

CHAPTER 1¹

INTRODUCTION TO ASYLUM AND THE MANUAL

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§ 1.1 Introduction

A. Asylum Protection Today

People who have fled their country because they fear persecution, and who are either in the United States (U.S.) or at the border, may seek asylum in the United States. Asylum is a protection granted to those individuals who meet the international definition of a “refugee” included in the United Nations 1951 Convention and 1967 Protocols (“the Convention and Protocols”), to which the U.S. is a signatory. The Convention and Protocols protect asylum-seekers through what is known as the doctrine of “non-refoulement,” which means that the U.S. cannot force someone to return to a place where his or her life would be threatened. In 1980, Congress passed the Refugee Act, in order to bring U.S. law into conformity with the Convention and Protocols.

Although the number of people who are granted asylum has increased over the last 20 years,² many critics of the U.S. asylum system have pointed out that the chances of the U.S. government granting a refugee asylum can often depend more on the U.S. foreign policy interests, American society’s cultural values, and the race or ethnicity of the applicants than on whether or not he or she fears a threat to his or her life or liberty.³

¹ Professor Richard Boswell contributed to this chapter.

² According to the U.S. Department of Homeland Security (DHS), in 1990, approximately 8,500 individuals were granted asylum. By 2000, this number had increased to about 32,500. Although there was a brief spike of asylum grants between the years 2000 and 2004, in 2016, the total number of asylum grants was 20,455. See the Yearbook of Immigration Statistics: 2016, Individuals Granted Asylum, Table 16 www.dhs.gov/yearbook-immigration-statistics.

³ Among the ten nationalities that had the largest number of immigration court asylum cases decided during 2011-2016, Mexico had the highest denial rate with 9 out of ten asylum seekers rejected. “Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality,” TRAC Reports, 2016, <http://trac.syr.edu/immigration/>. See also www.immigrationpolicy.org/just-facts/asylum-united-states.

Nevertheless, over the last 20 years, our understanding of the different types of harm inflicted on individuals and of the complex socio-cultural, economic, and political conditions that give rise to such harms has also challenged U.S. courts' interpretation and application of asylum law. This has expanded asylum protection over the years. For example, victims of domestic violence had historically faced much resistance from the U.S. government when they filed claims for asylum. Today, the government officially recognizes domestic violence as a form of persecution. Furthermore, lesbian, gay, bisexual and transgender (LGBT) individuals have also challenged asylum adjudicators to broaden their understanding of personal characteristics such as sexual orientation and gender identity. More recently, a significant number of children and their families, fleeing violence by criminal gangs in the countries of Guatemala, El Salvador, and Honduras are facing similar reluctance by the U.S. Citizenship and Immigration Services (USCIS) and the immigration courts to recognize their claims for asylum.

B. Asylum in Historical Context

After passage of the Refugee Act in the 1980s, the Immigration and Naturalization Service (the legacy INS) granted asylum to a majority of persons escaping Communist Bloc countries. However, it denied asylum to more than 97% of refugees escaping the well-documented horrors of civil war and human rights abuses in El Salvador, Guatemala and Haiti, countries whose governments and militaries the United States government supported. In part due to this injustice, the 1980s saw the emergence of many immigrants' rights and services groups. The unfair treatment of the hundreds of thousands of Central Americans rallied these refugee rights groups together, including groups composed of the refugees themselves. Refugee rights advocates and practitioners challenged the government's disparate application of the Refugee Act, which has contributed to a number of important changes referenced above, and provided protection against deportation for hundreds of thousands of people.

In the early 1990s a hopeful trend emerged in asylum practice. The legacy INS separated the adjudication of affirmative asylum cases from its regular Examinations Branch. This permitted the development of a corps of asylum officers who specialize in asylum law. However, in 1996 Congress enacted draconian changes in asylum procedure that have resulted in many genuine refugees being sent back to their homelands.⁴ Congress expanded the bars to asylum eligibility, preventing asylum seekers from applying after they have been in the country for a year, absent certain circumstances, and added to the criminal convictions that would prevent asylum eligibility. These changes present challenges for asylum advocates and our society in general to create a truly fair and humane refugee policy.

C. Asylum Advocates Play a Crucial Role in Safeguarding Asylum Protections

The availability of legal services for refugees is vital in order to assure that their voices are heard by those deciding their individual cases and by society at large. The percentage of persons who win their asylum cases is significantly higher for those who have legal representation.⁵ More than 20 percent

⁴ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. As the name of the act indicates, these changes resulted from the general anti-immigrant politics of the mid-'90s. The provisions of IIRIRA were incorporated into the Immigration and Nationality Act (INA).

