Refugee Law and Policy

A Comparative and International Approach

Fifth Edition

2019 Supplement

Karen Musalo
Professor of Law
Director, Center for Gender & Refugee Studies
University of California, Hastings College of the Law

Jennifer Moore
Professor of Law
Hatch Professorship
University of New Mexico School of Law

Richard A. Boswell
Professor of Law
University of California, Hastings College of the Law

Annie Daher
Staff Attorney
Center for Gender & Refugee Studies
University of California, Hastings College of the Law

Carolina Academic Press
Durham, North Carolina

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

This concise update attempts to flag some of the most significant developments since *Refugee Law & Policy* was published in its fifth edition in 2018. There have been so many executive orders, policy directives, interim and proposed regulations, court orders, etc., that it is impossible to catalogue them all. This document identifies a subset of the totality – especially those which are directly relevant to matters discussed in the Casebook.

Not all areas of refugee law were equally impacted, thus, there are not updates for every chapter of the Casebook. The chapters with the most developments are 2, 3, 9, 10, 11 & 12, and updates to particular sections or issues in those chapters appear below, with links to the most relevant documents.

Chapter 2 - International Norms and State Practice

The U.S. Refugee Resettlement Program
Pages 84-98 of Casebook

As noted in the 2018 Teachers Manual (p.20), the Trump Administration lowered the FY2018 refugee allocation to 45,000. This was further reduced to 30,000 for FY2019, and it has been reported that there is serious consideration of reducing refugee admissions to zero.

Access to the Territory of Asylum
Pages 99-159 of Casebook

The Trump Administration has engaged in a wide range of practices in an attempt to prevent asylum seekers from accessing the U.S. to apply for asylum. Following is a brief overview of the practices and current status:

Metering. US Customs and Border Protection has forced asylum seekers who arrive at ports of entry to wait, stating that they only have capacity to accept a certain number of asylum seekers a day. It has been reported that the practice began in May 2018, and it continues to this day.

Attempt to prohibit asylum to individuals who do not enter the US at ports of entry. The policy was challenged in *East Bay Sanctuary Covenant v. Trump*, and Judge Tigar, US District Court for the Northern District of California, issued a temporary restraining order against the policy, which was upheld by the Ninth Circuit Court of Appeals, found here.

Migrant Protection Protocols, known as Remain in Mexico. DHS announces and implements a policy forcing individuals arriving without documentation to wait in Mexico. The policy guidance issued on Jan. 25, 2019 is available here. Subsequent guidance is available here. The policy was challenged in *Innovation Law Lab v. Nielsen*, and Judge Seeborg, US District Court for the Northern District of California issued a nationwide injunction on April 8, 2019. The Ninth Circuit stayed the injunction, so the policy of Remain in Mexico continues. The Ninth Circuit decision can be found here.

Safe Third Country Agreement with Guatemala. As discussed in Chapter 11, p. 949, U.S. law enacted in 1996 allows the preclusion of asylum claims from individuals who could be "removed, pursuant to a bilateral or multilateral agreement" to a country where their life or freedom would not be threatened on account of a protected ground, and they would have access to a "full and fair procedure for determining a claim to asylum[.]" Until July 2019, the only country with which the US had such an agreement was Canada. On July 26, the US entered into an agreement with Guatemala, which purports to be a safe third country agreement. Although the contours of the agreement and its implementation are quite vague, it appears that, with few exceptions, it would allow the US to "transfer" to Guatemala any asylum seeker who entered the US without legal permission. The agreement has been roundly criticized given the dire human rights situation in

Guatemala, and its lack of any meaningful infrastructure for deciding asylum claims. For discussion and critique of the agreement, see here and here.

Expedited Removal
Pages 157-167 of Casebook

***Expansion of expedited removal*.** On July 22, 2019 DHS announced that beginning July 23, 2019 it was planning to expand expedited removal to individuals found anywhere in the US who have been here under two years. The announcement is found here. Given the critiques that have been made of expedited removal, and little evidence of improvement, its expansion has concerned advocates, and there is likely to be litigation challenging it.

Chapter 3 - Degrees of Risk: The Standard of Proof in Claims for Protection

The Standard in Expedited Removal – A "Credible Fear of Persecution"
Pages 239-241 of Casebook

The Credible Fear Standard. The Trump administration has repeatedly complained about the credible fear standard being too low, leading to abuse of the system. In *Grace v. Whitaker,* No. 18-cv-01853 at 8 (D.D.C. Dec. 19, 2018) Judge Emmet G. Sullivan of the U.S. District Court for the District of Colombia affirmed that "Congress intended the credible fear determinations to be governed by a low screening standard."

Chapters 9 & 10

Chapter 9 - Persecution Based on Membership in a Particular Social Group
Chapter 10 - Gender-Related Claims to Refugee Status

Successive attorneys general under the Trump administration have used their authority to certify cases to themselves for decision, a procedure permitted pursuant to 8 CFR 1003.1(h)(I)(i)-(iii). Among the many cases the Trump attorneys general certified for decision were two which attempt to dramatically curtail the use of the particular social group ground in claims for protection. The two cases are *Matter of A-B-*, 27 I&N 316 (A.G. 2018) and *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).

