Asylum Reform Needed

The system is broken and needs fixing

by Jack Martin

Since adoption of the Refugee and Asylum Act in 1980 over one million asylum claims have been filed with the Immigration and Naturalization Service. This number does not include the defensive asylum claims filed with judges hearing deportation cases. The 1980 Act contemplated a maximum number of 5,000 asylees accorded legal permanent residence (LPR) status in any year. Between 1980 and 1990 this would have allowed a maximum of 55,000. With the increased ceiling to 10,000 in 1991, this allowed an additional 50,000 or a total to date of 105,000. Therefore, asylum applicants have exceeded the entry limit by about 900,000. This raises the question of whether the system is adequate to meet the real needs of asylum claimants, or whether the nature of the asylum claim is so problematic that it is subject to widespread abuse.

The upward trend in the number of asylum applications and the number of approvals led to the 1990 doubling of the statutory ceiling on asylee adjustments. Through FY'95, INS statistics show that the total number of adjustments of asylum recipients to LPR status since FY'80 number 102,601, an average of over 6,400 per year. Unlike the limit on refugee admissions, which has been adjusted on an annual basis, the ceiling on asylum adjustments has operated as a ceiling, and has been changed only once. Adjustments to LPR status in excess of the limit become a backlog and that is likely to be the case again this year, despite the higher ceiling.

The percentage of approved asylum cases in the INS system, when compared to the total adjudications, has varied between 55 percent (1980) and 15 percent (1990). This statistic ignores closed cases resulting from the death of an applicant, other LPR adjustment, withdrawn application or the applicant failing to appear. Since FY'80, there have been 339,677 cases adjudicated (24% approved) and 339,065 otherwise closed.

There is a difference between the total asylum cases approved by the INS over the past 16 years (81,980) and the number adjusted to LPR status during that period (102,601). The difference is explained by the fact that an approved asylum case may include more than one person, and the fact that defensive asylum claims made before immigration judges in deportation cases, if approved, also enter the adjustment stream.

A further meaningful measure of the asylum process concerns the inability of the INS to keep up with asylum claims. Between 1984 and 1989 the INS was completing more cases than were filed each year, *i.e.*, preventing or reducing the backlog, although as already noted a large share of those cases were closed rather than adjudicated. Beginning in 1990, the number of new claims began to exceed the number of new applications. Denials dropped from a high of over 30,000 in 1984 and 1989 to less than 5,000 in 1991, and 7,000 in 1992. Meanwhile, detention space for asylum applicants was inadequate to hold the increasing number of new cases, so asylum applicants were being routinely paroled into the country with only cursory inspection and were issued a work permit. The message broadcast overseas was that the fast route into the United States for those seeking to start a new life, and otherwise ineligible to immigrate, was to request asylum. Asylum applications, that had averaged less than 44,000 per year from 1980 to 1991, zoomed to an average of 136,000 over the next four years. According to an INS Fact Sheet dated January 4, 1996,

> *In 1993, the United States' asylum system was in crisis...the program had become a magnet for abuse. Attracted by the easy availability of work authorization and often lured by unscrupulous profiteers, the system was*

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clogged by people submitting false applications solely for the purpose of getting work authorization.

Backlogged asylum cases in the INS system numbered over 219,000 at the beginning of FY'93. At the start of FY'95 that backlog was 422,000. Despite a record number of completed cases last year, a record number of applications was also filed, and the backlog numbered over 455,000 at the beginning of the current fiscal year.

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On the surface, this statistical review suggests that asylum is still one of the out-of-control aspects of current immigration policy. However, in light of INS assertions that it has turned the corner on the problem and is now managing asylum cases in a fashion that discourages fraudulent claims and will eliminate the backlog, the data merit a closer look.

The Issues

There are two primary issues that should be considered in a focus on the operation of our asylum policy and the need for any change in it.

The first is one that would be widely accepted: how can our asylum policy discourage fraudulent asylum claims while not restricting access for valid asylum claimants? This has been the focus of the Administration — and FAIR supports this objective, although it would differ on how to achieve it.

The other issue would be more controversial: should the United States expand the coverage of its asylum policy to new categories of non-traditional cases that will have the effect of increasing the overall number of asylum applications and permanently resettled aliens? It is not clear whether the Administration has addressed this question, but its actions indicate that it would support this objective. FAIR would oppose this trend for two reasons. First, the non-traditional areas into which asylum coverage is expanding are ones that are more difficult to decide objectively on a case-by-case basis as to whether there is a well-founded fear of persecution, thereby providing an incentive to individuals to attempt to make fraudulent claims and alien smugglers to coach their clients to do so. Second, a policy that expands asylum admissions is not in the national interest of a lower overall level of immigration.

