

No. 08-2336

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SELVIN ASael MEJILLA-ROMERO,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

**BRIEF AMICUS CURIAE OF THE UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES IN SUPPORT OF
PETITIONER'S PETITION FOR REHEARING EN BANC**

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AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The United Nations High Commissioner for Refugees [hereinafter UNHCR] is mandated by the United Nations General Assembly to provide international protection to refugees and, together with Governments, to seek solutions for the problems of refugees. *Statute of the Office of the UNHCR*, U.N. Doc. A/RES/428(v), ¶ 1 (Dec. 14, 1950). Paragraph 8 of the Statute entrusts UNHCR to supervise the application of international conventions for the protection of refugees. The 1951 *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 [hereinafter *Convention*] and 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter *Protocol*] obligate States to cooperate with UNHCR in the exercise of its mandate and facilitate UNHCR's duty of supervising the application of the *Convention* and its *Protocol*. *Convention* art. 35, ¶1; *Protocol* art. II, ¶ 1.

In 1968, the United States acceded to the *Protocol*, which incorporates by reference all the substantive provisions of the *Convention*. Congress passed the 1980 Refugee Act with the explicit intention to bring the United States into compliance with its international obligations under the *Protocol* and *Convention*.

The views of UNHCR are informed by almost 60 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees throughout the world and has staff in some 120 countries. UNHCR's interpretation of the provisions of the *Convention* and its *Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees.

This case involves the interpretation of the refugee definition in the *Convention* and its *Protocol* as implemented in United States law at section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42). In particular, this case concerns the appropriate application of the refugee definition to an asylum-seeker who was a child at the time the acts of persecution against him were committed and at the time he first testified at his asylum hearing before an immigration judge. Accordingly, it presents issues central to the mandate of UNHCR.

International standards and United States policies recognize that children seeking asylum have special needs and that their claims must be considered from a child-sensitive perspective, taking into account the age, maturity, vulnerability, and psychological state of the child both at the time the harmful acts were experienced or feared as well as at the time the claim

is presented and assessed. The record in this case does not reflect that a child-sensitive approach and analysis were employed. In the decision of this Court, the dissenting opinion addresses the errors made in assessing the claim and the evidence in the record supporting the dissent's analysis. *Mejilla-Romero v. Holder*, 600 F.3d 63 (1st Cir. 2010) (Stahl, J., dissenting) [hereinafter *Dissent*]. The *Dissent* recognizes the failure of the courts below to adequately address both the claim presented as well as the evidence in the record supporting the claim. The *Dissent* acknowledges that the essence of the claim is persecution on account of the political opinion imputed to the child applicant based on his family's long history of political activism in the land reform movement in Honduras.

In this brief, UNHCR will address the legal basis for and requirements of a child-sensitive approach regarding both the substantive and procedural aspects of the claim.¹

¹ UNHCR submits this brief amicus curiae to provide guidance to the Court on the relevant international standards and not to offer an opinion on the merits of the applicant's claim.

ARGUMENT

I. INTERNATIONAL PRINCIPLES RELATING TO CHILD ASYLUM-SEEKERS ARE ESSENTIAL TO A FAIR AND ACCURATE ASSESSMENT OF THEIR CLAIMS.

UNHCR has long recognized the specific protection needs of children in asylum procedures. The first and most comprehensive interpretative instrument issued by UNHCR, the 1979 *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*,² U.N. Doc. HCR/IP/4/Eng/REV.1, (1979, re-edited Jan. 1992) [hereinafter *Handbook*], addressed some of the particular needs of children seeking refugee protection. Most recently, recognizing the ever-growing number of children seeking protection and the increasing need for more specific guidance relating to assessing their claims, in 2009 UNHCR issued the *Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* [hereinafter *UNHCR Guidelines*] available

² UNHCR issued the *Handbook* at the request of its Executive Committee to provide States guidance on the application and interpretation of the *1951 Convention* and *1967 Protocol*. The United States Supreme Court ruled that, while not legally binding, the *Handbook* provides “significant guidance,” *INS v. Cardoza-Fonseca*, 480 U.S. 421 at 439 n.22 (1987), and may be a “useful interpretive aid,” *INS v. Aguirre-Aguirre*, 526 U.S. 415 at 427 (1999), in construing the *Protocol* and in giving content to the obligations established therein. See also *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting the BIA must be mindful of “the fundamental humanitarian concerns of asylum law” and referencing the *Handbook*).

at <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>. “These Guidelines offer substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner.” *Id.* ¶ I.1.

