

Op-Ed: A Country of Immigrants, but not in Their Favor

Lauren Davis⁷³

Since 2016 the general American public has become more aware of immigration as a political issue. This Op-Ed's goal is to share the author's observations about the U.S.'s asylum process as a caseworker and advocate for asylum seekers. The author has volunteered as a trained caseworker at a Pro-Bono immigration non-profit organization in the Greater Boston Area for nearly four years, working with immigrants from around the world and in very different circumstances. The article concludes by highlighting areas of failure in the asylum system and making resource suggestions for those wishing to learn more.

I. Introduction

Immigration policy is an outlier in the American legal system. Rather than the judiciary, immigration law falls under the purview of the executive branch of government and is classified as a civil matter. This means that immigration law is both more in flux than other areas of law because it can be altered by a presidential decision and is not beholden to the same obligations regarding rights. For instance, two rights not guaranteed in immigration proceedings are the right to an attorney and the right to a fair and speedy trial by one's peers.⁷⁴ Because immigration law exists under the purview of the executive and legislative branches, the American asylum

⁷³ Brandeis University Undergraduate, Class of 2023.

⁷⁴ 8 U.S. Code § 1362 - Right to counsel; *Fong Yue Ting v. United States*, 149 U.S. 730.



system has been set up to fail asylees, especially those most in need of assistance. The intention of this article is to detail the numerous ways in which this failure happens and make clear the negative effects of poor practices.

That being said, one does not need to be a member of the American Bar Association to practice immigration law. The United States Department of Justice allows *accredited representatives*⁷⁵ to represent immigrants in immigration court and hearings. This status requires that applicants undergo training overseen by a registered organization doing legal immigration work. The applicant can then be accredited by the Department of Justice through an application submitted by the training organization on the aspiring representative's behalf. This may seem a weak answer to the lack of right to representation, particularly since a large number of immigrants still go without representation. Department of Homeland Security data released in 2022 indicates that nationally 90.8% of asylum seekers do not have representation at their interview.⁷⁶ However, accredited representatives can be, but admittedly not always are, trained by organizations dedicated to actually helping those in need as opposed to being focused on profit. Accredited representatives are not the solution to low representation, but they do mitigate it.

Although I am currently waiting for a response to my application to become an accredited representative, I have had the opportunity to work on immigration cases since my freshman year at Brandeis University. I participated in a student training led by the on-campus wing of the

⁷⁵ “Federal regulations at 8 C.F.R. § 1292.1(a)(4) allow non-attorney ‘Accredited Representatives’ to represent aliens before the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR), which includes the immigration courts and the Board of Immigration Appeals (BIA).” (US Department of Justice Recognition and Accreditation Program).

⁷⁶ Gendelman, “Inadequate Access to Legal Representation,” 2022.



organization,⁷⁷ whose goal is to expand representation in immigration proceedings and educate the communities affected by underrepresentation, and then an intensive training to prepare me for this work. Over the past three years, I have worked on six asylum cases, one citizenship case, one U-Visa, one humanitarian parole, one Temporary Protective States case, and so many intakes that I have lost count. Of all of these types of cases, the one I consider myself most knowledgeable about is asylum because of the depth of the work involved on each individual case.

In fiscal year 2019, nearly 30,000 individuals applied for asylum in the United States. In the same year 46,508 individuals were granted asylum.⁷⁸ While it may seem those numbers do not match up, this discrepancy is due to the long wait times associated with this type of petition for status. As of 2019 there were 489,003 people in the asylum case “backlog.”⁷⁹ The United States Citizenship and Immigration Services (USCIS) is slowly working through this backlog, but at the organization I volunteer for we represent clients who have been waiting for their asylum interview for more than a decade. That means years of working with any particular client through this time, helping them take advantage of any benefits they are eligible for and watching for adjustments to asylum regulations that may affect their case. Due to the wait times and the personal and traumatic nature of asylum, there is no “quick” or “easy” asylum application.

⁷⁷ The name of this organization is consciously omitted, as I do not represent the organization and am sharing my own opinions.

