Post-*Matter of A–B–* Particular Social Group Asylum Strategies

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INTRODUCTION

The Trump Administration is waging a war on asylum seekers. While in the past protecting this most vulnerable group was generally an area of bipartisan support in immigration law, asylum seekers are now caught in the crosshairs of an administration that has weaponized immigration as a political issue. President Donald Trump has used incendiary language to describe Central Americans seeking asylum in the United States. "People hate the word 'invasion,' but that's what it is."[1] Former Attorney General Jeff Sessions frequently referred to the asylum process as a "loophole" and even called immigration attorneys who explain the credible fear process to clients "dirty immigration lawyers."[2] Sessions seems to have fully taken to heart a law review article written by former Attorney General Alberto Gonzalez, advocating for attorneys general to use the adjudication process to set immigration policy.[3] Whereas during the eight years of the Obama administration attorneys general only referred immigration cases to themselves four times (two of which were to vacate overreaching decisions issued by AGs of the Bush Administration),[4] under the Trump administration attorneys general have referred cases to themselves nine times in 2018 alone. Of the many cases the attorneys general have issued to remake the immigration system, *Matter of A–B–*, 27 I&N Dec. 316 (A.G. 2018) is the most significant. This article will focus on

[1] A. Iftikhar, "Trump Sees Immigrants as Invaders. White-Nationalist Terrorists Do, Too.", WASHINGTON POST, (Mar. 17, 2019), *available at* www.washingtonpost.com/outlook/2019/03/17/trump-sees-immigrants-invaders-white-nationalist-terrorists-do-too/?utm_term=.92b30385870b.

[2] DOJ, "Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review," (Oct. 12, 2017), *available at* www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review

[3] Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016), *available at* https://ilr.law.uiowa.edu/print/volume-101-issue-3/advancing-executive-branch-immigration-policy-through-the-attorney-generals-review-authority/

[4] *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (AG 2009); *Matter of Silva-Trevino*, 26 I&N Dec. 550 (AG 2015).

practical considerations in presenting particular social group (PSG) based asylum applications in the aftermath of *Matter of A–B–*.

Procedural History of Matter of A–B–

On December 1, 2015, Immigration Judge V. Stuart Couch in the Charlotte Immigration Court denied the asylum claim of Ms. A–B–, the victim of domestic violence, in spite of her claim falling squarely within the holding of *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014). Her attorneys appealed that decision and on December 8, 2016, the Board of Immigration Appeals (BIA or Board) reversed every aspect of Judge Couch's decision on appeal. The Board concluded that the respondent had credibly met her burden of proving that she had suffered past persecution on account of her membership in a cognizable PSG—El Salvadoran women who are unable to leave their domestic relationships where they have children in common—and that she was entitled to a presumption of a well-founded fear of persecution on the same ground. The BIA remanded the record back to Couch only for new biometrics.

Although the case was only remanded for biometrics and to grant the case, Judge Couch held the case off-calendar for eight months. When the delayed hearing finally took place, ICE stated that new biometrics were completed. However, Judge Couch did not issue a new decision (as directed by the BIA); instead, he certified the case back to the BIA, a new U.S. Court of Appeals for the Fourth Circuit decision, *Velasquez v. Sessions*, 866 F.3d 188, (4th Cir. 2017) as intervening precedent preventing him from granting the case. The *Velasquez* decision involves an intra-family child custody dispute which bore no relevance to the domestic violence-based PSG proposed by Ms. A–B–.

On August 18, 2017, Judge Couch directly emailed Executive Office for Immigration Review (EOIR) Director James McHenry, circumventing both his Assistant Chief Immigration Judge and the Chief Immigration Judge, to inform him that he had (improperly) certified the case back to the BIA that day. McHenry responded "Thanks. Let me know as soon as you hear from the BIA."[5] Based on EOIR's database, it is not clear that the record of proceedings ever reached the BIA following Judge Couch's irregular action. Somehow, then Attorney General Sessions not only became aware of the case, but invoked his certification authority to intervene in the matter. The Center for Gender and Refugee Studies (CGRS) has filed a lawsuit after the Department of Justice refused to release information pursuant to a Freedom of Information Act request regarding how Sessions came to certify the case to himself.[6]

On certification, Sessions issued an invitation for interested parties to file briefs in response to the question, "Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or

[5] "EOIR Director Condoned Immigration Judge V. Stuart Couch Misconduct Against Victims of Domestic Violence," Amoachi & Johnson, PLLC (Blog) (May 21 2018) https://amjolaw.com/2018/05/21/eoir-director-condoned-immigration-judge-v-stuart-couch-misconduct-against-victims-of-domestic-violence/.