International standards require that when the asylum applicant is a child, the refugee definition must be interpreted in a child-sensitive manner to ensure protection is not denied in error because of failure to take into account children’s unique experiences of persecution or to properly evaluate the child’s account of the events that give rise to the asylum claim. *UNHCR Guidelines* ¶¶ 1, 2. Other factors, such as “a child’s stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status.” *Id.* ¶ 4 (citation omitted).

The United States has likewise recognized the unique vulnerability and circumstances of children and the need for guidance concerning the appropriate procedures for child asylum-seekers. This guidance includes the 1998 *Guidelines for Children’s Asylum Claims*, U.S. Department of Justice, Immigration and Naturalization Service (December 10, 1998), issued by legacy Immigration and Naturalization Service [hereinafter *INS Guidelines*] and the *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (U.S. Department of Justice (Sept. 16, 2004), in effect at the

time of the immigration court hearing in this case, updated as *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (U.S. Department of Justice (May 22, 2007) issued by the Executive Office for Immigration Review [hereinafter *EOIR Guidelines*]). Like the *INS Guidelines*, the *EOIR Guidelines* are not legally binding³ but offer guidance in conducting hearings and assessing claims of child asylum-seekers. In fact, the 2004 *EOIR Guidelines* state as a basic principle that “[e]very immigration judge is expected to employ child sensitive procedures whenever a child respondent . . . is present in the courtroom.” *Id.* ¶ III.A. (emphasis added).

II. CHILD-SPECIFIC FORMS AND MANIFESTATIONS OF PERSECUTION MUST BE RECOGNIZED IN ASSESSING THE ASYLUM CLAIMS OF CHILDREN

While the term “persecution” is not expressly defined in the *Convention* or *Protocol*, it has long been recognized to encompass serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable situations, as assessed with regard

³ In 2008, the United States Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457 (2008), which, *inter alia*, recognizes the current gaps in substantive and procedural protection for children seeking asylum U.S. immigration law and calls for binding guidance addressing these gaps. This guidance has yet to be issued but the intent of Congress is clear that the special needs and circumstances of children must be taken into account in assessing their protection claims.

to the age, opinions, feelings and psychological make-up of the applicant. *See, e.g., UNHCR Handbook* ¶¶ 51-53; *UNHCR Child Guidelines* ¶ 10; *UNHCR Executive Committee Conclusion No. 107, Children at Risk* (LVIII) (2007), ¶ (g)(viii) (recommending that adjudicators “consider an age and gender-sensitive application of the 1951 Convention through the recognition of child-specific manifestations and forms of persecution . . .”).⁴

Persecution in the context of a child-sensitive approach encompasses violations of child-specific rights such as protection from all forms of physical and mental violence, abuse, neglect and exploitation. *UNHCR Guidelines* ¶ 13 (citation omitted). In addition, children may be more susceptible to harm than adults and may experience the harm differently.

The *UNHCR Guidelines* state at ¶ 15:

Actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.

Children are also more likely to be emotionally affected by hostile situations. Memories of traumatic events may linger in a child’s mind and

⁴ The Executive Committee is an intergovernmental body that advises UNHCR in the exercise of its protection mandate. It is currently comprised of 79 Member States of the United Nations, including the United States.

may result in on-going, long-term psychological harm. *Id.* ¶ 16. Even where the applicant’s experience is comprised of isolated incidents of lesser forms of harm, the cumulative effect of these incidents could give rise to persecution. *Id.* ¶ 15 (citation omitted).