⁷⁸ *Table 15*, “Refugee Arrivals by Relationship to Principal Applicant and Sex, Age, and Marital Status,” 2022; *Table 16*, “Individuals Granted Asylum Affirmatively or Defensively,” 2022.

⁷⁹ “A Mounting Asylum Backlog and Growing Wait Times,” 2021.



II. Historical Precedent and Background

In order to qualify the opinions I share in this article, some background on the asylum system is useful. Most people are familiar with the term “refugee,” but fewer people understand what it means to become one within the United States. In 1951, the United Nations established The United Nations Convention on Refugees and, in doing so, established the principle of non-refoulement,⁸⁰ the rules of fair asylum procedures, and an expectation of non-discrimination.⁸¹ This came in the aftermath of World War Two, a time with many horror stories about American decisions regarding refugees and intervention. One famous example is President Franklin D. Roosevelt’s decision to turn around a boat of Jewish refugees fleeing Nazi Germany because the quota had already been met.⁸² Few countries outside of Europe became signatories to the Convention until the later 20th century.⁸³ The three standards set by the UN Convention on Refugees only spread beyond Europe with the Refugee Protocol of 1967.⁸⁴ While the U.S. is not a signatory of the UN Convention on Refugees, it is a signatory to the Refugee Protocol which contains the rights to leave one’s country, to not be returned, and to seek asylum.

People can qualify for refugee status when they fear or have faced persecution based on their race, religion, national origin, political opinion, or membership in a particular social group. This technically holds true for American asylum policy;

⁸⁰ A person cannot be returned to a place where they will be persecuted.

⁸¹ United Nations High Commissioner for Refugees, “The 1951 Refugee Convention,” 2022.

⁸² Gross, “The U.S. Government Turned Away Thousands of Jewish Refugees,” 2015.

⁸³ “States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol,” 2015.

⁸⁴ The UN General Assembly, “Protocol Relating to the Status of Refugees,” 1966.



however, the standard of proof is very high due to the innumerable inefficiencies and failures of American asylum policy.

III. American Immigration Today

With history covered, let us begin exploring our modern immigration system in the same place where an individual's experience with the American immigration system typically does: at the border.⁸⁵ An individual intending to seek asylum in the United States is supposed to declare their intention at the border and then receive a *credible fear interview*. This name is self-explanatory: in this interview an officer is supposed to assess whether a potential asylum seeker has a credible fear of persecution or torture if returned to their country of origin.⁸⁶ In my almost 4 years of working on immigration cases in the Boston area, during which I have worked on six asylum cases and the intakes of dozens of other asylum applicants, I have never once met a single individual who received a credible fear interview. I don't know why this isn't happening, thankfully it doesn't make or break a case, but it is certainly a positive to have a finding of credible fear at the border to include in a filing.

Once a migrant crosses the border successfully the process diverges into *affirmative asylum* and *defensive asylum*. An affirmative asylee is one who has entered the United States legally or without inspection⁸⁷ and is not in removal

⁸⁵ In 1953 the US Department of Justice defined the border as within 100 miles of an "external boundary" to the US.

⁸⁶ "Questions and Answers," 2022.

⁸⁷ "Without inspection" indicates that the individual entered the United States (crossed the border) without being found out by border patrol or customs. The US government does not know that the individual is in the United States.



proceedings. A defensive asylum case is one in which the individual is already in removal proceedings because they entered without status. A defensive asylee will typically spend time in a detention center and may be released to a sponsor who is willing to take them in. Once an individual crosses the border, regardless of inspection, their one year clock to submit their application to even be considered for asylum starts ticking, unless the applicant has a good reason for not having submitted within that time. While an asylum seeker might want a representative to help them submit their application, represent them in court, and generally guide them through an unfamiliar legal system, in Immigration Court individuals are not guaranteed an attorney. This has horrifying consequences in terms of case outcomes; in fiscal year 2020 represented asylum seekers had a success rate of 31.1% whereas unrepresented seekers had a success rate of only 17.7%.⁸⁸ The number of unrepresented asylum seekers only continues to rise.