[6] Center for Gender and Refugee Studies, *CGRS Files Suit Seeking Information on Sessions' Intervention in Matter of A–B–*, Mar. 7, 2019, https://cgrs.uchastings.edu/news/cgrs-files-suit-seeking-information-sessions%E2%80%99-intervention-matter-b

withholding of removal."[7] This issue was problematic for a number of reasons, especially because it conflated three distinct elements of asylum analysis—a cognizable protected characteristic, the harm suffered, and whether the government is unable or unwilling to protect the applicant from a private actor persecutor. Even the U.S. Department of Homeland Security (DHS) seemed perplexed by the question presented. Its initial response to the attorney general certification was to file a motion seeking: (1) to have Sessions to wait for the BIA to issue a new decision after Judge Couch's certification to the Board[8]; and (2) clarification of the above question. Sessions refused both DHS requests.[9]

In May 2018, while *Matter of A–B–* was pending before him, Sessions said in an Arizona radio interview: "We've had situations in which a person comes to the United States and says they are victim of domestic violence; therefore they are entitled to enter the United States," he said. "Well that's obviously false, but some judges have gone along with that."[10] Sessions issued his decision in *Matter of A–B–* on June 11, 2018, during the first day of the Immigration Judges Legal Training Conference.[11]

One month after the Attorney General's decision, United States Citizenship and Immigration Services (USCIS) released a policy memorandum, (hereinafter USCIS *A–B–* Policy Memo) directing asylum officers on how to implement *Matter of A–B–* in affirmative asylum interviews, credible fear interviews, and reasonable fear interviews.[12] As discussed below, the broad language of this Policy Memo problematically incorporates much of *A–B–*'s dicta into the guidance as though it were binding precedent.

POST *A–B–* LITIGATION

Currently, *Matter of A–B–* is pending before the BIA, so there are other cases addressing domestic violence based claims that are likely to serve as vehicles for direct appeal of *Matter of A–B–* before Ms. A–B–'s case itself makes it to the circuit court. When the attorney general (AG) overturned the grant of Ms. A–B–'s case, he remanded it to the BIA which remanded it again to Judge Couch. Without even giving her a new hearing, Judge Couch again denied Ms. A–B–'s case, which is

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[7] *Matter of A–B–*, 27 I&N Dec. 227 (AG 2018).

[8] While the attorney general has broad discretion to certify cases to himself, he must follow the regulatory framework in doing so. The regulations state that the "Board shall refer to the Attorney General for review of its decision all cases that (i) The Attorney General directs the Board to refer to him." 8 CFR §1003.1(h). There is no mechanism for the attorney general to refer the decision of an immigration judge to himself.

[9] *Matter of A–B–*, 27 I&N Dec. 247 (AG 2018).

[10] "Jeff Sessions Wants to Close 'Blatant Loopholes' in Immigration Law," KTAR.COM, (May 7, 2018), http://ktar.com/story/2054280/ag-jeff-sessions-says-closing-loopholes-can-fight-illegal-immigration/.

[11] *Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program*, June 11, 2018, *available at* www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal. During his speech to the immigration judges, he reiterated their need to complete 700 cases a year, clearly linking the *A–B–* decision to the goal of speedy case adjudication "This decision will provide more clarity for you. It will help you to rule consistently and fairly. The fact is we have a backlog of about 700,000 immigration cases, and it's still growing."

[12] USCIS Memorandum, "Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A–B–*" (July 11, 2018), *available at* www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf.

therefore, again, pending before the BIA. The BIA has not yet issued a briefing schedule and has indicated to Ms. A–B–'s counsel that it cannot give a timeline on the case.

As this article goes to press, petitions for review are pending in the U.S. Courts of Appeals for the First Circuit (in which CGRS is serving as counsel), and the Fourth Circuit (in which the CAIR Coalition is representing the petitioner), which directly challenge *Matter of A–B–*. Practitioners are advised to check the CGRS website and/or subscribe to their newsletter to keep up with developments on these cases and others which may arise.

