**July 2019 Asylum Litigation Update to the
Vera Unaccompanied Children Legal Services Program**

Published Federal Courts of Appeals Decisions (April 1, 2019 to July 15, 2019)

The following is a non-exhaustive selection of published federal court of appeals decisions issued between April 1, 2019 and July 15, 2019. While some of the following cases may not be directly applicable to unaccompanied children's asylum claims, they may be informative to Vera network providers. The following include both favorable and unfavorable decisions.

***Twum v. Barr*, No. 18-1992, --- F.3d ---, 2019 WL 2949309 (1st Cir. July 9, 2019):** The court remanded to the Board of Immigration Appeals (BIA) petitioner's motion to reopen for purposes of applying for asylum, withholding of removal, and Convention Against Torture (CAT) protection. Petitioner, a Ghanaian woman, argued that: (1) she and her daughters would face a risk of female genital cutting (FGC) and other customary practices targeting women; and (2) she would be forced to return to her abusive ex-husband under Ghanaian marital customs. Petitioner's ex-husband physically, mentally, and sexually abused her both in Ghana and in the United States and has since returned to Ghana. The court agreed with the BIA that the evidence did not reflect any escalation in the frequency of FGC and other customary practices against women and therefore did not constitute a material change in country conditions for purposes of reopening proceedings. However, the court held that the BIA had erred in finding petitioner did not establish prima facie asylum eligibility based on her fear of being returned to her abusive ex-husband. The BIA had based its finding on the lack of evidence of any recent threats or contact by her ex-husband since 2002. Because a showing of past persecution gives rise to a presumption of well-founded fear, the court concluded that the BIA had failed to explain whether changed circumstances rebutted that presumption, assuming the agency found past persecution. Alternatively, if the BIA had not found past persecution, the court concluded that it had failed to explain the basis for that ruling.

Notably, the court highlighted that the BIA did "not expressly or impliedly conclude that domestic abuse is not a cognizable type of harm, nor does its opinion suggest a finding that [petitioner] failed to link the harm suffered to one of the enumerated statutory grounds." *Id.* at *7. It explained in a footnote that "[t]he question of whether and under what circumstances domestic violence and other forms of private violence can constitute 'persecution' is the subject of ongoing litigation outside of this circuit," citing to *Grace v. Whitaker*, 344 F.Supp.3d 96 (D.D.C. 2018), *appeal docketed sub nom. Grace v. Barr*, No. 19-5013 (D.C. Cir. 2019). *Id.* at *7 n.15. It further noted in the footnote that, "[t]he requirements for showing that a petitioner is a member of a 'particular social group' based on domestic abuse are also the subject of ongoing litigation," citing *Matter of A-B-*. *Id.* Accordingly, the court declined to address those questions.

***Godinez v. Barr*, No. 18-1060, --- F.3d ---, 2019 WL 2909316 (8th Cir. July 8, 2019):** The court affirmed the BIA's denial of asylum and withholding of removal to a Mexican woman

(Andrea), two of her children, and her mother (Victorina). Andrea suffered domestic violence in Mexico at the hands of two ex-partners, Jose and Diego. The BIA found that Andrea did not belong to her proffered social group of "women who are in abusive relationships in Mexico that they can't leave," and that Victorina was not persecuted on account of her familial relationship with Andrea. On appeal, petitioners' counsel argued that the BIA had erred because "[i]f the 'inability to leave' requirement meant anyone who has actually left (by coming to the United States) isn't a member, then nobody applying for asylum would ever be a member of that group." *Id.* at *3 (internal quotations omitted). The government countered that *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), which petitioners relied on, was overruled by *Matter of A-B-*.

The court declined to "address the difficult questions raised by *Matter of A-R-C-G-* and *Matter of A-B-*." *Id.* Rather, it affirmed the BIA's conclusion that Andrea did not belong to her proffered group, concluding that the BIA did not base its finding solely on her ability to reach the United States. The court noted that Andrea initially left Jose for a period of years, during which Jose did not attempt to contact her and she lived with either her mother or Diego. After Andrea escaped Diego's abuse and reunited with Jose, they lived together for a few months before Jose threatened to kill Andrea, her mother, and the children with a gun. The court further found substantial evidence supporting the conclusion that Andrea did not have a well-founded fear of persecution at either Diego's or Jose's hands. Diego did not attempt to contact her between the time she escaped from him and left for the United States. Even though both men tried to contact Andrea in the United States, the court noted that the attempts did not include threats. With respect to Victorina's own claim, the court affirmed the BIA's determination that Jose threatened Victorina because she was present in the home the night of the encounter, not because of her familial ties to Andrea.

