



Recommendation 89-4

Asylum Adjudication Procedures

(Adopted June 16, 1989)

Providing asylum to the persecuted is a vital and treasured part of the American humanitarian tradition. It deserves reaffirmation and continued commitment. The asylum process, however, can also become a misused exception in the nation's immigration laws, especially in a time of improved transcontinental travel and communications. Two important public values thus come into conflict in the asylum program. On the one hand stands the promise of refuge to the persecuted; on the other stands the demand for reasonable assurance of national control over the entry of aliens. This tension becomes acute whenever application numbers rise.

In the 1970s, the United States received approximately 2000 applications for asylum each year. By 1988, that number had risen to approximately 60,000 applications. The Immigration and Naturalization Service (INS) projects 100,000 applications in 1989. Government expenditures for coping with the increase have risen rapidly, both for adjudication and for detaining or otherwise arranging to shelter and feed the applicants. This is necessarily only a stopgap measure. It would be far more cost effective in the long run to devote the resources necessary to improve asylum adjudication procedures.

Although it should be possible to distinguish qualified from unqualified asylum applicants and thereby both honor the humanitarian tradition and avoid misuse of the asylum provision, several factors hinder our ability to do so. First, the "well-founded fear of persecution" standard, upon which asylum is based, is far from self-defining; there is no uniform understanding of its application to particular cases. Second, judgments about the relative risks faced by asylum seekers upon return to their native countries are unavoidably affected by preconceptions about what conditions may be like in those countries. It may also be misleading to posit a sharp distinction between economic migrants and political refugees. Asylum seekers represent a spectrum of motivations and many leave their home countries because of a mix of political and economic reasons. Third, the facts upon which adjudication must rest are elusive, largely because they turn on conditions in distant countries. Moreover, the individual applicant, often inarticulate and uneasy, may be the only available witness to the specific events that underlie the claim. Therefore, credibility determinations can be crucial, but they are



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complicated by barriers to effective cross-cultural communication. Improvements in the system must make allowance for all these difficulties.

The central standard for determining whether an applicant will be granted asylum derives from the definition of "refugee" contained in a United Nations (UN) treaty, the 1951 Convention relating to the Status of Refugees, amended by its 1967 Protocol. Under section 208 of the Immigration and Nationality Act (INA), the Attorney General may, in his discretion, provide asylum to applicants who establish they have a "well-founded fear of persecution" in the home country because of race, religion, nationality, membership in a particular social group, or political opinion. Additionally, section 243(h) of the INA establishes a mandatory country-specific protection which is known as *nonrefoulement*. Section 243(h) provides the government may not return an alien to a country where his "life or freedom would be threatened" on any of the same five grounds. Under current administrative practice, the most important test has become the "well-founded fear" standard, because people granted asylum status are necessarily shielded against removal from the United States.

Historically, the United States has employed a mix of adversarial and non-adversarial procedures for deciding on asylum and *nonrefoulement* claims. Currently, "walk-in" claims are adjudicated by examiners in the district offices of the INS after an essentially non-adversarial interview. It typically lasts about twenty minutes as the interviewer reviews the application form (I-589) and the applicant's supporting information, and also prepares and issues work authorization papers (provided the claim is adjudged "nonfrivolous"). The file is then sent to the State Department for its advisory views. The applicant is given fifteen days to respond to any recommendation by the State Department to deny the application. Subsequently, an INS examiner will review the file and issue a decision. This process may take eight months or more. Informal review of district office decisions is provided by the Asylum Policy and Review Unit (APRU), a small office in the Department of Justice created in April 1987.

Denials in the district office are not appealable, but unsuccessful applicants may renew the application in adversarial exclusion or deportation proceedings before an immigration judge, who will consider the matter de novo. These judges are officials in the Executive Office of Immigration Review (EOIR), which is wholly separate from INS but is also a part of the Department of Justice. Aliens who do not file for asylum until such proceedings have started have no access to the district office; they will be heard only by an immigration judge.

The immigration judge's ruling on asylum is appealable to the Board of Immigration Appeals (BIA), which is also located in EOIR. Appeals can easily consume a year or more, largely because



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of delays in receiving transcripts of immigration court hearings. No further administrative appeals are possible at the instance of the applicant, but on rare occasions, cases are considered by the Attorney General personally upon certification or referral. Judicial review of individual asylum denials almost always occurs as part of the review of exclusion or deportation orders under section 106 of the INA.

Administrative adjudication alone involves five distinct administrative units (the District Office, the State Department, APRU, the Immigration Judges, and BIA), only two of which see the applicant in person. This multiplicity of agencies spreads resources thin, resources that should be concentrated efficiently so as to improve the quality of the procedure and assure that genuine refugees are granted asylum.

