Litigating Gender and Domestic Violence-Based Asylum Claims

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Gender Asylum: Gender *per se* defining Particular Social Group (PSG)

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The Object & Purpose of Asylum

“Refugee law is…principally concerned with providing a remedy to a fundamental breakdown in the relationship between an individual and her state . . . . The Refugee Convention’s overarching goal is to provide a new national home to persons driven from their own country by the risk of being persecuted.”


International Human Rights Law: Relevance
US Refugee Law and International Law

• I.N.S. v Cardoza-Fonseca: “If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.”
Elements of the U.S. Refugee Definition

Element 1: STANDARD OF RISK
• Past persecution or Well-founded fear

Element 2: PERSECUTION
• Serious Harm + Failure of State Protection

Element 3: NEXUS
• “On account of”

Element 4: GROUNDS
• Race, Religion, Nationality, Membership in a particular social group, Political opinion

Element 5: BARS TO ELIGIBILITY
Favorable exercise of discretion
PARSE!
Particular Social Group: What is it?

- **Matter of Acosta:** Immutability (ejusdem generis)
  
  - Innate or unchangeable characteristics
    - Past status
  - Characteristics fundamental to identity or conscience
    - Protected association or belief
    - Fundamental to human dignity
    - Should not be forced to change
  - Mentions "sex, color, and kinship ties" as examples
Keeping with Acosta

- Family – *Gebremichael v I.N.S.*; *L-E-A- I I*
- Past Status – former law enforcement, witness, gang
- Sexual Identity - *Matter of Toboso-Alfonso*
- Child Status + other characteristics
- Gender: *Fatin v. I.N.S.* 12 F3d 1233 (3d Cir. 1993) (Alito; dicta)
Particularity and Social Distinction

• *M-E-V-G- and W-G-R-* (2014) add two criteria in addition to immutability:
  • Social distinction
    • “Social distinction exists where the relevant society perceives the group as a distinct social group . . . . Social distinction may therefore not be determined solely by the perception of an applicant’s persecutors”
    • “Ocular” visibility not required (members need not be identifiable by sight)
  • Particularity
    • Are there clear benchmarks for determining those who belong and those who do not?
    • “The group must also be discrete and have definable boundaries—it must not be amorphous.”
  • Withdrawn/Overruled: *A-B-* (A.G. 2018): does not alter social group framework set out in *Acosta* any more than *M-E-V-G* or *W-G-R-*
Challenges: Formulating a PSG

“Defining a PSG is unspeakably complex and the requirements ever-changing . . . . [E]ven experienced immigration attorneys have difficulty articulating the contours of a PSG.”

-Cantatero-Lagos v. Barr (5th Cir. 2019) (Dennis, J., Concurring in the judgment)
Problematic Formulations

PSGs now often conflate various elements – kitchen sink theory of the case

• “Individuals enrolled in school in Guatemala who are tall or have a muscular build [so as] to command respect resulting in their recruitment by gangs for their capacity to sell drugs”

• “Persons in Mexico who are not associated with either a cartel or the Mexican government”

• “Women who were previously targeted for sex-trafficking by members of the Haklaj gang and who managed to escape and avoid capture”

• “Young Guatemalan females who have suffered violence due to female gender”
History: Gender Asylum in the U.S.

- Recognition of gender claims, born (at least in part) out of the struggle of Haitian women refugees.
- **Matter of D-V-**, 21 I. & N. Dec. 77 (B.I.A. 1993); First precedent gender asylum decision; mobilization of law school clinics etc. Sexual assaults on women constitute “grievous harm.”
- **Matter of Kasinga, en banc precedent decision**, recognizing FGM as form of harm, that can constitute persecution.
- **Matter of R-A-**, 22 I. & N. 906: CGRS; HIRC’s Women’s Refugee Project brief (with 187 NGO signatures).
- Problematic PSGs (types of problems)
Gender