Recent Changes

LEGISLATION

The Administration launched an effort at asylum reform on July 27, 1993 as part of a number of measures to better control illegal immigration. The legislative initiative had been crafted with important input from David Martin, subsequently appointed INS General Counsel. The measure was introduced by Senator Kennedy as S. 1333. Key provisions established an expedited screening and exclusion process for those not presenting a prima facie, non-frivolous asylum claim.

ADMINISTRATIVE MEASURES

In February, 1994, the INS announced a series of administrative measures designed to better control abuse of the asylum system. This new approach was described as intended to supplement the legislative proposal for expedited exclusion procedures. But, rather than supplement asylum reform efforts, this signalled the end of interest in expedited exclusion procedures for asylum applicants, except for special "emergency" measures. Without publicly saying so, the Administration had abandoned its legislative initiative without ever explaining what analysis led them to back away from the conviction that these measures were appropriate and needed.

The new administrative procedures package, once again crafted for INS by David Martin, included the following provisions:

- refusal of "boilerplate" asylum applications;
- fingerprinting asylum applicants and checking for criminal records;
- doubling the Asylum Corps to 334 to process 150,000 applications on a current basis;
- increasing the immigration judge staffing;
- withholding work permits for five months unless granted asylum earlier;
- developing reciprocal policies for returning asylum applicants to safe countries;
- charging a fee of $130 for asylum claim processing.

In June, Attorney General Reno outlined a

request for additional funds and personnel resources to implement this plan. The FY'95 appropriation bill included a 29 percent increase in funding and the necessary personnel authority to implement the plan. The new regulations took effect in January of 1995, after dropping the $130 application fee.

> ***"…a further move in the direction of broadening the scope of our asylum protection far beyond what was contemplated or legislated by Congress."***

Fiscal Year 1995 Results

The new administrative remedial measures, especially withholding the work permit, have decreased the number of affirmative asylum applications (when allowance is made for non-recurring filings under the ABC case). But, even if most Salvadoran asylum applicants in FY'95 were ABC applications, which they most certainly were not, the over 77,000 new asylum applications from other countries exceeded the cases adjudicated. Furthermore, adjudication numbers are inflated under the new procedures, because the Asylum Office now counts as refusals those cases denied without an interview and sent for a hearing to an immigration judge.

If new Salvadoran asylum cases are estimated at about 15,000 (between the FY'94 and FY'93 levels) the total of new cases in FY'95 would have been 92,336, a decrease of about 36 percent from FY'94. However, even with the expedited process of handling apparently meritless cases, the adjudicated cases numbered only 48,259. An additional 54,169 were otherwise closed (the data do not reflect how many were closed as a result of the alien's failure to respond to the hearing notification). With these additional closed cases, the result is a decrease in the backlog by about 24,000 cases. Given the backlog at the beginning of FY'96 of 457,670, at this rate of reduction it would require over 19 years to eliminate the backlog — if the same rate of applications and processing held constant.

Before becoming enthused over the drop in asylum applications over the past year, the experience with the IRCA-adopted employer sanctions should be remembered. In the first year (from FY'86 to FY'87) apprehensions of illegal aliens — mostly Mexicans at the southern border — declined by 33 percent. The apprehensions continued to decrease over the next two years — by 15 percent and five percent, respectively — before they resumed their historic upward climb. We know now that the opportunity to permanently reduce illegal immigration by way of employer sanctions was lost at that time because effective document screening and enforcement capabilities were lacking.

Did the reduction in new asylum applicants, from the nearly 145,000 in FY'94, largely eliminate persons fraudulently trying to circumvent our normal refugee or immigrant screening system? No, that was not the case. In FY'95, over three new applications were turned down for every one approved during the year (excluding the possible ABC cases). It should be noted that the number of approvals (12,477) exceeds the 10,000 ceiling on adjustments even without including eligible family members. If approvals at a similar ratio continue, and new applicants arrive at a similar or higher rate, a major backlog will again develop of asylum recipients waiting to adjust to LPR status.

It is also important to remember that the ability of the asylum corps to continue to process cases at the FY'95 rate is dependent on their not becoming diverted to other more pressing responsibilities, as they were recently when the Administration was trying to cope with the Haitian and Cuban boat influxes. A similar diversion of effort could recur in the Caribbean or the land border with Mexico. Further, there is no reason to conclude that the decrease in new (non-ABC) cases will decline or even hold at the FY'95 level. The trend line has been one of increase and there is no reason to think that this upward pressure may diminish.