⁵ See TRAC Immigration Reports at <http://trac.syr.edu/immigration/>. The Transactional Records Access Clearinghouse (TRAC) is a research center at Syracuse University.

of asylum seekers remain unrepresented, which greatly impacts their likelihood of success. The odds of gaining asylum are five times higher when represented.⁶ Given the current political climate, asylum seekers face even more legal challenges. Under the new administration, new applications are meant to be fast-tracked through the system, which increases the likelihood that the asylum seeker will remain unrepresented.

This manual was created in the hope that it will contribute to effective asylum advocacy. One key to fulfilling that hope will be that practitioners learn asylum law so well that they can teach its basics to their clients. Additionally, practitioners have the opportunity to learn from their clients and other resources about the conditions and culture in their clients' home countries. Once both the practitioner and the client understand what the law requires of them, they can focus on telling the story of the client's fear. The real fears in asylum cases are often buried below the technicalities of law and procedure, and cultural and language barriers. Working together with our clients, we can assist them in telling their stories.

§ 1.2 The Statute: Legal Requirements for Asylum Eligibility

The Refugee Act of 1980, which is incorporated into federal law as § 208 of the Immigration and Nationality Act (INA), provides the eligibility requirements and procedural framework for people who are physically present in the United States to apply for **asylum**. Persons who are outside the United States must apply for **refugee** status pursuant to INA § 207. Applicants for refugee status abroad must meet the same legal definition of "refugee" as applicants for asylum in the U.S.

The definition of "refugee" is set out in INA § 101(a)(42), and includes the legal elements of an asylum. This is incorporated by reference into the basic asylum statute at INA § 208(b)(1).

PRACTICE TIP: The Refugee Definition Is the Key to Asylum Law. A refugee is defined as a person who:

"... 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."

Understanding and applying the refugee definition is the key to asylum law.

To meet this standard, the asylum applicant must show that she has:

1. a well-founded fear⁷
2. of persecution⁸
3. on account of race, religion, national origin, membership in a particular social group, or political opinion.⁹

Or, that she experienced such persecution in the past.¹⁰

⁶ "Asylum Representation Rates Have Fallen Amid Rising Denial Rates," TRAC, November 27, 2017.

⁷ See Chapter 2.

⁸ See Chapter 2.

⁹ See Chapter 3.

¹⁰ See Chapter 2.

In addition to these foundational sections of the INA, the Trafficking Victims Protection and Reauthorization Act (TVPR) of 2008¹¹ created important procedural protections for children asylum applicants who are or have ever before been classified as an “unaccompanied alien child” (UAC), also often referred to as an “unaccompanied minors.” The one-year bar to asylum, discussed in **Chapter 4**, does not apply to unaccompanied minors. Therefore UAC asylum applicants can file their applications at any time; and they do not need to worry about obtaining an exception to the one-year bar if they file their application past the deadline. Additionally, under the TVPRA, USCIS has the initial jurisdiction over *any* asylum application filed by a UAC applicant, even where the applicant is in removal proceedings.¹² Otherwise, UAC applicants for asylum still have to meet the definition of a refugee outlined above.

Presenting a case to meet this legal standard is a daunting task. Many asylum seekers arrive in the United States with no documents, connections, or resources. Without a legal advocate to assist, understanding what parts of their personal story is relevant to the adjudicator is a mystifying venture. This process is complicated by the psychological impact of trauma, lack of documents, and possibly incarceration. Arriving aliens that seek asylum at our borders are detained and must express and prove their claim from inside a detention center, with limited contact to family and friends who might help support their claim.

§ 1.3 Asylum’s Second Hurdle: Bars¹³

Once a person has established they meet the definition of a refugee, they must also show that they are not barred from eligibility for asylum. The definition of refugee excludes a person who has persecuted others; and there are other statutory and regulatory bars to eligibility for asylum. The bars to asylum are different from the grounds of inadmissibility. One of the most common obstacles is referred to as the “one year bar,” which requires an applicant for asylum to apply within one year of entering the United States, or meet one of the exceptions to this rule. This new formulation, added through the enactment of IIRIRA in 1996, results in the denial of asylum to many genuine refugees. Practitioners should carefully review and understand all the bars before proceeding with an asylum case. The bars to asylum eligibility are discussed in depth in **Chapter 4**.

