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MEJILLA-ROMERO: A NEW ERA FOR CHILD ASYLUM

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Children asylum seekers in the United States have faced unique challenges in the treatment of their claims. In response to systemic inadequacies, human rights and immigrants rights organizations and practitioners have successfully advocated for changes in approaches to asylum adjudication for children with positive effects for other claimants as well.

Children seeking asylum or refugee protection may flee a range of human rights violations, including sexual assault, forced labor, forced prostitution, trafficking, infanticide, and deprivation of food and medical treatment, among others. Their claims may be based on any number of reasons, including their race, religion, nationality, membership in a particular social group (such as their gender, youth, or membership in a targeted family), and/or political opinions or the opinions imputed to them.

Children’s asylum claims have moved asylum law forward—both in terms of procedural protections for asylum seekers and in terms of substantive interpretations of key elements of the refugee definition. Increasingly, practitioners and adjudicators are recognizing that each claim is individual, that each voice must be heard, that context (including politics, history, and country conditions) matters, that the harms suffered by applicants are interrelated, and that emotional harm, including harm to one’s community and family, is highly relevant to the analysis of whether an applicant has suffered or fears persecution. The result, we hope, is a movement towards a richer, more robust, and fairer body of asylum law.

In this Briefing, we highlight the importance of a child-centered approach in children’s asylum cases by focusing on Mejilla-Romero v. Holder, a recent First Circuit Court of Appeals case presented by the Harvard Immigration and Refugee Clinic at Greater Boston Legal Services. Mejilla-Romero involves a young boy from Honduras, Celvyn Mejia Romero, who fled to the United States after he and his family were brutally attacked.

The Mejilla-Romero case demonstrates the critical importance of evaluating the child’s claim from the child’s perspective and adopting a child-centered approach to deciding the claim. In Celvyn’s case, his family had long stood up to powerful and wealthy land-owning families in Honduras, and the family, including Celvyn, was brutally attacked as a result. Celvyn was also targeted by gangs that he refused to join. However, Celvyn was just 13 years old when he testified in immigration court about events that occurred when he was as young as five years old. He was not able to fully explain his family’s long history of political involvement and the reasons behind his opposition to the gangs. It was only through painstaking development of his case and a child-centered approach that this context came through in the record.

This Briefing first provides a brief overview of the system of domestic and international protection under the U.N. Refugee Convention and U.S. asylum law. The Briefing then addresses the history and context in which child asylum claims have developed in the United States and the procedural changes in the treatment of child asylum claims over the past 20 years. Next, the Briefing highlights the importance of a child-centered approach, drawing on the case of Celvyn Mejia Romero, and then discusses the evolving interpretation of the elements of the refugee definition in the context of children’s claims and the special considerations that children’s asylum claims raise. The Briefing concludes by providing guidance on how to adopt a child-centered approach in the representation of a child seeking asylum.

PROTECTION FOR CHILDREN UNDER THE 1951 UNITED NATIONS REFUGEE CONVENTION AND THE REFUGE ACT OF 1980

International refugee law and U.S. asylum law safeguard children against being forcibly returned to serious harm in their countries of origin. Refugee law provides international or surrogate protection when a state has failed to protect the basic human rights of its inhabitants, including children, for a discriminatory reason, specifically, the person’s race, religion,
nationality, membership in a particular social group, and/or political opinion. Article 33 of the Convention forbids a state from returning a refugee to a country of persecution. The United States incorporated the definition of refugee and the nonrefoulement protections of Article 33 into U.S. law with the Refugee Act of 1980 and subsequently by regulation and some specific statutory enactments.

U.S. asylum law is grounded squarely in international law. The U.S. Supreme Court emphatically recognized the international roots of U.S. asylum law in the seminal case of Cardoza-Fonseca: “If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees ...” References to international treaties and international guidance therefore have specific legitimacy in the asylum context, as the U.S. Supreme Court recently reiterated in Negusie v. Holder.

The U.S. definition of refugee is comprised of five distinct elements--standard of risk, persecution, nexus, grounds, and bars. In preparing or adjudicating an asylum case, the definition of refugee must be parsed, and each of these elements must be considered separately. The key provisions of the U.S. statute track the language of the international treaty almost exactly. The U.S. statute, however, adds past persecution as a separate basis for eligibility whereas it is viewed as evidence of a well-founded fear by states parties that copy verbatim the Refugee Convention’s Article 1 language. This formulation in U.S. law is important in cases of children applying for asylum protection that often involve serious harm suffered or witnessed by the child and the child’s family in the past.

Child asylum cases are either adjudicated in immigration court if the child is apprehended by immigration officials when trying to enter the country without papers or at another time or in front of a U.S. Citizenship and Immigration Services (USCIS) asylum officer in a nonadversarial interview if the child affirmatively applies. In either of these proceedings, children must be accorded special treatment and consideration as a result of their age and circumstances. As discussed below, under recent statutory enactments, many children will have a right to such a nonadversarial interview even if formal removal proceedings have been initiated.

HISTORY AND CONTEXT OF CHILDREN’S ASYLUM CLAIMS: PROCEDURAL CHANGES IN TREATMENT OF CHILDREN IN ASYLUM PROCEEDINGS

Domestic and international law has evolved over the past 20 years to recognize the profound differences between children and adults and the need for special treatment of children claiming protection. International human and women’s rights groups as well as immigrants’ rights organizations, asylum and refugee scholars, and practitioners have advocated for greater procedural protections for children. These efforts have led to positive changes in how adjudicators evaluate children’s claims, including the issuance of the 1998 Immigration and Naturalization Service (INS) Guidelines for Children’s Asylum Claims, USCIS Asylum Office training materials on children’s claims, immigration judge guidelines in 2007, guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), and provisions addressing child asylum applications in the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA).

These developments are the result of ongoing advocacy efforts starting in the mid-1990s, including collaboration among women’s and children’s rights activists as well as immigrant and human rights advocates and scholars. The work of these groups has increased attention on women and children seeking asylum and fleeing human rights abuses, such as abusive labor practices, trafficking, rape, prostitution, and female genital mutilation.

The U.N. Refugee Convention and other international human rights treaties, such as the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), provided the critical underpinnings for this advocacy--in particular, the CRC with its emphasis on the “best interests of the child” as the “primary consideration” in any action involving children.