Matter of A-B-, found here, involves a gender-related claim, and therefore is more relevant to discuss when covering materials in Chapter 10. As you may recall, the 2018 Teachers Manual, at pages 101-103, discusses *Matter of A-B*, so what appears below will be an update. *Matter of L-E-A-*, found here, addresses family as a particular social group is most appropriately discussed within the context of Chapter 9.

Matter of L-E-A-
The Mexican asylum seeker in *L-E-A-* was threatened and assaulted after his father, who owned a store, refused to comply with the request of cartel members to sell drugs in his store. His claim was based on particular social group, arguing that he was targeted on account of his membership in the PSG of his father's family.

The IJ denied asylum, withholding and Convention against Torture relief. On appeal, the BIA ruled that although family qualified as a particular social group, Mr. L-E-A-'s claim failed because he had failed to show nexus. According to the BIA, he had been targeted "as a means to an end" and not because he was a member of his father's family. The BIA remanded to the IJ for the CAT claim to be more fully considered.

The Attorney General certified the BIA decision to itself and ruled that "in the ordinary case, a nuclear family will not, without more, constitute a 'particular social group[.]' In so doing, the A.G. ignored decades of precedent from the BIA as well as numerous circuit courts of appeals.

Many analyses and critiques were issued in the immediate aftermath of the decision, and more will certainly come. Because the case is pending before an IJ on the CAT claim, it will take some time for an appeal of Mr. L.E.A.'s case to reach the circuit court. However, in the meantime, many other cases involving family based social groups will be brought before the circuit courts of appeal for decision.

Matter of A-B-
As discussed on pages 101-103 of the Casebook, *Matter of A-B-* attempts to foreclose claims for protection based on domestic violence and fear of gangs. After the A.G.'s June 2018 decision, the

case was remanded back to the IJ, who promptly denied it again. The case is currently on appeal to the BIA, with no briefing schedule ordered as of August 2019.

It is beyond the scope of this brief update to detail decision-making in domestic violence and fear-of-gang cases since *Matter of A-B-,* but it should be noted that, although many cases are being denied pursuant to the decision, some asylum officers, and immigration judges are still granting relief.

Of particular significance is the decision of Judge Emmet G. Sullivan of the U.S. District Court for the District of Colombia in *Grace v. Whitaker*, No. 18-cv-01853 at 8 (D.D.C. Dec. 19, 2018), mentioned above in relation to Chapter 3.

The A.G.'s decision in *Matter of A-B-*, and USCIS Guidance on its Implementation, went beyond the ruling in the individual case of Ms. A.B., and addressed credible fear determinations in the expedited removal context, stating that because there was a general rule against these claims, they would most likely not meet the credible fear standard. This made them susceptible to litigation pursuant to INA 242(e)(3)(A) which provides jurisdiction for challenges to "written policy directive, written policy guideline, or written procedure" which implement expedited removal. Exclusive jurisdiction for such challenges lies in the U.S. District Court for the District of Colombia.

The Plaintiffs in *Grace v. Whitaker* argued that the various holdings of *A-B-* were unlawful, and/or arbitrary and capricious as applied in the credible fear context. Judge Sullivan agreed on most counts, and issued a nationwide injunction against the application of these aspects of *A-B-* in credible fear determinations. For more details on the decision and its implications, you may want to read the ACLU and CGRS Practice Advisory on *Grace v. Whitaker* found here.

Chapter 11 - Qualifications Upon Protection

This update will address three among the many noteworthy developments relevant to this chapter:
1) ***Matter of Negusie***, interpreting the persecutor of other bar
2) ***Matter of A-C-M-,*** pertaining to security risk/material support to terrorists
3) Trump administration purported **Safe Third Country** agreement with Guatemala (discussed also in the context of Chapter 2, access to the territory of asylum).

1) Matter of Negusie, 27 I&N Dec. 347 (BIA June 28, 2018), found here.
Persecutor of Others, Casebook pages 903-912

The persecutor of others bar is covered on pages 903-912, and the facts and procedural background of *Negusie* is discussed in Note 4, pages 908-909. As signaled in Note 4, the Board had pending before it the issue of duress, and under what circumstances it could be raised in an exculpatory manner when an asylum seeker was accused of being a persecutor of others.

The BIA's 2018 *Negusie* decision sets a high threshold for overcoming the bar, stating that it requires, as a minimum, that the individual establish by a preponderance of the evidence that s/he:

> (1) acted under an imminent threat of death or serious bodily injury to himself or others; (2) reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) had no reasonable opportunity to escape or otherwise frustrate the threat; (4) did not place himself in a situation where he knew or reasonably should have known he would likely be forced to act or refrain from acting; and (5) knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others. *Matter of Negusie* at 363.