Several other federal cases have mentioned *Matter of A–B–* without directly addressing its issues; none have discussed *Matter of A–B–* at length.[13]

There has been a successful federal challenge to portions of the USCIS *A–B–* Policy Memo, however. CGRS and the American Civil Liberties Union (ACLU) brought a challenge, *Grace v. Whitaker*, to USCIS's implementation of the USCIS memo in the credible fear context.[14] The judge in *Grace* issued an injunction preventing USCIS from implementing numerous provisions of the USCIS memo in the credible fear interview (CFI) context. While the court's jurisdiction was limited to the issue of CFIs, the *Grace* decision may be useful to practitioners in asylum merits cases as well. First, *Grace* includes sweeping language about the infirmities of *Matter of A–B–*:

> Not only does *Matter of A–B–* create a general rule against such claims at the credible fear stage, but the general rule is also not a permissible interpretation of the statute. First, the general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims. Second, such a general rule runs contrary to the individualized analysis required by the INA. Under the current immigration laws, the credible fear interviewer must prepare a case-specific factually intensive analysis for each alien. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 126 (D.D.C. 2018)

While the judge's ruling only applies to CFI interviews, practitioners can argue that the same reasoning against a general prohibition on categories of asylum cases applies in the asylum merits context, an issue which was not before the *Grace* court. Furthermore, it would defy logic, if under *Grace*, asylum officers are no longer permitted to apply a blanket rule against finding a "significant possibility" of winning asylum in domestic violence and gang-based claims at the CFI stage but they could then apply such a blanket rule at the merits' stage. In any event, all practitioners arguing

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[13] *See*, *Saravia v. Attorney Gen. United States*, 905 F.3d 729, 739 (3d Cir. 2018)(declining to consider *Matter of A–B–* as intervening precedent and remanding the case for improper analysis of lack of corroboration issue); *Martinez-Perez v. Sessions*, 897 F.3d 33 (1st Cir. 2018) (citing *Matter of A–B–* in a footnote); *Rosales Justo v. Sessions*, 895 F.3d 154 (1st Cir. 2018) (citing *Matter of A–B–* in context of government unwillingness to protect, but ultimately remanding case on issue of Mexican government's inability to protect); *S.E.R.L. v. Attorney Gen. United States of Am.*, 894 F.3d 535, 550 (3d Cir. 2018)(mentioning *Matter of A–B–*, but relying on analysis of *Matter of M-E-V-G-* to determine that the proposed PSG, "immediate family members of Honduran women unable to leave a domestic relationship" did not meet the PSG standard.)

[14] Because the INA imposes jurisdictional limitation on federal court proceedings involving removal proceedings, bringing this case as a change in policy to expedited removal procedures, allowed the plaintiffs' counsel to bring the case quickly under INA §242(a)(3).

against application of *Matter of A–B–*'s seemingly broad mandates against granting asylum should review *Grace* and cite to it in briefing.[15]

OPERATING WITHIN THE *A–B–* FRAMEWORK

Whatever the Attorney General's intent in issuing the decision, *Matter of A–B–* must be interpreted in the same manner as any other precedent decision. Such analysis begins with separating binding legal holdings from dicta.

The primary legal impact of *Matter of A–B–* was to vacate the BIA's decision in *Matter of A-R-C-G-*. This interpretation is held by the Department of Justice itself, which argued in its brief in *Grace v. Whitaker* that no general rule prohibiting domestic violence or gang-related asylum claims exists, and that *Matter of A–B–*'s only change to the law was to overrule *Matter of A-R-C-G-*.[16] Whereas before, cases with fact patterns similar to that in *Matter of A-R-C-G-* could rely on that precedent decision, *A–B–* now requires all arguments as to asylum eligibility to be argued anew in each case. Thus, while the BIA had initially held in *Matter of A–B–* that Ms. A–B– did have a cognizable PSG, since it was almost identical to that of Ms. A-R-C-G-, the attorney general overturned *Matter of A-R-C-G-*. In *Matter of A–B–*, the attorney general found that the proposed particular social group was impermissibly circular, as he found that the "unable to leave" portion of the PSG was part of the feared harm.[17] Moreover, he found that the Board committed error in *A-R-C-G-* when it found that because the individual elements of the PSG had "commonly accepted definitions within Guatemalan society" that the PSG itself had sufficient particularity to qualify as a PSG.[18]