• Gender as an immutable characteristic
• Examples of cases where persecution may be on account of gender:
  • Trafficking
  • FGM
  • Forced Marriage/relationship (latter in gang context)
  • Femicide and targeting of single women
  • Domestic violence
• But note: PSG may not be the only or best basis for such claims (always also consider nexus to political opinion, race, religion, etc.)
• Recognition of gender per se PSG: Program of Action of Fourth World Conference on Women (Beijing, China 1995)
Gender per se claims

• 1995 U.S. Gender Guidelines
• 2002 UNHCR Guidelines
• *Perdomo v. Holder* (9th Cir. 2010) ("women in a particular country... could form a particular social group"); see also *Silvestre-Mendoza. v. Sessions* (9th Cir. 2018)
  • Remanding for consideration of gender + nationality claims
Gender *per se* claims and Social Distinction and Particularity Requirements

- Gender also meets the “particularity” & “social distinction” criteria
- Social Distinction: Are “women” perceived as a group by “the society in question?”
- Particularity: Are there “clear benchmarks” in the society in question for ascertaining gender?
  - It’s about whether a group is *discrete*, not about whether it is *large*. (*Cf. Perdomo*)
- Cognizability not enough—must still prove nexus
Social Distinction & Gender *Per Se*

“Through her testimony and documentary evidence, the respondent has established that Honduran society perceives women sufficiently distinct from society as a whole to qualify as a [PSG]. The . . . 2016 State Department Human Rights Report of Honduras . . . states that ‘violence against women and impunity for perpetrators continues to be a serious and pervasive societal problem . . . . The report further states that the Honduran government ‘did not effectively enforce’ laws governing sexual harassment. Finally, the report states that, although women and men have the same legal rights in many respects in Honduras, “many women did not fully enjoy such rights.”

Particularity & Gender *Per Se*

“Though it is a large group, the term ‘women’ has a commonly accepted definition in Mexico, as it does in most societies. In fact Mexico has laws that apply specifically to women, suggesting that the term is discrete and has legally definable boundaries . . . . Women constitute a precise, albeit large, segment of society, and the term is neither vague nor amorphous.”

Gender *Per Se* in Practice

- We have collected many EOIR decisions over the last several years either finding gender *per se* PSGs cognizable and granting asylum on that basis, or remanding for cognizability analysis. All of these decisions cited in the updated edition of *Anker, Law of Asylum in the United States*.
  - Most were decided *after* *Matter of A-B*; remember A-B has been withdrawn

- Applicants in these decisions fled countries including: El Salvador, Guatemala, Honduras, Mexico.

- A link to these decisions will be made available, can be found in *Law of Asylum*.

- *Unpublished* BIA decisions were collected from IRAC *Index of Unpublished BIA Decisions* available at: [https://www.irac.net/unpublished/index/](https://www.irac.net/unpublished/index/)
De Pena-Penagua v Barr, 957 F.3d 88 (1st Cir. 2020)

• “But it is not clear why a larger group defined as “women,” or “women in country X” -- without reference to additional limiting terms -- fails either the “particularity” or “social distinction” requirement. Certainly, it is difficult to think of a country in which women are not viewed as “distinct” from other members of society. In some countries, gender serves as a principal, basic differentiation for assigning social and political status and rights, with women sometimes being compelled to attire and conduct themselves in a manner that signifies and highlights their membership in their group. It is equally difficult to think of a country in which women do not form a “particular” and “well-defined” group of persons. While certain more narrowly-parsed groups might fail to exhibit societal salience, or internally coherent membership, the same does not follow for a group based on a gender.

• In Acosta, the Board applied the doctrine of ejusdem generis when interpreting the meaning of the term “refugee,” which, pursuant to statute, requires that an applicant demonstrate “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”
“There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation's residents to obtain asylum on the ground that women are persecuted there.... But the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do) but on whether the members of that group are sufficiently likely to be persecuted . . . “on account of” their membership.”

Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005)
EXAMPLE: Woman is severely and repeatedly beaten by her husband. The woman seeks protection by the authorities but is ignored because the abuse is considered a private, domestic affair.

Bifurcated Nexus:

- REASON: because she is female
- CONVENTION: severe beatings

Because she is female, the woman faces serious harm due to the refusal of state protection in the form of the refusal to intervene in what is considered a private affair.
Gender-Based PSGs in addition to gender *per se*

- Indigenous [nationality] women
- Women of [X] tribe
- Immediate Relatives of [targeted child/relative] (*L-E-A- II* to be discussed)
- Married [nationality] women
- [Nationality] women viewed as property
- Independent [nationality] women
- Single women living alone without male protection
- [Nationality] women in relationships they are unable to leave?
FGM

- *Bah v. Mukasey, 529 F.3d 99 (2d Cir. 2008)*: recognizing PSG of gender combined with ethnicity, nationality or tribal membership; rejecting fundamental change in circumstance argument where “nothing in the regulation suggests that the future threats to life or freedom must come in the same form or be the same act as the past persecution;” and concluding that “Guinean and/or Fulani women are routinely subjected to various forms of persecution...beyond genital mutilation,,” such as DV, rape, and trafficking.

- *Kone v. Holder, 596 F.3d 141, 147 (2d Cir. 2010)*: recognizing that “a woman...who has undergone genital mutilation may have been persecuted on account of” a PSG defined by “gender—combined with [her] ethnicity, nationality, or tribal membership”

- *In Re Kasinga, 21 I&N Dec. 357 (BIA 1996)*: “[Y]oung women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”

Femicide and targeting of single women

- *Matter of -- (San Francisco, CA Immigration Court 2015) (Griswold, J.)*: recognizing PSG of single Salvadoran women who are working professionals

- *Cece v. Holder, 733 F.3d 662 (7th Cir. 2013)*: “young Albanian women who live alone” constitutes a PSG

Forced Marriage

- *Ngengwe v. Mukasey, 543 F.3d 1029 (8th Cir. 2008)*: recognizing Cameroonian widows PSG where petitioner fled forced marriage to deceased spouse's brother

- *Gao v. Gonzales, 440 F.3d 62 (2d Cir. 2006), vacated on other grounds, 552 U.S. 801 (2007)*: recognizing PSG of women sold into marriage in China
Gender **Beyond** PSG

- Explicit & Imputed Political Opinion
  - DV cases
  - ‘Third generation’ gang cases
- Religion
  - Forced Marriage
  - ‘Third generation’ gang cases
- Race/Tribe/Ethnicity
  - FGM
Some Great Cases

• *Lazo-Majano v. INS*, 813 F.3d 1432 (9th Cir. 1987)

• *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (Alito, J.)

• *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc)

• *De Pena-Peniagua*, 957 F.3d 88 (1st Cir. 2020)
Practice Pointers – Gender & PSG

• Consider alternative protected grounds, including political opinion and religion
• Try to keep the PSG simple: gender identity, family, gender+, sexual orientation, youth+
• Focus on nexus: a protected ground needs to be “at least one central reason” for the harm suffered/fearred; consider direct and circumstantial evidence
• Remember to consider whether there are different grounds (or PSGs) for past persecution and for well-founded fear
• Consider social groups already recognized, including in favorable unpublished IJ, BIA & circuit court decisions
• Develop the record: present relevant country conditions, including high rates of violence against group and laws or policies that protect/discriminate against group. Consult with and use country experts where possible
• A-B- has been withdrawn.
W-Y-C- & H-O-B-

• WYC abused by father – refined PSG on appeal to the Board
• In its decision, Board said PSG “substantially different”
  • Preceding case law shows reformulation of PSGs has occurred to varying degrees at all levels
• Requires “exact delineation” of any proposed PSG “on the record before the Immigration Judge”
  • E-F-H-L- (2018) vacated
  • Some immigration judges pretermitting claims based on (non)cognizability at the pre-hearing stage
• Requires IJ’s to “seek clarification” when such delineation is not clear
Litigation following W-Y-C- & H-O-B-

