Practical Issues in Asylum Litigation

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Nexus Under the REAL ID Act
A Step in the Right Direction?

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Refugee Definition: Elements

- Element One: Well-Founded Fear
  - Past persecution or fear of future persecution
  - Humanitarian; internal flight?
- Element Two: Of Being Persecuted
  - Serious harm + failure of state protection
  - Internal flight?
- Element Three: For Reasons Of
  - "Nexus"
- Element Four: Grounds
  - Race, religion, nationality, membership of a particular social group, or political opinion
- Element Five: Bars to Eligibility

PARSE!!!

Nexus: Refugee Convention & U.S. Statute

- **Article 1 refugee definition**: *"…owing to well-founded fear of being persecuted **for reasons of** race, religion, nationality, membership in a particular social group or political opinion…"*
- **INA 101(a)(42)(A)**: *Past or feared persecution must be "**on account of**" one of the enumerated grounds*
- **Article 33 non refoulement obligation**: *"where his life or freedom would be threatened **on account of** his race, religion, nationality, membership in a particular social group or political opinion"*
- **INA 241(b)(3)**: *An individual whose life or freedom would be threatened **on account of** one of the grounds*
- **REAL ID Act, INA 208(b)(1)(B)(i):** *"[T]he applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be **at least one central reason** for persecuting the applicant.*

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Nature of Linkage in U.S. Law

- *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)
- *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996)
- *The REAL ID Act*, INA 208(b)(1)(B)(i)

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REAL ID: A Change in the Right Direction?

- *READ ID Changes encoded at 8 USC 1158 (INA 208(b)(1)(B)(i))*

…..
(b) Conditions for granting asylum.
(1) In general.
…..
(B) Burden of Proof
(i) In general. The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A) [8 USC §1101(a)(42)(A)]. To establish that the applicant is a refugee within the meaning of such section, **the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.**

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Evidence of Nexus

- Direct Evidence
  - Statements or actions by the persecutor
  - Statements or actions by victims expressing reasons for resisting
- Circumstantial Evidence
  - Persecutor's treatment of similarly situated
  - State's failure to protect similarly situated
  - Suppression or criminal prosecution of certain groups or opinions
  - Country condition evidence of views of persecutors

See Matter of S-P-, 21 I&N Dec. 486, 495 (1996).

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Post-REAL ID

- *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007)
- *Ndayshimiye v. Att'y Gen.*, 557 F.3d 123 (3d Cir. 2009)

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Nexus & State Actor

Standard Analysis:

CONVENTION REASON		**PERSECUTION**
Race Religion Nationality Membership in a particular social group Political opinion	causal link →	

Causal link revealed by evidence of reasons which led either to infliction or threat of relevant harm, or which cause the applicant's country to fail to effectively protect the applicant

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Nexus & Non-State Actor

Bifurcated Nexus:

SERIOUS HARM

CONVENTION REASON

causal link

FAILURE OF STATE PROTECTION

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Nexus & Non-State Actor

EXAMPLE: Gay man is brutally attacked by hate group because of his sexual orientation. The man complains to the police, who reply that "you people make me sick" and refuse to investigate or protect him from future attacks.

Bifurcated Nexus:

SERIOUS HARM
severe beatings

CONVENTION REASON
Particular Social Group

because he is gay
causal link
because he is gay

FAILURE OF STATE PROTECTION
refusal to investigate or protect

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Nexus & Non-State Actor

EXAMPLE: Woman is severely and repeatedly beaten by her husband. The woman seeks protection by the authorities but is ignored because the abuse is considered a private, domestic affair.

Bifurcated Nexus:

SERIOUS HARM
severe beatings

CONVENTION REASON
Particular Social Group

because she is female
causal link
because she is female

FAILURE OF STATE PROTECTION
refusal to intervene in "domestic affair"

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Employment Authorization for Asylum Applicants

- Regulatory eligibility requirements for an EAD
  - 1) not an aggravated felon; 2) filed a complete application; 3) asylum application not denied at time of EAD application; and 4) absent exceptional circumstances, asylum applicant has not failed to appear for an interview or hearing. 8 C.F.R. §§ 208.7(a), 1208.7(a)
- Can file for an EAD when asylum "clock" reaches 150 days.
- EAD Cannot be granted before 180 days have elapsed. 8 CFR §§208.7(a)(1), 1208.7(a)(1)
- "Asylum Clock" – counts the 180 day period before EAD can be granted

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Problems with the "Asylum EAD Clock"

