The Green Card

Judge Lawrence O. Burman, Founder and Designated Mascot of The Green Card. Photo by Helen Parsonage.

Quote of the Month

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

T.S. Eliot, Little Gidding

In This Issue

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Reflections on a 40-Year Career as an Immigration Lawyer and Judge

By The Honorable Dana Leigh Marks

DISCLAIMER: The author is President Emerita of the National Association of Immigration Judges and a sitting judge in San Francisco, California. The views expressed here do not necessarily represent the official position of the US Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.

I found immigration law quite by accident in 1976, the summer between my second and third years of law school. I responded to an ad for a part-time law clerk. The small law office was near school, paid well, and had nice support staff, so I took the job, barely knowing what the daily work would be. The field of immigration law was so small at that time that my law school only offered one, semester-long immigration law course every other year. It was not offered in the one year I had left before graduation. I have never taken an academic immigration law class, but rather learned my trade from generous practitioners who gave up their Saturdays once a month to teach free seminars to new practitioners. It was from that perspective that I developed a profound respect for immigration lawyers, so many of whom freely shared their knowledge in the hope of ensuring that quality legal services were offered to the immigrant community.

For me, the daily practice of immigration law was akin to love at first sight. It was the perfect mix of frequent client contact with fascinating people from all walks of life and all socioeconomic backgrounds that made me feel as if I was travelling the world; and a combination of social work and complex legal puzzles that intellectually intrigued me. As I became immersed in the field, I became totally hooked by the compelling stories behind my cases, as well as the complicated legal strategies that many cases required. At the time I began my career, I did not understand why immigration lawyers were generally ranked only slightly above ambulance chasers. My experience allowed me to interact with brilliant lawyers dedicated to helping their clients, often with little acknowledgement and meager remuneration.

When I began to practice and tried to explain the basics of immigration law to interested legal friends, it became clear to me that the statutory structure of this field of law was quite unique, but fairly sensibly built on general parameters of who would be a benefit to our country and thus should be allowed to find a way to legalize their status; and who were the bad actors who should not be allowed into the country or allowed to stay even if their initial entry had been legal. It struck a balance between family reunification and business and labor needs. There was even a category for industrious, pioneering individuals to come without sponsorship so long as they were able to support themselves financially. In short, it seemed to me to be a logical balance, with fair criteria to limit legal status to deserving, law-abiding people. Some of the hurdles that had to be overcome — for example, to test the labor market to protect US workers where one wanted to immigrate as an employee, or lengthy quotas that resulted in separation of families of lawful permanent residents (LPRs) — were clunky and cumbersome, but on the whole the system seemed to work fairly rationally.

While some aspects were frustrating and individual immigration officers sometimes seemed inflexible or even a bit irrational, I do not remember the legal community who helped immigrants being tormented by draconian twists and turns in the law on a daily basis, which is how it has seemed lately. When someone was in deportation proceedings, there was the possibility of showing that, after having lived in the United States for more than seven years as a person of good moral character, if one's deportation would cause oneself or a qualifying US citizen (or LPR) spouse, parent, or child extreme hardship, one could qualify for suspension of removal and eventual permanent resident status. There was also the possibility of qualifying for withholding of deportation if one was more likely than not to suffer persecution if returned to one's homeland if one had fled a communist country or certain specified geographic areas. Yes, the preference quotas could be problematic, but all in all, it seemed to me at that time that most people who wanted to regularize their status could carve out a reasonably achievable path towards their goal, while the bad actors who were sent home deserved that fate. Every so often there were sad cases of nice people who could not find a category that allowed them to stay, but somehow it just did not seem as harsh a result for so many people as it does lately.

The codification of the Refugee Act in 1980 ushered in a particularly exciting time. A large portion of my client base was from El Salvador, Guatemala, and Nicaragua, and the civil wars raging in the late 1970s were generating an influx of refugees. The stories I began to hear were exceedingly disturbing accounts of war and the cruelty which all too often accompanies it, but the horror was counterbalanced by the satisfaction of finding a way to protect people from further victimization by helping them secure safe haven in the United States. From an academic perspective, seeing how a statute evolved, through real-time interpretation and application, was a fascinating process — something many lawyers do not experience in their entire career. Then, to top it off, the Ninth Circuit set the stage to allow me to present oral argument in a case before the US Supreme Court in 1986. I am very proud that I, along with colleagues Kip Steinberg, Bill Hing, and Susan Lydon, were able to establish lasting precedent through our representation of Luz Marina Cardoza-Fonseca, making it clear that the use of the term "well-founded fear" was a significant change in the law and assuring that the adherence of the United States to the UN Protocol on Refugees was intended by Congress to guide our interpretation of US asylum law.[1]

Just as the briefs were being submitted, I learned that there

was an opening for a judge at the immigration court in San Francisco, a location I had vowed never to leave. I struggled with the decision of whether or not to leave a practice with partners I truly loved, or to dive into a new adventure, in the hope that I could lead by example and prove that a former private practitioner could be viewed as an impartial and fair judge, respected by both the prosecution and defense bars. It was an exciting time at the immigration court because only a few years earlier, in 1983, the Executive Office for Immigration Review (EOIR) was created as a separate agency outside the Immigration and Naturalization Service (INS) as a component in the Department of Justice (DOJ). That step was a vital step forward, acknowledging the important distinction which must exist between the prosecutor and the judge in deportation hearings. I went for it and became a member of a corps of 68 immigration judges working for EOIR at that time.

