

The Need for Asylum Reform in America

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Abstract

Purpose: This thesis examines asylum practices in the United States and compares them to practices abroad in order to determine recommended improvements to the U.S. asylum process.

Sources: The sources used throughout this paper are a combination of scholarly articles, government documents, and data compiled by international human rights groups such as Immigration Equality, Asylum Information Database.

Findings: The U.S. Asylum process features a number of policies that create unnecessary hurdles for asylum-seekers, such as: unnecessary restrictions on legal counsel, a lack of translator services, a one year bar to applying for asylum, and a decentralized approach to dealing with sexual orientation and gender-based asylum claims.

Format: The paper structure is divided into three main sections:

1. A History of Asylum Policies and Practices;
2. An Overview of Asylum in America; and
3. Asylum Policies and Practices Abroad

A shorter fourth section presents the researcher's analysis and suggested improvements.

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List of Abbreviations

Chapter 1:

I.R.O.- International Refugee Organization

The Convention- The Convention Relating to the Status of Refugees of 1951

U.N.H.C.R.- United Nations High Commissioner for Refugees

The Protocol- The Protocol Relating to the State of Refugees of 1967

Chapter 2:

D.P.A.- Displaced Persons Act of 1941

I.N.A.- Immigration and Nationality Act of 1952

I.N.S.- Immigration and Nationality Service

E.O.I.R.- Executive Office for Immigration Review

U.S.C.I.S.- United States Citizenship and Immigration Services

G-28- Notice Of Entry of Appearance as Attorney or Accredited Representative

L.G.B.T.Q.- Lesbian, Gay, Bisexual, Transgender, Questioning

N.O.I.D- Notice of Intent to Deny

I.C.E.-Immigration and Customs Enforcement

B.I.A.- Board of Immigration Appeals

Chapter 3:

N.A.M.- New Asylum Model

I.O.U.- Interpreter's Operations Unit

A.P.I.- Asylum Policy Instructions

I.L.P.A.- Immigration Law Practitioner's Association

R.S.D.O.- Refugee Status Determination Officer

1. A History of Asylum

To understand the current legal system governing asylum-seekers and refugees better, it is important to grasp the lengthy evolution and history these laws and concepts have endured. Pinpointing one precise moment as the creation of the right to asylum is not something easily done. Ancient histories quickly merge with myth, making a clear distinction impossible.

Sanctuary-Based Asylum

The right to asylum originated at its most basic level as the right to seek protection or sanctuary. As such, these forms of primitive asylum are strongly tied to religion and physical location. In many instances, sanctuary was a protection that only existed within the confines of a church or location of religious significance.

One of the first well-documented practitioners of a sanctuary-based asylum, was ancient Greece. The word “asylum” is derived from the Greek word “asylia.” In Ancient Greece, sacred places such as altars, statues, and temples had the privilege of granting asyilia, or sanctuary, to those who fled to them. While only certain holy places were legally authorized to provide asyilia in Ancient Greece, many other holy places were religiously authorized to provide sanctuary. This lapse between the legal and religious systems often resulted in the legal officer utilizing nonphysical means to compel individuals to leave.¹

Another ancient practitioner of asylum was the Roman Empire. The asylum practices of Ancient Rome were also sanctuary-driven, but with several key differences. First, a Roman citizen did not have a right to sanctuary for domestic wrongdoing or criminal activity. Second, asylum practices in Ancient Rome featured an international component where accused citizens from other states could avail themselves of asylum at the temple of Asylaesus, a temple located within Rome.²

The practice of sanctuary based-asylum persisted into the medieval era long after both Athens and Rome fell. In 597 AD, King Ethelbert of Kent authored the first set of Anglo-Saxon laws dealing with asylum. In this set of laws he included a protections of the “gyrth” or church grounds. Violation of a church’s sanctitude carried a punishment twice as severe as an “ordinary breach of the peace.”³ From this

¹ William Smith. *Dictionary of Greek and Roman Antiquities*. (Boston: Little, Brown, and Company, 1870) 165.

² Ibid. 165-166.

³ S. Prakash Sinha. *Asylum and International Law*. (The Hague, Netherlands: Martinus Nijhoff, 1971) 14.

original law, church-based asylum quickly became common practice in England. Shortly after King Ethelbert's protection of gyth was issued, King Ine of the West Saxons further formalized asylum practices. Under these regulations, two separate levels of sanctuary evolved through common law. The first applied to all churches and granted protections only within the church building. The second, given only to specially designated churches, gave protection throughout the entire church complex. Once persons sought refuge they were under the supervision of the of the highest ranking clergyman. They would have forty days of sanctuary at which point they were given two options. The accused could surrender themselves to the secular authorities and stand trial or confess guilt and exile themselves from the kingdom. If a person who chose exile and returned to the kingdom, he or she would be executed.⁴

As both of these options were undesirable, many asylum-seekers would flee the sanctuary of the church prior to the forty-day time period. Another common option was to refuse to make the decision. Despite the forty-day limit, it was unusual for legal authorities to breach the confines of the church to bring an accused person to custody. If the accused refused to decide between his two legal options, the church officials would often stop providing that person with food and drink. Nothing legally required that the church do this; however, the church was very closely tied to the crown. Allowing for suspected criminals to remain within their sanctuary for longer than the legally allotted time would have compromised whose relationship.⁵

This system of sanctuary-based asylum for domestic criminals would begin its demise when Henry VIII amended the existing legal framework so that only individuals suspected of committing a list of lesser crimes were eligible for this sort of sanctuary protection. In 1623, King James I abolished asylum for domestic criminals completely. Thus marking the end to the widespread practice of sanctuary-based asylum in Europe.⁶

Religious Asylum

As the medieval period passed, and the Protestant Reformation dominated Europe, asylum took on a new meaning and purpose. As opposed to protecting domestic criminals, asylum practices of this era were designed to protect religious minorities. At this point Europe was dominated by monarchies with state-

⁴ Ibid. 14-15.

⁵ Ibid.

⁶ Phil Orchard. *A Right to Flee*. (Cambridge, UK: Cambridge University Press, 2014) 49-51.

sponsored religions. Those practicing a minority religion were often forced to convert or face harsh persecution. In most instances Catholic nations would open their immigration processes to Catholics fleeing persecution in their homeland, while Protestant nations would open their immigration processes to Protestants fleeing persecution in their homeland. For example, in France, an entire ethno-religious group was forced to flee their homeland. The French Huguenots were practitioners of the Protestant Reformed Church of France, a church critical of Catholicism. As the Huguenot movement grew and expanded, relations between the Huguenots and the French-Catholic Government grew tense. In 1685, Louis XIV issued the Edict of Fontainebleau, which made Protestantism illegal. After this edict, as many as 1,000,000 Huguenots fled their homeland to seek protection in neighboring Protestant governments. Their destinations included the North American Colonies, Switzerland, the Netherlands, and England. England alone welcomed as many as 50,000 French Huguenots. Because of the nature of immigration practices at this time, many French Huguenots simply fled France and relocated; however, a number of immigrants, particularly noblemen and wealthy landowners, went through official processes and received religious asylum.⁷

The Foundations of Political Asylum

Drafted during the heart of the French Revolution, the French Constitution of 1793 included the first constitutional protections for a right to asylum. Section 120 of the document states: “[France] serves as a place of refuge for all who, on account of liberty, are banished from their native country.” This Constitution had little measurable impact on the citizens of France or those wishing to claim asylum within its borders. While the document was passed by the drafting convention and ratified through democratic means, implementation was postponed until a time of peace. By that time, the French Constitution of 1795, a less liberal document, had passed the Convention and was implemented. The more conservative 1795 version would only remain the governing document for less than five years before Bonaparte began his ascendance to power. Though the French Constitution of 1793 had only a small temporary effect on the French government and legal system, the document would be relied up on in France’s subsequent constitutional debates.⁸

⁷ Gunther Plaut. *Asylum: A Moral Dilemma*, (Westport, CT: Praeger Publishers, 1995) 38-41.

