Nexus and the US Refugee Definition

by Alicia Triche

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All refugees fear persecution, but not all who are persecuted are refugees. Under the U.S. Immigration and Nationality Act,[1] a "refugee" must fear persecution *on account of* a protected ground (such as race, religion, or political opinion).[2] Among practitioners, this is known as the "nexus" requirement.

In light of the recent and ongoing "surge" of applicants from Central America, "nexus" has begun to take center stage. Frequently, these applicants arrive with claims of the entire family being targeted by heavily armed, nongovernment actors, such as *maras, pandillas,* or family cartels. And, for many years now, immediate family has been accepted by courts as a "particular social group"—in other words, a statutorily protected ground, which, under the right circumstances, could give rise to a finding of refugee status.[3] However, the jurisprudential backdrop is also replete with cases characterizing the "motives" of various criminal and paramilitary groups as falling outside of the realm of persecutory intent envisioned by the statute.[4] Amid these developments, the question *du jour* has become: Under INA § 101(a)(42), when is "persecution" of an immediate family member sufficiently "on account of" that family relationship?

Matter of L-E-A- Litmus Test

Last year, the Board of Immigration Appeals (BIA) spoke substantially on the issue of nexus and family-based persecution. In *Matter of L-E-A-*,[5] the Mexican respondent had been attacked by La Familia Michoacana, a cartel wanting to sell drugs in his father's store. The group had also approached his father, who had refused. Apparently, neither the respondent nor the cartel made an explicit statement that the attack was based (even in part) upon family relationship. Instead, as evidence of nexus, the respondent relied largely on the fact that both he and his father had been targeted under the circumstances.

In *L-E-A-,* the BIA displayed what can only be called a highly characteristic hesitancy to *infer* persecutory intent to any nongovernmental actor. On a record devoid of any direct evidence of "family" as motive, the BIA held that the "motive" was merely access to the store.[6] By contrast, as an example of persecution "on account of" family, the BIA cited the killing of the royal Romanovs during the Russian Revolution in 1918-1919.[7] But, as for *L-E-A-*, the BIA held that the record did "not indicate that the persecutors had any animus against the family or the respondent based on their biological ties, historical status, or any other features unique to that family unit."[8]

Reason Is Different Than Motive

The BIA's repeated reference to "motive" in *L-E-A-* should not be taken as indication that the question of "motive" constitutes the entirety of the nexus determination. Under INA § 208(b)(1)(B)(i), to meet the burden of proof, the applicant must establish a protected ground "was or will be at least one central *reason* for persecuting the applicant" (emphasis added). This requirement was added in 2005, and it applies to all asylum applications made after the May 11, 2005, passage of the Real ID Act.[9] By enacting the phrase "one central reason," Congress specifically rejected a "motive" test—which *had* been proposed.[10]

Motive and reason are two different concepts. According to *Black's Law Dictionary* (10th ed. 2014), they are defined as:

> Motive: Something, esp. willful desire, that leads one to act.
> Reason: 2. A ground or cause that explains or accounts for something.

Reason Encompasses More Than the (Alleged) Thoughts of the Perpetrator

It can be seen from above that the question of motive encompasses why a particular person commits an act. By contrast, a "reason" constitutes why, overall, persecution is occurring. This means that pre-2005 cases emphasizing the "motives" of nongovernment groups should be considered carefully; and, arguably, might not be controlling.[11]

Perhaps the most useful example of the motive-versus-reasons concept is the BIA's decision in *Matter of Kasinga*.[12] There, female genital mutilation "[had] been used to control woman's sexuality" and also was characterized as a form of "sexual oppression" that was "based on the manipulation of women's sexuality in order to [en]sure male dominance and exploitation." These were the reasons, but not necessarily the "motive," of the elders. Their motive, in their

own minds, was potentially very different and was even sometimes characterized as "helping" their victims.

'One Central Reason' Can Co-Exist With Other Reasons

The seminal case on what was then called "mixed motives" is *Matter of S-P-*,[13] in which a Sri Lankan Tamil was detained and tortured, and the BIA held: "The harm may have been inflicted for reasons related to government intelligence gathering, for political views imputed to the applicant, or for some combination of these reasons."[14] In *L-E-A-*, the BIA acknowledges the continuing viability of the "mixed motives" concept post-Real ID Act, stating that "one central reason" means the family reason "cannot play a minor role," and family relationship cannot be "incidental or tangential" to the reason for the harm.[15]

Under these circumstances, one "bad" motive does not, in and of itself, destroy a nexus. Applying "mixed motives," *S-P-* held that the nexus enquiry should be "the reasonableness of the applicant's belief that persecution was based on a protected ground."[16] The assessment of nexus is thus not based on any one particular motive being cited in the record (such as, for example, the partial motive of a gang to collect money to support its expenses). Instead, the question is whether the overall circumstances, including country conditions, warrant a finding of the protected reason for persecution.

