

  
<p>ASYLUM FOR IMMIGRANT SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE</p> <p>A TRAINING FOR THOSE WHO ALREADY WORK WITH SURVIVORS OF GENDER VIOLENCE</p> <p><small>© ASISTA, CENTER FOR GENDER & REFUGEE STUDIES, & TAHIRIH JUSTICE CENTER</small></p>
<p>Webinar Three: Advanced Asylum Legal Issues</p>

<h3>Faculty</h3>
<ul style="list-style-type: none"><input type="checkbox"/> Blaine Bookey, Center for Gender and Refugee Studies, Co-Legal Director <input type="checkbox"/> Ashley Dilonno, Tahirih Justice Center, Social Service Program Manager <input type="checkbox"/> Cecelia Friedman Levin, ASISTA, Senior Policy Counsel <input type="checkbox"/> Morgan Weibel, Tahirih Justice Center, Baltimore Director

<h3>Asylum Series</h3>
<ul style="list-style-type: none"><input type="checkbox"/> Webinar 1: Asylum Overview for Attorneys and Advocates working with Survivors<ul style="list-style-type: none"><input type="checkbox"/> Recording available online. questions@asistahelp.org <input type="checkbox"/> Webinar 2: Mechanics of Filing an Asylum Application<ul style="list-style-type: none"><input type="checkbox"/> Thursday, February 4th <input type="checkbox"/> Webinar 3: Advanced Asylum Legal Issues<ul style="list-style-type: none"><input type="checkbox"/> Thursday, March 10th

Goals: after this training you will be able to

- Formulate and document a cognizable particular social group
- Assess one-year deadline and related asylum bars
- Consider discretionary factors in asylum cases and examine when an appeal of a denial of protection may be appropriate

Asylum Legal Standards-Review

Asylum: Legal Elements

- Past persecution OR well-founded fear** of persecution
- Nexus** ("on account of")
 - at least one of the 5 enumerated grounds is "one central reason" for the persecution
- Protected Ground** - race, religion, nationality, membership in a PSG, or political opinion
- Committed by **government** OR forces the **government is unwilling or unable** to control.
- Internal relocation** in-country not reasonable

Persecution: how severe?

- Harm of a serious nature; more than "mere harassment"
- Harm or threats of harm must be considered cumulatively
- Threshold of harm is lower for children
- Persecution of family members can be relevant to whether an individual has been persecuted

Does DV meet the standard?

- Physical harm
- Threats to life or freedom
- Rape/sexual assault
- Servitude/slavery
- Forced prostitution
- Forced marriage
- Female genital cutting
- Emotional or psychological harm
- Economic harm?

Well-Founded Fear (WFF)

Subjective Component

- Fear must be GENUINE**
 - Applicant's state of mind
 - Child may be unable to express actual fear and may need to rely on objective evidence

Objective Component

- Fear must be OBJECTIVELY REASONABLE**
 - A 10% chance
 - Country conditions evidence

WFF: two ways to establish

1. Evidentiary presumption arising from past persecution
2. Objective facts establishing risk of future persecution

“On account of” a protected ground

Two inquiries:

1. Protected ground (race, religion, nationality, membership in a particular social group,
 - Is the group cognizable in the society in question?
 - Is the applicant a member of the group?
2. Nexus
 - Must be “on account of” one of protected grounds
 - Mixed motives allowed, but protected ground must be at least “one central reason” for persecution
 - Importance of country conditions as circumstantial evidence
 - Child-sensitive standard

Particular Social Group

1. Immutable or fundamental characteristic(s)
2. Socially distinct
 - Perceived as a group by society
 - Treated distinctly
3. Particular
 - Terms commonly understood/accepted in society; discrete and definable boundaries

*Not all circuit court jurisdictions follow the “social distinction” and “particularity” test

