is socially distinct within the society in question.
Case 2 Concluded

- A “particular social group” can not be too large and must be defined with a “clear benchmark” so one can determine who is in and who is out;
- IJ Gonzalez determined Applicant 2 was a member of a particular social group and that he could not relocate anywhere in Somalia because Al-Shabaab would continue to look for him and target him;
- Applicant 2 released from detention August 26, 2014.
Case 3

• Applicant 3 is a 28 year old citizen and native of Ghana who fled Ghana on September 15, 2013 on account of his persecution, threats and personal attacks because he is a homosexual.

• Applicant travelled though more than 11 countries before he arrived at the Bridge of Americas Port of Entry in El Paso, Texas on February 15, 2014 where he presented himself and was admitted as an arriving alien.

• Laws in Ghana criminalize homosexuality; Ghana’s President Mahama and Minister of Justice Marietta Appiah Oppong support jail sentences for men accused of homosexual acts.
Case 3

- Applicant 3’s legal claims alleged membership in a particular social group that consisted of homosexual men;

- Applicant 3’s presiding Judge was IJ Chapa who was a visiting Judge from Florida who was assigned to El Paso Texas for one week to assist with the tremendous backlog of cases. A visiting Trial Attorney from Florida represented the government;

- For this case, Applicant 3 was physically present at the detention center and the IJ, the TA and Applicant 3’s attorney appeared in a immigration courtroom in downtown El Paso so the entire individual merits hearing was heard via ITV;

- During the 3.5 hour oral hearing the ITV connection cut out more than 25 times disrupting Applicant 3’s testimony and the subsequent questioning.
Case 3 Merits Hearing

• Applicant 3 had 3 Master Hearings and 1 3.5 Individual Merits Hearing but was assigned two different Immigration Judges. Judge Chapa had not seen nor reviewed the more than 200 pages that were submitted in support of Applicant 3’s cases prior to presiding over the oral hearing.

• Applicant 3 submitted an I 589, his own Declaration, more than 12 Sworn Affidavits, 2 Police Reports, numerous reports on Ghana’s country conditions as well as photos and other miscellaneous documents.

• IJ Chapa allowed Applicant’s attorney to question him, however he was very stern and interrupted almost every question. He continually requested the Applicant to identify a specific date and time when he knew he was a homosexual!
Case 3 Conclusion

- Aside from submitting documents prior to the Individual Merits Hearing that was held on July 30, 2014, all other arguments were made orally;
- After 3 hours of oral testimony, IJ Chapa asked the government attorney and Applicant 3’s attorney to summarize their legal argument;
- After a brief recess, IJ Chapa issued an oral order granting asylum;
- Applicant 3 released from detention August 1, 2014.
Lessons Learned From Winning 3 Asylum Cases

• It is critical that Applicants from exotic Countries such as Somalia and Ghana present documents that corroborate allegations stated in Applicants I 589 and their Declarations; without documents it is difficult to support the claims and prove credibility;

• As an attorney, one must assist to identify the individuals who are able to provide affidavits and be able to draft the necessary affidavits and instruct the Applicant to direct his declarants how to get the affidavits sworn. For example in Ghana, it is possible to go to the High Court and have a declaration sworn; and in the refugee camps in Kenya and Ethiopia, Somalis can get statements notarized through UN assistance.
Lessons Learned

• Each Immigration Judge handles asylum cases differently, it is necessary to prepare your client to be direct concise and always tell the truth; often clients ask…”What should I tell the Judge?” It is the attorney’s responsibility to assist the Applicant how and in what order to present his or her story.

• Be prepared to argue the specific legal claim that supports your client’s case with a case citation and the ability to differentiate your case from others that have been denied.

• Persecution and harm without more will never win an asylum case; it is important to remember just because an individual or family has suffered some awful event, without a legal nexus, it does not mean the individual can win an asylum case!
Lesson Learned

• According to one IJ, four main reasons exist why one loses an asylum case:
  • 1. There is no Nexus; i.e. one can’t prove with clear and convincing evidence that the persecution occurred on account of 1 of the 5 legal groups and that the government is incapable or unwilling to protect the individual;
  • 2. Relocation within the specific country that one is fleeing is possible;
  • 3. Applicant is not credible; i.e. too many inconsistencies in the testimony
  • 4. Case law does not support the legal theory