Changes in the treatment of women’s claims, including through issuance of gender guidelines, first by the UNHCR, then by Canada in 1993, and by the United States in 1995, also resulted in fairer treatment of children’s asylum claims. The UNHCR first issued guidelines on the international protection of children in 1994, and Canada adopted its own child asylum guidelines in 1996. In 1998, the United States followed suit when the INS issued groundbreaking Guidelines for Children’s
Asylum Claims, which remain in effect today.24

**U.S. Guidelines for Children's Asylum Claims and Adjudicative Training Materials**

The INS Guidelines for Children’s Asylum Claims were the product of close collaboration between the INS and U.S. nongovernmental organizations,25 experts, and the UNHCR26 and drew upon both U.S. and international law to address the “unique vulnerability and circumstances of children.”27 The Guidelines were designed to enhance the ability of the INS generally to address children’s asylum claims and, specifically, to provide members of the Asylum Office corps with the background and guidance necessary to adjudicate claims brought by unaccompanied children independently, rather than derivatively, through their parents.28 The Guidelines highlight, inter alia, the need for adjudicators to give greater weight to “objective factors” when testimony appears incomplete and to afford children a “liberal ‘benefit of the doubt.’”29 The Guidelines also instruct officers to “carefully review relevant country conditions information,” noting that officers should “supplement the record as necessary to ensure a full analysis of the claim.”30

Recognizing that children “may be less forthcoming than adults and may hesitate to talk about their past experiences in order not to relive their trauma,”31 the Guidelines emphasize that asylum officers must “evaluate the child’s words from a child’s point of view.”32 The Guidelines note that “the level of detail and consistency required of a child ... should be appropriate to the child’s age and maturity level. An adjudicator should also consider the child’s emotional state in assessing testimony.”33 Under the Guidelines, “adjudicators should ... recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult.”34

The Guidelines specifically invoke provisions in the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and other human rights treaties and international instruments, which recognize children’s rights as human rights and the “best interests of the child” as the primary consideration in decisions involving children.35 The Guidelines highlight Canada’s adoption of the “best interests of the child as the relevant standard,”36 but note that, “while useful to the interview process, [the standard] does not replace or change the refugee definition in determining substantive eligibility.”37

In 2007, the Executive Office for Immigration Review (EOIR) under the Department of Justice (DOJ) issued its own guidelines requiring special sensitivity toward child asylum applicants in the immigration courts.38 The EOIR guidelines, like the INS guidelines, instruct adjudicators that “[l]anguage and tone are especially important when children are witnesses. Proper questioning and listening techniques will produce a more complete and accurate record.”39

The EOIR guidelines also emphasize that “children, especially young children, usually will not be able to present testimony with the same degree of precision as adults.”40 Under the EOIR guidelines, immigration judges must “not assume that inconsistencies are proof of dishonesty” as “a child’s testimony may be limited not only by his or her ability to understand what happened, but also by his or her skill in describing the event in a way that is intelligible to adults.”41 The DOJ also promulgated regulations that barred immigration judges from accepting admissions of removability from unaccompanied children under the age of 18.42

**The 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act**

The 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) also enacted significant changes in the treatment of unaccompanied minors in asylum proceedings.43 The TVPRA mandated that children be treated specially, for example, by exempting unaccompanied minors, on the basis of “legal disability” from the one-year bar to asylum and the U.S.-Canada Safe Third Country Agreement.44 Importantly, the TVPRA gave the USCIS Asylum Office initial jurisdiction over children’s claims. This provision of the TVPRA allows a child to first have access to a nonadversarial interview in front of the Asylum Office rather than to present an asylum case in the first instance in a hearing before the immigration court even if the child is in removal proceedings.45

Asylum officers are trained to conduct nonadversarial interviews, allowing children to testify comfortably and promoting “a full discussion of the child’s past experiences.”46 Asylum officers are taught the importance of “building rapport” with the child “to enable the child to recount his or her fears” given the reluctance children may have in revealing traumatizing or embarrassing events, and asylum officers learn child-sensitive questioning and listening techniques.47
USCIS Asylum Officer Training Materials, Guidelines for Children’s Asylum Claims

In 2009, the USCIS Asylum Office issued updated national training materials based upon the legacy 1998 INS Guidelines for Children and other more recent developments. The USCIS Asylum Office instructs that a child-centered approach must inform both procedural and substantive application of law. The training materials specifically recognize the need to treat children as children in eliciting, listening to, and hearing testimony and in evaluating their asylum claims.

Asylum officers are trained to consider factors that affect a child’s ability to testify completely and to develop his or her claim, such as “chronological age,” “physical, psychological, and emotional development,” “cognitive processes,” “educational experience,” “language ability,” “experience with forms of violence,” “chaotic social conditions,” and “physical...and mental disabilities.” Asylum officers are instructed that the “inability of a child to articulate clearly a claim to asylum demand[s] that asylum officers thoroughly research conditions in the countries of origin and first asylum when evaluating a child’s case.”

The training materials explain that children may not know the specific details or circumstances that led to their departure from their home countries and require that asylum officers be sensitive to those limitations. Emphasizing that, “for both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults,” the training materials direct asylum officers to probe to determine, for example, whether a child’s family belonged to or was affiliated with a political or religious group or party.

The Asylum Office training materials also explain the significant impact trauma may have on a child’s ability to present testimony, including the impact on memory and emotion. The training materials instruct asylum officers to recognize that “[s]ymptoms of trauma can include depression, indecisiveness, indifference, poor concentration, avoidance, or disassociation ... A child may appear numb or show emotional passivity ... [or] ... may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds ... .” The training materials emphasize that symptoms of trauma “can be mistaken as indicators of fabrication or insincerity, so it is important for asylum officers to be aware of how trauma can affect an applicant’s behavior.”

A CHILD-CENTERED APPROACH: THE CASE OF CELVYN MEJILLA ROMERO

As noted, adjudicators often face difficulties in determining a child’s asylum claim, in part because the child is not able to explain fully the context surrounding his or her experiences. To overcome these obstacles, advocates from the Harvard Immigration and Refugee Clinic at Greater Boston Legal Services (GBLS) represented Celvyn Mejia Romero, a Honduran unaccompanied minor fleeing politically targeted violence, using a child-centered approach. The First Circuit, on appeal in the case, endorsed the rights of children to have their claims adjudicated in a child-sensitive manner, holistically considering the full context and record.

Before the immigration court, the Clinic at GBLS submitted copies of international documents addressing the treatment of refugee children and the adjudication of their claims as well as guidelines from the EOIR and copies of relevant decisions. Because Celvyn was a child and therefore unable to explain his family’s history and the political underpinnings of his case, family members presented supporting testimony accompanied by expert testimony and documentation of the political situation in Honduras. Finally, advocates submitted medical and psychological expert testimony confirming the injuries suffered by Celvyn and the lasting effects of the harm that he endured.

The immigration judge (IJ) denied his claim, focusing only on Celvyn’s testimony and finding no past persecution and no nexus to the grounds. The Board of Immigration Appeals summarily affirmed the IJ’s decision in a cursory, two-page order. The majority of the U.S. Court of Appeals for the First Circuit panel initially denied Celvyn’s claim with a scathing dissent by Judge Stahl. The Clinic then filed a motion for rehearing en banc, arguing that the First Circuit, the BIA, and the IJ failed to follow national and international guidelines as well as its own case law regarding the appropriate standard of review and a growing body of U.S. case law regarding the proper adjudication of child asylum claims. Both the UNHCR
and a group of advocates and law professors submitted amicus curiae briefs supporting that position. The First Circuit panel reconsidered its decision and granted the petition for review, remanding the case for consideration in light of international and national guidance on asylum claims presented by children.\(^5\)

**IJ and Board Decisions: Ignoring Guidance for Adjudicating Child Asylum Claims**

Celvyn testified before the immigration judge when he was but 13 years old and in the fifth grade and while he still suffered from acute post-traumatic stress disorder.\(^6\) His testimony described the brutal attacks that he and his family endured throughout his youth as well as his understanding of his family’s land reform struggles, which began years before he was born.\(^6\)

