

6-15-2024

## The Best Interests of the Immigrant Child in Asylum Cases: What Is the Answer?

Elizabeth Avila  
*University of Dayton*

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>

---

### Recommended Citation

Avila, Elizabeth (2024) "The Best Interests of the Immigrant Child in Asylum Cases: What Is the Answer?," *University of Dayton Law Review*. Vol. 49: No. 3, Article 5.  
Available at: <https://ecommons.udayton.edu/udlr/vol49/iss3/5>

This Comment is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact [mschlange1@udayton.edu](mailto:mschlange1@udayton.edu), [ecommons@udayton.edu](mailto:ecommons@udayton.edu).

# THE BEST INTERESTS OF THE IMMIGRANT CHILD IN ASYLUM CASES: WHAT IS THE ANSWER?

*Elizabeth Avila\**

“[Y]ou have to understand, that no one puts their children in a boat unless the water is safer than the land.”<sup>1</sup>

I. INTRODUCTION .....	386
II. BACKGROUND ON ELIGIBILITY FOR ASYLUM AND WITHHOLDING OF REMOVAL.....	388
<i>A. Types of Asylum Cases.....</i>	388
<i>B. Definition of Refugee .....</i>	389
<i>C. Fear of Past or Present Persecution .....</i>	390
III. PROCEDURAL ISSUES WITH THE ASYLUM PROCESS .....	390
<i>A. Accompanied Minors.....</i>	390
<i>B. Unaccompanied Minors.....</i>	391
IV. DEFINING THE BEST INTERESTS STANDARD.....	391
<i>A. How to Assess a Child's Best Interests .....</i>	391
<i>B. Real Life Examples of the Application of the Best Interests Standard.....</i>	392
<i>C. The Best Interests Standard in Special Immigrant Juvenile Cases .....</i>	393
V. APPLYING THE “BEST INTERESTS OF THE CHILD” STANDARD IN ASYLUM CASES .....	396
VI. PROPOSED SOLUTIONS TO THE APPLICATION OF THE BEST INTERESTS STANDARD IN ASYLUM CASES.....	398
<i>A. Tailoring the Definition of the “Best Interests” Standard .....</i>	398
<i>B. Considering Child-Based Types of Persecution for Asylum.....</i>	400
<i>C. Granting Derivative Asylum to Parents .....</i>	401
<i>D. Constitutionalizing the Right to Asylum for Children.....</i>	402

---

\* Elizabeth Avila is from Queens, New York. She attended Utica University and received her B.A. in political science. During her undergraduate studies, she was a part of the Young Scholars Liberty Partnership Program and the Pi Sigma Alpha National Political Science Honor Society. She also received her J.D from the University of Dayton School of Law and graduated cum laude in 2023. While in law school, she was a part of the Leadership Honors Program. Elizabeth was admitted to the Connecticut bar in November 2023 and is currently working as a judicial law clerk for the Connecticut Superior Court.

<sup>1</sup> Warson Shire, *Home*, <https://www.amnesty.ie/wp-content/uploads/2016/06/home-by-warsan-shire.pdf> (last visited Feb. 3, 2024).

E. <i>Providing Free Legal Counsel and Guardians Ad Litem for UACs</i> .....	403
F. <i>The Presence of a Known and Trusted Adult</i> .....	405
VII. CONCLUSION .....	406

## I. INTRODUCTION

The Fourteenth Amendment of the United States (U.S.) Constitution provides that, “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>2</sup> Similarly, the Fifth Amendment imposes the same legal obligation on the federal government.<sup>3</sup> Furthermore, the Fifth and Fourteenth Amendments apply to all “persons” in the United States.<sup>4</sup> They are not just confined to the protection of American citizens.<sup>5</sup> Thus, non-citizens, even those who entered the U.S. illegally, are guaranteed due process of the law by the Fifth and Fourteenth Amendments.<sup>6</sup> This means that the rights of migrant children, whether accompanied or unaccompanied, are safeguarded by the U.S. Constitution.

Unfortunately, many children are forced to grow up in countries with high rates of poverty, increased levels of violent crime, and corruption. They flee to the United States seeking protection from persecution and human rights violations, but the U.S. government either turns them away or separates them from their families.<sup>7</sup> If allowed to stay in the United States, the trauma from the abuse and violence they suffered in their home country is further compounded by separation from their parents and the loss of close relatives they have known their entire life. If forced to return to their home country, the child's life is put in grave danger and they are essentially denied of having a safe living environment, such as the one that the United States can provide for them.<sup>8</sup> It is impossible to use a “one size fits all” standard in granting asylum and refugee protection because every child has different experiences and trauma that must be taken under consideration.

The United States has identified an increasing number of migrant

---

<sup>2</sup> U.S. CONST. amend. XIV, § 1.

<sup>3</sup> U.S. CONST. amend. V.

<sup>4</sup> *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896).

<sup>5</sup> *Id.*; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>6</sup> *See Wong Wing*, 163 U.S. at 238; *see Yick Wo*, 118 U.S. at 369.

<sup>7</sup> *See* Caitlin Dickerson, *The Secret History of the U.S. Government's Family Separation Policy*, THE ATLANTIC (Aug. 7, 2022), <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/>; *Mexico: Asylum Seekers Face Abuses at Southern Border*, HUM. RTS. WATCH (June 6, 2022), <https://www.hrw.org/news/2022/06/06/mexico-asylum-seekers-face-abuses-southern-border>.

<sup>8</sup> *See* HUM. RTS. WATCH, *supra* note 7.

children crossing the border without their parents.<sup>9</sup> As a result of this spike, more than 19,000 beds have been prepared at shelters and housing sites to prevent these children from suffering in Border Patrol detention facilities.<sup>10</sup> Turning to the numbers, approximately 70,000 unaccompanied minors have been reported in the U.S. as of the end of April 2022.<sup>11</sup> According to the U.S. Customs and Border Protection (CBP), the average number of unaccompanied minors in CBP custody in June 2022 was 752 per day and 562 per day in July 2022.<sup>12</sup> These numbers continue to grow each year as children are forced to escape their home country to find safety in the United States. One of the main principles of the United States, as stated in the Pledge of Allegiance which is recited by schoolchildren all over the country, is that there should be “liberty and justice for all.”<sup>13</sup> Every child deserves protection, regardless of why he or she leaves home, where he or she comes from, where he or she is, or how he or she got to the U.S.<sup>14</sup>

Every one in eight migrants worldwide is a child.<sup>15</sup> They all share three common characteristics.<sup>16</sup> First, these children are all minors.<sup>17</sup> Second, they are at risk of being permanently or temporarily separated from their parents or legal guardians.<sup>18</sup> Third, they do not have a country that they can call their own.<sup>19</sup> Because they are either non-citizens or children of non-citizens, they are not guaranteed access to fundamental rights like protection, family life, education, and health care.<sup>20</sup> There is no authority or institution willing to protect these “stateless” children and the enforcement of their human rights is tenuous at best.<sup>21</sup>

The United Nations Children's Fund (UNICEF) report indicates that very often immigrant children face many obstacles before and after they enter

---

<sup>9</sup> Camilo Montoya-Galvez, *U.S. Preparing 19,000 Beds for Migrant Children in Case of Spike in Border Arrivals*, CBS NEWS (May 3, 2022, 8:25 AM), <https://www.cbsnews.com/news/immigration-migrant-children-border-arrivals-xavier-becerra/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *CBP Releases July 2022 Monthly Operational Update*, U.S. CUSTOMS & BORDER PROT. (Aug. 15, 2022), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-july-2022-monthly-operational-update>.