• *Grace v. Whitaker* (2018): unlawful for DHS to impose this “exact delineation” requirement on asylum seekers at the CFI stage


• *Cantarero-Lagos v. Barr* (5th Cir. 2019)
  • Upholds W-Y-C- & H-O-B- w/important limiting language in concurrence
Cantarero-Lagos v. Barr (majority opinion)

• Court upholds BIA’s decision, finds cognizability “turns on findings of fact,” but ultimately still a question of law reviewed de novo.

• Reasoning does not support pre-hearing pretermission
  • See also Matter of E-A-M-L- (BIA Dec. 19, 2018) (IJ reversibly erred by failing to provide applicant an opportunity to offer testimony)

• Emphasizes the active role IJ can (perhaps implying should) play helping litigants articulate cognizable PSGs in the course of removal hearings.
  • IJ engaged Ms. Cantarero’s counsel in a dialogue regarding the cognizability of her proffered PSG

• Suggests the holding may not extend to litigants who were pro se at the IH stage
Cantarero-Lagos v. Barr (concurrence/dissent)

- Judge James L. Dennis
- Criticizes the exact delineation requirement as “exacting and unnecessary;”
- Describes the Board’s PSG jurisprudence as “unspeakably complex, “every changing” and a “labyrinth”
- *Pro se* asylum seekers “will not stand a chance” if the “exact delineation” requirement is applied in their cases
- Similar to majority, emphasizes immigration judges taking a “cooperative approach” to PSG formulation
Exploring Imputed Political Opinion

Heather Axford, Director
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Overview

- Defining Political Opinion
- Proving Political Opinion
  - Caselaw
  - Evidence
Defining Political Opinion
How it started...

  - It is the political opinion of the asylum applicant, not the political opinion of the persecutor that matters.
  - Does not consider imputed political opinion
  - Resistance to joining the guerilla or getting involved in the war not found to be a political opinion for purposes of asylum.
How it’s going...

• Political opinions may be intertwined with ostensibly non-political issues—so that evaluating what constitutes a political opinion for asylum purposes “involves a complex and contextual factual inquiry into the nature of the asylum applicant’s activities in relation to the political context in which the dispute took place.”

• Zelaya-Moreno v. Wilkinson, citing to Hernandez-Chacon v. Barr, 948 F.3d 94, 103 (2d Cir. 2020) (internal quotation marks omitted).
Principles of Political Opinion

- Can be political affiliation, electoral politics, party membership
  - But does not have to be!
- May include verbal or expressive behavior
- May also include symbolic acts
- Political opinion must be applicant’s or attributed to applicant
- May be imputed
- Must be analyzed in the context of the country in question
Political Opinion in the Second Circuit

• Second Circuit’s fact-specific, context-specific determination of what constitutes “political” for purposes of asylum
  • Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994)
  • Delgado v. Mukasey, 508 F.3d 702 (2d Cir. 2007)
  • Castro v. Holder, 597 F.3d 93 (2d Cir. 2010)
  • Hernandez-Chacon v. Barr, 948 F.3d 94 (2d Cir. 2020)
Osorio v. INS (1994)

• Union activity as basis for finding of political opinion/persecution.

• Finds that “political” should be broadly defined and includes all entities that seek to directly influence laws, regulations, or policies.

• “the political motives of the persecutor constitute “some evidence . . . of the appropriate characterization of the dispute” and may well constitute “the only evidence of the victim’s political beliefs, other than the testimony of the victim himself or herself, but even overtly apolitical or nongovernmental organizations may take on a political valence such that support or opposition to them can constitute a political opinion.”

• Refusal to collaborate with FARC may be basis for an imputed political opinion claim where Colombian woman refused to provide computer services to the group.

