



# “At Least Let Them Work”

The Denial of Work Authorization and Assistance  
for Asylum Seekers in the United States

HUMAN  
RIGHTS  
WATCH



SETON HALL | LAW



# **At Least Let Them Work**

The Denial of Work Authorization and Assistance for Asylum  
Seekers in the United States

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# At Least Let Them Work

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## Summary

Khaled M. and his wife and daughter fled Egypt after people connected to the Islamist organization al-Gama'a al-Islamiya threatened and beat him and attempted to kidnap his wife and daughter. Upon entering the United States, Khaled filed an asylum claim and assumed that he would be allowed to work to support himself and his family while they waited for a decision.

However, as Khaled soon learned, asylum seekers in the United States are prohibited from working until at least 180 days have passed since they submitted the asylum application, unless they are granted asylum sooner. In practice, however, asylum seekers often wait for much longer than 180 days. Immigration judges and asylum officers have discretion to “stop the clock” towards work authorization for a variety of reasons. Once that happens, it is very challenging to get the work authorization clock to start running again, and in the meantime, the asylum seeker is not permitted to work.

This is exactly what happened to Khaled M. The prohibition on working stretched from months to years. During that time, like other asylum seekers in the United States, Khaled and his family were also barred from receiving public assistance. He was, therefore, unable to provide for his family, and they struggled to find food and shelter. The family sometimes slept on the streets, and Khaled resorted to begging to support his family. The inability to work took a physical and emotional toll on Khaled and his family. Eventually, the US government recognized Khaled as a refugee and granted him asylum, but before that happened he spent nearly five years feeling as though he had escaped persecution in Egypt only to find it again in the United States.

Khaled M.'s story is like many others. Asylum seekers from all over the world, facing persecution or fear of persecution, come to the United States in the hopes of escaping the horrors they faced in their home countries. But, once they arrive in the United States, they are often surprised to learn that they must face new, seemingly insurmountable obstacles.

In addition to being barred from working, asylum seekers are also ineligible to receive nearly any type of government benefit while awaiting a decision on their cases. While the

majority of developed asylum-granting nations place certain limitations on the right to work for asylum seekers, the United States stands alone in denying both employment and governmental assistance.

The denial of federal benefits, combined with long delays and frequent denial of work authorization, renders US treatment of asylum-seekers an anomaly among developed countries. First, provisions of the US immigration law for many other groups of migrants seeking protection provide applicants work authorization faster than in asylum law. This is particularly troubling because of the vulnerability of asylum seekers. But instead of treating asylum seekers at least as favorably as other similarly situated immigrants, US asylum law, in effect, seems to penalize them.

Second, unlike many other developed nations, the United States provides neither federal benefits nor work authorization to asylum seekers. Some of these other countries seek to fulfill their international obligations by giving asylum seekers the means to subsist rather than employment authorization. Providing the right to work can be another route to protecting the fundamental right to livelihood and the many other economic and social rights that depend upon it.

This report documents the hardships asylum seekers face in four major areas as a consequence of being denied work authorization: psychological harm and interference with the ability to heal after torture and persecution; economic hardships and vulnerability to further victimization; the physical and health-related hardships created by an inability to provide for oneself; and difficulties with access to legal counsel in pursuit of asylum claims and work authorization.

This report compares the treatment of asylum seekers with the treatment afforded to other vulnerable immigrant groups in the United States in relation to work authorization and social benefits. It also contrasts the policies and practices of the US government in this area with those of other developed countries. The report finds that the prohibition on work authorization and social benefits for asylum seekers under US law is incompatible with international human rights standards and inconsistent with the treatment of other vulnerable groups under US immigration law and with the treatment of asylum seekers in other countries.

Specifically, the report concludes that presently there are sufficient deterrents built into the US asylum system to prevent the abuse of employment authorization by asylum seekers without the need for an outright ban on employment. In light of the vulnerability and needs of asylum seekers, the report proposes amending the Immigration and Nationality Act (INA) to remove the bar to employment for asylum seekers with non-frivolous claims for asylum.

## **Recommendations**

### **To the President of the United States:**

- Call on Congress to repeal the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 provisions concerning work authorization filing procedures and specifically the provision requiring a stop of the “asylum clock” when the asylum seeker requests an adjournment.
- Call on Congress to enact legislation to amend the Immigration and Nationality Act (INA) per the recommendations to Congress, below.

### **To the Congress of the United States:**

- Amend INA § 208 to allow an asylum seeker to simultaneously file an asylum application and an application for work authorization, thereby eliminating the prolonged waiting period for work authorization during which asylum seekers are typically deprived of the means to lawfully ensure basic rights to health, food, shelter, and livelihood. This amendment will also eliminate the "asylum clock" and the provisions pertaining to it "stopping" for reasons such as the asylum seeker or court requesting a continuance or adjournment.
- Amend INA § 208 to allow asylum seekers to receive work authorization unless and until the government determines a given application to be frivolous.
- Enact legislation (or amend specific provisions) to allow asylum seekers with non-frivolous asylum applications to apply for, and if eligible receive, federal public benefits while their claims for asylum are pending.

## Methodology

The asylum seekers and persons granted asylum (asylees) interviewed for this report were either former clients of Seton Hall University School of Law Center for Social Justice's Immigrants' Rights / International Human Rights Clinic or clients of other law school immigration clinics or organizations contacted by the researchers. Most interviews were conducted by telephone; seven were conducted in person.

The researchers interviewed 26 asylum seekers, 19 men and 7 women. They ranged in age from 20 to 64. The asylum seekers and asylees fled from Bangladesh, Cameroon, Colombia, the Democratic Republic of the Congo, the Republic of Congo, Egypt, El Salvador, Ethiopia, Gambia, Guatemala, Honduras, Iran, Mexico, Pakistan, Rwanda, Serbia, Sudan, Uganda, Ukraine, and Zimbabwe. They settled in Maryland, Michigan, Minnesota, New Jersey, New York, and Texas.

Before interviewing any asylum seeker or asylee, interviewers obtained their consent as well as consent from their attorney. Interviewers told all asylum seekers or asylees that the interviews were confidential and voluntary, and that their purpose was to obtain their stories for this report. Interviews took 45 minutes to an hour and a half and were conducted in English and French. No one received any compensation or personal benefit for participating in the interview. The names of the asylum seekers and asylees have been kept confidential and pseudonyms have been assigned to each person and used as identification in this report. Full interviews are on file with the Seton Hall Law School Center for Social Justice's Immigrants' Rights / International Human Rights Clinic.

The Clinic students also interviewed law professors, legal aid providers, and mental health professionals on the broader impacts on asylum seekers of not being able to work, and in some interviews, these individuals spoke about specific cases or clients. These individuals came from Arizona, California, Illinois, Iowa, New Jersey, and New York. Their full names and affiliations appear in this report as they requested.

# Background

## The Right to Work under International Refugee and Human Rights Law

Chapter III of the 1951 Convention relating to the Status of Refugees (Refugee Convention) affirmatively recognizes a refugee's right to gainful employment.<sup>1</sup> Specifically, Article 17 accords refugees "lawfully staying" in a territory "the right to engage in wage-earning employment."<sup>2</sup> While the drafters of the Refugee Convention did not elaborate on the parameters of the term "lawfully staying," the United Nations High Commissioner for Refugees (UNHCR) has clarified that the term "stay" should be interpreted to "embrace both permanent and temporary residence," while "lawful" should be determined by the circumstances, "including the fact that the stay in question is known and not prohibited."<sup>3</sup> Some scholars have extrapolated that a refugee is lawfully staying, for purposes of the Refugee Convention, when he or she is granted asylum, or when he or she "enjoys officially sanctioned, ongoing presence in a state party."<sup>4</sup> Moreover, international refugee law makes clear that an individual is a refugee as soon as he or she meets the definition's requirements, as opposed to when a state recognizes their status as such.<sup>5</sup> Thus, an asylum seeker may be considered as "lawfully staying" when he or she initiates his or her asylum application.<sup>6</sup>

Article 17 of the Refugee Convention additionally states that refugees should be granted "the most favorable treatment accorded to nationals of a foreign country in the same circumstances" with respect to wage-earning employment.<sup>7</sup> The drafters fully intended for state parties to the Refugee Convention to give preferential treatment to refugees seeking

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<sup>1</sup> Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, adopted July 28, 1951, entered into force April 22, 1954, chap. III, <http://www.unhcr.org/3b66c2aa10.html> (accessed July 18, 2013). By acceding to its 1967 Protocol, the United States has bound itself to these provisions of the Refugee Convention.

<sup>2</sup> *Ibid.*, article 17(1).

<sup>3</sup> UNHCR, "Lawfully Staying'-A Note on Interpretation," May 3, 1988, <http://www.unhcr.org/refworld/docid/42ad93304.html> (accessed July 18, 2013).

<sup>4</sup> James C. Hathaway, *The Rights of Refugees Under International Law*, (New York: Cambridge University Press, 2005), p. 730.

<sup>5</sup> *Ibid.*, p. 158.

<sup>6</sup> *Ibid.*

<sup>7</sup> Convention Relating to the Status of Refugees, art. 17(1).

employment, as compared to other non-citizens.<sup>8</sup> Although the Refugee Convention does not contemplate that refugees be given employment of their choosing, the Refugee Convention does envisage that refugees be able to accept employment, if extended to them.<sup>9</sup> The Refugee Convention also requires contracting states to afford “lawfully staying” refugees some of the same rights given to nationals.<sup>10</sup> “Lawfully staying” refugees, therefore, are to receive the same treatment citizens would likewise receive, such as public elementary education,<sup>11</sup> public relief,<sup>12</sup> and social security.<sup>13</sup>

The right to work is recognized in numerous international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the United States has signed but not ratified. Article 23 of the Universal Declaration of Human Rights unequivocally states that “[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.”<sup>14</sup> In addition, the Committee that oversees compliance with the ICESCR has said that article 6, which recognizes the right to work, applies “to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”<sup>15</sup>

The ICESCR article 9 also includes a universal entitlement to social assistance, which intersects with the right, in article 11, to an adequate standard of living, including adequate food, clothing, and housing. *The Michigan Guidelines on the Right to Work* elaborate on this right:

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<sup>8</sup> UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, art. 17, 1990, <http://www.unhcr.org/4ca34be29.html> (accessed July 18, 2013).

<sup>9</sup> *Ibid.*

<sup>10</sup> Convention Relating to the Status of Refugees, ch. IV.

<sup>11</sup> *Ibid.*, p. 22.

<sup>12</sup> *Ibid.*, p. 23.

<sup>13</sup> *Ibid.*, p. 24.

<sup>14</sup> Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 23.

<sup>15</sup> UN Committee on Economic, Social, and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (2009), para. 30.

[I]t may be difficult for asylum-seekers to obtain work and states must, in any event, provide adequate levels of social assistance in accordance with Articles 9 and 11 of the ICESCR, as well as other interdependent rights such as the right to the highest standard of mental and physical health, the right to life, and the prohibition on inhuman or degrading treatment. State policy or conduct that leads to destitution through denial of access to social security and assistance and/or the employment market in the absence of other means of support may violate the prohibition on inhuman or degrading treatment.<sup>16</sup>

The duty of states to provide adequate levels of social assistance to asylum seekers was affirmed by the German Federal Constitutional Court in a 2012 ruling that cash benefits provided to asylum seekers under Germany’s Asylum Seekers Benefit Act were not sufficient to guarantee a dignified minimum existence. In so ruling, the court said that “migration-policy considerations of keeping benefits paid to asylum seekers and refugees low to avoid incentives for migration...may generally not justify reduction of benefits below the physical and socio-cultural existential minimum. Human dignity may not be relativized by migration-policy considerations.”<sup>17</sup>

## US Asylum and Work Authorization Law

In 1980, Congress enacted the Refugee Act, which essentially adopted the 1951 Refugee Convention definition of a refugee, and empowered the Attorney General to grant asylum to people who met that definition.<sup>18</sup> For the next decade, the government operating under interim regulations could, at its discretion, grant employment authorization to an asylum seeker upon filing a “non-frivolous” asylum application.<sup>19</sup> In 1990, the Immigration and Naturalization Service (INS) issued regulations, which were consistent with the interim regulations, and permitted an applicant to file simultaneously for asylum and employment authorization.<sup>20</sup>

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<sup>16</sup> University of Michigan Law School, *The Michigan Guidelines on the Right to Work*, March 16, 2010, <http://www.unhcr.org/refworld/docid/4bbaf1242.html> (accessed March 29, 2013).

<sup>17</sup> ESCR-Net, *Judgment of the Federal Constitutional Court in the proceeding 1 BvL 10/10*, July 18, 2012, <http://www.escr-net.org/node/364979> (accessed April 8, 2013).

<sup>18</sup> United States Code (U.S.C.), 1990, <http://www.law.cornell.edu/uscode/text/8/1158>, Section 1158(a).

<sup>19</sup> Federal Register, June 2, 1980, Vol. 45, pp. 37, 394.

<sup>20</sup> Federal Register, July 27, 1990, Vol. 55 ps. 30,674-01. The INS had promulgated only interim regulations before 1990. David A. Martin, *Making Asylum Policy: The 1994 Reforms*, Washington Law Review, Vol. 70(1995): 728–29. Some scholars

The 1990 regulations provided for the granting of work authorization for non-detained asylum applicants whose applications were not considered “frivolous.”<sup>21</sup> A “frivolous” application was one that was “manifestly unfounded or abusive,”<sup>22</sup> further defined in a May 1994 memo as those claims filed only “for purposes of avoiding departure from the United States,”<sup>23</sup> claims unsupported by evidence of persecution, or claims “subject to mandatory denial.”<sup>24</sup>

After the applicant filed both for asylum and for work authorization, the INS had 90 days to determine whether or not the asylum application at issue was frivolous.<sup>25</sup> If the INS was unable to make that determination within the 90 days, the asylum applicant was automatically granted work authorization for no more than 240 days.<sup>26</sup> Upon a denial of work authorization, the INS was required to provide the reason for the denial: for example, because the application did not specify a specific ground of persecution, because it was unsupported by “at least one fact,” or because the applicant was “subject to a mandatory bar.”<sup>27</sup> While a denial of work authorization could not be appealed, an asylum applicant could file a new

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have attributed the ten-year gap between Congress’s passing of the Act and the promulgation of regulations to the lack of media attention on the subject. *Ibid.*, p. 728. The INS was abolished in 2003 with the creation of the U.S. Department of Homeland Security.

<sup>21</sup> Federal Register, Vol. 55 pp. 30, 676.

<sup>22</sup> *Ibid.*

<sup>23</sup> “INS Makes Significant Changes to Asylum Process,” May 18, 1992, *Interpreter Releases*, Vol. 69 No. 19, pp. 597 and 600. The term “manifestly unfounded” is used by the United Nations High Commissioner for Refugees in determining the credibility of an asylum application. United Nations High Commissioner for Refugees, *UNHCR’s Position on Manifestly Unfounded Applications for Asylum*, 3 Europe Series 2, (Dec. 1, 1992), p. 397, <http://www.unhcr.org/refworld/docid/3ae6b31d83.html> (accessed November 6, 2013). For the UNHCR, however, “manifestly unfounded” is defined as “clearly fraudulent.” *Ibid.*, A “clearly fraudulent” application is one in which there seem to be “false allegations of a material or substantive nature relevant for the determination of [the applicant’s] status.” *Ibid.*

<sup>24</sup> An application by an asylum seeker not otherwise admissible under 8 U.S.C. § 1182 and 8 U.S.C. § 1227 may be denied, referred to an immigration judge, or dismissed by an asylum officer. Code of Federal Regulation (C.F.R.), 2011, <http://www.law.cornell.edu/cfr/text/8/208.14>, Title 8 Section 208.14(c)(1). United States Code Title 8 Section 1182 enumerates the mandatory bars of denial which include: health-related grounds; criminal and related grounds; security and related grounds; and public charge. U.S.C., 2010, <http://www.law.cornell.edu/uscode/text/8/1182>, (accessed November 6, 2013) Title 8 Section 1182. United States Code Title 8 Section 1227 specifies the aliens who are deportable, for reasons including: inadmissibility at time of entry or violation of lawful status; criminal offenses; failure to register or falsification of documents; security and related grounds; and public charge. U.S.C., 2008, <http://www.law.cornell.edu/uscode/text/8/1227>, (accessed November 6, 2013), Title 8 Section 1227.

