Asylum Removal and Immigration Courts: Definitions to Know

Asylum

Definition: An applicant for asylum has the burden to demonstrate that he or she is eligible for that protection. To satisfy that burden, the applicant must prove that he or she is a refugee. A "refugee" is a person outside of his or her country of nationality or habitual residence who is "unable or unwilling" to return to 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."

Talking Points:

- The number of asylum applications that U.S. Citizenship and Immigration Services (USCIS) has received has increased significantly in recent years, from 56,912 in FY 2014, to 84,236 in FY 2015, to 115,888 in FY 2016, to 142,760 in FY 2017.

- Due to its surreptitious nature, it is impossible to measure the extent of fraud in the asylum process. As Denise N. Slavin, then-vice president of the National Association of Immigration Judges, told the *New York Times* in 2011, however: "Fraud in immigration asylum is a huge issue and a major problem." In perhaps the most substantive attempt to examine asylum fraud, USCIS's Fraud Detection and National Security Directorate (FDNS) partially completed an asylum-based Benefits Fraud and Compliance Assessment (BFCA).

- The asylum-based BFCA Program was designed "[t]o determine the scope and types of fraud, and the application and utility of existing fraud detection methods" and "[t]o identify weaknesses and vulnerabilities, and propose/undertake corrective action." It consisted of a "random sampling of [239 out of 8,555] pending and completed (approved/referred) [affirmative asylum applications filed] with USCIS between May 1 and October 31, 2005." Of those 239 cases, 29 (or 12 percent) were determined to be fraudulent; 12 of those 29 cases had already been granted. While 72 (or 30 percent) of the cases did not contain any "fraud indicators" (that is, inconsistencies, derogatory, or negative information), 138 (or 58 percent) "exhibited possible indicators of fraud," not counting 27 additional cases (for a total of 69 percent) that had been referred because of fraud indicators for overseas verification requests, which had not been completed.

Expedited Removal

Definition: The Immigration and Nationality Act (INA) allows immigration officers — rather than judges — to order the deportation of arriving aliens who are inadmissible because of fraud or misrepresentation, because they have no documentation (like a passport or a visa) that would allow them to be admitted, or because they entered illegally and are apprehended within 100 miles of the border and 14 days of entry.

Talking Point:

- Expedited removal was intended to speed the process by which inadmissible aliens were removed from the United States. Unfortunately, as explained below, it is actually become a gateway by which aliens can gain entry into the United States.

Credible Fear

Definition: If an alien in expedited removal asserts a fear of persecution, the arresting officer will refer the alien to an asylum officer for a "credible fear interview". If the asylum officer determines that the alien has a credible fear, the alien is placed in removal proceedings before an immigration judge, where the alien can file his or her application for asylum. Under the INA, the term "'credible fear of persecution' means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208." This is a very low standard, and credible fear is found in 75 to 90 percent of all cases in which an alien claims credible fear.

Talking Points:

- The credible fear process itself hinders asylum officers in making credibility determinations. Aliens in expedited removal are subject to mandatory detention until they are found to have a credible fear. Because of the large number of cases and the lack of detention space along the border, many aliens subject to expedited removal are sent to detention facilities throughout the country. Due to the distance between these facilities and the asylum offices, many of the credible fear interviews occur by telephone. Most of the aliens in these proceedings do not speak English, requiring the asylum officers to employ interpreters, many of whom also appear telephonically.

- The high grant rate for credible fear suggests that the standards are too low. For example, the burdens of proof for asylum are low (i.e., an alien without documents can establish an asylum claim simply to his or her own testimony). Because the standard for finding credible fear is low, in light of the low evidentiary standards for asylum, it is not surprising that so many aliens are found to have credible fear.

- Further, even an alien who cannot satisfy the standard for asylum, but who makes a plausible claim that he or she has been harmed, or may be harmed, is still generally referred to an immigration judge for an asylum application to determine whether the alien is eligible for protection under the Convention Against Torture (CAT). That simply requires that an alien show they've been subject to harm by or at the instigation of, or with the consent or acquiescence of, a government official or other person acting in an official capacity. Those determinations are left to the immigration court.

- As a likely result of these factors, the number of credible fear reviews increased significantly, from 5,000 in 2009, to 94,000 in 2016. That number dipped to 78,564 in FY 2017; however, up to June 2018, there were already 73,283 credible fear claims made in FY 2018.

- Prior to 2013, only 1 percent of arriving aliens claimed credible fear, whereas currently 10 percent make such claims. The attorney general has stated that half of those who pass credible fear screening never file an asylum application, however. ICE lacked detention space to hold all aliens who claimed credible fear in the past, and many were released for hearings that may occur years in the future. It is unclear whether DHS will be able to find sufficient space to detain aliens who are apprehended and are found to have credible fear pending a final decision on their applications for asylum, despite the department's best efforts.

Bond

Definition: "Bond" is the term used in immigration for the release of an alien pending removal proceedings or removal. Aliens can be released on their own recognizance, or on a minimum bond of $1,500. Bond can be granted by either an immigration judge or U.S. Immigration and Customs Enforcement (ICE).

Parole

Definition: "Parole" is the term used in immigration for the release of an arriving alien. It can only be granted by the Department of Homeland Security (DHS). Again, DHS can release an alien on parole on his or her own recognizance, or for a sum of money as bond.

Unaccompanied Alien Child (UAC)

Definition: An alien under the age of 18 who enters the United States or is apprehended by DHS who does not have a parent or guardian in the United States. Under section 462 of the Homeland Security Act (2002), UACs must be turned over to the Department of Health and Human Services (HHS), not DHS, for detention.

Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

Definition: Modified the rules governing the detention of unaccompanied alien children (UACs). Under the TVPRA, UACs must be turned over to HHS within 48 hours of detention by DHS, or identification as a UAC, and "promptly placed in the least restrictive setting that is in the best interest of the child," generally meaning release to a family member or friend.

Talking Point:

- The TVPRA distinguishes between UACs from "contiguous" countries (Canada and Mexico) and aliens who are nationals of "non-contiguous" countries. A UAC from a contiguous country can be returned if the alien has not been trafficked and does not have a credible fear. Under the TVPRA, however, "Other Than Mexicans" (OTMs) are to be transferred to the care and custody of HHS within 72 hours and placed in formal removal proceedings, even if they have not been "trafficked". According to the Congressional Research Service (CRS): "ORR reported that children spent about 34 days on average in the program as of January 2016." Between February 2014 and September 2015, 56,000 (80 percent) of the children were placed with sponsors illegally in the United States and an additional 700 were placed with sponsors in deportation proceedings. In FY 2014, according to CRS, most of the UACs who were released were placed with parents or legal guardians.

Flores Settlement Agreement

Definition: An agreement between the then-Immigration and Naturalization Service (INS) and a class of alien minors in 1997, which is currently overseen by Judge Dolly Gee of the U.S. District Court for the Central District of California. In 2016, it was read to create a presumption in favor of the release of all alien minors, even those alien minors who arrive with their parents.

Talking Points:

- Under the *Flores* agreement, DHS can only detain alien minors for 20 days before releasing them to HHS, which places the minors in foster or shelter situations until they locate a sponsor. It encourages UACs to enter the United States illegally, and encourages the parents of UACs to hire smugglers to bring them to the United States. Further, it encourages people to bring their own children (or children whom they claim to be their own) when they make the perilous journey to the United States, thinking that it will make it more likely that they (the parents or purported parents) will be more likely to be released if they travel with children.

- ICE explains: "While smugglers most often transport adult males, the number of women, children and family units seeking transport has increased dramatically in recent years. They often find themselves at risk for assault and abuse such as rape, beatings, kidnapping and robbery. Smugglers regularly overcrowd living and sleeping accommodations, and withhold food and water. In addition, individuals who are smuggled may be forced into human trafficking situations upon their arrival in the U.S. or their families may be extorted. Even knowing these dangers, the majority of people who travel with a smuggling organization do so voluntarily."

Executive Office for Immigration Review (EOIR)

Definition: Agency of the Department of Justice (DOJ) with jurisdiction over the immigration courts and the Board of immigration appeals (BIA).

Immigration Courts

Definition: Courts with primary jurisdiction over removal proceedings. Immigration judges in these courts determine removability, set bond where they have jurisdiction, and can adjudicate applications for relief from removal, including asylum.

Talking Point:

- The number of cases currently pending before the immigration courts is called the "caseload". Through August 2018, there were 764,561 cases pending before the 395 immigration judges in 58 immigration courts throughout the nation, or almost 1,936 cases per immigration judge.

Backlog

Definition: Cases that have been pending before the immigration courts for more than one year. The backlog more than doubled from FYs 2006 through 2015, primarily due to declining numbers of cases completed per year. There were 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.

Talking Points:

- GAO has found that the immigration courts' "case backlog — cases pending from previous years that remain open at the start of a new fiscal year — more than doubled from fiscal years [(FY)] 2006 through 2015 ... primarily due to declining cases completed per year." The courts' backlog increased from approximately 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.

- "[C]ontinuances increased by 23 percent from [FY] 2006 to [FY] 2015," and "immigration judge-related continuances increased by 54 percent from about 47,000 continuances issued in [FY] 2006 to approximately 72,000 continuances issued in [FY] 2015." Department of Homeland Security (DHS) attorneys and others complained that the "frequent use of continuances [by immigration judges] resulted in delays and increased case lengths that contributed to the backlog."

- The number of cases the immigration courts "completed annually declined by 31 percent between [FY] 2006 and [FY] 2015 — from 287,000 cases completed in [FY] 2006 to about 199,000 completed in [FY] 2015".

- Total case completions declined, even though the number of immigration judges (IJs) increased 17 percent.

- There are a number of reasons for the increase in the backlog:

    - Resources. There are too few judges and support staff to do the job adequately.

    - Increases in Benefits and Leave. IJs are government employees, and as they get more seniority, they receive more leave. This limits the amount of time that is spent hearing cases.

    - The "Surge". The number of families and unaccompanied alien children (UACs) entering the United States began to increase in FY 2014.9 EOIR responded by "prioritizing" certain "cases involving migrants who had recently crossed the Southwest border and whom DHS had placed into removal proceedings." This both swelled dockets and led to IJs being reassigned from already scheduled hearings. Those surge cases were also more complicated than cases involving single adult males, requiring more courtroom time (and continuances) per case.

    - Case Law. Recent federal court decisions have complicated IJs removal decisions, slowing proceedings and requiring additional continuances. In addition, recent decisions from the Ninth Circuit Court of Appeals have increased the number of aliens who are eligible for bond, requiring the scheduling of bond hearings and rescheduling of cases when aliens are released from custody.

- Obama Administration Policies. Policies instituted in the last administration led to numerous continuances, as aliens sought counsel and applied for relief or discretionary closures, release, or termination based on those policies.

- IJ Burnout. A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This, in turn, results in more reversals and remands, adding even more cases to the backlog.

Board of Immigration Appeals (BIA)

Definition: Appellate tribunal with jurisdiction over appeals from immigration courts. Most aliens have a right to appeal immigration court decisions to the BIA.