§ 1.4 Asylum’s Third Hurdle: Discretion¹⁴

Asylum is discretionary. Therefore, in addition to meeting the refugee definition and showing she is not subject to any bars, the applicant must also demonstrate that asylum should be granted in the exercise of discretion. She will want to show is deserving of a grant of asylum but demonstrating positive equities that should incline the adjudicator to grant her asylum.

§ 1.5 The Sources of Asylum Law beyond the Statute: The Regulations, the BIA, Appellate Court Decisions and the UN Handbook

Immigration laws are now administered and enforced by three separate divisions within the Department of Homeland Security: the Customs and Border Protection (CBP), the Citizenship

¹¹ P.L. 110–457.

¹² See TVPRA § 235(d)(7)(B).

¹³ See Chapter 4.

¹⁴ See Chapter 4.

and Immigration Services (USCIS), and the US Immigration and Customs Enforcement (ICE). The secretary of DHS is ultimately responsible for USCIS, ICE, and CBP. Therefore, you should bear in mind that all references to DHS in this publication refer to one of these three separate divisions.

Some immigration decisions remain under the authority of immigration judges, who work for the Executive Office of Immigration Review (EOIR). EOIR is part of the Department of Justice, under the direction of the Attorney General. Asylum applications that were initially filed with USCIS through the *affirmative* asylum process may be referred to immigration judges for an ultimate decision on the case. Otherwise, immigration judges also decide *defensive* asylum applications filed directly with the court by someone already in removal proceedings.

A. The Statute and Regulations

The Refugee Act, as incorporated into the Immigration and Nationality Act at § 208, is implemented by the “procedures established by the Attorney General” which are regulations.¹⁵ The asylum regulations are published in the Code of Federal Regulations (CFR) under Title 8: Aliens and Nationality, where they discuss application procedures and legal standards and define many key terms. The regulations are administered by USCIS and EOIR.

The regulations on asylum law, 8 CFR § 208 *et seq.*, were rewritten substantially in 1990, and in many respects these changes were more generous to asylum applicants.¹⁶ These regulations apply to asylum cases that were filed after October 1, 1990 and before April 1, 1997. The DHS amended the regulations in 1997 to implement changes in asylum law and procedure legislated in IIRIRA in 1996. In addition, the REAL ID Act of 2005 amended the statute and resulted in numerous changes to the regulations, particularly regarding credibility findings and bars associated with suspected support for terrorist groups.

B. The BIA and the Appellate Courts

If an asylum applicant wishes to appeal a denial from the Executive Office of Immigration Review (EOIR) or “immigration court” which adjudicates asylum cases in removal hearings,¹⁷ that appeal must be made to the Board of Immigration Appeals (BIA). The BIA is an administrative court that also operates under the Attorney General. Appeals may be made by either the person applying for asylum or by USCIS or ICE if they disagree with the immigration court’s decision.

If the BIA denies asylum, the asylum seeker can appeal to the federal court of appeals. The BIA’s published case decisions are the controlling law (precedent) for asylum unless a federal court overrules a BIA decision. If a federal court of appeals adopts a different rule than the BIA, that rule is applied within that court’s jurisdiction or circuit. This is important in asylum law because some circuit Courts of Appeal, especially the Ninth Circuit, have interpreted the asylum laws more generously than the BIA. The Ninth Circuit’s interpretation would only apply within the Ninth Circuit.

¹⁵ INA § 208(b)(1), 8 USC § 1158(b)(1).

¹⁶ The asylum regulations are reproduced in their entirety in Appendix A, located at the end of the manual.

¹⁷ 8 CFR chapter V, part 1003.

C. The Asylum Officer Basic Training Course (AOBTC)

The Asylum Officer Basic Training Course (AOBTC) contains interpretations of substantive law that can arguably be construed as DHS positions on these matters. While the lesson modules are not legally binding, they offer a strong indication of the appropriate standards to be used in evaluating asylum claims. They also offer case law citations for the various legal rules and examples discussed.

D. The UN Handbook

In enacting the Refugee Act of 1980, the Congress rewrote its basic immigration law in order to bring U.S. law into accordance with the international refugee treaties to which the U.S. was already a party. Because U.S. law in this area is based on international law, we have access to an important tool for asylum cases: the *Handbook on Procedures and Criteria for Determining Refugee Status*, referred to as the UN Handbook, written by the United Nations High Commissioner for Refugees (UNHCR).¹⁸ The U.S. Supreme Court as well as other courts have approved the use of the UN Handbook as a source in interpreting U.S. asylum and refugee law.¹⁹ Experienced asylum practitioners have said it is close to malpractice for an attorney representing an asylum client to not have access to the Handbook.