<sup>25</sup> C.F.R., 1994, <http://www.law.cornell.edu/cfr/text/8/274a.13>, (accessed November 6, 2013), Title 8 Section 274a.13(d).

<sup>26</sup> *Ibid.*, If the INS was then able, within the 240-day period, to make a negative determination on the application and deny work authorization, the work authorization would terminate immediately. *Ibid.*, In 1992, only one-third of all applicants were granted an interview, meaning that the remaining two-thirds were granted work authorization without any determination being made as to the bona fide nature of their asylum claims. Martin, *supra note 20*, p. 735.

<sup>27</sup> “INS Issues Guidelines on Determining ‘Frivolous’ Asylum Applications,” June 22, 1992, *Interpreter Releases* Vol. 69 No. 23: pp. 744 to 745

application for work authorization based on additional information not found in the original asylum request.<sup>28</sup>

Complaints arose that the work authorization framework and comparative lack of resources within the INS to process all the applications led to undocumented immigrants abusing the asylum and work authorization systems and the development of a large backlog of pending asylum applications.<sup>29</sup> According to immigration law professor and former general counsel to the INS, David A. Martin, there was evidence that undocumented immigrants were filing fictitious “boilerplate” asylum applications that were based on legitimate-looking claims in order to get “genuine, legitimate [work authorization documents].”<sup>30</sup> INS officials claimed that this interfered with the identification of genuine asylum seekers<sup>31</sup> because bona fide applicants in need of employment authorization might rush to file false boilerplate applications on the advice or belief that it would increase their likelihood of getting work authorization.<sup>32</sup> There were also fears that the backlog caused by the large number of “frivolous” asylum applications was undermining the ability to adjudicate bona fide asylum cases.<sup>33</sup>

The Clinton Administration responded not only by adding additional asylum officers and other measures to speed up processing and reduce the backlog, but also by issuing new regulations that decoupled the asylum seeking process from the work authorization process.<sup>34</sup> The regulations established the “asylum clock,” which required that an asylum seeker wait a minimum of 150 days after filing his or her application before submitting a request for work authorization.<sup>35</sup> Upon filing a complete application for asylum, the clock would begin to run.<sup>36</sup> Once an asylum seeker was permitted to apply for work authorization, the INS then had 30 days to consider their application; it could not, however, issue a grant

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<sup>28</sup> *Ibid.*

<sup>29</sup> Martin, *supra* note 20, p. 735.

<sup>30</sup> *Ibid.*, p. 736.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 737.

<sup>34</sup> Martin, *supra* note 20, pp. 737–38, 754.

<sup>35</sup> C.F.R., 1994, <http://www.law.cornell.edu/cfr/text/8/208.7>, (accessed November 6, 2013) Title 8, Section 208.7 (a) (1).

<sup>36</sup> *Ibid.*, (a)(2).

of work authorization before the clock reached 180 days, unless it granted asylum to the applicant before that time.<sup>37</sup>

Two additional changes sought to deter the manipulation and abuse of the system. First, “any delay requested or caused by the applicant” would stop the clock.<sup>38</sup> Second, an asylum applicant’s clock would not start—meaning that the person could not be granted work authorization prior to the granting of asylum—if the person “fails to appear for a scheduled interview before an asylum officer or a hearing before an immigration judge.”<sup>39</sup>

Congress codified these regulations in their entirety in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), an Act that dramatically changed the landscape of immigration—and particularly asylum—law.<sup>40</sup>

Under US law, there are two types of asylum seekers: those who apply for asylum “affirmatively,”<sup>41</sup> meaning they are not in removal proceedings, and those who file an asylum claim “defensively” once they are in proceedings initiated by the government to “remove” them from the United States.<sup>42</sup> A claim’s defensive or affirmative nature will then determine the procedure the claim follows. In either case however, an asylum seeker may only apply for work authorization 150 days after properly filing his or her asylum application and must then wait an additional 30 days before their work authorization can

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<sup>37</sup> Ibid., (a)(1).

<sup>38</sup> Ibid., (a)(2). Clock stopping is the term widely used to refer to the process whereby an immigration judge or asylum officer halts the accrual of time for purposes of authorizing employment. Jesus Saucedo and David Rodriguez, et. al., “Up Against the Asylum Clock: Fixing the Broken Employment Authorization Asylum Clock,” Penn State Dickinson School of Law’s Center for Immigrants’ Rights and the Legal Action Center of the American Immigration Council, [http://law.psu.edu/\\_file/immigrants/asylum\\_clock\\_paper.pdf](http://law.psu.edu/_file/immigrants/asylum_clock_paper.pdf) (accessed July 25, 2013).

<sup>39</sup> Ibid., (a)(4).

<sup>40</sup> *Illegal Immigration Reform and Immigrant Responsibility Act*, Pub. L. 104-208, Division C, 104th Congress, September 30, 1996, <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/o-o-o-10948.html>, (accessed November 6, 2013) 3009-546; U.S.C., 2009, <http://www.law.cornell.edu/uscode/text/8/1158>, Title 8, Section 1158 (d)(2).

<sup>41</sup> United States Citizen and Immigration Services (USCIS), “The Affirmative Asylum Process,” United States Government, March 10, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=888e18a1f8b73210VgnVCM100000082ca60aRCRD> (accessed July 19, 2013).

<sup>42</sup> USCIS, United States Government, “Obtaining Asylum in the United States,” March 10, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed July 19, 2013).

be granted.<sup>43</sup> The accrual of the 150 days is what is referred to as the asylum “clock.” If asylum is granted before the 150 days have passed, the person is entitled to work authorization as soon as he or she receives notice of approval.<sup>44</sup>

If the claim is made affirmatively, a United States Citizenship and Immigration Services (USCIS) officer will initially review the claim during an interview with the applicant. This officer has the authority to grant the claim, deny the claim, or refer the claim to an immigration court.<sup>45</sup> Affirmative claims are usually scheduled for an interview about 45 days after submission. And if the USCIS officer comes to a final decision after the interview, the entire process can be completed, theoretically, 60 days after submission of the claim.<sup>46</sup> However, if the USCIS officer refers the claim to an immigration court, the applicant is placed back at the beginning of the defensive asylum process. There are also hurdles that an affirmative applicant must overcome, such as the procurement of an interpreter. If an interpreter is necessary for an interview with a USCIS officer, it is the applicant’s duty to find one. If the applicant appears at the interview without a necessary interpreter, it will be noted that the applicant missed the interview, and the clock will stop.<sup>47</sup>

In contrast, defensive asylum claims are made directly to the Executive Office of Immigration Review (EOIR or “immigration court”). An immigration judge initially hears the applicant’s claim, and, until the settlement of a nationwide class action suit, *A.B.T. et al vs. USCIS, et al*, which is due to be implemented in November 2013, court proceedings were sometimes scheduled as little as two weeks after the claim was received by the court. Under the *A.B.T.* settlement immigration judges must give non-detained asylum applicants a minimum of 45 days, as opposed to the prior minimum of 14 days, in advance of an expedited hearing date (see Chapter II).<sup>48</sup> The short timeframe had sometimes caused applicants to ask for an adjournment to better prepare the case or to find counsel. Such adjournments cause the applicant’s clock to stop. Prior to the *A.B.T.* settlement, if an

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<sup>43</sup> U.S.C., 2009, <http://www.law.cornell.edu/uscode/text/8/1158>, Title 8, Section 1158 (d)(2); C.F.R., 2011, <http://www.law.cornell.edu/cfr/text/8/208.7> (accessed November 6, 2013) Title 8, Section 208.7.

<sup>44</sup> C.F.R., <http://www.law.cornell.edu/cfr/text/8/208.7> (accessed November 6, 2013) Title 8 Section 208.7 (a)(1).

<sup>45</sup> C.F.R., 1999, <http://www.law.cornell.edu/cfr/text/8/208.14> (accessed November 6, 2013), Title 8, Section 208.14.

<sup>46</sup> USCIS, “The Affirmative Asylum Process.” *Supra*, note 41.

<sup>47</sup> C.F.R., 2011, <http://www.law.cornell.edu/cfr/text/8/208.9> (accessed November 6, 2013), Title 8, Section 208.9.

<sup>48</sup> “Revised Settlement Agreement,” US District Court – Western District of Washington at Seattle, September 18, 2013, <http://legalactioncenter.org/sites/default/files/KLOK-Revised%20Settlement%20Agreement.pdf> (accessed October 22, 2013), p. 17.

immigration judge denied the asylum claim, the clock would stop permanently, including during any appeal of the decision to the Board of Immigration Appeals (BIA), during judicial review before the federal courts, or while a case was remanded to the immigration court.<sup>49</sup> The *A.B.T.* settlement provides that the clock will restart on the date that the BIA remands the case to the immigration judge, and the applicant will be credited with the number of days the case was pending since the immigration judge denial.<sup>50</sup>

The codification of the asylum clock was just a part of a larger overhaul of the immigration law and asylum framework contained in IIRIRA.<sup>51</sup> This new legislation in turn erected more obstacles for people wanting to lodge asylum claims, created harsher living conditions for asylum seekers with pending cases, and made the adjudication process stricter, making asylum much harder to achieve.<sup>52</sup> IIRIRA contained four additional provisions that restricted asylum seekers' ability to file applications. The first restrictive provision is the so-called "one-year bar," which requires that the applicant file his or her application for asylum within one year of the person's last arrival in the United States.<sup>53</sup> The second applies to asylum applicants who traveled through a "safe-third country," to which they could be safely removed without being subjected to further persecution and where they "would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."<sup>54</sup> The third restriction is that asylum may be denied to someone whose previous application for asylum was denied.<sup>55</sup> The last limitation is that an

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<sup>49</sup> Executive Office for Immigration Review, US Department of Justice, "Operating Policies and Procedures Memorandum 11-02: The Asylum Clock," November 15, 2011, <http://immigrantjustice.org/sites/immigrantjustice.org/files/EOIR%20Asylum%20Clock%20Memo%2011%2015%202011.pdf> (accessed October 8, 2013), para. VIII, p. 16.

<sup>50</sup> "Revised Settlement Agreement," US District Court – Western District of Washington at Seattle, September 18, 2013, <http://legalactioncenter.org/sites/default/files/KLOK-Revised%20Settlement%20Agreement.pdf> (accessed October 22, 2013), p. 19.

<sup>51</sup> Ruth Ellen Wasem, "U.S. Immigration Policy on Asylum Seekers," Congressional Research Service, RL32621, May 5, 2005, <http://www.ilw.com/immigrationdaily/news/2010,0901-crs.pdf> (accessed July 19, 2013).

<sup>52</sup> *Ibid.*; See generally, Philip G. Shrag, *A Well-founded Fear: The Congressional Battle to Save Political Asylum in America*, (New York: Routledge, 1999).

<sup>53</sup> *Ibid.*, U.S.C., 2009, <http://www.law.cornell.edu/uscode/text/8/1158>, Title 8 Section 1158 (a)(2)(B). The only exception to this time limit is when the applicant can show that there were certain "changed circumstances which materially affect[ed] the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing" the asylum application. *Ibid.*, (a)(2)(D).

<sup>54</sup> That third country must be one with which the United States has a special treaty and one that would afford the asylum seeker a "full and fair procedure" to determine asylum eligibility in that country. Wasem, *supra* note 51, at 5–6; U.S.C., <http://www.law.cornell.edu/uscode/text/8/1158> (accessed November 6, 2013), Title 8, Section 1158(a)(2)(A).

<sup>55</sup> Wasem, *supra* note 51, p. 6; U.S.C., Title 8, Section 1158(a)(2)(C).

applicant becomes “permanently ineligible for any [immigration] benefits” if the Attorney General determines that an asylum seeker made a “frivolous” application.<sup>56</sup>

Additionally, two key provisions of IIRIRA, expedited removal and mandatory detention of certain arriving asylum seekers introduced new obstacles and hardships for immigrants generally and asylum seekers specifically. Expedited removal is a process by which an immigration officer stationed at a port of entry—whether seaport or airport—makes a determination as to whether a person who has improper or no documentation will be able to apply for asylum and whether that person has a fear of persecution.<sup>57</sup> If the officer believes that the person “does not have a credible fear of persecution,” the officer has the power to “order the [person] removed ... without review.”<sup>58</sup> “Credible fear” is a lower standard than “well-founded,” which is required for a grant of asylum; credible fear “means that there is a significant possibility ... that the alien could establish eligibility for asylum.”<sup>59</sup> This process was implemented to “target the perceived abuses of the asylum process by restricting the hearing, review, and appeal process for aliens at a port of entry.”<sup>60</sup>

Mandatory detention requires that when a person with improper or no documentation presents him or herself to an immigration officer at a port of entry, that person *must* be detained pending the credible fear determination.<sup>61</sup> If that person is found not to have such a fear, he or she is removed.<sup>62</sup> If, on the other hand, an officer or immigration judge concludes that a person does have a credible fear of persecution in his or her home country, the person may be released until the full case is heard before a judge.<sup>63</sup>

Arguably, adding more asylum officers and additional resources was the “reform” that played the most significant role in reducing the huge backlog of cases, speeding up the processing of asylum claims, and weeding out fraudulent claims from the system. In 1990,

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<sup>56</sup> Wasem, *supra* note 51, p. 6; U.S.C., Title 8, Section 1158(d)(6).

<sup>57</sup> Wasem, *supra* note 51, p. 5; U.S.C., 2009, <http://www.law.cornell.edu/uscode/text/8/1125> (accessed November 6, 2013), Title 8, Section 1225(b)(1)(A)(ii).

<sup>58</sup> *Ibid.*, (b)(B)(iii)(I).

<sup>59</sup> *Ibid.*, (b)(1)(B)(v).

<sup>60</sup> Wasem, *supra* note 51, p. 5.

<sup>61</sup> *Ibid.*; U.S.C., Title 8 Section 1225(b)(B)(iii)(IV).

<sup>62</sup> *Ibid.*, (b)(B)(iii)(IV).

<sup>63</sup> Wasem, *supra* note 51, p. 5.

when 73,637 asylum applications were filed, the INS had only 82 asylum officers.<sup>64</sup> By 1992, the INS's 150 asylum officers were only able to complete 16,552 asylum cases out of 103,964 new applications filed.<sup>65</sup> In 1995, the year before IIRIRA was enacted in law, the INS had 325 asylum officers, 149,566 new asylum claims were filed, and the backlog of pending cases had grown to 457,670.<sup>66</sup> By contrast, in fiscal year 2013, USCIS had 279 asylum officers, received 44,453 new asylum applications, and had a backlog of 32,560 cases at year's end.<sup>67</sup> Although there are now fewer asylum officers than in 1995, the number of new asylum cases and the backlog of pending cases are considerably smaller. From a ratio of 693 new asylum applicants per asylum officer in 1992 (not counting the considerable backlog of cases from previous years), and 461 new applicants per asylum officer in 1995, the year the work authorization bar started, the ratio of new asylum applicants per asylum officer in 2013 has fallen to 159 to 1.

