Asylum and Refugee Programs

Some recommended reforms

by William Chip

During FY 1996, 129,579 cases for asylum in the United States were filed (many of which would involve more than one person) and 455,725 cases were pending. Unless asylum opportunities for aliens who enter the U.S. without a visa are substantially circumscribed, the number of applicants will continue to overwhelm the government's ability to make prompt and accurate adjudications. Although some of the needed restrictions might require statutory change, there is much that can be done by (1) regulating the procedures for application and (2) exercising discretion in the granting of applications. The proposed rule, in its present form, is a missed opportunity in that regard.

The Attorney General's authority to grant asylum derives from [United States Code] 8 U.S.C. § 1158 (a), which provides that the Attorney General shall establish an "asylum application procedure" for aliens "physically present in the United States or at a land border or port of entry." An alien may be granted asylum only if he is a "refugee," defined by 8 U.S.C. § 1101 (a) (24) (A) as a person unable or unwilling to return to his home 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."

8 U.S.C. § 1158 (a) provides that aliens who qualify as refugees and apply for asylum "may" be granted asylum "in the discretion of the Attorney General." There is no statutory right to asylum, only a right to apply for it [*INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1986)]. Moreover, asylum may be terminated by the Attorney General if the alien ceases to be a refugee owing to a "change in circumstances" [8 U.S.C. § 1158 (b)].

Although the grant or denial of asylum is discretionary, an alien who is present in the United States may not be returned or deported to any country if the Attorney General determines that the alien's "life or freedom" would be threatened there [8 U.S.C. §1253 (h)]. Because not all forms of "persecution" constitute a threat to an alien's "life or freedom," the severity of the persecution that precludes the return of an alien under 8 U.S.C. § 1253 (h) is generally greater than what would meet the minimum eligibility requirements for asylum [*INS v. Stevic*, 467 U.S. 407, 428 (1983)].

The statutory mandate to establish an asylum procedure was part of the Refugee Act of 1980. The principal purpose of the Refugee Act was to replace "the piecemeal approach of our government reacting to individual refugee crises" with a "permanent and systematic procedure for the admission to this country of refugees" [S. Rep. No. 256, 96 Cong., lst Sess. 3 (1979)]. The "permanent and systematic procedure" for refugee admissions is governed by 8 U.S.C. § 1157, which provides that the President, in consultation with Congress, will determine the number of refugees to be admitted each year.

Although the Refugee Act mandates the establishment of an "asylum application procedure," the Attorney General is empowered with complete discretion over the granting and denial of asylum. As a practical matter, this discretion has not been exercised. Under current asylum policy any alien is permitted to remain who manages to obtain a "presence" in the United States and can establish a

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well-founded fear of persecution, without regard to how the alien acquired his "presence," and without regard to the number of aliens receiving asylum. Grants of asylum are "indefinite" and are almost never withdrawn, even when the threat of persecution has abated.

Considering this open-ended approach to granting asylum, the *1991 World Refugee Report* of the Federation for American Immigration Reform (FAIR) warned that the asylum procedure "has been expanded far beyond its intended purpose to benefit hundreds of thousands of persons who cannot satisfy the requirements for entry into the U.S. either as immigrants or refugees." For example, refugees who are not selected for admission under the refugee program can "end run" the program by entering the U.S. illegally and applying for asylum here. Even worse, aliens who are not refugees at all can use the asylum procedure as a de facto immigration lottery, betting the price of a plane ticket and a counterfeit visa on their chances of hoodwinking an asylum officer or disappearing into the woodwork while their claims are being adjudicated. Asylum fraud is being fostered and facilitated by what amounts to an overseas industry in the invention of false asylum claims and the manufacture of false entry documents.

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The legislative history of the Refugee Act explicitly states that qualification of an alien as a refugee would not guarantee resettlement in the U.S. and that Congress did not intend to create "a new and expanded means of entry" for aliens not admitted as refugees [H.R.Rep. No. 608, 96th Cong., lst Sess. 10 (1979)]. Yet, a "new and expanded means of entry" is exactly the consequence of an asylum program that signals to aliens who are ineligible to immigrate and who are not selected for admission under the refugee program that they can obtain admission anyway by entering illegally and asking for asylum.