E. Other Sources

In addition to these sources of law, regulations, and interpretations, many other sources are sometimes useful. These consist of case law, settlement agreements, Operating Instructions, Implementation Wires, Memos from the Director of DHS, and local policies, both written and unwritten, by the district director, immigration judges, detention officers, DHS Examination Officers, the DHS Director of Asylum, etc. Depending on the case, these documents and authorities may provide useful support for specific arguments on behalf of your client.

§ 1.6 How to Use This Manual

This manual provides an overview of asylum law and practice and is intended as a guide to help legal practitioners understand the basic requirements of an asylum claim and how to fulfill them. In **Chapter 2** and **Chapter 3**, we examine the legal components, or elements, of an asylum claim and provide practical guidance on how to craft successful arguments to fulfill each element. We then move on to discuss the various bars to asylum in **Chapter 4**. And for claims for withholding of removal or claims under the Convention Against Torture, we provide a thorough description of the legal requirements involved in **Chapter 5**. Practitioners should familiarize themselves with the regulations included in this manual at **Appendix A**.

The chapters that follow address the procedural steps required for filing an asylum application. In **Chapter 6**, we look at how to prepare an asylum application; how to assemble the various pieces of evidence necessary, including the client declaration; and how to work with Asylum clients. **Chapter 7** provides an overview of the affirmative asylum process; while **Chapter 8** covers the defensive

¹⁸ The Office of the United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (Dec. 2011), ¶ 53 (hereinafter “UN Handbook”).

¹⁹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

asylum procedure in immigration court. Finally, **Chapter 9** discusses the various benefits granted to an individual once they have successfully been granted asylum protection.

Practitioners should also take a look at the instructions & sample declarations included in the appendices at **Appendices G–J**. We’ve included samples for both an adult case and an unaccompanied minor case. We also urge you to stay abreast of the latest procedural updates issued by USCIS and EOIR and to seek the support of our asylum experts if necessary.

§ 1.7 Summary of This Manual

Chapter 2: Persecution and Well-Founded Fear. A person will prevail in an asylum claim if they can demonstrate that they suffered persecution in the past or have a “well-founded fear” of future persecution. Although the term “persecution” is not defined in the law, a common definition from case law is, “the infliction of suffering or harm upon those who differ in a manner that is regarded as offensive.” Thus the harm need not rise to the level of long-term detention and torture. However, harm or the danger of harm as a result of a personal vendetta, criminal prosecution, civil war, anarchy, or the like does not normally constitute actionable persecution. The persecution can be inflicted or threatened by a government or its agents, such as the army or police. But it need not be. It is sufficient if the harm is by persons or groups “that the government is unable or unwilling to control.” This chapter includes a section regarding persecution in children’s asylum claims.

Chapter 3: Protected Grounds. The persecution must be *on account of* at least one of five enumerated grounds: political opinion, race, religion, nationality, or membership in a particular social group. This chapter not only addresses each ground for asylum separately, it also includes sections specifically addressing some of the most common and evolving forms of “particular social groups,” such as children and youth, victims of gang violence, groups based on gender and LGBTQ identities. In addition, if a persecutor *believes* that the asylum seeker possesses characteristics within these grounds, whether or not they actually possess them, they can prevail on the asylum claim if they suffer fear or persecution as a result of the persecutor’s wrong belief. For instance, a foreign government may believe that a person holds a particular political opinion based on the political opinions expressed by his activist wife; and it may thus persecute him based on that belief. This is an example of what could be an asylum claim based on imputed political opinion. Additionally, a claim can be based on more than one ground. A claim with two bases is common and each should be emphasized.

Chapter 4: Bars to Asylum. A person may be barred from receiving asylum for any of the following: if he or she has persecuted others based on the other’s political opinion, race, religion, etc.; if he or she has committed a serious non-political crime before coming to the U.S.; if he or she has been convicted of certain crimes in the U.S.; if he or she is a danger to the security of the U.S.; or if he or she has been “firmly resettled” in a third country (i.e., has received an offer of permanent residence in a third country).

In addition, a person must file the asylum application within one year of his or her last entry into the U.S., with two exceptions. One exception allows for a late application when there are “changed conditions” in the person’s home country or changes in the U.S. laws. The allows for late filing where an applicant can demonstrate “extraordinary circumstances” which delayed filing, examples of which may include things like illness; a person having been in lawful status

(such as a visa) after they entered the U.S.; a person grappling with personal or cultural barriers, such as the “coming out” process for many gays and lesbians escaping persecution in their home country. As discussed in this chapter, the one-year deadline does not apply to Unaccompanied Alien Children (UACs).

