Seeking Refuge

Asylum Law in the Current Climate

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This article discusses the basics of asylum representation in the context of the current political environment.

"Miriam"[1] never wanted to come to the United States. She was content with her life in San Salvador, where she was born and raised. Then her husband started beating her. She called the police, but the calls went unanswered. She went to the police station in person to file a complaint, but the police told her that they would not get involved in her marriage. The attacks worsened and became more frequent. With no end to the abuse in sight, Miriam fled her home in the middle of the night, taking only the essential belongings she could carry in her arms. She spent the night at a friend's house. Her husband found her there the next day, dragged her home, and threatened to kill her if she ever left again. Not having anywhere else in El Salvador to go, she traveled overland through Guatemala and Mexico to request asylum in the United States, and stay with her cousin in Colorado. With the assistance of a competent lawyer, Miriam has a chance of winning asylum.

Would you take Miriam's case?

There is an ever-growing demand for pro bono asylum attorneys in Colorado.[2] The demand for asylum lawyers is currently so high that the Colorado Bar Association has partnered with the Rocky Mountain Immigrant Advocacy Network (RMIAN) to train pro bono lawyers to take these cases.[3] Additionally, a group of lawyers formed the Colorado Asylum Project to place cases with pro bono attorneys.[4]

Clients like Miriam need representation to successfully pursue their claims. This article discusses the basics of asylum representation in the current political climate.

How Asylum Law Evolved

After World War II displaced millions of people, the United Nations adopted the 1951 Convention Relating to the Status of Refugees.[5] The 1951 Convention first defined the term "refugee," which initially applied primarily to Europeans.[6] In the 1960s, the decolonization of Africa, the Cold War, and other events led the U.N. to adopt the 1967 Protocol Relating to the Status of Refugees,[7] to which the United States acceded in 1968. Congress passed the Refugee Act in 1980 to conform to the 1967 Protocol,[8] which codified into U.S. law the 1967 Protocol's definition of "refugee." A "refugee" is currently defined as:

> any person who is outside any country of such person's nationality . . . 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.[9]

A "well-founded fear" means persecution is a reasonable possibility, and the Supreme Court has held that a 10% chance of persecution is sufficient to show a "well-founded fear."[10]

Among other requirements, an applicant for asylum must

- be a refugee,[11]
- warrant the favorable exercise of discretion,[12] and
- file within one year of the refugee's arrival in the United States.[13]

An economic migrant[14] is not a refugee, and whether a person qualifies as a "refugee"

may depend on the "particular social group" in which the person claims membership, as discussed below.

Asylum Practice in Colorado

A foreign national may request asylum in the United States through either an affirmative or a defensive application. "Defensive" asylum applicants are those in removal proceedings, and "affirmative" asylum applicants are those not in such proceedings.

Affirmative Applicants

If a foreign national residing in Colorado applies affirmatively, an asylum officer for the U.S. Citizenship and Immigration Services (USCIS) will adjudicate the application. As of January 31, 2018, asylum applications are being processed in a last-in, first-out basis.[15] Affirmative asylum applications pending for fewer than 21 days are prioritized.[16] If the asylum application is denied, the applicant is generally placed in removal proceedings and pursues the asylum claim defensively.[17]

Defensive Applicants

"Defensive" asylum applicants are those in removal proceedings, commonly referred to as deportation, which may be initiated because the foreign national is apprehended at the border attempting to enter the United States, or because the foreign national has already entered the United States and has been placed in removal proceedings.[18] A foreign national apprehended at the border who expresses a fear of return to her country[19] is detained [20] pending a "credible fear interview," where she must show a significant possibility of establishing eligibility for asylum.[21] If she does not pass the interview, she may ask an immigration judge to review the decision.[22] If the immigration judge does not vacate that decision, however, the foreign national is removed expeditiously; there is no subsequent appeal.[23]

Under current policy, once the foreign national passes the credible fear interview, he is usually released from detention under a discretionary process called "parole" and will then litigate the asylum case.[24] The process of being released on parole, however, may take months in Colorado,[25] but a detained asylum case may not take that long.[26] In a February 2018 decision, the Supreme Court held that foreign nationals apprehended at the border who pass a credible fear interview must be detained for the duration of the asylum case; there is no implicit right to a bond hearing every six months, as the Ninth Circuit had held.[27]

Asylum applicants who pass a credible fear interview at the border and have a Colorado contact are released on parole and may move to Colorado to be with their contacts here. The Denver Immigration Court, located in downtown Denver, has jurisdiction over non-detained asylum applicants. The dockets at the Denver court are so backlogged that it currently takes, depending on the courtroom, between two and three years to get an individual hearing once the asylum application is filed with the court. Immigration judges in Denver are administrative law judges and serve as employees of the Executive Office of Immigration Review (EOIR), which is an agency housed within the Department of Justice (DOJ). Decisions from the immigration courts may be appealed to the Board of Immigration (BIA) appeals, also part of EOIR. As DOJ employees, immigration judges and BIA judges are bound by DOJ policy memoranda.