• The political context of Colombia’s internal armed conflict was such that the FARC and opposition to the FARC took on a political dimension (where the FARC, a group with an overtly communist ideology, sought to overthrow the government).

- Guatemalan police officer who denounced police corruption to human rights organization demonstrated a political opinion.

- BIA erred in failing to consider how Castro’s actions may take on a political dimension in the context of Guatemala “where certain democratic rights have only a tenuous hold.”
  - See also Zhang v. Gonzales, 426 F.3d 540, 548 (2d Cir. 2005) (Opposition to endemic corruption or extortion may have a political dimension when it transcends mere self-protection and represents a challenge to the legitimacy or authority of the ruling regime)
Hernandez-Chacon v. Barr (2020)

• Salvadoran woman who resisted the sexual advances of a member of the Mara Salvatrucha may have evidenced a feminist and anti-gang political opinion where Hernandez-Chacon described her resistance as a right.

• Court looked to entrenched patriarchal power structures in El Salvador and, with regard to gangs, stated “We have held, for example, that resisting corruption and abuse of power -- including non-governmental of power -- can be an expression of political opinion.”
WE NEED TO TALK...

about Zelaya-Moreno....

(Thanks to Stephanie Cordero at LSNYC for appropriately cheeky imagery)
Zelaya-Moreno

• Zelaya-Moreno v. Wilkinson, 989 F.3d 190 (2d Cir. 2021)
  • Petitioner was tortured by Mara, in cahoots with police officers, for his refusal to join the Mara. Court found he has NOT established actual or imputed political opinion
  • How do we square this with the Second Circuit’s other IPO/PO case law?
  • Look for helpful language and a road map for IPO claims in Zelaya-Moreno v. Wilkinson

• It all comes down to the facts and the record
It’s Not Just the Second Circuit!


• *Alvarez Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019): Finding that Imputed Political Opinion may be appropriate where persecution was on account of resistance to gang demands.
One Central Reason
Proving Political Opinion

Must demonstrate that persecutor was motivated by applicant’s actual or imputed political opinion

• Persecutor’s political opinion is relevant, but not sufficient

• May use direct and/or circumstantial evidence
Demonstrating Persecutor’s Motive

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

• Applicant was a Sri Lankan of Tamil ethnicity kidnapped by Tamil Tigers and forced to work
• Sri Lankan army raided camp, captured applicant, and accused him of being a Tamil Tiger
• Applicant was held in prison for 6 months and tortured
• IJ found that the motive for harm was *ongoing civil strife* in Sri Lanka
Matter of S-P- (cont.)

- RULE: Not necessary to have direct proof of persecutor’s motive – may use circumstantial evidence
- List of factors to determine motive:
  - Indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct (e.g., statements or actions by the perpetrators or abuse out of proportion to nonpolitical ends);
  - Treatment of others in the population who might be confronted by government agents in similar circumstances;
  - Conformity to procedures for criminal prosecution or military law including developing international norms regarding the law of war;
  - The extent to which antiterrorism laws are defined and applied to suppress political opinion as well as illegal conduct (e.g., an act may broadly prohibit “disruptive” activities to permit application to peaceful as well as violent expressions of views);
  - The extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse.
Why argue an imputed political opinion?

  • Neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities nor the family members of such Salvadoran youth constitute a “particular social group.”

  • The respondent did not establish that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” constitute a “‘particular social group’ or that there is a nexus between the harm he fears and his status as a former gang member.