<sup>13</sup> *The Pledge of Allegiance*, INDEP. HALL ASS'N, <https://www.ushistory.org/documents/pledge.htm> (last visited Feb 3, 2024).

<sup>14</sup> *Migrant and Displaced Children*, UNICEF, <https://www.unicef.org/migrant-refugee-internally-displaced-children> (last visited Feb. 3, 2024).

<sup>15</sup> *Protection of Children in Migration*, IOM UN MIGRATION, <https://eea.iom.int/protection-children-migration> (last visited Feb. 3, 2024).

<sup>16</sup> Jacqueline Bhabha, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?*, 31 HUM. RTS. Q. 410, 413 (2009).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See id.* at 410–11.

<sup>21</sup> *Id.* at 410.

the U.S.<sup>22</sup> For example, 36.5 million children had been displaced from their homes by the end of 2021.<sup>23</sup> Furthermore, they were denied access to proper education and lacked adequate medical care.<sup>24</sup> Because it is difficult to adjust to a completely different culture and learn a new language, refugee children are five times more likely to drop out of school than other children.<sup>25</sup> To make matters worse, children are susceptible to abuse, including forced child labor, child marriage, human trafficking, sexual exploitation, and smuggling.<sup>26</sup> As previously stated, these children have already endured many challenges at such a young age. The least one can do to ensure the safety and well-being of migrant children is to give them the opportunity to succeed by allowing them to remain in the United States.

This Comment discusses several points regarding why the “best interests of the child” standard can be harmful to minors when used in asylum cases. Part II of this Comment describes the elements that need to be satisfied for an individual to qualify for asylum. Part III of this Comment highlights many procedural issues encountered by children while navigating the asylum process. Part IV of this Comment explains what the “best interests of the child” standard is and how it has been used in Special Immigrant Juvenile (SIJ) cases. Part V of this Comment uses examples from case law to highlight the factors the court considers when deciding child-based asylum cases. Part VI of this Comment proposes some solutions to the issues stopping children from obtaining asylum in the United States.

## II. BACKGROUND ON ELIGIBILITY FOR ASYLUM AND WITHHOLDING OF REMOVAL

### A. *Types of Asylum Cases*

The asylum process is very difficult to navigate, and the applicant must satisfy several requirements to be granted asylum. There are two ways that an individual can apply for asylum in the United States: either affirmatively or defensively.<sup>27</sup> Under either process, the individual can be ordered removed if he or she does not establish a “well-founded fear” of persecution in his or her home country during a credible fear interview with immigration officials.<sup>28</sup> During the credible fear interview, the individual has

---

<sup>22</sup> See UNICEF, *supra* note 14.

<sup>23</sup> *Nearly 37 Million Children Displaced Worldwide – Highest Number Ever Recorded*, UNICEF (June 17, 2022), <https://www.unicef.org/eap/press-releases/nearly-37-million-children-displaced-worldwide-highest-number-ever-recorded>.

<sup>24</sup> UNICEF, *supra* note 14.

<sup>25</sup> *27 Million Children Out of School in Conflict Zones*, UNICEF, (Sept. 18, 2017), <https://www.unicef.org/press-releases/27-million-children-out-school-conflict-zones>.

<sup>26</sup> UNICEF, *supra* note 14.

<sup>27</sup> *Fact Sheet: U.S. Asylum Process*, NAT’L IMMIGR. F., [https://immigrationforum.org/wp-content/uploads/2018/08/Asylum-Fact-Sheet-Update\\_Final.pdf](https://immigrationforum.org/wp-content/uploads/2018/08/Asylum-Fact-Sheet-Update_Final.pdf) (last visited Feb. 3, 2024).

<sup>28</sup> *Id.*

the chance to explain how he or she has been persecuted or has a well-founded fear of persecution based on his or her race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her home country.<sup>29</sup>

Individuals may qualify for affirmative asylum if they are physically present in the United States.<sup>30</sup> Regardless of how the individual entered the U.S., he or she will be barred from receiving asylum if the individual does not apply within one year of arriving to the United States.<sup>31</sup> In an affirmative asylum process, the United States Citizenship and Immigration Services (USCIS) officer determines whether to grant the individual asylum in the U.S.<sup>32</sup> Individuals may also apply for asylum as a defense in removal proceedings after they are detained by Immigration and Customs Enforcement or CBP officers.<sup>33</sup> In the defensive asylum process, the immigration court judge decides whether to grant asylum to the individual.<sup>34</sup> If the individual is ordered removed, then he or she may appeal the decision of the immigration court judge.<sup>35</sup>

### B. *Definition of Refugee*

A refugee is defined as someone who fled from his or her home country due to war, violence, or fear of persecution.<sup>36</sup> A refugee seeks protection from outside of the United States, while an asylee seeks protection from inside the U.S. or at a port of entry.<sup>37</sup> For an individual to be eligible for asylum, the applicant must meet the international definition of a refugee.<sup>38</sup> The applicant has the burden of proving that he or she is unable to, or unwilling to, return to his or her home country because he or she was, or will be, persecuted based on his or her race, religion, nationality, membership in a particular social group, or political opinion.<sup>39</sup>

---

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Fact Sheet: Asylum in the United States*, AM. IMMIGR. COUNCIL, [https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum\\_in\\_the\\_united\\_states\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states_0.pdf) (last modified Jan. 15, 2024).

<sup>32</sup> NAT'L IMMIGR. F., *supra* note 27.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *What is a Refugee?*, USA FOR UNHCR, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> (last visited Feb. 3, 2024).

<sup>37</sup> NAT'L IMMIGR. F., *supra* note 27.

<sup>38</sup> *Id.* In order to meet the international definition of a refugee, a person must have a “well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, who has been forced to flee his or her country because of persecution, war or violence.” *Id.*

<sup>39</sup> See 8 U.S.C. § 1101(a)(42); 8 C.F.R. § 1208.13(b)(1).