Beyond overruling *Matter of A-R-C-G-*, the *A–B–* decision cobbled together already existing case law[19], most of which existed at the time *Matter of A-R-C-G-* was issued by the BIA. For example, *A–B–* favorably cites both *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). However, both decisions predated DHS's stipulation as to the

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[15] For further analysis of *Grace v. Whitaker*, *see*, Geoffrey A. Hoffman, *How Trump Era Immigration Enforcement Violates the Law;* Jeffreyschase.com, *How Far Reaching is the Impact of Grace v. Whitaker?; ACLU & CGRS, Practice Advisory: Grace v. Whitaker*. Note that *Grace* at 126 states that "[c]redible fear determinations, **like requests for asylum in general**, must be resolved based on the particular facts and circumstances of each case."

[16] *See Grace v. Whitaker*, 344 F. Supp. 3d at, 125.

[17] "*A-R-C-G-* never considered that "\'married women in Guatemala who are unable to leave their relationship"' was effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability 'to leave' was created by harm or threatened harm." *Matter of A–B–* at 335.

[18] *Id.*

[19] Another key problematic aspect of *Matter of A–B–* is its seeming tightening of the legal standard in cases where the persecutor is not the government. In *Matter of A–B–*, the AG states one time that in private harm cases, "The applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims." Matter of A–B–, 27 I&N Dec. at 337. However, this is not the correct legal standard and the AG in fact cites to the correct standard in other portions of the A–B– decision, for example, citing Matter of Acosta, "Where an asylum applicant claims that the persecution was inflicted by private conduct, she must also establish that the government was unable or unwilling to protect her." Matter of A–B–, 27 I&N Dec. at 319. Although the AG correctly states the standard more than a dozen times, the USCIS Policy Guidance at 2, incorporates the "complete helplessness" or "condone" language. This language was rejected in the *Grace v. Whitaker* decision discussed below, but only in the context of credible fear interviews.

cognizability of the particular social group in *A-R-C-G-*. It is further worth noting that in its brief to Sessions in *A–B–*, DHS itself argued that the PSGs expressed in *A-R-C-G-* and in *A–B–* satisfied all case law requirements for cognizability, that "none of the circuit court decision cited by the Immigration Judge questioned the underlying validity of *A-R-C-G-*," and that Sessions "should not directly or indirectly abrogate *A-R-C-G-*."[20]

While *Matter of A–B–* does not state that domestic violence can never be the basis of a successful asylum claim, its primary critique of *Matter of A-R-C-G-* was that the BIA did not perform a sufficiently rigorous analysis of the legal claims because DHS had conceded several important issues. Thus, a key takeaway from *Matter of A–B–* is that practitioners must be sure to engage in a rigorous analysis of the cognizability of each proposed particular social group in every case.

As a result of this language from the AG, practitioners are cautioned not to assume that if a PSG has been accepted in the past by the BIA or a circuit court that it will necessarily be accepted in the case being litigated. Instead, the practitioner should be prepared to go through each prong of the PSG test in every case. Under *Matter M-E-V-G-*, every applicant for asylum under the PSG category must "establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter M-E-V-G-* 26 I&N Dec. at 237.

With the *A–B–* language disfavoring "concessions" the practitioner should be prepared to establish each of these prongs even for PSGs that have been recognized in previous precedential cases.[21] Moreover, even if the DHS attorney agrees that the PSG is cognizable, unless he or she will agree to waive appeal on all grounds, it is safest to make a record on the cognizability of the PSG.[22] After *Matter of A–B–*, it is possible that the BIA will not simply accept that DHS does not oppose a particular social group formulation in any given case. Thus it is prudent to make the record in each case on each PSG.

Practical Considerations

Practitioners must "reinvent the wheel" in each asylum claim. This can be accomplished by ensuring that each of the following requirements are met in each case:

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[20] DHS Opening Brief to the A-G- in *Matter of A–B–* (redacted) https://uchastings.app.box.com/s/tt1ydliq5ttm1i2zxlz4rname4bk29s7/file/291240839944 at 18, 20.

[21] In a footnote in *Matter of A–B–, t*he AG similarly questioned the "key concessions by DHS to recognize a particular social group that might not have withstood the rigorous legal analysis required by Board precedent" in *Matter of L-E-A-*. *Matter of A–B–* at 333, note 8.