- 1) Implementation Problems – EOIR/USCIS fail to follow agency guidance; 2) Interpretation Problems – EOIR and USCIS wrongly interpret the regulations when making clock decisions
- What guidance is EOIR implementing?
  - OPPM 11-02: The Asylum Clock
  - OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes
  - OPPM 00-01: Asylum Request Processing
- USCIS?
  - Affirmative Asylum Procedures Manual
  - EOIR database

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Common Asylum Clock Problems Result from the Following:

- Inadequate Notice and Review
- "Hearing" Policy (asylum applications filed at time other than court hearing are not considered "filed" for purposes of the clock)
- "Remand" Policy (clock does not start/restart following remand)
- "Prolonged Tolling" Policy (clock only starts/ restarts at hearing)
- "Failure to Appear" Policy (a clock that has been stopped by USCIS because the applicant failed to appear at an interview at the Asylum Office remains permanently stopped upon referral to immigration court)
- See LAC Practice Advisory at *http://www.legalactioncenter.org*

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Strategies for Addressing a Stopped Clock

- OPPM 11-02:
- Request the issue be addressed on the record by the judge
- After the hearing, address the issue to the Court Administrator
- If unsuccessful with IJ, contact ACIJ in writing – *www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm*
- Cases before the Board – applicants who believe more time should have accrued during initial proceedings before IJ should contact EOIR Office of General Counsel by letter
- Additional Suggestions:
- File motion to advance hearing date in prolonged tolling cases
- Submit proof of biometrics to the court
- Argue your case and why clock stop is violation of regulations

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Asylum Clock Litigation

- *A.B.T. et al. v. USCIS*, No. 11-02108 (W.D. Wash. filed December 15, 2011); see LAC website
- Challenges to EOIR and USCIS Asylum Clock Policies
- Legal Claims:
  - Violation of INA and Regulations - 8 USC §1158(d)(2), and its implementing regulations, including, inter alia, 8 CFR §§208.3(c), 208.4(b), 208.7(a), 274a.12(c)(8), 274a.13(a), 1208.3(c), 1208.4(b), and 1208.7(a)
  - Violation of the Administrative Procedure Act, 5 USC §701, et seq.
- A.B.T. et al v. USCIS update
- Other Asylum Clock litigation – *Gjondrekaj v. Napolitano*, 801 F. Supp. 2d 1344 (M.D. Fla. 2011)

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Post Grant Issues for Asylees

- Work Authorization
- Eligibility for Refugee Social Services
- Travel and Family Reunification
- Adjustment of Status

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Work Authorization

- Asylees are authorized to work "incident to status"
- Employment Authorization Documents (EAD)
  - Pending application
  - Affirmative grant
  - Grant in Immigration Court
- Educating Employers who may discriminate
  - The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), in DOJ's Civil Rights Division

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Eligibility for Benefits

- Office of Refugee Resettlement (ORR)
- Asylees are eligible as of the date of asylum grant
  - For asylees granted by IJ, need to verify order of asylum is FINAL
- Refugee Cash Assistance vs. Match Grant Program
- Other Benefits can include TANF, SNAP, SCHIP, Medicaid, Refugee Medical Assistance, SSI, WIC

local refugee assistance organization should assess your client for eligibility in these programs

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Family Reunification

- Who is eligible for derivative status?
- The I-730 Process
- Issues in proving relationship
- "When will my family get here?"

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Asylee Travel

- Refugee Travel Documents (I-131)
- Purposeful Availment and/or Return Home
- Impact on Adjustment of Status

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Adjustment of Status

- Eligibility and Timeline
- Does an asylee **have to** adjust status?
- Fee Waiver, I-912
- Delays in the Adjudication Process

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Questions & Answers

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UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Select UNHCR Resources on Interpretation & Application of the Refugee Definition

UNHCR's RefWorld

RefWorld, found at http://www.refworld.org, contains a vast collection of reports relating to situations in countries of origin, policy documents and positions, and documents relating to international and national legal frameworks. The information has been selected and compiled from UNHCR's global network of field offices, Governments, international, regional and non-governmental organizations, academic institutions and judicial bodies. It includes UNHCR positions, including legal and country-specific positions and amicus briefs; recommendations; guidelines; and related papers.

Sign up for Email Alerts

To receive copies of UNHCR positions, including legal and country-specific positions; recommendations; guidelines; and related papers as they are issued, sign up for e-mail notifications of these papers by contacting refworld@unhcr.org. All former alerts are available on RefWorld at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=alerts.