I found the transition to the bench challenging. There was far less interaction and discussion among peers as to how thorny legal issues might be resolved. In addition, because of the need to remain distant from the lawyers who appeared before me, I was much lonelier than I had been in private practice. While I found the interactions in the courtroom just as fascinating as in the first days of my legal career, there was a part of me that was unfulfilled. The stories I heard were riveting and the ability to resolve a conflict in a fair way extremely satisfying. However, I soon realized just how large a part advocacy played in my personality and path to personal satisfaction. This was quite a dilemma for a neutral arbiter who was determined to show the world that a former private practitioner could give both the government and the respondent a fair day in court! I searched to find an appropriate outlet for that aspect of my character, and the answer came in the form of my volunteer work for the National Association of Immigration Judges (NAIJ).

The NAIJ was formed in 1979 as a professional association of immigration judges to promote independence and enhance the professionalism, dignity, and efficiency of the immigration courts. Through my membership and eventually leadership at NAIJ, I was able to help my colleagues as a traditional labor union steward, as well as to educate the public about the important role played by the immigration court and the reality which exists behind the cloak of obscurity the DOJ favors. Many people, lawyers included, are surprised to learn that the DOJ insists on categorizing immigration judges as attorney employees, which gives rise to a host of problems for both the parties and for judges themselves.

While the creation of EOIR was a huge step forward, there was still considerable influence wielded by the INS. From courtrooms to management offices, ex parte communications occurred at all levels, and our relatively small system remained dwarfed by the behemoth immigration enforcement structure. My NAIJ colleagues and I worked hard to elevate the professionalism of our corps, to adhere to the American Bar Association (ABA) Model Code of Judicial Ethics, and to insulate our courts from political or ideological driven agendas, with the goal of assuring that all who appeared before us had a fair day in court. But we have always faced the headwinds of our classification as attorneys in an enforcement-oriented agency and the tension caused by enforcement goals that run counter to calm, dispassionate deliberation and decisional independence.

Despite the creation of EOIR and its early promise that we would benefit from enhanced equality with those who enforced our nation's immigration laws, we remained "legal Cinderellas," mistreated stepchildren who seemed to be doomed to endless hard work without adequate resources or recognition for our efforts. From the time I became an immigration judge, we have never received the resources we needed in a timely or well-studied manner, but instead for decades we have played catch-up, had to make do with less, and have faced constant pressure to do our work faster with no loss of quality. Immigration judges scored a legislative victory when our lobbying efforts codified the position of immigration judge in the mid-1990s, and again in 2003 when we succeeded, quite against the odds, to remain outside the enforcement umbrella of the Department of Homeland Security (DHS) when it was created. Those accomplishments were quite sweet, but unfortunately, they did not go far enough — a fact predicted by my NAIJ colleagues and me.

When I fast-forward to today, I see a substantive law which has spiraled out of control and a court system on the brink of implosion. The law has become so misshapen by unrelated, sometimes conflicting or overly repetitive congressional tweaks that it has become an almost unnavigable labyrinth, where many are lost on the way to their ultimate goal because of unanticipated interactions by the various incarnations of the statute. For example, the myriad criminal provisions interact illogically and conflict in ways that allow some clever lawyers to navigate a path for their clients, while pro se respondents become blocked from status with far less serious criminal histories because of an inability to parse nuances and wage creative legal battles.

And many provisions of the statute would surprise, or even shock, members of the public. Many people do not know that there is no such thing as "anchor babies" because US citizens cannot sponsor a parent until they are over 21 years of age, and even then, the parent's years of unlawful presence in the United States often present a virtually insurmountable bar to legal status. Many do not realize that US citizen children are routinely de facto deportees when their parents are removed, or that parental rights can be terminated for responsible, loving parents who are held in immigration detention and thus are prevented from appearing in family court to exercise their parental rights. Nor does someone become a US citizen (or even lawful resident) just because of marriage to a US citizen. But perhaps the most sobering fact that is little known by the public is the fact that there is no statute of limitations for crimes under the immigration laws. Therefore, LPRs can be deported decades after a conviction for a relatively minor drug crime because there is no mechanism in the law which allows them to remain, despite deep roots in the community and sometimes being barely able to speak the language of the country of their birth.

I am deeply concerned that decisions on immigration legislation so often seem to be based on sound bites or knee-jerk reactions to individual horror stories rather than careful and unbiased analysis of documented facts and trends. I fear the public is deprived of the ability to form a well-reasoned

opinion of what the law should provide because the rhetoric has become so heated and the facts so obscured. The immigration law has grown away from allowing decision-makers, especially immigration judges, to make carefully balanced decisions which weigh nuanced positive and negative considerations of someone's situation. Instead, rigid, broad categories severely limit the ability of those of us who look an immigrant in the eye and see the courtroom filled with supporters from carefully tailoring a remedy, which can make our decisions inhumane and disproportionate. Such rigidity reflects poorly on our legacy as a country that welcomes immigrants and refugees and leads to results which can be cruel and not in the public's interest.