[22] *Matter of L-E-A-* is currently pending review by the Attorney General after acting Attorney General Matthew Whitaker certified the case to himself. Although DHS conceded that family was a cognizable PSG and the immigration judge agreed without analysis that "family is certainly a particular social group" the immigration judge denied the case on nexus and Mr. L-E-A- appealed to the BIA. The BIA likewise found that his family comprised a PSG, but the case is now pending before the AG on the issue of "[w]hether, and under what circumstances, an alien may establish persecution on account of membership in a "particular social group" under 8 USC §1101(a)(42)(A) based on the alien's membership in a family unit." Thus, even in a case where there is no dispute over a legal issue may lead to the issue being considered at a later time.

1. Delineate a cognizable PSG. In domestic violence claims, this will usually mean stating a group of nationality plus gender—*e.g.*, "Guatemalan women." Gender satisfies all case law requirements: it is an immutable characteristic (plus it is fundamental to one's identity). It is sufficiently particular (*i.e.*, it provides a benchmark for inclusion). Gender further enjoys social distinction in all societies. And gender is not impermissibly "circular," as its definition does not contain the harm feared.

   Although DHS may argue that this configuration is overbroad, the practitioner should remind DHS, and the immigration judge, that membership in a PSG is an entirely distinct consideration from nexus and harm. For example, arguably, every human being has a "religion" (or may be an atheist), yet not every individual can succeed on a religion-based asylum claim. Similarly, the fact that every individual has a gender (or identifies without a gender) does not mean that every individual will meet he nexus and harm requirements for asylum on account of gender.

   a. While "nationality plus gender" will usually be the strongest claimed PSG in domestic violence cases (with several IJs issuing written decision granting asylum based on such group membership post- *Matter of A–B–*), don't hesitate to propose additional PSGs at the Immigration Judge level. Additional proposed groups may include relationship status (and the inability to leave them), and factors such as race, religion, nationality, and/or political opinion (including feminism) where present and relevant as a motive for the feared harm.[23]

2. Establish the persecutor's awareness of the group, either through direct statements (e.g. exclamations such as "a woman's place is in the home, like a servant"[24] (*A–B–*), or through the type of harm inflicted:

   a. Would the same persecutor have inflicted the same treatment on a close male relative, friend, or roommate- i.e. in *Matter of A–B–*, the harm included: rape, control, humiliation and isolation, calling her a 'slut' or a 'dog;' waking her up in the middle of the night, forcing her out of bed and saying "bitch, feed me?"[25]

   b. Emphasize that the "one central reason" requirement recognizes mixed motives - therefore, the persecution inflicted could be for both personal reasons[26] AND on account of gender.

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[23] The Center for Gender & Refugee Studies, Univ. of Cal. - Hastings College of Law, has published a practice advisory that offers guidance on formulating PSGs post- *Matter of A–B–*: https://cgrs.uchastings.edu/article/practice-advisories-available-domestic-violence-and-childrens-asylum-claims.

[24] CGRS, *Matter of A–B–*, Respondent's Brief to AG (redacted) https://uchastings.app.box.com/s/tt1ydliq5ttm1i2zxlz4rname4bk29s7/file/291241595459 at 3.

[25] *Id.*

[26] In *Matter of A–B–*, Sessions failed to engage in a mixed motives analysis, instead essentially finding that if there is any personal motivation for the harm, it fails the to meet the standard for asylum. "When private actors inflict violence based on a personal relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse." 27 I&N Dec. at 338–39.

c. Where a motive may appear to the adjudicator to lack a nexus to a protected ground (*i.e.*, where the facts may suggest an economic or personal motive), apply the BIA's test in *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), which does not require evidence of motivation, but evidence "from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground," including abuse or punishment that is "out of proportion" to other purported ends.

3. In preparing the application, question the asylum applicant with great care in order to paint as detailed a picture as possible for the adjudicator. For example, if the claim involves gangs, question your client to establish (a) the name of the gang in question; (b) the gang's presence (if any) in the daily life of the citizens of her town or village; (c) the attitude of the police towards the gang; and (d) the actual success of the police in prosecuting gang members or affording protection to its victims.