It is essential that persecution be viewed from the child’s perspective. “[T]o assess accurately the severity of the acts and their impact on a child, it is necessary to examine the details of each case and to adapt the threshold for persecution to that particular child.” *Id.*

Violence such as physical assaults and attacks with a machete could constitute persecution for anyone, especially when the targeted individual is a child. A fear of further violent attacks that is so great that the child must remain indoors for his safety and well-being, not even leaving to attend school, could also amount to persecution against a child.

Children are also more sensitive to acts that target close relatives and witnessing such acts may traumatize a child as well as give rise to a well-founded fear of persecution, even if the act was not directly targeted against the child. *Id.* ¶ 17 (citation omitted). Being exposed to the murdered body of a close relative whose throat was slashed with a machete could constitute just such a form of trauma and fear of persecution. Witnessing the violent

destruction of the child’s home is another form of traumatic event that could give rise to a fear of persecution.

III. THE REFUGEE CONVENTION GROUNDS MUST BE ASSESSED FROM THE PERSPECTIVE OF THE CHILD.

Just as a child-sensitive perspective is essential in assessing whether the harm rises to the level of persecution, it must also be applied in determining whether the well-founded fear exists “for reasons of” or, in other words, “on account of” one or more of the five *Convention* grounds.

It is firmly established under international norms that, when assessing the reasons for a fear of persecution, “[i]t is for the [adjudicator], when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition [] is met with in this respect.” *UNHCR Handbook* ¶ 67.

The *Convention* grounds are not mutually exclusive, that is, more than one ground may apply in any given case, and the grounds may also overlap. *Id.* For example, in the context of a political opinion that is imputed because of the views of other family members, there may also be a claim based on “membership of a particular social group” where the family is the social group or child-based social groups can be identified, for example, “children of families involved in land disputes.”

UNHCR has long supported the principle that a political opinion that has been or would be imputed to an asylum-seeker can constitute the basis of a claim for protection. *UNHCR Handbook* ¶ 80.

Consistent with U.S. law and international standards, this Court ruled as early as 1990 that “an imputed political opinion, whether correctly or incorrectly attributed, can constitute a ground of political persecution within the meaning of the Act.” *Alvarez-Flores v. INS*, 909 F.2d 1, 4 (1st Cir. 1990) (citations omitted); *see also Cuko v. Mukasey*, 522 F.3d 32, 38 (1st Cir. 2008); *Matter of S-P-*, 21 I. & N. Dec. 486, 489 (BIA 1996) (“Persecution for 'imputed' grounds . . . can satisfy the 'refugee' definition.”) (citation omitted).

A child’s inability to articulate the opinion or views of a parent does not change the fact that the views of the parent could be attributed to the child. The *UNHCR Guidelines* are explicit in this regard, stating in paragraph 46:

[T]he views or opinions of adults, such as the parents, may be imputed to their children by the authorities or by non-State actors. This may be the case even if a child is unable to articulate the political views or activities of the parent, including where the parent deliberately withholds such information from the child to protect him/her. In such circumstances, these cases should be analysed not only according to the political opinion ground but also in terms of the ground pertaining

to membership of a particular social group (in this case, the “family”).⁵

Similarly, the *UNHCR Handbook* provides at ¶ 218: “The circumstances of the parents and other family members, including their situation in the minor’s country of origin, will have to be taken into account.”

As discussed in the dissenting opinion, the record in this case indicates the child’s family has a long history of involvement in the land reform movement in Honduras and that the government and many others in Honduran society view proponents of land reform as political “enemies,” that the family members who fled Honduras before the child did had also faced persecution based on their political opinion and that the child and his grandmother, with whom he lived, were the target of political epithets. *Dissent* at 50. Yet there is no indication that the court below considered a claim based on imputed political opinion.

⁵ Although the “membership of a particular social group” ground is not addressed in this brief, it is important to note that family relationship has been recognized by the Board of Immigration Appeals in its seminal decision on this issue, *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), and may be an appropriate basis to consider in the case of a child asylum applicant. Other potential particular social groups that may be applicable in children’s claims include, for example, age, innocence, relative immaturity, impressionability and evolving capacities. *UNHCR Guidelines* ¶ 49.