• Salazar v. Lynch, 645 F. App'x 53 (2d Cir. 2016)
  • young Guatemalan males who resisted or rejected forcible gang membership did not constitute particular “social group”
Domestic violence asylum claims based on PSG

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• First BIA published decision following 1999 Matter of R-A- (vacated by AG Reno) which had reversed a grant of asylum to Guatemalan DV survivor Rody Alvarado

• A-R-C-G- held that “married women in Guatemala who are unable to leave their relationship” can constitute a social group

• Found gender to be immutable and recognized marital status can be immutable if the woman is unable to leave due to factors beyond her control

• Social distinction and particularity met

• Decision emphasized case-by-case determination of PSG cognizability

- AG Sessions overruled Matter of A-R-C-G-, questioning the validity of PSGs which include the characteristic of “unable to leave” suggesting they are circular (i.e. defined by the harm), and lack SD and P
- Raised doubts about nexus, stating the DV is generally motivated by a “preexisting personal relationship” rather than a protected ground
- Increased the burden for showing government is unable/unwilling by restating the standard as “completely helpless/condoning”

• Issued by AG Rosen
• Did not elaborate on PSG analysis, but addressed state protection and nexus
• Stated that completely helpless/condoned standard was the same as unable/unwilling
• Established two part nexus text: 1) protected ground must be but-for cause of persecution and not be incidental or 2) tangential to another reason for the harm

• Reaffirmed holding A-B-I that where there is a personal relationship, it will be difficult to establish nexus to a protected ground

• Taken together A-B-I, A-B-II and A-C-A-A-I:
  • Threw doubt on validity of “unable to leave” PSGs by stating they were defined by harm and thus circular
  • Heightened nexus standard (implied lack of nexus if pre-existing relationship)
  • Heightened state protection standard - requiring completely helpless/condoning instead of unable/unwilling
Biden administration Executive Order on PSG and asylum for DV survivors

• February 2, 2021 Executive Order (Creating a Comprehensive Regional Framework) committed to reviewing all existing precedent, etc. “to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards,” and to issue regulations defining particular social group consistent with the 1951 Convention and 1967 Protocol.

• Review of precedent was to take place within 180 days (beginning of August 2021), and issuance of regs was to take place within 270 days (beginning of November 2021)

• Regulations have still not issued

  - Decisions vacated in light of pending rulemaking referred to in Feb. 2 EO
  - AG decision flags problematic aspects of vacated decisions, including presumption created against claims based on private conduct which could discourage “careful case-by-case adjudication of asylum claims”

- Directs adjudicators to not apply vacated decisions in pending or future cases. A-R-C-G- and other pre-A-B-I precedent control
  - “A vacated decision has no precedential effect whatsoever.” *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424, n.2 (9th Cir. 1991)
A-R-C-G- as Precedent

• A-R-C-G- constitutes precedent
• It held that on facts of that case “married women in Guatemala who are unable to leave their relationship” is a cognizable PSG
• Note: In *Jaco v. Garland*, 24 F.4th 395 (5th Cir. 2021) Fifth Circuit rejected A-R-C-G- after vacatur of the A-B- decisions, so it is not controlling law in the Fifth.
• *Jaco v. Garland* does not preclude recognition of DV claims/PSGs that do not rely on A-R-C-G-’s holding
A-R-C-G-: Particular Social Group - SD & P

• Do not rely on A-R-C-G- decision alone; provide evidence on social distinction and particularity relevant to your country/case

• Social distinction evidence could include: 1) laws and policies addressing the group; 2) statistics or expert testimony regarding rates of violence or discrimination against group members

• Particularity evidence could include: 1) laws or policies defining the group’s defining characteristics; 2) expert or other evidence that society understands who is in the defined group

• The reasoning of A-R-C-G- is not limited to formal marriages; can apply to common law or other intimate relationships
  • Use same type of evidence noted above for SD and P for these PSGs
Unable to leave

• For ”unable to leave,” document factors that contribute to inability to leave; demonstrate it is not the harm of persecution which prevents an individual from leaving the relationship.
  • Relevant factors could include legal or social norms, importantly, it also includes the refusal of the male to accept that the woman has right to leave the relationship
• Establish applicant’s membership in the group, demonstrating that although she fled to the U.S. she was “unable to leave” in situations where partner did not accept her termination, and sought her out repeatedly after separation or divorce
Simplify your PSG

• Although A-R-C-G- is good precedent, consider PSGs defined by nationality and gender-alone

• BIA and courts have long recognized groups defined principally by gender

• But note that the Third Circuit rejected the gender alone social group of “Guatemalan women” as insufficiently particular in *Chavez-Chilel v. U.S. Attorney General*, 20 F.4th 138 (3d Cir. 2021) The court does not hold that such a group could never be cognizable, but proceed with caution.
Nexus: establishing gender as the motivating factor

• Need to counter erroneous belief that DV is result of individual’s meanness, substance abuse, drunkenness, etc.