⁸ Mandan Gupta, *Government of the Fifth Republic of France* (Central Book Depot: London, 1963), 14.

It would be roughly 20 years later before political asylum and non-extradition would be discussed again by a European power. This time it would be in the halls of the English Parliament. After a number of political fugitives had been extradited to the Spanish government, Lord Castlereagh on the floor of the House of Lords stated: “There can be no greater abuse of the law than by allowing it to be the instrument of inflicting punishment on foreigners who have committed political crimes only.”⁹ Moving into the 1830s and through the remainder of the 1800s, non-extradition of political criminals became more and more commonplace. The acceptance or denial of these requests was largely based on the frequently changing political alliances. Friendly governments would extradite political fugitives to their homeland while unfriendly governments would not.¹⁰

As social contracts gained popularity, and European monarchs ceded more power to the citizenry, the asylum process began to incorporate more protections for unpopular political opinions. In many instances the asylum-seekers were members of the ruling class seeking protection after the lower classes had turned against them. One prominent example of a monarch seeking political asylum is that of Kaiser Wilhelm II. At the end of WWI, the Kaiser was largely blamed for the violent and deadly war. His kingdom was being divided, and civil war was eminent. He abdicated both of his imperial thrones in November 1918. Article 227 of the Treaty of Versailles, completed in 1919, called for the prosecution of the former Kaiser for war crimes. At this point he been granted asylum in the Netherlands, and Queen Wilhelmina refused to extradite him.¹¹

Post World War II and the path to Modern Asylum

World War II left Europe ravaged and shocked. Millions of Jews, Slavs, Romani, and Ukrainians were systematically murdered, and millions more were displaced. Many of those who managed to survive the war no longer felt at home in Europe. Hundreds of thousands of European Jews relocated to Israel, North America, and Africa. In the aftermath of the war, multiple stories surfaced of large groups of Jews and other targeted peoples who managed to reach the borders of Allied territories but were turned away and

⁹ S. Prakash Sinha. *Asylum*, 172-174.

¹⁰ *Ibid*, 175.

¹¹ John Rohl. *Kaiser Wilhelm II: A Concise Life*. (Cambridge, UK: Cambridge University Press, 2014) 28-30.

sent back to land controlled by the Axis. The need for a comprehensive and uniform policy concerning refugees and asylum seekers had never been more needed.¹²

In the immediate aftermath of the War, three nations enshrined a right to asylum in constitutions that would have lasting impacts. The first to do so was France. In Paragraph 4 of the preamble of the French Constitution of 1946, France ensured asylum protections to “Any man persecuted in virtue of his actions in favour of liberty...[within] the territories of the Republic.”¹³ While this Constitution would later be replaced by the French Constitution of 1958, all portions of the 1948 preamble were adopted through the 1958 preamble.¹⁴

While France’s decision to redraft its constitution was largely voluntary, nearly every axis power had to reframe its governing documents in order to comply with minority rights requirements of the Paris Treaties of 1947. Both Italy and Germany included explicit protections of the right to asylum. The Italian Constitution of 1948 stated in Article 10, section 3 that: “An Alien who is denied the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his or her own country has the right of asylum in the territory of the Italian Republic in accordance with the conditions established by law.”¹⁵ While the German Basic Law of 1949 ensures that: “Persons persecuted on political grounds shall have the right of asylum.”¹⁶ One very important factor in the constitutional language of France, Italy, and Germany is that the asylum-seeker must have already been persecuted or had their rights curtailed prior to seeking protection.

On April 20, 1946 the International Refugee Organization (I.R.O.) was established mainly to deal with the large number of refugees who were created by World War II. The organization worked as a specialized agency of the United Nations, and its constitution was adopted by the U.N. General Assembly on December 15, 1946. Within this Constitution, the first international definition was provided for a refugee; however, it specifically blocked those of Axis dissent from inclusion. This specialized agency replaced the existing United Nations Relief and Rehabilitation Administration that dealt with rehabilitating war-torn areas and providing humanitarian relief to civilians in areas of war. The I.R.O. managed to

¹² Bernard Wasserstein, “European Refugee Movements After World War Two,” BBC, February 2, 2011, http://www.bbc.co.uk/history/worldwars/wwtwo/refugees_01.shtml.

¹³ French Constitution of 1946, Preamble, Sec. 4.

¹⁴ Constitution of France, Preamble, Sec. 1.

¹⁵ Constitution of Italy, Art. 10, Sec. 3.

¹⁶ Basic Law of Germany, Art. 16a, Sec. 1-5.

rehabilitate 10 million of the 15 million displaced persons within Europe. However, the I.R.O. was designed to fix a very specific problem; and, as such, it focused on practical goals as opposed to determining universal international guidelines for refugee and asylum cases.¹⁷

In 1951 diplomatic proceedings in Geneva resulted in The Convention Relating to the Status of Refugees (the Convention) and the Office of the United Nations High Commissioner for Refugees (U.N.H.C.R.), which replaced the I.R.O. In addition to creating guidelines for the treatment of refugee and asylum cases, the Convention also provided the legal language used to define refugee and asylum cases today. Pursuant to the Convention, a refugee or asylum-seeker is a person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁸

One key clause in the language adopted by the Convention was “a well founded fear.” This meant that unlike the constitutional provisions discussed earlier, these conventional protections worked prior to persecution taking place.

Two components of the Convention severely limited its applicability. Due to Article I (B) 1 and Article I (B) 2 of the Convention, a contracting state had the option to apply the regulations of the Convention to refugees from Europe only. This clause allowed the contracting nation to choose between the following language for the definition of refugee quoted previously: "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1 January 1951." The date attached in the definition also severely limited the application of the Convention. This means that the signatories of the Convention are not bound to follow the guidelines for refugees or asylum-seekers who were displaced after January 1, 1951 or from homelands outside of Europe.¹⁹

For those refugees who do qualify, the Convention contains a set of protections for refugees as well as a set of obligations that the refugee has to his or her protecting country. As the Convention is a document that is meant to have a broad application, it does not insure a list of defined rights. Instead, it

¹⁷ Louise Holborn, *International Refugee Organization: A Specialized Agency of the United Nations 1946-1952*. (London, UK: Oxford University Press, 1956) 20-29.

¹⁸ United Nations Convention on the Status of Refugees, Chap. 1, Art. 1, Sec. A.

¹⁹ Ibid.

insures the same level of rights for a refugee as a foreign national within the borders of the protecting nation as a base level. Under the Convention, a refugee is guaranteed rights to mobility, work, housing, public assistance, education, and access to court.²⁰ In turn, refugees have the obligation to follow the laws of his or her host country.²¹ If the refugee violates the laws of the protecting nation in a particularly serious manner or becomes a threat to his or her community, the protecting nation may refoul the individual. However, the refugee is entitled to the same level of due process as other noncitizens in a similar situation. A refugee must have the ability “...to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority...” The only exception to this requirement of a fair legal proceeding is in cases where national security is an issue.²²

Under the Convention, the status of refugee is not permanent. If the basis for which the refugee originally sought refuge or asylum ceases to exist, the protecting country has grounds to return the refugees to their homeland. Refugees may also choose to repatriate of their own fruition.²³

In total 144 nations became signatories to the 1951 Convention. Although the United States had a delegate participate in the talks that resulted in the Convention, it did not become an official signatory to the agreement.²⁴

Due to changing political landscapes in places outside of Europe and after 1951, world leaders reconvened in 1967 to fix these limitations to the Convention. Meeting in New York at the current United Nations Headquarters, the talks resulted in the 1967 Protocol Relating to the Status of Refugees (the Protocol). The Protocol removed the temporal and geographic constraints of the Convention so that it would also apply to modern refugees. A provision was included that grandfathered in nations that had previously been using the definition that limited refugees to Europe only under Article I (B) 1.²⁵ Despite this inclusion, there were two parties to the Convention who did accede to the Protocol: Madagascar and Saint Kitts and Nevis. On the other hand, the United States, Venezuela and Cape Verde all acceded to the

²⁰ Ibid. Chap. 2-5.