Once they submit their application, defensive applicants are scheduled for a Master Calendar Hearing⁸⁹ at which they may contest their charges and set a date for their immigration trial. At the time of writing, fall 2022, defensive asylum applicants often receive a Master Calendar Hearing roughly two years out from their arrival date. During that hearing, the asylum seeker or their representative and the judge decide when their Immigration Court trial will be, although it is rare for it to be within a year or two of the Master Calendar Hearing.

In contrast to defensive applicants, once affirmative asylum applicants submit their application they will receive a notice with their interview date. Typically, this date is years out and may be further delayed by USCIS. However, one important thing to note is that if the client delays their interview, they will

⁸⁸ "Asylum Denial Rates Continue to Climb," 2020.

⁸⁹ Master Calendar Hearing: Respondent (and representative, if represented) appear before a judge to schedule a date for their trial.



be penalized. Additionally, rather than present their case to peers or before a judge, an affirmative asylum seeker must present their case to an asylum officer. These officers are ordinary civilians who are trained by United States Citizenship and Immigration Services in,

...topics such as international refugee law and the U.S. Asylum Program's role in world-wide refugee protection, U.S. asylum law and its interpretation by the Board of Immigration Appeals and federal appellate courts, interviewing techniques, researching country of origin information, and decision-making/writing.⁹⁰

This may sound expansive, however all of this is covered over a period of only five and a half weeks and is the only training required.⁹¹ Note that in this six point list, trauma-informed decision making is glaringly absent. This is the first example to support the thesis of this op-ed: that the American asylum system is set up to fail those most in need of its assistance. The following section will explore this as well as other areas ripe for discriminatory practices.

IV. Successes and Failures

USCIS policy is that asylum applicants are eligible to apply for a work permit six months after submitting their application.⁹² That is because all asylum applications are supposed to be adjudicated by 180 days after the application is filed. However, it has been true for a long time that this does

⁹⁰ "Asylum Division Training Programs," 2016.

⁹¹ "Asylum Division Training Programs," 2016.

⁹² INA § 208(d)(2).



not happen. In my experience the applicant might receive an interview notice in that amount of time, but almost certainly will not have completed the interview itself. If, during those six months, the applicant requests to reschedule the date of their interview, moves and must transfer their case to a different asylum office, etc., the six month timer pauses. Once this happens, the applicant must wait for USCIS to reschedule, which does not happen quickly, for the timer to resume. This is additional time that an individual cannot legally work, nor drive, which are two serious impediments to one's quality of life in the United States.

Of recent concern is the adjustments to the asylum process proposed by President Biden. To combat the current backlog, Biden is attempting to alter the process so that once an individual is inspected at the border they will be interviewed within five weeks of their arrival. This presumes that all individuals inspected are given an opportunity to declare intent to apply for asylum and receive a credible fear interview. Never, in my over three years of casework and intakes, have I met an individual who has received a credible fear interview. This is bad enough in the current system, so how could this proposed solution to the backlog actually function if (1) recent arrivals are unaware of their options in terms of status, and (2) even when informed, individuals are not given the opportunity to declare their intention to apply for asylum? Frankly, this new rule could only have been suggested and approved by a group of people with the most basic knowledge of the system. It certainly would not be supported by anyone who actually understands the flaws in the system. Given the history of discrimination in the immigration system, to assume ignorance is to give the benefit of the doubt.

I would now like to address the soft-skills and training which are sorely lacking throughout the system. As briefly mentioned before, all levels of the asylum process suffer from a core lack of understanding of the symptoms of trauma. From



asylum officers conducting interviews to judges in trials, asylum seekers are mistreated in countless ways by countless bureaucrats in their effort to receive asylum due to a lack of training on a condition which is effectively a prerequisite to enter the asylum system. Asylum seekers face both first- and second-hand trauma in their country of origin, and may experience traumatic events in the process of coming to the U.S. as well. If an individual has faced past persecution—been tortured by their government’s security forces, targeted by a mob for their sexuality, discriminated against due to their ethnic group—they will inherently have gone through traumatic experiences. These traumatic experiences are the basis of an asylum claim. So why, when memory difficulty is one of the main symptoms of Post-Traumatic Stress Disorder (PTSD), do those who assess asylum applicants treat this symptom as an indication that the individual is not telling the truth?