## Benefit Provisions for Asylum Seekers

Until his or her application is granted or he or she receives work authorization, an asylum seeker is eligible for few, if any, social or medical benefits in the United States. The result is that many asylum seekers go without any public assistance or recourse to work while waiting for a determination on their asylum applications. Federal law does not provide any asylum seeker-specific social service benefits.<sup>68</sup> The Patient Protection and Affordable Care Act (ACA), also known as Obamacare, allows asylum seekers to participate in state or federal health insurance exchanges and apply for premium tax credits to offset the cost of health insurance, but only if they have been granted work authorization.<sup>69</sup> The 180-bar on work authorization, plus clock stopping delays, therefore, also prevents asylum seekers from accessing affordable health care while their claims are pending.

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<sup>64</sup> Martin, *supra* note 20, p. 731.

<sup>65</sup> *Ibid.*

<sup>66</sup> "Asylum Cases Filed with Immigration and Naturalization Service Asylum Officers, Approved, Denied, and Referred after Interview, by Selected Nationalities, April 1991-September 1995," *Refugee Reports*, Vol. XVI, No. 12, December 31, 1995, p. 12.

<sup>67</sup> Human Rights Watch telephone call with David Pilotti, USCIS, Washington, DC, October 11, 2013.

<sup>68</sup> U.S.C., 2009, <http://www.law.cornell.edu/uscode/text/8/1611> (accessed November 6, 2013), Title 8, Section 1611(a).

<sup>69</sup> "Lawfully Present' Individuals Eligible under the Affordable Care Act," National Immigrant Law Center, September 2012, <http://www.nilc.org/document.html?id=809> (accessed October 16, 2013); see also Code of Federal Regulations (CFR) 2013, Title 45, Section 152.2, <http://www.law.cornell.edu/cfr/text/45/152.2> (accessed October 18, 2013).

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 categorized asylum seekers as “nonqualified” immigrants, so they are explicitly excluded from eligibility for many social welfare benefits.<sup>70</sup> While there are particular humanitarian or disaster-based circumstances that might qualify an asylum seeker for federal assistance, these are narrow exceptions to the general rule that asylum seekers are precluded from accessing federal benefits.<sup>71</sup>

Under federal law, states are required to cover benefits for certain categories of immigrants, including asylees (persons already granted asylum).<sup>72</sup> However, when it comes to those seeking asylum, the federal government and the PRWORA give states broad discretion with regard to providing state benefits.<sup>73</sup> For example, pursuant to federal law, states *may* provide state-only funded benefits to other groups of immigrants, even if they are ineligible for federal benefits.<sup>74</sup> Five states—California, Hawaii, Minnesota, New York, and Washington—provide benefits under the Temporary Assistance to Needy Families Program to nonqualified immigrants, such as asylum seekers.<sup>75</sup> Sixteen states and the District of Columbia provide some state-only funded health care benefits to nonqualified immigrants, such as asylum seekers. These benefits, however, are often limited by status, age, and disability.<sup>76</sup> For example, some states provide benefits to the elderly and children but provide no benefits to other asylum seekers.<sup>77</sup>

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<sup>70</sup> Office of Human Services Policy, United States Department of Health and Human Services, “Overview of Immigrants’ Eligibility for SNAP, TANF, Medicaid, and CHIP,” *ASPE Issue Brief*, (March 2012), p. 1, <http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Eligibility/ib.pdf> (accessed November 6, 2013).

<sup>71</sup> The limited exceptions are for emergency medical assistance, pursuant to United States Code Title 8 Section 1611(b)(1)(A); disaster relief, pursuant to United States Code Title 8 Section 1611(b)(1)(B); immunization, pursuant to United States Code Title 8 Section 1611(b)(1)(C); other services determined by the Attorney-General, pursuant to United States Code Title 8 Section 1611(b)(1)(D); or housing assistance as determined by the Secretary of Housing and Urban Development, pursuant to United States Code Title 8 Section 1611(b)(1)(E). Asylum seekers who are classified as victims of human trafficking, pursuant to Pub. L. No. 106-286, 114 Stat. 1464 (2000); or torture victims, pursuant to Pub. L. No. 105-320, 112 Stat. 3016 (1998). may be provided some federal social benefits.

<sup>72</sup> Office of Human Services Policy, *supra* note 70, p. 2.

<sup>73</sup> U.S.C., <http://www.law.cornell.edu/uscode/text/8/1621> (accessed November 6, 2013), Title 8 Section 1621(d).

<sup>74</sup> Office of Human Services Policy, *supra* note 70, p. 2.

<sup>75</sup> *Ibid.*, p. 4.

<sup>76</sup> *Ibid.*, p. 5.

<sup>77</sup> National Immigration Law Center, “Overview of Immigrant Eligibility for Federal Programs,” October 2011, <http://www.nilc.org/overview-immeligfedprograms.html> (accessed Nov. 11, 2012).

## Stopping the Asylum Clock: Asylum Seekers in Limbo

As originally envisioned, decoupling work authorization from asylum adjudication, along with other reforms instituted at that time, was supposed to speed up the process of adjudicating asylum claims, ideally leaving most asylum seekers without work authorization for no more than 150 days.<sup>78</sup> The practical effect, however, of the “clock” has been to deny asylum seekers—both those who apply for asylum affirmatively from inside the United States, and those who apply during removal proceedings—the right to work for considerably longer periods of time. Asylum seekers often wait much longer than 180 days before receiving work authorization.<sup>79</sup> Sometimes, asylum seekers wait months or years before they either win their asylum case or their clock starts up again. In extreme cases, applicants have been without work authorization for nearly a decade while their cases are adjudicated in various stages of appeals.<sup>80</sup>

In 2011, the Citizenship and Immigration Services Ombudsman recognized this problem and recommended that USCIS change its clock management.<sup>81</sup> Most of these recommendations concerned clearer communications about the clock and increased transparency about how the clock works.<sup>82</sup> Nevertheless, problems have persisted.

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<sup>78</sup> Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation, March 30, 1994, 59 Fed. Reg. 14779-01. Available at <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-33/0-0-0-1089/0-0-0-3719.html> (accessed September 9, 2013).

<sup>79</sup> *A.B.T. et al. vs. U.S. Citizenship and Immigration Services (USCIS), Plaintiff's Motion for Class Certification*, United States District Court for the Western District of Washington, Case CV11-2108-RAJ, January 13, 2012, <http://www.legalactioncenter.org/sites/default/files/docs/lac/AsylumClock-Motion-Exhibits-Order-12-20-2011.pdf>; at exhibit. 3 (client submitted complete application but clock was not started and had to wait a year for clock to start), at exhibit. 5 (applicant had earned “zero” days one year after applying for asylum), at exhibit. 7 (applicant had been in asylum proceedings for eight years and had not accrued sufficient time on the clock for work authorization), at exhibit. 8 (applicant pursuing asylum for nine years unable to acquire work authorization), at exhibit. 9 (applicant’s hearing scheduled for over a year after applying for asylum, at which point the clock would start), at exhibit. 28 (applicant filed affirmative asylum claim in 2003 and had not received work authorization as of December, 2011), at exhibit. 11 (client filed for asylum in March, 2009 and had not received work authorization as of November, 2011); Charles Gordon, et.al., *Immigration Law & Procedures*, Matthew Bender and Company, Section 34.02[7](c)(i) (2012).

<sup>80</sup> *Ibid.*

<sup>81</sup> Citizenship and Immigration Services Ombudsman, U.S. Department of Homeland Security, “Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication,” Aug. 26, 2011, <http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf> (accessed July 19, 2013).

<sup>82</sup> *Ibid.*

In 2012, in *A.B.T. et al vs. USCIS, et al*, a group of asylum seekers brought a suit against the government, alleging that its policies and practices relating to the asylum clock deprived them of the opportunity to obtain work authorization, fair notice of decisions relating to their eligibility to apply for work authorization, and a means of correcting erroneous decisions.<sup>83</sup> According to data acquired by the litigants from the Executive Office of Immigration Review (EOIR), between 2007 and May 2011 there were 285,101 pending cases before the immigration courts.<sup>84</sup> Of those pending cases, 262,025, or 91.9%, had stopped clocks at some point during the case.<sup>85</sup> In New York, 51,224 cases, or approximately 82%, had stopped clocks.<sup>86</sup> Affidavits from 26 immigration attorneys and organizations document their clients' problems with respect to the clock, demonstrating that clock issues are not only widespread but also systemic—and that those issues create real hardships for their clients.<sup>87</sup>

The *A.B.T.* class action suit was settled in April 2013. The terms of the *A.B.T.* settlement remedied some problems with the clock (discussed below) but left several basic problems wholly unaddressed, including the ability to correct erroneous decisions.

Once they have filed their applications for work authorization, asylum seekers usually receive their employment authorization document about three weeks to three months later.<sup>88</sup> However, the current law makes it very difficult for asylum seekers to accrue the requisite 150 days on the asylum clock needed to apply for work authorization.<sup>89</sup> Under the language of the statute, the asylum clock can be stopped due to a “delay request[ed] or caused by the [asylum] applicant.”<sup>90</sup> One harsh result of this provision and implementing regulation is that an asylum applicant who does not appear at a scheduled interview or hearing cannot even apply for work authorization until asylum is granted, unless the

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<sup>83</sup> *A.B.T. et al. vs. USCIS et al., Plaintiff's Motion.*

<sup>84</sup> *Ibid.*, p. 9, exhibit. 1, p. 2–3. An asylum case pending before the EOIR is a result of the applicant being in removal proceedings and asserting an asylum claim as a defense against removal. These are called defensive asylum applications. Affirmative asylum applications are those filed with USCIS by persons physically present in the United States.

<sup>85</sup> *Ibid.*, p. 9, exhibit. 1, p. 2–3. This information is from EOIR's response to a May 23, 2011 Freedom of Information Act request by the Legal Action Center.

<sup>86</sup> *Ibid.*, p. 9, exhibit. 1, p. 2–3.

<sup>87</sup> *Ibid.*, exhibits. 2–14, 16–28.

<sup>88</sup> USCIS, “USCIS Processing Time Information,” undated, <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (accessed Apr. 4, 2013).

<sup>89</sup> Gordon, et.al., *supra* note 79, Section 34.02[7](c)(i) (2012).

<sup>90</sup> C.F.R., 1997, <http://www.law.cornell.edu/cfr/text/8/208.7> (accessed November 6, 2013), Title 8 Section 208.7(a)(2).

applicant can show exceptional circumstances for missing the interview or hearing.<sup>91</sup> The *A.B.T.* settlement now requires that USCIS send an applicant who missed his or her interview a letter describing the consequences for work authorization of missing an interview and provide the asylum seeker with 45 days to demonstrate good cause for missing the interview.<sup>92</sup> Despite this improvement in the information provided to asylum seekers, the regulations bar those who cannot demonstrate good cause from applying for work authorization until asylum is granted.

The clock can also be stopped if the asylum seeker requests an adjournment or additional time to prepare his or her case.<sup>93</sup> The fact that the asylum seeker requests the delay is what stops the clock, and the clock will remain stopped even when the judge or court's schedule is unable to accommodate a short delay. Sometimes, proceedings can only recommence months, or even years, later. For example, a mother and daughter from Guatemala were only able to procure representation a few days prior to their first hearing in immigration court. At the hearing, their lawyer requested an adjournment, but expressed that she would be ready to file a complete asylum claim within a few weeks. The judge then proceeded to schedule their next hearing nine months in the future, making it impossible for this mother and daughter to accrue necessary days on their clock.<sup>94</sup> This example typifies the problems that many asylum seekers face.<sup>95</sup>

Lawyers and asylum seekers often ask for adjournments because immigration judges tend to schedule hearings for dates very soon after filing of a claim. Thus, asylum seekers and lawyers are put in a precarious position: they can accept an expedited hearing date and risk proceeding without sufficient time to fully prepare their case, or they can request a new date, which will stop the clock for what may become an extended period of time.<sup>96</sup>

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<sup>91</sup> *Ibid.*, 208.7(a)(4).

<sup>92</sup> *A.B.T. et al vs. USCIS et al, Settlement Agreement*, United States District Court Western District of Washington, Case CV11-2108-RA), pp. 17-18: [http://legalactioncenter.org/sites/default/files/60-1\\_Settlement%20Agreement.pdf](http://legalactioncenter.org/sites/default/files/60-1_Settlement%20Agreement.pdf) (accessed November 6, 2013).

<sup>93</sup> Executive Office for Immigration Review, US Department of Justice, "Operating Policies and Procedures Memorandum 11-02: The Asylum Clock," November 15, 2011, <http://immigrantjustice.org/sites/immigrantjustice.org/files/EOIR%20Asylum%20Clock%20Memo%2011%2015%202011.pdf> (accessed October 8, 2013), para. VI(E)(2)(a), p. 10; C.F.R., <http://www.law.cornell.edu/cfr/text/8/1208.7>, Title 8 Section 1208.7(a)(2).

<sup>94</sup> *A.B.T., et al. v. USCIS, Plaintiffs' Motion*, exhibit. 7.

<sup>95</sup> *Ibid.*, exhibits. 4, 7, 9.

<sup>96</sup> Seton Hall telephone interview with Professor Barbara Schwartz, November 19, 2012.

Asylum seekers are often not told of the consequences of their decision to adjourn. The *A.B.T.* settlement now provides asylum seekers with at least 45 days before an expedited hearing date, which previously could have been as short as 14 days.<sup>97</sup> However, for some asylum seekers who may need to compile difficult to assemble evidence and witnesses, often from overseas, while addressing possible trauma or other challenges related to their persecution, 45 days may not be sufficient, and they will still need to request adjournments.

Prior to joining the Rutgers-Newark School of Law faculty, Professor Anjum Gupta, her client, and her clinical students appeared before an immigration judge at an individual hearing scheduled for November 2009.<sup>98</sup> There were five individual hearings scheduled that day before this particular immigration judge. The immigration judge ran out of time, so he asked Professor Gupta, the clients, and the students whether they could come back the following day. As they began to answer in the affirmative, the judge noted that he only had fifteen minutes the next day, so he scheduled the hearing for February, four months in the future.

When asked whether the clock would stop, the judge noted that it would. The judge reasoned that the client could not accept the hearing date for the next day because the client could not put on his case in fifteen minutes, which was all the time the judge had, and as a result, the hearing would have to be postponed. Professor Gupta commented that this story illustrates that in some courts there is a “culture of stopping the clock whenever possible and charging it to the applicant.”<sup>99</sup> The *A.B.T.* settlement would not have affected this case because the judge was not setting an initial hearing date. The *A.B.T.* settlement also does not provide an avenue for applicants to appeal or otherwise challenge these decisions. Under the terms of the *A.B.T.* settlement agreement, judges must clearly state on the record the reason for adjourning a hearing.<sup>100</sup> However, the clock can still be stopped at this stage.

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<sup>97</sup> *A.B.T. et al vs. USCIS et al, Settlement Agreement*, p. 17.

<sup>98</sup> This incident occurred before Professor Anjum Gupta started at Rutgers with students from a different school. The exact location of the court has been omitted to preserve anonymity. The client in this case was granted asylum after spending years without work authorization while his claim was pending.

<sup>99</sup> Seton Hall interview with Anjum Gupta, professor at the Rutgers School of Law, Newark, N.J., November 28, 2012.