State Protection

- Persecution must be by a state actor or private actor that the state is "unable or unwilling" to control (which is the case in most domestic violence asylum claims)
- How to establish state failure?
 - Actual failure to protect when report
 - Futility or danger of reporting
 - Failure to protect similarly situated
 - Law on books vs. enforcement of law

Internal Relocation

- Not eligible for asylum if [*this applicant*] can reasonably *and* safely relocate to another part of the country
- Generally not reasonable to expect a child to relocate

Particular Social Group Claims

Challenges in Gender Asylum Cases

- Gender not listed as a protected ground
- Persecution traditionally viewed through the lens of a male dissident
- Fear of opening the “floodgates”
- Addition of social distinction and particularity requirements

Domestic Violence (intimate partner)

- **1985:** In *Matter of Acosta*, BIA set out the immutability test, listing “sex” as an example
- **1995:** U.S. issued gender guidelines stating that gender may be a defining characteristic of a PSG
- **1996:** In *Matter of Kasinga*, the Board approved a PSG defined in part by gender
- **1999:** The Board retreats in *Matter of R-A-*
- **2009/2010:** *R-A-* and *L-R-* granted asylum
- **2014:** BIA recognizes DV asylum in precedent decision *Matter of A-R-C-G-*

Matter of A-R-C-G-

Facts

- Married Guatemalan woman suffered extreme physical violence, rape, and death threats from her husband
- She attempted to leave him more than once, but he found her and threatened to kill her if she did not return
- She sought the protection of the police at least three times, but they refused get involved in “marital relationships”

A-R-C-G-, cont'd

BIA Holding

"[M]arried women in Guatemala who are unable to leave their relationship" can constitute a cognizable PSG that forms the basis of a claim for asylum

- Social distinction
- Particularity

Post-A-R-C-G-: interpretive issues

1. Has been extended to women fleeing DV in countries other than Guatemala
2. Has been extended to women who were not formally married to their abusers
3. Confusion over what it means to be "unable to leave"

Post-A-R-C-G-: approach

Gender + nationality + relationship status + other immutable characteristics

- Married women in [country] who are unable to leave their relationship
- [Country] women in domestic relationships who are unable to leave
- [Country] women who are viewed as property by virtue of their positions within a domestic relationship
- Other characteristics: ethnicity, partner's status as police officer or gang member, fundamental belief, etc.

Building the Record for PSG

Social Distinction

- How to demonstrate the proposed group is perceived as a group by the society?
- News articles, scholarly research, popular literature
- Laws enacted re: group members
- Words/phrases in vernacular re: the group
- Statistics and/or expert testimony regarding rates of persecution and/or prosecution, etc.
- Expert testimony that explains how socio-economic, political context, etc.
- Lay testimony from people in community about how they perceive/treat the group

Particularity

- How to determine with clarity whether applicant is or is not a member?
- Laws or policies defining terms (e.g., "domestic partner")
- Objective means of determining membership (e.g., birth certificates to show family)
- Expert testimony regarding how in the particular society it's easily determinable who is a member of the group

Other grounds

- Political opinion (e.g. feminism)
- Religion (e.g. liberal views of Islam)
- Race (e.g. indigenous)

Child Abuse Claims

- Social groups defined by age/childhood/youth +
 - Nationality
 - Gender
 - Family
 - Ethnicity
 - Sexual orientation/gender identity
 - Lack of adult supervision or parental protection
 - Disability or mental illness
 - Street children
 - Subgroups of children may be especially vulnerable (e.g., orphans, stepchildren)

Successful PSGs in Child Abuse Cases

- Family-based
- Childhood + status in family [X nationality] children unable to leave the familial relationship
- [X nationality] children viewed as property
- Children of [X nationality] women in domestic relationships they are unable to leave
- Children on their own
- Disability
- Orphans
- Adopted children or stepchildren
- Indigenous children
- LGBT children, or children perceived to be LGBT
- Children born out of wedlock, children perceived as illegitimate, children with contested paternity

