



Asylum

Withholding of Removal/CAT

October 26, 2018

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Sources of Asylum Law

- ▶ U.S. asylum law derives from international law, primarily:
 - ▶ 1951 Convention Relating to the Status of Refugees
 - ▶ 1967 Protocol Relating to the Status of Refugees
- ▶ STATUTES:
 - ▶ INA 101(a)(42) (definition)
 - ▶ INA 208 (procedures/eligibility)
- ▶ REGULATIONS:
 - ▶ 8 CFR 208, 1208

Refugee or Asylee?

- *Refugees*: Recognized outside of the US in 3rd country. Enter U.S. with refugee status as a resettled refugee.
- *Asylum seekers*: Come to the US with or without immigration status. Ask the government to stay because of fear of returning to their country and apply for asylum at port of entry or from inside US

Defensive Asylum Process in Removal Proceedings

- ▶ How someone ends up in Immigration Court:
 - Filed affirmative asylum application with USCIS, but Asylum Office did not approve asylum, automatically referred case to court if out of status to “renew” application with Judge
 - ▶ Note: For Unaccompanied Children in removal proceedings, USCIS has initial jurisdiction so file with USCIS first – concurrent proceedings
 - USCIS denied other benefit and referred to ICE for removal
 - Border encounter with CBP and expressed fear
 - Detained by ICE inside U.S.
- ▶ Document to Initiate Removal Proceedings: Notice to Appear
- ▶ Once case is filed with Court, file (or renew) I-589 application for Asylum, withholding of removal, CAT as a defense to removal/deportation
- ▶ Go to Master Calendar Hearing, then request asylum merits (“Individual”) Hearing
- ▶ If case denied by Judge, can appeal to Board of Immigration Appeals

Application Process

- ▶ Step 1: File I-589 – in open court at Master Calendar Hearing (or with the Clerk if first Master Calendar is more than one year after entry to U.S.)
- ▶ Step 2: Receive Individual Hearing date
- ▶ Step 3: File any remaining supporting documents (at least 15 days prior to Individual Hearing)
- ▶ Step 4: Present case at Individual Hearing
- ▶ Step 5: Receive decision (either orally at the time of the hearing or in writing by mail at a later date)

Application Components

- ▶ Form I-589
- ▶ Supporting documentation
 - Personal Statement
 - Witness affidavits/Expert affidavits
 - Documentary evidence (police reports, court records, medical records, news clippings, etc.)
 - Psychological/Medical evaluations
 - Country conditions (reports, articles, studies, etc.)
- ▶ Legal brief (depending)
- ▶ Oral testimony

Individual Hearing

- ▶ Adversarial proceeding
- ▶ Local courts in Arlington and Baltimore
- ▶ Present your case
 - ▶ Government will cross examine
- ▶ Government presents its case (maybe?)
- ▶ Closing arguments (maybe?)
- ▶ IJ either grants relief or issues removal order
- ▶ Can appeal a denial within 30 days of decision to BIA
- ▶ If lose at BIA, can appeal to Federal Court of Appeals
- ▶ If lose there, can appeal to SCOTUS

Elements for Asylum

- ▶ Any person
- ▶ outside country of such person's nationality, or in the case of someone having no nationality, is outside any country in which such person last habitually resided
- ▶ 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
- ▶ Must file within 1 year of last entry to US
- ▶ Discretion

“Well-Founded Fear”

- ▶ Well-founded fear requires you to have both subjective and objective fear
- ▶ Past persecution creates rebuttable presumption of a well-founded fear (8 CFR 208.13(b)(1))
 - If past persecution particularly severe, can argue humanitarian asylum
- ▶ How to prove:
 - Personal statement
 - Country conditions
 - Objective documentary evidence
 - Expert affidavits or testimony

“Persecution”

- ▶ No statutory definition
- ▶ Infliction of harm or suffering to overcome a characteristic of the victim (Matter of Kasinga)
- ▶ Harassment is not persecution (Matter of A-E-M-)
- ▶ Examples of persecution: threats to life or freedom, torture, rape, sexual assault, forced abortion, FGM
 - ▶ Clients have often experienced high levels of trauma
- ▶ How to prove:
 - Personal statement
 - Psychological/medical records or evaluations
 - Country conditions
 - Witness affidavits
 - Police, court or prison records
 - Expert opinion

