Representing Asylum Seekers after *Matter of A-B-*

NIJC and *A-B-*

- Direct representation of > 600 asylum seekers/year:
  - Unaccompanied children
  - Detained adult asylum seekers
  - Non-detained adult and family asylum seekers
  - Asylum seekers who identify as LGBT
- Lead impact litigation across the CoAs to preserve asylum protections
  - PSG definition
  - Gender and LGBT-based asylum
  - Corroboration and credibility standards
- Participate as amicus (*A-B-*, *L-E-A-*, *A-R-C-G-*, *M-E-V-G-*; Cece; etc.)
- Advocate with and provide intel to members of Congress

Training Overview

- Takeaways:
  - Narrow holding
  - Media narrative is wrong, but optics are bad
- Roadmap:
  - How Did This Happen?
  - What Really Happened?
  - What Do I Do About My Case?
How Did This Happen?
The history of domestic violence and particular social group-based asylum

Asylum System

The Asylum System

Asylum Office/Affirmative Process

- Client in U.S.; no NTA issued
- Asylum Office Interview
- Grant
- Referral
- Merits Hearing & IJ Decision
- BIA Appeal
- Court of Appeals
- A.G. certification

Immigration Ct/Defensive Process

- Client apprehended at port of entry & passes CFI
- Unaccompanied child client apprehended
- Client apprehended internally

Asylum Office Interview

Grant

Referral

Merits Hearing & IJ Decision

BIA Appeal

Court of Appeals

A.G. certification

Asylum: Elements

1. "Well-Founded Fear"
2. of "Persecution"
3. Perpetrated by the government or an entity the government cannot/will not control
4. "On account of"
5. – Race
   – Religion
   – Nationality
   – Political Opinion
   – Membership in a Particular Social Group

These elements are SEPARATE!
What is a Particular Social Group?

- **Acosta** definition: A group whose members share a “common, immutable characteristic” that “members of the group either cannot change, or should not be required to change.” *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)

- Receives **Chevron** deference by all COAs.

  **Chevron**
  Congress delegates the administration of a statute to an agency → a statutory provision is ambiguous → the agency’s interpretation is based on a permissible construction of the statute = **Chevron** deference

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The Convoluted History of DV-Based Asylum

- Floodgates fears
- INS guidelines
- **R-A-** (1999)
  - 2000: proposed rules
  - 2001: Reno vacates
  - 2003: Ashcroft certifies
  - 2004: DHS brief
  - 2008: Ashcroft remands
  - 2008: Mukasey certifies and remands
  - Many AOs/IJs continue to issue positive decisions

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Meanwhile, the BIA Targets Gang Violence-Based Claims

  - New PSG test (social visibility/particularity)
  - Results-driven decisions
  - Incomprehensible test
  - 7COA and 3COA reject

  - BIA doubles-down (social visibility = social distinction)
  - Claims previously accepted PSGs remain viable
  - Rejects demographically diverse groups

*See NIJC’s PSG Practice Advisory*
2014: Matter of A-R-C-G-

- PSG: married women in Guatemala who are unable to leave their relationship
- Based on DHS concessions regarding the PSG and nexus (but contained PSG analysis)
- Only PSG recognized by the BIA since 2008
- Conflicts with the BIA’s demographic diversity concerns in W-G-R-
- Continues to set a high evidentiary burden

Developments at the Seventh Circuit

- Consistent application of a pure Acosta test
- No explicit Chevron analysis of M-E-V-G/W-G-R-
- Has not directly opined on A-R-C-G-

<table>
<thead>
<tr>
<th>Case</th>
<th>PSG Description</th>
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<tbody>
<tr>
<td>Cece (2013 - en banc)</td>
<td>PSG: young, Albanian women living alone</td>
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<tr>
<td>Sarhan (2011)</td>
<td>PSG: Jordanian women who have allegedly flouted moral norms</td>
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<tr>
<td>Escobar (2011)</td>
<td>PSG: truckers who have collaborated with law enforcement &amp; refused to cooperate with the FARC</td>
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<td>Benitez Ramos (2009)</td>
<td>PSG: former Salvadoran gang members</td>
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<tr>
<td>Orejuela (2005)</td>
<td>PSG: the educated, landowning class of cattle farmers in Colombia</td>
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Seventh Circuit vs BIA

<table>
<thead>
<tr>
<th>BIA Case Law</th>
<th>Seventh Circuit Case Law</th>
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<tbody>
<tr>
<td>Can’t be overly broad</td>
<td>Breadth is irrelevant</td>
</tr>
<tr>
<td>Must be considered a group by society</td>
<td>No social distinction test</td>
</tr>
<tr>
<td>“Former” status/past experience is not enough</td>
<td>“Former” status/past experience is enough</td>
</tr>
<tr>
<td>Groups can’t be overly diverse</td>
<td>Diversity not an issue</td>
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What Really Happened?
*Matter of A-B*: Holding and Dicta

**Matter of A-B**: Holding
- *Matter of A-R-C-G* is overruled on procedural grounds
  - The decision was based on DHS concessions
  - The legal analysis of social distinction, particularity, and nexus was insufficient
- *A-B*’s case is remanded

**Matter of A-B**: Dicta
- "Generally" these claims will not be viable
- Only in "exceptional circumstances" will claims by non-state actors be viable
- Various formulations of the "unable/unwilling to control" standard
- Gender-based PSGs are impermissibly circular
- Consider denying asylum based on manner of entry; border interviews, and travel through other countries
Matter of A-B -: Dicta

- Persecution:

<table>
<thead>
<tr>
<th>Correct Formulation</th>
<th>A.G.'s Formulation</th>
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<tr>
<td>Persecution</td>
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<tr>
<td>+ Nexus, Protected Ground, Unable/Unwilling/State Actor</td>
<td>+ Nexus, Protected Ground, Unable/Unwilling/State Actor</td>
</tr>
<tr>
<td>Rebuttable Presumption of Future Persecution</td>
<td>Persecution</td>
</tr>
</tbody>
</table>

- Nexus: DV is private and based on personal relationships; implies persecutor must be aware of PSGs existence to prove nexus

What Do I Do About My Case?
Preparing and Presenting Asylum Cases After Matter of A-B-

Hypo: Maritza and Edgar

When Maritza was a teenager in Honduras, a man abducted her and held her as his “wife” for two years. He regularly raped her and she had two children as a result. After her rescue, Maritza reported him to the police, but he escaped and abducted her children.

