
A New Approach: Gang-based Asylum in the Age of “Zero Tolerance”

by Caylee Watson

A record number of migrants are fleeing the Northern Triangle. In recent years, about 265,000 migrants have left annually. This number is on track to more than double in 2019.[1] Gang violence, corruption, and a lack of economic opportunity and security challenge Guatemala, El Salvador, and Honduras.[2] Homicide rates in the Northern Triangle have been among the world’s highest for decades.[3] It is no secret that the U.S. foreign policy in the 1970s through the 1990s laid the foundation for much of the instability in the region. Over the past twenty years, the U.S. has attempted, with limited effect, to remedy the situation by aiding programs that try to combat the underlying issues causing some of the instability.

During the 2016 presidential campaign, Donald Trump promised to reduce “illegal immigration.”[4] When he became president, in addition to developing a scheme to build a wall on the Mexican northern-U.S. southern border, President Trump enacted “zero-tolerance” policies that led to family separation.[5] Since Trump took office three years ago, not only has the United States seen an influx in irregular entries at the southern border, but the zero-tolerance policies may even violate domestic and international law.[6]

For example, in the spring of 2018, the Trump Administration (“Administration”) implemented a zero-tolerance policy which sought to criminally prosecute all adults entering the United States irregularly, including asylum seekers, and those traveling with children. [7] Simultaneously, the Administration cut hundreds of millions of dollars in aid to the Northern Triangle because the countries “failed to slow migration flows to the United States.”[8] These policies contradict each other — experts agree that cutting off assistance aimed to help programs improve safety and economic security in the region was only going to cause migration to increase.[9] In fact, the policies have failed to slow

the number of migrants and have led to overcrowded detention centers and a massive backlog in U.S. immigration courts.

One aspect of immigration policy that the Administration cannot override through proclamation or executive order is asylum law. Under the Refugee Convention and Protocol, the U.S. cannot deny entry to asylum seekers.[10] Domestically, an asylum applicant meets the definition of a refugee under INA § 101(a)(42) if the person seeking asylum is “unable or unwilling to return to . . . [his or her] country [of origin] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”[11]

However, in the past year, alongside the above-mentioned executive orders, the Attorney General (“AG”) has decided a number of cases that impede traditional Asylum law.[12] In *Matter of A-B-* and *Matter of L-E-A-*, the AG attempted to limit the scope of the frequently utilized protected ground, “particular social group,” by asylum applicants fleeing gang violence in the Northern Triangle.[13] Prior to *Matter of L-E-A-* and *Matter of A-B-*, an applicant could demonstrate that they were persecuted as a member of a particular social group if they could show that they were persecuted because of gender-based domestic violence or because of their familiar ties. Now, in circuit courts that lack overriding precedent, both Attorney General Sessions’ and Barr’s interpretations present problems for applicants. This article suggests a supplementary approach—(imputed) political opinion—for attorneys representing asylum applicants fleeing gang-based persecution.

For an applicant to establish their eligibility for asylum on account of political opinion, the applicant must

allege specific facts from which it can be inferred that they hold a political opinion known to the persecutor, and that the persecution occurred on account of that political opinion.[14] The protected ground of (imputed) political opinion is a valid strategy when advocating for victims claiming asylum for gang opposition. For example, although gangs are not “the state,” in the Northern Triangle, certain gangs operate as the “de facto” government and wield more power and control over the country and its citizens.[15] The UNHCR explained that “[t]he ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and sociocultural context of the country of origin.[16] In contexts, such as in El Salvador and Guatemala, objections to the activities of gangs may be considered as opinions that are critical of the methods and policies of those in control and, thus, constitute a “political opinion” within the meaning of the refugee definition. For example, individuals who resist recruitment by gangs, or who refuse to comply with demands made by the gangs, such as demands to pay extortion money, may be perceived as holding a political opinion. In addition, the gangs in the Northern Triangle have demonstrated a capacity to challenge states directly by murdering state officials and controlling other corrupt law enforcement, political, or local security officers. Therefore, those victims who resist such authorities are persecuted on account of their political opinion because, in the Northern Triangle, the gangs have infiltrated the state and are in control of the political world.[17]

Although some immigration courts have failed to find asylum based on this approach, the adjudicators explained that they were not presented with enough evidence to show significant gang control of the state. For example, *Matter of S-P* held that imputed political opinion may satisfy the refugee definition.[18] Therefore, with some adjustments, advocates can use this case to make valid asylum claims.

Additionally, in *Koudriachova v. Gonzales*, the Second Circuit emphasized, for imputed political opinion, “the relevant question is not whether an applicant subjectively holds a particular political view, but instead, whether the authorities in the applicant’s home country perceive him to hold a political opinion and would persecute him on that basis.”[19] When determining authorities, “adjudicators must consider the claim within the context of the country itself.” Also, in the

Ninth Circuit, the Court in *Regalado-Escobar v. Holder*, found that opposition to a strategy of violence can constitute a political opinion for asylum purposes.[20]

In their article ‘Third Generation’ Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground, Deborah Anker and Palmer Lawrence argue that despite the positive foundation, Immigration Judges dealing with seriously overloaded dockets, limited authority to grant continuances, and completion quotas will be hard-pressed to engage in “complex and contextual factual inquiry.”[21] Practitioners should do their best to educate adjudicators through country-condition evidence, expert testimony, memoranda of law, and detailed direct examination of the asylum seeker.