<sup>100</sup> *A.B.T. et al vs. USCIS et al, Settlement Agreement*, p. 15. See also, Executive Office for Immigration Review, US Department of Justice, “Operating Policies and Procedures Memorandum 11-02: The Asylum Clock,” November 15, 2011, <http://immigrantjustice.org/sites/immigrantjustice.org/files/EOIR%20Asylum%20Clock%20Memo%2011%2015%202011.pdf> (accessed October 8, 2013), para. VIII, pp. 15-16.

Similar to the problems associated with adjournments, asylum seekers often face delays when the court's schedule cannot accommodate an initial hearing until months after their asylum application is complete. In these circumstances, an asylum seeker will file a completed asylum application with the court, but the court will file the claim as "lodged not filed," and therefore, the applicant will not begin to accrue days on his or her clock.<sup>101</sup> The *A.B.T.* settlement terms will now allow for applicants to submit completed claims with the court clerk before the date of their hearing and allow them to use the date of submission, rather than the date of the hearing, as the date on which their clock begins.<sup>102</sup>

A small number of asylum seekers appeal a denial of their claim. A successful appeal is likely to involve the appellate court remanding the case for consideration by the Board of Immigration Appeals or by an immigration court. Prior to the *A.B.T.* settlement, the time that passed during these appeals would not be added to an applicant's clock. The settlement now provides that in such cases, the asylum seeker should be credited with the number of days from the initial denial to the date of the remand order.<sup>103</sup> Because so few asylum seekers appeal their cases, and even fewer win their appeals, this reform will only assist a small number of asylum seekers. Additionally, many cases that are appealed successfully will take months, if not years, to be remanded, and during that time the applicant will not be allowed to apply for work authorization if their clock has not already reached 150 days.<sup>104</sup>

A significant number of problems with the asylum clock remain because there is confusion among asylum seekers and attorneys about why the asylum clock stops, which is exacerbated by confusion about how and when it is possible to re-start the clock.<sup>105</sup> A comprehensive study by Penn State University Dickinson School of Law (Penn State Law) and the Immigration Council's Legal Action Center attributed this confusion to a lack of transparency in the management of the clock; a "lack of clarity and comprehensiveness" of the government's manuals that detail what causes a delay and how to stop and restart the clock; misinterpretation of the manuals; and misapplication of the guidelines as

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<sup>101</sup> *A.B.T. et al vs. USCIS et al, Plaintiffs' Motion*, exhibit. 9.

<sup>102</sup> *A.B.T. et al vs. USCIS et al, Settlement Agreement*, p. 16-17.

<sup>103</sup> *Ibid.*, p. 19.

<sup>104</sup> *A.B.T. et al vs. USCIS et al, Plaintiffs' Motion*, exhibit. 7.

<sup>105</sup> Seton Hall interview with Emanuel L., New York, NY, September 15, 2012, *A.B.T. et al vs. USCIS et al, Plaintiffs' Motion*, exhibits. 1-4, 7, 13.

immigration judges stop the clock for different reasons.<sup>106</sup> As noted in the Penn State Law study, and affirmed by the *A.B.T.* settlement, these problems combine to cause unacceptable delays in restarting an applicant's clock and, in some instances, permanent stoppages.<sup>107</sup>

Inquiring about or attempting to restart an applicant's clock can be a cumbersome process. Lawyers sometimes send multiple letters or file multiple motions with an immigration court before they are informed of the reasons for an applicant's clock being stopped. Furthermore, when an immigration officer denies an applicant's request for work authorization due to an insufficient amount of time on the clock, it is difficult to determine why the court or officer stopped the applicant's clock. Correspondence from USCIS and EOIR regarding particular cases is often unhelpful or ambiguous. For example, in a letter responding to a lawyer's request to re-start an applicant's clock, an EOIR representative stated that "the record is quite voluminous and [after] a cursory review of the record I was unable to find particular rulings/submissions [regarding the clock]" and therefore concluded there was "no cause to alter the status of the clock."<sup>108</sup> This lack of clear communication about issues that affect the clock can result in delays that not only affect the applicant's ability to apply for work authorization, but that also detract from the time lawyers need to effectively represent their clients. As an immigration lawyer described it, "the number of steps and the length of time needed to alter a [clock] classification gave the... process limited utility."<sup>109</sup>

Because the regulations specify that the clock stops only during delays caused by the applicant,<sup>110</sup> the clock should be re-started "when the applicant is no longer responsible for the delay."<sup>111</sup> Yet in cases documented for this report, the clock often remains stopped for a prolonged period when it was the court's calendar that could not accommodate a short delay or when the applicant was not responsible for the delay in the first place.<sup>112</sup>

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<sup>106</sup> Saucedo and Rodriguez, et. al., *supra* note 38.

<sup>107</sup> *Ibid.*, p. 21, *A.B.T.*, et al. v. USCIS, *Plaintiffs' Motion*.

<sup>108</sup> *A.B.T.*, et al. v. USCIS et al., *Plaintiffs' Motion*, exhibit. 5.

<sup>109</sup> *Ibid.*

<sup>110</sup> C.F.R., <http://www.law.cornell.edu/cfr/text/8/208.7> (accessed November 6, 2013), Title 8 Section 208.7(a)(2); C.F.R., <http://www.law.cornell.edu/cfr/text/8/1208.7> (accessed November 6, 2013), Title 8 Section 1208.7(a)(2) (2009).

<sup>111</sup> Saucedo and Rodriguez, et al., *supra* note 38, p. 17–18.

<sup>112</sup> *Ibid.*, 18; Lori Nessel, email to Human Rights Watch, April 16, 2013; *A.B.T.*, et al. v. USCIS et al., *Plaintiffs' Motion*, exhibit. 4.

Two particularly striking examples of incorrect stoppages were detailed in the complaint of the *A.B.T.* class action suit. In the first, an immigration judge gave the applicant the option of attending a hearing in either January or May. After opting for the date in May, the applicant's clock was stopped because the judge ruled that picking the later date amounted to a delay caused by the applicant. The applicant was not informed of this possibility when given the option to choose her hearing date. Then, the court delayed her hearing even further because it was unable to find an interpreter. Meanwhile, the client's clock remained stopped because of the delay that she "caused."<sup>113</sup> In a second example, the court stopped an applicant's clock simply because his lawyer requested to supplement the record. The lawyer did not request an adjournment or delay, and the request caused no such delay, yet the court stopped the clock anyway.<sup>114</sup>

While the USCIS Affirmative Asylum Procedures Manual outlines generally when the clock should stop, it does not provide direction on when the clock should be re-started or who is responsible for re-starting the clock.<sup>115</sup> Stakeholders report that it is "often unclear [as to] who controls the asylum clock in immigration court," and that it is "difficult to get immigration judges to correct the clock when it is improperly stopped."<sup>116</sup>

All asylum seekers are entitled to work authorization upon a grant of asylum. The government's goals are to adjudicate asylum applications in immigration court within 180 days.<sup>117</sup> But immigration judges are often unable to meet those deadlines.<sup>118</sup> There are few, if any, reliable statistics on how long it takes for full adjudication of an asylum case.<sup>119</sup>

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<sup>113</sup> *A.B.T.*, et al. v. USCIS et al., *Plaintiffs' Motion*, exhibit. 4.

<sup>114</sup> *Ibid.*, exhibit. 13.

<sup>115</sup> Saucedo and Rodriguez, et al., *supra* note 38, p. 17–18.

<sup>116</sup> USCIS., "Executive Summary: Employment Authorization Document and the Asylum Clock Engagement," Oct. 31, 2011, <http://www.uscis.gov/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2011/Sept/Asylum%20Clock%20Executive%20Summary.pdf> (accessed November 6, 2013); *A.B.T.*, et al. v. USCIS et al., *Plaintiffs' Motion*, exhibit. 3.

<sup>117</sup> U.S. Government Accountability Office (GAO), "Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement," August 2006, <http://www.gao.gov/assets/260/251155.pdf> (accessed November 6, 2013); The GAO "interviewed EOIR officials; reviewed information on caseload trends, caseload management, and court evaluations; and analyzed caseload data, case completion goal data, and OCIJ court evaluation reports." *Ibid.*, "Highlights."

<sup>118</sup> Saucedo and Rodriguez, et. al., *supra* note 38, p. 22.

<sup>119</sup> The difficulty in ascertaining the length of time for which a case has been pending is due to a lag that often occurs between when the asylum application is lodged with the court when the asylum applicant files the application with the judge at the first hearing. It often takes months between the lodging and filing stages, delaying the starting of the asylum clock, and masking the length of time the case has been pending. After determining that there were no publicly available statistics

While many cases are inevitably adjudicated sooner, some may take between three and five years.<sup>120</sup> If the court stops an asylum seeker's clock for one of the above reasons, the asylum seeker may have to wait until final adjudication of their case to be able to work.

As a result, the court effectively deprives many asylum seekers of any means of subsistence for themselves and their families while their asylum claims are pending. Because they cannot support themselves and are also denied access to public benefits, they face one of two choices: either they must rely on others—family, friends, fellow refugees,<sup>121</sup> charities, and other organizations—for support; or they must work illegally, which not only jeopardizes the asylum claim and puts the applicant at risk of removal, but also frustrates the government's stated intent of preventing unauthorized employment.

Because they are not authorized to work and because US immigration law does not allow for court-appointed attorneys to represent asylum claimants, some asylum seekers cannot afford to pay for an attorney to assist them and must either pursue their claims without legal representation or find pro bono legal assistance.

Khaled M. found a law school immigration clinic to represent him at his initial appearance before an immigration judge. At the hearing, the judge gave Khaled a hearing date a few months in the future; the immigration judge stopped Khaled's clock and did not tell Khaled or his lawyers. Later, the judge claimed that because the clinic worked on a protracted schedule, he "knew" that the clinic would ask for an adjournment, so he gave Khaled a later hearing date and on that basis stopped Khaled's clock.<sup>122</sup>

Barbara Schwartz, a clinical professor at the University of Iowa, notes that law school clinics, which do much of the asylum work, operate on an academic schedule. When the clinic requests a few more weeks for new clinic students to familiarize themselves with and prepare a case, the next available hearing date is often months away (either due to the

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on this issue, Human Rights Watch filed a FOIA request with the EOIR on June 10, 2013 (request on file with Human Rights Watch). Unfortunately, we were unable to delay publication of this report until we received a response to our request.

<sup>120</sup> GAO, *supra* 117, at 15. The GAO study was based on interviews with EOIR officials; reviewing information on caseload trends, caseload management, and court evaluations; and analyzing caseload data, case completion goal data, and OCIJ court evaluation reports.

<sup>121</sup> *A.B.T., et al. vs. USCIS, Plaintiffs' Motion*, p. exhibit. 2.

<sup>122</sup> Seton Hall interview with Anjum Gupta, lawyer for Khaled M., September 20, 2013.

court's calendar, or due to the unavailability of law school clinics during academic vacations, or some combination of the two), and the court stops the asylum applicant's clock until the new hearing date.<sup>123</sup>

Thus, the period of time for which the court stops the clock is not always tailored to the period of time for which the asylum seeker requests an extension or adjournment. As a result, the asylum clock creates a burden for lawyers and clinics that try to help asylum seekers. The asylum clock system is inflexible and does not account for the fact that sometimes the delay is not caused by the asylum seeker, but rather by his or her attorney or the government. If an asylum seeker's lawyer goes on vacation, or is too busy to prepare for an expedited hearing, the asylum seeker will be penalized when the court stops the clock.<sup>124</sup> Both asylum seekers and lawyers suffer as a result of the prohibitive and inflexible asylum clock system.

Asylum seekers are often unaware of the 180-day bar to employment authorization. When they learn that they will not be able to work for many months or years, it can compound the stress that they are already suffering. According to the terms of the *A.B.T.* settlement, upon filing an asylum claim with an immigration court, applicants will now be informed of the clock and how their actions might impact the clock.<sup>125</sup> Still, the terms of the settlement do not specify how an applicant can dispute or correct erroneous attributions of fault made by immigration judges.

As this report demonstrates, the harm endured by asylum seekers as a result of having to wait to accrue the necessary time on their asylum clocks can be severe. Although the *A.B.T.* settlement may improve certain aspects of managing the asylum clock, it does not resolve several fundamental problems that will continue to cause delays in the accrual of time. Since denial of the ability to work violates basic rights of asylum seekers, this report advocates abolishing the arbitrary, confusing, and inefficient clock system altogether.

“When you flee your country you have the stress of your country—then you come here and it's double stress,” said Fabrice M., a human rights activist from the Democratic Republic

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<sup>123</sup> Seton Hall telephone interview with Barbara Schwartz, Clinical Professor of Law, University of Iowa College of Law, November 19, 2012.

<sup>124</sup> *Ibid.*

<sup>125</sup> *A.B.T. et al vs. USCIS et al, Settlement Agreement*, p. 15.

of Congo (DRC). Although Fabrice faced serious economic hardship and difficulty securing housing as a result of the work restrictions (causing the double stress he refers to), he believes that “America is a good country ... [i]t is like a gift from God, this country.”<sup>126</sup>

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<sup>126</sup> Seton Hall interview with Fabrice M., Newark, NJ, November 6, 2012.

# Consequences of the Bar on Work Authorization and Lack of Social Support

## Physical and Emotional Harm

Given the harsh treatment that asylum seekers have experienced in their countries, it is not uncommon for them to need medical treatment while their cases are pending and they are prohibited from working and earning money to pay for medical care.<sup>127</sup> However, adult asylum seekers with pending cases are mostly exempt from state and federal medical benefits and insurance (apart from urgent care received in an emergency room),<sup>128</sup> and as a result, asylum seekers may be deterred from going to the doctor or hospital for treatment.<sup>129</sup> This inability to pay for medical care can be detrimental to an applicant's health.<sup>130</sup> Some asylum seekers interviewed were able to obtain health services from nonprofit organizations and free clinics.<sup>131</sup>

Abdul C. owned a restaurant and meat processing store in Bangladesh. His clientele was international, so he offered cuisine—including pork—that was not regularly available in Bangladesh. Although, as a Muslim, Abdul did not eat pork, he was threatened numerous times and beaten because he sold this forbidden meat. One of these beatings nearly cost Abdul his life. At the time of his interview for this report, Abdul was still not allowed to work, but that did not stop the bills from coming in. He said he needed to pay for food and medicine for his arm, which was injured when he was brutally beaten and nearly killed in Bangladesh. Despite his injury, he said that he had only seen a doctor once since he has been in the United States.<sup>132</sup>

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<sup>127</sup> Seton Hall interviews with Thomas N., Newark, NJ, October 18, 2012, and Khaled M., Newark, NJ, September 20, 2012.

<sup>128</sup> Michael K. Gusmano, "Undocumented Immigrants in the United States: U.S. Health Policy and Access to Care," Hastings Center Issue Brief, October 3, 2012, <http://www.undocumentedpatients.org/issuebrief/health-policy-and-access-to-care/> (accessed November 6, 2013).

See also, "'Lawfully Present' Individuals Eligible under the Affordable Care Act," National Immigrant Law Center, September 2012, <http://www.nilc.org/document.html?id=809> (accessed October 16, 2013); see also Code of Federal Regulations (CFR) 2013, Title 45, Section 152.2, <http://www.law.cornell.edu/cfr/text/45/152.2> (accessed October 18, 2013).

<sup>129</sup> Seton Hall interview with Abdul C., Queens, NY, August 2012.

<sup>130</sup> *A.B.T., et al. v. USCIS, Plaintiffs' Motion*, exhibit. 11.

<sup>131</sup> Seton Hall interviews with Fabrice M., Newark, NJ, November 6, 2012, and Norma G., Newark, NJ, October 25, 2012.

<sup>132</sup> Seton Hall interview with Abdul C., Queens, NY, August 2012.