IV. THE PRESENTATION OF THE ASYLUM CLAIM MUST BE ASSESSED FROM THE PERSPECTIVE OF A CHILD AND, AS IN EVERY CASE, THE ENTIRE RECORD MUST BE CONSIDERED.

Every request for asylum depends on a full and fair assessment of all the evidence in the record. When the applicant is a child, this requires a child-sensitive approach to the presentation of the claim as well as to any supporting evidence that may be provided. The *UNHCR Handbook* states:

[I]t is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded [and an adjudicator] will have to come to a decision as to the well-foundedness of the minor's fear on the basis of *all* the known circumstances, which may call for a liberal application of the benefit of the doubt.

Id. ¶¶ 214 and 219 respectively (emphasis added).

Children cannot be expected to provide adult-like accounts and may have difficulty articulating their fears. *UNHCR Guidelines* ¶¶ 2, 72; 2004 and 2007 *EOIR Guidelines* ¶ V.F. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. *UNHCR Guidelines* ¶ 72; 2004 and 2007 *EOIR Guidelines* ¶ V.F. When persecution is experienced by a child at a young age, these difficulties are compounded because the memories of these experiences are formed at an innocent and impressionable stage of development. Trauma itself can have a

significant impact on the ability of anyone to present testimony—especially children. *UNHCR Guidelines* ¶¶ 16, 72.

An adjudicator must take into account the unique combination of factors presented, including the child’s personal, family and cultural background. *UNHCR Guidelines* ¶ 71 (citation omitted). For example, if a thirteen-year-old child testifies to having experienced traumatic events between the ages of five and eleven and submits evidence of suffering from Post Traumatic Stress Disorder at the time of giving testimony arising from these past events, the adjudicator should consider these strong indications that a child may be suffering long-term effects of the traumatic experiences. As such, the claim presented must be assessed with these factors prominently considered.

It is a fundamental principle that an adjudicator must consider all evidence in the record. Although testimony alone can be sufficient to support a claim for asylum, where corroborating evidence is submitted, the claim must be assessed on the entirety of the record. This is especially critical in the context of a child applicant. Children may have limited knowledge of country conditions or family circumstances, may be unable to

fully explain the reasons for the persecution or may not fully comprehend their vulnerability.

This Court has affirmed this principle, ruling that relying on oral testimony while ignoring other supportive evidence in the record is reversible error. *Mukamusoni v. Ashcroft*, 390 F.3d 110, 120-22 (1st Cir. 2004). In *Mukamusoni*, this Court held that the failure to evaluate the documentary evidence “unreasonably eviscerated the applicant’s attempt to establish the objective element of her asylum claim.” *Id.* at 124. More recently, this Court ruled that “[a]n IJ may not simply ignore substantial testimony and document proof.” *Pan v. Gonzales*, 489 F.3d 80, 87 (1st Cir. 2007).

As in *Mukamusoni* and *Pan*, the record in this case indicates a failure to consider the entire record when evaluating the applicant’s claim.⁶ And as in *Mukamusoni* and *Pan*, this failure constitutes reversible error.

⁶ The *Dissent* makes numerous references to supporting evidence in the record establishing the family’s long involvement in political activism in their rural town in the province of Olancho, Honduras, which includes: an affidavit from an expert on land conflicts in Olancho province; an affidavit from a Honduran attorney on the history of land reform struggles in Olancho province; the account in the applicant’s affidavit of his family’s long-running problems related to land issues and politics. *Dissent* at 56-57. See *IJ Dec.* at 11-13 for a full list of exhibits.

CONCLUSION

For all the foregoing reasons, we respectfully urge this Court to grant rehearing en banc.

Respectfully submitted,

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AMICUS CURIAE IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because it contains 3,161 words and does not exceed the 15 page limit for Petitions for Rehearing En Banc, excluding the parts exempted by Fed. R. App. P. 32.

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s/ pamela goldberg
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CERTIFICATE OF E-FILING AND SERVICE

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