Asylum and "Credible Fear" Issues in U.S. Immigration Policy

Ruth Ellen Wasem
Specialist in Immigration Policy

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Summary

Foreign nationals seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion. Foreign nationals arriving or present in the United States may apply for asylum affirmatively with the United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security after arrival into the country, or they may seek asylum defensively before a Department of Justice Executive Office for Immigration Review (EOIR) immigration judge during removal proceedings.

Asylum claims ebbed and flowed in the 1980s and peaked in FY1996. Since FY997, affirmative asylum cases decreased by 79% and defensive asylum claims dropped by 53% by FY2009. Asylum seekers from the People's Republic of China (PRC) dominated both the affirmative and defensive asylum caseload in FY2009. Five of the top 10 source countries of asylum seekers were Western Hemisphere nations in FY2009: Haiti, Mexico, Guatemala, El Salvador, and Colombia. Ethiopia was the only African nation that was a top source country for asylum seekers in FY2009. Despite the general decrease in asylum cases since the enactment of the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) in 1996, data analysis of six selected countries (the PRC, Colombia, El Salvador, Ethiopia, Haiti, and Mexico) suggests that conditions in the source countries are likely the driving force behind asylum seekers.

Roughly 30% of all asylum cases that worked through USCIS and EOIR in recent years have been approved. Affirmative asylum cases approved by USCIS more than doubled from 13,532 in FY1996 to 31,202 in FY2002, and then fell to the lowest point over the 14-year period—9,614—in FY2009. The number of defensive asylum cases that EOIR judges have approved has risen by 99% from FY1996 through FY2009. The PRC led in the number of asylum cases approved by USCIS and EOIR over the decade of FY2000-FY2009.

Despite national data trends that appeared to be consistent, approval rates for asylum seekers differ strikingly across regions and jurisdictions. For example, a study of 290 asylum officers who decided at least 100 cases from the PRC from FY1999 through FY2005 found that the approval rate of PRC claimants spanned from zero to over 90% during this period. In a separate study, the U.S. Government Accountability Office (GAO) analyzed asylum decisions from 19 immigration courts that handled almost 90% of the cases from October 1994 through April 2007 and found that "significant variation existed."

At the crux of the issue is the extent to which an asylum policy forged during the Cold War is adapting to the competing priorities and turbulence of the 21st century. Some assert that asylum has become an alternative pathway for immigration rather than humanitarian protection. Others argue that—given the religious, ethnic, and political violence in various countries around the world—it has become more difficult to differentiate the *persecuted* from the *persecutors*. Some express concern that U.S. sympathies for the asylum seekers caught up in the democratic political uprisings in the Middle East, northern Africa, and south Asia could inadvertently facilitate the entry of terrorists. Others maintain that current law does not offer adequate protections for people fleeing human rights violations or gender-based abuses that occur around the world. Some cite the disparities in asylum approvals rates and urge broad-based administrative reforms. The Refugee Protection Act of 2011 (S. 1202/H.R. 2185) would make significant revisions to asylum policy.

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Comprehensive refugee reform legislation, the Refugee Protection Act of 2011 (S. 1202/H.R. 2185), would make significant revisions to asylum policy. Senate Committee on the Judiciary Chairman Patrick Leahy and House Committee on the Judiciary Subcommittee on Immigration Policy and Enforcement ranking member Zoe Lofgren introduced the companion bills on June 15, 2011. Among the asylum revisions in S. 1202/H.R. 2185, the bill would eliminate the time limits on seeking asylum in cases of changed circumstances; proscribe conditions under which an asylum seeker who was a victim of terrorist coercion would not be excluded as a terrorist; provide alternatives to detention of asylum seekers; modify certain elements necessary for the asylum seeker to meet the conditions for the granting of asylum; and, allow aliens interdicted at sea the opportunity to have an asylum interview.