Chapter 5: Withholding of Removal and the Convention Against Torture. Persons who are ineligible for asylum for any of the above reasons may be eligible for other related forms of relief. One is called “Withholding of Removal” (“Withholding”) and the other is protection under the Convention Against Torture (CAT). Although these may all offer a form of protection against being deported to the country where persecution is feared, the standards for each are very different, as are the benefits they grant. Applying for Withholding, for example, has the advantage of allowing a person to seek protection despite the fact that they did not file an application within one year of entering the U.S. However, in order to be granted withholding, such an applicant is also required to show a higher likelihood of persecution than they would be required to show in order to obtain asylum. If granted Withholding, a person is not eligible to obtain a travel document with which to travel outside and then reenter the U.S., nor will he or she ever qualify for adjustment of status based on Withholding. Protection under CAT does not require that the feared harm be on the basis of a protected ground, but does require a showing that the person is more likely to be tortured than not, if removed to their country of origin.

Chapter 6: The Asylum Application. There are two different procedural ways for a person to file for asylum: “affirmatively” with the USCIS and “defensively” in immigration court. Both procedures involve the same application form and the same standards apply. This chapter, therefore, provides detailed guidance on how to complete the Application for Asylum and Withholding of Removal on Form I-589 and how to assemble the evidentiary documentation that must accompany it, including the applicant’s declaration. It also provides extensive practice tips on how to work with Asylum clients, including a section on working with children. Building a successful lawyer-client relationship is key to winning an asylum case. Therefore, working in partnership with the client in the preparation and the presentation of a case will be greatly helpful to both, you and your client. Finally, because many asylum applicants have experienced severe trauma and other difficult situations that their asylum claim requires them to talk about, we have provided in this chapter tips for practitioners on how to skillfully establishing trust and the ability to talk about traumatic events and difficult emotional experiences. This is covered in various sections, including the section dedicated to working with children.

Chapter 7: Affirmative Asylum Process. An *affirmative asylum application* is filed by persons who are in the U.S. and not in removal proceedings. The application is filed with the U.S. Citizenship and Immigration Services (USCIS), after which a person will be asked to submit their biometrics and attend a non-adversarial interview with an Asylum Officer. The asylum officer can grant asylum, or can refer the person to immigration court. This process is described in Chapter 7 with special practice tips for attorneys and their clients, as well as a description of the special protections afforded to Unaccompanied Alien Children (UACs) under the Trafficking Victims Protection and Reauthorization Act (TVPRA).

Chapter 8: Applying for Asylum in Immigration Court. An asylum applicant can end up in immigration court in several ways. They could be referred to immigration court when the USCIS did not grant their asylum application (if they are not otherwise in lawful immigration status);

they could be sent to immigration court after undergoing a “credible fear interview” because they expressed a fear of returning to their home country at the airport or other port of entry, when they arrived to the U.S.; or they could be in removal proceedings because they were charged with being removable from the U.S. for other reasons. An application filed while in proceedings is considered a *defensive asylum application* because it is filed in defense to removal. In a defensive asylum context, DHS is actively seeking to deport or remove the person from the country; and an asylum application serves as the defense to removal.

In the defensive process, an adversarial hearing is held before an immigration judge, where testimony is heard and witnesses may be introduced. If the judge denies asylum, an appeal can be made to the Board of Immigration Appeals. In this context there are important strategic considerations that warrant attention, such as the Asylum Clock related to work authorization, which has recently undergone significant changes. This chapter, therefore, explores the *defensive asylum application* process in detail and provides practice tips for how to prepare to represent asylum clients in immigration court. Additionally, this chapter explains the unique processes available to unaccompanied minors.

Chapter 9: Benefits of Asylum Status. This chapter guides you through the benefits of asylum after an application has been granted. If an asylum claim is approved, the applicant can proceed to apply for a variety of benefits, including an employment authorization document, a travel document, asylum status for qualifying relatives and certain public benefits. The following benefits are listed and discussed in the chapter:

1. The right to apply for certain public benefits;
2. The right to apply for asylum status for the asylee’s spouse and children;
3. The right to employment authorization;
4. The right to travel outside the U.S. ; and
5. The right to apply for permanent residency one year after receiving asylum.

Each section highlights the main points of which to be aware and to advise your clients when their asylum claim is granted. This chapter includes special warnings about travel abroad and ensuring protection for minor children under the Child Status Protection Act (CSPA).