2) Matter of A-C-M-, 27 I&N Dec. 303 (BIA 2018), found here.
Security Risk/Terrorist Support, Casebook pages 930-941

The security risk/terrorist support bar is covered on pages 930-941, with a discussion of how harsh its impact has been on individuals who are the victims, rather than the perpetrators of terrorist acts. The *A-C-M-* decision perpetuates that cruelty.

The asylum seeker, a Salvadoran woman, was kidnapped and held as a "slave" by the guerrillas, being ordered to cook, clean and wash their clothing under threat of death. Prior to being taken, she had been forced to witness the murder of her husband, a sergeant in the military. She argued that the material support bar should not apply to her because her acts of cooking, cleaning and washing were *de minimis*, and carried out under duress. The Board panel, with one dissenting member, held that under precedent, duress does not excuse material support and the fact that

her assistance was *de minimis* was irrelevant because there is not quantitative requirement in the application of the bar.

3) Safe Third Country Agreement
Casebook, pages 949-952

The statutory provision creating Safe Third Country preclusions from asylum is discussed on pages 949-952. The purported US attempt to enter into a Safe Third Country Agreement with Guatemala, which was raised above in the context of Chapter 2, *supra*, could be discussed again in relation to the US agreement with Canada.

Chapter 12 - The Process and Rights of Asylum Seekers

The update of Chapter 12 will address the following issues:
1) ***Matter of E-F-H-L-***, denying the right to a full hearing for all asylum seekers
2) Changes and challenges to policies regarding **detention of asylum seekers**
3) Performance "metrics" for immigration judges
4) Potential limits on work authorization

1) Matter of E-F-H-L- the right to a hearing on a claim for asylum and withholding. The Attorney General vacated *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) a precedent decision which held that every applicant for asylum and withholding had the right to an immigration hearing, without being required to first establish *prima facie* eligibility. The A.G.'s decision can be found *here*. This could be discussed when covering Casebook pages 988-997, in the section entitled *The Adjudicatory Structure*

2) Detention of Asylum Seekers
There have been numerous developments increasing the use of detention and/or limiting alternatives to detention (covered on pages 1037-1057). Following are some of the most notable in chronological order:

• ***The Family Case Management Program***. The Family Case Management Program, described in Prof. Marouf's article on Casebook p. 1049 was terminated by the Trump Administration in June 2017. More details about the termination can be found here.

• ***Ending presumption of release from detention of pregnant women*.** ICE terminated an August 15, 2016 Policy Directive which provided for a presumption of release of pregnant detainees. The superseding ICE document, issued on Dec. 14, 2017, can be found here.

• ***Family separation***. Responding to reports of family separation, on Feb. 8, 2018, Congressmembers sent a letter of concern to former DHS Secretary Kirstjen Nielsen.
Although it had started much earlier, the Trump administration attempted to justify family separation by pointing to A.G. Sessions's May 2018 call for "zero tolerance" towards unlawful entry at the southern border. The zero tolerance memo found here, called on US Attorneys to prosecute all unlawful entry along the southern border. The criminal prosecution and related incarceration became the justification for removing children from their parents.

The policy of family separation was challenged in *Ms. L. v. ICE*, and U.S. District Judge Dana Sabraw ordered the unification of the separated families. Although Trump subsequently issued an executive order ending family separation, it is widely and credibly reported to have continued.

• ***The release of asylum seekers who have established a positive credible fear***. In *Matter of M-S-,* 27 I&N Dec. 509 (A.G. 2019), A.G. Barr overruled the BIA's decision *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005) which had held that individuals in expedited removal, who establish a credible fear and are put in full removal proceedings, are eligible for release on bond. On July 2, US District

Court Judge Martha Pechman, of the Western District of Washington, issued an injunction against *M-S-* in *Padilla v. US ICE*.

3) Performance Metrics for Immigration Judges

This section of the Casebook entitled *A Fair, Independent and Unbiased Adjudicator* (pages 1058-10891) addresses criticisms of immigration judges, and the quality of their decision-making. The imposition of new "performance metrics" by the Attorney General, described in the following paragraph, is only bound to exacerbate the existing problems.

Quotas imposed on Immigration Judges. On January 17, 2018, the EOIR issued new metrics by which it will evaluate the performance of immigration judges. The standards, which went into effect on Oct. 1, 2018, require judges to complete 700 cases per year, and not have more than 15 per cent of their cases remanded by the BIA or circuit courts. These performance evaluation measures have been criticized as encroaching on the independence of immigration judges. Dana Leigh Marks, former president of the National Association of Immigration Judges stated that the measures were a "huge, huge, huge encroachment on judicial independence" and was treating immigration judges "like assembly-line workers."

4) Potential Limits on Work Authorization

Presidential Memo calling for regulations to impose new bars
On April 29, 2019, Trump issued a memo calling for regulations to be released within 90 days which would impose new bars to asylum. The memo is found here.

They would include barring individuals who entered the US unlawfully from receiving work authorization, and revoking employment authorization for individuals who have been denied asylum. This potential change could be discussed when covering the section entitled *The Right to Work and Social Benefits* (pages 1091-1095)