Conference on Protection of Unaccompanied and Separated Children (UASC)  
Panel on Legal Remedies in U.S. Immigration Proceedings  
October 24, 2008, 9:00 – 10:30 AM  
Panelist Comments: Susan Schmidt, MSW

Note: This panel was organized around a series of questions directed to panel members. The questions are highlighted in bold italics, with a prepared response following.

I. What were some legal recommendations from the Seeking Asylum Alone (SAA) research?
   a. There is a need for better data collection. How can we assess legal remedies if we don’t know how children are faring?
      i. 15 federal government offices, across 4 federal agencies, are involved in some way with UASC; in the SAA research, the best statistics in the U.S. were from the Asylum Office, Department of State, and Office of Refugee Resettlement. We did not receive answers to our statistical requests from the Immigration Court, Board of Immigration Appeals, Immigration and Customs Enforcement, nor Customs and Border Patrol.
      
      ii. Publicly available data has been hard to come by. I know that the U.S. has been trying to remedy this situation, but we have not yet been able to provide data to UNHCR on child asylum seekers. From a comparative perspective, the United Kingdom presents a good practice model, publishing data on asylum seekers every quarter, including data on UASC.
      
      iii. UNHCR has been asking for data on UASC since 2006, in compiling data for its Statistical Yearbook. The next UNHCR Statistical Yearbook will have a section on UASC, scheduled to come out near the end of 2008. This document includes data from about 150 countries, and roughly 80% have provided information on child asylum applicants.
   
   b. The lack of guaranteed legal representatives is a serious flaw in the U.S. system, compromising children’s ability to seek asylum or other legal remedies.
         a. Only about 1/3 of children were represented (ranged between 10% of children represented in Miami district, to 47% of children represented in the DC/Northern VA district).
         b. 48% of represented children were granted asylum, compared to only 27% of unrepresented children (see SAA-U.S. report, pp. 188-190).
      
      ii. UK: Even though the UK employs a more child-friendly process, only 2-5% of children were granted refugee status (for 2004, 2005; see p. 14 of SAA comparative report).
iii. Without legal representation, a child in the U.S. is essentially denied access to the appeals process, since it is largely a paper process in a foreign language. The Catholic Legal Immigration Network (CLINIC) has tried to work with the Executive Office for Immigration Review (EOIR) on this.

   a. UK stats: about 12% of children’s asylum appeals cases were granted; this was lower than the adult grant rate of 19-20%

c. The importance of guardians or trusted advisors to provide the best-interest-of-the-child perspective in the absence of a parent.

   i. Why are both a guardian and an attorney needed? If your son had to go to court, you wouldn’t send him alone; if your daughter had to go speak with an attorney, you wouldn’t send her alone. The parent provides “the big picture,” the context, fills in the gaps, provides moral support; the attorney works on legal remedies, but is not supposed to act like the child’s parent. The guardian is a stand-in for that parental role.

   ii. Sometimes there are conflicts between what the child wants and what appears to be in the child’s best interests—guardians can play an important role in such situations.

   iii. The European Union (EU) countries seem to be examining guardianship issues in greater depth than the U.S.

   iv. The UK’s “Panel of Advisors” for children is sometimes held up as a model for the U.S. Personally, I don’t think the Panel of Advisors model offers sufficient protection—there aren’t enough advisors for all children, they may only meet with a child once, and they do not have a mandated role in the process.

d. Need for more child-sensitive asylum processing: in the SAA report, we specifically recommend that the U.S. affirmative asylum process be used as the primary adjudicator of children's cases, with immigration court accessed as a secondary process.

   i. A more child-friendly system already exists within our asylum system; we should figure out how to have children’s cases originate there, with immigration court as the second instance procedure.

e. We need to consider persecution from the perspective of the child; in the SAA report we discuss three general types of persecution with respect to children:

   i. Acts which constitute persecution for either an adult or a child.