### C. *Fear of Past or Present Persecution*

An asylum seeker need not establish that he or she experienced past persecution to establish a well-founded fear of future persecution.<sup>40</sup> Persecution may be emotional, psychological, or physical.<sup>41</sup> If an individual cannot prove that he or she suffered past persecution, he or she can demonstrate both a “subjectively genuine and an objectively reasonable fear” of future persecution.<sup>42</sup> A well-founded fear of future persecution can be shown through a pattern of persecution against similar people in the applicant's home country.<sup>43</sup> However, the applicant must also show that there is no possibility of safely relocating to another part of his or her home country or last habitual residence.<sup>44</sup>

## III. PROCEDURAL ISSUES WITH THE ASYLUM PROCESS

The asylum system, as it currently stands, is not child-friendly. The complexity of the asylum process, combined with language and cultural barriers, make it nearly impossible for children to successfully obtain asylum.<sup>45</sup>

### A. *Accompanied Minors*

The biggest weakness of the asylum system is that it views children as being objects of their parents, instead of treating them as their own independent individuals with need for protection.<sup>46</sup> In other words, accompanied children are out of luck if their parents are not granted asylum.<sup>47</sup> Even if the child has a separate claim of persecution that has not been raised by the parents within the one-year deadline, the immigration court is unable to consider the child's independent basis for asylum.<sup>48</sup> Children are not just dependents of adults; asylum officers should make sure to inquire into the child's case even if a separate I-589 asylum application has not been filed.<sup>49</sup> The asylum process also fails to consider that some children suffer persecution in their home country that their parents are involved in or

---

<sup>40</sup> See *What Is the Difference Between Credible Fear and Reasonable Fear?*, MUSA-OBREGON LAW PC (Mar. 16, 2020), <https://www.musa-obregon.com/blog/2020/march/what-is-the-difference-between-credible-fear-rea/>.

<sup>41</sup> *Real ID Act- Long Form Boilerplate Language*, U.S. DEP'T OF JUST., <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/long-form-boilerplate.pdf> (last visited Feb. 5, 2024).

<sup>42</sup> *Id.*

<sup>43</sup> MUSA-OBREGON LAW PC, *supra* note 40.

<sup>44</sup> 8 C.F.R. § 1208.13(b)(2)(ii).

<sup>45</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, 134 HARV. L. REV. 1456, 1458 (2021).

<sup>46</sup> *Id.* at 1457.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Jeff Weiss, *Guidelines for Children's Asylum Claims*, U.S. DEP'T OF JUST. IMMIGR. AND NATURALIZATION SERV. 15 (Dec. 10, 1998), <https://www.uscis.gov/sites/default/files/document/memos/ChildrensGuidelines121098.pdf>.

condone.<sup>50</sup> This includes allegations of domestic violence and female genital mutilation (FGM).<sup>51</sup>

### *B. Unaccompanied Minors*

The asylum system also negatively impacts unaccompanied children. There is a misconception that all children can obtain derivative asylum through their parents.<sup>52</sup> But what happens if the parents are not granted asylum or if the minor arrives in the U.S. without an adult? There is no alternative path for unaccompanied children to seek asylum relief.<sup>53</sup> The minor is forced to deal with the complicated asylum process, alone, usually without any guidance from an attorney or guardian ad litem.<sup>54</sup> The vulnerability of children and their inability to fit into the limited grounds of persecution recognized make it especially difficult for them to satisfy the eligibility requirements for asylum.<sup>55</sup> In fact, there are many forms of persecution that are unique to children but that are not recognized in the rigid asylum framework.<sup>56</sup>

## IV. DEFINING THE BEST INTERESTS STANDARD

### *A. How to Assess a Child's Best Interests*

The “best interests of the child” standard is a trademark of the protection of children in the United States.<sup>57</sup> All 50 states have laws that require the use of the “best interests” standard when making decisions regarding a child's custody and other serious life issues.<sup>58</sup> The factors taken into account when determining the “best interests of the child” vary case by case.<sup>59</sup> In 2013, the Committee on the Rights of the Child described seven factors that should be considered in the analysis of the “best interests of the child”: (1) the child's wishes and views; (2) the child's identity; (3) the preservation of the family environment and close familial relationships; (4) the ability to care, protect, and maintain the child's safety; (5) the child's vulnerability and emotions; (6) the child's right to health care; and (7) the child's right to education.<sup>60</sup> Although this is a meaningful framework, there

---

<sup>50</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1457.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1457–58.

<sup>56</sup> *Id.* at 1458.

<sup>57</sup> Jennifer Nagda & Maria Woltjen, *Best Interests of the Child Standard: Bringing Common Sense to Immigration Decisions*, FIRST FOCUS: BIG IDEAS 2015 – PIONEERING CHANGE 105, 107.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



is no guidance as to which factor should be given the most weight and which one should be given the least importance.<sup>61</sup>

*B. Real Life Examples of the Application of the Best Interests Standard*

To better understand how the use of the “best interests standard” in immigration proceedings can lead to unfair or absurd results, consider the following two scenarios.

First, Julia, an 11-year-old minor, fled to the United States after she witnessed her grandmother being sexually assaulted by a police officer in Honduras.<sup>62</sup> She immigrated to the U.S., hoping to reunite with her mother, but was instead detained in an “shelter” for approximately six months.<sup>63</sup> Julia was abruptly separated from her family and was only allowed a weekly, ten-minute phone call with her mother.<sup>64</sup> Because of how devastated and lonely she felt, Julia told her attorney that she wanted to return to Honduras and stop pursuing her case.<sup>65</sup> The asylum process can take many years and is very difficult for adults, even more so for children, to deal with on their own.<sup>66</sup> The vulnerability of children makes them ill-equipped to cope with the stress and exhaustion the asylum process can bring.<sup>67</sup> Here, Julia decided that she would rather go back to her only caretaker in Honduras, who was unable to protect her and keep her safe, rather than be so close to, yet separated from, her mother.<sup>68</sup> Julia's attorney would be obligated to tell the immigration judge Julia's expressed desire to return to her home country, but then the immigration judge would have no obligation to inquire into Julia's safety and well-being in Honduras.<sup>69</sup> Julia's mother would play no part in the hearing and, even if she asked the court to be present telephonically, the court would have no duty to listen to her before deciding whether to send Julia back to Honduras.<sup>70</sup> This example portrays the difficulties immigration judges face when weighing the child's best interests against the child's wishes.