Gang Violence Claims

- Types of gang-related Asylum claims
 - Gender-based violence
 - Resistance to recruitment
 - Extortion
 - Witness and informant
 - Family membership
 - Former gang membership

Gender-Related Gang Claims

- Significance of sex discrimination and patriarchy that pervade and are exacerbated in gang culture
- No positive, published case law, though focus is on recruitment or aspects other than the gender-based nature of the harm
- A-R-C-G- framework might apply
- CGRS database cases recognized PSGs:
 - [nationality] women
 - [nationality] women who are viewed as gang property by virtue of the fact they were victimized by gang members before
 - Single Salvadoran women who are working professionals

<input type="checkbox"/>	Bars to Asylum

Bars to Asylum: THE ONE YEAR BAR	
<input type="checkbox"/>	
<ul style="list-style-type: none"><input type="checkbox"/> Must demonstrate by <i>clear and convincing evidence</i> that the application was filed within one year of your client's arrival in the US<input type="checkbox"/> Proving entry:<ul style="list-style-type: none"><input type="checkbox"/> Entry is proven ordinarily by the I-94 (little white card) or through CBP's online retrieval system.<input type="checkbox"/> Entry is from your client's <i>most recent</i> arrival, so, if they have been to the US before, but, most recently entered in December 2010, you don't have a one year bar problem. 8 C.F.R. Section 1208.4(a)(2)(ii).<input type="checkbox"/> Testimony alone, if credible, can be sufficient.	

What if your client entered without inspection?	
<input type="checkbox"/>	
<ul style="list-style-type: none"><input type="checkbox"/> You need to prove their date of entry.<input type="checkbox"/> How?<ul style="list-style-type: none"><input type="checkbox"/> Their declaration<input type="checkbox"/> Affidavits from friends/family, anyone who can attest to the fact that your client entered when they said they did.<input type="checkbox"/> Do they have any evidence that they were <i>outside</i> the US prior to that date? Pay stubs? Any documents with dates from their country of origin or wherever they were before this?	

Exceptions to the One Year Bar

- Must demonstrate that it is *reasonable* to conclude that an exception applies under the circumstances.
 - Extraordinary circumstances
 - Delay due to an extraordinary circumstance must be “reasonable.”
 - Changed circumstances
 - if so must file within a “reasonable time” of that changed circumstance or the delay due to an extraordinary circumstance must be “reasonable.”

Extraordinary Circumstances

- Extraordinary circumstances must relate to the delay in filing the application within the one year period.
- Events or factors *directly related* to the failure to meet the one year deadline.
- Excused as long as the applicant files within a reasonable period, given those circumstances
 - Unfortunately, lack of knowledge of the law is NOT an extraordinary circumstance.

What constitute extraordinary circumstances?

- Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, or during the one-year period after arrival
 - How do you prove this?
 - Psychological or medical evaluation – Survivors of Torture, Center for Survivors of Torture (San Jose)
Request asap, and, work with psych expert on their report
 - Letters from therapist
 - Client declaration
 - Letters from family/friends
 - Medical Records – hospitalization? Appointments? Prescriptions?

Extraordinary Circumstances Cont.

- Legal disability (e.g. applicant was an unaccompanied minor or suffered from a mental impairment) during the one year after arrival
- Ineffective assistance of counsel
- Applicant maintained lawful immigrant/non-immigrant status, or was given parole, includes TPS, until a reasonable period before filing – or, a belief that they maintained status – student visas!
- Applicant filed before one year, but application was rejected as not properly filed, corrected and re-filed.
- Death or serious illness/incapacity of applicant's attorney or member of applicant's immediate family.

Other Potential Extraordinary Circumstances

- Severe family or spousal opposition
- Extreme isolation within refugee community
- Profound language barriers
- Profound difficulties in cultural acclimatization

How long is reasonable?