²¹ Ibid. Chap. 1, Art. 2.

²² Ibid. Chap. 2.

²³ Ibid. Chap. 1, Art. 1, Sec. C

²⁴ United Nations, “States Parties to the 1951 Convention and its 1967 Protocol,” *UNCHR, N.D.* <http://www.unhcr.org/3b73b0d63.html>.

²⁵ United Nations Protocol on the Status of Refugees

Protocol without acceding to the Convention.²⁶

The Protocol marks the last international agreement on practices regarding asylum and refugee status.

The History of Asylum in the United States

Like most of the Western World, the United States' legal code made no distinction between refugees and immigrants prior to World War II. The first legislation to make such a distinction was the Displaced Persons Act of 1948 (D.P.A.), which was designed to deal with the large influx of people fleeing post-war Europe. The D.P.A. allowed for 200,000 displaced persons to enter the United States each year for a period of four years. In addition to meeting the definition for a refugee outlined by the I.R.O., additional requirements had to be met before a refugee qualified under the D.P.A. These requirements tied the refugee directly to the actions of WWII. Apart from the 200,000 refugees granted per year, the D.P.A. allowed for 2000 traditional immigrant visas to be issued to displaced persons who qualified under the act and 3000 non-quota visas issued to eligible displaced orphans.²⁷

Following the D.P.A., which expired in 1952, Congress passed the Immigration and Nationality Act (I.N.A.) of 1952. Under the I.N.A. of 1952, the previous national-origin quota system was upheld without any exceptions for cases of refugees or displaced persons. Because of this, President Truman vetoed the bill. Congress would override this veto in both houses. However, President Truman was successful in securing the Refugee Relief Act of 1953, which expanded the quotas for Southern Europe to allow for more refugees and displaced persons. As this was in the heart of the Cold War, refugee status was used largely as a political tool and almost exclusively offered to those fleeing communist-controlled states.²⁸

The Immigration and Nationality Act underwent a number of amendments over the next decades that greatly altered the law's original purpose and incorporate lasting refugee and asylum policy into the law itself. In 1965, the national-origin quota system was replaced by a preferential system based on the immigrant's skills, talents, and

²⁶ United Nations, "States Parties to the 1951 Convention and its 1967 Protocol,"

²⁷ Displaced Persons Act, S. 224; Pub.L. 80-774; 62 Stat. 1009.

²⁸ Keith Fitzgerald. *The Face of the Nation: Immigration, the State, and the National Identity* (Sandford, CA: Stanford University Press, 1996) 211-215.

familial relationship with U.S. Citizens. Under the 1965 regulations, the status of refugee was a preference category within the system, and refugees counted toward the traditional immigration ceilings.²⁹

In 1980, the Refugee Act eliminated the refugee preference category and incorporated a separate annual ceiling for refugees apart from mainstream immigration. It enabled the President and Congress annually to alter the number of refugees allowed to enter the country, while giving additional authorization to increase that number due to emergency situations. The Refugee Act is also responsible for codifying the requirements of the 1967 United Nations Protocol and streamlining US refugee and asylum policy. In order to be granted asylum or refugee status, a person must prove a “history or well-founded fear of persecution based on account of race, religion, nationality, membership in a particular social group, or political opinion.”³⁰

One significant component of the law was its inclusion of specific asylum practices. For the first time in U.S. history, national legislation had been passed to dictate asylum procedures. Under the Refugee Act, the Attorney General is charged with developing procedures to determine the legitimacy of asylum claims regardless of the legal status of the asylum-seeker. The law also clarifies the difference between refugees and asylum-seekers.

While both groups of individuals are very similar, there is a clear difference. An asylum-seeker is someone who is already “present in the United States or at a land border or port of entry,” when his or her claim is initiated. Conversely, a refugee is someone

²⁹ Edward Kennedy. “The Refugee Act of 1980,” *International Migration Review* 15, No. ½, (1981): 141-156.

³⁰ *Ibid.* 141.

physically outside of the United States who has fled his or her homeland seeking refuge within the United States.³¹

The Refugee Act of 1980 marks the last successful and significant reform of asylum and refugee practices in the United States. While the United States is effectively in compliance with the Convention, it has still not signed the document.

³¹ Ibid. 143.

2. Current Asylum Policies and Practices in the United States.

The Refugee Act of 1980 brought the United States into agreement with the 1967 Protocol in word only. After its passage, lawmakers and government bureaucrats would have the responsibility of setting up procedures and rules to transition the current system. The implementation of the Act would result in a flawed and slow rollout.³² One reason for the largely botched implementation was the fact that Congress was not expecting such a surge in asylum applications. In 1979 there were 5,801 applicants. A year and a half after the Refugee Act was passed, an astounding 53,000 asylum applications had been completed.³³ Another reason implementation was tricky was that, by nature of its purposeful vagueness, the Act gave much discretion to both the Attorney General, as well as the Immigration and Nationality Service (I.N.S.).³⁴

For its role in creating implementation procedures, the I.N.S. largely pawned off decision making to regional directors, giving them a simple framework with uniform paperwork.³⁵ However, the Justice Department took a more active role in restructuring, establishing the Executive Office for Immigration Review (E.O.I.R.) in 1983. The E.O.I.R. oversees all legal proceedings concerning immigration. This includes 235 immigration judges in 59 immigration courts across the nation, the Board of Immigration Appeals, which oversees all immigration related appeals, and the Chief Administrative Hearing Officer, which handles immigration related issues that do not involve deportation threats such as employer sanctions for illegal hiring of undocumented immigrants.³⁶

United States Citizenship and Immigration Office

Before any part of the asylum process can be initiated, the claimant must be physically present within the United States. If an individual has a fear or history of persecution based on the protected grounds but is incapable of reaching the United States that case would fall under a separate process and set of rules discussed later in this chapter.³⁷

³² Johnathan Nelson and Sheri Rickert. "The Implementation of the Refugee Act After A Decade of Experience," (Lawyers Committee for Human Rights, New York, 1990), 1-14.

³³ Richard Preston. "Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and International Obligations?" *Maryland Law Review* 45, no. 1: 94.

³⁴ Nelson and Rickert. "Implementation." 64.

³⁵ *Ibid.* 8-10

³⁶ "Background Information," *Department of Justice, Executive Office of Immigration Review*, n.d., <http://www.justice.gov/eoir/about-office>.