Celvyn was attacked in his home and hacked with a machete by conservative neighbors because of his family’s land-reform activities; he was targeted by gang members who beat him, repeatedly attempted to rape him, threw snakes in his face, and ultimately left him tangled in a barbed wire fence where he believed that he would die.\(^6\) He saw the murdered body of his uncle and testified that he and his family members were called “Communist” and that his grandmother, with whom he lived, flew a red flag from her home while others in his neighborhood flew a different colored flag representing the conservative party.\(^6\) The administrative record submitted in Celvyn’s case contained extensive evidence corroborating his claim, providing details of the family’s political history, and explaining the history of the land-reform struggle in his area.\(^6\)

The IJ found Celvyn’s testimony credible but mischaracterized the past harm as “no more than a series of isolated altercations with a disgruntled neighbor ... and a group of boys who bullied younger children.”\(^6\) The IJ found no past persecution or nexus to the statutory ground and concluded that, notwithstanding his youth, the illness, and the unavailability of family members, Celvyn could relocate within Honduras.\(^6\) The IJ failed to consider the extrinsic evidence and surrounding context of his testimony although such evidence was in the record.

The Board affirmed the IJ in what dissenting Judge Stahl described as a “beggarly effort” that “d[id] not rise to the bare minimum that we should expect from a responsible administrative court”\(^6\) and that “grossly misstate[d] the content of Celvyn’s claim.”\(^6\) The Board blatantly ignored the evidence presented in Celvyn’s case and relied solely upon the IJ’s mischaracterization of Celvyn’s testimony, which failed to account for Celvyn’s young age. The BIA, like the IJ, found that the actions of a “disgruntled neighbor and a gang of youths” did not constitute persecution.\(^6\)

**Petition for Review: Majority Errs; Dissent Insists on Child-Centered Approach**

Advocates petitioned for review of Celvyn’s case by the First Circuit, and, on April 6, 2010, a divided panel of the First Circuit denied Celvyn’s petition. In denying the petition for review, the majority relied on the IJ and Board decisions, which evaluated Celvyn’s testimony in isolation and failed to consider the history of Celvyn’s family’s long-standing dispute with wealthy land-owning families and the reasons underlying the attacks that Celvyn had suffered. The scathing dissent by Judge Stahl highlighted the deficiencies in this reasoning and called for a child-sensitive approach to evaluating Celvyn’s asylum claim.

In his dissent, Judge Stahl humanized Celvyn, calling him by his first name and addressing in depth the political and historical context in which Celvyn and his family were attacked. Judge Stahl’s dissenting opinion highlighted the cognitive and developmental differences between children and adults and the special vulnerabilities faced by children. He concluded that the panel majority erred in its treatment of Celvyn’s claim by failing to consider the record in light of Celvyn’s minor age at the time of his testimony and relevant events.\(^6\)

Judge Stahl explained:

[T]hree courts [the IJ, BIA, and First Circuit] have ignored the voluminous additional evidence that explains in great detail the political causes of the violence that Celvyn and his family experienced. The IJ, BIA, and now, to a large extent, the majority have contented themselves with quoting from Celvyn’s simplistic oral testimony, using such quotations to purportedly show that there really is no meat on the bones of his asylum claim. This strikes me as particularly troubling given that the respondent is a young
child who, by virtue of his age and development, simply cannot carry his asylum burden based on his oral testimony alone.

Judge Stahl noted that, by focusing almost exclusively on Celvyn’s testimony, the IJ and the BIA “so completely misstated the factual basis of Celvyn’s claim that it is plain that the agency has not adequately thought about the evidence and therefore could not have reached a reasoned conclusion.” As Judge Stahl’s dissent underscores, the majority panel perpetuated the errors made by the IJ and BIA in relying solely on selected excerpts of the traumatized 13-year-old applicant’s testimony without properly evaluating other evidence in the record—in direct contravention of the agency’s own directives on the treatment of child asylum claims. The majority also erred in upholding the agency’s unreasonable application of substantive standards to Celvyn’s particular circumstances and in failing to take into account Celvyn’s young age in its analysis of his claim.

In contrast, Judge Stahl considered Celvyn’s age throughout his analysis. He considered Celvyn’s inability to present a complete account of his experiences or to place them within an accurate historical and political context. He weighed all of the record evidence, including Celvyn’s affidavit, the affidavits and testimony of five expert witnesses, the testimony and affidavits of Celvyn’s family members and documentation that explained the political context of the harm suffered by Celvyn and his family; the impact of Celvyn’s age on the suffering that he experienced; the effect of the harm to Celvyn’s family on Celvyn; and the effect of Celvyn’s age on his ability to return to or safely relocate within Honduras.

Judge Stahl specifically adopted a child-sensitive approach in addressing the claim and criticized the majority for:
avoid[ing] the obligations of our court system to treat children who seek refugee protection with the care and attention required by law, administrative guidance and international norms ... resulting in a decision that is both legally incorrect and that inflicts a terrible human price on a child who has turned to the United States for protection.

Rehearing and First Circuit Remand: Instructions to Follow Guidelines for Child Asylum Seekers and a Child-Centered Approach

Celvyn’s attorneys highlighted these errors in the majority panel’s decision in a petition for rehearing en banc. The panel that decided the case in the first instance vacated its prior decision and the decision of the Board of Immigration Appeals and remanded the case to the Board for reconsideration in light of guidelines that the IJ was bound to follow. The First Circuit also instructed the Board to consider a remand to an IJ “in order that the IJ can evaluate the testimony and supporting evidence in light of the Guidelines’ standards regarding child asylum seekers.”

Judge Stahl’s dissent and the First Circuit’s remand order in Mejilla-Romero constituted a major breakthrough for children asylum seekers, explicitly requiring adjudicators and the Board upon review to follow the agencies’ own child-centered guidelines as well as related international standards.

Evolving Interpretations: Sensitivity to Children’s Special Circumstances in Analyzing the Substantive Elements of the Refugee Definition

Cases brought on behalf of children require adjudicators to adopt increasingly nuanced understandings of the elements of the refugee definition, including the meaning of persecution, the standard of risk and internal relocation, the five grounds (race, religion, nationality, political opinion, and membership in a particular social group), and bars to asylum.