Adjudication of an asylum claim through the various administrative and judicial levels requires several months and often consumes years. Such delays increase the attraction for marginal applicants because applicants can enjoy substantial benefits, including work authorization and freedom of movement, throughout the period their claim is pending. Deterrents such as detention or limitations on work authorization could be used to minimize this magnet effect. Those measures, however, carry substantial disadvantages. Primarily, they are indiscriminate in their impact and may fall most heavily on genuine refugees who have already suffered greatly. These measures also entail higher costs for the federal government, especially when asylum claims remain pending for lengthy periods.

The Conference believes fair but speedy conclusion of adjudication, leading either to a grant of asylum or to an enforceable removal order, is crucial to any healthy asylum adjudication system. This objective can be promoted through attention to two elements. First, delay derives in part from the point of two separate rounds of de novo consideration of asylum claims. One unified initial asylum proceeding should be established instead. (If the alien has other defenses to deportation or exclusion, those other defenses should continue to be heard by immigration judges in contemporaneous and separate proceedings). Second, additional delay derives from the qualified right to counsel as specified by current statutes and regulations, which provide for counsel in exclusion or deportation cases "at no expense to the government." Because so many applicants are indigent, delays often result from the need to accommodate the schedules of those attorneys who are willing to take the cases on a pro bono basis—a problem that is compounded when applications increase in a particular geographic location. A healthy system of asylum adjudication must be able to schedule hearings expeditiously, even if pro bono counsel are not immediately available in sufficient numbers. Fairness must be sought,



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therefore, through hearing procedures, training, and monitoring that assure a special role for the adjudicator in developing a complete record when the applicant is not represented.

The Conference also believes a healthy asylum adjudication process must foster the greatest possible accuracy as well as public confidence that decisions are rigorous, professional, and unbiased. Reliance on a specialized adjudicative board without routine reference of applications to the State Department would serve these ends and minimize any perception that asylum decisions are influenced by political considerations. Additionally, arrangements must be made to provide the adjudicators with information concerning foreign country conditions that is as accurate and complete as possible, derived from a wide variety of sources, both to help dislodge any preconceptions and to foster systematic expertise for use in developing the record and making the ultimate judgment on the claim.

For several years the Department of Justice has been considering amended asylum regulations that would serve many of these ends. A version proposed in August 1987 [52 FR 32552] would have established a specially trained corps of adjudicators, responsible to the INS Central Office rather than to the district directors, and it would have eliminated de novo reconsideration of asylum claims by immigration judges. These regulations drew criticism, in part because of concern about the professionalism and independence of the adjudicators, and the Department responded with modified proposed regulations in April 1988 [53 FR 11300] that retained the new corps of adjudicators but also restored the availability of de novo consideration before the immigration judges. Those regulations are still pending in the Attorney General's office and the Department has encouraged this study and analysis.

Recommendation

The Attorney General should adopt regulations creating a new asylum adjudication process that would eliminate much of the duplication and division of responsibility associated with the current complicated system. Resources should be applied to enhance the professionalism, independence, and expertise of the adjudicators, and to assure fair and expeditious adjudications, so genuine refugees may be speedily given a secure status and unqualified applicants, absent circumstances which would allow them to remain in this country, may be promptly deported.



I. Creation of a New Asylum Board

The Attorney General should create a new Asylum Board located, for administrative purposes, within the Executive Office of Immigration Review (EOIR) of the Department of Justice and consisting of an adjudication division, an appellate division, and a documentation center. The chairperson of the Asylum Board would be responsible for administrative support and supervision of the operation of all three units.

A. *The Adjudication Division*

1. *Jurisdiction.* All claims for asylum under section 208 of the Immigration and Nationality Act (INA) or withholding of deportation under INA section 243(h) (hereinafter collectively "asylum" claims) should be heard exclusively by asylum adjudicators in the adjudication division of the Asylum Board.

2. *Nature of the asylum hearing.* Asylum claim proceedings should be recorded.¹ The asylum adjudicator should be responsible for developing a complete record of the specific facts relating to the applicant's claim, including those which might support a grant of asylum and those which might cast doubt on the claim or on the applicant's credibility. Care should be taken to assure the service of skilled interpreters. The adjudicator should be responsible for most of the questioning, with a reasonable and adequate opportunity for additional questioning and entry of relevant information, including the presentation of witnesses, by the applicant and counsel. The Immigration and Naturalization Service (INS) should not be represented as an opposing party in the proceedings.²

3. *Representation of applicants.* Applicants should be encouraged to secure counsel (or a qualified nonattorney representative) to develop the initial claim and to provide representation during the asylum proceedings. Although reasonable accommodation should be provided for counsel to be obtained, proceedings should not be unduly delayed, because expeditious initial decisions are essential.

