



BY DEIRDRE M. GIBLIN

DOES IT TAKE A VILLAGE, OR JUST A GOOD CIRCUIT COURT DECISION?

Enforcing Child Testimony Guidelines for Child Asylum Seekers

The application of international and US standards governing child testimony in refugee and asylum cases was upheld recently by the US Court of Appeals for the First Circuit—just months after the court had seemingly ignored those guidelines. On August 6, 2010, the First Circuit panel granted a rehearing petition of its decision *denying* a petition for review just a few months earlier in April 2010.

Denial, Rehearing Petition, Remand

The US Court of Appeals for the First Circuit granted a rehearing in *Mejilla-Romero v. Holder*, 600 F.3d 63 (1st Cir. 2010), vacating its original decision which had denied a petition for review brought by a child asylum applicant. The order granting rehearing directs the Board of Immigration Appeals (BIA) to address the special treatment of child asylum applicants. Such special treatment has been set forth in three different guidelines recommended for children: (1) guidelines issued by the US Department of Homeland Security, (2) guidelines issued by the US Department of Justice, and (3) guidelines issued by the United Nations High Commission for Refugees (UNHCR).

The applicability of child guidelines in the adjudication of child asylum claims has been broadly recognized over the last decade in administrative hearings before US asylum offices, as well as in the Second, Sixth, Seventh, and Ninth Circuits. The two panel decisions in the *Mejilla-Romero* decision marks the first time the First Circuit has invoked the guidelines.

The Harvard Clinic at Greater Boston Legal Services represented the child asylum applicant, Selvin Asael

Deirdre M. Giblin is an asylum attorney at Community Legal Services and Counseling Center (www.clsacc.org) in Cambridge, Massachusetts. She has specialized in refugee and asylum law since 1998, and represents children and other humanitarian claims.

Mejilla-Romero (“Celvyn”) (footnote 10 of the decision notes that though the majority, the BIA, and the IJ refer to the petitioner as Selvin Mejilla-Romero, or just “Mejilla-Romero” throughout their opinions, the boy’s name is “Celvyn,” and the incorrect entry of his name in the charging document issued by the government was never corrected despite notice of the mistake). Celvyn is a young man from Honduras who had escaped targeted brutality and death threats on account of his resistance to gang recruitment and his family’s background and political beliefs. He came to the United States at the age of 10 and testified at hearings in immigration court between July 2005 and November 2006 when he was between 13 and 14 years old. The immigration judge (IJ) denied the boy’s claim, the BIA upheld the denial, and in April 2010, a three-judge panel of the First Circuit denied his petition for review. A petition for rehearing was filed June 21, 2010, urging the First Circuit to vacate the panel decision, arguing that the BIA, IJ, and First Circuit panel had committed legal error by failing to afford child-sensitive treatment to the petitioner’s claim. The First Circuit panel granted the rehearing petition on August 6, 2010, remanding the case to the BIA with instructions to consider arguments regarding “the Guidelines’ child-sensitive approach” and errors caused by the agency’s “failure to follow the child-sensitive Guidelines.”

Protections Found in the Child Guidelines

International and US refugee child guidelines were developed in the 1990s in recognition of the special vulnerabilities of refugee children and limitations on their ability to present detailed testimony in support of refugee/asylum claims:

- In 1994, the UNHCR issued “Refugee Children: Guidelines on Protection and Care,” incorporating international norms relevant to the protection and care of refugee children.

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- In 1997, the UNHCR issued “Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.”
- In 1998, the US Department of Justice issued “Guidelines for Children’s Asylum Claims” (INS guidelines) through an INS policy and procedure memorandum (December 10, 1998).
- In 2004, and through revisions in 2007, the US immigration courts incorporated child guidelines in their “Operating Policies and Procedures Memorandum 04-07, Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children” (issued on September 16, 2004, and revised in 2007 in OPPM 07-01).

The international and US immigration guidelines recognize the need for adjudicators to consider limitations in the oral testimony of children and accord greater weight to documentary and other objective evidence to compensate for a child’s lack of ability to present accurate or persuasive testimony in support of their claim. The UNHCR Handbook specifically notes that children may lack the maturity to form a well-founded fear of persecution, thus requiring an adjudicator to give more weight to objective factors in support of a claim: “Minors . . . may have fear and a will of their own, but these may not have the same significance as in the case of an adult. (UNHCR Handbook at 215–17.)”