³⁷ "Refugees and Asylum," *U.S. Citizenship and Immigration Services*, September 1, 2011, <http://www.uscis.gov/humanitarian/refugees-asylum>

Once the individual has made his or her way into the United States, through legal or illegal means, the next step is completing the I-589 Application for Asylum and for Withholding of Deportation and turn it into the United States Citizenship and Immigration Services Office (U.S.C.I.S.) closest to the applicant. The form is thirteen pages long and is designed to provide the applicant with an opportunity to make his or her case for asylum. Within the form, the applicant can jointly apply for asylum with a spouse and dependent children. In addition to several security-related questions, the form requires the applicant to describe the history of persecution and the potential for mistreatment upon returning home.³⁸

This application is the first chance for an asylum-seeker to make his or her case of the need for protection; however, there is one major factor that can inhibit an applicant's ability to adequately speak for himself: language barriers. The I-589 must be completed in English. While the form can be found online translated into other common languages such as Spanish, the responses turned into U.S.C.I.S. must be completely in English. If the application is written a different language for any portion, it will be returned without consideration.³⁹

After receipt of the I-589, the applicant is subject to fingerprinting and a background check. Once these security measures have been completed, the individual will be notified of the asylum interview date. According to administrative regulations put in place in 1997 the initial interview should be scheduled 45 days after the date of filing. However, this is not the case many times.⁴⁰ Depending on the time of submission, the process of scheduling an initial asylum interview can take months. This 45-day guideline is oftentimes violated in situations when there are border-related crises. For example, in the year 2013 there were as many as 40,000 affirmative asylum cases that were backlogged at one point.⁴¹

U.S.C.I.S. schedules the interview without consultation with the applicant. If the applicant is unable to make that appointment work, the rescheduling process can take additional weeks or even months. If for some reason an applicant is absent, the scheduled interview or fingerprinting appointment, it is under

³⁸U.S. Citizenship and Immigration Services and Office of Immigration Review, *I-589 Application for Asylum and Nonwitholding Instructions*. OMB No. 1615-0067 (Web, Washington DC, 2014), 1-2.

³⁹ *Ibid.* 4

⁴⁰ "The Affirmative Asylum Process," *U.S. Citizenship and Immigration Services*, February 4, 2015, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>

⁴¹ Cherri Attix, "Affirmative Asylum Backlog Explained," (American Immigration Lawyers Association, Washington, DC, 2014) 1

U.S.C.I.S.'s discretion to deny the asylum application all together or forfeit that applicant's right to an interview.

As of December 2014, the U.S.C.I.S. had a hierarchy in place for prioritizing asylum requests:

1. Applications that were scheduled for an interview, but the applicant could not attend and requested an alternative interview date.
2. Applications filed by children
3. All other pending asylum applications.

After the asylum-seeker has been granted an interview date that works for him or her, the process continues to the next phase of consideration: the initial interview. At this point, the applicant meets with an asylum officer and is interviewed on the merits of his or her claims.⁴²

For this portion of the process, the applicant must bring all family members who are joining the asylum claim. For every person who is seeking asylum, official copies of birth certificates and marriage licenses must be provided. If there are any documents or materials that support the asylum-seekers case, it is requested that he or she also bring those documents.⁴³

While not required, legal counsel is allowed to be present for the interview. As asylum-seekers are not American citizens, they are not entitled to the same right to legal counsel, so no funding is provided if an asylum-seeker cannot afford attorney. If the applicant is able to afford an attorney or has been able to secure pro bono services from an attorney, a separate form, the Notice of Entry of Appearance as Attorney or Accredited Representative or G-28, must be completed and submitted by the attorney or representative. If for some reason the attorney is unable to be present for the interview despite the wishes of the applicant and the submission of the G-28, the USCIS is under no obligation to reschedule the interview and a different date.⁴⁴

Per regulation, the interview must be conducted in English even if the asylum officer is capable of speaking the native tongue of the applicant. If the applicant cannot speak English for the duration of the interview, an interpreter must be provided. The cost of the interpreter is a burden placed completely on the applicant. Per government regulation, the interpreter must be eighteen years of age and cannot be a witness

⁴² "The Affirmative Asylum Process," *U.S. Citizenship and Immigration Services*.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

brought to the interview to testify on behalf of the applicant. If the asylum-seeker had opted to provide a legal advocate for him or herself, that attorney cannot also act as the asylum-seeker's translator. If one of the witnesses brought to testify on behalf of the asylum-seeker can also speak the native tongue of the applicant and English, that person cannot act as the translator.⁴⁵

The interview itself lasts about an hour and takes into consideration the factors that are discussed throughout the application. The applicant is given the opportunity to explain the details and reasons he or she is seeking asylum. These include, per regulation of the 1967 Protocol: race, religion, nationality, political opinion, membership in a particular social group, and violations that occurred under one of the international torture conventions. A very important factor is why the applicants fear persecution if they return home.⁴⁶

After the interview concludes, a period of review begins. The U.S.C.I.S. officer reviews the testimony, evaluates its authenticity, and makes a decision. Prior to the initial decision being issued to the applicant, the State Department has the ability to submit a recommendation. Through reviewing the exhibits submitted and the notes of the asylum officer, the state department can provide an official recommendation as to whether or not the asylum-seekers claims are legitimate. Even though the State Department does not have a representative in the interview, they have the ability to make a recommendation on the authenticity of the claims. Historically, this recommendation has politicized the asylum-granting process. The State Department is more apt to recommend a grant of asylum to those seeking refuge from unfriendly governments and deny those seeking refuge from friendly governments. Many believe that the State department's involvement in this process further perpetuates the political nature of the asylum and refugee process in place prior to the passage of the 1980 Refugee Act.⁴⁷

It is important to note the classifications that are left out of the list protected by the 1967 Protocol. Neither gender nor sexual orientation are explicitly protected. Both of these groups are relegated to the "membership of a particular group" category. This means that there are additional factors that they must

⁴⁵ U.S. Citizenship and Immigration Services and Office of Immigration Review, *I-589 Application for Asylum and Nonwitholding Instructions*

⁴⁶ "Preparing for Your Asylum Interview," *U.S. Citizenship and Immigration Services*, December 3, 2015, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/preparing-your-asylum-interview>

⁴⁷ Richard Preston. "Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and International Obligations?"

prove in order to gain asylum. In order to qualify under the particular social group category of the Refugee Act, a group must have a shared, innate characteristic that cannot be changed or that should not be changed.⁴⁸

This can become particularly challenging in cases involving asylum on the basis of sexual orientation. Under this definition, an L.G.B.T.Q. asylum-seeker is subject to the belief system of the asylum officer overseeing his or her case. On top of that the method of proving one's membership also becomes tricky. How does one prove a sexual orientation? There is no universal answer to this question. One of the most common methods used by asylum seekers is proving visibility; that he or she is known as a member of the L.G.B.T.Q. community in his or her home country. To do this, applicants can provide letters of support from friends and family back home.⁴⁹

After all of these factors have been considered, the U.S.C.I.S. will offer its initial opinion. There are five distinct options for the asylum officer. The first is the least likely: a granting of asylum. If the applicant is lucky enough to receive this result, its attempt to gain refuge within the United States is over. This grant of asylum does not have an expiration date. It lasts until the threat of persecution in the homeland of the applicant dissipates or the grantee commits a crime that threatens the security of the community.⁵⁰

If the applicant is unable to secure a grant of asylum, the second-best result is a recommended approval. This result is issued whenever the asylum officer believes that the applicant is worthy of asylum, but has not been cleared through the appropriate security measures. Once this individual has been approved through the security-related background checks, he or she will be granted full asylum privileges and rights.⁵¹

After the recommended approval, the results of the asylum interview become less positive. A Notice of Intent to Deny (N.O.I.D.) is issued if the applicant has a valid legal status, but lacks the characteristics necessary of an asylum-grantee. After receiving a N.O.I.D, the individual has 16 days to

⁴⁸ "Applying for Asylum" *Immigration Equality*. Accessed January 31, 2015.

<http://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/applying-for-asylum/>

⁴⁹ "Can I Apply for Asylum Based on Being Lesbian, Gay, Bisexual Transgender, Or HIV-Positive" *Immigration Equality*. Accessed January 31, 2015. <http://www.immigrationequality.org/get-legal-help/our-legal-resources/asylum/applying-for-asylum/>

⁵⁰ "Types of Asylum Decisions" *U.S. Citizenship and Immigration Services*

⁵¹ *Ibid.*

appeal this initial decision. Throughout this appeal process, the applicant has the opportunity to provide new documentation of his or her claim and new evidence to support his or her case for asylum that might have arisen since his or her initial interview. If new evidence is provided that warrants a different decision, the asylum officer has the ability to alter his or her decision to approval or recommended approval.⁵²

If an applicant does not respond within 16 days to a N.O.I.D., this will result in a final denial. Another route to a final denial is responding to a N.O.I.D. with evidence that is insufficient to amount to reconsideration. As one might guess, the result of a final denial cannot be appealed. This result means that the applicant will be removed from the United States and returned to his or her home country.⁵³

The Immigration Courts of the Executive Office of Immigration Review

The fifth and final option for an U.S.C.I.S. asylum officer is referral to an immigration court. This is an option that is used frequently when the applicant is an illegal immigrant. In these cases, the process almost starts over. The applicant and his or her family members will receive a letter of explanation and a Notice to Appear with the time, date, and place of their court date. The immigration judge acts independently of the U.S.C.I.S.

