Legal Research for Asylum Cases: A 'Learning to Fish' Guide for Solid Results

by Dr. Alicia Triche

Dr. Alicia Triche is sole proprietor at Triche Immigration Law, a Memphis, Tenn.-based private practice that focuses on appeals, research support for fellow attorneys, and refugee cases. In 2013, Dr. Triche received a D.Phil. in international refugee law from Oxford University.

U.S. immigration law, especially in recent years, has exploded with a proliferation of binding, nonbinding, and potentially persuasive "sources." In no area is this more pronounced than in the asylum context. Locating these sources is not overly difficult—amid existing publications, Google searches, and even internet forums, references to them abound. However, successfully navigating this vast river of authority is an entirely different skill. It's not simply a matter of finding "a" source, but finding the best possible source for the argument; and at the same time, making sure the text is authentic and the ruling is authoritative.

At this year's Annual Immigration Law seminar, the FBA's Immigration Law Section presented "Learning to Fish With a Particular Social Group," a panel that introduced a framework for navigating and authenticating legal authorities. This column is an adaptation of the general asylum context. The goal of an asylum law researcher is to establish a methodology that is mindful, thorough, and legally sound. Based on the panel, this column suggests a four-step approach toward that end.

Step 1: Start With Secondary Sources to Frame the Issue and to Determine 'Starting Point' Jurisprudence

To start from scratch on a general research issue, it is useful to consult treatises and the publication pages of expert organizations. For treatises, start with Deborah Anker's *Law of Asylum in the United States,* which is in hard copy and on Westlaw, and *AILA's Asylum Primer,* both of which are updated periodically. The website for the Center for Gender and Refugee Studies[1] has an excellent list of publications. Professor Sabrineh Ardalan at Harvard Law also provides an excellent online list of publications on refugee issues.[2] Reaching out to a colleague or an email discussion list can also be useful because someone may know a particularly on-point article or source that does not readily jump out from the treatises. For example, even though some case law has supplanted it, Matthew Lister's "Gang-Related Asylum Claims: An Overview and Prescription"[3] is useful for pinning down basic concepts. The Immigration Law Section's *The Green*

Card[4] newsletter has substantive articles, and the Executive Office for Immigration Review has its own *Immigration Law Advisor*.[5] Finally, the training manual for U.S. Citizenship and Immigration Services (USCIS) asylum officers also contains introductions to the subject area from the government's perspective. The basic sources can help to frame the issue more narrowly—for example, from "what is persecution" to "does a death threat constitute persecution."

From these "opening" sources, a researcher can more specifically frame the issue and make a list of opening cases to review. However, it is important to note that this is only Step 1 of research. No case should ever be cited unless its source is authentic and its authority is confirmed (i.e., it has not been vacated, modified, or overturned).

Step 2: Find All Current, Relevant Binding Authority, Making Sure Your Content and Citations Are Accurate and Authoritative

Statutes and regulations listed online are not necessarily authentic. The U.S. government publishes the only 100 percent "authentic" versions, found in the hard copy editions of the Code of Federal Regulations and U.S. Code or online at govinfo.gov. Despite this, respected sources are accepted as sufficiently reliable transcriptions, including Lexis, Westlaw, Bloomberg, and (at least among immigration practitioners) the American Immigration Lawyers Association. USCIS can be consulted for convenience, but in the end, the version of any statute cited should be checked against a sufficiently reliable commercial source or govinfo.gov.

Just as the text of laws must be authenticated, authority of cases must be validated. Every case cited *must* be "Shepardized." This is not negotiable. Commercial sources such as Westlaw will have "red flags" or similar alerts for overturned, published cases. More affordable sources are sometimes available for local attorneys, such as Fastcase in Tennessee. Google Scholar should not be used to Shepardize—it is not reliable. Other options are to look for free commercial databases at a local law school or to hire a legal research attorney a la carte to Shepardize a few cases

for a small fee. Keep in mind, also, that unpublished cases by the Board of Immigration Appeals (BIA) will *not* be part of the "red flag" system, so the researcher must look to the cases cited within and Shepardize those.