In the rush to reduce the backlog that was decades in the making, our immigration courts are once again in the hot seat, and individual judges are being intensely pressured to push cases through quickly. Immigration judges are placed in the untenable position of having to answer to their boss because of their classification as DOJ attorneys who risk loss of their jobs if they do not follow instructions, and yet we judges are the ones who are thrown under the bus (and rightfully so) if the corner we cut to satisfy that unrealistic production demand ends up adversely impacting due process. That pressure is intense and the delicate balance is one that often must be struck in an instant through a courtroom ruling — made all the more difficult because of the dire stakes in the cases before us. But, just to make it abundantly clear to immigration judges that productivity is paramount, last October our personnel evaluations were changed so that an immigration judge risks a less than satisfactory performance rating if s/he fails to complete 700 merits cases in a year. The DOJ's focus and priority in making that change is not subtle at all, and the fact that our corps has recently expanded so fast that dozens, if not hundreds, of our current judges are still on probation, makes this shift an even more ominous threat to due process. The very integrity of the judicial process that the immigration courts are charged by statute to provide are compromised by actions such as this. Production quotas are anathema to dispassionate, case-by-case deliberation. One size does not fit all, and quantity can take a toll on quality. Perhaps most important, no judge should have his or her personal job security pitted against the due process concerns of the parties before them.

I know I am not alone in feeling the weight that this constellation of circumstances of an out-of-date law and political pressure on immigration judges has created. All around me, I see frustration, disillusionment, and even despair among immigration law practitioners who are also suffering the consequences that the speed-up of adjudications places on their ability to prepare fully their cases to the highest standards. I see many colleagues leaving the bench with that same mix of emotions, a sad note upon which to end one's career. Yet I can completely relate to the need to leave these pressures behind. I have witnessed several judges leave the bench prematurely after very short terms in office because they felt these constraints prevented them from being able to do the job they signed up to perform.

It is supremely discouraging and, frankly, quite a challenge to remain behind in that climate. But as I write these reflections, I know I am not ready to leave quite yet. We must learn from history. We must do better for ourselves and the public we serve. Our American ideal of justice demands no less. When we canaries in the immigration courtrooms began to sing of our need for independence decades ago, we were seen as paranoid and accused of reacting to shadows in the mirrors of our cages. Finally now, we are seen as prescient by thousands of lawyers, judges, and legislators across the country, as reflected by proposals by the ABA, Federal Bar Association, National Association of Women Judges, Appleseed Foundation, and American Immigration Lawyers Association. There are signs that these calls are being heeded by lawmakers, although the legislative process seems both glacial and mercurial at best. The creation of an Article I Immigration Court is no longer a fringe view, but rather the solution to the persistent diminution of essential safeguards our system must have, clearly acknowledged by experts and stakeholders alike.

The challenges our nation faces as we struggle to reform our immigration law to meet modern needs are many, but a single solution for a dramatic step towards justice has become crystal clear: we must immediately create an Article I Immigration Court. We cannot afford to wait another 40 years to do it. Besides, I want to see it happen in my professional lifetime so that the chapter can be complete and the clock is ticking…

Endnotes:

[1]See *INS v. Cardoza-Fonseca*, 480 US 421 (1987).

These remarks are reprinted with permission from the Center for Migration Studies (CMS). The original is located at https://cmsny.org/publications/marks-40yr-career/ (accessed Apr. 23, 2019). On November 15, 2018, CMS hosted an event on access to justice, due process and the rule of law to honor the legacy of Juan Osuna, a close colleague and friend who held high-level immigration positions in four administrations over a 17-year period. Prior to his government service, Mr. Osuna served as a respected editor and publisher and a close collaborator with many civil society organizations. As a follow-up to its November 15th gathering, CMS will be posting and publishing a series of blogs, essays, talks, and papers on the values and issues to which Mr. Osuna devoted his professional life, and ultimately compiling them as part of a CMS special collection in his memory.

ILS Sponsors Fourth Annual NYLS Asylum Conference

By Reyna Baum Lifson and Eliza George

"Who lives, who dies, who tells your story?"

-- from "Hamilton" the musical

"Is anybody there, does anybody care, does anybody see what I see?"

-- John Adams quote, delivered in closing remarks by the Honorable Dorothy Harbeck

The "New York Asylum and Immigration Law Conference: 2018 – 2019," the fourth yearly event of its kind, took place on March 8, 2019 at New York Law School. As in years past, FBA-ILS was an enthusiastic sponsor. Several ILS Executive Officers, including Chair Betty Stevens, incoming Chair Mark Shmueli, and Treasurer Judge Amiena Khan, were speakers and active participants. Long-standing ILS members such as Amy Gell, Ray Fasasno, Linda Kenepaske and Amelia Wilson, and George Terezakis also spoke. Finally, long-standing Board member Judge Dorothy Harbeck was a key organizer of the conference.