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Adding to the difficulty of proving an asylum claim, the BIA recently held that an asylum case based on persecution on account of membership in a particular social group (PSG) must articulate the PSG before the immigration court.[28] The BIA, therefore, will not accept formulations of PSGs on appeal that were not proposed and litigated below.[29] It is imperative that the applicant provide all possible formulations of a PSG in immigration court. This task is one of many in an asylum case that requires the assistance of a competent attorney.

Ethical Considerations

Attorneys must competently, zealously, and honestly apply the statutes, regulations, and case law to asylum cases. Further, knowingly filing a frivolous asylum application renders the applicant permanently ineligible for any immigration benefit in the United States.[30]

Colorado Rules

Several Colorado Rules of Professional Conduct are particularly relevant to asylum cases. The Preamble requires that "a lawyer zealously assert[] the client's position under the rules of the adversary system."[31] Rule 1.1 requires competent representation, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[32] In an asylum case, this means that the lawyer knows, for example, which PSGs are legally cognizable. It also means that the lawyer fully examines the claim and guides the client in gathering evidence to support the claim.

Rule 3.1 requires that a lawyer "not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which

includes a good faith argument for an extension, modification or reversal of existing law."[33] Rules 3.3(a)(1) and (a)(3) prohibit a lawyer from knowingly making a false statement of material fact or law to a tribunal and from knowingly offering false evidence, respectively. Rule 3.2 prevents a lawyer from employing dilatory tactics. An asylum lawyer following Rule 3.1 will not file or defend a frivolous asylum case. Rules 3.3(a)(1) and (a)(3) prevent a lawyer from making a false statement in an affirmative or defensive asylum case and proscribe the introduction of false testimony or documentary evidence.

Rule 8.4(c), which states that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation," prevents asylum lawyers from engaging in making false claims of asylum or providing their clients with a false script.

Federal Rules

Separately, federal law provides for disciplinary and criminal penalties against attorneys in certain situations. Notably, an attorney shall be subject to disciplinary sanctions in the public interest if the attorney

> [k]nowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads . . . any person (including a party to a case or an officer or employee of the Department of Justice)[] concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence.[34]

Other regulations mirror the Colorado Rules of Professional Conduct. For example, an attorney may be sanctioned if the attorney "engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay."[35] Similarly, the regulations proscribe the ineffective assistance of counsel and the failure to provide competent representation.[36]

Additionally, an attorney preparing an asylum application who knowingly makes "a false statement with respect to a material fact" shall be fined *or imprisoned*.[37]

The Current State of Asylum Affairs

"Immigration attorneys and advocates know that access to counsel may be the single most important determinant in an individual's ability to win his or her immigration case, and this perception is backed by empirical studies."[38] Yet there is no right to counsel in immigration proceedings. Further, recent statements by government officials indicate a hostility toward immigration attorneys. Thus, in addition to knowing the substantive law, attorneys must be aware of the political climate and anticipate that potential legislative and regulatory changes could take place in the near future.

In October 2017, Attorney General Sessions delivered remarks to the Executive Office of Immigration Review, which he oversees. Ostensibly there to discuss fraud and abuse in the "asylum system,"[39] he specifically targeted immigration lawyers, stating "[w]e also have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process."[40] Apart from the obvious generalization, Attorney General Sessions misstated a simple truth: The credible fear process begins at a port of entry when a foreign national expresses a fear of returning to his or her country of origin. The vast majority of those detained at entry will not have consulted or hired an immigration lawyer before they enter the United States.[41] And though volunteer lawyers[42] from nonprofit organizations may consult the detainee before the credible fear interview, based on this author's personal experience, they do not provide detainees with "magic words needed" to pass a credible fear interview.