4. Consider whether other protected grounds besides from PSG might apply, such as race, nationality, or religion. If the persecutor is a gang member, consider including in imputed political opinion ground based on the argument that a Third Generation Gang such as MS-13 or M-18 operates as a de facto government in Northern Triangle countries.[27]

5. Document your arguments with country condition evidence. Such evidence can be offered to establish (a) societal views towards women in domestic relationships and their ability to leave such relationships; (b) the prevalence of domestic violence; (c) the treatment of women by gang members; (d) the impunity enjoyed by certain groups from criminal prosecution; (e) the ability or willingness of the police to intervene to protect victims of domestic violence; (f) the reasonableness of avoiding further violence by relocating within the country, and (g) whether the gangs, the domestic abusers, or society imputes a political opinion to women who resist male domination or control.

6. Argue for a broad application of the district court decision in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018). Although the decision addresses the application of *A–B–* to credible fear interviews, advocates have argued that the decision should apply to full-fledged asylum determinations before both USCIS and EOIR.

7. In briefing Immigration Judges in domestic violence-based claims, reference the above-cited arguments of DHS itself as to the very limited impact of *A–B–* (as argued in its brief in *Grace v. Sessions*), and as to the cognizability of domestic violence claims under all existing case law (as argued in its brief to Session in *A–B–* itself.

8. Remember that the immigration judges have received no training on this topic. Sessions released his decision during their annual training conference, meaning there was no opportunity to prepare a training session for the conference. Attach written decisions by other immigration judges granting asylum in domestic violence and gang violence claims to your memoranda of law to allow the judges to see the analysis of their colleagues (and

[27] For further explanation of the Third Generation Gang theory, see www.jeffreyschase.com/blog/2018/6/3/3rd-generation-gangs-and-political-opinion.

to possibly use as a model for their own decisions). While decisions by other immigration judges are not precedential, they can help judges feel less nervous that they are going out on a limb by granting a PSG asylum case.

Making the Record—A Case Example

As discussed above, with *Matter of A–B–'s* critique of the BIA relying on any concessions by the parties in *Matter of A-R-C-G-*, the practitioner should present evidence on every element of each asylum claim unless DHS is willing to agree to a grant and waive appeal. In most asylum cases, the primary evidence in the case is the testimony of the applicant, both in court and through the declaration and I-589, and country conditions materials. In many cases there may also be fact witnesses and/or expert witnesses.

To examine how this works in practice, it may be helpful to use a common particular social group as an example. In *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015), the Fourth Circuit granted asylum to the mother of a young man who was being recruited by gangs in El Salvador. In that case, the BIA had denied asylum for lack of nexus to family membership and the Fourth Circuit held, "Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities." Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 (4th Cir. 2015). In that case, DHS conceded that "membership in a nuclear family" constituted a cognizable particular social group. In its brief in *Matter of L-E-A-* pending before the Attorney General, however, DHS is no longer conceding that "nuclear family" is necessarily a valid PSG. Instead, the government is arguing for an intensive, case-by-case analysis on the issue, similar to what the attorney general has demanded in *Matter of A–B–*.

How does one prove the elements of PSG? First, the practitioner should include the required language in the applicant's declaration. The applicant should avoid legal conclusions and legalese, but should lay out facts that meet the PSG test. So, for example, in a case where a mother fears harm from a gang due to her relationship to her son, the declaration could include language like the following:

"The gang targeted me because of I am in the same immediate family as my son NAME. I am his biological mother (see attached Ex. #, birth certificate) and nothing can ever change this fact. People in our community know who is in our immediate family because we live together and have the same last name. We attend community events together and people in our community know that I am the mother of [CHILDREN's NAMES]. In El Salvador, family is a key part of our society. In fact it is very common when meeting new people to begin a conversation by asking about extended family, and then narrowing the conversation to who is in the immediate family. This is just an ordinary way for us to categorize people."

Of course, this is just one potential example, but it is important for practitioners to consider including language like this in every declaration that includes a PSG. Of course, it would be unnatural (and unconvincing) for an asylum seeker to talk about "particularity" or "social distinction" in her declaration or testimony, the practitioner should carefully review *Matter of M-*

E-V-G and *Matter of W-G-R-* to fully understand how the Board interprets those prongs of the PSG test before considering how the applicant can naturally discuss those elements.

If the practitioner is arguing more than one PSG, language that lays out the contours of each PSG should be included in the declaration. This is one reason that including many different possible PSG formulations can become cumbersome.