4. *Use of official notice of country conditions.* Asylum adjudicators should develop substantial cumulative expertise regarding country conditions, to be used in developing the record, and should be responsible for posing illuminating questions to the applicant and other witnesses,

¹ The Administrative Conference recommends experimentation with other methods for creating a record that would maintain flexibility but preserve objectivity, professionalism, and fairness to the applicant.

² The Administrative Conference takes no position on the possible application of the Equal Access to Justice Act to asylum proceedings.



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for evaluating evidence, and for reaching the ultimate determination about likely risks to the applicant upon return to the home country. The accepted standards for official notice, in accordance with the Administrative Procedure Act, should govern use of such information. Ordinarily, these standards will simply require an adequate statement of reasons for accepting or rejecting the asylum claim, reflecting such expertise. In instances when specific and detailed facts developed from the documentation center or other sources (and not from information supplied by the applicant) appear to be crucial, the applicant should be given notice of intent to deny based on such information, along with an opportunity to offer information or argument in rebuttal.

5. *The adjudicators.* Asylum adjudicators should be recruited from among attorneys possessing adjudicative skills and appropriate judgment and temperament, with close attention given to those who are familiar with international relations and refugee affairs and who are sensitive to the difficulties of cross-culture communication. Adjudicators should receive salary, benefits, and guarantees of adjudicative independence equivalent to those of immigration judges, and they should be assigned no other enforcement or adjudication responsibilities. The adjudicators should be given thorough and ongoing training, especially on techniques for fairly conducting this specialized type of proceeding and on conditions in those countries from which a substantial number of asylum applications is received. If, alternatively, a separate Asylum Board is not created and the adjudication assignment is given to immigration judges, then such judges should be assigned to a separate unit in EOIR.

B. Appellate Division

1. *Composition and functions.* The appellate division of the Asylum Board should consist of the chairperson and two additional members, assisted by staff attorneys and other support personnel. The division's principal responsibilities should be to consider appeals filed by persons denied asylum at the initial stage, in light of the administrative record compiled before an adjudicator, and such other information as the applicant may wish to submit or of which official notice may be taken. The division, however, should also monitor cases, and should have the authority to require certification to it of selected cases, either granting or denying asylum, in order to foster consistency, fairness, and political neutrality. It will thus absorb the principal functions now performed by the Asylum Policy and Review Unit.

2. *Certification or referral to the Attorney General.* The Attorney General should retain the authority to review decisions of the Asylum Board, upon formal certification or referral or *sua sponte*.



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3. *Expeditious completion of appeals.* A high priority should be placed on completing all asylum appeals expeditiously, preferably within three months of filing. The Department of Justice should ensure that transcripts, where required, are made from recorded hearings in a timely fashion.

C. Documentation Center

A documentation center, staffed with regional specialists, should maintain current and detailed information on country conditions, from both governmental and nongovernmental sources, periodically compile and publish usable summaries on selected countries, and respond to requests for more specific information received from officials of the Asylum Board. Special effort should be devoted to assuring complete compilations of ongoing reports from established nongovernmental human rights organizations, and to drawing upon information from documentation centers in other countries. Information and procedures developed by other countries can be particularly useful in minimizing start-up costs. The center's collections and publications shall be accessible to the public.

D. Role of the Department of State and the United Nations High Commissioner for Refugees

The Department of Justice should take advantage of resources, assistance, and information available through the State Department and the United Nations High Commissioner for Refugees (UNHCR). In particular, arrangements should be made with both to assist in training adjudicators and to augment information available through the documentation center.

If it so requests, on an across-the-board or country-specific basis, the State Department should receive notice of individual asylum applications, so it may offer its judgment, in particular, about appropriate responses in sensitive, such cases, as those involving foreign government officials.

II. Detention

Where detention of asylum seekers is deemed necessary,³ the Department should limit it to short-term detention in "asylum processing centers," as recommended by the Select Commission on Immigration and Refugee Policy. Such centers should also keep families together wherever possible, minimize the length of detention, provide assistance in securing

³ The Administrative Conference does not take a position on the suitability of detention in asylum proceedings.



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representation, and otherwise foster conditions which reflect that the purpose of detention is not punitive.

III. Deportation

The Department of Justice should ensure individuals denied asylum are removed promptly if they are otherwise excludable or deportable, subject to any policy decision by the Attorney General to grant extended voluntary departure to nationals of particular countries.

IV. Judicial Review

Judicial review of asylum denials should be available as part of the review under section 106 of the INA for orders of deportation or exclusion. Appropriate arrangements therefore should be made to combine, for purposes of judicial review, the record of proceedings before the Asylum Board with that of the regular deportation or exclusion proceedings before the immigration judges and the Board of Immigration Appeals.

Citations:

54 FR 28970 (July 10, 1989)

___ FR ____ (2011)

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