During a January 14, 2018 interview on Fox News Sunday, the Secretary of Homeland Security, Kirstjen Nielson, referred to the procedures relating to the credible fear process as "loopholes":

> The problem is that we have so many loopholes within our legal system . . . that if you are in the South or Central America, those

> who would wish to smuggle you are able to tell you if you get to America you can stay. So, more and more are willing to undertake the journey because there is no way for me to promptly remove them . . . . [the] wall works, but it only gets us partway there because if I can stop them at the border but I can't remove them, that's not border security.[43]

As described above, the credible fear process is not a "loophole" in the statutory or regulatory regime. Rather, it stems from international convention with the sole purpose of protecting refugees from being forced to return to countries where they would suffer persecution. The Immigration and Nationality Act specifically provides for the screening of foreign nationals subject to expedited removal from the United States. If they do not pass the credible fear interview, and the immigration judge does not vacate the denial, the person is removed expeditiously.[44]

Criticism of immigration attorneys comes not only from the Attorney General and Secretary of Homeland Security. In November 2017, law professor Benjamin Edwards published an article in *The Wall Street Journal*, "Immigrants Need Better Protection—From Their Lawyers."[45] Citing two surveys of judges and a 2015 study, Professor Edwards argued that because "the private immigration bar now contains the worst lawyers in all of law,"[46] the Department of Justice should collect and disclose case outcomes for each lawyer.[47] But attributing case outcomes solely to lawyers would only worsen the problem that Edwards purports to solve. Asylum cases are so fact-specific that almost no meaningful information can be deduced from a win-loss percentage; as in other types of cases, a denial may result from a lack of documentary evidence, a hostile judge, the absence of corroborating witnesses, or a simple lack of fact-finding assistance from the client. Or a denial may result if the case is adjudicated in an "asylum-free zone."[48] In short, by relying solely on case-outcome information, a potential client possessing the lawyer's case-outcome record might avoid hiring a good lawyer. Conversely, good lawyers might be incentivized to avoid new cases for fear of hurting their case-outcome records.

More important, these comments must be understood in the context of "this era of increased immigration enforcement and detention."[49] New Secretary of Homeland Security directives include the increased use of expedited removal to the interior of the United States, expanded use of detention, reduced use of parole, expansion of enforcement priorities to undocumented individuals, and increased use of local law enforcement to enforce federal immigration law.[50]

Conclusion

There is a high need for pro bono representation of refugees, such as Miriam, seeking asylum. Attorneys should not let negative statements discourage them from representing immigrants, nor should they be deterred by false attributions regarding case outcomes.[51] The lack of counsel in immigration proceedings denies due process and results in unequal access to justice.

To competently and effectively represent asylum clients, Colorado lawyers must understand not only the substantive law and procedure, but also the shifting political climate in which these cases currently exist. CL

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NOTES

1. This fact pattern is very common among citizens of Guatemala, El Salvador, and Honduras, a region referred to as the "Northern Triangle." www.cfr.org/backgrounder/central-americas-violent-northern-triangle.

2. *See* Goehring with Barber, "Beyond Borders: The Case for Pro Bono Representation in Immigration Proceedings," 47 *Colorado Lawyer* 18 (Apr. 2018).

3. *Id.*

4. CAP volunteers have filed asylum applications for over 60 asylum seekers in Colorado. Email from Volunteer Managing Attorney for the Colorado Asylum Project, February 25, 2018.

5. Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf.

6. U.N. High Commissioner for Refugees, The 1951 Convention relating to the Status of Refugees and its 1967 Protocol at 3, www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention-relating-status-refugees-its-1967-protocol.html.

7. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for United States, Nov. 1, 1968).

8. *E.g. INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citations omitted).

9. 8 USC § 1101(a)(42)(A).

10. *INS v. Cardoza-Fonseca*, 480 U.S. 421 at 440 (citing *INS v. Stevic*, 467 U.S. 407, 424–25 (1984)).

11. 8 USC § 1158(b)(1)(A).

12. *Id.*

13. 8 USC § 1158(a)(2)(B).

14. For purposes of this article, an "economic migrant" is one coming to the United States solely to work, and not due to any persecution or fear of persecution in his or her country of origin.

15. USCIS, USCIS to Take Action to Address Asylum Backlog (Jan. 31, 2018), www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog.

16. *Id.*

17. 8 CFR § 1208.14(c)(1).

18. How a foreign national is placed into removal proceedings after entering the United States is a topic outside the scope of this article.