Second, Ana, a 13-month-old baby, was found when a smuggler was trying to bring her into the United States.<sup>71</sup> Ana's mother had been killed weeks before.<sup>72</sup> Since the day she was born, Ana had been raised by her

---

<sup>61</sup> *Convention on the Rights of the Child: General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, UN (May 29, 2013).

<sup>62</sup> Nagda & Woltjen, *supra* note 57, at 106.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *See id.*; *Fact Sheet: Unaccompanied Migrant Children (UACs)*, NAT'L IMMIGR. F., <https://immigrationforum.org/article/fact-sheet-unaccompanied-migrant-children-uacs/> (Nov. 2, 2020).

<sup>67</sup> NAT'L IMMIGR. F., *supra* note 66.

<sup>68</sup> Nagda & Woltjen, *supra* note 57, at 106.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

mother and maternal grandparents.<sup>73</sup> Without giving any consideration to Ana's age and the fact that she could not speak yet, the Department of Homeland Security, went ahead and filed charges against Ana for unlawfully entering the U.S.<sup>74</sup> It is absurd to think that Ana would be able to appear and defend herself in immigration court.<sup>75</sup> Even more outrageous is the fact that in order for Ana to be reunited with her grandparents in her home country, Ana would have to make the request herself through an attorney.<sup>76</sup> This request would have to be done by an attorney Ana would have to hire to represent her in removal proceedings.<sup>77</sup> Simply put, Ana would have no one to advocate for her best interests until she retained legal counsel.<sup>78</sup> This scenario indicates that many asylum procedures and their technicalities can end up harming migrant children and are not in the interests of government efficiency.

### C. *The Best Interests Standard in Special Immigrant Juvenile Cases*

An area in immigration law that already incorporates the “best interests” standard is the classification of a minor as a Special Immigrant Juvenile (SIJ).<sup>79</sup> A minor may seek SIJ classification if he or she is under twenty-one years of age, not married, and meet a list of other requirements.<sup>80</sup>

SIJ classification is available to immigrant children who are not able to reunify with their parents due to abuse, abandonment, or neglect, or a similar basis under state law.<sup>81</sup> First, the child must ask the state court judge in the state where the child resides to make special findings showing that: (1) parental reunification is not a viable option; (2) the minor is dependent on the court and should be placed under the custody of a state agency or department, or a person appointed by the state juvenile court; and (3) it would not be in the child's best interests to be returned to his home country.<sup>82</sup> Second, the child may submit a petition for SIJ status to USCIS.<sup>83</sup> Upon approval of the SIJ petition, the child can apply for I-485 Adjustment of Status to obtain

---

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Policy Manual: Chapter 2 - Eligibility Requirements*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2> (current as of Jan. 24, 2024).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 280 (2014).

<sup>83</sup> *Id.*

lawful permanent residence in the U.S.<sup>84</sup>

Even in determining eligibility for SIJ classification, the process fails to protect marginalized families affected by poverty, the jail system, and the broken immigration system.<sup>85</sup> A parent's autonomy to raise and educate their own child is greatly disrupted.<sup>86</sup> In fact, the parent is blamed and may end up being punished for being a "bad parent."<sup>87</sup> Furthermore, the beneficiary child is prohibited from ever petitioning for legal status for his parents—even a non-abusive, custodial parent.<sup>88</sup> Instead of promoting family reunification, SIJ status characterizes a parent as undeserving or evil under the guise of protecting an "innocent child."<sup>89</sup>

The problem with the use of the "best interests" standard when granting any type of immigration relief lies in its inconsistency and unclarity. Each state has a list of different factors it considers, including, but not limited to: (1) the child's safety and well-being; (2) the bond the primary caregiver has with the child; (3) the primary caregiver's financial stability and ability to provide the child with a loving home; and (4) the child's connection to and familiarity with the environment.<sup>90</sup> The court makes an independent analysis and has the power to decide which factor it wishes to give more weight.<sup>91</sup> This creates confusion because the same factors could lead to completely different outcomes across jurisdictions.<sup>92</sup>

The juvenile court has jurisdiction to make judicial determinations about the custody and care of juveniles.<sup>93</sup> Thus, the state court's role is limited to identifying undocumented children that have been abused, neglected, or abandoned and cannot be reunited with their parent.<sup>94</sup> However, these special findings do not give the minor any immigration benefits.<sup>95</sup> Trial judges are not gatekeepers tasked with determining who is a worthy candidate for citizenship; only USCIS has the power to approve or deny SIJ petitions.<sup>96</sup>

---

<sup>84</sup> *Policy Manual: Chapter 3 – Filing Instructions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., POLICY MANUAL, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3#S-B> (last modified Jan. 24, 2024).

<sup>85</sup> Ellyn Jameson, "Best" Interests and "Bad" Parents: Immigration and Child Welfare Through the Lens of SIJS and Foster Care, 168 U. PA. L. REV. 513, 515 (2020).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 514.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 516.

<sup>90</sup> *Policy Manual: Chapter 2 - Eligibility Requirements*, *supra* note 79.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 8 C.F.R. § 204.11(a).

<sup>94</sup> *Immigration Relief for Abused Children: Information for Juvenile Court Judges, Child Welfare Workers, and Others Working with Abused Children*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Apr. 2014), <https://perma.cc/SCXB-85H7> (stating that "[t]he role of the [juvenile] court is to make factual findings based on state law about abuse, neglect, or abandonment." (emphasis added)).

<sup>95</sup> *Id.*

<sup>96</sup> See *Simbaina v. Bunay*, 221 Md. App. 440, 458 (2015) (citation omitted) (noting that state courts are "not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent").

Immigration matters are exclusively within the purview of the Federal Government.<sup>97</sup> As such, a probate court judge must make special findings even when the judge does not believe that the child will prevail in his or her SIJ application.<sup>98</sup> Additionally, a probate court judge cannot decline to make special findings simply because he suspects that the child's primary motivation is to apply for SIJ status and not that he or she cannot reunify with one or both of his or her parents.<sup>99</sup> A trial court's job is not to determine the legitimacy of SIJ petitions.<sup>100</sup>

Although state courts are not supposed to be gatekeepers in immigration matters, they have slowly taken on this task in two inconsistent ways.<sup>101</sup> First, some state laws prevent youth that are over eighteen from receiving predicate orders in dependency or custody hearings.<sup>102</sup> In other words, minors that are between the ages of 18 and 21 are blocked from seeking SIJ status, even though they would otherwise qualify under federal law.<sup>103</sup> For example, a custody petition that is filed in Virginia for a migrant child that is 17 years old, but turns 18 before the hearing is held, would be denied.<sup>104</sup> This is because Virginia law only permits custody petitions for children that are under 18.<sup>105</sup> However, in a state like Mississippi or New York that extends the age to 21, the same child would be able to obtain a guardian and the required SIJ order.<sup>106</sup> Second, state courts have continuously usurped federal courts' roles and used language opining on the merits of the immigration application.<sup>107</sup> These special findings are usually grounded on neglect rather than actual physical abuse.<sup>108</sup> However, there is great debate between the meaning of "neglect" as opposed to "poverty."<sup>109</sup> In cases involving SIJs, courts have considered lack of food, lack of supervision, and living in a dangerous neighborhood as a sufficient basis to find neglect.<sup>110</sup> However, poverty is not the same as neglect and confusing the two terms can disproportionately affect lower-income families of color.<sup>111</sup> Federal court judges with years of experience and knowledge are better equipped to resolve

---

<sup>97</sup> *Id.* at 451; *see also* *Recinos v. Escobar*, 473 Mass. 734, 738 (2016).