Persecution: Level of Harm in Claims involving Children

As in all cases, adjudicators must consider whether the harm that a child fears or suffers rises to the level of persecution. However, the INS Children’s Guidelines explicitly state that “the harm a child fears or has suffered ... may be relatively less than that of an adult and still qualify as persecution.” Age is thus a factor to be considered in determining whether
persecution occurred as the “quantum of harm suffered by a child may be relatively less than that of an adult and still qualify as persecution.”84

The INS Children’s Guidelines emphasize the varied nature of harm that children may be particularly vulnerable to, including “sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment” as well as cultural practices, such as female genital mutilation (FGM).85 In addition, adjudicators have recognized that children can be subjected to forms of harm specific to children.86 Children are, for example, often targeted for the political opinions imputed to them for being members of their families or communities.87

Recent circuit court decisions emphasize the importance of considering the totality of the emotional and psychological harm to children, including the impact on the child of serious harm to the child’s family. For example, in the February 2012 case of Mendoza-Pablo v. Holder, the Ninth Circuit recognized the harm to an infant born during the Guatemalan Civil War, including the impact of exposure to ongoing violence, premature birth, severe malnutrition, and continuous fear, in considering whether the harm constituted persecution.88 As the Ninth Circuit noted in Hernandez-Ortiz v. Gonzales, “[t]hree sister circuits have now vindicated a principle that is surely a matter of common sense: a child’s reaction to injuries to his family is different from an adult’s. ... [T]he trauma [is] apt to be lasting ... .”89

These decisions recognize that such emotional harm should not just be considered as a part of the harm suffered but can be the main component of persecutory harm. For example, in its 2006 decision Jorge-Tzoc v. Gonzales, the Second Circuit found that the harm the applicant suffered as a seven-year-old Mayan Indian child in Guatemala whose family was targeted by the Guatemalan army, whose sister and cousin were fatally shot, and who endured displacement and economic hardship, among other harms, could constitute persecution.90 Courts have thus recognized that harm suffered by family members should be considered in evaluating whether a child suffered past persecution where the events were perceived or experienced when the applicant was a child91 even if the child is unable to recall or testify about it.92

**Well-Founded Fear in the Context of Children’s Asylum Claims**

The INS Children’s Guidelines explain that “well-founded fear of persecution” involves both subjective and objective elements. For child asylum seekers, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess; “the UNHCR Handbook suggests that children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors.”93

In the 2004 Abay v. Ashcroft decision, for example, the Sixth Circuit rejected the immigration judge’s conclusion that Amare had “no imminent fear” of persecution, finding that the immigration judge’s “conclusions underestimate the problem and do not take the full picture into account.”94 The Sixth Circuit emphasized that, “[a]t the time of the hearing, Amare was a nine-year-old child testifying in court about an extremely personal matter” and while “her expression of fear in that context may have come across as ‘general’ or ‘ambiguous,’... the Immigration and Naturalization Service’s guidelines for children’s asylum claims, following the recommendations of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1992), advises adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the same degree or with the same level of detail as an adult.”95

The INS Children’s Guidelines also note that, “if the child was sent abroad by his or her parents or family members, the circumstances of that departure are also relevant to the child’s asylum application.”96 Specifically, “[i]f there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution’ that may suggest that the child has such a fear as well, according to the UNHCR Handbook.”97 A parent’s objectively reasonable fears of persecution may thus be important in the analysis of well-founded fear in the context of the child’s claim.

In addition, as discussed further below, a child’s age and gender are critical to addressing issues of internal flight or protection.98 If the persecutor is the government, there is a presumption that the child could be harmed anywhere in the country, and it is the Department of Homeland Security’s (DHS) burden to rebut that presumption. If the child fears or was targeted by nonstate actors, attorneys must show that the harm feared is countrywide, i.e., that the child would not be safe in any part of the country, and/or that it would not be reasonable to force the child to relocate to another part of the country.99
Nexus: “On account of”–Linkage Between Persecution and the Grounds

To establish an asylum claim, the protected ground must be “at least one central reason” for the harm; it need not be the only reason for the harm, and there may be multiple reasons for the persecution, some of which may bear no connection to the protected ground. Nexus can also be established by demonstrating that the state failed to protect the child at least in significant part for reasons of a protected ground.

The reasons for the harm need not be malicious or malevolent; the persecutor need not be motivated by a bad intent. For example, the persecutory action, such as female genital mutilation or forced marriage, may be customary for parents or relatives and may be intended to “cure” a girl or to help her be accepted into her community.

Determining nexus may be particularly challenging in a child asylum claim because a child may be fearful or have experienced harm without understanding why he or she was being harmed. However, a child’s incomplete understanding certainly does not mean that he or she cannot meet the elements of the refugee definition, including the “on account of” element. Indeed, nexus may be found despite a child’s inability to explain the connection between the harm and the protected ground or grounds. It is to the resolution of these issues that the knowledge and expertise of experts and the testimony of the adults in a child’s life are essential as demonstrated by the case of Celvyn Mejia Romero.

The INS Children’s Guidelines emphasize that, even if a child is unable to identify all relevant reasons for the harm suffered, “nexus can still be found if the objective circumstances support the child’s asylum claim that the persecutor targeted the child based on one of the protected grounds.” The Asylum Office training materials explain that, while the burden is on the child “to establish that he or she belongs, or is perceived to belong, to a protected group on account of which he or she has suffered or fears suffering persecution[,] ... children may lack, or have limited access to, the necessary documents to establish their identity” and to corroborate the claim, and “the asylum officer may [therefore] have to rely solely on the testimony of the child ...” The training materials emphasize that the testimony of the child alone can be sufficient to establish nexus and the asylum claim.

Grounds of Persecution and Child Asylum Claims

Child asylum claims may be based on any of the five grounds—race, religion, nationality membership in a particular social group (PSG), and/or political opinion. Family membership, political opinion or imputed opinion, race, and gender (particular social group ground) are well-established bases in children’s asylum claims. Claims based on age alone, or in part, may also be cognizable, and UNHCR guidelines cite street children and orphans as examples of child-based claims under the “particular social group” ground of the refugee definition.

Adjudicators have recognized that age may be an “immutable characteristic” that defines a particular social group under the test set forth in Matter of Acosta because the progression of age is outside of a child’s control. In Tchoukhrova v. Gonzales, the Board and Ninth Circuit found that “disabled children in Russia” could constitute a particular social group, and street children have been recognized as a particular social group in several cases.

Children may also have cognizable political opinions. The INS Children’s Guidelines explain that, “[j]ust as a younger child may have difficulty forming a well-founded fear of persecution, the ability to form a political opinion for which one may be persecuted may be more difficult for a young child to establish.” The Guidelines make clear, however, that “the level of children’s political activity varies widely among countries,” and asylum officers therefore “should not assume that age alone prevents a child from holding political opinions for which he or she may be persecuted.”

A political opinion claim may, for example, be based on a family’s or child’s opposition to gangs, and, even though a child applicant may not characterize the claim in terms of political opinion, adjudicators should recognize the politicized nature of gangs in Central America and consider that context in evaluating the claim. In the recent Ninth Circuit case, Henriquez-Rivas v. Attorney General, for example, a 12-year-old girl from El Salvador received death threats after testifying in court against gang members who murdered her father. She fled to the United States and applied for asylum on a number of grounds, including political opinion, namely her expressed opposition to the gangs and her testimony against them.

As noted above, child asylum claims can also be based on imputed political opinion; a persecutor may attribute a political
opinion to a child because of the child’s family membership, race, nationality, gender, or sexual identity or for other reasons. The INS Children’s Guidelines make clear that political opinion may be an important ground for children seeking asylum, especially where the political opinion is imputed to the child. The Guidelines instruct adjudicators to carefully review the family history of the child and to explore in as much depth as possible the child’s understanding of his or her family’s activities to determine whether the child may face persecution based on beliefs imputed to him or her because of the child’s family membership or the child’s identification with some other group. In Mejilla-Romero, for example, the dissent in the panel decision highlighted the opinions imputed to Celvyn as a result of his membership in a family that had long been involved in the land struggle in Honduras and emphasized that his testimony must be evaluated in that context, not in isolation.