The event drew lawyers, judges, retired judges, artists, mental health professionals, activists, advocates and law students from throughout the country. The focus on this year's conference was a multidisciplinary examination of the "story" that is the central part of a refugee's asylum application, and of the applicant's experience facing and fearing persecution at home. The story of every asylee is unique. Immigration attorneys are tasked with the immense responsibility of conveying these stories to the Court in a manner that accurately captures and humanizes their plight; that is sensitive to the trauma they have experienced; that effectively incorporates expert testimony and country conditions, and that meets the complex and ever-changing requirements of the law in this area. In a wonderfully engaging day filled with scholarship, networking, information and the sharing of stories, the conference emphasized the importance of both narrative and the law in shaping the strategies utilized by immigration attorneys.

Each of the twelve sessions, divided into three tracks (basic, intermediate and advanced topics), featured lively panel discussions involving a range of distinguished speakers and moderators. The first track, "Basics", featured presenters who provided a comprehensive introduction to the asylum process, practice tips on proving the grounds for asylum, and an overview of important legal developments relating to the particular social group ground and statutory bars to asylum. The third "Advanced" track, Asylum Topics and Ethics, provided attendees with the opportunity to learn from leading immigration law practitioners, academics and the Newark Asylum Office about how to address some of the most pressing challenges facing immigration rights' advocates today, including advanced discussions on new impactful cases (e.g., the *Matter of A-B-* and *Matter of L-E-A*), statutory bars to asylum, withholding of removal in a post 9-11 national security landscape, and expert advice dealing with best practices before the Asylum Office and the myriad of ethical issues that arise in immigration law cases.

In addition to these engaging and highly informative presentations led by immigration law practitioners, experts, and Judges, what made this year's conference incredibly memorable was its interdisciplinary focus. For example, the second track, aptly named the "special" track, featured the "Constructing the Narrative" series. In Constructing the Narrative, Part 1, filmmaker Susan Margolin (who is documenting the escape from gang violence of a family of children), John Volk from the NY Academy of Art (who works with students to use 3D printed skulls of those who died crossing the desert in Arizona to create lifelike faces using forensic techniques that help identify the deceased) and retired Judge and rug hooker, Polly Webber (who displayed her artistic depictions of the refugee's plight) were captivating speakers. Constructing the Narrative, Part 2 was moderated by ILS Board member/Green Card Editor Dr. Alicia Triche, and featured Chilean-American writer and poet, Professor Marjorie Agosin, who showed a short film about story-telling through apilleras. Other panels featured the role of mental health experts in applications where asylees have faced trauma and discussion of new issues impacting detainees. During lunch, the conference attendees joined together to hear Professor Agosin read poems about her family's experiences as immigrants.

"A lot of times. All they'll find is a skull." John Volk Presents "Constructing the Narrative Part 1."

The conference concluded with a closing plenary featuring retired Immigration Judge and former Board of Immigration Appeals Chair Paul Schmidt, retired Immigration Judge Jeff Chase, who were joined by skype by Professor Blaine Bookey (attorney at the Center for Gender and Refugee Studies at University of Hastings who represented Ms. A-B in Matter of A-B). The three explored strategies to preserve the right to asylum for survivors of gender violence in the aftermath of the *Matter of A-B*, a case which departed from decades of precedent regarding the ability of victims of domestic violence to seek asylum. Retired Immigration Judge/former Board of Immigration Appeals Chair Paul Schmidt inspired the audience with his call for immigration law advocates to become "due process warriors", and with his impassioned discussion about the need for an articled and independent Immigration Court. His call to action elicited a standing ovation from the audience.

In addition, the conference featured opening remarks by Elizabeth Stevens and Judge Khan, who explained that judges are no longer allowed to present in their capacity as judges, expressed concerns about politics used in immigration courts raising due process concerns, and highlighted the backlog of 800,000 asylum cases. In this context, it is all the more imperative for lawyers to clearly present the stories of asylum applicants, and to utilize intricate knowledge of the complexities of law, case law and political developments. The Keynote Welcome was delivered by Commissioner Bitta Mostofi, Mayor's Office of Immigration Affairs. She emphasized New York City's commitment to immigrants, and warned of an 80% increase in immigration enforcement against people with no criminal conviction. She stressed the city's role in working with others to protect immigrants.

Dr. Alicia Triche and Hon. Jeff Chase (ret.). Photo by Judge Harbeck

In closing remarks, Judge Harbeck and Professor Thomas reemphasized the centrality of the narrative in asylum work, and the need for new ideas and approaches to address the new challenges facing immigration attorneys today. Elizabeth Stevens emphasized the need for immigration decisions to be unbiased and apolitical. She urged conference attendees to sign a petition recommending a draft bill to make Immigration Courts Article 1 courts which would no longer be part of the U.S. Department of Justice.

If you missed this invaluable conference, there is always next year, for another incredible day of knowledge, networking, sharing, learning, bonding, and being inspired. Special thanks to the many organizers, presenters, moderators and volunteers who made this day possible.

Photo Album: ILS/New York Law School Asylum Convention

Hon. Polly Weber (ret.) and Hon. Jeff Chase (ret.)