From 2000-2004, U.S.C.I.S. approved 12% of the asylum cases that came before the organization. 2% were outright denied, and 31% were referred to the Department of Justice. The other 49% of cases were otherwise closed. This umbrella category refers to cases that were, for some reason, not adjudicated.⁵⁴

Once an asylum case makes it into the Department of Justice's Immigration Court System, there are two classifications: affirmative and defensive. An affirmative asylum case is a case where the applicant has gone through the U.S.C.I.S. process and received a referral to an immigration court. A defensive asylum case is a case where typical immigration proceedings have taken place, and the immigrant offers asylum as defense to deportation. Note, in some cases a referred case from U.S.C.I.S. would be considered to be defensive if the immigrant is in the United States illegally.⁵⁵

⁵² Ibid.

⁵³ Ibid.

⁵⁴ "Immigration Judges Reports- Asylum," *Transactional Records Access Clearinghouse (TRAC) of Syracuse University*. Accessed January 3, 2015. <http://trac.syr.edu/immigration/reports/judgereports/>

⁵⁵ "Key Differences Between 'Affirmative' and 'Defensive' Asylum," *US Citizenship and Immigration Services*, March 10, 2011, <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>

These court proceedings are conducted very differently than the information-gathering interviews of U.S.C.I.S. They are heard *de novo* or from the new without any consideration of previous proceedings or interviews. All testimony and evidence are subject to the Federal Rules of Evidence. While the interviews were merely inquisitive, the Immigration Court proceedings are adversarial in nature. For every court proceeding, an attorney from Immigration and Customs Enforcement (I.C.E.) is present and most often fighting against relief for the applicant. Just as before, no attorney is provided to immigrants appearing before an immigration court. They must fund an attorney themselves, secure pro bono services, or represent themselves before the court. In many instances, the I.C.E. attorney has dozens of active cases before one Immigration Judge at given point. The subtleties of immigration law can make it very difficult for even a pro bono attorney to understand the practices and lingo used throughout the trial.⁵⁶

Because of the nature of the laws surrounding asylum in the U.S., much discretion is granted to the immigration courts. Their decision is final and binding, and because of this, an asylum applicant is faced with far different odds based on his or her geographic location and judge assignment. In many instances the acceptance rate range is broad even among two judges from the same state. For example New York Judge Alan Vomacka has a 37.9% acceptance rate, while Judge Alice Segal has an 81% acceptance rate for the years 2009-2014. If one broadens the comparison to immigration judges in different regions of the nation, an even wider variety of acceptance rates exists.⁵⁷

Making an even broader comparison, Judge Elizabeth Lam of New York has a 96.1% approval rating while Judge Thomas Roepke of El Paso has 1% approval rating over the same five year period. While these statistics might expose a broad range of judicial bias, it is more likely the that more diverse comparisons are a result of different case compositions. For example, Judge Roepke, while he only has a 1% approval rating for over five years, deals with a different type of immigration case than an immigration judge in Seattle, WA. Drawing a fast and simple comparison between the two is not effective.⁵⁸

Another very important factor that must be considered when examining asylum acceptance rates is legal representation. In a five year period from fiscal year 2009-2014, 89% of all denied asylum applicants

⁵⁶ "Immigration Court Proceedings" *Immigration Equality*, Accessed January 13, 2015, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/27-immigration-court-proceedings/>

⁵⁷ "Immigration Judges Reports- Asylum," *Transactional Records Access Clearinghouse (TRAC) of Syracuse University*.

⁵⁸ *Ibid.*

were represented *pro se*, or themselves. Looking again at Judge Roepke's statistics, 55% of the cases he heard involved individuals representing themselves, well above the national average of 14.6% of self representation.⁵⁹

In most cases a denial from an Immigration judge will result in a final denial. When an immigrant is here legally, a denial in asylum does not result in deportation. That legal immigrant is allowed to continue living in the United States through the parameters of his or her visa without the benefits granted asylees. If the denied asylum applicant is here illegally, the immigration judge's denial also serves as a notification of deportation.⁶⁰

The Appeals Process

In some cases, the immigration judge's denial can be appealed. A denied asylum applicant can file an appeal to a separate independent body located in Falls Church, VA called the Board of Immigration Appeals (B.I.A.). The appellant has thirty days after the oral decision from the immigration judge to file this appeal. The B.I.A. is not a fact-finding court. It does not see every case appealed, and it does not require that the appealing individual appear before the court. The only way that an individual can introduce new evidence at this level is if that evidence was not available at the time of the initial hearing before the immigration judge. The B.I.A. looks for errors on the part of the immigration judge. If errors are found, the B.I.A. can either grant asylum for the individual or remand the case and ask the immigration judge to rehear the case. The delay at this level can be extensive. Noncitizens that are not in detention can expect to wait as long as a year to hear the BIA's opinion. Those in detention and facing deportation are typically prioritized over those not in detention.⁶¹

If the B.I.A. rules against an asylum-applicant, the process then filters into the typical Federal judicial process. The appeal first goes to the U.S. Court of Appeals and then to the U.S. Supreme Court. Each step of the way, the process becomes more selective and less likely to result to in a grant of relief.⁶²

Groups Excluded from the Process

⁵⁹ Ibid.

⁶⁰ "Immigration Court Proceedings" *Immigration Equality*,

⁶¹ "Board of Immigration Appeals," *Department of Justice*, February 6, 2015, <http://www.justice.gov/eoir/board-of-immigration-appeals>

⁶² Ibid.

The first group of individuals excluded from the process below are traditional refugees unable to make it to the border. These refugees are subject to meeting the same criteria as an asylum-seeker within the United States, but are evaluated on an even more political scale. Each year the President, in conjunction with Congress, sets a ceiling for refugee admittance into the United States. This ceiling includes the countries from which the US will take the refugees. The location within the United States where the refugees will be distributed is also pre-decided by the US Government.⁶³

The second group of individuals excluded from the asylum process are those who do not file for asylum within one year of entering the country. This is commonly referred to as the one-year bar. This can serve as an absolute bar to consideration for asylum.⁶⁴

⁶³ Richard Preston. "Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and International Obligations?" *Maryland Law Review* 45, no. 1: 94.

⁶⁴ Philip Schrag, Andrew Schoenholtz, Jaya Ramji-Nogales, Jamed Dombach. "Rejecting Refugees: Homeland Security Administration on the One-Year Bar to Asylum," *William and Mary Law Review* 52, no. 3: 675-680.

3. Asylum Policies and Practices Abroad.

While certain concepts and purposes of asylum have been standardized through the Convention and Protocol, each signatory nation-state has deference as to how it complies with those standards. It can create its own unique practices and procedures to govern the asylum process within its borders.

On top of the regulatory baseline put in place by the UN, the European Union has built additional practices that are shared by its member-states. The most significant of these practices is the Dublin Regulation. This regulation came about to ensure that only one member-state is responsible for evaluating certain asylum claims and prevents an applicant from launching multiple asylum claims at once.⁶⁵

Below are overviews of the asylum processes in three of the most popular destinations for asylum seekers.