   ii. Child specific persecution (e.g. child soldiers, forced child sale or marriage, child labor, child abuse, threats against street children, second children under a “one child policy”).

   iii. Harm that becomes persecution when the victim is a child, but might not rise to the level of persecution with an adult (due to a child’s sensitivity and dependence, such as aggressive questioning, slapping, shouting, threats by authorities which produce greater terror in children, forced separation from
parents).

f. Importance of child-specific training for adjudicators and others affecting children’s cases—not only asylum officers and immigration judges, but also DHS trial attorneys and CIS officers who interview SIJS applicants.
   i. Inappropriate methods with children: aggressive questioning, efforts to confuse children, over-reliance on dates with children, expecting children to have adult understandings of situations or precise memories.

g. Regarding Special Immigrant Juvenile Status (SIJS): We need to freeze the child's age at the time of application, to reduce the risk that a child will age-out of eligibility due to bureaucratic processing delays.

h. Permanent legal protections are best for children, rather than temporary forms of protection.

2. How does the U.S. compare to other countries in terms of legal remedies for children?

   a. I have been working temporarily this Fall at UNHCR in Geneva on a project with Ron Pouwels regarding processing of child asylum seekers in the European Union (EU)—these observations are primarily from this recent work.

   b. Coming from the U.S., the most obvious difference is the extent to which the EU countries build upon the foundation of the Convention on the Rights of the Child (CRC) for determining appropriate treatment of this population.

   c. And, in comparison, the extent to which we, in the U.S., do not look to the CRC for guidance. Yes, there is the odd reference, but on the whole, the CRC does not frame our debate and discussion around UASC. Working on these issues from the European perspective for the past several months, this omission is to our detriment.
      i. The CRC is a road map, but we do not use it. I say this to NGO’s, advocates such as myself, and U.S. governmental representatives.
      ii. We need to change our thinking about the CRC from why we can’t use it, to how we can use it.
      iii. We learned yesterday about the BID process, which the U.S. State Department funds for children overseas, yet, for the most part, we don’t incorporate the best interest principle into immigration processing with children inside the U.S. How can we change this, so there is more parity in our treatment of UASC inside and outside the U.S.? Why, as a country, are we more willing to incorporate a best-interests assessment for UASC outside the U.S., than for those inside the U.S.?

   d. Beyond the CRC, I have been surprised by how much the broad issues are the same between the U.S. and the EU; both the U.S. and the EU countries are wrestling with similar issues, such as:
      i. Access to the territory, including how UASC are dealt with in interdiction and fast-track procedures,
ii. Identification of UASC,

iii. Detention of children by certain states,

iv. How age assessments are done – I learned from a Dutch colleague at this conference that wrist and collarbone X-rays are used, while the UK has been moving towards a more holistic assessment,

v. Child-focused asylum processing,

vi. Long-term care arrangements,

vii. Family reunification,

viii. Return of children to their country of origin and what safeguards should be put in place before doing so.

ix. In short, the context and the specifics vary, but the broad issues are quite similar.

e. Some specific strengths and weaknesses.

i. **Good Practices in the U.S.:**
   
   o **Children between ages 0-18** are all treated as minors (unlike 16-17 year olds in Germany and in some Canadian provinces)
   
   o asylum office [lesson plan](#) a good model for other countries
   
   o Asylum Office and Immigration Court [children’s guidelines](#)
   
   o a [variety of legal options](#) –
     
     a. SIJS is a unique asset for children within the U.S. system, while at the same time there are things we can do to make it more accessible to children.
     
     b. The recent waiving of SIJS application fee is an improvement, but the simultaneous increase of other application fees undermined its impact.
   
   o Once granted, most forms of legal status are permanent (with a few exceptions); this is not the case in the UK (where status can be reviewed after 5 years) – establishing permanence is especially critical with children.