After Maritza returned to her family home, her father told her she would inherit his land. Furious, her brothers attacked their father and beat Maritza when she tried to intervene.

Later, Maritza began a relationship with Edgar. She moved in with him and soon became pregnant. One day, Edgar witnessed Mara 18 gang members murder a young woman. The gang members found him a few days later, beat him, and threatened to kill him if he ever talked about what he had seen.

Maritza and Edgar fled to the United States soon afterwards. Since then, Mara 18 gang members attacked the caretaker of Maritza and Edgar’s home in Honduras with a machete and demanded information about them.
Keep the Big Picture in Mind

Affidavit

Legal Argument

Corroborating Evidence

Persecution

• Rely on Stanjokova
  – Footnote the correct persecution formulation

• Argue ALL prior harm as persecution
  – Rebuttable presumption
  – Humanitarian asylum
  – Different standard for kids

• Spend significant time establishing context → threats are credible and harm will continue
  – Affidavits
  – Country condition evidence

PSG

• Present all viable PSGs (& argue w/all elements), per Matter of W-Y-C- BUT be strategic
  – Present narrower/broader versions of the same PSG
  – Consult with NIJC! (We need to review your brief)

• Focus heavily on 7COA law and explain how it remains unchanged by A-B-
  – Fn that social distinction/particularity don’t apply, but demonstrate how your PSG meets them anyways
  – See NIJC’s PSG practice advisory

• For DV-based claims, explain what A-B- actually holds and what it does not.
PSG Cont.

- Avoid circular definitions and consider affirmatively arguing that your PSGs are not circular

- Potential PSGs for Maritza and Edgar
  - “Honduran women, or more narrowly, Honduran women in relationships they are unable to leave” (Cece; DHS briefs; other COA gender case law)
  - “Hondurans [Honduran women] who have violated social norms regarding family hierarchies” (Sarhan)
  - “Immediate family members of the [X] family” (Lwin; N.L.A.; Cece; L-E-A.- (BIA))
  - “Hondurans who have witnessed gang crimes” (Sepulveda; Henriquez-Rivas (9th); Garcia (3th))

Common Social Groups

- Child abuse/domestic violence claims:
  - Children in the X family/children of X
  - [Nationality] children who lack parental protection
  - [Nationality] women in intimate relationships they are unable to leave

- Gender violence claims:
  - [Nationality] females [women; girls]
  - [Nationality] females in relationships they are unable to leave
  - [Nationality] females who lack parental/male protection

- Gang-related claims:
  - [Nationality] youth who have opposed [resisted/disrespected] gangs
  - [Nationality] who have witnessed [and reported] gang activities

Nexus

- Use ALL evidence to establish context
  - Place harm into a broader context of a cultural norm, policy or modus operandi (R.R.D.)
  - Particularly critical with DV claims, but also important with gang-based claims
  - Gender violence is NOT a personal dispute

- Demonstrate the persecutor’s awareness of your client’s PSG or at least, the immutable characteristic she shares with others
Nexus cont.

- Follow the three-part nexus analysis for gender-based claims

![Diagram showing three parts of nexus: Harm itself as evidence of nexus (Kasinga), Direct evidence (words; actions), Country evidence shows harm occurs because the govt has deemed it permissible and required (Sarhan)]

Nexus cont.

- Maritza and Edgar:
  - Gender
  - Family
  - Witness

  - Country condition evidence
  - Background evidence placing the harm within context
  - Affidavits from multiple witnesses
  - Affidavits from Maritza and Edgar

Unable or Unwilling to Control

- Likely to be a key issue moving forward – SPEND SIGNIFICANT TIME HERE

- Footnote an explanation that A-B- did not change the 7COA’s unable/unwilling to control standard (see Practice Advisory)

- Don’t let the adjudicator consider this element in the abstract

- Consider affirmatively distinguishing from the United States
  - Comparison is inappropriate
  - Comparison cannot be made
Unable or Unwilling to Control cont.

- Maritza and Edgar:
  - Personal experiences → affidavits, reports
  - Community experiences → affidavits, reports
  - Big picture → country condition evidence

Relocation

- Likely to be a key issue moving forward – SPEND SIGNIFICANT TIME HERE
- Know your geography
- If your client never moved, explain why.
- Obtain details about what life would be like in other parts of the country (and corroborate)
- Two prongs: (1) Safe and (2) Reasonable
  - check the regs and be creative

Discretion

- FOIA EARLY to get border interview records
  - Talk to your client about what happened at the border.
  - Strategize whether or not to front inconstancies
  - Object to the admission of border docs
  - Rely on 7COA case law (Jimenez Ferreira; Moab)
- Be familiar with Matter of Pula
Arguments to Preserve

1. A-B doesn’t establish new standards - doing so would be ultra vires
2. Accardi Principle
3. Case-by-case analysis is required
4. Assuming arguendo that a new standard has been created, it cannot be applied retroactively
   (see Practice Advisory for details)

THANK YOU!

For more information contact
Anna Sears
312-660-1307
ansears@heartlandalliance.org

Other ways to support NIJC:
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