<sup>98</sup> *Guardianship of Penate*, 477 Mass. 268, 269–70 (2017).

<sup>99</sup> *Id.* at 275.

<sup>100</sup> *Id.*

<sup>101</sup> *Jameson*, *supra* note 85, at 541.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Hlass*, *supra* note 82, at 267–68.

<sup>105</sup> *Id.* at 268.

<sup>106</sup> *Id.*

<sup>107</sup> *Jameson*, *supra* note 85, at 542.

<sup>108</sup> *Id.* at 543.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

these issues.

A clear example of how the SIJ process works is illustrated in *Celso Monterroso Romero v. Josefa Perez*.<sup>112</sup> In that case, the father petitioned for sole custody of his 17-year-old son, R.M.P.,<sup>113</sup> an undocumented migrant child from Guatemala.<sup>114</sup> The circuit court was unsure about what standard of proof, “clear and convincing evidence” or “preponderance of the evidence,” to use in issuing its special findings.<sup>115</sup> The circuit court did not provide an answer to this question, but instead found that the petitioner failed to establish that reunification was not viable due to neglect under either standard.<sup>116</sup> On appeal, the intermediate appellate court found that the proper standard to apply in SIJ cases is the “preponderance of the evidence” standard.<sup>117</sup> The court went even further to hold that the petitioner had not provided enough evidence to establish a finding of neglect.<sup>118</sup> The Court of Appeals of Maryland conceded that the “preponderance of the evidence” standard is the appropriate standard to use in SIJ cases.<sup>119</sup> However, the terms “abuse,” “neglect,” and “abandonment” should be interpreted broadly to give way to Congress’s intent in creating SIJ classification.<sup>120</sup> Here, the forced labor performed by R.M.P. without regard to his safety and health satisfies the definition of “neglect” under Maryland law.<sup>121</sup>

The aforementioned case indicates that whether reunification is viable is case-specific and dependent upon state law.<sup>122</sup> For example, the circuit court considered: (1) the child’s relationship with the parent; (2) whether there is any evidence of mistreatment; (3) the impact of forced reunification on the child’s health, education, or welfare; (4) the conditions in the child’s home country; and (5) whether the child would be exposed to danger or harm.<sup>123</sup> However, this is a non-exclusive list and trial courts are free to consider other factors in light of the evidence and testimony on the record.<sup>124</sup>

#### V. APPLYING THE “BEST INTERESTS OF THE CHILD” STANDARD IN ASYLUM CASES

The best interests of a child standard has many flaws, which result in

---

<sup>112</sup> See generally *Romero v. Perez*, 463 Md. 182, 185 (2019).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 186.

<sup>115</sup> *Id.* (internal quotations omitted).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 187.

<sup>119</sup> *Id.* at 197.

<sup>120</sup> *Id.* at 202.

<sup>121</sup> *Id.* at 206.

<sup>122</sup> See generally *id.*

<sup>123</sup> *Id.* at 202–03.

<sup>124</sup> See generally *id.*

serious harm to migrant children.<sup>125</sup> The principle unnecessarily separates fit parents from their children.<sup>126</sup> Additionally, it has a disparate impact on poor non-white families because of deeply embedded stereotypes in our society.<sup>127</sup> The best interests standard has a substantive right component, which protects the child's right to have his or her best interests considered in any decision about him or her, and a procedural right component, which analyzes the “‘possible impact’ of decisions upon a child or group of children.”<sup>128</sup> It takes into account a number of factors such as education, nutrition, equality of opportunity, and many others.<sup>129</sup> However, this principle has not stopped at protecting children from violence, sexual abuse, or neglect.<sup>130</sup> It has overreached, extending beyond its intended purpose and shattering the lives of immigrant families.

In *In re A-K*, the court held that the respondent could not show that he qualified for asylum or withholding of removal solely because his daughter would be harmed by having to undergo FGM if forced to return to his home country.<sup>131</sup> The respondent was a native and citizen of Senegal.<sup>132</sup> He sought withholding of removal based on the fact that his two U.S. citizen daughters would be subjected to FGM.<sup>133</sup> The immigration judge agreed with the respondent, but the Board of Immigration Appeals (BIA) vacated the order granting withholding of removal.<sup>134</sup> First, the BIA found that the respondent's daughters could avoid undergoing FGM by safely relocating to another area in Senegal.<sup>135</sup> Second, the respondent failed to establish a risk of persecution to himself.<sup>136</sup> There was no pattern of persecution tied to the respondent personally and he would not be forced to undergo FGM because he was an adult male.<sup>137</sup> Although the child of an alien who is granted asylum can obtain the same status as their parent, the converse is not true.<sup>138</sup> Furthermore, the respondent had not proved that “it is more likely than not that his life or freedom would be threatened on account of his opposition to [FGM.]”<sup>139</sup> Third, the court determined that, because the children were U.S. citizens, they

---

<sup>125</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1456.

<sup>126</sup> *Id.* at 1456.

<sup>127</sup> *Id.* at 1456, 1464.

<sup>128</sup> Nagda & Woltjen, *supra* note 57, at 107.

<sup>129</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1470.

<sup>130</sup> *Id.* at 1467.

<sup>131</sup> *In re A-K*, 24 I&N Dec. 275, 275-76 (B.I.A. 2007).

<sup>132</sup> *Id.* at 275.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 281.

<sup>135</sup> *Id.* at 277.

<sup>136</sup> *Id.* at 278.

<sup>137</sup> *Id.* at 278-79.

<sup>138</sup> *Id.* at 279.