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Asylum applicants are generally subject to a one-year filing deadline unless they can show either “extraordinary” or “changed” circumstances that materially affect an applicant’s ability to establish eligibility for asylum. The one-year filing requirements are, however, applied more liberally and contextually to claims brought by children and particularly to unaccompanied minors.

Under the regulations, children may qualify for the extraordinary circumstance exception to the one-year filing deadline, based on “extraordinary circumstances,” such as “[s]erious illness or mental or physical disability, including any effects of persecution or violent harm suffered,” and “[l]egal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the one-year period after arrival.” Adjudicators have recognized that minors suffer both practical and legal disabilities, and the TVPRA specifically exempts unaccompanied minors from the one-year filing deadline.

PRACTICAL ADVICE FOR ATTORNEYS REPRESENTING CHILDREN IN ASYLUM CLAIMS

In preparing a child’s claim, attorneys must interview their clients in a child-sensitive manner, focusing on what the child knows, experienced, heard, or witnessed and on the child’s general emotional state. In addition, attorneys should reflect on the child’s developmental stage, cultural background, and preconceived notions that could hinder solicitation of information. The building of a trusting relationship is critical as is the use of skilled child-sensitive interpreters where appropriate. To elicit information, attorneys should ask questions in a clear, concise, age-appropriate manner, and children should be allowed to use their own words in answering questions. Attorneys must also be sensitive to issues of trauma and retraumatization.

By speaking with a child’s caretakers, elders who know the child, siblings of the child, and country experts, attorneys can develop a more effective understanding of the country conditions, social, political, and familial background surrounding the child’s claim. Attorneys should research the human rights country conditions and gather documentation to support and contextualize a child’s experiences.

In presenting a child’s claim, attorneys should clearly articulate the theory of the case and address every substantive element of the refugee definition. In order to demonstrate that the child suffered or fears persecutory harm, attorneys should gather and present evidence of the harm, including the long-term effects of harm, such as post-traumatic stress disorder, anxiety, and depression, which can be documented by forensic psychologists. Reports by doctors can document scars and ongoing physical effects of harm. Expert testimony addressing levels of harm suffered by similarly situated children is also very useful. Attorneys should cite to relevant human rights instruments and show how the harm suffered by a child implicates a right protected by those instruments.

Attorneys should also present evidence of any age- and gender-specific types of persecution, including forced labor, trafficking, rape and other sexual abuse/assault, FGM, forced marriage, forced abortion or sterilization, forced prostitution, severe parental abuse, infanticide, severe discrimination, and deprivation of food and medical treatment, among others.

In cases where the government is not the persecutor, attorneys should present evidence to demonstrate that the government and state authorities are either unwilling or unable to protect the child. Such evidence can include any laws that foreclose protection to the child or, if laws appear to provide protection, any evidence that the laws are not effectively enforced at a
Attorneys should also present any evidence that a persecutor can act with impunity because of his or her professional or personal position, connections, or employment (e.g., police officers), and they should include any documentation evidencing that the child or the child’s family or caretakers unsuccessfully sought state protection. If the child or the child’s family or caretakers did not seek state protection, attorneys should provide evidence to show that seeking state protection would have been futile.

To show that internal relocation would not be reasonable, attorneys can present evidence of other serious harm that a child would face in the place of relocation, including harm that the child would face if rendered a “street child” or homeless in the home country. Attorneys should also address the availability or dearth of care providers and child protective services in the home country. Ongoing civil strife, a lack of administrative, judicial, or economic infrastructure in other parts of the country, and poor treatment of children in detention and prisons in the home country can also substantiate the unreasonableness of internal relocation. Social and cultural constraints, including “age, gender, health, and social and family ties,” may also prohibit a child from relocating in the home country.

To demonstrate nexus, attorneys should present either direct or circumstantial evidence linking the harm to the protected ground of race, religion, nationality, membership in a particular social group, and/or political opinion. Evidence linking harm to the grounds can include statements by the persecutor indicating that his or her reasons for harming the child were based, at least in part, on a protected ground (e.g., “You are a stupid Indian kid,” “Your place is in the house,” “You are a worthless kid and have no rights,” “You must do as I say,” “You are a bad Christian”).

Attorneys should, where applicable, submit a copy of a country’s laws and documentation regarding the application of the laws and the historical treatment and social circumstances or perception of children as circumstantial evidence that the reasons for persecution were based on the child’s age, gender, race, ethnicity, political or religious belief.

When country conditions or the child’s circumstances have changed, a child may establish a refugee sur place claim (i.e., a claim based on post-departure events), and attorneys should present evidence of those changed circumstances and conditions to substantiate the claim. Attorneys should explore whether, now that the child is older, persecutors would likely target the child more aggressively or for new reasons. Attorneys should also present evidence in support of that argument, including supporting affidavits from family members, friends, and country experts familiar with the situation in the child’s home country.

Humanizing the child and emphasizing special equities are critical in successfully presenting a child asylum claim. U.S. school records (where helpful) and awards and evidence of a child’s efforts to build a new life despite the trauma suffered, including participation in the community and school and family, can help support a child’s asylum claim. In addition, attorneys should draw attention to the age of child and the related vulnerabilities as well as harm (including trauma) experienced since the child’s arrival in the United States and evidence that caretakers in the United States are providing for the child in a way that the child would not or could not expect in his or her home country.

CONCLUSION

In addressing the elements of the case, the attorney should present a thoroughly documented claim, including corroborating documentation and testimony, extensive country conditions documentation, forensic testimony, and other expert testimony. The attorney should carefully prepare the claim with an eye toward appeal in the case of a denial. Each child’s case provides an opportunity not only to protect an individual child but also to positively influence this body of evolving law.

A major hurdle for children seeking asylum protection in the United States is the lack of representation. The U.S. government does not provide free legal representation to children (or anyone) in immigration proceedings. More than half of the children in immigration proceedings do not have a lawyer to represent them. There has, however, been increased recognition of children’s need for legal representation in immigration proceedings. Judges have been trained in children’s issues and have begun facilitating pro bono representation of children.
As a result of recent developments in the law, as evidenced by the Mejilla-Romero decision, refugee advocates and adjudicators take procedural protections and related guidances more seriously. Even though the mantra repeated by adjudicators is that there is no separate substantive refugee standard for children, elements of the refugee definition— including persecution, particular social group, political opinion, and nexus—have been framed differently in the context of children’s claims; this has resulted in the development of a refugee law jurisprudence generally that is more nuanced, contextual, and robust.

Children need good lawyers to be able to present their claims and especially their testimony in context along with forensic medical and psychological evaluations and affidavits and testimony of country experts. Good lawyers take the time to develop a deep understanding of their clients’ history and stories; patience and better advocacy generally is the touchstone for refugee law’s evolution as a more complete and developed body of jurisprudence.

Footnotes


2. These challenges are particularly salient in detained cases. In 1999, the U.S. Immigration and Naturalization Service (INS) placed approximately 2,000 children in detention as compared to the period from 2005 to 2007 when more than 8,000 unaccompanied children were held in custody each year. Over 80% of children detained are from Central America, and their average age is about 15 years old. See Young and McKenna, The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States, 45 Harv. C.R.-C.L. L. Rev. 247, 248 (2010) (citing, inter alia, Division of Unaccompanied Children’s Services, Department of Health and Human Services, Fiscal Year Summary: UAC Statistics (2008)). See also Haddal, Congressional Research Service, Report to Congress, Unaccompanied Alien Children: Policies and Issues (2007).