Persecution by a Private Actor

- ▶ Persecution must be at the hands of a State actor OR a private actor that the State is unwilling or unable to control
- ▶ The Attorney General has recently attempted to change the “unwilling and unable” standard – issued a ruling in Matter of A-B- stating that the government must “condone” persecution by a private actor

Protected Grounds

- ▶ Race
- ▶ Religion
- ▶ Nationality
- ▶ Political Opinion
 - Does not necessarily have to be about a political party or person (e.g. a political opinion re: coercive population control in China, promotion of LGBT rights in Latin America, etc.)
- ▶ Membership in a particular social group (PSG):
 - Shares an immutable characteristic, defined with particularity, and considered socially distinct *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)
 - Generally acceptable social groups: LGBT, former police officers, family members
 - Generally not a social group: bus drivers, gang recruitment, deportees, victims of crime

Formulating a PSG

- ▶ An immutable characteristic is one a person can not or should not be required to change b/c it's fundamental to identity
- ▶ Most courts will not accept overly broad PSGs ("women" or "people who resist gangs")
- ▶ Important to clearly delineate who falls within the group and who does not
- ▶ Group cannot be defined by the harm suffered ("victims of domestic violence")
 - *Matter of A-B-* overturned *Matter of A-R-C-G-*, the case which held that "married women unable to leave their relationship" (more commonly read as victims of domestic violence) could form a particular social group
- ▶ Can propose multiple variations of the PSG ("gay men in El Salvador"/"sexual minorities in El Salvador"/"LGBT people in El Salvador")
- ▶ Must clearly indicate on the record before the Immigration Judge the exact delineation of any and all proposed particular social groups (*Matter of W-Y-C-* & *H-O-B-*)

Nexus

- ▶ Must show persecution ON ACCOUNT OF a protected ground
- ▶ Applicant must establish that protected ground is “one central reason” for the persecution (REAL ID)
 - Motive from point of view of the persecutor, not applicant
- ▶ Persecution may be on account of a protected ground even when the characteristic is merely *imputed* to the applicant
- ▶ How to prove
 - Personal statement
 - Witness affidavits
 - Country conditions
 - Other evidence

Bars to Asylum

- One year filing deadline
- Firm resettlement
- Criminal Bars:
 - Conviction in U.S. of Particularly Serious Crime
 - Committed serious nonpolitical crime outside U.S.
- Terrorism-Related Inadmissibility Grounds (TRIG)
- Participated in persecution

One Year Filing Deadline

- ▶ Must apply for asylum within 1 year of latest entry to the US
- ▶ INA § 208(a)(2)(D) Exceptions for:
 - Changed circumstances
 - Extraordinary circumstances beyond her control
 - Mendez-Rojas class members (while temporary stay is in place)
 - Designated Unaccompanied Children (UAC): exempt
- ▶ An exception does not automatically create a new 1 year extension. *Matter of TMH & SWC*, 25 I&N Dec. 193 (BIA 2010).
 - Application must be filed within a “reasonable period” of those changed circumstances
 - Less than 6 months= per se reasonable?
 - Anything over 6 months usually per se unreasonable
 - Look to specific event to signify “end” of circumstance to start the reasonableness inquiry

Changed Circumstance Exception

- ▶ Changed circumstances must “materially affect the applicant’s eligibility for asylum.” 8 CFR 208.4(a)(4). May include, but not limited to:
- ▶ Changes in the applicant’s country of nationality
 - *Zambrano v. Sessions*, 878 F.3d 84 (4th Cir. 2017): “New facts that provide additional support for a pre-existing asylum claim can constitute a changed circumstance” based on new assaults by gangs in Honduras against family in increased efforts to look for applicant.
- ▶ Changes in the applicant’s circumstances, including changes in law and activities that the applicant becomes involved in outside the country of persecution that place applicant at risk, incl. religious conversion.
- ▶ In the case of individual previously included as a dependent in an application where there has been a loss of the qualifying relationship