Renouned filmmaker Susan Margolin in Constructing the Narrative Pt I

New York Law School Students doing a bang-up job running things

Left to right: Dr. Alicia Triche, Prof. Lori Nesel, Dr. Marjorie Agosin and Dr. Lisa Bernstein, panelists in Constructing the Narrative Pt. 2

Judge Dorothy Harbeck, right, with a fellow conference attendee

Elizabeth (Betty) Stevens, ILS Chair, Speaks Persuasively on the Importance of an Article I Immigration Court

Happy conference-goers await the next session in the main auditorium

Intro to Asylum Law Panelists Raymond Lahoud and Lt. Col. Margaret Stock

In her NAIJ capacity, Judge Amiena Khan delivers a compelling plenary on due process in US Immigration Courts

Left to right: George Terezakis, Linda Kenepaske and H. Raymond Fasano speak on Statutory Asylum Bars

Conference-goers enjoy their lunch while Hon. Paul Schmidt (left) reviews his rousing plenary remarks

Poster signed by all speakers and organizers at the closing reception

Accolades for ILS Members at Poarch Law in Salem, VA

Poarch Law is in the news! Long time ILS Governing Board member Christine Poarch and her associate (and now Professor) Rachel Thompson have issued recent press releases detailing notable achievements. They are excerpted below.

Virginia Attorney Christine Poarch earns recognition as one of the top adoption attorneys in US.

SALEM, Va. (Feb. 20, 2019) Salem-based Immigration and Adoption Attorney, Christine Poarch, has been named a Fellow of the prestigious Academy of Adoption and Assisted Reproduction Attorneys (AAAA or "Quad-A"). Poarch's induction into AAAA follows a highly selective process, including extensive demonstrated expertise, audited professional experience, a referral for admission by several current AAAA members, and a rigorous review of ethical practices.

AAAA is a credentialed organization dedicated to the competent and ethical practice of adoption and assisted reproduction law. It advocates for laws and policies to protect the best interests of children, the legal status of families formed through adoption and assisted reproduction, and the rights of all interested parties.

Fellows of AAAA are considered legal thought leaders and are a highly vetted, experienced group. Currently the majority of Virginian attorneys in the academy are based in and around DC and Christine is the only attorney with a practice in Southwest Virginia.

President of the Academy Eric Stovall said, "We are delighted to welcome Christine into the Academy. Having a resource of her caliber in Southwest Virginia combined now with the support of the Academy will be a great asset to the local community. "

"The work we've done in international and domestic adoption is some of our most challenging and rewarding. It's both an honor and an opportunity to be named an Adoption Fellow." Christine Poarch said.

Local attorney Rachel Thompson Joins Liberty University School of Law as Adjunct Law Professor

SALEM, Va. (Feb. 20, 2019) Salem based immigration and adoption attorney Rachel Thompson has returned to her alma mater as an adjunct professor for Liberty University School of Law. She is teaching Adoption Law at the same program where she earned her own law degree in 2012.

Thompson brings extensive experience as an Immigration and Adoption Lawyer to her new position. She continues practicing full time with Poarch Law in Salem, Virginia where she has been since 2013.

The daughter of immigrants, Thompson is passionate about her area of practice and hopes to make an impactful difference in the minds and careers of her new law students. "It means so much to be able to teach at a place that has taught me so much," Thompson stated. "I'm so grateful for the professors I had at Liberty. I plan to not only teach law but to invest in my students the same way my professors invested in me."

Liberty University lies in the foothills of the Blue Ridge Mountains in Lynchburg, Virginia and is within a few hours of Washington, D.C and Charlotte, N.C. Its rigorous legal skills program is taught from a Christian worldview, which not only prepares students with the core competency skills needed to practice law but also how to integrate faith and reason into their choice of law practice. They are approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association.

Publication Opportunity

Is your office in the news? Get your story in The Green Card. Email the editor, Dr. Alicia Triche at aliciatricheclc@gmail.com.

ILS Chicago Holds First Leadership Luncheon

ILS instituted a highly successful first Chicago leadership lunch on Jan. 24, 2019. It was titled "Immigration Court Hot Topics." Speakers were retired Immigration Judge Robert Vinikoor and National Immigrant Justice Center attorney Ashley Huebner, and around 40 people attended. To learn more about the Chicago luncheons, contact ILS Secretary Kate Goettel.

ILS Chair Elizabeth Stevens Attends 2019 Capitol Hill Day

Our current chair, Betty Stevens, has been a tireless advocate for an Article I Immigration Court. On March 21, she played a large part in this year's FBA "Capitol Hill Day." Excerpts from the official FBA account follow. (Original located at http://www.fedbar.org/Advocacy/2019-Capitol-Hill-Day-Recap.aspx).

Seventy-four Federal Bar Association leaders fanned out across Capitol Hill on March 21, 2019 to educate House and Senate lawmakers about the importance of the federal courts and their needs. This year's annual FBA advocacy event, the largest ever, coincided with the FBA Leadership Summit and Midyear Meeting.

Participants hailed from 25 states and Puerto Rico, 11 circuits and represented 38 FBA chapters. All delegates reported they received a warm reception throughout the course of 200-plus meetings they held with House and Senate offices. In their meetings, FBA advocates promoted the following five FBA policy priorities (taken from the FBA's official website):

Adequate FY 2020 funding for the federal courts. FBA supports the judiciary's FY 2020 budget request of $7.6 billion, reflecting a 4.9 percent increase above last year's courts appropriation.