UNHCR Handbook

The legal weight and authority of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* in interpreting and applying the refugee definition and the provisions of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol has been recognized by courts and other adjudicative bodies throughout the world, including the United States Supreme Court beginning with its leading decision on U.S. asylum law, *INS. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The Handbook also includes as Annexes II and III the 1951 Convention and 1967 Protocol.

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, Re-edited 1992, Reissued 2011), available at http://www.unhcr.org/refworld/docid/4f33c8d92.html.

Guidelines on International Protection

UNHCR issues Guidelines on International Protection pursuant to its mandate, as contained in the *Statute of the Office of the United Nations High Commissioner for Refugees*, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, re-edited, Geneva, January 1992). These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

1. UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles I1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* HCR/GIP/09/08, 22 December 2009, available at: http://www.unhcr.org/refworld/docid/4b2f4f6d2.html.

2. UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked,* HCR/GIP/06/07, 7 April 2006; http://www.unhcr.org/publ/PUBL/443b626b2.pdf.

3. UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 28 April 2004; http://www.unhcr.org/publ/PUBL/40d8427a4.pdf.

4. UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003; http://www.unhcr.org/publ/PUBL/3f7d48514.pdf.

5. UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, HCR/GIP/03/03, 10 February 2003; http://www.unhcr.org/publ/PUBL/3e637a202.pdf.

6. UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003; http://www.unhcr.org/publ/PUBL/3f28d5cd4.pdf.

7. UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002; http://www.unhcr.org/publ/PUBL/3d58de2da.pdf.

8. UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.* HCR/GIP/02/01, 7 May 2002; http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf.

Guidance Notes

UNHCR Guidance Notes on thematic legal or procedural matters are issued by UNHCR pursuant to its mandate as stated in the 1950 *Statute of the Office of the United Nations High Commissioner for Refugees* and to the responsibilities defined in Article 35 of the 1951 *Convention relating to the Status of Refugees* and Article II of the 1967 *Protocol* to the *Convention*. These Notes are prepared in response to emerging legal or operational refugee issues and are intended to provide guidance on the interpretation or application of the law and legal standards being addressed. Guidance Notes should be read in conjunction with the relevant Guidelines on International Protection as they provide important complementary information.

1. UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at: http://www.unhcr.org/refworld/docid/4bb21fa02.html.

2. UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009, http://www.unhcr.org/refworld/docid/4a0c28492.html.

3. UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, http://www.unhcr.org/refworld/docid/48abd5660.html.

Country-Specific Protection Assessment Guidelines, selected recent examples

1. UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 Dec. 2010, http://www.unhcr.org/refworld/pdfid/4d0b55c92.pdf.

2. UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 5 July 2010, http://www.unhcr.org/refworld/pdfid/4c31a5b82.pdf.

3. UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia*, 5 May 2010, http://www.unhcr.org/refworld/pdfid/4be3b9142.pdf

4. UNHCR, *Note on the Continued Applicability of the April 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, 28 July, 2010, 2010, http://www.unhcr.org/refworld/docid/4c4fed282.html; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, April 2009, http://www.unhcr.org/refworld/pdfid/49f569cf2.pdf.

Notes on Establishing Eligibility for Protection, selected example

UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, http://www.unhcr.org/refworld/docid/3ae6b3338.html.

General Resource on Comparative International Jurisprudence

UNHCR, *Compilation of Case Law on Refugee Protection in International Law*, March 2008 http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47dfc8e32.

Selected Amicus Briefs Submitted to U.S. Courts

1. UNHCR, *Mejilla-Romero v. Holder. Brief Amicus Curiae of the United Nations High Commissioner for Refugees in Support of Petitioner's Petition for Rehearing en Banc*, 18 June 2010, http://www.unhcr.org/refworld/pdfid/4c2325212.pdf.

2. UNHCR, *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 April 2009, http://www.unhcr.org/refworld/docid/49ef25102.html.

3. UNHCR, *Daniel Girmai Negusie v. Mukasey. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 23 June 2008, http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-499_PetitionerAmCuUNHCR.pdf.

4. UNHCR, *Ahmed Ali v. Deborah Achim, Michael Chertoff, Secretary of the Department of Homeland Security, and Michael Mukasey, United States Attorney General. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, November 2007, No. 06-1346, http://www.unhcr.org/refworld/docid/47503a952.html.

Selected Topical Power Point Presentations

1. *Application of the Refugee Definition to Gang-related Asylum Claims*, July 2010 (not available on-line)

2. *The Relevance of International Law in U.S. Asylum Adjudication*, 2010 (not available on-line)