A. Hypothetical Example

Let us work with an example to illustrate the gross irresponsibility of this situation. Say an immigration caseworker is working with an asylum seeker who is an ethnic Tigrayan from Ethiopia. Over the course of four months they work together, building trust and improving the client’s understanding of the asylum process, and putting together the asylum application. During this time, as the client comes to trust their caseworker they begin to open up about the fear they experienced day to day in their country of origin. The client recounts how they discovered that their family members in the big cities and in the country alike were disappearing, and how they still don’t know if their family remaining in Ethiopia is alive nor if they are alive or safe.

The client receives a notice stating her interview date will be in six months; although this is unlikely now, for a time



it was policy to take the most recently submitted cases first rather than working on the backlog. As a team, we spend these six months doing interview preparation and connecting our client to other organizations which can assist them with housing, food, health insurance, and transportation since they cannot work or drive. We prepare the client for all types of interviewers: an insensitive one who will ask direct and probing questions, one who wants to believe you but will still need to convince their supervisor, one who has been interviewing Tigrayans for a week straight and doesn't think that many people could have come here so they must all be lying, and many more. The anticipation builds up for the client over this time, so when the date of the interview comes, they are prepared, but understandably nervous.

The day of the interview the client and representative are taken to the office of the asylum officer. There, credentials are presented, and the officer hasn't heard of an accredited representative before and needs to check with their supervisor.⁹³ Half an hour later the officer returns and says they can continue with the interview. At this time the officer may be reviewing the filing package for the first time; if not, they have probably scanned it to get the gist of the client's story. We never assume that the asylum officer has read the whole thing because, as far as we know, they almost never do. The officer begins by asking some questions from the application itself—form I-589—such as the client's full name, date of birth, the last time they entered the US, their current address, etc.

Once they get through some basic biographical information, the officer will move on to questions about the individual's claim. This may take many forms, but officers will often focus on the past persecution and why the individual

⁹³ I would like to note that this actually happened to a colleague, although the R&A program was established in 2003.



believes they will be persecuted going forward. Effectively, the officer is trying to establish whether or not the applicant has a credible fear of returning to their country of origin. Remember that at this point the client has been in the US for almost a year, so they are at least that length of time removed from the events that caused them to flee their country and seek asylum in the first place.

Fortunately, the client in this hypothetical has seen mental health counselors so they are able to remember much of what happened and know how to go about answering the questions because of all the preparation we did.⁹⁴ However, the client is nervous and in the process of explaining what happened to them they misspeak and say June instead of July. They just remembered that they were persecuted in the summer, but through affidavits of support and working through the timeline of events, we figured out as a team that the event happened in July. The asylum officer notices this and chooses not to try to correct her, noting it as an inconsistency in their story.

The interview lasts about four hours in which the client makes a couple other minor mistakes, including saying that a scar is on her left shoulder instead of her right, which is what the doctor she saw in the United States had written in their affidavit of support. The client doesn't cry or express much emotion at all during the interview. The asylum officer notices this and thinks it is strange. This makes the officer suspect that this was a canned story the applicant was told to tell: how else could they have gotten through it without crying or pausing? This would also explain why they forgot a couple facts such as notable dates. The story also sounds quite similar to the story of an applicant the officer interviewed yesterday. In fact, the

⁹⁴ Please note that many are unable to seek mental health treatment under these circumstances due to financial reasons, lack of transportation, and numerous other blocks to access.



officer had heard the story over and over. How could it be that so many people have had such similar experiences?⁹⁵

The answer is obvious to us as the people who work with these waves of refugees resulting from conflict or discrimination. People have the same stories because persecution is often systematic. In fact, in order to prove that the client faces future persecution it would have to be systematic. Otherwise, it would be a one-off instance and the individual would not qualify for asylum. Additionally, memory loss and emotional numbness are known within medical circles to be a common symptom of PTSD. Exacerbators of symptoms like these include stress and exposure to reminders of the traumatic event.⁹⁶ Why, when PTSD occurs in 6 of every 100 American adults, is this not accounted for in a system which deals exclusively with victims of traumatic events?⁹⁷

