

## The Law of Refugee Status

Jonah Eaton - Staff Attorney

Nationalities Service Center  
Philadelphia Partnership for Resilience



## The Geneva Convention of 1951

Asylum is a surrogate protection regime  
tangible legal mechanism to vindicate human rights

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”

Protocol relating to the Status of Refugees, art. 1, 31 Jan., 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention relating to the Status of Refugees, art. 1, 28 Jul., 1951, 189 U.N.T.S. 137.

## Refugee Resettlement

- The Refugee Act of 1980 established system for overseas recognition of refugees and resettling them here in the US
- A “durable solution” – address long term refugee encampments

(2) . . . the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation  
8 USC § 1157(a)

## 6 Elements

1. Alienage
2. a well-founded fear
3. of persecution
4. perpetuated by government or actor the government cannot or will not control
5. on account of
6. one of five enumerated grounds.

## Alienage

Must be outside country of origin – you have to cross a boarder

Distinguish from internally displaced persons

Refugees, Asylees & Asylum Seekers

Refugee Resettlement

## Well-founded Fear

Applicant must show “reasonable probability” she will be persecuted – *INS v Cardoza-Fonseca*, 480 US 421 (1987)

c.f.

“more likely than not” – withhold of removal

## Persecution

There must be a sufficient level of harm BUT no statutory or regulatory definition

“harm or suffering *must* be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”

In re Acosta, 19 I. & N. Dec. 211, 223 (BIA 1985), overruled on other grounds In re Mosharrhi, 19 I. & N. Dec. 439 (BIA 1987).

“serious violations of human rights . . . constitute persecution.”

United Nations High Commissioner for Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 51 (1979)

“punishment for political, religious, or other reasons that our country does not recognize as legitimate.”

Ossagecy, U.S.I.N.S., 942 F.2d 1160, 1163

## Past Persecution

Showing of past persecution -> rebuttable presumption of future persecution – 8 C.F.R. § 208.13 (b)(1)

Past persecution -> possible grant of “humanitarian” asylum

## Who is the Persecutor?

Government Actor

Non-government actor

Not general criminality, or random acts of violence

State action or non-action is a requirement

## On Account of – Nexus Requirement

The persecutor must be motivated by one of 5 enumerated grounds – race, religion, nationality, political opinion and social group

Motivation may be imputed – Persecutor acts against victim because they believe victim part of group

Motives may be mixed; applicant must establish that the protected ground “was or will be *at least one central reason* for persecuting the applicant”

Shaikh v. Holder, 702 F.3d 897 (7th Cir. 2012).

## Enumerated Grounds

1. Race; 2. Religion; 3. Nationality; 4. Political Opinion; 5. Social Group

Group that shares a “common immutable characteristic.”  
In re Acosta, 19 I. & N. Dec. 211, 223 (BIA 1985)

A characteristic that cannot or should not be required to change

Category now includes: survivors of FGC; victims of domestic violence; LGBT

## Enumerated Grounds

Social Group is an increasingly complicated and restricted; BIA added “particularity” and “social visibility” requirements

**Particularity:** group is defined in a manner sufficiently distinct that the group would be locally recognized as a discrete class of persons

Matter of S.E.G., 24 I&N Dec. 579 (BIA 2008).

**Social visibility** - shared characteristic “should generally be recognizable by others in the community.” Id. at 586.

“We are hard-pressed to discern any difference between the requirement of ‘particularity’ and the discredited requirement of ‘social visibility.’ Indeed, they appear to be different articulations of the same concept and the government’s attempt to distinguish the two oscillates between confusion and obfuscation. . . .” Id. at 608.

Valdiviezo-Galdamez v. Holder, 663 F.3d 582 (3d Cir. 2011).

## The Process

Refugees, Asylees & Asylum Seekers

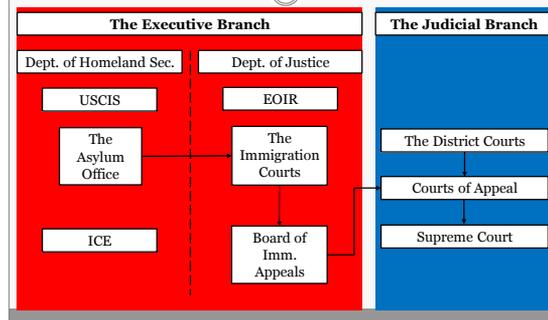
Asylum vs. Withholding vs. CAT Withholding

Non-refoulement, art. 33 and Withholding of Removal  
(*Cardozo-Fonseca* withholding vs. asylum standards)

Asylum seeker comes to the US and requests protection;  
discretionary relief based on balance of equities

Affirmative vs. Defensive application (in removal proceedings)

## The Process - Jurisdiction



## Refugee Resettlement

- UNHCR identifies candidates for resettlement in high impact areas
- They are referred to the Office of Refugee Resettlement at US DOS
- Multiple rounds of interviews with ORR and DHS
- If selected, refugees are then issued travel documents by the IOM
- Travel to the US and placed with a social service agency such as NSC

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## Other Issues

- Asylum bars: Persecutors, criminals, terrorists
  - 1 year deadline
- Internal relocation alternative/firm resettlement/safe third country of asylum