<sup>139</sup> *Id.* at 280.

would not be legally required to leave the country with their father.<sup>140</sup> Thus, the court ordered that the respondent be removed from the U.S. to Senegal without asking if the children would be safe and had someone to care for them in the U.S.<sup>141</sup>

In *Olowo v. Ashcroft*, the court concluded that the respondent did not establish a claim for derivative asylum based on the ground that she and her twin daughters were members of a social group that is subjected to FGM in Nigeria.<sup>142</sup> The BIA denied the respondent's asylum claim and the Seventh Circuit affirmed.<sup>143</sup>

First, the court found that the respondent did not provide sufficient evidence to show that she feared future persecution herself.<sup>144</sup> Second, claims for derivative asylum based on harm to one's children "are cognizable only when the . . . children are subject to 'constructive deportation' along with the applicant."<sup>145</sup> Here, the twins were legal permanent residents of the U.S. and their father was available to care for his daughters in the U.S.<sup>146</sup> As such, the respondent's daughters had a legal right to remain in the U.S. and would not be forced to return to Nigeria with their mother.<sup>147</sup> In fact, the BIA asked that state authorities and the Illinois Department of Children and Family Services be notified of respondent's intent to take her daughters to Nigeria and expose them to the threat of FGM.<sup>148</sup> Thus, the immigration court tends to favor the child's country of citizenship and the availability of a caretaker over stability and the family unit.

## VI. PROPOSED SOLUTIONS TO THE APPLICATION OF THE BEST INTERESTS STANDARD IN ASYLUM CASES

### A. Tailoring the Definition of the "Best Interests" Standard

The "best interests" standard is a very subjective and discretionary test.<sup>149</sup> This principle extends access to asylum for minors but offers no similar path for adults.<sup>150</sup> As a result, migrant children are either ripped apart from their families or are deported along with their parents.<sup>151</sup> The term "best interests" has no exact definition and this, in turn, leads to inconsistent

---

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 281.

<sup>142</sup> *Olowo v. Ashcroft*, 368 F.3d 692, 679, 701 (7th Cir. 2004).

<sup>143</sup> *Id.* at 704–05.

<sup>144</sup> *Id.* at 701.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 703–04.

<sup>149</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1473.

<sup>150</sup> *Id.* at 1456.

<sup>151</sup> *Id.*

decisions and confusion among immigration judges.<sup>152</sup> In other words, immigration judges have unfettered discretion in deciding which of the “best interests” factors to give the most consideration to, and whether to grant asylum to the minor.<sup>153</sup> An immigration judge in the Cleveland, Ohio Immigration Court may decide to grant asylum, while an immigration judge in the Hartford, Connecticut Immigration Court may deny a minor asylum under identical facts.

In reality, the “best interests” standard is used as a tool for interpretation rather than as a device to implement social change.<sup>154</sup> As seen in child protection proceedings, judges utilize this principle to decide between existing options: either to send the minor to a foster home or to unite them with their family.<sup>155</sup> Under the guise of safety and well-being, the family structure is destroyed.<sup>156</sup> The same parallel can be drawn to child asylum cases.<sup>157</sup> It would lead to biased decision-making by immigration judges and would tear colored, low-income families apart.<sup>158</sup>

The lack of a bright-line test leaves to the adjudicator the task of assessing the minor’s subjective fear and the objective factors.<sup>159</sup> For example, the United Nations High Commissioner for Refugees Handbook suggests that children under the age of 16 lack the maturity to establish a well-founded fear of persecution.<sup>160</sup> As a result, a child’s expressed fear of persecution is not given the same significance as it would be in an adult asylum case.<sup>161</sup> This results in the risk of denial of asylum to many migrant children.<sup>162</sup> However, a “minor’s mental maturity must normally be determined in the light of his (or her) personal, family and cultural background.”<sup>163</sup> A 13- or 14-year-old minor may have the capacity to form a genuine and reasonable fear of persecution, but because they are under 16 years of age, their belief is given less weight.

These dangers could be minimized by enacting a statute that provides a clear definition of the “best interests” standard.<sup>164</sup> In fact, the legislative

---

<sup>152</sup> *Id.* at 1473–74 (internal quotations omitted); see also Nagda & Woltjen, *supra* note 57, at 107.

<sup>153</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1470.

<sup>154</sup> *Id.* at 1467.

<sup>155</sup> *Id.* at 1466–67.

<sup>156</sup> *Id.* at 1467.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1468.

<sup>159</sup> Weiss, *supra* note 49, at 19.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Jennifer C. Everett, *The Battle Continues: Fighting for a More Child-Sensitive Approach to Asylum for Child Soldiers*, 21 FLA. J. OF INT’L L. 285, 299 (2009).

<sup>163</sup> Weiss, *supra* note 49, at 19 (internal quotations omitted).

<sup>164</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1473–74.



definition should go even further to explain exactly what should not be considered in the child's best interests.<sup>165</sup> For example, a parent should not be deemed unfit to care for his or her child solely on the basis of poverty.<sup>166</sup> Narrowing the definition of the “best interests” standard will prevent judges, attorneys, and guardians from being influenced by bias and prejudice.<sup>167</sup> Some judges tend to decide against reunification because they are afraid that they will be deemed responsible for any harm the child could suffer upon his or her return to their home country.<sup>168</sup> Similarly, lawyers and guardians ad litem can be blinded by stereotypical views about how a child should be raised and who should be the primary caretaker.<sup>169</sup> Thus, a clearly articulated standard can be a great step towards keeping immigrant families together.

*B. Considering Child-Based Types of Persecution for Asylum*

Due to their vulnerability, children experience unique risks and are exposed to physical and emotional abuse. Some forms of persecution specific to children include “infanticide, conscription as a child soldier, child abuse, incest, female genital mutilation . . . , bonded or hazardous child labour, child sale, child marriage, and religious sexual servitude.”<sup>170</sup> Thus, some actions taken against adults may be deemed to be mere interference or harassment but could qualify as persecution when directed at minors.<sup>171</sup>

A solution to this problem would be acknowledging “youth” as a separate social group eligible for asylum.<sup>172</sup> Failing to recognize this category means that children who are persecuted for being children may not be granted asylum and will be forced to return to their home country, where they will continue to be harmed by their aggressors.<sup>173</sup> Currently, individuals who are persecuted based on race, religion, nationality, membership in a particular social group, or political opinion are the only ones eligible for asylum.<sup>174</sup>

Broad characteristics like “youth” and “gender” do not, by themselves, provide individuals with membership in a particular social group.<sup>175</sup> The BIA and federal courts have rejected cases based primarily or exclusively on age.<sup>176</sup> This leaves many children who do not fit nicely into one of these categories unprotected.

---

<sup>165</sup> *Id.* at 1474.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1456, 1473–74.

<sup>168</sup> *Id.* at 1466.

<sup>169</sup> *Id.* at 1465.

<sup>170</sup> *Id.* at 1458 (internal quotations omitted).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1456, 1458–59.

<sup>174</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b).

<sup>175</sup> Weiss, *supra* note 49, at 24–25.

