Statement of

IGOR V. TIMOFEYEV

Before the Subcommittee on Immigration and the National Interest of the Committee on the Judiciary United States Senate

Hearing on

Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program

Thursday, April 23, 2015
Dirksen Senate Office Building, Room 226
Washington, D.C.

Chairman Sessions, Senator Schumer, Members of the Committee:

Thank you for the opportunity to appear before you today as you examine the Central American Minors Refugee/Parole Program ("CAM Program"), instituted by the Departments of State and Homeland Security as part of the U.S. refugee program. The United States, a nation founded by immigrants, has a proud history of welcoming individuals fleeing persecution in their own countries, and offering them an opportunity to live their lives with dignity and respect. Our Nation's enduring commitment to serving as a safe haven for refugees spans political and ideological divides, and I commend this Committee's determination to ensure that the refugee program continues to enjoy public trust and support.

I am proud that my own family is a part of this heritage. My great-grandfather and his family arrived in the United States around the turn of the twentieth century as Jewish immigrants from Russia, fleeing then-rampant anti-Semitism. My immediate family and I made a similar journey about a century later, leaving the then-Soviet Union to make the United States our new home.

From 2006 to 2008, I was privileged to serve as the Special Advisor for Refugee and Asylum Affairs at the Department of Homeland Security ("DHS"). I was the first holder of that position after its establishment as part of the reforms recommended by the United States Commission on International Religious Freedom. For most of that time, I served concurrently as a Director of Immigration Policy at DHS.

Prior to my work at DHS, I served as an associate legal officer to the President of the United Nations International Criminal Tribunal for the Former Yugoslavia. While there, I advised the president and judges of the Tribunal on appeals involving issues of international humanitarian and criminal law. I am currently an attorney in private practice, specializing in

appellate and international litigation. I wish to add that I am appearing before the Committee in my personal capacity, and that my testimony should not be attributed to my law firm.

As the Committee is aware, beginning in October 2011, the United States recorded a dramatic rise in the number of unaccompanied children attempting to enter the United States from three Central American countries — El Salvador, Guatemala, and Honduras. The number of such children more than doubled from Fiscal Year 2011 to Fiscal Year 2012, and then doubled again in Fiscal Year 2013. As the Administration announced when it inaugurated the CAM Program, it envisions this program as providing "a safe, legal, and orderly alternative to the dangerous journey that [these] children are currently undertaking to the United States."[1] The Administration's desire to reduce the migration of Central American children into the United States — migration that poses great risks to the children themselves — is commendable. I also wish to be clear that children who seek to escape persecution and who meet the refugee definition under U.S. law deserve the protection that our Nation has historically extended to refugees.

At the same time, there is a question as to whether the children for whom the CAM Program is designed would qualify as refugees under the definition of the Refugee Act of 1980 ("the Refugee Act"), which is the cornerstone of the U.S. refugee and asylum system. The law defines a refugee as one who "is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[2] Given the prevailing case-law, there is considerable uncertainty whether the Central American children selected for access to the CAM Program would satisfy this requirement. This Committee is acting appropriately in seeking to ensure that the CAM Program is consistent with the requirements of the U.S. immigration law. Indeed, we owe it to the children who may be seeking access to the CAM Program, and to the parents applying on their children's behalf, to make sure that the prospect of obtaining refuge in the Unites States offered by this program does not prove illusory.

The CAM Program also has as one of its objectives reuniting Central American children with their parents who are residing in the United States. The laudable goal of reuniting families is one of the fundamental tenets of the U.S. immigration law, and the U.S. refugee program already seeks to ensure that individuals admitted into the United States as refugees are able to bring their immediate family members into the country. The CAM Program, however, permits the anchor relatives authorized to be in the United States only on a temporary basis to seek admission of their minor children. Again, it is proper for the Committee to examine whether this feature of the CAM Program is consonant with the intent of the Refugee Act.

[1] U.S. Dep't of State, *Launch of In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras With Parents Lawfully Present in the United States* (Nov. 14, 2014), http://www.state.gov/r/pa/prs/ps/2014/12/234655.htm.

[2] 8 U.S.C. § 1101(a)(42)(B).

Conformity with the "Refugee" Definition Under the Refugee Act

The modern U.S. refugee regime dates back to the post-World War II era. In 1948, Congress enacted the first refugee legislation — the Displaced Persons Act of 1948.[3] This law included provisions for admission of certain refugees who qualified under the United Nations refugee standards, particularly those who had fled Nazi or Fascist persecution or were fleeing Soviet persecution. A few years later, Congress followed suit with the Refugee Relief Act of 1953, providing for admission of refugees from Communist-dominated parts of Europe and the Middle East.[4] Congress extended the Refugee Relief Act in 1957, providing for admission of refugees defined as victims of racial, religious, or political persecution from Communist or Communist-dominated countries, or from countries in the Middle East.[5]

In 1965, Congress provided the first permanent statutory basis for the admission of refugees, defined as persons fleeing communist or communist-dominated nations or the Middle East where such flight was caused by persecution or fear of persecution on account of race, religion, or political opinion.[6] Under this provision, the United States later admitted several thousand Czechoslovakian refugees after the Soviet Union and its allies crushed the Prague Spring in 1968, as well as thousands of Soviet Jews.