It is best practice to include questions during the individual hearing which will elicit similar testimony. For some PSGs, like family, it may seem so obvious to the applicant that the PSG is "immutable or fundamental," "socially distinct," and "particular," that asking questions on this topic may seem illogical. Nonetheless, it is important to explain the legal requirement to the applicant, even if she doesn't fully understand the contours of PSG, so that the required information gets into the record.

In addition to testimony from the applicant and other potential fact witnesses, country conditions materials can help prove that the proposed PSG meets the three prong definition. For example, in El Salvador, the Constitution states "the family is the fundamental base of society" and goes on to lay out rights that the State recognizes based on familial relationships. Salvadoran Constitution,[28] The U.S. State Department Human Rights Report likewise reports on this constitutional protection.[29] It may also be helpful to include other reference to other laws in El Salvador that indicate that families are treated as distinct groups, such as inheritance laws, child custody laws, etc.

Finally, in cases where the PSG is more nuanced, the practitioner may need to find a country conditions expert to discuss how the proposed PSG meets the three prong test for cognizability. If the practitioner has retained a country conditions expert to write a report or testify about other issues, such as lack of government protection, it would be best practice to also elicit the expert's opinion on each of the three prongs necessary to demonstrate the existence of the PSG.

USING EXPERT WITNESSES

One of the outcomes of *Matter of A–B–* is the need for practitioners to provide evidence on every aspect of their claim, and, in a potentially more hostile environment, to make a record for appeal. In many cases it will be very important to make use of expert witnesses.

The leading case on the use of expert witnesses in immigration court is *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011). In *Matter of D-R-*, the respondent was a lawful permanent resident who had been admitted as a refugee from Bosnia and Herzegovina. DHS initiated removal proceedings alleging that he had withheld information in his refugee application which would have subjected him to the persecutor bar. In the proceedings before the immigration judge, DHS offered as an expert Richard Butler, "a criminal research specialist with the DHS who formerly worked as a military analyst for the ICTY [United Nations International Criminal Tribunal for the Former Yugoslavia at The Hague and who] testified on military operations that occurred in Eastern

[28] Salvadoran Constitution, *available at* http://pdba.georgetown.edu/Constitutions/ElSal/constitucion.pdf
[29] U.S. DOS Report, El Salvador, at 16, *available at* www.state.gov/documents/organization/277575.pdf.

Bosnia." *Id.* at 447. On appeal, the respondent objected to his qualification as an expert. Relying on the federal rules, the BIA found that, "An expert witness is broadly defined as someone who is 'qualified as an expert by knowledge, skill, experience, training, or education.' . . . An expert has "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." [Internal citations omitted.] *Id.* at 459. Since Mr. Butler was qualified as an expert, "it was proper for him to testify as to his inferences from the facts in evidence." *Id.* at 460. In a footnote the Board noted that an "Immigration Judge who finds an expert witness qualified to testify may give different weight to the testimony, depending on the extent of the expert's qualifications or based on other issues regarding the relevance, reliability, and overall probative value of the testimony as to the specific facts in issue in the case."[30]

Thus, even though the immigration court does not strictly observe the federal rules of evidence, the general concepts in the rules are applicable in immigration court. *Matter of D-R-* is somewhat unusual in that, in most immigration court cases, the burden of proof is on the respondent and it is therefore much more common for the respondent to call an expert witness than for DHS to do so.

Expert witnesses are most commonly academics who have studied and written about the country of feared persecution or individuals who work or have worked for human rights organizations, either internationally or in the country of origin. In working with an expert witness, the practitioner will first have to decide whether he or she intends to have the expert testify in court, or whether or the expert will only submit written testimony. Even if the expert will provide oral testimony, under the Immigration Court Practice Manual (ICPM),[31] he or she still must provide "a written summary of the testimony" as well as "a curriculum vitae or resume."[32]

The practitioner should carefully review the written statement by the expert before submitting it. The more specific the expert report is to the respondent's claim, the more useful it will be to the immigration judge. For example, a report that only states that the MS-13 is active in a particular region of Honduras will not be as helpful as a report that can describe how the MS-13 targets individuals who share the respondent's protected characteristic. As with any witness, the credibility of the expert is crucial and he or she must be able to explain **how** he or she arrived at the opinion to which he or she is testifying. As discussed above, in particular social group cases, it can be extremely helpful to include evidence from the expert that demonstrates that the proposed particular social group is viewed as "socially distinct" and has "particularity" within the respondent's country. That is, if an expert is secured for the hearing the witness should be prepared to testify on every issue about which he or she has expertise: country conditions; government willingness and ability to protect; the ability to safely relocate internally; and the particularity and social distinction of the proposed PSG. For experts who are experienced in testifying in immigration court, the focus on elements of the PSG in case types that have seemingly established PSGs may be new for the expert.