• Experts on domestic violence make clear that domestic violence is rooted in patriarchal views of gender roles, and violence is motivated by concepts of gender and gender roles
  • Submit CGRS declaration of Prof. Nancy Lemon on gendered motivation of domestic violence

• Be attentive to statements of abuser asserting his right to treat “his woman,” as he pleases

• Document gendered slurs and insults
Failure of State Protection

• *A-B*- heightened standard of unable/unwilling to completely helpless/condoned, which is arguably a higher standard

• Second, Third and Fifth Circuits previously held the completely helpless/condoned standard in *A-B*- is equivalent to unable/unwilling

• Since vacatur of *A-B*-, the Fifth has reaffirmed that position, however the Second and Third Circuits have not revisited their decisions

• Where possible, push back against the completely helpless/condoned standard

• Where there is state protection, detail if it is not effective: low prosecution/conviction rates, lack of enforcement of protective orders, limits on stays in available shelters

• Explain why reporting would have been futile or dangerous
Trends tracked by CGRS

• IJs have granted on the following theories:
  • Gender-only PSGs (e.g., nationality women or girls)
  • Gender and other characteristics (e.g., relationship status, ethnicity)
  • Family
  • Political opinion / imputed political opinion
  • Race
  • Religion
Strategies at the BIA

• Consider seeking a remand where IJ relied on vacated decisions
• If BIA cannot affirm IJ decision on same basis IJ used, remand is warranted, *Matter of S-H-,* 23 I&N Dec. 462 (BIA 2002)
• Seek DHS non-opposition
  • If DHS does not file opposition within 13 days of service, motion will be deemed unopposed, 8 CFR 1003.2(g)(3)
Strategies at the Court of Appeals

• Upon vacatur of A-B-I and A-B-II, Assoc AG Vanita Gupta issued a memo directing DOJ Civil Division to review affected pending cases and to “take appropriate steps, including seeking remands in appropriate cases to allow the Board to reconsider asylum claims based on this change in the law.”

• For any case denied on A-B- grounds, you may reach out to OIL to join a motion to remand
  • Court should let the agency apply the new standards in the first instance
  • Unfavorable circuit law that relied on the AG decisions should no longer apply because it is no longer the agency’s position
Center for Gender & Refugee Studies

Resources

• CGRS provides free expert consultation to attorneys and organizations representing asylum seekers, including legal technical assistance, strategy development, sample briefs, unpublished decisions, country conditions evidence, and expert witness affidavits.

• Request assistance in your case: http://cgrs.uchastings.edu/assistance.

• Email: CGRS-TA@uchastings.edu with your CGRS Case Number if you have follow-up questions.

• Reach out to CGRS: cgrs-ABtracking@uchastings.edu to request CGRS’s amicus support in a case involving Matter of A-B- before the BIA or courts of appeals.
CGRS Technical Assistance Resources

Practice Advisories
• Domestic violence
• Children’s asylum
• Fear-of-gang claims
• Gender-based claims
• CAT protection claims
• EAD Rule

Country Conditions Reports
• Specific topics in individual countries (e.g., children, indigenous, LGBTI, gang)

Unpublished Case Law
• IJ and BIA decisions

Expert Declarations
• Country-specific (e.g., violence against women, children, LGBTQ)
• Topic-specific (e.g., domestic violence, incest, trauma and memory)

Sample Pleadings
• Case documents: declarations, indices, expert affidavits
• Legal briefs