United Kingdom

The United Kingdom operates under a far more recent process than the United States. The entire process was given a facelift in 2007 after the implementation of the New Asylum Model (N.A.M.). Under the N.A.M., all decisions on asylum processes are made by the U.K. Border agency, a sub-department of the Home Office. In the U.K, it is important that an asylum-seeker make his or her claim for protection at the border agency office through which he or she is being processed. If the person makes it illegally into the U.K. or does not claim asylum at the point of entry, then he or she must travel the Border Agency Central Office in Croydon. Similar to the American process, asylum applicants in the U.K. must be at or within the geographic borders in order for their claim to be heard.⁶⁶

While there is no automatic bar to asylum in the United Kingdom at any point, there is incentive to reporting one's claim at the entry to the country. If a person does not automatically claim protection, the asylum-seeker can be denied welfare services for the duration of the proceedings. The delay in reporting can also compromise the chances of the asylum case being granted. Another factor that can held against an asylum case's chances are the use of false documents to enter the country.⁶⁷

⁶⁵ "Dublin Regulation," *European Council on Refugees and Exiles*, Accessed February 13, 2015, <http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html>.

⁶⁶ "The Asylum Process Made Simple," *Asylum Aid; Protection from Persecution*, Accessed March 1, 2015. <http://www.asylumaid.org.uk/the-asylum-process-made-simple>.

⁶⁷ "Claim Asylum in the UK," *United Kingdom Home Office*, April 28, 2015, <https://www.gov.uk/claim-asylum/overview>.

Like in the United States, the asylum process is divided into administrative and judicial portions, with the administrative branch handling all initial levels of considerations. On the first level, there is a screening interview by the Border Agency. At this informal interview, personal information on the applicant is recorded as well as information on his or her journey to the United Kingdom. One of the most important facts gathered during this screening interview is whether or not the individual has ever sought asylum through another European government. During this interview the applicant is given a reference number and a “first reporting event.”⁶⁸

The first reporting interview is simply an official, scheduled meeting between the Border Agency case owner and the asylum applicant. Within a few weeks of the first reporting event, the case owner and the asylum-applicant will meet again for the substantive interview. At the substantive interview the case is evaluated on its merits. The applicant is required to explain why he or she fears persecution upon returning to his or her homeland. Unlike the American process, if the applicant cannot speak English, the British government will provide an interpreter through its Interpreter’s Operations Unit (I.O.U.). The I.O.U. is informed ahead of time of the dialect and language of the asylum-seeker. A translator then reports for the substantive interview. At this interview, the translator is instructed to inform the case manager. If the applicant is having trouble understanding the translator because of linguistic issues, the translator is instructed to inform the interviewer, and the interviewer will either reschedule or take a recess in the interview until the issues can be resolved.⁶⁹

Throughout the entire interview process, the Border Agency may require the applicant to attend additional reporting meetings. The Border Agency might also require “electronic tagging” of asylum seekers. Electronic Tagging is the placing of an electronic bracelet or ankle bracelet that reports the location of the applicant to the border agency at all time.⁷⁰

If a case is being fast-tracked, the applicant is transferred to a detention center where the decision-making and appeals process can be completed within 9 days.⁷¹

⁶⁸ “The Asylum Process Made Simple,” *Asylum Aid; Protection from Persecution*.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ “The Fast-Track System,” *Liberty*, Accessed March 13, 2015, <https://www.liberty-human-rights.org.uk/human-rights/asylum-and-borders/fast-track-system>.

The elements considered by the case manager are similar to elements considered in America. They must have a well-founded fear of persecution for one of the five explicitly stated reasons in the Convention. Factors such as the credibility of the applicant and the socio-political information on the home country are given consideration in coming to the initial decision. Another factor that can be very detrimental in U.K. asylum cases is if the applicant traveled through “safe third country” and did not seek asylum there.⁷²

The U.K. asylum process does not expand the list of asylum-worthy characteristics. Neither gender nor sexual orientation are explicitly included. As in the United States, both of these groups have successfully gained asylum through the membership in the particular social group category. In addition to this, the U.K. Government has taken steps to make sure that the asylum process is open to female and L.G.B.T.Q. applicants. In addition the traditional Asylum Policy Instructions (A.P.I.), which govern Border Agency Officers throughout the interview process, the UK Government issues an A.P.I. on Gender Issues in Asylum Claims. In this supplemental A.P.I., guidance is given for case managers to mitigate the societal discriminations against women. The A.P.I. on Gender goes so far as to state that the Convention was created through a framework of “traditionally male experiences.” The document goes on to explain that in some societies, women’s involvement and political expression can take vastly different forms than expression of a man’s opinion. A woman’s form of expression will oftentimes take a more subtle form than that of a man’s such as providing refuge or protection for a political agitator rather than speaking out herself.⁷³

The U.K. Government has issued a similar document for issues of gender and sexual identity that provide a centralized set of instructions and guidelines for case managers to consider. This most recent version of this document was issued on February 11, 2015, bringing the U.K. into accordance with a string of decisions issued by the Court of Justice for the European Union in December 2014 regarding asylum cases on the basis of sexual and gender identity. The impetus for these cases was leaked stories involving asylum applicants being asked questions of an extremely personal and sexual nature; some were even asked to submit explicit evidence of their sexual practices. The A.P.I.s on both gender and sexual identity,

⁷² “Asylum in the UK,” *United Nations High Commissioner for Refugees*, March 2014, <http://www.unhcr.org/uk/about-us/the-uk-and-asylum.html>.

⁷³ Home Office of the United Kingdom, *Asylum Policy Instruction: Gender Issues in the Asylum Claim*, (London, UK: Web. October 29, 2010)

outline a set of practices that are designed to be inquisitive into the individual's orientation claims while still affording the applicant a level of privacy and dignity.⁷⁴

The concepts that guide the A.P.I. on orientation are largely a codification of S. Chevlan's work on the issue. Chevlan, an English barrister, published the "DSSH" framework for sexual orientation, which sought to direct the asylum interview to expose the applicant's different, stigma, shame, and harm, as opposed to specifics about his or her sexual preferences and practices.⁷⁵

After the border officer issues his or her initial decision, most claimants will have the opportunity to file for an appeal from within the United Kingdom. However some denied-applicants will only be allowed to file for an appeal from outside the borders. Most of the time these cases involve an applicant already claiming asylum in a "safe third country" or a nation that typically produces unfounded asylum cases.⁷⁶

After the initial decision has been released, the Home Office's role in the asylum process ends, and the judicial system takes over. The deadlines for appealing an initial decision are very quick. At the first level of appeal, an accepted case is heard by the First Tier Tribunal. This is a fact-finding tribunal that acts completely independent from the Home Office and Border Agency. At this point in the process, legal representation becomes more necessary. In immigration and asylum cases, only attorneys accredited by the Immigration Law Practitioner's Association (I.L.P.A.) can appear.⁷⁷

While not always provided, monetary support can be secured to fund legal aide at this point in the process. If an accredited barrister deems that the applicant has a greater than 50% chance, his or her chance of receiving government aid is more likely. If the prospects of success are unclear or borderline, the assistance will only be provided if the case is of "overwhelming importance to the client," raises significant issues of human rights, or the case has a significant wider public interest.⁷⁸

After the appeal has been heard, a decision typically arrives within two weeks. For most asylum applicants, this is the last level of appeal heard. To move further in the process, the case must hinge on a

⁷⁴ Home Office of the United Kingdom, *Asylum Policy Instruction: Sexual Identity Issues in the Asylum Process*, (London, UK: Web. February 16, 2015)

⁷⁵ S. Chevlan, interview by Babita Sharma, *BBC World Service Radio*, July 24, 2014.

⁷⁶ "The Asylum Process Made Simple," *Asylum Aid; Protection from Persecution*.