Eric N. is an asylum seeker from Cameroon in his forties, living in Texas. Because of the stress associated with his asylum application and his lack of work authorization, Eric developed hypertension and was rushed to the hospital because he thought he was having a heart attack. He was left with a \$5,000 hospital bill that he is unable to pay because he cannot work.<sup>133</sup>

One of the most profoundly troubling effects of the lack of work authorization is the mental and emotional toll it takes on asylum seekers.<sup>134</sup> To be sure, asylum seekers have experienced a range of traumatic experiences that may contribute to mental health problems. Their mental health problems cannot be attributed solely to lack of work authorization. Nevertheless, several of the asylum seekers interviewed for this report said that they felt depressed because being denied the ability to work rendered them completely helpless and reliant upon others.<sup>135</sup> One asylum seeker was put on medication to treat his depression.<sup>136</sup> Another asylum seeker visited a psychologist at the organizational home in which he was staying seventeen times to treat his depression.<sup>137</sup>

Josiane F., a 27-year-old rape survivor from Rwanda, said that not being able to work year after year “kills you emotionally.” She said, “Just sitting on your own, one year, two years, three years, five, doing nothing, just sitting there, kills you. I was so depressed.”<sup>138</sup>

William K., an asylum seeker from the Democratic Republic of Congo (DRC), said that not being able to work and not having a lawyer “was really frustrating.” He said that it had a negative impact on his mental health. “I was not sleeping at night, had nightmares. You feel like you are lost, depression.”<sup>139</sup>

Some of the asylum seekers interviewed for this report who had survived egregious persecution in their home countries said that being barred from work made them feel that

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<sup>133</sup> Seton Hall interview with Eric N., Newark N.J., July 2012.

<sup>134</sup> Seton Hall interview with Dr. Lauren Heidlbrink, Program Associate at the Young Center for Immigrant Children’s Rights, July 2012.

<sup>135</sup> Seton Hall interviews with Thomas N., Newark, NJ, October 18, 2012; Norma G., Newark, NJ, October 25, 2012; Khaled M., Newark, NJ, September 20, 2012; Fabrice M., Newark, NJ, November 6, 2012; and Jacqueline N., Newark, NJ, June 18, 2012.

<sup>136</sup> Seton Hall interview with Emanuel L, New York, NY, September 15, 2012.

<sup>137</sup> Seton Hall interview with Fabrice M., Newark, NJ, November 6, 2012.

<sup>138</sup> Human Rights Watch interview with Josiane F., Fort Worth, TX, February 26, 2013.

<sup>139</sup> Human Rights Watch interview with William K., Fort Worth, TX, February 26, 2013.

they were re-experiencing persecutory or discriminatory treatment. They said that not being permitted to work made them feel as though they were inferior. For example, Emanuel L., an asylum seeker from the DRC, said that being unable to work was “another form of persecution,” because “you’re nothing without a work permit.” Not having work authorization is “like punishment,” he said. “We feel discriminated [against].”<sup>140</sup>

An asylum seeker from Cameroon, Thomas N., said, “I don’t feel like I have the same kind of respect” as others. “It’s demeaning.” Not having the ability to work makes you “[r]emember that you don’t belong here.”<sup>141</sup>

Asylum seekers expressed feelings of hopelessness because of the denial of the right to work. They said that they feel as though they do not have control over their own destiny, and that they are at the mercy of a system that does not look out for them.<sup>142</sup> Norma G., a transgender woman from Colombia who was eventually granted asylum, elaborated on her sense of helplessness. “Your life depends on what [the immigration officials] say.... It’s like a game of Russian Roulette.”<sup>143</sup>

For many asylum seekers, work is a source of dignity as well as a source of livelihood. Preventing them from working is emotionally eviscerating and makes asylum seekers feel like they are worthless.<sup>144</sup> Amina Esseghir, a former caseworker at the International Institute of New Jersey who has counseled many asylum seekers, said that many of them found it very frustrating, if not incomprehensible, that they could not work. Some told Esseghir that they felt as though they were “worth nothing in the eyes of American society.”<sup>145</sup>

Bosco N. said that not being allowed to earn money is very hard. He said that he experiences feelings of worthlessness and acute stress. He said he does not think about

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<sup>140</sup> Seton Hall interview with Emanuel L., New York, NY, September 15, 2012.

<sup>141</sup> Seton Hall interview with Thomas N., Newark, NJ, October 18, 2012.

<sup>142</sup> Seton Hall interview with Fabrice M., Newark, NJ, November 6, 2012.

<sup>143</sup> Seton Hall interview with Norma G., Newark, NJ, October 25, 2012.

<sup>144</sup> Seton Hall interview with Jacoline N., Newark, NJ, October 25, 2012.

<sup>145</sup> Seton Hall interview with Amina Esseghir, former lead refugee and asylee case manager at the Torture Survivors Program, International Institute of New Jersey, November 27, 2012.

the future, only about how he will get by today. “Being without money is hard, it makes you feel like less of a man. You have no voice; no one will listen to you.”<sup>146</sup>

Asylum seekers often feel as though they must rely upon other people or organizations to survive.<sup>147</sup> For many asylum seekers who are used to being self-sufficient, this is very difficult. Anastasia K., a Ukrainian asylum seeker, relies on her brother for food and shelter. “I want to be able to work,” said Anastasia. “I am a burden on my brother, but I have nowhere else to go.”<sup>148</sup>

Cristina M. came to the United States seeking protection from domestic violence. She lives with a family that provides everything for her—food, clothing, shelter, and transportation. Although she cannot legally work, she helps out the family with chores around the house as a “thank you” for letting her stay. She commented that “it’s hard having to ask people for everything; not being able to provide for yourself.”<sup>149</sup>

Work may be the single “most important thing” in rehabilitating traumatized asylum seekers, said Dr. Joanne Ahola, a medical director of both the Weill Cornell Center for Human Rights and Research Institute Without Walls, who also serves as a trainer in asylum work for Physicians for Human Rights. A job gives asylum seekers a sense of purpose and can function as a “distraction from thinking about traumatic experiences.”<sup>150</sup>

In fact, work can function as a therapy for asylum seekers. Many asylum seekers cannot afford therapy or treatment, and for many, treatment is not even available in their geographical locations.<sup>151</sup> Indeed, for many, finding housing and food is a priority over psychological treatment. There is very little in the way of treatment and therapy available for the majority of asylum seekers.<sup>152</sup> The doctors, medical personnel, and facilities necessary to treat victims of persecution are not readily available—and wait lines for

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<sup>146</sup> Seton Hall interview with Bosco N., Detroit, MI, August 2012.

<sup>147</sup> Seton Hall interview with Fabrice M., Newark, NJ, November 6, 2012.

<sup>148</sup> Seton Hall interview with Anastasia K., New York, NY, July 1, 2012.

<sup>149</sup> Seton Hall interview with Cristina M., Newark, NJ, February 22, 2013.

<sup>150</sup> Seton Hall interview with Dr. Joanne Ahola, November 20, 2012. Dr. Ahola is a professional psychiatrist and Medical Director at the Weill Cornell Center for Human Rights and Research Institute Without Walls, as well as a trainer in asylum work for Physicians for Human Rights. Dr. Ahola is on the voluntary faculty of the Weil Cornell Medical Center.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

treatment are often long.<sup>153</sup> Work can provide some therapy until asylum seekers can find treatment or until they can meet their basic needs.

Dr. Ahola, who has evaluated many asylum seekers, said, “These people are survivors and are eager to work. If we are not going to treat them, at least let them work.”<sup>154</sup> Failing to provide asylum seekers with treatment or work often results in medical problems later in life. Dr. Ahola noted that trauma presents itself first psychologically and then later in life physically.<sup>155</sup>

## Housing and Transportation

It is often very difficult for asylum seekers who are barred from work authorization to find accommodation because they cannot legally make enough money to pay for housing and transportation. Some fortunate asylum seekers may be able to find organizations that can provide shelter or assist them in finding housing.<sup>156</sup> Other asylum seekers stay with family or friends.<sup>157</sup> Living with friends and family, however, can be difficult, especially because asylum seekers are uncertain about when they may receive work authorization, and such authorization may take a long time.

Protracted stays and uncertainty can create frustrations for asylum seekers and tensions with their hosts. Many asylum seekers are forced to live in and share houses or apartments with people they do not know—people who sometimes come from very different backgrounds than they do.<sup>158</sup> Facing high rents and no income, it is difficult for asylum seekers to make rent payments, and many do not.<sup>159</sup> Some asylum seekers are forced into homelessness.

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Seton Hall interview with Fabrice M., Newark, NJ, November 6, 2012.

<sup>157</sup> Seton Hall interview with Abdul C., New York, NY, August 2012; Eric N., Houston, TX, July 2012; Ibrahim T., New Jersey, NJ, August 2012; Bosco N., Detroit, MI, August 2012, and Fabrice M., November 6, 2012.

<sup>158</sup> Seton Hall interview with Emanuel L., September 15, 2012, Thomas N., October 18, 2012, and Demeke Y., Newark N.J., July/August 2012.

<sup>159</sup> Seton Hall interviews with Thomas N., October 18, 2012; Khaled M., Newark, NJ, September 20, 2012; and Abdul C., Queens, NY, August 2012.

There were nights when Khaled M. and his family did not have a place to sleep. They would try to find a place to sleep in a bus station or in an airport. On one particular occasion, Khaled and his family were evicted from the apartment in which they had been living during the hottest week of the summer.<sup>160</sup> Khaled, his wife, and two small children were forced to roam the streets in the heat of summer without shelter or food.

Maria V. came to the United States with her husband and one daughter. Her husband was taken into custody by law enforcement just days before she gave birth to her second daughter. Maria and her daughters lived with distant relatives until these relatives became fed up with providing for them and told her to leave. Another relative has taken Maria in but if those relatives' willingness to help runs out, however, so will her shelter.<sup>161</sup>

Asylum seekers often live in impoverished neighborhoods and cramped apartments. Eric N., who holds two master's degrees, was forced to sleep on the couch of his sister's living room. Because the couch was in a common room of the house, he could not go to sleep until the last inhabitant of the house went to sleep and was awoken as soon as the first person woke up. Despite these inconveniences, he said he was grateful to have a place to stay.<sup>162</sup>

## Food

Asylum seekers who are barred from work authorization and not assisted by friends, families, or organizations are often unable to purchase food.<sup>163</sup> Some asylum seekers and their families reported going to sleep hungry or skipping meals because they could not afford food.<sup>164</sup>

While Khaled M. waited for asylum without work authorization, he and his family became destitute and hungry. One day, while roaming the streets, Khaled's wife noticed some apple trees and begged Khaled to pick the apples so the family could eat. Khaled, seeing

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<sup>160</sup> Seton Hall interview with Khaled M., Newark, NJ, September 20, 2012.

<sup>161</sup> Seton Hall interviews with Tiana O'Konek, attorney for Maria V., and Azad Molla Hosseini, student attorney.

<sup>162</sup> Seton Hall interview with Eric N., Houston, TX, July 2012.

<sup>163</sup> Seton Hall interview with Khaled M., Newark, NJ, September 20, 2012.

<sup>164</sup> Ibid.

no other option, stole the apples. He reflects, “It’s not something you should go through, but reality is different.”<sup>165</sup>

Other asylum seekers have reported that even if they could afford food, it was generally not very nutritious, because they could not afford a well-balanced diet.<sup>166</sup>

Thomas N. often goes to sleep hungry because he regularly lacks money to purchase food. When he is able to purchase meals, he has no choice but to buy cheap, unhealthy fast food. Thomas said he yearns for the home cooked meals of Cameroon that he can no longer enjoy. As a result, Thomas has lost weight since applying for asylum.<sup>167</sup>

## Vulnerability to Exploitation

Some asylum seekers resort to unauthorized work to support themselves and their families while they wait for work authorization. But working without authorization leaves asylum seekers vulnerable to exploitation by unscrupulous employers. For example, one asylum seeker reported being paid below minimum wage, and going without pay for weeks because her employer knew that she was undocumented and had no recourse to report him.<sup>168</sup>

Munyiga N., a child soldier from Uganda, worked a number of manual-labor jobs without authorization. Working in such jobs “was really hard and very complicated.” Munyiga was paid only \$3 an hour but noted that “[I] [couldn’t] say that they mistreat me” for fear of reprisal. One day, while working on a roof, Munyiga fell and hit the ground. He lay on the ground, unconscious for several minutes until someone called the police. But because Munyiga did not have work authorization, when he regained consciousness, his boss told him to run. Although Munyiga was the victim, his employer made him leave the scene so as not to implicate himself and his employer in illegal work activity. Munyiga asked, “What does that have to do with my being injured?... I couldn’t even go to the hospital because they wouldn’t look at me.” This experience made Munyiga realize that, without work authorization, “you are a piece of nothing; you are a nobody.”<sup>169</sup>

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<sup>165</sup> Ibid.

<sup>166</sup> Seton Hall interview with Thomas N., October 18, 2012, October 18, 2012.

<sup>167</sup> Ibid.

<sup>168</sup> Seton Hall interview with Amina Esseghir, Newark, NJ, November 27, 2012.

<sup>169</sup> Seton Hall interview with Munyiga N., Newark, NJ, February 20, 2013.

Professor Christine Lin, clinical teaching fellow in the Refugee & Human Rights Clinic at the University of California, Hastings College of the Law and also a staff attorney at the Center for Gender & Refugee Studies at Hastings, noted that this exploitation occurs because employers know that they have the upper hand; their unauthorized asylum seeking workers cannot report work abuses or exploitation for fear of identifying themselves as undocumented workers.<sup>170</sup> As a result, exploitation and workplace injuries may go unreported and unaddressed.<sup>171</sup>

Forcing asylum seekers to rely on others for subsistence permits, and even encourages, abusive and exploitive relationships. Amina Esseghir, a former caseworker at the International Institute of New Jersey, said that one of her clients, a 21-year-old female asylum seeker, was taken in by a family who provided for her well-being. But this situation created an “odd power dynamic” between family members and the dependent asylum seeker. Members of the family told the asylum seeker that they were going to prostitute her out to make money. Esseghir noted that the client “was in a situation where if she didn’t do what the [family] wanted, she would be homeless.”<sup>172</sup>

Asylum seeker Isabel C.’s boyfriend is physically, verbally, and psychologically abusive. He confines her within his home and away from her cousins. She is afraid to leave because she does not want her daughter to go hungry or live on the streets. She said that she will not be able to support herself and her daughter because she cannot work. Isabel’s lack of work authorization as an asylum seeker is one factor keeping her in a situation of domestic violence. “I am scared for myself and my daughter. There is no place for us. I wonder if I will ever be able to provide a better life for her.”<sup>173</sup>

Because of the risks associated with unauthorized work, such as exploitation and vulnerability to detention and deportation, some asylum seekers choose instead to accept the hardships associated with unemployment. Kazim J., a victim of torture from Iran, is worried that if he works illegally, it will complicate his asylum application and his ability to

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<sup>170</sup> Seton Hall interview with Professor Christine Lin, Clinical Teaching Fellow at University of California-Hastings, November 16, 2012.

<sup>171</sup> Ibid.

<sup>172</sup> Seton Hall interview with Amina Esseghir, November 27, 2012.