***Alvarez Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019):** The court vacated and remanded the BIA's denial of asylum and withholding of removal to a Honduran woman who feared gang-related violence. After she separated from her husband and moved in with her brother and sister-in-law, a Barrio 18 gang member extorted petitioner under threat of harm or death to her and her daughter. He later threatened petitioner again if she did not meet another extortion demand. The court reversed the BIA's finding of lack of nexus to petitioner's imputed anti-gang political opinion and membership in a proposed social group of "unmarried mothers living under the control of gangs in Honduras." The court referenced expert testimony on the failure to comply with gang extortion as a political act, patriarchal and machista culture in Honduras, and the particular vulnerability of unprotected women and single mothers. It also cited the gendered nature of the gang member's derogatory slurs, his threats of "what happens to women who don't obey" and "what the gang does to women," and his references to petitioner's daughter. *Id.* at 244, 250-51 (internal quotations and alterations omitted). Petitioner further testified that she did not face gang threats before she separated from her husband and that the gang member did not target her sister-in-law, a married mother. The court rejected the agency's argument that "gang members target much of the Honduran population for extortion, most of whom are not unmarried mothers," because the fact "that the criminal activities of a gang affect the population as a whole is simply beside the point in evaluating an individual's particular claim." *Id.* at 251 (internal quotations and alterations omitted). It also declined to remand to the immigration judge (IJ) on the question of nexus in light of *Matter of A-B-*, finding that the Attorney General's decision "does not purport to change the standards for measuring nexus." *Id.* at 250 n.2.

On the other hand, the court characterized *A-B-* as having "clarified the agency's interpretation of 'particular social group,' considering whether it extended to a proposed group of women who are unable to leave their relationships because of domestic abuse." *Id.* at 252. The court concluded that the Attorney General's decision "might affect the Board's reasoning on remand" and thus left it to the BIA to analyze the cognizability of petitioner's social group in the first instance. *Id.* Nonetheless, it identified several agency errors with respect to particularity and social distinction findings. The court reiterated that the size of a group is not dispositive. It further clarified "the fact that 'persecutors torture a wide swath of victims' is not enough to show that none of those victims are members of socially distinct groups." *Id.* at 254.

***Rivas-Duran v. Barr*, 927 F.3d 26 (5th Cir. 2019):** The court upheld the BIA's denial of asylum and withholding of removal to a Salvadoran woman who had suffered domestic violence at the hands of her former partner. The BIA reversed the IJ's asylum grant, finding lack of sufficiently severe harm or membership in the proposed social group of "women in El Salvador unable to leave a domestic relationship." The court distinguished the case from *Matter of A-R-C-G-* and likened it to *Vega-Ayala v. Lynch*, 833 F.3d 34 (1st Cir. 2016), and *Cortez-Cardona v. Sessions*, 848 F.3d 519 (1st Cir. 2017), to hold that petitioner's relationship lacked "the hallmarks of a domestic relationship required to establish membership in a particular social group." *Id.* at 32 (internal quotations omitted). Specifically, petitioner never lived with her partner, who only "sporadically" tried to contact or visit her and their children. *Id.* In a footnote, the court recognized that the Attorney General overruled *A-R-C-G-*, "finding that 'without performing the rigorous analysis required by the [BIA's] precedents,' it recognized 'an expansive new category of particular social groups based on private violence.'" *Id.* at 31 n.1. However, the court noted that the BIA found lack of membership in the proposed group "even when *Matter of A-R-C-G-* was still in effect, and the intervening case would not change that result." *Id.* Therefore, the court declined to address social group cognizability, "which is where *Matter of A-R-C-G-* would come into play," or remand the case to the IJ. *Id.*

***Rodriguez-Palacios v. Barr*, 927 F.3d 13 (1st Cir. 2019):** The court upheld the BIA's denial of CAT protection to a Mexican man who fears gang-related violence. Petitioner fears that kidnappers or extortionists would target him or his children in Mexico because they would assume he has money, having lived in the United States. Four years before he entered the United States, an alleged gang member tried to hit petitioner with a bottle at a party. Petitioner ran away with his friends and did not report the incident out of fear of retaliation. He testified that his family has not had problems in Mexico, although his brother, who previously worked for the Mexican military, keeps to himself out of fear. He also testified that his friend was murdered by gang members close to his hometown. The court affirmed the BIA's and IJ's finding that petitioner was unlikely to be tortured because he did not face torture in the past, his family had not been tortured in Mexico, and petitioner failed to present evidence showing the motivations of his friend's killers.

***W.M.V.C. v. Barr*, 926 F.3d 202 (5th Cir. 2019):** The court denied petitioner's request to recover attorneys' fees and expenses after it had previously granted the government's motion to remand her asylum, withholding of removal, and CAT protection claims to the BIA. Petitioner, a Honduran woman, suffered domestic violence in a forced relationship at the hands of a former