Prompt action in filling judicial vacancies on the federal district and appeals court bench. Current high numbers of vacancies on the federal bench should be erased because they harm the delivery of justice, the economic interests of litigants, and public respect for our judicial system...In mid-March 2019, there were 140 Article III vacancies, including 129 district court vacancies. The FBA's interest in this area lies in the assurance of prompt, dispositive action by the President in nominating federal judicial candidates and the Senate in confirming (or not confirming) them. As a matter of policy, the FBA takes no position on the credentials or qualifications of specific nominees to the Federal bench.

Growing Caseloads in our Federal Courts Require More Judgeships. Several district courts continue to struggle with extraordinarily high and sustained workloads...

Congress Should Establish an Independent Immigration Court. There is broad consensus that our system for adjudicating immigration claims is broken and deserves systemic overhaul. Since 2013, the FBA has urged Congress to replace the Executive Office for Immigration Review in the Department of Justice with an independent "United States Immigration Court" to serve as the principal adjudicatory forum under title II of the Immigration and Nationality Act. Establishing a specialty court would replace a bloated bureaucracy with a new structure, modeled on the federal courts, with demonstrated expertise in delivering prompt, effective justice. Cheaper, faster, better justice is possible through an Article I immigration court.

Support for Foundation of the Federal Bar Association Charter Amendments Legislation. The FBA urges Congress to pass the bipartisan Foundation of the Federal Bar Association Charter Amendments Act, H.R. 1663. This measure, introduced by Rep. Steve Chabot (R-OH) and cosponsored by Rep. Jamie Raskin (D-MD), would make technical changes in the federal charter of the FBA Foundation and flexibility to permit the Foundation to fulfill its role as the only institution in America chartered by Congress to promote the federal administration of justice, the advancement of federal jurisprudence and the practice of law in the federal courts.

Article

Advancing a "Social Group Plus" Claim After Matter of A-B-

By Cyrus D. Mehta

In Matter of A-B–, 27 I&N Dec. 227 (A.G. 2018), former Attorney General Jeff Sessions overruled a prior Board of Immigration Appeals (BIA) precedent, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which held that victims of domestic violence can qualify for asylum based on their particular social group (PSG) of "married women in Guatemala who are unable to leave their relationship." Although victims of domestic violence has been recognized as a particular social group in US asylum law as well as in the asylum laws of other countries like the United Kingdom, Canada and New Zealand, Sessions set aside *Matter of A-R-C-G* resulting in a setback for persons fleeing domestic violence.

There is much commentary revealing how the reasoning of *Matter of A-B* was dicta. The application of *Matter of A-B* has been successfully challenged in the context of credible fear claims in *Grace v. Whitaker*. Therefore, despite *Matter of A-B*, an applicant must still assert membership in a particular social group when fleeing domestic violence. In *Matter of M-E-V-G-*, 26 I&N 227 (BIA 2014), the Board acknowledged that whether a particular social group exists is a case-by-case determination and the AG's decision should not be read to foreclose alternative particular social group formulations for victims of domestic violence where the facts of the case support it. *Matter of M-E-V-G-*, 26 I&N 227, 242 (BIA 2014); *Matter of A-B-*, 27 I&N Dec. 227, 319 (AG 2018) (noting that this decision is consistent with *Matter of M-E-V-G-*). It may however be prudent for an applicant fleeing domestic violence to assert other grounds of asylum in addition to membership in a particular social group.

As brief background, in order to be granted asylum, the applicant must show that they have suffered past persecution or have a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion, and that he or she is unable or unwilling to return to, or avail himself or herself of the protection of, their country of origin owing to such persecution. 8 C.F.R. § 1208.13(b)(1) & (2).

The agile immigration law practitioner must endeavor to invoke grounds in addition to particular social group when representing an asylum claimant fleeing domestic violence such as race, religion, nationality or political opinion. This is what I refer to as a "social group plus" claim. Often times, the additional ground can be blended and intertwined with the particular social group ground that would only strengthen this ground, and enable the client's claim to be readily distinguished from *Matter of A-B*.

Religion and Ethnicity

It may be worth exploring whether an applicant can claim asylum on account of race, religion or nationality. Many applicants may belong to ethnic backgrounds or religions whose members may face discrimination in the country. Hence, a victim of domestic violence who belongs to a religion or ethnic group that is disfavored may find it more difficult to seek the help of the authorities when seeking protection from domestic violence perpetrated by a private actor. Establishing this fact, based on the claimant being part of a disfavored group, will enable such a claim from overcoming the elevated concern of "private actor harm" in *Matter of A-B.* There are several decisions that have acknowledged persecution claims based on religion, ethnicity or both. In one decision, the Board held that the respondent faced anti-Semitic persecution on account of the respondent's Jewish nationality. Even if ethnicity is not part of the grounds for asylum, an ethnic group may fall under the "nationality" ground. It can thus be argued that ethnicity or religion can also constitute "nationality", such as Jewish nationality in the Ukraine, Armenian in Russia or Parsi Zoroastrian in a Muslim majority country. The following decisions support such an argument:

- *Pan v. Holder*, 777 F.3d 540 (2d Cir. 2015) (Korean ethnicity and evangelical Christian religion).
- *Shi v. AG*, 707 F.3d 1231 (11th 2013)(Christian religion in China).
- *Bracic v. Holder*, 603 F.3d 1027 (8th 2010) (Muslim religion and Albanian ethnicity).
- *Matter of O-Z and I-Z-*, 22 I&N Dec. 23 (BIA 1998) (Jewish nationality).
- *Ahmed v. Keisler*, 504 F.3d 1183 (2007) (Bihari in Bangladesh was a disfavored group and respondent likely to be targeted as a result).