In the "binding authority" phase, the researcher is looking for *all* authority that is on point, so as to provide the adjudicator a thorough and honest picture. This includes cases where the point is in *dicta,* which (although the researcher can certainly argue against this) in practice can often be treated no different than a central ruling. One tip to find all binding authority, is to take your opening cases from Step 1 and look up all citing cases in a commercial database. Then, keep going until the cases begin to repeat themselves. Also, when looking to binding authority, keep in mind the *Brand X* rule that a court holding only trumps the agency when the language interpreted is "unambiguous" and leaves no room for discretion.[6] The BIA specifically purports to apply *Brand X. Matter of Cortes-Medina.*[7]

Step 3: Find the Best Persuasive Authority

Many asylum law questions are not directly answered in the binding sources. In that case, persuasive authority can be very useful. Court of Appeals cases are among the highest "level" of persuasive authority, but immigration practitioners often also cite to international courts, BIA unpublished decisions, and immigration judge decisions. When citing to "persuasive" authority, especially unpublished or Ninth Circuit decisions, it is very important to articulate why they are persuasive. For example: Is the case specifically on-point? Is the case particularly well-researched or well-reasoned? How often has it been cited? These are the characteristics that would make the case more persuasive.

Colleagues and legal publishers can be particularly useful in tracking down persuasive authority. Database "unpublished" immigration cases will not include asylum cases and do not include immigration judge decisions. However, the Immigrant & Refugee Appellate Center maintains an index of unpublished BIA decisions that can be purchased for a small fee. The Center for Gender and Refugee Studies maintains a database of both BIA and immigration judge decisions, which can be accessed through a request for attorney assistance. Dan Kowalski regularly circulates unpublished decisions on the Bender's Immigration Bulletin daily blog. These sources have no centralized database, so it is important to stay alert and keep track of good cases as they appear online or in an email inbox.

Step 4: If Necessary, Use Policy or Concepts to Bolster Your Argument

If, after completing Steps 1 through 3, there remains a gap in authority—or, if there is particularly persuasive policy support for the research position—then it can be useful to cite policy and concepts. To determine the "international" policy behind U.S. refugee law, useful starting points are *INS v. Cardoza-Fonseca*[8] and Anker and Posner's *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980.*[9] The four main international treaties include:

1. Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (2007);
2. James Hathaway, *The Rights of Refugees Under International Law* (2005);
3. Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951: Articles 2-11, 13-37* (1997); and
4. *The 1951 Convention Relating to the Status of Refugees and*

its 1967 Protocol: A Commentary (Andreas Zimmermann et al. eds., 2011).

Each of these can inform as to the "object and purpose" of the Refugee Convention, as expressed by international refugee law founders or commentators. For example, at page 37 of the Zimmermann collection above, one commentator discusses a possible "intent of the framers" argument for particular social groups: The Swedish delegate was "more likely" referencing persecution of groups "as had happened in Nazi Germany," Roma ("Gipsies"), "asocial persons," and "homosexuals." At the time, posits Terje Einarsen, it would have been a delicate matter to mention these groups explicitly, but it was well-known that Nazi Germany had particularly targeted such vulnerable groups.[10]

This shows that "particular social group" could have been meant to apply to especially vulnerable groups. This "object and purpose" policy could potentially be used to support similar groups today, such as homeless children targeted by gangs in Central America.

Conclusion

In the high-stakes context of U.S. asylum law, a researcher should aim for a standard of excellence. The strategy outlined above is designed to provide the adjudicator with an array of sources that persuasively compels a ruling in support of the argument at hand. At all times, the researcher should be aware of the argument, sort out each point of logic, and, perhaps most importantly of all, have empathy for the adjudicator's perspective and purpose. ⊙

Endnotes

[1] Center for Gender and Refugee Studies, Univ. Calif. Hastings, http://cgrs.uchastings.edu (last visited July 25, 2017).

[2] Sabrineh Ardalan, Harvard L. Sch., http://hls.harvard.edu/faculty/directory/10026/Ardalan/publications (last visited July 25, 2017).

[3] Matthew Lister, *Gang-Related Asylum Claims: an Overview and Prescription*, 38 Univ. Memphis L. Rev. (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1119967.

[4] The Green Card, Fed. Bar Ass'n, http://www.fedbar.org/Sections/Immigration-Law-Section/iThe-Green-Cardi.aspx (last visited July 25, 2017).

[5] Immigration Law Advisor, Dep't of Justice, https://www.justice.gov/eoir/immigration-law-advisor (last visited July 25, 2017).

[6] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005).

[7] *Brand X. Matter of Cortes-Medina*, 26 I&N Dec. 79 (BIA 2013).

[8] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987).

[9] Deborah E. Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981).

[10] Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol*, in The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary 37, [55-56] (Andreas Zimmermann et al. eds., 2011).