<sup>173</sup> Seton Hall interview with Isabel C., Newark, NJ, July 1, 2012.

get work authorization.<sup>174</sup> Kazim’s family had been sending him money, but economic sanctions against Iran have made this more difficult.<sup>175</sup>

## Difficulty of Access to Counsel

The obstacles to asylum seekers obtaining work authorization are closely linked to the lack of their right to court-appointed counsel in the United States. Asylum seekers often have no choice but to file asylum claims on their own (*pro se*). These *pro se* asylum claims are often not as strong as they would be if they had been filed with the assistance of legal counsel.<sup>176</sup> As a result, many *pro se* asylum applications fail at the asylum officer stage and are referred to immigration court. According to the EOIR statistical yearbook for fiscal year 2012, only 56 percent of asylum seekers are represented in court.<sup>177</sup> From 2000 to 2004, immigration courts granted asylum to asylum seekers represented by counsel 45.6 percent of the time, compared to a grant rate of 16.3 percent for unrepresented asylum seekers.<sup>178</sup> If asylum seekers are represented by counsel at the outset, asylum is more likely to be granted, and work authorization will automatically follow

Munyiga N. was a child soldier in Uganda. When he arrived in the United States, he tried to find legal counsel. No lawyer or organization would take on his case. Despite his diminished mental capacity due to violent trauma in Uganda, Munyiga tried to apply for asylum on his own, but his application was denied. Subsequently, Munyiga was able to obtain the pro bono assistance of a lawyer. But he commented that the lack of preparation,

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<sup>174</sup> Asylum is granted in the discretion of the asylum officer. Among the factors that the officer balances is “presence of significant violations of immigration laws,” which can include working illegally. USCIS, “Lesson Plan Overview: Mandatory Bars to Asylum and Discretion,” *Participant Workbook*, March 25, 2009 <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Bars-to-Asylum-Discretion-31aug10.pdf>, (accessed November 6, 2013).

<sup>175</sup> Human Rights Watch interview with Kazim J., Fort Worth, TX, February 26, 2013. Pursuant to United States legislation, 10 different Iranian banks are barred from accessing the US financial system, making it difficult for individuals to transfer money to and from the United States and Iran. Amy E. Worlton, et al., “U.S. Dollar Transactions with Iran are Subject to New Restrictions – Tough Policy Decisions Face International Financial Institutions,” Wiley Rein LLP, Nov. 28, 2007.

<sup>176</sup> Interview with Professor Christine Lin, November 16, 2012.

<sup>177</sup> Executive Office for Immigration Review, *FY 2012 Statistical Yearbook*, Department of Justice, March 2013, <http://www.justice.gov/eoir/statspub/fy12syb.pdf> (accessed November 6, 2013) p. G1. It is possible that even fewer asylum seekers have counsel at the asylum officer stage.

<sup>178</sup> Commission on Immigration, “Report to the House of Delegates,” American Bar Association, p. 2-3, [http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/summary\\_of\\_recommendations/114E.a.uthcheckdam.doc](http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/summary_of_recommendations/114E.a.uthcheckdam.doc) (accessed November 6, 2013).

guidance, and support by counsel made him more vulnerable in proceedings, especially because of his mental state.<sup>179</sup> He is now an immigration detainee in a county jail.

Many asylum seekers find it prohibitively difficult to navigate asylum and work authorization laws and procedures without legal assistance. These difficulties often result in failed asylum claims and work authorization applications. Kazim J., an asylum seeker from Iran, observed, “If you don’t have a lawyer, you are really lost in the process.”<sup>180</sup>

Josiane F., the Rwandan rape survivor, applied for asylum without the help of legal counsel in May 2008. She said that the asylum application she submitted on her own had many errors. “Maybe if I had a lawyer that time, I would have said it differently. I was only 22 when I came. I needed someone to direct me.” For the next four years while her asylum claim was pending, she was not allowed to work. “I applied for work authorization on my own four times,” she said. “It’s not that easy.” She said that she did not know anyone who could provide her with information on the process.<sup>181</sup>

Josiane said that she almost gave up on her asylum application. “My application wasn’t moving forward. I had no money to pay a new lawyer. The whole process was taking forever.”

The disadvantages asylum seekers face in navigating the legal procedures because of the bar on work authorization are not limited to those who represent themselves. Some asylum seekers who cannot afford to hire a lawyer manage to find pro bono legal representatives through nongovernmental organizations or law school clinics. Attorneys often add pro bono cases on top of full (paying) caseloads and have to delay court appearances for their pro bono clients as they manage their schedules. Similarly, law students providing pro bono advice and representation are doing so within the confines of academic calendars and other academic demands. Consequently, pro bono legal representatives frequently seek continuances that delay the proceedings and stop the work authorization clock.

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<sup>179</sup> Seton Hall interview with Munyiga N., Newark, NJ, February 20, 2013.

<sup>180</sup> Human Rights Watch interview with Kazim J., Fort Worth, TX, February 26, 2013.

<sup>181</sup> Human Rights Watch interview with Josiane F., Fort Worth, TX, February 26, 2013.

For these reasons, Josiane’s difficulties with the asylum clock and work authorization process did not stop after she obtained the services of a pro bono lawyer; in fact, the lawyer did not help at all with this problem. “I didn’t understand the clock stopping process. I asked the lawyer why the work authorization was not going through but he said he’s only helping with asylum and not with work authorization.” Josiane’s clock stopped when the US government sent documents to be verified in Rwanda, and it remained stopped throughout the three years of this investigation. After the investigation was completed, the clock started running again, but no one told Josiane that she could apply for work authorization.<sup>182</sup>

It is also often very difficult for asylum seekers who are unable to work to afford counsel. Impoverished asylum seekers are caught in a circular problem: because they cannot work, they cannot afford legal assistance, and because they cannot afford legal assistance, they often fail to represent their claims competently and then are barred from work authorization.

William K. is an asylum seeker from the Democratic Republic of Congo (DRC). He tried to apply for asylum on his own, but he “didn’t know which forms [to use].” William then sought assistance from a not-for-profit organization and waited three months before they denied him assistance. He eventually found a lawyer who charged him \$2,500 to file an asylum application, which he paid for with assistance from his church. Upon filing the completed asylum application, he was specifically barred from work authorization. But when William was referred to the court, he could no longer afford to pay the lawyer. A lawyer friend of his tried to help him but did not know about immigration law and did not ask William to explain his story. Today, William has a lawyer, but he cannot pay him: “Once I have work authorization I can start paying the lawyer back.” When asked about the role of lawyers in the process, William said, “If you don’t have a lawyer, you feel a little bit lost. Only a lawyer can handle the language [of the application]. We need lawyers.”<sup>183</sup>

Pierre M. was in a similar situation. He fled Cameroon after being held prisoner there. After arriving in the United States, Pierre applied for asylum on his own because he could not afford a lawyer. He does not speak English and said he could not understand the judge or

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<sup>182</sup> Ibid.

<sup>183</sup> Human Rights Watch telephone interview with William K., Fort Worth, TX, February 26, 2013.

why the judge stopped the work authorization clock. He later hired a lawyer, though he does not have the money to pay him. At the time of the interview, Pierre’s asylum claim was still pending, he did not have work authorization, his clock was stopped, and he was worried that his lawyer would stop representing him because he was unable to pay him.<sup>184</sup>

In addition, many asylum seekers find it difficult to devote time and energy to their asylum claim when they are struggling to survive. Amina Esseghir, a former caseworker at the International Institute of New Jersey, asks, “How can you ask [asylum seekers] to focus on their legal case when they can’t provide for themselves?”<sup>185</sup>

At immigration court, immigration judges inform unrepresented asylum seekers that they may obtain counsel at their own cost.<sup>186</sup> If asylum seekers need time to find counsel, the clock will stop.<sup>187</sup> This is just one of the ways the lack of a right to counsel can thwart or delay obtaining work authorization. Asylum seekers lucky enough to obtain pro bono counsel or assistance from immigration law clinics must work with attorneys whose own schedules or caseloads may require requesting extensions from the courts, which can stop the clock. Asylum seekers without counsel may see their claims fail because of a lack of effective legal assistance, or may experience delays until they can find representation. Unrepresented asylum seekers may have to ask for adjournments or may otherwise miss appointments or deadlines due to lack of familiarity with the required procedures. Asking for an adjournment or missing an appointment or deadline stops the work authorization clock.

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<sup>184</sup> Human Rights Watch telephone interview with Pierre M, Fort Worth, TX, February 26, 2013.

<sup>185</sup> Seton Hall interview with Amina Esseghir, Newark, NJ, November 27, 2012.

<sup>186</sup> Seton Hall interview with Professor Christine Lin, Newark, NJ, November 16, 2012.

<sup>187</sup> Ibid.

## Treatment of Asylum Seekers Compared to Other Protected Immigrant Groups in the United States

The restriction on asylum seekers' right to work, particularly the clock stopping rules, mean that asylum seekers are often treated differently than similarly vulnerable populations. For immigrants seeking other types of humanitarian relief—for example, temporary protected status, the T-visa for victims of human trafficking, and the U-visa for victims of violent crime—there are paths to work authorization that may be more straightforward than the paths for asylum seekers. Applicants for these other forms of immigration relief may apply simultaneously for work authorization, whereas asylum seekers may not.

### Deferred Action for Childhood Arrivals

A new humanitarian immigration provision is the Deferred Action for Childhood Arrivals (DACA) program. Announced on June 15, 2012 by the Secretary of Homeland Security, DACA permits immigration officers to exercise prosecutorial discretion to stay removal proceedings for two years for children who arrived in the United States without inspection before turning 16.<sup>188</sup> Receiving deferred action does not give an individual lawful immigration status but instead simply halts the accumulation of unlawful status for two years, subject to renewal.<sup>189</sup> A DACA application requires that an application for employment authorization be filed *simultaneously*, regardless of the person's intention to work.<sup>190</sup> A grant of work authorization, however, is based on demonstrated need and is provided once the DACA application is approved. However, DACA applicants are not subject to the clock stopping rules that asylum seekers face. United States Citizenship and Immigration Services began receiving applications for DACA on August 15, 2012, after the

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<sup>188</sup> USCIS, "Consideration of Deferred Action for Childhood Arrivals Process," July 2, 2013, [www.uscis.gov/childhoodarrivals](http://www.uscis.gov/childhoodarrivals) (accessed July 23, 2013).

<sup>189</sup> Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, U.S. Department of Homeland Security, June 15, 2012, <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (accessed November 6, 2013).

<sup>190</sup> USCIS, "Instructions for Consideration of Deferred Action for Childhood Arrivals," Department of Homeland Security, <http://www.uscis.gov/USCIS/files/form/i-821dinstr.pdf>; C.F.R. 2011 (accessed November 6, 2013) Title 8 Section 12(c)(14).

two month transition period allowing USCIS to prepare for the new program had expired.<sup>191</sup> As of October 10, 2012, USCIS has received 179,794 applications for processing and has granted 4,591 requests for deferral.<sup>192</sup>

## “U” visa

The “U” visa was created by the Battered Immigrant Women’s Protection Act (contained within the Victims of Trafficking and Violence Protection Act) in 2000.<sup>193</sup> This non-immigrant visa was designed for victims of violent crime—such as domestic violence or sexual assault—to remain in the United States to assist in the investigation or prosecution of the crime by law enforcement.<sup>194</sup> Upon the grant of a U visa, the person is also granted work authorization.<sup>195</sup> A U visa lasts for four years, and work authorization expires at the same time as the visa.<sup>196</sup> The current processing time for a U visa application is eleven months.<sup>197</sup>

While there is a 10,000-visa cap for recipients of the U visa, USCIS has granted conditional work authorization to applicants in excess of that cap in years in which U visa applications exceeded 10,000.<sup>198</sup> Those applicants must have a bona fide U visa application pending before USCIS to receive conditional authorization to work.<sup>199</sup>

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<sup>191</sup> Napolitano, *supra* note 189; Julia Preston, “Illegal Immigrants Line Up for Deportation Deferrals,” *New York Times*, Aug. 15, 2012, [http://www.nytimes.com/2012/08/16/us/illegal-immigrants-line-up-for-deportation-deferrals.html?\\_r=0](http://www.nytimes.com/2012/08/16/us/illegal-immigrants-line-up-for-deportation-deferrals.html?_r=0) (accessed November 6, 2013).

<sup>192</sup> USCIS, “Deferred Action for Childhood Arrivals Process,” U.S. Department of Homeland Security, October 10, 2012, <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACAOct2012.pdf> (accessed November 6, 2013).

<sup>193</sup> C.F.R., 2009, <http://www.law.cornell.edu/cfr/text/8/214.14> (accessed November 6, 2013), Title 8 Section 214.14(a)(1); USCIS, *Questions & Answers: Victims of Criminal Activity, U Nonimmigrant Status*, Nov. 22, 2010, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=1b15306f31534210VgnVCM10000082ca60aRCRD&vgnnextchannel=ee1e3e4d77d73210VgnVCM10000082ca60aRCRD> (accessed November 6, 2013).

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*, (p)(3)(B); C.F.R., 2011, <http://www.law.cornell.edu/cfr/text/8/274a.12> (accessed November 6, 2013), Title 8 Section 274a.12(a)(19).

<sup>196</sup> C.F.R., 2011, <http://www.law.cornell.edu/cfr/text/8/274a.12> (accessed November 6, 2013), Title 8 Section 274a.12(a)(19).

<sup>197</sup> USCIS, *USCIS Processing Time Information*, *supra* note 88. The Vermont Service Center was processing applications filed on January 2, 2012 in December 2012.

<sup>198</sup> U.S.C., <http://www.law.cornell.edu/uscode/text/8/1184> (accessed November 6, 2013), Title 8 Section 1184(p)(6).

<sup>199</sup> *Ibid.*

Even prior to the full implementation of the U visa program, USCIS took steps to ensure that potential U visa applicants would not be left without the ability to work. From 2000 until 2009, USCIS granted interim relief, which allowed those individuals who were U visa-eligible to receive work authorization and additional benefits.<sup>200</sup> Upon the interim relief program's conclusion, benefit recipients were encouraged to apply for the U visa; those who already had applied and whose applications were pending were allowed to continue to receive benefits until their applications were adjudicated.<sup>201</sup>

In a 2009 report, the Citizenship and Immigration Services Ombudsman noted that U visa applicants face severe hardships because they must often wait considerable periods of time before receiving work authorization upon approval of their application.<sup>202</sup> Congress recognized the importance of work in the Trafficking Victims Reauthorization Act by stating that “[t]he Secretary may grant work authorization to any alien who has a pending, bona fide application for [a U visa].”<sup>203</sup> While the Ombudsman noted that determining such prima facie eligibility for relief may present some challenges, it nevertheless recommended that USCIS immediately implement regulations that would allow U visa applicants to apply for work authorization while their claims are pending.<sup>204</sup> According to the Ombudsman, “[w]ork authorization can assist in [applicants'] ability to receive adequate protection, feed their families, pay their rent, and gain independence without relying on public aid.”<sup>205</sup>

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<sup>200</sup> USCIS, *USCIS Update: U Nonimmigrant Interim Relief Recipients Reminded to Apply for U Visa*, Dec. 14, 2009, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=1c4cb1be1ce85210VgnVCM100000082ca60aRCRD> (accessed November 6, 2013).

<sup>201</sup> *Ibid.*

<sup>202</sup> Office of the Citizenship and Immigration Services Ombudsman, “Improving the Process for Victims of Human Trafficking and Certain Criminal Activity: The T and U Visa,” U.S. Department of Homeland Security, January 29, 2009, [http://www.dhs.gov/xlibrary/assets/cisomb\\_tandu\\_visa\\_recommendation\\_2009-01-26.pdf](http://www.dhs.gov/xlibrary/assets/cisomb_tandu_visa_recommendation_2009-01-26.pdf) (accessed November 6, 2013), p. 9.