An additional complicating factor not incorporated into this scenario is the need for translation. Regardless of the ease of finding a translator for different languages and dialects, translation can put non-native English speakers at a disadvantage. The asylum interview is extremely personal. The officer takes all aspects of the meeting into account from body language to file size. There is value in hearing an individual's story from their own mouth. Another concern is the quality of the translation. This is of greater concern for less common languages or instances where an individual's native language is creole,⁹⁸ but since there is no common metric or certification of translation abilities, it is difficult for representatives and asylum officers to assess the accuracy of the translation. Asylum officers understandably take translators at their word, assuming that they repeat close to exactly what the applicant

⁹⁵ The sentiments ascribed to the officer in this scenario are drawn from officer interviews conducted in the movie *Well Founded Fear* (2000).

⁹⁶ Mayo Clinic, "Post-traumatic stress disorder."

⁹⁷ "PTSD," 2022.

⁹⁸ Creole is a combination of two languages.



says. However, this is often not the case. It may be difficult or impossible to translate exactly, and some nuance of the applicant's statements may be lost to translation, leaving the asylum officer without a full understanding, which then may count against the applicant in the officer's decision. Another concern is if a translator misspeaks or misunderstands and restates something incorrectly, as this may also count against the client as an inconsistency.

At this point, we turn to the actual decision process after the interview has finished. There is not much publicly available information on this, but what we do know is that officers must justify a positive decision to their supervisor. Note here: they must justify positive decisions, not a decision to deny asylum. This means that even if an asylum officer or supervisor is educated about the effects of trauma, or is willing to overlook some mistakes, one must convince the other to do the same. This is a massive barrier to positive outcomes for two populations in particular: non-native English speakers and sufferers of PTSD. Keeping in mind that asylum seekers are *always* both from another country and have suffered persecution, those two populations are not insignificant, and these issues affect thousands of lives.

V. Conclusion and Resource Suggestions

So how might we improve these inequalities? There are so many different, yet effective, ways to improve this system that it is hard to know where to begin. In terms of the interview process, guaranteeing representation, high quality translation, and mandatory trauma training among officials would go a long way. But covered in this article are just a few parts of a years-long process in which asylum seekers are disadvantaged at every turn. Without a work permit, how can an asylum seeker make money to pay an attorney to put together a



complete asylum filing, let alone feed themselves and their family, pay rent, and more? Without representation, how can individuals be expected to put together an asylum application based on legal precedent and with in-depth research to establish their claim? I leave you with just these questions to stand in for the innumerable others which would point out the countless flaws and inequalities inherent to the current asylum process as it stands. Unfortunately, at this time, it seems as though obstacles will only be increased for those seeking safety and security in the United States in the near future.

In the spirit of hope, I would like to make three suggestions to readers who hopefully feel as indignant as I and other immigrant advocates do with this knowledge. The first is to watch the documentary *Well Founded Fear* and encourage others to as well. Although it is pre-9/11, and the asylum process has undergone significant change since then, it is the only real look that lay people get into the inner workings of an asylum office. At the organization I was trained by and volunteer for, all trainees must watch this movie to gain the perspective necessary to be cynical enough about the system to be able to put together an effective asylum application.

The second is specific to a certain region. The University of Maine School of Law, the American Civil Liberties Union, and the Immigrant Legal Advocacy Project worked together to publish a report in March 2022 detailing problematic policies and failures that occur in the Boston Asylum Office. The Boston Asylum Office serves all of Massachusetts, Maine, New Hampshire, and Rhode Island and the report supports much of what is presented in this article using interviews and a massive Freedom of Information Act release of USCIS documentation from the Boston Asylum Office. The report is extremely well written and has created a political onus to reform performance at this office.