Moreover, as family qualifies as a social group under *Matter of L-E-A*, 29 I&N Dec. 40 (BIA 2017), an applicant can also distinguish ethnicity or religion of the family that stands out in the country or because it may be a vulnerable minority group. This can overcome the nexus barrier in *L-E-A*. Although former Acting Attorney General Whitaker referred L-E-A to himself, *L-E-A* is still good law at present. There is also a long history of family units constituting particular social groups. *See, e.g., Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Al-Ghorbani v. Holder*, 585 F.3d 980 (6th Cir. 2009); *Torres v. Mukasey,* 551 F.3d 616, 629 (7th Cir. 2008). The BIA has previously "explained that 'persecution on account of membership in a particular social group' refers to 'persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic…such as…kinship ties." *Matter of C-A-*, 23 I&N Dec. 951, 955 (BIA 2006) (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985)). "It has been said that a group of family members constitutes the 'prototypical example' of a particular social group." INS,

Asylum Officer Basic Training Course: Eligibility Part III: Nexus 21 (Nov. 30, 2001) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)). "There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family." *Gebremichael v. INS,* 10 F.3d 28, 36 (1st Cir. 1993).

Imputed Political Opinion

Imputed political opinion can also be developed in a domestic violence asylum case when the abusive spouse is politically powerful and uses the state apparatus to persecute defiant or feminist spouse or spouses who defy their husband's authority under an honor code such as Kanun in Albania. Long before there was any precedent decision, in 1996, I successfully represented a respondent claiming asylum who escaped domestic violence abuse perpetrated by her husband who was a powerful police officer in Bangladesh. He did not allow her to work or start her own business, and thus she was persecuted for expressing herself, which went against the mores of her family and society. She was unable to seek protection as her husband was a powerful police officer. Around the same time, in another case where I had no involvement, an Immigration Judge granted asylum to Bangladeshi woman who had been beaten by family on account of her role in the Jatiyo Mahila Party and because of her efforts to lead an independent life. *Matter of Sonia Sharmin* (A73 556 033, IJ New York, NY, Sept 30, 1996). In *Fatin v. INS*, 12 F.3d 1233 (3d Cir 1993), Judge Alito writing for the majority agreed that gender was an immutable characteristic and thus satisfying the particular social group definition, and in addition, the respondent's feminism or opposition to male dominance constituted political opinion. In a post *Matter of A-B–* decision, an Immigration Judge in San Francisco granted asylum to a woman from Mexico who suffered abuse from both her mother and her husband on account of both particular social group and her feminist political opinion.

There is also a nexus between gangs and the government in the Northern Triangle countries. Gangs may control the government, and in some cases they have become the "de facto government" controlling significant areas of the country. This factor too can give rise to an alternative ground for asylum under political opinion.

Consider the following cases in advancing imputed political opinion in addition to membership in a particular social group for an asylum claimant fleeing domestic violence:

- *Al-Saher v. INS*, 268 F.3d 1143 (9th 2001) (political opinion encompassed more than electoral politics or formal political ideology or action).
- *Sangha v. INS*, 103 F.3d 1482 (9th 1997) (political opinion can be an actual opinion held by the applicant or an opinion imputed to him/her by persecutor).
- *Ahmed v. Keisler, supra* (Bihari in Bangladesh who wants to be sent to Pakistan can show imputed political opinion in addition to membership in particular social group).
- *Osorio v. INS,* 18 F.3d 1017 (2d Cir. 1994) (membership in union can constitute social group, but if union is also opposed to the government in economic dispute, can impute political opinion to its member).

Matter of A-B was a cowardly decision based on Session's personal bias. He abused his authority as Attorney General to overturn an established precedent decision that has provided protection to thousands of victims of domestic violence in the United States. Although Sessions is no longer Attorney General, this is his dark legacy that must not be allowed to undermine the rights of mainly women fleeing domestic violence. Immigration practitioners must use every strategy to both overcome and take down *Matter of A-B*.

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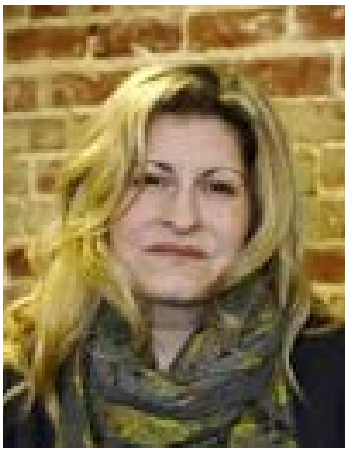
Editor's Corner: Cases to Watch, Spring 2019

By Dr. Alicia Triche



Some may have heard of a parable that goes: "in the land of the blind, the one-eyed man is King." For the past few years, I have often felt that a new version of this age-old adage might be called for. It goes something like this: "In the land of the internet, s/he with the Filter is King." It can seem, these days, like "immigration law" is a moving target—one that attorneys much search out, constantly, through a noisy and never-ceasing stream of incoming internet chatter. With that in mind, here are some of what I consider to be the most important, "moving target" judicial developments for (non-business) federal immigration attorneys. These are, in my opinion, the "ones to watch".