The refugee program affords all aliens who have fled their country to escape persecution the opportunity to be selected for admission as refugees. In a number of Presidentially-designated countries, aliens threatened by persecution can apply without even leaving their country. Asylum should be reserved for the two situations to which the refugee program is applicable: (1) where the alien was legally in the U.S. when the threat of persecution arose in his own country, or (2) where the alien fled to a country other than the U.S. from a country that was not Presidentially-designated for direct refugee admissions. Aliens who flee to a country other than the U.S., where they would be safe from persecution, should not be given access to the U.S. except through the refugee program. Aliens who flee directly to the U.S. should be obligated to make their claims upon entering the U.S.

While the Attorney General has discretion to grant asylum to aliens fleeing any form or degree of persecution, holding out the prospect of asylum to all of the world's six billion people who feel threatened by persecution is a commitment that goes well beyond what can be realistically accomplished with the resources that Congress is ever likely to commit to the asylum program. To discourage illegal immigration, grants for asylum to aliens who arrive in the U.S. without a lawfully obtained visa should be limited to those whose persecution was so severe that it could not reasonably be endured. The "life of freedom" standard of 8 U.S.C. § 1253 (h) could be applied for this purpose. Moreover, if an asylum officer denies an application on the basis that the alien's "life of freedom" would not be threatened in his own country, that finding should be binding in any subsequent exclusion or deportation proceeding unless the immigration judge determines that the asylum officer's decision was arbitrary or capricious.

The basic elements of a sound and reasonable refugee/asylum policy can be summarized as follows:

• Grant asylum only to applicants who (a) are legally in the United States when the circumstances giving rise to refugee status first occur, and (b) to aliens who flee directly to the United States, *i.e.*, without traveling through another country where the alien would be safe from persecution.

• In the case of aliens who enter the U.S. without a lawfully obtained visa, limit asylum to those whose "life or freedom" was or would be threatened in their own countries.

• Deny asylum to any non-immigrant alien who enters the U.S. legally but fails to claim asylum before his term of admission expires.

• Deny asylum to any alien who enters the U.S. without a lawfully obtained visa unless he applies at the time of entry.

Requirements as to *when* an alien must apply for asylum are well within the Attorney General's authority to establish an asylum "application procedure." Limitations on *which* applicants will be granted asylum are an exercise of discretion that is also within the Attorney General's authority. Although that discretion may not be exercised in an arbitrary and capricious way, uniformly applied limitations intended to make the system workable and consistent with the refugee program are clearly lawful [*Hintopoulos v. Shaughnessy*, 353 U.S. 72, 78 (1956)].

The proposed limitations are not draconian — 8 U.S.C. §1253 (h) would continue to preclude sending an alien to a country where his life or freedom would be threatened. The limitations could be implemented on an indefinite basis, or as a temporary measure until the backlog of applications was eliminated and the integrity of the system restored. The Attorney General could retain discretion to authorize exceptions to these limitations under extraordinary circumstances. **TSC**

Alan Nelson Remembered

by Roger Conner

I note with sadness that Al Nelson passed away January 29, 1997. When he was first proposed to head the Immigration and Naturalization Service (INS) in 1981, I opposed his nomination. Nelson was an unknown, but we thought he was a powerless no-name — not what we needed at INS. We could not have been more wrong. As an individual he was personally committed to immigration control and reform. As a bureaucrat he was a well-connected, tenacious fighter for the policies he believed in. He battled all comers, whether it was the media critics of INS or the open-border advocates within his own administration.

Washington, D.C., is full of people who operate like sail boats: they constantly run with the prevailing politcial winds. Nelson was more like a power boat, moving toward his target without regard to the polls, the pundits or the powerful.

Being director of the INS during the 1980s was a thankless job. The agency was a mess and Congress kept piling on more and conflicting demands while resources were growing at a much more modest pace. Any improvements he made, and there were many, were dwarfed by the escalating demands of border enforcement and the newly adopted Immigration Reform and Control Act.

Perhaps the best measure of Nelson's personal commitment to immigration reform was what he did after leaving office. Rather than cash in on his knowledge and history by joining the immigration lawyers' lobby on the other side, he went to California and continued his work for immigration reform. Indeed, he helped ignite the most powerful grassroots rebellion on immigration issues in this half-century, Proposition 187.

We remember Al Nelson and we mourn this loss — a loss not only to his family and friends, but to the larger immigration reform movement.

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