In 1980, Congress enacted the Refugee Act, which continues to form the basis for the current refugee regime.[7] The Refugee Act defines a "refugee" as "any person" who "is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[8] In adopting this definition, Congress sought to implement the essential requirements of the international treaties on refugee protection, namely the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees.[9] Under this definition, to qualify as a refugee, an individual must demonstrate that the persecution was on account of one of the protected grounds — race, religion, nationality, political, opinion, or membership in a particular social group.

This last statutory ground — "membership in a particular social group" — is the one most often invoked in cases of unaccompanied children seeking protection in the United States from gang-related violence.[10] This phrase is not defined in the Refugee Act, and no

[3] Pub L. No. 80-774, 62 Stat. 1009 (1948).

[4] Pub. L. No. 203, 67 Stat. 400 (1953).

[5] Pub. L. No. 85-316, 71 Stat. 639 (1957).

[6] Pub. L. No. 89-239, 79 Stat. 911 (1965).

[7] Pub. L. No. 96-212, 94 Stat. 102 (1980).

[8] 8 U.S.C. § 1101(a)(42)(B); *see also id.* § 1101(a)(42)(A) (same).

[9] *See* 19 U.S.T. 6259; 19 U.S.T. 6224.

[10] *See* Kate M. Manuel & Michael John Garcia, Cong. Research Serv., *Unaccompanied Alien Children — Legal Issues: Answers to Frequently Asked Questions* at 16 (July 18, 2014); Center for Gender & Refugee

contemporary legislative materials shed light upon its meaning. While the refugee definition derives from the 1951 UN Refugee Convention, by way of the 1967 UN Refugee Protocol, the term "particular social group" was added to the Convention at the last minute and, again, without any informative discussion. What is clear, however, is that the term was not meant to be a "catch-all" applicable to all persons fearing persecution.

The meaning of the phrase "particular social group" has been interpreted by the Board of Immigration Appeals ("the BIA") — the U.S. agency with jurisdiction over asylum claims, which have the same statutory requirement of demonstrating persecution on the basis of a protected ground[11] — and by federal courts of appeals. The BIA first defined this term in 1985, in the case known as *Matter of Acosta*.[12] The BIA explained that persecution on account of a particular social group means "persecution that is directed toward an individual who is a member of a group of persons all of whom share *a common, immutable characteristic*," and that this characteristic "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities of consciences."[13]

Over the subsequent years, the BIA has refined the definition of what constitutes membership in a "particular social group" in a variety of cases, seeking — as the U.S. Court of Appeals for the Tenth Circuit observed — "to provide an interpretation that is understandable and workable."[14] In particular, the BIA explained that, to qualify for relief under this criterion, an individual must also demonstrate that the social group can be defined with "particularity" and that the group must be "socially distinct within the society in question."[15] Most of federal courts of appeals that have examined this question follow this definition of the particular social group.[16] Under this definition,

> In order to establish eligibility for asylum based on persecution for membership in a social group, [an refugee applicant] must show that he's part of a group that's well-defined by a characteristic *other* than the fact that its members have been subjected to harm; is recognized within the society as a distinct group; is described with sufficient particularity so that it's possible to determine with reasonable certainty who's included in the group; and whose members are targeted for persecution because of their membership

---

Studies & KIND, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* at 20 (Feb. 2014).

[11] *See* 8 U.S.C. § 1158(b)(1)(B)(i).

[12] 19 I. & N. Dec. 211 (BIA 1985) (emphasis added).

[13] *Id.* at 233.

[14] *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012).

[15] *In re M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014); *see also In re W-G-R-*, 26 I. & N. Dec. 208, 212-18 (BIA 2014).

[16] *See Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1099 (9th Cir. 2013) (Kozinski, C.J., dissenting) (listing cases from the First, Second, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits).

> in the group, not on account of some other, perhaps closely associated, trait.[17]

Although the determination of what constitutes a particular social group is done on a case-by-case basis, it is unclear whether the intended beneficiaries of the CAM Program, viewed from a categorical perspective, would be able to meet this definition. As the Department of State and DHS stated, one of the factors they considered when designating minors in El Salvador, Honduras, and Guatemala for refugee processing under the CAM Program is "whether members of the group will likely be able to qualify for admission as refugees under U.S. law."[18] Yet, neither agency has explained how they expect the Central American minors considered for refugee status under the CAM Program to demonstrate the requisite nexus between the harm they experienced and one of the Refugee Act's statutory grounds. To date, no federal court has approved a social group defined solely by childhood; indeed, at least one court of appeals — the Third Circuit — has rejected such an argument with respect to children from Honduras, one of the countries covered by the CAM Program.[19]

The main reason children from El Salvador, Guatemala, and Honduras seek to escape their countries is because of the violence by organized criminal gangs or drug cartels. As a study by the UN High Commissioner for Refugees found, 48% of the displaced children from the region indicated that organized violence in their community is what caused them to flee.[20] Yet, courts have made clear that generalized violence or lawlessness is not sufficient to demonstrate persecution on account of a statutorily protected ground.[21] And federal courts have rejected social groups defined as comprised of young people resisting gang recruitment as failing the requirements of social distinction or particularity.[22]

I wish to reiterate that efforts to address the humanitarian plight of Central American children who seek to escape pervasive violence in their societies deserve our complete support. The United States should be working proactively with the other governments in the region to

---

[17] *Id.* at 1098.