Pereira v. Sessions and Subject Matter Jurisdiction.

In the aftermath of *Pereira v. Sessions*, 138 S.Ct. 2015 (2018), much uncertainty arose regarding the potentially far-reaching effects of the Supreme Court's ruling. The decision rested on a preliminary finding that, without a time and place, a document is not a "notice to appear" within the meaning of INA § 239(a)(1)(G). This raised the question of whether such a "purported" notice to appear could ever be a "charging document," thus vesting jurisdiction under 8 C.F.R. § 1003.14(a). The Board attempted to lay the matter to rest with *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). However, the litigation is still ongoing.

US District Courts have repeatedly ruled that Pereira is applicable to subject-matter jurisdiction via 8 C.F.R. § 1003.14(a), with some denying deference to *Bermudez-Cota.* Some of those cases are:

- *United States v. Bastide-Hernandez*, 2018 WL 7106977 (E.D. Wash. 2018);
- *United States v. Tzul*, 2018 WL 6613348 (S.D. Tex. 2018) ;
- *United States v. Lopez-Urgel*, 2018 WL 5984845 (W.D. Tex. 2018);
- *United States v. Ortiz*, 2018 WL 6012390 (D. N.D. 2018);
- *United States v. Cruz-Jimenez*, 2018 WL 5779491 (W.D. Tex. 2018);
- *United States v. Zapata-Cortinas*, 2018 WL 4770868 (W.D. Tex. 2018);
- *United States v. Virgen-Ponce*, 320 F. Supp.3d 1164 (E.D. Wa. 2018).

However, at least three Circuits have deferred to the Board, holding that a Notice to Appear that does not meet Pereira's requirements can still impart subject matter jurisdiction:

- *Karingithi v. Holder*, 913 F.3d 1158 (9th Cir. 2019)
- *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018)
- *Banegas-Gomez v. Barr,* ____ F.3d ___ (2d Cir. Apr. 23, 2019).

The Tenth Circuit heard oral argument on the issue May 7, 2019, and should soon render an opinion. Professor Geoffrey Hoffman at the University of Houston Law Center Immigration Clinic has been informally tracking developing jurisprudence on Pereira in the Circuit Courts.

IJ Bond Jurisdiction for Detained Asylum Seekers

On April 16, 2019, Attorney General Barr issued *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019). M-S- explicitly overruled *Matter of X-K-* to hold that INA § 235(b)(1)(B)(ii) mandates detention for those who have passed credible fear, and who have been subsequently transferred from expedited proceedings to full proceedings. By its own direction at footnote 8, the mandate of this decision is delayed for 90 days. Thus, it is not yet in effect—but, if and when it does take effect, Immigration Judges will no longer have jurisdiction to issue bonds for arriving asylum-seekers who fall within the description of the class in *Matter of M-S-*.

M-S- is directly affected by national, ongoing litigation regarding the rights of detained arriving asylum-seekers in bond proceedings. Starting May 31, 2019, that group now has specific rights under a nation-wide injunction issued in *Padilla v. U.S. Immigration & Customs Enforcement*, No. C18-928 (W.D. Wash. Apr. 5, 2019). According to the injunction, starting May 31, 2019, arriving asylum seekers who have passed credible fear and asked for a bond hearing have the right to a hearing within 7 days, a verbatim transcript of the hearing, and a presumption against detention. The order can be found here: https://www.nwirp.org/wp-content/uploads/2019/04/110-order-granting-PI.pdf (accessed May 7, 2019).

The *Padilla* complaint has now been amended to challenge *Matter of M-S-*. It remains to be seen whether the Court's order, as it stands, will go into effect May 31, or if that order will be amended to reflect the *M-S-* decision. At present, *M-S-* and the *Padilla* order are on a collision course, that will have to be resolved, one way or another.

Gender Plus Nationality as a Particular Social Group

In the aftermath of *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the fate of future domestic-violence based asylum claims has been uncertain. One trend that seems to be developing is a buffering of the concept that gender plus nationality constitutes a particular social group. Historically, the Ninth Circuit held that Guatemalan women could be a

PSG in *Pedromo v. Holder*, 611 F.3d 662 (9th Cir. 2010). A few years later, in dicta, the Tenth Circuit indicated the possibility for such a group in *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005).

Now, according to the Center for Gender and Refugee Studies, at least three recent Immigration Judge decisions have held that either "Salvadoran women" or "Guatemalan women" are PSGs. Anecdotally, it is also rumored that the BIA has remanded cases for IJ consideration of similar particular social groups. It remains to be seen how this development will play out. It is worth noting that USCIS (but not EOIR) is now bound by *Grace v. Whitaker,* 2018 WL 6628081 (D.D.C. Dec. 19, 2018), which effectively overrules much of the A-B- decision. The D.D.C. opinion is available here: https://www.aclu.org/sites/default/files/field_document/opinion_-_grace_v._whitaker.pdf (accessed May 7, 2019).

The Green Card

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