4. Mejilla-Romero v. Holder, 600 F.3d 63 (1st Cir. 2010), opinion vacated on reh’g, 614 F.3d 572 (1st Cir. 2010).

5. Because of an error when the applicant was originally detained by ICE, the court papers refer to him as Selvin Mejilla-Romero, but his correct name is Celvyn Mejia Romero.

Under the U.N. Refugee Convention, a child is a refugee if he or she “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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Refugee Convention, supra note 6, Art. 1. See also Hathaway, The Law of Refugee Status 135 (1991); Asylum Officer Basic Training Course, Introduction to the United Nations High Commissioner for Refugees (UNHCR) and Concepts of International Protection 9, 17-18 (Mar. 1, 2005), available at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/0Asym/020Lesson%202Plans/UNHCR-Concepts-%20Intl-%20Protection%20-31aug10.pdf (“Where a nation has failed to protect its citizens’ rights and privileges, another nation, ... as a matter of ... international [Refugee Convention] obligation, ... assume[s] the responsibility for the protection of those citizens.”); Asylum Officer Basic Training Course, International Human Rights Law 4 (Mar. 1, 2005), available at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/0Asym/020Lesson%202Plans/International-Human-Rights-Law-31aug10.pdf (hereinafter Asylum Officer Basic Training Course, International Human Rights Law) (“Modern asylum law in the United States is rooted in international treaty ... . Because the U.S. statutory provisions regarding asylum and withholding of removal are based on international law, the Supreme Court, other federal courts, and the [Board of Immigration Appeals] have all recognized that it may be appropriate to consider international law when adjudicating requests for asylum and withholding of removal.”).

Since the 1980 Act, statutory and regulatory changes to U.S. asylum law have been implemented. The most significant for purposes of children’s asylum claims is the creation and maturation of a well-trained professional Asylum Officer corps (initially part of the INS and now under the DHS) to interview asylum seekers who come forward on their own in the first instance. 8 C.F.R. § 208.1(b); Asylum Officer Basic Training Course, History of the Affirmative Asylum Program 18-26 (Jan. 9, 2006) (on file with authors).

See Anker, Law of Asylum in the United States § 1:1 (2012); Refugee Convention, supra note 6, preamble. (“Considering that the Charter of the United Nations and the Universal Declaration of Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination ... .”); Asylum Officer Basic Training Course, International Human Rights Law, supra note 7, at 4 (“Reference to international law may assist in determining whether an applicant meets the definition of refugee, if there is not United States law addressing the specific legal issue at hand.”). See also Anker, Refugee Law, Gender and Human Rights Paradigm, 15 Harv. Hum. Rts J. 133 (2002).

INA § 101(a)(42)(A) [8 U.S.C.A. § 1101(a)(42)(A)] (2006) (“[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, 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 ... .”) (emphasis added).

Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (Dec. 23, 2008), children now have the right to a first-instance interview before a USCIS asylum officer even if they are apprehended by law enforcement and in removal proceedings. USCIS has initial jurisdiction applications for asylum filed by unaccompanied children. See also USCIS, Questions and Answers: USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum (Mar. 2009), available at http://www.uscis.gov/files/article/tvpra_qa_25mar2009.pdf. Children can also obtain asylum derivatively through their parents’ cases. For further discussion of derivative versus independent child asylum claims, see Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 48. See also Thronson, Entering the Mainstream: Making Children Matter in Immigration Law, 38 Fordham Urb. L.J. 393 (2010). There is administrative review of asylum cases by
the Board of Immigration Appeals, and, once administrative remedies have been exhausted, claims can be appealed in federal court. See generally Anker, Law of Asylum in the United States § 1:4 (2012).

This principle has been recognized in other contexts. Congress has created special immigrant juvenile status for abused, neglected, or abandoned children. See INA § 101(a)(27)(J) [8 U.S.C.A. § 1101(a)(27)(J)]. In addition, minors are given special consideration in other areas of law, including contract, tort, and criminal law. See Mejilla-Romero, 600 F.3d at 84 (Stahl, J., dissenting). For an overview of other forms of protection available to children in addition to asylum and withholding, see Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 50-51; see also Pyati, Immigration Remedies Available to Abused and Unaccompanied Minors, Defending Immigration Removal Proceedings 2011, 213 PLNY 249 (2011); see also Konings, An Advocate’s Guide to Protecting Unaccompanied Minors, 31 No. 6 Child L. Prac. 81 (2012).


United Nations Convention on the Rights of the Child Art. 3 (1), Sept. 2, 2009, 1577 U.N.T.S. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).


Canadian Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution (Mar. 9, 1993); see also Canadian Immigration and Refugee Board, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update (Nov. 25, 1996).


The Harvard Immigration and Refugee Clinic and the Women Refugees Project actively participated in this collaboration.

The U.S. government described these 1998 INS Guidelines for Children’s Asylum Claims as a “collaborative effort developed after consultations with interested U.S. governmental and non-governmental organizations (NGOs) and individuals, as well as with the UNHCR[.]” INS Children’s Guidelines, supra note 24, at 4.


INS Children’s Guidelines, supra note 24, at 5 (noting that, “[w]hile the Guidelines are particularly relevant for children who raise independent asylum claims, the procedural sections may be useful for children’s cases generally. These Guidelines will also apply to those individuals between the ages of 18 and 21 for purposes of interview scheduling and derivative determinations only.”). The Guidelines also instruct asylum officers to “bear in mind that an applicant who is above the age of 18 at the time of the asylum interview, but whose claim is based on experiences that occurred while under the age of 18, may exhibit a minor’s recollection of the past experiences and trauma.”

INS Children’s Guidelines, supra note 24, at 19, 26. See also Abay v. Ashcroft, 368 F.3d 634, 640, 2004 FED App. 0145P (6th Cir. 2004) (citing the INS guidelines, carefully examining the record as a whole, and finding that the evidence compelled a finding of asylum eligibility). Indeed, adjudicators must accord “the benefit of the doubt” to all asylum applicants, including adults. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status ¶¶ 196, 203-04 (rev. ed. 1992), available at http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf (“[I]f the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”) (hereinafter UNHCR Handbook).
“the same definition of a refugee applies to all individuals, regardless of their age”). Similarly, the 2007 Department of Justice, Executive Office for Immigration Review Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children explained that immigration judges (IJs) may consider the best interest of the child in establishing a child appropriate hearing environment with respect to courtroom procedures but not in establishing a basis for providing immigration relief. EOIR Children’s Guidelines, supra note 1, at 4, 8. As a result, some commentators have emphasized the ongoing punitive effects of a system that does not allow immigration judges to consider a child’s best interests in deciding eligibility for relief, and that does not guarantee kids a lawyer or advocate to represent them and to ensure their basic needs are met. See, e.g., Bhabha and Schmidt, From Kafka To Wilberforce: Is The U.S. Government’s Approach To Child Migrants Improving? 11-02 Immigration Briefings 1, 12-13 (Feb. 2011); Young and McKenna, The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States, 45 Harv. C.R.-C.L. L. Rev. 247, 256-59 (2010).