[18] Dep't of State, Dep't of Homeland Security & Dep't of Health and Human Servs., *Proposed Refugee Admissions for Fiscal Year 2015: Report to Congress* at 8 (2014) (hereinafter, "*Proposed Refugee Admissions for Fiscal Year 2015*").

[19] *Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005).

[20] *See* U.N. High Comm'r for Refugees Regional Office for the U.S. and Canada, *Children on the Run* at 6 (Mar. 2014).

[21] *See, e.g.*, *Jutus v. Holder*, 723 F.3d 105, 111-12 (1st Cir. 2013).

[22] *See, e.g.*, *Rivera-Barrientos*, 666 F.3d at 647-54 (rejecting a social group composed of "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment") (footnotes omitted); *Orellana-Monson v. Holder*, 685 F.3d 511, 521-25 (5th Cir. 2012) (rejecting a social group of "Salvador[an] males between the ages of 8-15 who have been recruited by Mara 18 but refused to join the gang because of their principal opposition to the gang") (internal quotation marks omitted) (alterations in original); *Barrios v Holder*, 581 F.3d 849, 854-56 (9th Cir. 2009) (rejecting a social group of "young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang's criminal activities").

address the underlying causes that lead these children to flee their homes. And I wish to underline that Central American children who do qualify as refugees or asylees under the Refugee Act should be given protection and welcome in the United States. Children who seek to escape persecution are uniquely vulnerable. Our immigration system appropriately recognizes this fact, and our humanitarian (and simply human) instincts command us to do what we can to alleviate the plight of unaccompanied children. But, in creating a dedicated refugee program for these kids, we owe it to them to make sure that we can deliver on our commitment, and that they would, indeed, qualify as refugees.

Family Reunification Provisions

The CAM Program also has a laudable objective of reuniting Central American children with their parents who reside in the United States. Indeed, family reunification is one of the central principles of U.S. immigration law generally and the refugee program specifically. Again, efforts to enable refugee families to rebuild their lives together in a new country deserve our complete support.

To that extent, the U.S. refugee program contains a specific priority category — called "Priority 3 (P-3) — for "members of designated nationalities who have immediate family members in the United States who initially entered as refugees or were granted asylum."[23] Under the P-3 category, the Department of State (in consultation with DHS) establishes a list of eligible nationalities; specific countries are included upon a determination that they are "of special humanitarian concern to the United States for the purpose of family-reunification refugee processing."[24] After the list is designated, individuals from these countries who have been admitted into the United States as refugees or asylees (including individuals who have since become U.S. citizens or legal permanent residents) may file applications for their immediate relatives — spouses, unmarried children under 21, or parents — to join them in the United States.[25]

The CAM Program, however, is different. This program is designated as a "Priority 2 (P-2)" category — a category designed for "specific groups (within certain nationalities, clans or ethnic groups, sometimes in specified locations)" identified "as being in need of resettlement."[26] As such, the CAM Program is not limited to anchor relatives in the United States who are refugees or asylees (or have a permanent legal status). Instead, the CAM Program extends to individuals who are in the United States only temporarily — such as individuals granted temporary protected status, parole, deferred action, deferred enforced departure, or withholding of deportation. These forms of relief are strictly discretionary, and are subject to termination by the Executive at any time. It is appropriate for the Committee to examine whether the CAM

[23] *Proposed Refugee Admissions for Fiscal Year 2015* at 11.

[24] *Id.*

[25] *See id.* at 11-12. In addition, a refugee admitted into the United States may also, within two years of admission, file a so-called "following-to-join" petition requesting that his spouse or unmarried children under 21 be also admitted as refugees. *Id.* at 13-14; 8 C.F.R. § 207.7.

[26] *Proposed Refugee Admissions for Fiscal Year 2015* at 8-10.

Program's extension of the family reunification principle to individuals whose presence in the United States is only temporary is consonant with objectives of the refugee program.

Conclusion

Congress has been instrumental in setting up the current legal regime for admission of refugees into the United States, and in ensuring that refugees from across the globe continue to find safety in our country. This Committee specifically has oversight and consultation responsibilities with respect to the refugee program under the Refugee Act.[27] I therefore welcome the Committee's intention to ensure that the Administration's CAM Program reflects the aims of the Refugee Act and comports with its legal requirements.

[27] *See* 8 U.S.C. § 1157(d)-(e).