The Expanding Scope of Asylum

Concurrently with the above outlined efforts to discourage asylum abuse, the courts and the Administration have been focussing on a number of non-traditional asylum cases and deciding that the scope of asylum protection should be broadened to accommodate a number of new concepts.

The clearest example of the expansion in asylum

coverage is the adoption of sexual preference grounds as a basis for asylum protection. In June, 1994, Attorney General Reno designated as a precedent a BIA (Board of Immigration Appeals) decision that found gays and lesbians eligible for asylum protection as members of a "particular social group."

The most recent initiative by the INS, *i.e.*, requesting that the BIA provide guidelines for favorable consideration of asylum claims on the basis of female genital mutilation (FGM), is a further move in the direction of broadening the scope of our asylum protection far beyond what was contemplated or legislated by Congress. That this is being done without regard to a strict reading of the law may be seen in the argumentation of INS General Counsel Martin, who wrote, even as he asked the BIA on February 28, 1996 to announce an expansion of asylum jurisdiction to cover FGM cases,

> *There is no indication that in enacting INA 208 and 243(h) Congress considered application of these sections to broad cultural practices of the type involved here.*

"…the opportunity to permanently reduce illegal immigration by way of employer sanctions was lost … because enforcement capabilities were lacking."

Although not providing similar protection for Chinese who allege fear of persecution related to China's family planning policy, the INS in August 1994 endorsed stays of deportation for those making such claims who are not granted asylum. The effect of this decision, which it was reported at the time of issuance, could apply immediately to as many as 1,000 persons (Interpreter Releases p. 1056), appears to be the creation of a new informal Deferred Enforcement of Departure program without the participation of Congress.

What should be focussed on is the fact that this stretching process has no obvious limit and that it is being done without reference to Congress. The number of asylum applicants converted to permanent residence is limited by the current 10,000 adjustment ceiling, but in light of the doubling of that limit in 1990, and the possibility that additional claimants in excess of that number may be left to reside indefinitely in the United States on the basis of withheld deportation, that ceiling does not appear to represent a firm boundary.

Terrorism Prevention Bill Provisions

The Terrorism Prevention Act amendment of section 235 (b) of the INA provided for port of entry screening of asylum applicants by an asylum officer, reviewed by a supervisory asylum officer, and not subject to administrative appeal.

This provision is similar to the Administration's proposed S.1333 provision cited earlier, except that in that legislation the reviewing asylum authority would have had to come from other than the Asylum Corps.

The implementation of the new 235 (b) provision will streamline the hearing and exclusion process for those who arrive with fraudulent (or no) entry documents and who do not establish credible fear of persecution. Instead of months or years of review, exclusion will take place at the port of entry in hours or days. We are convinced that this reformed procedure offers the INS a better chance of getting on top of new asylum cases and provide the opportunity to begin eliminating the backlog.

Recommendations

The Federation for American Immigration Reform makes the following recommendations to the Commission:

Recommendation I — Support the Streamlined Asylum Process of the Terrorism Prevention Act. Asylum remains out of control despite major remedial efforts of the Administration. The problem will worsen, because the INS is inviting new gender and sexual preference cases. The Terrorism Act's expedited exclusion measure is needed, and should be allowed to go into force. The Administration and the Senate and House conferees deliberating this issue should be informed now, while it is being decided, that the Commission opposes enactment of the Leahy Amendment, which would reestablish the status quo ante. This will accomplish the following objectives:

- Discourage fraudulent asylum claims by implementing expeditious exclusion of claimants at

the airports without their having gained their objective of access into the United States;

• Reduce the number of asylum grantees.

Recommendation II — End the Current Advantage Given to Asylum Applicants Over Refugees. Asylum should protect aliens already admitted to the United States who face circumstances in their home country which arose after they came here that cause them to fear persecution if they return. By accepting applications from persons at ports of entry, we have given asylum applicants an advantage over refugees. They gain access into the United States without screening as well as access to counsel and to the U.S. legal system to argue their case. These persons should be required to make their case for refugee protection from abroad. The exception should be only those non-refoulement cases in which the applicant has travelled directly and continuously from the home country to the United States. This will accomplish the following objectives:

• Decrease the potential of asylum applicants from countries where poor human rights conditions exist to gain favorable consideration of their claims on the general conditions in their country, rather than on the basis of the individual circumstances they would face if they were returned;

• Eliminate legalistic delaying tactics in immigration hearings.