ii. **Good Practices in the EU:**
   
   o CRC is foundational
   
   o Good data collection—UK in particular
   
   o Two other observations about the UK process:
     
     o UK [asylum app](#)—special questions for children;
     
     o UK—Non-adversarial process, also true for the Netherlands
   
   o State funded legal representation is more often the norm
A lot more discussion about, and examination of, the use of guardians—looking at the different practical meanings of guardian, and the various ways that guardians are used with UASC

Allowing UASC to reunify with family in other EU countries and pursue asylum from there (UASC exempt from some Dublin II provisions)

Norwegian study: removals are discussed in the context of family tracing rather than legal expulsion—that is, what is in the child’s interests rather than what is perceived to be the government’s interests

a. Finland, Norway, Sweden, the UK, the Netherlands (with some caveats) grant a residence permit (perhaps temporary) when family cannot be traced

3. What can the U.S. learn from other countries regarding legal remedies for children?

a. See handout I prepared: “Selected List of International Reports on UASC Asylum Seekers” (a selective list of Web-available reports, most in English).

b. While the U.S. has, on paper, more legal options for children that offer the potential for more permanent protection, other countries offer at least temporary protection--such as discretionary leave to remain--to a higher portion of UASC. There are pros and cons to both approaches.

i. Canadians offer a pre-removal risk assessment (PRA) and “H & C” (Humanitarian and Compassionate leave).

ii. In the Netherlands, 1/3 of children are granted asylum, 1/3 are granted residency for being UASC without an adult caregiver to whom they can return.

iii. UK: grants discretionary or limited leave (DL) to remain (APR) -- grants three year residence permit or leave until 18th birthday, whichever is shorter.

   o UK Home Office report: “Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children” -- advocates in the UK likely take issue with some aspects of this report, but positive things that I see:

   a. Effort to comprehensively evaluate treatment of UASC

   b. Age assessment: holistic approach (not just an x-ray)

   c. Data: UK has good data, releases it quarterly; on asylum, children have low approval rates (6% in 2005) – lower than the U.S. – but 63% are granted limited leave to remain, until age 18. What can the U.S. learn from this model?

      i. We have higher child asylum approvals, and SIJS approvals, which grant permanent status – this is good.

      ii. But the UK grants a high percentage of children permission to remain, at least until age 18 – a mixed
blessing – achieves protection but not permanence.

iii. For both the U.S. and UK, how can we expand our understanding of protection needs within the refugee definition? We want to protect children, as evidenced by this conference, while at the same time governmentally we fear grants of asylum to children under novel or emerging grounds as potentially opening the “flood gates.”

iv. Germany: a toleration permit, for rejected asylum seekers (APR)

v. We learned on Wednesday that the Dutch provide legal residency to about 1/3 of rejected asylum seeking children on the grounds that the children have no one to return to in their home country.

4. What is missing, or could be improved, in U.S. legal remedies for children?

a. Approaching these issues from a best-interests-of-the-child (BIC) perspective:

i. The only BIC mention in U.S. immigration law is regarding SIJS and the requirement that a juvenile court find that it’s not in a child’s best interests to be returned to the country of origin, so BIC is not even a consideration in the immigration context but only in the juvenile court context.

b. Do we allow for children’s participation in the process itself, or in an assessment of the process? The things that stand out to children are different from the things that stand out to adults.

c. We do not have a good alternative humanitarian legal option for children who do not neatly fit into the asylum definition, but who cannot return to their country of origin for one reason or another. SIJS is a safety net for some of these children, but not all.

d. Family reunion is currently carried out from an adult’s perspective of which relationships are important (spouse & children), rather than from a child’s perspective (parents and siblings).

e. As we struggle with these issues, what kind of a system would we want if our own children were needing protection in another country? Would it look like the system we have?

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For links to Seeking Asylum Alone reports, go to:
http://www.humanrights.harvard.edu/index.php?option=com_content&view=article&id=115&Itemid=71