INS Guidelines

In the introduction to the INS guidelines, formatted as a memorandum issued by DOJ to provide the Asylum Officer Corps (AOC) with background and guidance on adjudicating children’s asylum claims, the government notes that, “During the last 10 years, the topic of child asylum seekers has received increasing attention from the international community. Human rights violations against children can take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution. In violation of current international standards that establish age 15 as the minimum age for participation in armed conflicts, children under age 15 in some countries are forcibly recruited by regular or irregular armies to participate directly in military conflicts. Children who have had such experiences are referred to as “child soldiers” throughout this text. The protection needs of these and other children have commanded much international and domestic attention.”

The memorandum is framed at the outset to provide

guidance primarily for claims by children under the age of 18 who apply for asylum independently rather than as a derivative applicants. The memo distinguishes that the generally accepted international definition of “child” is a person under the age of 18 and that the guidelines take the same approach, except that they also apply to individuals between 18 and 21 for purposes of derivative determinations for asylum claims.

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CHILD GUIDELINES.**

Officers are encouraged to allow a trusted adult in the room for the child: “It is generally in the child’s best interests for asylum officers to allow a trusted adult to attend an asylum interview with the child asylum applicant.” The memo explains further, “Testifying can be difficult for a child, and the presence of a trusted adult may help the child psychologically. The function of the support person is not to interfere with the interview process or coach the child during the interview, but to serve as a familiar and trusted source of comfort. The asylum officer may allow the adult to help the child explain his or her claim, but the asylum officer should at the same time ensure that the child is able to speak for him/herself and is given an opportunity to present the claim in his or her own words.” (Section II (a).)

The guidelines detail specific instructions on child sensitive questioning, active listening techniques, building rapport with a child and encouraging communications, and even provide sample language to be used throughout the adjudication. Asylum officers are advised that they “may be able to overcome much of a child’s timidity or nervousness with a brief rapport-building phase during which time neutral topics are discussed (such as general interests, future career goals, school, pets, hobbies).” (Section II (d).)

A sample soliloquy is even set forth: “As we talk, we will both have jobs. My job is to understand what happened to you. But I need your help. Your job is to help me to understand by telling me as much as you can remember, even the



little things . . . I will be asking you a few questions today. Some questions will be easy, but other questions you might not understand. It is OK if you do not understand a question. Just tell me that you do not understand and I will ask the question some other way. But please do not guess or make anything up. If you do not know the answer to the question, that is OK too. Just tell me that. No one can remember everything. There are no “right” or “wrong” answers to any of my questions.” (Section II (d) (“Sample Opening Statement”).)

“A terrible human price”

The lapse by the First Circuit in initially denying the petition for review in *Mejilla-Romero*, and in doing so, failing to recognize the long-standing application of such sensitivities for children, elicited a stern dissent from Circuit Judge Norman H. Stahl. Stahl reprimanded his colleagues for upholding a decision that relied “almost entirely” on the oral testimony of the child and overlooked the broader claim put forth by the applicant, finding that the court’s error resulted in a decision that is “both legally incorrect and that inflicts a terrible human price on a child who has turned to the United States for protection.” (600 F.3d at 77.)

**CHILDREN AND ADOLESCENTS
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Judge Stahl also noted that the First Circuit is “among the least likely to reverse a decision of the BIA.” (*Id.* at 92, n.30.) The dissent criticizes the courts for limiting the evaluation of the factual basis of the claim to the child’s testimony about events that occurred between the ages of five to 10 years old. The decision criticizes the IJ’s approach of diminishing the claim to a series of altercations with a disgruntled

neighbor, which discounted “voluminous documentation” detailing a claim of violent past persecution on account of an imputed political opinion attributed to him because of his family’s long-standing land activism. (*Id.* at n.1.)

Despite testimony supporting a claim that the child’s family had suffered persecution as a result of a decades-long struggle for land rights in Honduras, including the murder of his grandfather and two uncles, the First Circuit referred only briefly to the murder of Celvyn’s family members and the destruction of the grandmother’s home and crops with a machete. The IJ cited the child’s failure to provide a clear explanation for the motivation of such harm, but took no initiative to link the murders of family members to the family’s sustained involvement in political struggle with an entrenched landed elite and its government backers, including the involvement of Celvyn’s step-grandfather as a founding member of an organization of landless peasants that had organized legal takeovers of idle land under land reform legislation enacted in the 1970s. Judge Stahl points out in his dissent that the IJ briefly mentions that the supporting evidence “bolster[s] the credibility” of the child’s testimony, but the IJ does not discuss the context of the evidence as it relates to the factual basis of the past persecution claim. (*Id.* at n.27.) In fact, the dissent submits the IJ’s decision as an appendix to show how the IJ characterized the events: “[W]ithout a doubt, troubling, [but amounting] to no more than a series of isolated altercations with a disgruntled neighbor and with a group of boys who bullied younger children into providing them with money.” (*Id.* at appendix.)