<sup>176</sup> *Id.* at 25.

### C. *Granting Derivative Asylum to Parents*

Under the Immigration and Nationality Act (INA), a spouse or child of an alien who is granted asylum based on persecution may, if not otherwise eligible for asylum, be granted the same status as the alien if accompanying, or following to join, such alien.<sup>177</sup> However, the opposite is not true for parents; there is no statutory authority for a claim of derivative asylum on the basis of the child's asylum status.<sup>178</sup> The INA is silent on whether a parent can obtain derivative asylum through their child.<sup>179</sup> To clarify, an asylum seeker's claim of "future persecution" based on harm to his or her family members does not suffice to establish a threat of persecution to the applicant directly.<sup>180</sup> The parent must show that he or she has a well-founded fear of persecution to his or her own person.<sup>181</sup> A family connection cannot be the sole basis for granting asylum.<sup>182</sup>

Courts have found that an applicant has a well-founded fear of persecution based on imputed political opinion when the applicant is reasonably believed to share his or her family's beliefs and will be directly harmed as a result.<sup>183</sup> Also, an applicant under certain circumstances may be granted asylum upon a showing that a person persecutes someone close to him or her with the purpose of causing emotional harm to the applicant.<sup>184</sup> Although this means that direct physical harm is not necessary for an asylum claim, the applicant must prove that he or she was the intended target of emotional persecution.<sup>185</sup> However, automatically considering persecution suffered by family members as a basis for granting derivative asylum goes against what was intended by Congress when enacting the INA.<sup>186</sup>

Extending derivative asylum to parents can serve to protect the child against separation from the family environment.<sup>187</sup> It would prevent fit parents from losing their children simply because of their financial status or income.<sup>188</sup> Ideally, legislative action can safeguard against abuse by immigration judges and guarantee derivative asylum for parents.<sup>189</sup> Another

---

<sup>177</sup> INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A).

<sup>178</sup> *In re A-K*, 24 I&N Dec. 275, 279 (B.I.A. 2007).

<sup>179</sup> Alida Y. Lasker, *Solomon's Choice: The Case for Granting Derivative Asylum to Parents*, 32 BROOK. J. INT'L L. 231, 232 (2006).

<sup>180</sup> *In re A-K*, 24 I&N Dec. at 278.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *Id.*

<sup>187</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1474.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

option would be urging the BIA to change its mind.<sup>190</sup> In *In re A-K*, the court held that persecution based on harm to family members does not establish a well-founded fear of persecution to the applicant personally.<sup>191</sup> Although granting asylum to the parents of an immigrant child is within the reasonable interpretations of the INA, it is unlikely that the BIA will favor this use of derivative asylum given its holding in *In re A-K*.<sup>192</sup> Unless a statute is enacted, the future of immigrant parents and children will be left to the whim of the executive and judicial branches.

#### D. Constitutionalizing the Right to Asylum for Children

Another solution to the absurd results that the use of the “best interests” standard in asylum cases has led to is to constitutionalize the right to asylum. The right to asylum has been incorporated into the constitutions of at least fifteen countries.<sup>193</sup> Although the U.S. Constitution includes a number of human rights provisions, such as the Bill of Rights, it has not expanded its protection to include the right to seek asylum.<sup>194</sup> The Trump administration viewed asylum as a “loophole” that prevents enforcement of restrictive immigration policies.<sup>195</sup> Because of the seriousness of the individual interests at stake, it is important to reconsider the need for a constitutional right to asylum.<sup>196</sup>

Constitutionalizing the right to seek asylum in the U.S. would actually have real effect in national jurisprudence.<sup>197</sup> However, this power would not be unfettered.<sup>198</sup> First, a constitutional right to asylum would not expand the protection provided by the Refugee Convention, but it would provide better protection against executive or legislative efforts to restrict an individual’s access to asylum relief.<sup>199</sup> Second, judicial oversight of asylum restrictions that arise within the removal process would be limited by the INA until there has been a final agency action.<sup>200</sup> Now that it has been established that there are sufficient safeguards in place, this Comment will discuss the difference a constitutional right to asylum can make in the adjudication of

---

<sup>190</sup> *Id.*

<sup>191</sup> *In re A-K*, 24 I&N Dec. at 278–279.

<sup>192</sup> *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, *supra* note 45, at 1474–1475.

<sup>193</sup> Notable countries that have enshrined the right to asylum are: Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, the Bolivarian Republic of Venezuela, and the Dominican Republic. *The Right to Asylum is Included in the Constitution*, U.N. HIGH COMM’R FOR REFUGEES, TABLE 9, [https://acnur.org/fileadmin/Documentos/Proteccion/Buenas\\_Practicas/11349.pdf](https://acnur.org/fileadmin/Documentos/Proteccion/Buenas_Practicas/11349.pdf) (last visited Apr. 8, 2024).

<sup>194</sup> Stephen Meili, *Asylum Under Attack: Is it Time for a Constitutional Right?*, 26 BUFF. HUM. RTS. L. REV. 147, 148 (2020).

<sup>195</sup> *Id.* at 147.

<sup>196</sup> *Id.* at 149.

<sup>197</sup> *Id.* at 183.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

challenges to the asylum process.

Some courts have been eager to listen to due process challenges brought by individuals seeking asylum.<sup>201</sup> For instance, in *Ms. L v. ICE*, the district court found that the government violated the plaintiff's substantive due process right to family integrity.<sup>202</sup> This holding was grounded on the basis that the family separation policy "shocks the conscience." Although a constitutional right to seek asylum may not have made a difference in the decision, this case demonstrates that some courts are willing to engage in due process challenges on behalf of asylum seekers.<sup>203</sup> Thus, a due process right to seek asylum could be defended in court.

A constitutional right to asylum would ensure that there is a uniform and consistent way to test the constitutionality of any restrictions on the right to obtain asylum. A circuit-by-circuit analysis of immigration policies can bring to light judicial favoritism toward certain policies.<sup>204</sup> An example of this would be the "Safe Third Country" policy, which means that an individual will be denied asylum if they have already been granted protection by another country.<sup>205</sup> The Safe Third Country policy would most likely violate a constitutional right to asylum.<sup>206</sup> The U.S. would be depriving asylum-seekers their right to obtain protection from persecution because the number of asylum-seekers whose applications would be denied before being sent to El Salvador, Guatemala, or Honduras would significantly increase.<sup>207</sup>

#### *E. Providing Free Legal Counsel and Guardians Ad Litem for UACs*

An "unaccompanied alien child" (UAC) arrives in the U.S. with no parent or guardian and has no lawful legal status.<sup>208</sup> Unlike in juvenile delinquency proceedings, immigration courts do not give minors special treatment.<sup>209</sup> In other words, children in immigration proceedings are not entitled to legal representation at government expense.<sup>210</sup> Additionally, unaccompanied migrant children do not have access to guardians ad litem in removal proceedings.<sup>211</sup> Unlike in child custody proceedings, they have no

---

<sup>201</sup> *Id.* at 184.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 186.