For example, in *Bi Xia Qu v. Holder*,[17] a Chinese man required that a father give his daughter to the man in marriage due to a financial obligation. The daughter sought asylum and related protection in immigration court. Acknowledging that the forced marriage was sought, in part, under an alleged financial obligation, the Sixth Circuit held: "If there is a nexus … the simultaneous existence of a personal dispute does not eliminate that nexus."[18] Continued the court, "Zhang targeted Qu both to secure the repayment of his loan from Qu's father and because she was a woman whom he could force into marriage in a place where forced marriages are accepted."[19] Forced marriages were "common practice" in China, and this was established not by direct evidence of motive, but by country conditions.[20]

Ultimately, 'Nexus' is a Case-by-Case Determination

Yet again, *L-E-A-* demonstrates what is perhaps the central theme of U.S. refugee law: Every case is unique, and it must be considered on its own set of facts. As this column has noted before, the United Nations Convention Relating to the Status of Refugees,[21] upon which our U.S. definition is now based, specifically rejected any "group" approach to refugee adjudications. Although "on account of" is a common requirement in the refugee definition, it is meant to be applied only in the midst of individual assessment, one case at a time.[22] It is also important to note that precedential rules regarding the refugee definition are not the same as fact-finding in an individual case. The Ninth Circuit's *Piric-Boc v. Holder* saliently makes that distinction, holding that one "particular social group" ruling should not be applied to outside and distinct sets of facts.[23]

In the nexus context, both direct and circumstantial evidence can be considered,[24] and the record as a whole should be used to determine the overall "reason" for the feared persecution. In some reports, Central American groups are, in fact, documented as displaying propensity to target families, as a group, in a punitive or retaliatory fashion.[25] Such evidence might be interpreted as meeting *L-E-A-'s* requirement of "biological ties"[26] or might be reasonably argued, under *Maldonado-Cruz*, as establishing that the family itself was "considered offensive." Each case must turn on its own set of facts. If, however, considering that individual record, a respondent establishes a subjective and reasonable fear of persecution "on account of" an immediate family relationship then, under the case law, nexus is satisfied. ⊙

Endnotes

[1]Immigration and Nationality Act (codified at 8 U.S.C. § 1101 *et seq.*) (1951) (as amended).

[2]*Id.* at § 1101(a)(42)(A); INA § 101(a)(42)(A) (Westlaw 2018).

[3]"There can, in fact, be no plainer an example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family." *Al-Ghorbani v. Holder*, 585 F.3d 580, 594 (6th Cir. 2009) (citations omitted); *see also Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (the "family unit" is a particular social group); *Matter of C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006) ("family relationship … is generally easily recognizable and understood by others to constitute [a] social group"); *Matter of L-E-A-*, 27 I. & N. Dec. 40, 42 (BIA 2017) ("immediate family may constitute a particular social group").

[4]*See, e.g., Matter of Maldonado-Cruz,* 19 I. & N. Dec. 509 (BIA 1988); *Matter of T-M-B-*, 21 I. & N. Dec. 775 (BIA 1997); *Matter of V-T-S-*, 21 I. & N. Dec. 792 (BIA 1997); *Matter of C-A-L-*, 21 I. & N. Dec. 754 (BIA 1997); *cf. Matter of Salim*, 18 I. & N. Dec. 311 (BIA 1982) (Russian military invading Afghanistan was a persecutor). Hon. Jeffrey Chase (ret.) must be credited for the research on this line of cases, which he presented at a panel during the 2018 FBA annual NYC Asylum Conference. Any mistakes or inaccuracies belong solely to the author.

[5]*L-E-A-*, 27 I. & N. Dec. 40.

[6]*Id.* at 44 ("motive" is determined on a case-by-case basis and the immigration judge should consider "both direct and circumstantial evidence").

[7]*Id.*

[8]*Id.* at 47.

[9]Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 305 (May 11, 2005).

[10]*See* Deborah Anker, Law of Asylum In the United States § 5:11 (2017).

[11]*See, e.g., Maldonado-Cruz,* 19 I. & N. Dec. at 513 ("in the context of a civil war, it is necessary to look at the motivation of the group threatening harm"); *T-M-B-*, 21 I. & N. Dec. at 778 ("the record must be examined for direct or circumstantial evidence … that those who threatened the respondent were in part motivated by … [a protected ground]").

[12]*Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

[13]*Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996).

[14]*Id.* at 492.

[15]*L-E-A-*, 27 I. & N. Dec. at 44.

[16]*S-P-*, 21 I. & N. Dec. at 492.

[17]*Bi Xia Qu v. Holder*, 618 F.3d 602 (6th Cir. 2010).

[18]*Id.* at 608.

[19]*Id.*

[20]*Id.* at 607.