19. 8 USC § 1225(b)(1)(A)(i). If the person does not express a fear of return, the person is summarily removed, a process called "expedited removal."

20. 8 USC § 1225(b)(1)(B)(ii), (b)(1)(B)(iii)(IV). Family detention could encompass a future article. At the South Texas Family Residential Center, where a private prison corporation manages the detention of women and their children, the water quality is so bad that the asylum officers, contract employees, and volunteers drink bottled water, a privilege not afforded the detainees. Several detainees have recently complained that the water is causing stomach and throat problems for the children. Email from Advocacy Coordinator for Dilley Pro Bono Project, American Immigration Council, February 27, 2018.

21. 8 USC § 1225(b)(1)(B)(v).

22. 8 USC § 1225(b)(1)(B)(iii)(III).

23. 8 USC § 1225(b)(1)(B)(iii)(I).

24. U.S. ICE Directive 11002.1, U.S. Immigration and Customs Enforcement: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 9, 2009), www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

25. Email from USCIS associate field office director to author, January 22, 2018.

26. Recent EOIR guidance has mandated case completion goals for all immigration judges, requiring that 85% of all detained cases be completed within 60 days. U.S. Dep't of Justice Memorandum, Case Priorities and Immigration Court Measures at 7 (Jan. 17, 2018), www.justice.gov/eoir/page/file/1026721/download.

27. *Jennings v. Rodriguez*, 583 U.S. __ , (2018), slip op. at 19 (Feb. 27, 2018).

28. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 192-93 (BIA 2018), www.justice.gov/eoir/page/file/1027451/download.

29. *Id.*

30. 8 USC § 1158(d)(6).

31. Colo. RPC Preamble [2]. www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Preamble-and-Scope. *See also* Colo. RPC 1.3, cmt. [1].

32. Colo. RPC 1.1.

33. Colo. RPC 3.1.

34. 8 CFR § 1003.102(c).

35. 8 CFR § 1003.102(j)(1).

36. 8 CFR §§ 1003.102(k), (o).

37. 18 USC 1546(a) (emphasis added).

38. *Id.*

39. There is no "asylum system."

40. U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review, Justice News (Oct. 12, 2017), www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

41. Email from Advocacy Coordinator for Dilley Pro Bono Project, American Immigration Council, January 22, 2018.

42. From, for example, CARA, http://caraprobono.org, and RAICES, www.raicestexas.org.

43. Wallace, Secretary Nielson talks border security, immigration reform, Fox News Sunday (Jan. 14, 2018), www.foxnews.com/transcript/2018/01/14/secretary-nielsen-talks-border-security-immigration-reform.html.

44. *See* 8 USC § 1225(b)(1)(A)(i).

45. Edwards, "Immigrants Need Better Protection From Their Lawyers," *The Wall Street Journal* (Nov. 26, 2017), www.wsj.com/articles/immigrants-need-better-protectionfrom-their-lawyers-1511730450.

46. *Id.*

47. *Id.*

48. Certain immigration courts have astronomically high denial rates of asylum applications. For example, at the Atlanta Immigration Court 98% of asylum applications are denied. https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Human-Rigts-of-Asylum-Seekers-in-US-%5BPetitioners%5D.pdf.

49. Goerhing, *supra* note 2 at 21.

50. *Id. See* Executive Orders issued on January 25, 2017, "Border Security and Immigration Enforcement Improvements" and "Enhancing Public Safety in the Interior of the United States." *See also* February 20, 2017 implementing memo from Department of Homeland Security Secretary John Kelly, "Enforcement of the Immigration Laws to Serve the National Interest."

51. The Syracuse University TRAC database provides data on the percentage of represented applicants and the countries of origin for applicants. This provides some context to the denial rate, but not enough to be able to analyze the rate meaningfully. As illustrated by TRAC, which among other data, collects and discloses each immigration judge's asylum denial rate, this number is meaningless without context. If Judge X approves 70% of asylum cases, does that mean an asylum applicant in Judge X's court has a 70% chance of winning? Absolutely not. How many asylum cases did Judge X decide in the relevant time period? What percentage of the denials were for asylum applications filed outside the one-year filing deadline? What percentage of the denials were based on a particular protected ground? Who was the attorney on each case? These are only a few examples of the missing context in the data on immigration judges. *See* http://trac.syr.edu/phptools/reports/reports.php?layer=immigration&report_type=report.