⁷⁷ *Ibid.*

⁷⁸ "Survey on Legal Aid for Asylum Seekers in Europe," *European Council on Refugees and Exiles*, October 2010, <http://www.ecre.org/component/downloads/downloads/268.html>.

legal error or issue, furthering the need for an attorney. After this denial, the asylum-seeker is expected to make plans for departure from the U.K.. To assist, the government of the U.K. operates the Choices Programme for Assisted Voluntary Return. Choices helps rejected individuals coordinate plans to return to their homeland. The U.K. law does contain a provision where a denied applicant can make a “fresh claim,” if new evidence surfaces. This claim would start the entire process over.⁷⁹

Germany

Germany consistently has the largest number of asylum-seekers reach its borders of all nations bound by the Convention or Protocol. In 2012, Germany had 110,000 individuals apply for asylum, surpassing the United States by more than 10,000.⁸⁰ One factor in Germany that is not present in the United States or the United Kingdom is the constitutional component. As mentioned in the previous section, the right to asylum is protected by the German Basic Law.⁸¹

The German asylum process follows a similar methodology as the United Kingdom, with a few key differences. The first occurs at the initial entry point on to German soil. Because Germany receives such a large number of asylum applicants annually and most of the applicants are concentrated at the border regions, a system of redistribution has been put in place so that the burden of asylum-applicants is borne evenly across the entire nation. Utilizing a formula that involves population numbers, tax receipts, and the applicant’s home country, each German land or federal state is given an acceptance quota for asylum-seekers.⁸²

Once the applicant applies for asylum at the border of Germany, he or she is assigned to an initial reception center. If the asylum seeker enters the nation through one state, but for some reason is assigned to

⁷⁹ “The Asylum Process Made Simple,” *Asylum Aid; Protection from Persecution*.

⁸⁰ “Mind the Gap: Perspective on Challenges to Accessing Protection in the Common European Asylum System,” *Asylum Information Database*, September 9, 2014.

⁸¹ Basic Law of Germany, Art. 16a, Sec. 1-5.

⁸² “Asylum Procedure,” *Federal Office for Migration and Refugees of Germany*, Accessed April 12, 2015, <http://www.bamf.de/EN/Migration/AsylFluechtlinge/asylfluechtlinge-node.html>.

a different state for the asylum proceedings, the asylum seeker must travel to that state and report to the initial reception center there. At this center, the applicant will have the ability to stay for a period of three months while the asylum claim is processed. Asylum-seekers are often given free reign to travel locally within the city or region of the initial reception center. The housing provided at the initial reception centers vary based on location. These centers are left completely in the hands of the federal state controlling the region. Oftentimes these accommodations are renovated army barracks.⁸³

After a period of three months, if the asylum-seeker's case has not been dealt with, a they are transferred to another type of facility called collective accommodation centers. Municipal authorities as opposed to state authorities control these centers, and as such, their conditions vary at an even greater degree. In some municipalities, collective accommodation centers have been disbanded and asylum seekers are allowed to rent traditional apartments.⁸⁴

While the accommodations provided in Germany vary from other nations, the process asylum seekers complete is ultimately very similar to that of the United States and United Kingdom. As a member of the European Union, Germany follows all of the EU Courts rulings on issues related to asylum as well as the Dublin Regulation.⁸⁵

Similar to the United States and United Kingdom, the process consists primarily of a series of interviews that take place while the asylum-seeker is living in the reception centers. These interviews are handled by the Federal Office for Migration and Refugees and must take place in the German language. If a person cannot speak German, it is required by law that a government-sponsored interpreter be present. The German government provides interpreters for approximately 400 languages that are hired on a freelance basis. While efforts are made by the government to ensure the interpreters are qualified, it does not guarantee that each interpreter has a degree or professional qualifications.⁸⁶

⁸³ "Conditions in Reception Facilities," *Asylum Information Database*, Accessed April 12, 2015, <http://www.asylumineurope.org/print/1137>.

⁸⁴ "Asylum Procedure," *Asylum Information Database*, Accessed April 12, 2015, <http://www.asylumineurope.org/reports/country/germany/overview-legal-framework>.

⁸⁵ "Regular Procedure," *Asylum Information Database*, Accessed April 12, 2015, <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/regular-procedure>.

⁸⁶ "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Detailed Research on Key Asylum Procedures Directive Provisions," *United Nations High Commission on Human Rights*, March 2010, p. 120.

Through the interview process there are three types of favorable decisions: granting constitutional asylum, granting conventional asylum, or prohibiting deportation. Constitutional asylum is given only to those who have a fear of governmental persecution for political purposes. Conventional asylum is given out of obligations to the UN Convention and Protocol. Prohibiting deportation is slightly different. This classification refers to individuals who if returned home would face serious physical harm because of access to healthcare, extreme poverty, or other societal factors. Over the past few decades this last category has been severely limited through case law; in order to receive this level of protection, an individual must now show that deportation would expose them to a likely death.⁸⁷

In roughly 20-25% of the asylum cases in Germany, a formal decision is made. This means that the case is not reviewed on its merits rather a technicality, such as the Dublin regulation, resulting in the case being sent to another EU nation. Appeals of these types of decisions are rarely considered.⁸⁸

If the Federal Office of Migration and Refugees evaluates the case on its merits and issues an unfavorable decision, the option for an appeal exists. At this point, as is the case in the U.S. and U.K., the judicial system comes into play. However, in Germany, these cases are heard before the administrative court in which the asylum-seeker is stationed not a special court of immigration appeals. Appeals past this initial level are extremely unlikely. If such an appeal is granted, it flows through the German judicial system.⁸⁹

Once the process transitions from the administrative to judicial, the need for legal representation greatly increases. While legal representatives may be present throughout the process, the German government does not provide funding for legal counsel for asylum-seekers at any point in the process. If a case makes it past the second stage of an appeal, legal representation is required.⁹⁰

There is no component of the German asylum process similar to the one-year bar present in the United States.

South Africa

⁸⁷ “Short Overview of the Asylum Procedure” *Asylum Information Database*, Accessed April 12, 2015, <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/general/short-overview-asylum-procedure>.

⁸⁸ *Ibid.*

⁸⁹ “Legal Assistance,” *Asylum Information Database*, Accessed April 12, 2015, <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/regular-procedure>.

⁹⁰ *Ibid.*

While South Africa has a troubled history with human rights and acceptance of diversity, the current framework is vastly improved and largely democratic. Because of its liberal form of government and because of its geographic location, the country is faced with a large number of asylum-seekers. Unlike the other three nations previously discussed, South Africa is less equipped to deal with these numbers. Because of this, South Africa has a harsher approach to asylum-seekers than the U.S., U.K., or Germany.⁹¹

Once an asylum-seeker enters the country, he or she must immediately declare his or her intention to claim asylum at the border processing office. At this point the asylum-seeker would be issued an Asylum Transit Permit and be instructed to travel to a Refugee Reception Office. There are currently three Refugee Reception Offices in the cities of Pretoria, Durbin, and Musina. At the Reception Office, the applicant would receive an asylum-seeker's permit that is proof that the seeker was within the borders of South Africa legally and are awaiting your asylum-decision. One issue that frequently arises in South Africa is making it inside the Refugee Reception Office. Oftentimes, these facilities are overcrowded and lines form hours before they open. At any point before an individual enters the office, he or she may be arrested by police or immigration officers. However if this does happen, and an applicant explains to the officer that he or she is trying to apply for asylum, the officer is required to assist him or her with gaining this permit.⁹²

Once inside the facility an initial interview takes place where the individual's vital information is collected and a 6-month permit is issued.⁹³ However, in South Africa, in addition to the standard information, education and work experience information is also recorded. This series of skill-related questions was added in late 2014 to the dismay of human rights activists. Critics assert that these questions allow for a person's economic contributions or detractions from society to be used as an evaluating factor in asylum decision-making.⁹⁴