● Extraordinary Circumstances Exception

- ▶ Cannot be created by applicant! Also, must be directly related to failure to file within one year deadline. 8 CFR 208.4(a)(5)
- ▶ Serious illness or mental/ physical disability during 1YFD, including consequences of persecution
- ▶ Legal disability (minor or mental impairment)
- ▶ Ineffective assistance of counsel*
- ▶ Applicant maintained TPS, lawful immigrant or nonimmigrant status, or parole
- ▶ Applicant filed within one year but application was rejected by Service for improper filing
- ▶ Death or serious illness of applicant's representative or a member of applicant's immediate family

Discretion

- ▶ Factors playing into discretion:
 - Manner of entry (by fraud, EWI, with a visa)
 - Criminal record or gang affiliation
 - Ties to US
 - Employment/volunteer work
 - Severity of persecution
 - Humanitarian considerations
- ▶ Denials solely on discretion should be rare
 - Generally where there is “egregious negative activity by the applicant.” *Zuh v Mukasey*, 547 F.3d 504, 507-14 (4th Cir. 2008)
 - “The danger of persecution will outweigh all but the most egregious of adverse factors.” *Dankam v Gonzales*, 495 F.3d 113, 119 n.2 (4th Cir. 2007)

Burden of Proof

- ▶ Asylum applicant must prove eligibility for relief requested
 - “Well-founded fear” of future persecution in theory is “One in ten” probability. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)
 - Under REAL ID Act, must include evidence or a credible explanation as to why evidence was not obtainable
- ▶ If applicant meets burden of proof, burden shifts to government to rebut with proof of changed circumstances or internal relocation
- ▶ If government successfully rebuts, burden is on applicant to rebut the rebuttal, or argue for humanitarian asylum (in the case of changed circumstances).

Withholding of Removal

- ▶ INA 241(b)(3)(A) – person whose life or freedom is threatened based on protected ground CANNOT be sent back to their country
- ▶ Even if barred from asylum because of 1YFD or firm resettlement, person can apply for withholding of removal
- ▶ Application for asylum is automatically considered an application for withholding as well – can only be granted in court
- ▶ Higher standard of proof of persecution than asylum: “more likely than not”
- ▶ Receive removal order, which is then withheld
 - ▶ No path to citizenship, no international travel, no derivatives

Convention Against Torture

- ▶ 8 CFR 208.16, 17, and 18
- ▶ Objective fear of torture at hands of government or government acquiescence
- ▶ “More likely than not” standard
- ▶ For individuals not eligible for asylum or withholding (e.g. no protected ground, 1YFD, criminal bars)
- ▶ Mandatory if burden is met, no bars for deferral
- ▶ Same effect as grant of withholding, order of removal
 - ▶ No path to citizenship, no international travel, no derivatives

Definition of Torture

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 a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

	Asylum	Withholding of Removal	CAT
Fear Requirements	Fear of Persecution based on: 1. Race 2. Religion 3. Nationality 4. Political opinion 5. Particular social group (PSG)	<i>Same as Asylum</i>	1. intentional infliction of severe pain or suffering 2. by, or at the instigation of, or with the consent or acquiescence of 3. a public official
Legal Standard	“Well-founded fear” of future persecution “One in ten” probability <i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	Clear probability of persecution “More likely than not” <i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	“More likely than not” that person will be subjected to torture
Filing Deadline	Within 1 Year of Entry (some exceptions)	None	None
Bars	<ul style="list-style-type: none"> • Particularly serious crime bar • Material support bar • Persecutor bar 	<i>Same as Asylum</i> but particular serious crime bar only applies if aggravated felony has a sentence of 5 years or more	<ul style="list-style-type: none"> • Bars apply for withholding version of CAT • None for deferral
Immigration Status	Asylee → Green Card → US Citizen	Final removal order with work permit	Final removal order with work permit
Authority to Grant	Asylum Office & Immigration Judge	Immigration Judge only!	Immigration Judge only!
Laws or Regulations	INA § 208 and INA 101(a)(42)(A) defining refugee	INA 241(b)(3)	UN Convention Against Torture, 8 CFR 1208.18

Questions?

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