



MUSINGS ON OUR ASYLUM SYSTEM - AFTER AG SESSIONS' REMARKS ON 'DIRTY IMMIGRATION LAWYERS'

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Attorney General Sessions who has been hostile towards increased immigration and views the asylum system as a loophole for unauthorized entry into the US said in [recent remarks](#) that “over the years, smart attorneys have exploited loopholes in the law, court rulings, and lack of resources to substantially undermine the intent of Congress.” He got even more animated as he went on his diatribe about how the credible fear interview process is being gamed by those who would otherwise be expeditious removed. “We also have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to clients to make false claims to asylum providing them with the magic words needed to trigger the credible fear process,” he said.

Sure enough, there have been a few lawyers who have filed fraudulent asylum claims and have deservedly faced punishment through criminal convictions. However, the vast majority of these supposedly dirty immigration lawyers are some of the finest people I have known who work with passion to ensure due process, fairness and justice. Mr. Sessions was appropriately rebuked by AILA President Annaluisa Padilla who said, “Attorney General Sessions chose today to deride the American asylum system, the vulnerable populations who seek safety here, and the immigration attorneys who work tirelessly to ensure due process is afforded to everyone,”

The law surrounding political asylum is extremely complex, and one who fears persecution needs competent representation – and a lot of representation in the asylum arena is pro bono. An asylum applicant’s chances improve exponentially when he or she is represented by a good lawyer. Indeed, Judge Katzmman who [spearheaded a study in 2010](#), and who is today the chief judge

of the Court of Appeals of the Second Circuit, found that detained immigrants with attorneys were 500 percent more likely to win their cases than those without. Judge Katzmann is more on the mark than Mr. Sessions. Representing asylum applicants with bona fide claims is one of the most honorable things that a lawyer can do. It is part of the ethical duty of a “dirty lawyer” to establish that the client has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion. This is especially true when the government is always represented by skilled counsel, and in order to level the playing field, an applicant also deserves equally skilled representation.

Mr. Sessions seemed to aim his ire against lawyers who attempt to broaden asylum based on theories under the membership in a particular social group ground. Establishing that an applicant belongs to a social group is a legal minefield, and even if the persecution is based on the applicant being a family member of the one who is targeted, more has to be demonstrated in order to qualify for asylum. A case in point in the Board of Immigration Appeals recent decision in [Matter of L-E-A](#), 27 I&N Dec. 40 (BIA 2017). Although persecution on account of membership in a family has been recognized as a basis for asylum, the BIA in *Matter of L-E-A* explicitly confirms this but also requires a nexus and further holds that applicants whose claims are based on membership in a particular social group composed of family members must “demonstrate that the family relationship is at least one central reason for the claimed harm to establish eligibility for asylum on that basis.” *Id.* at 40. As the BIA explains, “if the persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established a claim on this ground.” *Id.* at 43-44.

In *L-E-A* the respondent was a native and citizen of Mexico whose father owned a store in Mexico City that sold groceries and general merchandise. Members of a drug cartel approached the respondent's father to ask if they could sell drugs in the store as they viewed it as a favorable distribution location. The respondent's father refused. The members of the drug cartel approached respondent to see whether he would sell drugs for them at his father's store. Upon respondent also refusing, the members of the cartel tried to grab him and put him in their car, but he was able to get away. The respondent left for the border and successfully crossed into the United States.

The BIA in *L-E-A* acknowledged that members of an immediate family may

constitute a social group. There is a long line of cases that have suggested this, but L-E-A held so explicitly. 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).

The BIA could have concluded at this point, but then went onto state that there must also be a showing of nexus. In other words, a persecution claim cannot be established if there is no proof that the applicant or other members of the family were targeted because of that family relationship. If the persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established asylum on this ground. The BIA provided an example of clear nexus based on family membership where the persecutor is seeking to harm the family members because of an animus against the family itself. An example given was the assignation of Czar Nicholas II, his wife and their five children after he abdicated the throne in 1917. This, according to the BIA, was a classic example, of the persecution based on family membership as one of the central reasons for the persecution.