The third is to support pro-bono immigration law clinics and organizations, in addition to local organizations that



work to help individuals struggling with food insecurity, housing, healthcare access, etc. If the government won't provide the services necessary to allow people to survive in the United States, we can try to fill that gap. Some may say that filling that gap only means that the government won't see the need to step in, but to that I ask how many times they have received a phone call from a recent immigrant struggling to feed their family who doesn't know what their status is or how to move forward. Why should those fleeing conflict and persecution be punished for our shortcomings as voters? If America wants to continue to consider itself to be the best of the best, let's make it so for our most vulnerable populations.



Bibliography

- “A Mounting Asylum Backlog and Growing Wait Times.” *TRAC Immigration*, 22 Dec. 2021, <https://trac.syr.edu/immigration/reports/672/>.
- “Asylum Denial Rates Continue to Climb.” *TRAC Immigration*, 28 Oct. 2020, <https://trac.syr.edu/immigration/reports/630/>.
- “Asylum Division Training Programs | USCIS.” *U.S. Citizenship and Immigration Services*, 19 Dec. 2016, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-division-training-programs>.
- Baugh, Ryan. “Fiscal Year 2020 Refugees and Asylees Annual Flow Report.” Office of Immigration Statistics, 8 Mar. 2022.
- “Refugees and Asylees: 2019 Annual Flow Report.” Office of Immigration Statistics, Sept. 2020. *Zotero*, https://cis.org/sites/default/files/2020-11/refugee_and_asylee_2019.pdf.
- Gendelman, Rebecca. “Inadequate Access to Legal Representation, Rushed Timelines Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule.” *Human Rights First*, 14 Sept. 2022, <https://humanrightsfirst.org/library/inadequate-access-to-legal-representation-rushed-timelines-impede-meaningful-opportunity-to-seek-asylum-under-new-asylum-processing-rule/>.
- Gross, Daniel A. “The U.S. Government Turned Away Thousands of Jewish Refugees, Fearing That They Were Nazi Spies.” *Smithsonian Magazine*, 18 Nov. 2015, <https://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/>.



- “Post-Traumatic Stress Disorder (PTSD).” *Mayo Clinic*,
<https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967>. Accessed 19 Dec. 2022.
- “PTSD: National Center for PTSD.” *U.S. Department of Veterans Affairs*, 29 Aug. 2022,
https://www.ptsd.va.gov/understand/common/common_adults.asp.
- “Questions and Answers: Credible Fear Screening”
USCIS. 31 May 2022,
<https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening>.
- Refugee and Human Rights Clinic, et al. “Lives in Limbo: How the Boston Asylum Office Fails Asylum Seekers.” Mar. 2022, p. 31,
<https://mainelaw.maine.edu/wp-content/uploads/sites/1/Lives-in-Limbo-How-the-Boston-Asylum-Office-Fails-Asylum-Seekers-FINAL-1.pdf>.
- “States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.” UNHCR, Apr. 2015,
<https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.
- “Table 15. Refugee Arrivals by Relationship to Principal Applicant and Sex, Age, and Marital Status: Fiscal Year 2019 | Homeland Security.” *Department of Homeland Security*, 14 Dec. 2022,
<https://www.dhs.gov/immigration-statistics/yearbook/2019/table15>.
- “Table 16. Individuals Granted Asylum Affirmatively or Defensively: Fiscal Years 1990 to 2019 | Homeland Security.” *Department of Homeland Security*, 14 Dec. 2022,



<https://www.dhs.gov/immigration-statistics/yearbook/2019/table16>.

“The Constitution in the 100-Mile Border Zone.” *ACLU*, 2022,

<https://www.aclu.org/other/constitution-100-mile-border-zone>.

The UN General Assembly. “Protocol Relating to the Status of Refugees.” Resolution 2198, 16 Dec. 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-relating-status-refugees>.

United Nations High Commissioner for Refugees. “The 1951 Refugee Convention.” *UNHCR USA*, 2022, <https://www.unhcr.org/1951-refugee-convention.html>.

Cases Cited

Fong Yue Ting v. United States, 149 U.S. 698 (1893).

Codes Cited

8 C.F.R. § 1292.1(a)(4).

8 U.S. Code § 1362 - Right to counsel.

INA § 208(d)(2).