- Waiting six months is *too long*, but, considered on a case by case basis.
- Show that the delay was reasonable for your client – based on their education, language ability, transportation situation, access to information, etc.

What constitute changed circumstances?

- That *materially affect* your client's eligibility for asylum
- Changes in conditions in the applicant's country or origin or, if stateless, country of last habitual residence.
- Changes in applicant's personal circumstances that materially affect eligibility for asylum, including changes in US law and activities applicant is involved in outside country of origin that puts applicant at risk.

Examples of Changed Circumstances

- Change of government in country of origin – now hostile to applicant
- Applicant's involvement in political organizing, demonstrations, etc, in the US, critical of their home government
- Religious conversion or abandonment of religion
- Recent antagonism in country of origin towards applicant's race or nationality
- Threats against applicant's family members living abroad
- Potentially, birth of USC child (in FGM context)

Again, must file within a reasonable time of Changed Circumstance

- Must apply for asylum within a reasonable period of the changed circumstances
- Delay in learning about those circumstances can be factored into reasonable time.
- To be safe, file within less than six months, but, take into account your client's education and personal situation.

Resources on One Year Bar

- K. Musalo & M. Rice, "CGRS: The Implementation of the One-Year Bar to Asylum" 31 Hastings Int'l & Comp. L. Rev 693 (Summer 2008)
- See the AOBTC: One Year Filing Deadline lesson
- Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002) (sets out three part test for extraordinary circumstances)
- CBP's I-94 online system:
<https://i94.cbp.dhs.gov/i94/consent.html?sessionId=q8lpWWsqwLXMptQ9s2w3kN2LzdFLFcarSSyy1RkG0yjPTMTdWHGpl-436884709>

Other Bars to Asylum:

- Firm Resettlement – status in another country – should be an offer of status equivalent to permanent residence (green card)
- Prior frivolous application or final denial on same grounds
- Safe Third Country – Canada?
- Persecutor of others

Other Bars to Asylum, Continued:

- Committed a particularly serious crime in the US
- Committed a serious non-political crime outside the US
- Prior deportation order a.k.a reinstatement of removal (NB: current litigation pending)
- Re-availment – applicant has gone back to the country where they fear persecution or sought gov't protection
- Material support to or other involvement with a terrorist group – defined broadly

	Discretion & Asylum

How does discretion impact asylum?

Element	Asylum	Withholding
Harm	Persecution	Threat to life or Freedom
Occurrence or Likelihood of Harm	Well-founded fear of future persecution (1-in-10 chance) OR Eligibility on Past Persecution alone if sufficiently severe	More likely than not (more than 50% chance)
Nexus between harm and grounds	On account of: race, religion, nationality, political opinion, or MPSPG	Same
Discretionary v. Mandatory	If no statutory bars apply, relief is <i>discretionary</i>	If no statutory bars apply, relief is <i>mandatory</i>
Relief Provided	Leads to green card and then USC status and can bring derivatives	Prevents only return to country of feared harm. No other benefits – cannot file for derivatives ☹️

	Credibility and Corroboration

Credibility	
Factors Considered	Factors Impacting Credibility
<ul style="list-style-type: none"><input type="checkbox"/> Demeanor<input type="checkbox"/> Candor or responsiveness<input type="checkbox"/> Inherent plausibility<input type="checkbox"/> Consistency<input type="checkbox"/> Inaccuracies or falsehoods in statements	<ul style="list-style-type: none"><input type="checkbox"/> Psychological/effects of trauma<input type="checkbox"/> Sensitivity regarding the nature of persecution<input type="checkbox"/> Cultural<input type="checkbox"/> Fear upon arrival<input type="checkbox"/> Translation/interpretation<input type="checkbox"/> Childhood<input type="checkbox"/> Circumstances of airport interviews

Corroboration
<ul style="list-style-type: none"><input type="checkbox"/> REAL ID Act Standard<ul style="list-style-type: none"><input checked="" type="checkbox"/> Evidence must be provided unless asylum seeker does not have and cannot reasonably obtain the evidence<input checked="" type="checkbox"/> Credible testimony of the applicant may be sufficient