For example, in *Marroquin-Ochoma v Holder*, the Eighth Circuit indicated that “. . . [e]vidence that the gang is politically minded could be considered evidence that the gang members would be somewhat more likely to attribute political opinions to resisters,” but found that a “generalized political motive underlying the gang’s forced recruitment” was inadequate evidence to establish that resistance to the recruitment efforts was based on an anti-gang political opinion.[22] More recently, this approach succeeded in the Fourth Circuit case, *Alvarez Lagos*, where the Court concluded that the country conditions and evidence presented by the applicant showed that Mara 18, a powerful gang in the Americas, imputed her anti-gang political opinion and that opinion was one central reason for her persecution.[23] Expert testimony showed that Alvarez Lagos’s failure to comply with the gang’s demands and subsequent flight to the United States would be seen by Mara 18 as “a direct challenge to its efforts to establish and maintain political domination within Honduras.” As a direct result, she would be “targeted for violence in a manner that was very graphic, and visible to the community.” Another expert explained that failure to pay was not simply a refusal to pay a debt, but Mara 18 would feel “compelled to crush what it views as political resistance.”

Although the imputed political opinion route may be weaker than the well-established, but recently contested, protected ground of “particular social group,” it does not diminish the fact that it is a perfectly valid way to argue a protected category. Under current case law, international law, and conditions in the Northern

Triangle, the Courts are making the correct decisions in recognizing (imputed) political opinion. The idea that opinions or matters that involve gangs might constitute political opinion is supported by the Office of the United Nations High Commissioner for Refugees (UNHCR), which has recently published Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Guatemala (January 2018), El Salvador (March 2016), and Honduras (July 2016).[24] Therefore, the U.S. has a duty under the obligations of the Refugee Convention and Optional Protocol to recognize this protected category.

Not only is (imputed) political opinion based on gang persecution a valid protected category, but it could lead a new age of asylum law practice during zero-tolerance.

1 Amelia Cheatham, Central America's Turbulent Northern Triangle, COUNCIL ON FOREIGN RELATIONS (OCT. 1, 2019), <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle>.

2 Id.

3 Id.

4 Transcript of Donald Trump's Immigration Speech, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html>.

5 Human Rights Watch, Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy (Aug. 15, 2018), <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#>.

6 Amelia Cheatham, *supra* note 1; Jasmine Aguilera, Trump's New Restrictions on Asylum Seekers Violate U.S. and International Law, Experts Say, TIME (July 15, 2019) (updated July 24, 2019), <https://time.com/5626498/trump-asylum-rule-international-law/>.

7 Human Rights Watch, *supra* note 5.

8 Kevin Sieff, U.S. Officials Said Aid to El Salvador Helped Slow Migration. Now Trump is Canceling It, WASH. POST (Apr. 1, 2019), https://www.washingtonpost.com/world/the_americas/us-officials-said-aid-to-el-salvador-helped-slow-migration-now-trump-is-canceling-it/2019/04/01/5a8ca570-540a-11e9-aa83-504f086bf5d6_story.html.

9 Id.

10 1951 Convention Relating to the Status of Refugees & 1967 Protocol Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 137.

11 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2018).

12 <https://cliniclegal.org/resources/asylum-and-refugee-law/practice-pointer-matter-l-e>

13 Matter of A-B-, Respondent, 27 I&N Dec. 316 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download>; Matter of L-E-A-, Respondent, 27 I&N Dec. 581 (A.G. 2019), <https://www.justice.gov/eoir/page/file/1187856/download>.

14 INS v. Elias-Zacarias, 502 U.S. 478 (1992), <https://supreme>

[justia.com/cases/federal/us/502/478/](https://www.justia.com/cases/federal/us/502/478/).

15 Jeffrey S. Chase, 3rd-Generation Gangs and Political Opinion, Blog Post (June 3, 2018), <https://www.jeffreyschase.com/blog/2018/6/3/3rd-generation-gangs-and-political-opinion>.

16 Id.

17 <https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle>

18 In re S-P-, Applicant, 21 I&N Dec. 486 (B.I.A. 1996), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3287.pdf>.

19 Koudriachova v. Gonzales, 490 F.3d 255 (2d Cir. 2007).

20 Regalado Escobar v. Holder, 717 F.3d 724 (9th Cir. 2013).

21 Jeffrey S. Chase, *supra* note 15.

22 Marroquin-Ochoma v. Holder, 574 F.3d 574 (8th Cir. 2009).

23 Alvarez Lagos v. Barr, 927 F.3d 236 (4th Cir. 2019).

24 UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala (2018), <https://www.refworld.org/pdfid/5a5e03e96.pdf>; UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador (2016), <https://www.refworld.org/pdfid/56e706e94.pdf>; UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras (2016), <https://www.refworld.org/docid/579767434.html>.