It is often very helpful to the respondent's case to have oral testimony by an expert. In fact, DHS may object to the introduction of an expert witness report if DHS does not have the opportunity to cross-examine the expert. However, expert witnesses can be expensive, and for attorneys taking

[30] *Id.* at n.13
[31] EOIR, *Immigration Court Practice Manual*, *available at* www.justice.gov/eoir/page/file/1084851/download.
[32] ICPM at 57–58.

asylum cases pro bono or at reduced rates, it may not be possible for the client to pay for expert testimony. Some experts may be willing to write a report for free or at a low cost but may not be able to also give up a substantial part of his or her day to testify in court. Practitioners should bear in mind that the respondent has the right to call witnesses in the order that he or she prefers. So, in some cases, it may be prudent to call an expert as the first witness, rather than waiting until after the respondent has testified. Some experts may find it more convenient to testify if they have a more accurate sense of when during the course of the hearing they will be called to testify.

It is common practice for expert witnesses to testify telephonically. For professionals, like academics, it is much more convenient to be available by telephone than to have to spend the day in court. The practitioner must make a motion in advance to allow for telephonic testimony.[33] Some immigration judges will impose additional burdens on witnesses who testify telephonically, such as requiring them to testify from an EOIR courtroom in the city where they reside.

With immigration judges under increasing pressure to finish cases quickly,[34] and asylum seekers facing increasing evidentiary burdens, practitioners will have to make strategic decisions about how important an expert witness's oral testimony is to the case. DHS may agree to stipulate that the expert would testify consistently with the content of his or her declaration. Likewise, the immigration judge may pressure the respondent's counsel to not have the expert testify live if the testimony will be "cumulative" with what is in the expert's affidavit. While it is important to have the expert affidavit as part of the record which can be cited in an appellate brief if necessary, having live testimony by a persuasive witness can be critical to a respondent's case. Having live testimony insures that the immigration judge actually hears what the expert has to say. The practitioner can also ask the expert questions about issues which may be critical to the judge's decision, such as the feasibility of internal relocation, or whether the government is able to provide protection to the asylum seeker.

As with any witness, the practitioner should carefully prepare with the expert. The practitioner should both practice the questions he or she intends to ask, and prepare the expert for any anticipated cross examination. If the expert frequently testifies on behalf of asylum seekers, DHS is likely to ask questions to try to demonstrate that the expert is biased.

Increasingly, asylum seekers are being asked to provide evidence to support their cases that many lay people simply cannot provide. Asylum seekers may have to demonstrate the boundaries of their proposed particular social group, as well as how that group is perceived in the society from which they come, as well as whether the government is unable or unwilling to provide protection. These concepts are difficult even for American-trained lawyers to understand, and even more difficult for asylum seekers who may have limited educational training or understanding of the American legal system. In many cases, having an expert witness will be the difference between winning or losing. And when appearing before a hostile judge, using an expert witness to create a strong record for appeal is also essential.

CONCLUSION

[33] ICPM at 85–86.

[34] *See*, James R. McHenry, EOIR Director, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), *available at* www.justice.gov/eoir/page/file/1026721/download.

There is no question that *Matter of A–B–* has made a difficult area of immigration practice even harder. Nevertheless, it is important for practitioners to continue to accept PSG-based asylum cases and litigate them vigorously. It is still possible to win these claims, but those seeking asylum based on particular social group are in greater need than ever of receiving high quality legal representation from counsel willing to put the time and effort into meeting every element of the asylum claim. Furthermore, with *Matter of A–B–* facing federal court challenges, it is critical to make a strong record in every case and preserve every argument on the asylum seeker's behalf. CGRS continues to represent Ms. A–B– and to take the lead in issuing guidance on domestic violence-based asylum issues. Practitioners are strongly urged to reach out to CGRS both for case assistance when needed, and to keep CGRS apprised of case outcomes so they can continue to educate the public.[35]

Hopefully, the federal courts will insure that asylum seekers continue to receive a fair hearing of their claims.

[35] *See* https://cgrs.uchastings.edu/A–B–Action .