[21]July 28, 1951, 189 U.N.T.S. 150. The United States is bound by Articles 2 to 34 as a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267.

[22]*See, e.g.,* Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 35-36 (3d ed. 2007).

[23]*Piric-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2004).

[24]Anker, *supra* note 10, at § 5:7.

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Rule 1's "paramount command" will reap the rewards of promoting efficiency. But those that violate it—say, by engaging in gamesmanship and invoking unregulated procedural devices at the last minute and in bad faith[15]—will be discouraged and ultimately deterred from doing so. ☉

Endnotes

[1]Federal Rule of Civil Procedure 26(b)(1) no longer allows discovery that "appears reasonably calculated to lead to the discovery of admissible evidence"; it now requires that it be "proportional to the needs of the case." *See, e.g.*, *United States ex rel. Customs Fraud Investigations LLC v. Victaulic Co.*, 839 F.3d 242, 258-59 (3d Cir. 2016).

[2]*Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (mentioning—among other such examples—motions *in limine*).

[3]*See id.*

[4]Fed. R. Civ. P. 1.

[5]*See* Fed. R. Civ. P. 1, 2015 comm. note.

[6]Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1029 (4th ed., Apr. 2017 update) (footnote omitted).

[7]Fed. R. Civ. P. 1, 2015 comm. note; *see Harper v. City of Dallas, Texas*, No. 3:14-CV-2647-M, 2017 WL 3674830, at *15 (N.D. Tex. Aug. 25, 2017) ("Rule 1's general direction on how to construe, administer, and apply the Federal Rules … is not a license to ignore the more specific rules' commands or routinely excuse parties' noncompliance.") (citing Fed. R. Civ. P. 1, 2015 comm. note); *Obesity Research Inst. LLC v. Fiber Research Int'l LLC*, No. 15-CV-595, 2017 WL 2705425, at *3 (S.D. Cal. June 23, 2017) (rejecting argument that Rule 1 can invalidate a magistrate judge's standing order regulating discovery disputes) (quoting *Hon. Mitchell D. Dembin's Civil Pretrial Procedures* § IV(C)(2)); *Espinosa v. Stevens Tanker Div. LLC*, No. SA-15-CV-879-XR, 2017 WL 1718443, at *2 (W.D. Tex. Apr. 27, 2017) (refusing to sanction counsel for violating Rule 1).

[8]*Wagner v. Holtzapple*, No. 4:13-CV-3051, 2016 WL 7042964, at *3 (M.D. Pa. Jan. 15, 2016).

[9]*Id.* (footnote omitted).

[10]*Greer v. Wal-Mart Stores E. LP*, No. 4:15-CV-0199-HLM, 2015 WL 12976116, at *3 (N.D. Ga. Dec. 16, 2015) (citation omitted).

[11]*In re Micron Tech. Inc.*, 875 F.3d 1091, 1097 (Fed. Cir. 2017); *accord Allsop Inc. v. Ambient Lighting Inc.*, No. C17-549 RAJ, 2018 WL 828225, at *2 (W.D. Wash. Feb. 12, 2018) (finding that, although a defendant's initial responsive pleading omitted asserting its defense of improper venue, it did not "unreasonably delay[]" the assertion, thus making it "appropriate under the Rule 1 to find that [the] defendant has not waived its right to challenge venue in this forum").

[12]Fed. R. Civ. P. 1, 2015 comm. note.

[13]*See, e.g., Mills v. State of Ala.*, 384 U.S. 214, 218 (1966); *United States v. Tigano*, 880 F.3d 602, 615, 2018 (2d Cir. 2018) ("It is clear that court congestion … contributed to the substantial delay faced by Tigano.").

[14]*See, e.g.*, *EP Henry Corp. v. Cambridge Pavers Inc.*, No. CV 17-1538, 2017 WL 4948064, at *4 n. 4 (D.N.J. Oct. 31, 2017) (making clear that the "recent amendment" to Rule 1 now imposes "obligations" on counsel); *Wesby v. Globe Mfg. Co. LLC,* No. 3:16-CV-235-DPM, 2017 WL 2267269, at *1 (E.D. Ark. May 23, 2017) (encouraging "more collaboration and reasonable compromise—and reminding counsel of their Rule 1 obligation to work together, using the Rules to promote fairness and efficiency") (citation omitted).

[15]*See generally, e.g.,* Arturo V. Bauermeister, *Are Rule 12(b)(6) Motions Still Appropriate Mechanisms for Enforcing Forum-Selection Clauses?*, Fed. Law.(Dec. 2015), at 17 & n. 15 (so noting in the context of motions to enforce forum-selection clauses).

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[25]*See, e.g.,* U.N. High Comm'r for Refugees, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers From Honduras (July 27, 2016), http://www.refworld.org/docid/579767434.html.

[26]*L-E-A-*, 27 I. & N. Dec. at 47.