After completing this initial interview questionnaire, the South African process goes through similar steps as the countries above. In a second interview called the Status Determination Hearing, the applicant has the ability to plead his or her case for refugee status. In South Africa, the Refugee Status

⁹¹ "2015 UNHCR Country Operatios Profile-South Africa," *United Nations High Commission on Human Rights*, Accessed April 12, 2015, <http://www.unhcr.org/pages/49e485aa6.html>

⁹² "Applying for Refugee Status in South Africa," *Consortium for Refugees and Migrants in South Africa*, Accessed April 12, 2015, <http://www.cormsa.org.za/applying-for-refugee-status-in-south-africa/>

⁹³ *Ibid.*

⁹⁴ Kristy Siegfried, "South African's Controversial New Asylum Form," *IRIN Humanitarian News and Analysis*, December 11, 2014, <http://www.irinnews.org/report/100935/south-africa-s-controversial-new-asylum-form>

Determination Officer (R.S.D.O.) determines the outcome. Unlike in the U.S., U.K., and Germany, in South Africa this can be adversarial in nature. The R.S.D.O. is specifically tasked with testing the person's credibility. The applicant could be questioned on street names, political leaders, and historical events related to his or her home country and back-story.⁹⁵

While an applicant is allowed to appear with a legal representative and an interpreter, the government provides neither. However, the restrictions that exist within the U.S. system on who can and cannot serve as interpreter are not present in the South African system. This means that a person who is also present as a witness, family member, or legal counsel can also interpret the proceedings if the applicant is comfortable with such an arrangement.⁹⁶

While follow-up interviews can be scheduled, it is a common occurrence that the case will be decided by the time the asylum-seeker returns to the refugee office for a second interview or to renew his or her asylum-seeker permit.⁹⁷

The appeals process moves very quickly in South Africa. If a negative decision is issued by the R.S.D.O., the applicant has the ability to appeal to the Refugee Appeal Board within thirty days from decision being handed over. It is important to note that in many instances in South Africa, there is a delay in communication between the asylum-seeker and the R.S.D.O. A decision may be issued but not handed over to the asylum-seeker for a number of weeks. This thirty-day review process only begins when the decision is delivered to the applicant not from when the decision is made.⁹⁸

While it is unlikely that an asylum-seeker could spend longer than a year in South Africa illegally without being apprehended, there is no component of South African asylum-law similar to the one-year ban present in the U.S. system.

⁹⁵ "The Interview Process," *Consortium for Refugees and Migrants in South Africa*, Accessed April 12, 2015, <http://www.cormsa.org.za/applying-for-refugee-status-in-south-africa/>

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ "Appeal and Review Process," *Department of Home Affairs of the Republic of South Africa*, Accessed April 12, 2015, <http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>

Graphic Representation of Asylum Practices in Discussed Countries

Country	Language Rights	Legal Representation	LGBTQ and Gender Inclusiveness	One Year Bar
U.S.A.	Interview must be in English. No translator is provided with restrictions on who can serve as translator.	No attorney or financial assistance for an attorney is provided. At no point is an attorney required.	Orientation and gender are not included under explicit protections. No central policy on dealing with these groups is in place	There is a strong bar to asylum after 1 year in the country with minimal exceptions.
U.K.	Interview must be in English. Government provides translator.	No attorney is provided with the possibility of government assistance. At no point is an attorney required.	Orientation and gender are not included under explicit protections. Strong A.P.I.s are in place to guide asylum officers on how to deal with issues of orientation and gender.	There is no set bar to asylum based on length of time in the U.K. However, the length of time in the country before initiating a claim is a factor in the asylum decision.
Germany	Interview must be in German. Government provides translator.	No attorney is provided at any point, but is required in the appeals process. There is no possibility of financial assistance	Orientation and gender are not included under explicit protections. No central policy on dealing with these groups is in place.	There is no set bar to asylum based on length of time in Germany. However, the length of time in the country before initiating a claim is a factor in the asylum decision.
South Africa	Interview must be in English. No translator is provided without restriction on who can serve as translator.	No attorney or financial assistance for an attorney is provided. At no point is an attorney required.	Orientation and gender are not included under explicit protections. No central policy on dealing with these groups is in place.	There is no set bar to asylum based on length of time in South Africa. However, due to very string immigration policies, it is extremely unlikely

				that an asylum-seeker would be in the country for more than a day without initiating his or her claim.
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4. Suggested Improvements

After comparing the American asylum process to the procedures utilized by other nations, the following best practices and improved practices are recommended with the goal of opening our asylum process so that well-deserving candidates are not denied protection because of systematic flaws.

Language Rights

Best Practice: providing interpreters for all official asylum meetings or hearings. The ability to communicate authentically and clearly is central to an asylum-seeker’s ability to advocate for him or herself. In order to alleviate the burden placed on asylum-seekers in regards to speaking English during the asylum proceedings, the United States should enact a similar process as the processes in place in the United Kingdom and Germany. Creating a pool of interpreters that can be used throughout the asylum process would prevent the asylum-seeker from conducting the interview in English or providing his or her own interpreter.

Improved Practice: relaxing the regulations governing asylum interpreters. This would be following a method similar to the method put in place by South Africa. This practice has the benefit of not costing the government any additional funding while also alleviating some of the restrictions placed on the asylum seeker to procure a translator. Some examples of regulations that could be relaxed include: allowing the seeker’s attorney to serve as an interpreter, allowing the seeker’s witnesses or family members to serve as an interpreter, or allowing the interview to be conducted in an interview other than English if both the USCIS officer and the asylum-seeker speak the language.

Legal Representation

Best Practice: provide legal counsel for all cases that make it to the judicial portion of the process. While legal representation would be beneficial at any point during the asylum process, it is crucial at the point when the process transitions from the USCIS to the immigration judges. Based on statistics collected over a five year period by TRAC Immigration services, that legal representation was one of the most

decisive factors in determining an asylum-applicant's success or failure. It is unrealistic to believe that an immigrant, who might not speak English, can adequately defend him or herself in a court system that requires three years of formal training to practice professionally.

Improved Practice: create a balancing test for determining the odds of a case and provide legal representation for those who have a significant chance for success. This approach would follow the policy utilized by the United Kingdom in which a panel of immigration attorneys surveys the case for its chances of success. Government assistance is provided to those cases that are more likely to be won than lost. Note, this system has its flaws. It gives a board of attorney's immense power and ability to interject political opinions in the asylum process. The benefit to a program such as this is that does not waste the government's money on legal fees for asylum-seekers with spurious claims.

LGBTQ and Gender Inclusiveness

Best Practice: expanding the list of protected asylum characteristics. By adding both sexual orientation and gender to the list of asylum-worthy categories, a base level of protection would be ensured across the U.S. This would also be taking an unprecedented step to update the language from the 1967 Protocol. To date, no nation has taken this step of inclusiveness. It would send a clear message that the U.S. is committed to asylum protections for all who face a threat to persecution.

Improved Practice: issuing guiding documents for specialized asylum interviews. One step that could be taken by the U.S. Government that would not be as drastic as explicitly adding these two groups into the legal framework is to issue something similar to the United Kingdom's Asylum Policy Instructions for cases involving gender or sexual orientation. These documents would be issued to USCIS officers and provide guidelines for evaluating these types of asylum cases.

One-Year Bar

Best Practice: abolishing the one-year ban and allowing length of time in country to be considered in asylum proceedings. This would follow a procedure similar to the framework used by the United Kingdom. By ending the one-year-ban, an applicant's case would still be evaluated on its merits no matter when he or she claimed protection. However, the length of time that the person remained in the country illegally before claiming protection could be held against his or her chances for acceptance.

Improved Practice: leaving the one-year bar intact while incorporating adequate exceptions.