<sup>203</sup> Public Law 110-457: William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110th Congress, <http://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-40656.html> (accessed November 6, 2013), Section 201. Yet it appears that USCIS has not yet determined how a bona fide standard would differ from a prima facie standard, used elsewhere. USCIS, *Questions and Answers: Filing T, U, and VAWA Petitions with USCIS*, July 8, 2009, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=5a870c100c475210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> (accessed November 6, 2013). USCIS, *Questions and Answers: USCIS Stakeholder Meeting on VAWA, T and U Visas*, March 2011, [http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/March%202011/March%202011%20VSC\\_march.pdf](http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/March%202011/March%202011%20VSC_march.pdf) (accessed November 6, 2013).

<sup>204</sup> Office of the Citizenship and Immigration Services Ombudsman *supra* note 202, p. 14.

<sup>205</sup> *Ibid.*, p. 13.

## Temporary Protected Status

Established by the 1990 Immigration Act, Temporary Protected Status (TPS) is the “statutory embodiment of safe haven for those aliens who may not meet the legal definition of refugee but are nonetheless fleeing—or [are] reluctant to return to—potentially dangerous situations.”<sup>206</sup> TPS is a grant of prosecutorial discretion to persons already in the United States who are nationals of countries designated by the Secretary of Homeland Security as unsafe.<sup>207</sup> Those persons are protected from removal until their country of origin is deemed safe again. Once the USCIS approves an application for TPS, the applicant is also granted work authorization for the duration of his or her country’s designation as an unsafe state.<sup>208</sup> As of November 9, 2012, the processing time for work authorization based on TPS status is three months at the California and Texas Service Centers.<sup>209</sup>

## “T” visa

The “T” visa was created in 2000 by the Victims of Trafficking and Violence Protection Act.<sup>210</sup> It is a non-immigrant visa that allows for victims of human trafficking to stay in the United States in order to provide assistance to law enforcement in an investigation.<sup>211</sup> Upon a successful grant of a T visa, the person is also simultaneously given work

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<sup>206</sup> Ruth Ellen Wasem and Karma Ester, “Temporary Protected Status: Current Immigration Policy and Issues,” Congressional Research Service, December 13, 2011: <http://www.fas.org/sgp/crs/homesec/RS20844.pdf> (accessed November 6, 2013). U.S.C., 2012, <http://www.law.cornell.edu/uscode/text/8/1254a> (accessed November 6, 2013), Title 8 Section 1254a; Immigration and Nationality Act (INA), <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-7226.html> (accessed November 6, 2013), Section 244.

<sup>207</sup> U.S.C., 2012, <http://www.law.cornell.edu/uscode/text/8/1254a> (accessed November 6, 2013), Title 8 Section 1254a(b); INA Section 244(b). Those countries may include those embroiled in an armed conflict, struck by an environmental disaster or epidemic, or experiencing an extraordinary or temporary condition. U.S.C. Title 8 Section 1254a(b). Currently, those countries designated as unsafe are El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria. USCIS, “Temporary Protected Status,” June 18, 2013, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=848f72ef0745210VgnVCM100000082ca60aRCRD&vgnnextchannel=848f72ef0745210VgnVCM100000082ca60aRCRD>.

<sup>208</sup> C.F.R., <http://www.law.cornell.edu/cfr/text/8/244.12> (accessed November 6, 2013), Title 8 Section 244.12(12); C.F.R., 2011 (accessed November 6, 2013), <http://www.law.cornell.edu/cfr/text/8/274a.12>, Title 8 Section 274a.12(a)(12), (c)(19).

<sup>209</sup> *USCIS Processing Time Information*, *supra* note 88. The Vermont Service Center was processing work authorization requests from El Salvadoran, Honduran, and Nicaraguan nationals filed on October 31, 2010 on April 4, 2013. *Ibid*. It was processing TPS applications for nationals of El Salvador filed October 31, 2010 and applications for nationals of Honduras and Nicaragua filed on January 6, 2011 on April 4, 2013. *Ibid*.

<sup>210</sup> USCIS, “Victims of Human Trafficking: T Nonimmigrant Status,” Oct. 3, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=02ed3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=02ed3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed November 6, 2013).

<sup>211</sup> U.S.C., 2012, <http://www.law.cornell.edu/uscode/text/8/1101>, Title 8 Section 1101(a)(15)(T)(i); C.F.R., 2012, <http://www.law.cornell.edu/cfr/text/28/1100.27> (accessed November 6, 2013), Title 28, Section 1100.27(a)(3) (2012).

authorization.<sup>212</sup> The authorization is valid for the duration of the visa, which is usually four years.<sup>213</sup> As of April 2013, it was taking the Vermont Service Center—the only service center processing T visa applications—approximately four months to render decisions on T visa applications.<sup>214</sup>

A victim of human trafficking may also be granted an alternative form of temporary immigration status called “continued presence.”<sup>215</sup> To receive continued presence, a law enforcement official must submit an application to the Secretary of Homeland Security certifying that a person “is a victim of a severe form of trafficking and may be a potential witness to such trafficking,” which would require that the person remain in the United States for one year, subject to renewal, to assist in investigations and prosecutions.<sup>216</sup> Only a law enforcement official can request this status,<sup>217</sup> and sometimes law enforcement officials do not cooperate in requesting such status.<sup>218</sup> Upon a successful grant of continued presence, the person will be able to obtain state and federal benefits as well as work authorization.<sup>219</sup> A decision on employment authorization usually takes three months from the date of application for authorization.<sup>220</sup> Employment authorization is automatic, and children can receive a work authorization card as a means of identification when continued presence is granted.<sup>221</sup>

The Citizenship and Immigration Services Ombudsman noted that this process often leaves victims of trafficking unable to work and vulnerable to “hardship” “for extended periods of time.”<sup>222</sup> As a result, the Ombudsman recommended that USCIS develop

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<sup>212</sup> C.F.R., <http://www.law.cornell.edu/cfr/text/8/214.11> (accessed November 6, 2013), Title 8 Section 214.11(l)(4).

<sup>213</sup> C.F.R., Title 8 Section 214.11(p)(1). The status may be extended if a law enforcement official or other authority certifies that the person’s presence is required to investigation or prosecution of the human trafficking activity. *Ibid.*

<sup>214</sup> USCIS, *USCIS Processing Time Information*, *supra* note 88.

<sup>215</sup> U.S. Department of Homeland Security, *Continued Presence: Temporary Immigration Status for Victims of Human Trafficking*, August 2010, <http://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf>; U.S.C., <http://www.law.cornell.edu/uscode/text/22/7105> (accessed November 6, 2013), Title 22 Section 7105(c)(3).

<sup>216</sup> U.S.C., <http://www.law.cornell.edu/uscode/text/22/7105> (accessed November 6, 2013), Title 22 Section 7105(c)(3)(A)(i).

<sup>217</sup> *Ibid.*

<sup>218</sup> Office of Citizenship and Immigration Services Ombudsman, *supra* note 202 at 12–13.

<sup>219</sup> U.S. Department of Homeland Security, *Continued Presence*, *supra* note 214; U.S.C. Title 22 Section 7105; C.F.R., <http://www.law.cornell.edu/cfr/text/28/1100.35> (accessed November 6, 2013), Title 28 Section 1100.35

<sup>220</sup> USCIS, *USCIS Processing Time Information*, *supra* note 88.

<sup>221</sup> U.S. Department of Homeland Security, *Continued Presence*, *supra* note 215.

<sup>222</sup> Office of Citizenship and Immigration Services Ombudsman, *supra* note 202, p. 9, 13.

regulations that would enable T visa applicants to apply for, and receive, work authorization while they wait for a decision on their application.<sup>223</sup> The Ombudsman suggested that USICS consider a process similar to that afforded to U visa applicants under the interim regulations.<sup>224</sup> This would enable T visa applicants to apply for and receive work authorization—without the help of law enforcement officials—while their applications are pending.<sup>225</sup> Although the Ombudsman recognized that making such a prima facie determination may present some operational challenges, the Ombudsman nevertheless recognized that “the ability to work legally in the United States is a strong incentive for victims to gain independence and become less reliant on public assistance.”<sup>226</sup>

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<sup>223</sup> *Ibid.*, p. 13.

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

## US Treatment of Asylum Seekers Compared to Other Developed Countries

The United States, one of the 44 developed countries with individualized asylum procedures,<sup>227</sup> lags behind other developed countries with regard to allowing asylum seekers to work or alternatively providing social and economic support while their asylum claims are pending. Some developed countries, such as Australia, New Zealand, Canada, and South Africa, may give asylum seekers who lawfully entered the country work authorization contingent on some identification and/or an evidentiary showing of a need to work. Many countries also give some access to basic social benefits. Even in the European Union, where wait times for work authorization can take up to nine months, member states provide social benefits to asylum seekers that are not available in the United States.

This is in line with the rationale and purpose behind much of the governing international law: all people, including asylum seekers, have the right to life and livelihood. But the United States is an outlier—in addition to prohibiting asylum seekers from earning a living, it also prevents asylum seekers from receiving federal public assistance. In essence, the United States, unlike other developed nations, assumes that asylum seekers have sufficient wealth to sustain themselves or are able to avail themselves of the private charity of others, or that it is acceptable for asylum seekers to live in a state of destitution while awaiting adjudication of their asylum applications.

### Canada

Canada may grant asylum seekers the right to work after they have passed through an initial screening to determine if the asylum claim is eligible for review by the Immigration and Refugee Board.<sup>228</sup> Although most claims are deemed eligible for review, many are subsequently denied after a full review.<sup>229</sup> However, while an asylum claim is being

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<sup>227</sup> United Nations High Commissioner for Refugees, “Asylum claims in industrialized countries up sharply in 2011,” March 27, 2012, <http://www.unhcr.org/4f7063116.html> (accessed November 6, 2013).

<sup>228</sup> AsylumLaw.org, “Canada: Step-by-Step Through the Process,” [http://www.asylumlaw.org/legal\\_tools/index.cfm?category=59&countryID=35](http://www.asylumlaw.org/legal_tools/index.cfm?category=59&countryID=35) (accessed Oct. 24, 2012).

<sup>229</sup> *Ibid.*

processed before the Board, asylum seekers are provided with social security, healthcare, and legal representation.<sup>230</sup> Asylum seekers in Canada must apply for work authorization with a Personal Identification Form and medical exam, and authorization is generally only granted to those who cannot subsist on public benefits alone.<sup>231</sup> Canada has recently passed the Balanced Refugee Reform Act which has been described as toughening the asylum process but has not affected the right to work for asylum seekers.<sup>232</sup>

## Australia

Australia divides its asylum seekers into those who enter the country by plane and those who enter the country by boat. Those who arrive by plane may apply for a Protection Visa (an applicant for a Protection Visa is considered an asylum seeker).<sup>233</sup> If they arrived without a valid visa, they are put into mandatory detention while their applications are processed.<sup>234</sup> Applicants awaiting a determination on the Protection Visa, whether in detention or not, may also apply for a bridging visa that will allow them to work.<sup>235</sup> A bridging visa is an interim visa that makes a stay lawful while the person is awaiting more permanent immigration relief.<sup>236</sup> There are different types of bridging visas depending on whether the applicant has a current substantive visa that has not yet expired, a substantive visa that has expired, or no substantive visa.<sup>237</sup> Not all bridging visas automatically allow the holder to work; in order to be granted the ability to work, the applicant must usually demonstrate a “compelling need,” such as a financial hardship,

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<sup>230</sup> Helen Yu, *Overview of the Canada's Asylum System*, Uniya: Jesuit Social Justice Center, [http://www.uniya.org/research/asylum\\_canada.pdf](http://www.uniya.org/research/asylum_canada.pdf)[http://www.uniya.org/research/asylum\\_canada.pdf](http://www.uniya.org/research/asylum_canada.pdf) (accessed November 6, 2013), p. 9.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

<sup>233</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/visas/humanitarian/onshore/> (accessed Aug. 7, 2013); Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, [http://www.immi.gov.au/media/fact-sheets/62assistance.htm#g\\_](http://www.immi.gov.au/media/fact-sheets/62assistance.htm#g_) (accessed Aug. 7, 2013).

<sup>234</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/allforms/bridging.htm> (accessed August 7, 2013).

<sup>235</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/visas/humanitarian/onshore/866/after-you-lodge.htm#e> (accessed August 7, 2013).

<sup>236</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/visas/bridging> (accessed August 7, 2013).

<sup>237</sup> *Ibid.*

meaning that “the cost of reasonable living expenses exceeds [the applicant’s] ability to pay for them,” sponsorship by an employer, or other specialized skills.<sup>238</sup>

For those migrants and asylum seekers who arrive in Australia by boat and without a visa, Australia has implemented a new policy.<sup>239</sup> Those who come to Australia in this manner will no longer be settled in Australia but instead will be transferred to Papua New Guinea (and other regional states with whom Australia concludes an agreement) after a “short health, security and identity check in Australia.”<sup>240</sup> Once in Papua New Guinea, a person’s refugee status will be determined based on Papua New Guinea’s laws, including their provisions for work authorization.<sup>241</sup> If granted refugee status, that person will be resettled in Papua New Guinea or another state.<sup>242</sup>

The Australian government, in partnership with the Red Cross, has created a variety of programs that provide access to medical care, immigration advice, and financial assistance for those asylum seekers who are in Australia and meet the eligibility requirements.”<sup>243</sup>

## New Zealand

Asylum seekers who enter New Zealand legally—in other words, those who are not detained—and file an asylum claim may be granted work permits.<sup>244</sup> While such grants are given on an ad hoc, discretionary basis,<sup>245</sup> most asylum seekers who entered legally will be

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<sup>238</sup> See, e.g., Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/visas/bridging/010/holders.htm> (accessed August 7, 2013); Australian Government Department of Immigration & Citizenship, Form 1024I: Bridging Visas, <http://www.immi.gov.au/allforms/pdf/1024i.pdf> (accessed August 7, 2013).

<sup>239</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/visas/humanitarian/novisa/> (accessed August 7, 2013).

<sup>240</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/visas/humanitarian/novisa/regional-arrangements.pdf> (accessed August 7, 2013).

<sup>241</sup> Asylum Seekers and Refugees, Australian Human Rights Commission, [http://www.hreoc.gov.au/human\\_rights/immigration/asylum\\_seekers.html](http://www.hreoc.gov.au/human_rights/immigration/asylum_seekers.html) (accessed August 7, 2013).

<sup>242</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/visas/humanitarian/novisa/regional-arrangements.pdf> (accessed August 7, 2013).

<sup>243</sup> Visas, Immigration and Refugees, Australian Government Department of Immigration & Citizenship, <http://www.immi.gov.au/media/fact-sheets/62assistance.htm#g> (accessed Oct. 10, 2012).

<sup>244</sup> New Zealand Immigration Service, *Work Visas and Permits Research*, Immigration Research Programme, August 2001, <http://www.dol.govt.nz/PDFs/Work%20Visas%20and%20Permits%20Research.pdf>, p. 5; New Zealand Red Cross Refugee Services, “FAQs,” 2009, [http://www.refugeeservices.org.nz/faqs#Refugees in New Zealand](http://www.refugeeservices.org.nz/faqs#Refugees%20in%20New%20Zealand) (accessed Oct. 28, 2012).