Overview of Current Policy

Introduction

The United States has long held to the principle that it will not return a foreign national to a country where his life or freedom would be threatened.[1] This principle is embodied in several provisions of the Immigration and Nationality Act (INA), most notably in provisions defining refugees and asylees. [2] Foreign nationals seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.[3]

Foreign nationals arriving or present in the United States may apply for asylum with the United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS) after arrival into the country, or they may seek asylum before a Department of Justice Executive Office for Immigration Review (EOIR) immigration judge during removal proceedings. Foreign nationals arriving at a U.S. port of entry who lack proper immigration documents or who engage in fraud or misrepresentation are placed in expedited removal; however, if they express a fear of persecution, they receive a "credible fear" hearing with a USCIS asylum officer and—if found credible—they are referred to an EOIR immigration judge for a hearing.[4]

The INA makes it clear that the Attorney General and Secretary of Homeland Security can exercise discretion in the granting of asylum. Foreign nationals who participated in the persecution of other people are excluded from receiving asylum. The law states other conditions

[1] The term "foreign national" is synonymous with "alien," which is the term the Immigration and Nationality Act §101(a)(3) defines as a person who is not a citizen or national of the United States.

[2] Refugees are aliens displaced abroad and their cases are considered overseas. For a full discussion of U.S. refugee admissions and policy, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

[3] INA §208; 8 U.S.C. §1158.

[4] Distinct from asylum law and policy, aliens claiming relief from removal due to torture may be treated separately under regulations implementing the United Nations Convention Against Torture. For a full legal analysis of this convention, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

for mandatory denials of asylum claims, including when the alien has been convicted of a serious crime and is a danger to the community; the alien has been firmly resettled in another country; or there are reasonable grounds for regarding the alien as a danger to national security.[5] The INA, moreover, has specific grounds for exclusion of all aliens that include criminal and terrorist grounds.[6]

This report opens with an overview of current policy, discussing the threshold of what constitutes asylum and the procedures for obtaining it. The second portion of the report identifies the top sending countries and includes a time series analysis of six selected source countries for asylum seekers.[7] The third section of the report analyzes asylum approvals by country of origin. The report rounds out with a discussion of selected legislative policy issues.

Recent History of U.S. Asylum Policy

In 1968, the United States became party to the 1967 United Nations Protocol Relating to the Status of Refugees (hereafter referred to as the U.N. Refugee Protocol), agreeing to the principle of *nonrefoulement*. *Nonrefoulement* means that an alien will not be returned to a country where his life or freedom would be threatened, and it is embodied in several provisions of U.S. immigration law.[8] The U.N. Refugee Protocol does not require that a signatory accept refugees, but it does ensure that signatory nations afford certain rights and protections to aliens who meet the definition of refugee. At the time the United States signed the U.N. Refugee Protocol, Congress and the Administration thought that there was no need to amend the INA, assuming that the provisions to withhold deportation[9] would be adequate. In 1974, the former Immigration and Naturalization Service (INS)[10] issued its first asylum regulations.[11] The Refugee Act of 1980 codified the U.N. Refugee Protocol's definition of a refugee in the INA and included provisions for asylum in INA §208. The law defined asylees as aliens in the United States or at a port of entry who meet the definition of a refugee.

As **Figure 1** illustrates, asylum claims spiked immediately after passage of the Refugee Act in 1980, when over 120,000 Cubans and about 25,000 Haitians set sail for Florida. Known as the Mariel Boatlift, this mass exodus of asylum seekers put the new law to the test.[12] In the 1980s,

[5] INA §208(b)(2); 8 U.S.C. §1158.

[6] CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia; and CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

[7] Each of the six selected countries were among the major source countries of asylum seekers from FY1997 through FY2009.

[8] §208 of INA (8 U.S.C. §1158); §241(b)(3) of INA (8 U.S.C. §1231); and §101(a) of INA (8 U.S.C. §1101(a)(42)).

[9] Now known as withholding of removal, it prohibits an alien's removal to the country where his or her life or freedom would be threatened, but it allows removal to a third country where his or her life or freedom would not be threatened. The law states that aliens must establish that it is more likely than not that their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion in the proposed country of removal. INA §241(b)(3).

[10] Prior to the enactment of the Homeland Security Act of 2002 (P.L. 107-296), most federal responsibilities and functions pertaining to immigration were handled by the Immigration and Naturalization Service (INS) in the U.S. Department of Justice. P.L. 107-296 abolished the INS and transferred its various immigration components to several new agencies within the newly created Department of Homeland Security.