Unfortunately, despite affirming that family was a social group, it did not work out favorably for the respondent in L-E-A. The BIA held that even if the persecutor harmed the respondent, but if it was done so as a means to an end, that in itself was insufficient to establish a claim, especially if the end is not connected to another protected ground. In L-E-A, according to the BIA, the cartel’s objective was to sell drugs in the store owned by his father, which is why they approached the respondent and harmed him. The central reason for the persecutor to harm the respondent was because the cartel wanted to

increase profits by selling drugs in the store and there was no evidence to indicate that the persecutors had any animus against the family. The cartel would have gone after any family who owned a business there.

[Jeffrey Chase](#), an astute blogger on asylum law, observed that the BIA missed an opportunity in L-E-A to simply affirm that showing persecution based on family was a sufficient nexus in itself. There was no need to also include a “means to an end” requirement. “Under the fact patterns we commonly see from Mexico and the “northern triangle” countries of Central America, claims based on family as a particular social group will continue to be denied, as such fears will inevitably be deemed to be a means to some criminal motive of gangs and cartels (i.e. to obtain money through extortion or as ransom; to increase their ranks; to avoid arrest) as opposed to a desire to punish the family itself.”

Mr. Sessions would also cynically welcome the outcome in L-E-A, although he would have been probably happier if the BIA had not acknowledged family as a social group! L-E-A provides an ability for the adjudicator to deny asylum claims based on family under a means to an end analysis, especially those fleeing Central America based on gang based violence. The Trump administration, consistent with Mr. Session’s remarks, has proposed restricting asylum claims of young people from Central America in exchange for preserving DACA, in addition to [many other onerous demands](#). In any event, the lawyer representing the asylum applicant has an ethical obligation to convincingly demonstrate that the family relationship was the central reason for the persecution. That could have been the outcome in L-E-A too, as it was reasonable to infer that the cartel went after the respondent because his father owned the store, but the lawyer must now take pains to distinguish the facts of her case from L-E-A. Indeed, the lawyer must show like in the case of the Romanovs after the Russian revolution that there was an animus against the family that caused the persecution.

Contrary to Mr. Session’s assertion, there is a great need for an ethical lawyer to advance the best possible argument on behalf of his client in the hope that the law could change that would be consistent with the definition of social group in the [1951 Refugee Convention and the 1967 Protocol](#). The term “particular social group” was added as an afterthought and was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee. See

[Matter of Acosta](#), supra. Consistent with this view, the BIA in *Matter of Acosta* interpreted the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. Over the years, the *Acosta* definition of "immutable characteristic" has been qualified to also require that the group is "defined with particularity" and is "socially distinct." See [Matter of M-E-V-G](#), 26 I&N Dec. 227 (BIA 2014) ("Society can consider persons to comprise a group without being able to identify the group's members on sight") and [Matter of W-G-R](#), 26 I&N Dec. 208 (BIA 2014). Even then, [some Circuit courts have rejected this new definition](#).

If Mr. Sessions was not so blinded by his animus against asylum seekers, he may appreciate the lawyer's role in interpreting and advancing the definition of a social group to protect people fearing persecution if they are unable to establish a nexus on account of race, religion, nationality or political opinion.

The challenge has become even greater after the *Acosta* definition was limited by also requiring that the social group is defined with particularity and is socially distinct. This includes those who were unable to seek protection in their countries if they suffered domestic violence or because of their sexual orientation. The lawyers that Mr. Sessions derides are not exploiting loopholes but protecting people from harm, unjust imprisonment or death. If this is what Mr. Sessions means by a dirty immigration lawyer, then lawyers endeavoring to broaden protections for vulnerable people under our asylum system ought to feel extremely proud.