The BIA and First Circuit relied on a standard of review of accepting the IJ’s finding of no past persecution, a finding which scarcely itemized any of the corroborating testimony of the child’s mother or affidavits of five experts, including one from a mental health expert that attributed “a constellation of symptoms” of post-traumatic stress disorder in the child to past traumas of the attacks. The dissent asserts that even more troubling than the way in which the majority viewed the facts in a diminutive way, was the failure to honor the child guidelines requiring giving weight to the objective record in order to supplement the child’s testimony, noting: “Of course, we are required to review the entire record in all cases, but that is particularly true in a case involving a minor.” (*Id.* at 77.)

Indeed, the need to recognize gaps that will likely exist in a child’s testimony is the very crux of creating child guidelines. Even adult testimony based on experiences that occur in childhood will likely exhibit a child’s recollection

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of events, and steps should be taken to elicit meaningful testimony in these cases. The INS guidelines direct in Section III (f), “Children’s testimony should be given a liberal ‘benefit of the doubt’ with respect to evaluating a child’s alleged fear of persecution,” citing the UNHCR guidelines at section 219. The US government incorporated this direction as well in a memorandum to all immigration regional directors, district directors, chief patrol agents, and regional and district counsel in a memorandum titled “Exercising Prosecutorial Discretion issued in November, 2000.

It is well-established in areas of law involving minors that children and adolescents are entitled to special attention because of their special needs, limitations on their reasoning abilities, and inhibitions due to their social status, which are often significantly different from those of adults, and from each other as well, due to age-related developmental differences. Over the past decade, the Department of Homeland Security (DHS) has apprehended an increasing number of alien juveniles. Surveys and statistics published in numerous sources indicate that DHS detains over 5,000 unaccompanied juveniles annually in upwards of 90 juvenile facilities. Given the high number and grave circumstances of thousands of children escaping poverty, abuse, or persecution facing a complex and daunting immigration process often without legal representation, honoring child guidelines is more important than ever.

In the short, three-paragraph decision to remand, the First Circuit notes that the Petitioner raised arguments regarding the guidelines’ child-sensitive approach in his brief to the IJ and the BIA, but “neither the BIA nor the IJ explicitly addressed the arguments in their decisions,” and “that was one of the main arguments presented in the petition for rehearing.” The First Circuit noted that the petitioner’s claim—that the lower courts’ failure to follow the guidelines resulted in the evidence submitted in support of his asylum claim not being properly considered—may implicate important issues of law

and policy, concluding: “Since petitioner’s claims may implicate important issues of law and policy, we are of the view that these arguments should be considered by the administrative courts in the first instance.”

The First Circuit vacated both the panel opinion and the BIA’s decision and remanded to the BIA to “undertake de novo consideration of petitioner’s arguments and reevaluate the record in their light.” The court also instructed that the parties were to be given an opportunity for further briefing with “further specificity which guidelines are claimed to have been transgressed.” Further, the court suggested that the BIA “should also consider a remand to an IJ, in order that the IJ can evaluate the testimony and supporting evidence in light of the guidelines’ standards regarding child asylum seekers.”

No Magic Words

While the IJ stated in his decision in *Mejilla Romero* that he “considered” the fact that children may experience persecution in ways that are different from adults, the First Circuit dissent astutely advocates that: “It should not be enough . . . for the IJ to merely state he has taken age into account. The IJ [should] demonstrate through his analysis that this factor was taken into account. There is a big difference between these two. Using magic words should not be enough.” (*Id.* at n. 16, emphasis added.) As the high commissioner wrote in the introduction to UNHCR guidelines, “The ultimate value of the UNHCR Policy and Guidelines on Refugee Children will likely be in their translation from words to concrete action.” While it is imaginable that an individual immigration official or administrative judge might not, in fact, take care or take actions to implement the guidelines in every case, it is reasonable to expect that when a breach of such guidelines come to the attention of the judges on the federal bench, those guidelines will be applied or a case remanded so that a lower court can take care to do so. ♦



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