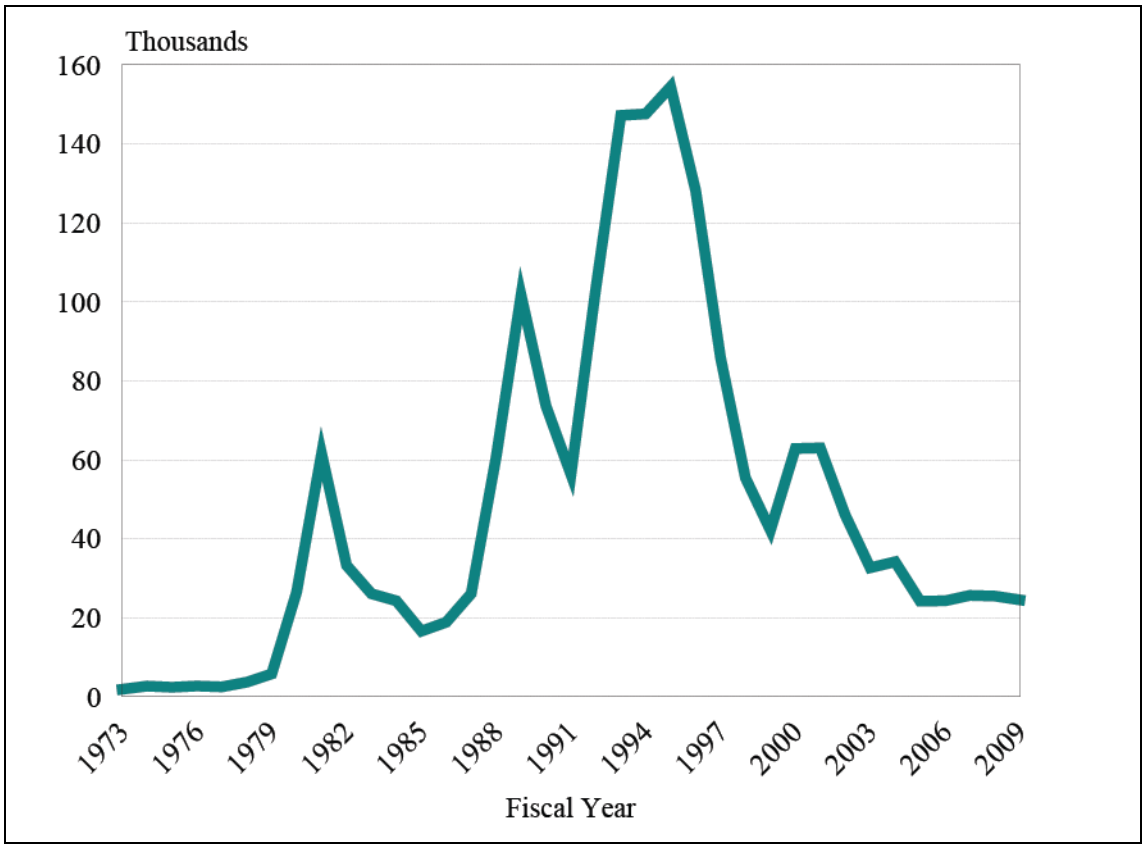
[11] CFR 8, §108

[12] In 1981, then-Attorney General William French Smith opined that most Cuban asylum seekers were permitted to (continued...)

political violence and civil wars in Central America prompted mass migration of asylum seekers from El Salvador, Guatemala, and Nicaragua. Asylum cases filed with the INS surpassed 100,000 for the first time in 1988. The Tiananmen Square massacre of Chinese protesters in 1989 symbolized events that triggered asylum seekers from China, who contributed, along with conditions in Central America, to the second spike depicted in **Figure 1**.

Figure 1. Asylum Cases Filed with INS/USCIS

FY1973-FY2009



Source: CRS presentation of data from the DHS Office of Immigration Statistics.