Trial Strategy and Tips

Practice Pointers for Trial Preparation

- Have a clear (one to two sentence) theory of the case
- Create a trial binder: list of important dates, NTA, list of exhibits, important case law, common objections
- Practice your direct with your client to understand her limitations and better phrase your questions.
- Do a moot hearing so the client can get a sense of what to expect (i.e. pausing for an interpreter)
- Have a closing outline prepared with citations to helpful case law

What is the Attorney's Role?

- Evaluate the strengths and weaknesses of the claim (raise and distinguish negative case law on point)
- Prepare a theory of the case and closing outline
- Know the relevant law (Circuit, BIA, and useful unpublished decisions on point)
- Develop client-centered direct questions
- Explain the process to the client and set expectations (i.e. you can ask for breaks, you should only answer the question being asked etc.)
- Make appropriate objections and ensure that the record is preserved for appeal

What is the Advocate's Role?

- Assist/support client during trial moots- mitigating anxiety, provide relaxation techniques
- Assist client in identifying court appropriate attire
- Empower client to take active role in their testimony (you can ask for clarification, a break, a tissue etc.)
- Help coordinate transportation/accommodation and childcare for clients as needed
- Accompany for moral support, encouragement if necessary

	Appeals Considerations

You can prevail on appeal!	
<input type="checkbox"/>	Despite deferential standards of review, you can make winning arguments on appeal in these cases
<input type="checkbox"/>	Identify legal and factual errors in the decision, winnowing issues as you go up the chain
<input type="checkbox"/>	Comply with all deadlines
<input type="checkbox"/>	Remember: clerks are there to help!

Applicable Rules	
	These rules provide information on deadlines, service, format, length, etc.
<input type="checkbox"/>	BIA Practice Manual
<input type="checkbox"/>	Federal Rules of Appellate Procedure
<input type="checkbox"/>	Circuit Rules

Effective Brief Writing

- Remember what you know about good writing
 - Grammatically correct
 - Proper punctuation
 - Active voice
 - Organization/paragraph structure – IRAC!
 - Proper/consistent citation
- Things to avoid
 - Run-on sentences
 - Judgmental language
 - Exaggeration
 - Block quotes
 - Legalese

It's all (often) about the facts

- Humanize your client
- You do not need to recite everything that happened
- Set the context as well as evoke emotion
- Cite to the record (and, remember, you're bound by it)
- No argumentation

Argument

- Concise/argumentative point headings
- Analysis!
- Lead with your strongest arguments – which issues are dispositive?
- Address adverse published decisions
- Keep in mind the scope standard of review
- Remember: you can't always get what you want – be strategic!

Where to start?

- Pick a process that works for you and stick with it!
 - Read and outline opinion
 - Read and outline record
 - Conduct legal research
 - Outline brief
 - Write
 - Review and revise

Review

Proving a DV-Asylum Case

- Domestic violence: frequency, level of harm, injuries
- Relationship status: clearly defined relationship
- Country conditions: societal perception of group
- State failure to protect: unable/unwilling
- Motive: central reason(s) for persecution
- Relocation alternatives

Resources

- ALA, *Asylum Primer* (2015), <http://agora.aila.org/Product/List/Publications>
 - ILRC, *Essentials of Asylum Law* (2015), <http://www.ilrc.org/publications/essentials-of-asylum-law>
 - Ninth Circuit, *Immigration Outline* (updated regularly), http://www.ca9.uscourts.gov/guides/immigration_outline.php
 - Ira Kurzban, *Immigration Law Sourcebook* (updated annually), <http://agora.aila.org/Product/Detail/1848>
- Request assistance from the Center for Gender & Refugee Studies in your case, cgrs.uchastings.edu/assistance

Questions?