See EOIR Children’s Guidelines, supra note 1, at 2. The EOIR Guidelines also encourage judges to consult the INS Guidelines, which are distributed to all immigration courts. Id.

EOIR Children’s Guidelines, supra note 1, at 7.

EOIR Children’s Guidelines, supra note 1, at 7.

EOIR Children’s Guidelines, supra note 1, at 7. See also INS Children’s Guidelines, supra note 24, at 15, 26 (noting that “vagueness and inconsistencies are likely to occur during the interview of a child”).

See 8 C.F.R. § 1240.10(c) (“The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.”). See also Thronson, Kids will be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law, 63 Ohio State L.J. 979 (2002).

The TVPRA mandates that an unaccompanied child in HHS custody be “promptly placed in the least restrictive setting that is in the best interests of the child” and authorizes the HHS to appoint independent child advocates to advocate for the “best interests” of the child. For a lengthier discussion of the TVPRA provisions, see Bhabha and Schmidt, From Kafka To Wilberforce: Is The U.S. Government’s Approach To Child Migrants Improving? 11-02 Immigration Briefings 1 (Feb. 2011); see also Bhabha and Schmidt, Kafka’s Kids: Children In U.S. Immigration Proceedings Part I: Seeking Asylum Alone, 07-01 Immigration Briefings 1 (Jan. 2007); Schmidt and Bhabha, Kafka’s Kids: Children In U.S. Immigration Proceedings Part II: Beyond And Besides Asylum, 07-02 Immigration Briefings 1 (Feb. 2007).

See 8 C.F.R. §§ 1208.4(a)(5)(ii), 208.4(a)(5)(ii) (“The term ‘extraordinary circumstances’ in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline ... . Those circumstances may include [inter alia] ... [l]egal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival.”). See infra notes 82-122 and accompanying text.

The Asylum Office has “initial jurisdiction over any asylum application filed by an unaccompanied alien child” regardless of the posture of the claim. William Wilberforce Trafficking Victims Protection Act of 2008, INA § 208(b)(3)(C) [8 U.S.C.A. § 1158(b)(3)(C)].

INS Children’s Guidelines, supra note 24, at 7; 8 C.F.R. § 208.9(b) (“The asylum officer shall conduct the interview in a nonadversarial manner”).

INS Children’s Guidelines, supra note 24, at 7-13; see also Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 22.
See Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 7.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 15-19, 35-45.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 13-14.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 52.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 35 (“Given the difficulties associated with evaluating a child’s claim, asylum officers should carefully review relevant country conditions information. While the onus is on the child, through his or her advocate or support person, to produce relevant supporting material, asylum officers should also supplement the record as necessary to ensure a full analysis of the claim.”).

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 29-30.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 32 (“Trauma can be suffered by any applicant, regardless of age, and may have a significant impact on the ability of an applicant to present testimony.”).

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 32.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 32.


Mejilla-Romero, 600 F.3d at 65-69; 93 (IJ decision).

Mejilla-Romero, 600 F.3d at 69.

Mejilla-Romero, 600 F.3d at 63.

Counsel argued that the standard of review applied in Mejilla-Romero conflicted with Mukamusoni v. Ashcroft, 390 F.3d 110 (1st Cir. 2004), Sok v. Mukasey, 526 F.3d 48 (1st Cir. 2008), and Cordero-Trejo v. I.N.S., 40 F.3d 482 (1st Cir. 1994).

See Abay v. Ashcroft, 368 F.3d 634, 2004 FED App. 0145P (6th Cir. 2004); Liu v. Ashcroft, 380 F.3d 307 (7th Cir. 2004); Khalyavskiy v. Mukasey, 540 F.3d 555 (7th Cir. 2008); Jorge-Tzoc v. Gonzales, 435 F.3d 146 (2d Cir. 2006); Zhang v. Gonzales, 408 F.3d 1239 (9th Cir. 2005); Hernandez-Ortiz v. Gonzales, 496 F.3d 1042 (9th Cir. 2007).

Mejilla-Romero v. Holder, 614 F.3d 572 (1st Cir. 2010).
Judge Stahl argued that the majority “overlook[ed] that the IJ and BIA denied Celvyn’s asylum application without considering the actual claim he put forth” because “both administrative courts limited their understanding of the factual basis for Celvyn’s claim to the oral testimony Celvyn gave when he was just thirteen years of age, testifying about events that occurred when he was a young child of five to eleven years old.” Mejilla-Romero, 600 F.3d at 76-77 (Stahl, J., dissenting).

The majority failed to adequately consider Celvyn’s age or evaluate other testimonial and documentary evidence in the record in order to contextualize and understand Celvyn’s testimony. See, e.g., Mejilla-Romero, 600 F.3d at 71-72 (“Nothing compelled the IJ or the BIA to conclude that these statements [given by Celvyn in his oral testimony] signaled that Hubert’s motivations were based on the political beliefs of petitioner or his family, or on retaliation.”); Mejilla-Romero, 600 F.3d at 71 (“Mejilla-Romero’s testimony contained no clear explanation for the motivation for Hubert’s behavior and certainly did not link it to any political feud between Hubert’s family and his own.”). Judge Stahl correctly emphasizes that “[l]imiting review to such a small portion of the record would be inexcusable in any case, but it is particularly so in a case involving a minor.” Mejilla-Romero, 600 F.3d at 85 (citation omitted) (Stahl, J., dissenting).

Amici curiae, including the UNHCR as well as the Center for Gender & Refugee Studies, Immigrant Child Advocacy Project, National Immigrant Justice Center, Tahirih Justice Center, Professor Deborah Anker, Professor Rebecca Sharpless, and Professor David B. Thronson, also submitted briefs.
The court specifically mentioned the INS Children’s Guidelines, supra note 24, the EOIR Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children (2004), and the UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors Seeking Asylum (1997).


INS Children’s Guidelines, supra note 24, at 19. The 2009 Asylum Office training materials similarly note that, “[g]iven the variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts persecution are bound to vary.” Asylum Office Basic Training Course, Children’s Guidelines, supra note 1, at 36-37 (internal citations and quotations omitted).

*Mendoza-Pablo v. Holder*, 667 F.3d 1308, 1313 (9th Cir. 2012) (internal quotations omitted; Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, 36-40 (citing, inter alia, *Kholyavskiy v. Mukasey*, 540 F.3d 555, 571-72 (7th Cir. 2008); *Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146 (2d Cir. 2006); *Kahssai v. I.N.S.*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring).)

INS Children’s Guidelines, supra note 24, at 19.

Violations of child’s fundamental human rights can rise to the level of persecution. See Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 7-12.

*Mejilla Romero*, 600 F.3d at 90 (Stahl, J., dissenting) (advising that an “‘[a]djudicator should carefully review the family history of the child’ where the child claims persecution on account of an imputed political opinion”) (emphasis in original) (citing INS Children’s Guidelines, supra note 24); *Andres v. Holder*, 312 Fed. Appx. 905 (9th Cir. 2009) (granting petition for review where BIA erred in summarily affirming IJ’s decision denying application for asylum of applicant who suffered past persecution as a young child “on account of his ethnicity as a Kanjobal Mayan Indian, and on account of his imputed political opinion for his alleged support of the guerrilla forces during the Guatemalan civil conflicts”).

*Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012).

*Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634, 640, 2004 FED App. 0145P (6th Cir. 2004).

*Jorge-Tzoc v. Gonzales*, 435 F.3d 146, 150 (2d Cir. 2006).
See Mendoza-Pablo v. Holder, 667 F.3d 1308 (9th Cir. 2012) (concluding that, where a pregnant mother is persecuted in a manner that materially impedes her ability to provide for the basic needs of her child and where that child’s family has undisputedly suffered severe persecution, that child may be said to have suffered persecution).

Hernandez-Ortiz, 496 F.3d at 1045-46 (finding that the IJ erred in failing to consider harm to two Mayan brothers by the Guatemalan military from the perspective of children when the applicants were seven and nine years old at the time when the military invaded their village and beat their father, causing the family to flee and ultimately killing their older brother, and noting that, “The child is part of the family, the wound to the family is personal ... We now join the Second, Sixth, and Seventh Circuits in affirming the legal rule that injuries to a family must be considered in an asylum case where the events that form the basis of the past persecution claim were perceived when the petitioner was a child.”); see also Mendoza-Pablo, 667 F.3d at 1314 (noting that harm suffered while “being forced to flee from one’s home in the face of an immediate threat of severe violence or death is squarely encompassed within the rubric of persecution, as long as the persecutor’s actions are motivated by the victim’s race or some other protected consideration”).

INS Children’s Guidelines, supra note 24, at 19. The UNHCR Handbook states that “[m]inors under 16 years of age ... may have fear and a will of their own but these may not have the same significance as in the case of an adult ... [A] minor’s mental maturity must normally be determined in the light of his [or her] personal, family and cultural background.” UNHCR Handbook, supra note 29, ¶ 215-16.

Abay v. Ashcroft, 368 F.3d at 640 (internal quotations and citations omitted).

Abay v. Ashcroft, 368 F.3d at 640 (internal quotations and citations omitted).

INS Children’s Guidelines, supra note 24, at 20.

INS Children’s Guidelines, supra note 24, at 20 (quoting the UNHCR Handbook, supra note 29, ¶ 218).

See Mejilla-Romero, 600 F.3d at 81-82 (Stahl, J., dissenting) (noting that child had only two family members with whom he could conceivably live, his grandmother and father, and finding it unreasonable to expect the child to be cared for either by a father who had never cared for him or by a grandmother who was very ill).


INA § 208(b)(1)(B)(i) [8 U.S.C.A § 1158(b)(1)(B)(i)].


See Pitcherskaia v. I.N.S., 118 F.3d 641, 647-48 (9th Cir. 1997) (“The fact that a persecutor believes the harm he is inflicting is ‘good for’ his victim does not make it any less painful to the victim, or, indeed, remove the conduct from the statutory definition of persecution. ... Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as ‘curing’ or ‘treating’ the victims.”); In re Kasinga, 21 I. & N. Dec. 357, 366-67, 1996 WL 379826 (B.I.A. 1996); see also Asylum Officer Basic Training Course, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 11
For further discussion of nexus or the “on account of element,” see Anker, Law of Asylum in the United States §§ 5:1 et seq. (2012).

INS Children’s Guidelines, supra note 24, at 21.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 43.

Asylum Officer Basic Training Course, Children’s Guidelines, supra note 1, at 43.

For further discussion of the grounds of persecution, see Anker, Law of Asylum in the United States §§ 5:1 et seq. (2012).


Matter of Acosta, 19 I. & N. Dec. 211, 1985 WL 56042 (B.I.A. 1985); see also Matter of S-E-G-, 24 I. & N. Dec. 579, 583-84, 2008 WL 2927590 (B.I.A. 2008) (“we acknowledge that the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable”); but see Escobar v. Gonzales, 417 F.3d 363, 667-68 (3d Cir. 2005); Lukwago v. Ashcroft, 329 F.3d 157, 171 (3d Cir. 2003) (noting that “age changes over time”). See also Muller, et al., Escobar v. Gonzales: A Backwards Step for Child Asylum Seekers and the Rule of Law in Particular Social Group Asylum Claims, 10 U.C. Davis J. Juv. L. & Pol’y 243 (2006).

Tchoukhrova v. Gonzales, 404 F.3d 1181, 1188-89 (9th Cir. 2005), cert. granted, judgment vacated on other grounds, 549 U.S. 801, 127 S. Ct. 57, 166 L. Ed. 2d 7 (2006) (“We agree with the legal conclusion of the immigration judge and the BIA that disabled children and their parents who provide care for them are members of ‘a particular social group.’ ... Disabled children in Russia constitute a distinct and identifiable group ... . Disabled children in Russia share not only common characteristics but a common experience as well ... . All of this evidence supports our conclusion that in Russia disabled children constitute a particular social group.”). See also Asylum Officer Basic Training Course, Nexus, supra note 104, at 52-53.

See IJ Grants Asylum to Guatemalan Street Child, 79 Interpreter Releases 440 (Mar. 25, 2002); Boyle, Paths to Protection: Ideas, Resources, and Strategies for Presenting Central American Gang-related Asylum Claims, 07-11 Immigration Briefings 1 (Nov. 2007).

INS Children’s Guidelines, supra note 24, at 22.

INS Children’s Guidelines, supra note 24, at 22.

Brief of Amicus Curiae Harvard Immigration and Refugee Clinical Program in Support of Petitioner and Reversal of Panel Opinion, filed Feb. 21, 2012, on rehearing en banc, Rocio Henriquez-Rivas v. Eric Holder, Jr., No. 09-71571 (9th Cir. 2009) (on
file with authors).


See DHS, USCIS Memorandum, Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS at 5 (Aug. 14, 2007) (defining a “minor” applicant as someone under age 18 at the time of filing).


Agents of harm may be either governmental or nongovernmental. 8 C.F.R. § 208.13. See generally Anker, Law of Asylum in the United States §§ 4:1 et seq. (2012).

8 C.F.R. § 208.13 ("[J]udicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.").

8 CFR § 208.13.

In Mejilla-Romero, Celvyn’s advocates presented detailed affidavits from Celvyn, his mother, and his aunt. They also presented a detailed psychological report, as well as detailed affidavits from four expert witnesses, corroborating personal documentation, copies of four relevant court decisions, seven documents addressing national and international standards as they relate to the treatment and adjudication of children’s asylum claims, and 68 documents regarding country conditions and human rights in Honduras addressing relevant issues in the claim.

The Homeland Security Act and the TVPRA both include language that advances the cause of legal representation for minors, but neither one guarantees it. The TVPRA directed the HHS to ensure “to the greatest extent practicable” that counsel represent unaccompanied children in DHS custody, but in practice resources for legal services are scarce. 8 U.S.C.A. § 1232(c)(5). For further discussion of the legal protections for children under the Homeland Security Act and TVPRA, see Hill, The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children, 31 B.C. Third World L.J. 41, 45-53 (2011); Young and McKenna, The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States, 45 Harv. C.R.-C.L. L. Rev. 247, 256-59 (2010).

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