<sup>245</sup> New Zealand Red Cross, Frequently Asked Questions, <http://www.refugeeservices.org.nz/>, (accessed November 6, 2013).

granted work permits.<sup>246</sup> The need to provide for a family seems to make the granting of a work permit more likely.<sup>247</sup> Asylum seekers on conditional release from detention are not eligible for work permits, only qualify for limited social services, and cannot get work authorization.<sup>248</sup>

Non-detained asylum applicants are eligible for the same social benefits as permanent residents, including “education, health, employment and social welfare.”<sup>249</sup>

## South Africa

South Africa receives a large number of asylum applications, and it is estimated that some asylum seekers wait up to four to five years for a decision on their status.<sup>250</sup> South Africa’s 1998 Refugees Act is silent on whether asylum seekers may work while awaiting a decision on their refugee status.<sup>251</sup> However, under a decision by the South Africa Court of Appeal, asylum seekers have been given the right to work and study effective upon the filing of their applications.<sup>252</sup>

The South Africa Supreme Court of Appeal held that working was inherent to human dignity, especially when work is essential to provide for one’s basic necessities.<sup>253</sup>

Recently, however, the Cabinet stated on November 11, 2011 that it would review the minimum rights of immigrants, including the right to work and study<sup>254</sup> to address concerns

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<sup>246</sup> Ibid.

<sup>247</sup> New Zealand Ministry of Business, Innovation, and Employment, “Flows of Refugees and Asylum Seekers,” *International Migration Outlook 2009/10*, <http://www.dol.govt.nz/publications/research/sopemi/2009-2010/03.asp> (accessed August 7, 2013).

<sup>248</sup> Ibid.

<sup>249</sup> New Zealand Red Cross. *Supra* note 245.

<sup>250</sup> “South Africa: New Laws Mean New Hurdles for Asylum Seekers,” *Irinnews.com*, Mar. 25, 2011, <http://www.irinnews.org/report/92286/south-africa-new-laws-mean-new-hurdles-for-asylum-seekers> (accessed July 25, 2013); Julien Blanc, “Threats concerning the right to work of asylum seekers in South Africa,” *Right to work for asylum seekers and refugees*, January 8, 2012, <http://asylumwork.blogspot.com/2012/01/threats-concerning-right-to-work-of.html> (accessed July 25, 2013).

<sup>251</sup> “South Africa: “Harsher regime” for asylum seekers,” *Irinnews.com*, November 29, 2011, <http://www.irinnews.org/report/94337/south-africa-harsher-regime-for-asylum-seekers> (accessed July 25, 2013).

<sup>252</sup> South Africa Supreme Court of Appeal, *Minister of Home Affairs and Others v. Watchenuka and Another*, Judgment of November 28, 2003, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&type=CASELAW&publisher=&coi=ZAF&docid=47fdffb093a7&skip=0>, paras. 25– 27, 31-3, and 36.

<sup>253</sup> Ibid., paras. 25-7 and 32.

<sup>254</sup> Ibid.

that the current asylum system is subject to abuse by economic migrants.<sup>255</sup> Local human rights organizations have expressed their concerns with the Cabinet's decision to potentially withdraw the rights, stating that "[t]he current asylum application system in South Africa is overwhelmed, characterised by inordinate delays and occasioned by inaccuracies ..." and removing the right to work would only leave this already vulnerable population in "limbo."<sup>256</sup>

## The European Union

The European Union operates under a common asylum system whereby member states are required to operate according to a Reception Directive, which outlines the minimum standards and rights they must adopt for asylum seekers with cases pending.<sup>257</sup> In June 2013, the European Parliament and Council recast the Reception Directive to change the maximum time period member states can delay the grant of work authorization to asylum seekers from one year to nine months after their applications are filed, so long as delays in the claim are not attributable to the applicants themselves.<sup>258</sup> Member states are free, however, to provide more favorable conditions to asylum seekers within their own countries.<sup>259</sup> Member states may also set conditions on granting work authorization, but must ensure that asylum seekers can still effectively access the workforce.<sup>260</sup>

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<sup>255</sup> Ibid.

<sup>256</sup> Zimbabwe Exiles Forum, Solidarity Peace Trust, PASSOP, and Southern African Litigation Center, "Statement on cabinet's decision to review asylum seekers' right to work and study," Kubatana.net, Nov. 25, 2011, <http://www.kubatana.net/html/archive/cact/111125passop.asp?sector=CACT> (accessed July 25, 2013).

<sup>257</sup> Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for asylum seekers*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>, article 1, updated June 26, 2013 by European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF> (accessed August 7, 2013).

<sup>258</sup> United Nations Human Rights Commission (UNHCR), *Moving Further Toward A Common European Asylum System*, June 2013, <http://www.unhcr.org/51b7348c9.html> (accessed August 13, 2013); European Parliament and Council, Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>, art. 15(1).

<sup>259</sup> European Parliament and Council, Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF> (accessed November 6, 2013) art. 4; European Parliament and Council, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF> (accessed November 6, 2013).

<sup>260</sup> European Parliament and Council, Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF> (accessed November 6, 2013) art. 15(2).

France previously had a one-year wait time for work authorization<sup>261</sup> but began the process of reforming its asylum procedures in July 2013.<sup>262</sup> Germany also had a one-year wait time<sup>263</sup> but has since reduced the wait for work authorization to nine months.<sup>264</sup> The Netherlands has a six-month waiting period before granting work authorization<sup>265</sup> and provides only seasonal work permits with a cap on the number of days of work allowed.<sup>266</sup> Some countries, such as Cyprus, Spain, and Belgium, offer work authorization after six months.<sup>267</sup> Austria affords asylum seekers the right to work after only three months.<sup>268</sup> Other countries, like Greece, Portugal, Hungary, and Sweden, may give work authorization to asylum seekers upon meeting some threshold admissibility determination.<sup>269</sup> Ireland, Denmark, and the United Kingdom opted out of the Directive and are not bound to provide the right to work to asylum seekers,<sup>270</sup> and Lithuania is not in compliance with the Directive as it does not provide access to the labor market.<sup>271</sup>

Although the EU Receptions Directive currently places a restriction on when an asylum seeker can apply for work authorization, the Directive also mandates that EU states provide asylum seekers with a standard of living adequate for mental and physical health and subsistence.<sup>272</sup> Asylum seekers are to be provided with housing assistance<sup>273</sup> and

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<sup>261</sup> European Council on Refugees and Exiles, ECRE/ELENA Survey on Legal Aid for Asylum Seekers in Europe, October 2010, <http://www.unhcr.org/refworld/docid/4d243cb42.html> (accessed June 14, 2012).

<sup>262</sup> “Consultations on forthcoming reform of the French asylum law,” AIDA Asylum Information Database, July 23, 2013, <http://www.asylumineurope.org/news/23-07-2013/consultations-forthcoming-reform-french-asylum-law> (accessed Aug. 26, 2013) *citing* “Manuel VALLS lance la concertation nationale sur la réforme de l’asile,” Ministère de l’Intérieur, July 16, 2013, <http://www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Reforme-de-l-asile> (accessed Aug. 26, 2013).

<sup>263</sup> European Council on Refugees and Exiles, ECRE/ELENA Survey on Legal Aid for Asylum Seekers in Europe, October 2010, <http://www.unhcr.org/refworld/docid/4d243cb42.html> (accessed June 14, 2012).

<sup>264</sup> Greta Harmann and Carl Holm, “Refugees as luggage porters – politics gone wrong” Deutsche Welle, July 28, 2013, <http://www.dw.de/refugees-as-luggage-porters-politics-gone-wrong/a-16980132> (accessed Aug. 26, 2013).

<sup>265</sup> “Asylum,” Immigration and Naturalisation Service of the Netherlands, <http://www.ind.nl/en/Residence-Wizard/asylum/Pages/default.aspx#paragraph7>, (accessed Aug. 26, 2013).

<sup>266</sup> *Ibid.*

<sup>267</sup> Penelope Mathew, *Reworking the Relationship between Asylum and Employment*, New York, NY: Routledge, 2012, pp. 31–32.

<sup>268</sup> *Ibid.*, p. 31.

<sup>269</sup> *Ibid.*, p. 31–32.

<sup>270</sup> Bernd Riegert and Sarah Steffen, “EU speeds up asylum procedures,” Deutsche Welle, June 11, 2013, <http://www.dw.de/eu-speeds-up-asylum-procedures/a-16874828> (accessed Aug. 26, 2013).

<sup>271</sup> Mathew, p. 31–32.

<sup>272</sup> European Parliament and Council, Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF> (accessed November 6, 2013) art. 17(2).

<sup>273</sup> *Ibid.*, art. 18.

basic medical care,<sup>274</sup> and further benefits must be provided for persons with special needs.<sup>275</sup>

In Germany, litigation before the Federal Constitutional Court in 2012 brought attention to the disparity between benefits provided to asylum seekers and benefits allotted to citizens. The German Court held that cash benefits to asylum seekers, sometimes as low as 225 Euros a month, were unconstitutional because they were "insufficient to guarantee a dignified human existence."<sup>276</sup> In its decision, the Court looked to the International Covenant on Economic, Social and Cultural Rights and noted that "[h]uman dignity may not be relativized by migration-policy considerations."<sup>277</sup> The Federal Constitutional Court ordered the German government to increase the rate of benefits to asylum seekers<sup>278</sup>

The Reception Directive also requires that EU member states provide asylum seekers with the opportunity to contact legal organizations for representation from the beginning of their application process<sup>279</sup> and to provide them with free legal aid on appeal, subject to means and merits testing.<sup>280</sup> In fact, most states offer at least minimal access to benefits and legal aid, though it is heavily conditioned on need.<sup>281</sup>

## The United Kingdom

The issue of the right to work for asylum seekers in the United Kingdom, which has opted out of the common European asylum system, has recently gained attention. Asylum

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<sup>274</sup> *Ibid.*, art. 19(1).

<sup>275</sup> *Ibid.*, art. 19(2).

<sup>276</sup> ESCR-Net, *Judgment of the Federal Constitutional Court in the proceeding 1 BvL 10/10*, July 18, 2012, <http://www.escr-net.org/node/364979> (accessed November 23, 2012).

<sup>277</sup> *Ibid.*

<sup>278</sup> "One Euro Job: German Rail Scraps Refugee Work Project," *Der Spiegel*, July 25, 2013, <http://www.spiegel.de/international/germany/refugee-project-deutsche-bahn-cancels-asylum-seeker-1-euro-job-a-913054.html> (accessed Aug. 26, 2013).

<sup>279</sup> European Parliament and Council, Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>, para. (21), art. 5(1).

<sup>280</sup> European Parliament and Council, Directive 2013/33/EU of 26 June 2013 laying down standards of reception of applicants for international protection (recast), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0096:0116:EN:PDF>, art. 26(2).

<sup>281</sup> Mathew, *supra* note 267, pp. 30–32. States that provide some benefits to asylum seekers include Germany, Cyprus, Slovenia, Greece, Spain, Portugal, Austria, Belgium, and Sweden.

seekers can apply for permission to work if they have waited one year for an initial decision on their asylum claim and are not considered responsible for delays in the determination.<sup>282</sup> Normally, asylum applications are adjudicated within six months of receipt of application.<sup>283</sup>

An applicant who has been denied his or her asylum claim may nevertheless apply for work authorization while an appeal is pending after one year elapses from the initial filing of the claim.<sup>284</sup> Work authorization is typically granted within 30 days of lodging the application, however, asylum seekers are only permitted to work in certain occupations.<sup>285</sup>

Although UK asylum law prohibits asylum seekers from working until one year after their claim is filed, it does permit asylum seekers to obtain other benefits upon assessment that the asylum seeker meets the requirements for support. For example, asylum seekers in the United Kingdom are entitled to free healthcare and may be given accommodation and free legal representation, if they qualify.<sup>286</sup>

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<sup>282</sup> Melanie Gower, "Asylum seekers and the right to work," House of Commons Library, November 7, 2011, <http://www.parliament.uk/briefing-papers/SNo1908>.

<sup>283</sup> U.K. Border Agency, "The asylum process," Home Office, <http://www.ukba.homeoffice.gov.uk/asylum/process/> (accessed Nov. 4, 2012).

<sup>284</sup> U.K. Border Agency, "Employment," Home Office, <http://www.ukba.homeoffice.gov.uk/asylum/support/employment/> (accessed Nov. 4, 2012); *R (on the application of ZO (Somalia) and others) (Respondents) v. Secretary of State for the Home Department (Appellant)*, United Kingdom Supreme Court, "Judgment," July 28, 2010, <http://www.unhcr.org/refworld/docid/4c5a7a652.html> (accessed June 14, 2012).

<sup>285</sup> U.K. Border Agency, "Employment," *supra* note 284.; Gower, *supra* note 282.

<sup>286</sup> U.K. Border Agency, "Rights and responsibilities," Home Office, <http://www.ukba.homeoffice.gov.uk/asylum/rights/> (accessed Nov. 4, 2012).

## Conclusion

When asked how he was supporting himself, Demeke Y., an asylum seeker from Ethiopia, said that was not the question that should be asked. He suggested that the question should really be, “Are you begging or not? ‘Support yourself’ does not describe my life, I am begging. I cannot say I am supporting myself.” When asked what he thought about the government providing benefits to asylum seekers, he said he also thought this was basically begging, saying, “It is better to work for yourself than to beg.”

It is unreasonable to expect asylum seekers to manage a complicated process of clock-stopping rules, given the reality that they are not entitled to court-appointed counsel in the United States, and many must handle their claims *pro se* or with overburdened, low-cost or volunteer lawyers. Yet even if the rules were simple and clear and applied fairly and uniformly, requiring this particularly vulnerable group to wait for work authorization places an unfair burden on them, their families, and their broader community.

Asylum seekers do not ask for welfare or handouts. They want to contribute to and be productive members of society. If the US government is averse to providing asylum seekers with public benefits, it could fulfill its international human rights obligations by letting asylum seekers provide for themselves.

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## Appendix:

### Human Rights Watch/Seton Hall Law School Center for Social Justice Proposed Legislative Modifications to INA § 208

The current provision of the Immigration and Nationality Act that bars work authorization for 180 days after filing an asylum application, INA 208 (d)(2), reads as follows:

(d) Asylum Procedure. -

(2) Employment. - An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

We propose striking the current language of INA 208 (d)(2) and replacing it with:

(d)(2)(I) An applicant for asylum may file an application for employment authorization simultaneously with an application for asylum.

(II) The Secretary of Homeland Security shall authorize employment to applicants for asylum within 30 days unless the Secretary or the Attorney General determines that the application for asylum is frivolous.

(III) Employment authorization for applicants for asylum shall be for a period of one year, renewable, for the continuous period of time necessary to adjudicate the asylum claim, including administrative or judicial review.

We note that the US Senate on July 27, 2013 passed The Border Security, Economic Opportunity, and Immigration Modernization Act (bill S.744) by a vote of 68 to 32, which amended INA 208 (d)(2) to say:

An applicant for asylum shall be provided employment authorization 180 days after the date of filing of the application for asylum.

While the Senate bill improves current law by eliminating the asylum clock, it would retain the 180-day bar on work authorization from the time an asylum application is filed. In contrast, the Human Rights Watch/Seton Hall Law School Center for Social Justice proposal would allow asylum seekers to file their applications for work authorization simultaneously with their asylum applications unless their asylum claims are found to be frivolous.

# “At Least Let Them Work”

## The Denial of Work Authorization and Assistance for Asylum Seekers in the United States

People seeking asylum in the United States often wait for months or years without any means of support while their asylum claims are pending. The US government prohibits asylum seekers from working for the first six months after filing their asylum applications unless their cases are granted, and often “stops the clock,” resulting in delays in some cases far beyond that period. Asylum seekers in the United States are also ineligible to receive nearly any type of government benefit while awaiting a decision on their cases. This report documents the hardships asylum seekers face as a consequence of being denied work authorization, including lacking money to hire legal counsel to pursue their claims for asylum and work authorization. In light of the vulnerability and needs of asylum seekers, the report proposes amending the Immigration and Nationality Act (INA) to remove the bar to employment for asylum seekers unless their claims are found to be frivolous.



*A man seeking asylum in the U.S. holds his work authorization card.*

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