Recommendation III — Call for Congress to Restate a Narrow Asylum Scope. The courts, with the active participation of the Administration, have stretched asylum coverage to cases never contemplated in the law. Congress should be asked to stop this expansion by re-delineating the boundary. We do not accept refugees seeking protection from societal practices or prejudices, so we should not accept these claims from asylum applicants. This will accomplish the following objective:

• Assure that the asylum law embodies not just international standards for the protection of individuals, but also standards that will be supported by the American public over the long run.

Recommendation IV — End Asylee Adjustments to Permanent Residency to Underscore the Difference between Refugee and Asylum Protection. Refugee screening seeks those who require permanent resettlement, not just temporary protection. Asylees are not similarly screened. It is appropriate, therefore, to accord them temporary protection until such time that they may safely return to their native country, rather than adjustment to LPR status.This will accomplish the following objective:

• Allow the system to respond to rapidly changing conditions in political or social regimes that are not locked in time, as used to be more common. An example is the change in conditions in China that have led many Chinese students, who were granted residence under the Chinese Student Adjustment Act, to return on visits to mainland China. It suggests that temporary protection could have served the purpose of protection without the need for a distortion to our immigration law to accord the students permanent residence.

Recommendation V — End Automatic Adjustment to Permanent Residence for Cubans. We believe the Cuban Adjustment Act is discriminatory and wrong and should be repealed. But, if Congress is only prepared to drop the Cuban Adjustment Act when Cuba is no longer a communist dictatorship, then the Act should be amended so that Cubans are only offered temporary protection, not routine adjustment to permanent residence.

Recommendation VI — Support Other Measures. Actions now pending in either the Senate or House bills to reform illegal immigration would address the following issues:

• Limit the Attorney General's excessive authority to parole aliens into the country;

• Bar from later immigration those who make frivolous asylum applications as well as “no-shows” — those who fail to appear for a scheduled hearing.

Subsequent Actions by the Congress, the INS, and the Commission on Immigration Reform

The major immigration reform effort of the last Congress (the Illegal Immigration Reform and Immigrant Responsibility Act), which failed to address needed legal immigration reform, nevertheless further amended the expedited exclusion process that had just been adopted in the Terrorism Prevention Act. In the current system that went into effect on April 1, 1997 section 235 (b) provides for the detention of asylum applicants and

their speedy screening by the INS Asylum Officer corps. Decision of an Asylum Officer to exclude an alien who requests asylum may be appealed to an Immigration Judge. The alien may contact relatives, friends and legal advisors in this country. If the Asylum Officer's decision that the person does not have a credible fear of persecution is upheld by the Immigration Judge, that ends the appeal process and the alien is put into exclusion proceedings.

This sytem is similar in nature to the one which FAIR urged, and it is one of the positive legislative developments achieved last year.

Immigrant advocacy groups and civil liberties organizations immediately filed suit to block implementation of the new law. However, they were unable to obtain an injunction against its implementation, and as of this writing, it has been in effect for three months. The INS has just issued a report based on the first three months which argues that the new process is working smoothly and effectively. Although statistics on the process are not yet reliable, the number of aliens arriving at the nation's 25 largest ports of entry who have requested asylum have numbered only about 60 per week. Of those, about 80 percent have received a favorable finding of "credible fear" and only "a handful" of the applications that have been rejected by Asylum Officers have been reversed on appeal to the Immigration Judges. The average processing time from entry to final decision on the asylum cases has been 32 days. This experience appears to justify our conviction that expedited exclusion will be effective in separating legitimate asylum claimants from aliens who are attempting to use the procedure for fraudulent entry.

In June, before this INS data was available, the Commission on Immigration Reform released its recommendations of refugee and asylum policy. Unfortunately, it failed to incorporate most of FAIR's recommendations. Most unhelpfully, it revived the concept, earlier advanced by the Clinton Administration, that expedited exclusion be limited to mass migration emergencies. With the INS now claiming success with the new ongoing system, this recommendation will hopefully fall on deaf ears. The Commission entirely sidestepped the issue of the expanding scope of asylum protection, and FAIR will comntinue to support legislative efforts to achieve a narrowed scope that will keep asylum cases to a minimum. Nevertheless, the Commission did indirectly support FAIR's call for an end to Cold War-era refugee policies, such as the Cuban Adjustment Act.

This, however, will also require congressional action. TSC