<sup>205</sup> *Id.* at 178.

<sup>206</sup> *Id.* at 175, 181.

<sup>207</sup> *Id.*

<sup>208</sup> Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings*, 16 CHILD. RIGHTS LITIG. 4 (Jul. 14, 2014).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

one there to advocate for their safety and well-being.<sup>212</sup>

Immigration Judge Jack Weil from the Department of Justice asserts that children as young as three years old are able to represent themselves in immigration court.<sup>213</sup> However, the lack of legal counsel for unaccompanied minors who enter the United States should be considered a violation of the Constitution's Due Process Clause.<sup>214</sup> Unaccompanied minors are forced to defend themselves against government attorneys with years of experience, training, and knowledge.<sup>215</sup> How can one expect a child, who has barely even started talking, to be capable of explaining what the nexus of their asylum claim is? The frightened migrant child faces a plethora of challenges: they must testify under oath, plead to government charges, tell the judge what relief they are seeking, file applications and provide supporting documentation in English, and call witnesses with no knowledge of the legal norms and customs.<sup>216</sup> No consideration is given to the fact that many of these children do not speak English fluently and must communicate through an interpreter.<sup>217</sup> In addition, many of these children who have crossed the border into the United States have experienced serious trauma.<sup>218</sup> It is hard for an adult, let alone a child, to talk about the persecution and abuse they have suffered.<sup>219</sup> One cannot expect children to be forthcoming about events that have caused them great pain.<sup>220</sup> Because of their youth, they may not be able to recall all the details of what happened accurately, and this can hurt their ability to obtain asylum.<sup>221</sup> Furthermore, the child may refuse to talk to a stranger about such sensitive topics due to embarrassment or emotional upset.<sup>222</sup>

Another problem minors in immigration proceedings face, due to the unavailability of proper representation, is that many unaccompanied minors do not even know what kind of relief they are eligible for.<sup>223</sup> They are never screened for eligibility and are denied the protection Congress intended.<sup>224</sup> For example, SIJ status was first established in 1990, over 30 years ago, yet the law has not been implemented consistently.<sup>225</sup> New York, California, and

---

<sup>212</sup> *Id.*

<sup>213</sup> Jessica Roy, *A Judge Thinks 3-Year-Olds Can Defend Themselves, so Immigration Lawyers Tried it on Their Own Kids*, LA TIMES (Mar. 12, 2016, 8:17 PM), <https://www.latimes.com/la-na-immigration-toddler-lawyers-videos-snap-story.html>.

<sup>214</sup> *Id.*

<sup>215</sup> Chen, *supra* note 208.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Roy, *supra* note 213.

<sup>219</sup> *Id.*

<sup>220</sup> Weiss, *supra* note 49, at 5.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Hlass, *supra* note 82, at 5.

<sup>224</sup> *Id.*

<sup>225</sup> *Policy Manual: Chapter 1 - Purpose and Background*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1> (last modified Jan. 24, 2024).

Massachusetts have the most SIJ applications.<sup>226</sup> On the other hand, Mississippi and Illinois have the lowest numbers of SIJ applications.<sup>227</sup> Due to the lack of competent legal counsel, many minors are deported without even being aware of the legal options that are available to them.<sup>228</sup>

Guardians ad litem for each minor in immigration proceedings would make sure that the child's best interests are heard and considered in the immigration judge's decision.<sup>229</sup> Meanwhile, access to adequate assistance of counsel would (1) ensure that the child's expressed wishes are considered and (2) protect the child's legal rights.<sup>230</sup>

#### *F. The Presence of a Known and Trusted Adult*

There is no requirement that children have a parent, relative, or friend be present at their asylum interview for “moral support,” but a support person is allowed if the minor asks for one.<sup>231</sup> A trusted adult can help close the gap between the child’s culture and the asylum interview.<sup>232</sup> For instance, in some cultures, children are taught only to listen to adults and are not allowed to talk back to them.<sup>233</sup> A support person can help overcome the child’s nervousness and timidity.<sup>234</sup> An asylum interview can be emotionally draining for a child, but the face of someone the child knows and trusts may help him or her feel more comfortable during the interview.<sup>235</sup> A trusted adult is not replacement for an attorney or representative, but rather serves as a source of comfort and familiarity for the child.<sup>236</sup> While the trusted adult may be allowed to help the child explain his asylum case, the interviewing officer must ensure that the minor is given the opportunity to speak for himself or herself and present his claim in his own words.<sup>237</sup>

In theory, having the presence of a trusted adult is a great practice because it can help a child psychologically.<sup>238</sup> However, the child has the responsibility of requesting to have a trusted adult present at the interview and must consent to it.<sup>239</sup> But what if the child is too young to ask for a trusted adult or does not even know that he has the right to have one? Talking about

---

<sup>226</sup> Hlass, *supra* note 82, at 19.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 5.

<sup>229</sup> Chen, *supra* note 208.

<sup>230</sup> *Id.*

<sup>231</sup> Weiss, *supra* note 49, at 5–6.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 5.

<sup>237</sup> *Id.* at 5–6.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

trauma can be extremely difficult and a child without the support of a trusted adult is forced to navigate the interview process alone.<sup>240</sup> Asylum officers also have immense discretion over whether to allow an individual to remain with the child for the entirety of the interview.<sup>241</sup> Again, if denied, the minor will be left without the moral support of a trusted adult.<sup>242</sup> Due to fear and humiliation, the child may not be as transparent and truthful in the asylum interview, causing him or her to be denied asylum relief.

## VII. CONCLUSION

Although allowing immigrant children to remain in the United States helps protect them from persecution and violence in their home country, it is even more harmful to separate them from their parents and loved ones. First, being away from family can be emotionally tolling on young children who have already gone through a lot. For example, most children feel safer with their parents and depend on them for food, shelter, education, medical care, and love. Second, separating minors from their parents can put the children in great danger. The children are forced to live with someone they do not know and have never lived with before. Because their parents are not close by, the children often have no trusted adult to talk to if something is wrong. The alternative is sending the child back to their home country where they will most likely be kidnapped, sexually abused, or killed by criminals in their country. Finally, the “best interests” standard in asylum cases disproportionately impacts poor families of color and unnecessarily removes children from fit parents. In conclusion, the “best interests of the child” standard overprotects minors at the expense of the close family unit.

---

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 6.

<sup>242</sup> *Id.*