The December 1991 military coup d'etat deposing Haiti's first democratically elected president, Jean Bertrand Aristide, led thousands of Haitians to flee by boat to the United States in FY1992. The following year, 285 Chinese came ashore in New York on the "Golden Venture" and a total of 683 Chinese came ashore in three different ocean-going vessels along the coast of California in the summer of 1993.[13] Asylum claims with the INS peaked at 149,566 in FY1995 (**Figure 1**). Almost half of those cases, however, resulted from the 1990 settlement of the American Baptist Church (ABC) case that allowed Salvadorans and Guatemalans living in the United States who

(...continued)

forego the asylum process because of the Cuban Adjustment Act of 1966, and this legal analysis has stood. For further background on Cuban asylees and refugees, see CRS Report R40566, *Cuban Migration to the United States: Policy and Trends*, by Ruth Ellen Wasem.

[13] CRS Report 93-727, *Chinese Migration to the United States: Trends and Issues*, by Ruth Ellen Wasem. (Archived, available upon request)

had not obtained asylum in the past to apply for asylum.[14] By the end of FY1995, there were 457,670 asylum cases in the backlog, as the INS asylum corps was unable to keep pace.

The Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA, P.L. 104-208) of 1996 made substantial changes to the asylum process, most notably by establishing summary exclusion provisions (now known as expedited removal), adding time limits on filing claims, and limiting judicial review in certain circumstances. IIRIRA also added a provision enabling refugees or asylees to request asylum on the basis of persecution resulting from resistance to coercive population control policies.[15] Asylum claims with the INS dropped in the years following the passage of IIRIRA, as **Figure 1** depicts. It remains difficult to assess the extent to which the IIRIRA revisions to asylum policy affected this decline.

The Real ID Act of 2005 (P.L. 109-13) further revised asylum law. Foremost, it established expressed standards of proof for asylum seekers, including that the applicant's race, religion, nationality, social group, or political opinion was or will be one of the central motives for his or her persecution. It also required that the asylum seeker provide evidence which corroborates otherwise credible testimony; such evidence must be provided unless the applicant cannot reasonably obtain it.[16]

Standards for Asylum

Because "fear" is a subjective state of mind, assessing the merits of an asylum case rests in large part on the credibility of the claim and the likelihood that persecution would occur if the alien is returned home. These two distinct concepts—the credibility of the claim, or "credible fear," and the likelihood that persecution would occur, or "well-founded fear"—are fundamental to establishing the standards for asylum. A third dimension that overlays these concepts is the matter of "mixed motives" for persecuting the alien. Each of these standards are discussed below.

Credible Fear

The INA states that "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 §208."[17] Integral to expedited removal, which is discussed below, the credible fear concept also functions as a pre-screening standard that is broader—and the burden

[14] For a full discussion, see CRS Report 97-810, *Central American Asylum Seekers: Impact Of 1996 Immigration Law*, by Ruth Ellen Wasem. (Archived, available upon request)

[15] This coercive family planning provision was added by §601. It states

> For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

[16] CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

[17] INA §235(b)(1)(B)(v); 8 U.S.C. §1225.

of proof easier to meet—than the well-founded fear of persecution standard required to obtain asylum.

Well-Founded Fear

The standards for "well-founded fear" have evolved over the years and been guided significantly by judicial decisions, including a notable U.S. Supreme Court case.[18] The regulations specify that an asylum seeker has a well-founded fear of persecution if

> (A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and
>
> (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.[19]

The regulations also state that an asylum seeker "does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country.... "[20]

In evaluating whether the asylum seeker has sustained the burden of proving that he or she has a well-founded fear of persecution, the regulations state that the asylum officer or immigration judge shall not require the alien to provide evidence that there is a reasonable possibility he or she would be individually singled out for persecution if

> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.[21]

Mixed Motives

The intent of the persecutor is subjective and may stem from mixed or multiple motives. The courts have ruled that the persecution may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.[22] A 1997

[18] *INS v. Cardoza-Fonseca*, 480 U.S.C. 421 (No. 85-782, March 9, 1987).

[19] 8 C.F.R. §208.13(b)(2).

[20] Ibid.

[21] 8 C.F.R. §208.13(b)(2).

[22] For example, the Indian police's desire to obtain information regarding terrorist activities in the Sikh cases was seen as the main motive for torturing a Sikh named Surinder Pal Singh when he was initially denied asylum. The court did not dispute the facts: "The Indian police learned of the apparent support of the Singh family for the separatists and arrested Singh on June 15, 1989. Despite Singh's assurances that he did not support the separatists, the police (continued...)