## Evidence

- Burden of proof is initially on applicant to show she meets the requirements for asylum
- The Application: Form I-589, Affidavit & Supporting docs
- Testimony: can meet burden if credible, persuasive, refers to specific facts sufficient to show refugee definition is met
  - REAL ID Act 2005 – adjudicator can require corroboration; if not presented, explain why

## Evidence

- Expert Testimony/Reports
- There is a right to expert testimony in removal proceedings  
See *Indradajaja v. Holder*, 737 F.3d 212 (2<sup>nd</sup> Cir. 2013)
- *Daubert v. Merrell Dow Pharm., Inc.*, 509 US 579 (1993), *Kumho Tire Co., Ltd. v. Carmichael*, 526 US 137 (1999), Fed. R. Evid. 702 control experts in civil cases
- Physical and Psychological Evaluations and/or testimony
  - Adhere to Istanbul Protocol
  - Experts are impartial observers

## Convention Against Torture

An act committed . . . under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control  
8 C.F.R. § 208.18 (Torture Victims Relief Act of 1998)

CAT Withholding – “more likely than not” standard

Must raise claim before IJ but mandatory form of relief

PPR Program

## “Challenges to Immigrant Communities Under Trump”

Swarthmore College Student  
Speaker Fund / Muslim Students Assoc.

Swarthmore College  
Feb. 28, 2017

## The Executive Orders – A Timeline

- Jan 25 – 2 Executive Orders (border wall, sanctuary cities, expedited removal ...);
- Jan 27 – Executive Order barring entry from 7 countries, scaling back refugee resettlement;
- Jan 28 – chaos at airports, detentions & deportations
  - 27+ federal lawsuits filed; evening of Jan 28, EDNY grants TRO;
- Feb 3 – WDWA issues nationwide TRO of much of Jan 27 Order;
- Feb 9 – CA9 upholds TRO, no *en banc* or SCOTUS appeal;
- Mar 6 – EO II issued; modifies original, is enjoined by judge in HI before taking effect; similar order granted in MD
- DOJ appeals MD order to 4<sup>th</sup> Cir
- May 25 – 4<sup>th</sup> Cir *en banc* upholds TRO 10-3; appeal will likely go to SCOTUS

## The Executive Orders

- **Executive Order 13767 of Jan 25, 2017**
- **“Border Security and Immigration Enforcement Improvements”**
  - § 2 Policy – “secure the southern border ... through the immediate construction of a physical wall”; detain, expedite removal;
  - “In accordance with existing law”:
    - × Build a wall;
    - × Build more prisons.
- **Executive Order 13768 of Jan 25, 2017**
- **“Enhancing Public Safety in the Interior of the United States”**
  - Enforcement priorities:
    - × “convicted of any criminal offense”,
    - × “has committed acts that constitute a chargeable criminal offense”,
    - × “has abused any program related to receipt of public benefits”.
  - § 9 Sanctuary Jurisdictions – punish “sanctuary cities” – no federal grants
  - § 13 Office for Victims of Crimes Committed by Removable Aliens

## The Executive Orders

- **Executive Order 13769 of Jan 27, 2017**
- **“Protecting the Nation From Foreign Terrorist Entry Into the United States”**
  - § 3 – “Suspension of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern”
    - × DHS has 30 days to write a report;
    - × 90 day entry bar, pursuant to 212(f), of any alien listed in 217(a)(12) (exception to visa waiver program – list of countries of concern)
    - × “extreme vetting” measures
  - § 5 – Suspension of Refugee Admission program for 120 days; 212(f) bar on all Syrian Refugees indefinitely
  - 212(f) bar on refugee admission past 50,000 (now at ~39,000)

## The Executive Orders

- **DHS Guidance Memos of Feb 20, 2017**
  - Implements EO 13768 of Jan 25;
  - Eliminates Obama removal priorities; no PD for specific “classes”;
  - Expand 287(g) programs;
  - Establish VOICE office
  - Expansion of Expedited Removal
    - Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created 235(b) “expedited removal” process
    - Had been limited for several administrations to 100 miles of boarder; arrived within 14 days
    - Memo expand this to anywhere in US; 2 years (as allowed by statute)

## The Executive Orders

- **§ 240(a) / § 1229(a) Removal Proceedings**
  - Removal proceeding in front of a judge;
  - Right to attorney, 5<sup>th</sup> Amend. due process rights;
  - Right to appeal.
- **§ 235(b) / § 1225(b) “Expedited” Removal**
  - Usually applies to “arriving aliens” (at the boarder); can apply to undocumented with in the US;
  - Process and Rights? None of the above. No attorney, no appeal;
  - DHS Immigration Officer operates as prosecutor and judge; same person may arrest and then order alien removed in the same day;
  - If articulates a fear of return -> credible fear process and possible NTA in Immigration Court

## The Executive Orders

- **Executive Order of Mar 6, 2017 (EO-2)**
- **“Protecting the Nation From Foreign Terrorist Entry Into the United States”**
  - Justification for previous EO, but formally rescinds it
  - Iraq removed from list of “ban” countries
  - Drops preference for religious minorities in refugee resettlement
  - Greencard holders exempted
  - No immediate affect
  - Judge Watson, Dist. of HI enters TRO on March 15