female police officer. Petitioner also feared harm from others because neighbors perceived her to be a lesbian and said "rape would fix her." *Id.* at 206 (internal quotations omitted). She fled to the U.S. after a gang member attempted to extort her and threatened to kill her. "Without defending its stance on W.M.V.C.'s sexual-orientation claim, the government assert[ed] the agency reasonably denied CAT protection and rejected, under *In re A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014), *overruled by In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), the proposed social group of Honduran women unable to leave a domestic relationship." *Id.* at 209. Although the court noted the overruling of *A-R-C-G-* again in a footnote, its asylum and withholding analysis rested on distinguishing *A-R-C-G-* from the case at hand. *See id.* at 212 n.9 ("*A-R-C-G-* was overruled in its entirety after the motion to remand in this case. *See A-B-*, 27 I. & N. Dec. at 333."). Unlike *A-R-C-G-*, petitioner was not married. Further, according to the court, she did not identify "societal expectations or legal constraints" that prevented her from leaving the relationship or seeking help from the authorities. *Id.* at 213. Citing to *Cardona v. Sessions*, 848 F.3d 519, 523 n.5 (1st Cir. 2017), the court noted: "Though the BIA has clarified that 'marital status should not be the determinative factor in deciding a domestic violence asylum claim,' its decisions were unpublished and hence 'carried no precedential value.'" *Id.* at 212. The court assumed, without deciding, that the agency's alternate nexus finding and dismissal of the sexual orientation claim were unreasonable.

However, the court found the government's position substantially justified as a whole, including in light of the agency's reasoning for the CAT denial. With respect to CAT protection, the court held that the BIA reasonably found no evidence that Honduran officials acting under color of law would acquiesce to petitioner's torture. Although the abuser's former colleagues in the police force saw her lock up petitioner and her children in a room and did not intervene, the court stated that it was not apparent whether "temporarily cloistering someone in a room" amounts to the type of treatment triggering CAT protection. *Id.* at 211. It further noted that the police officers' visits were of a "purely social nature," and therefore it was not obvious that they were acting under color of law. In another instance, the abuser nearly hit petitioner's sister with a car, but the police released the abuser from custody and advised her to kill petitioner's siblings if they interfered in her affairs again. While expressing alarm over this statement, the court stated that reckless driving likely does not amount to torture.

***Guan v. Barr*, 925 F.3d 1022 (9th Cir. 2019):** The court found that substantial evidence supported the agency's finding that petitioner committed a serious nonpolitical crime in China and was therefore barred from asylum and withholding of removal. However, the court remanded the case to the BIA to reconsider petitioner's CAT protection claim based on his fear of torture as a practicing Christian in China. The BIA had summarily affirmed the IJ's denial of CAT protection based on the IJ's adverse credibility finding. The court held that both the BIA and the IJ failed to address additional evidence supporting petitioner's claim apart from his testimony that he participated in religious activities in China and was beaten up by the police. It noted that petitioner's argument for CAT relief focused mostly on his religious beliefs and practices and included only a cursory statement the fears torture based on his past actions. In support of its analysis, the court cited to *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001), where the panel was "not comfortable with allowing a negative credibility determination in the asylum context to wash over the torture claim; especially when the prior adverse credibility determination is not necessarily significant in this situation." *Id.* at 1034 (internal quotations

omitted). It also highlighted that under circuit precedent, "[i]t is well-accepted that country conditions alone can play a decisive role in granting relief under CAT." *Id.* at 1035 (quoting *Nuru v. Gonzales*, 404 F.3d 1207, 1219 (9th Cir. 2005) (internal quotations and alterations omitted). In this case, the court noted that the country reports did not merely contain "generalized statements that torture occurs in China"; rather, they pointed to torture against particular religious groups, including Christians. *Id.* at 1034-35. Moreover, petitioner submitted not only country reports, but also evidence from his church in the United States that he is a practicing Christian.

***Martinez Manzanares v. Barr*, 925 F.3d 222 (5th Cir. 2019):** The court upheld the BIA's denial of asylum, withholding of removal, and CAT protection to a former Honduran law enforcement official who faced death threats and murder attempts by a man named Edis who he had previously arrested. Petitioner had proffered three social groups: (1) ex-law enforcement officials of San Isidro, Victoria, Yoro, Honduras who are persecuted for having performed their law enforcement duties; (2) ex-law enforcement officials of San Isidro, Victoria, Yoro, Honduras who participated in the capture of Edis; and (3) ex-law enforcement officials of San Isidro, Victoria, Yoro, Honduras who participated in the capture of persons accused of committing a crime. The court stated that it doubted the cognizability of any of the proffered social groups, because "the harm visited upon members of [the] group[s] is attributable to the incentives presented to ordinary criminals rather than to persecution." *Id.* at 226 (quoting *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007)) (internal quotations omitted). In particular, the court found the second proffered group clearly invalid because it lacked social distinction and it was unclear that anyone other than petitioner belonged to that group. Even if the groups were cognizable, the court agreed with the BIA that petitioner failed to show nexus. According to the court, the evidence demonstrates that Edis targeted petitioner because of his specific involvement in Edis's arrest, not his general status as an ex-law enforcement official. The court distinguished the case from *Madrigal v. Holder*, 716 F.3d 499, 505-06 (9th Cir. 2013), which applied a "mixed motives" analysis, finding that petitioner "offered no similar evidence that Edis had a reason for threatening him other than revenge, much less another central reason." *Id.* at 227-28.

With respect to petitioner's CAT protection claim, the court held that petitioner failed to show likelihood of torture because the evidence demonstrated that he could likely relocate within Honduras to avoid Edis. It also held that petitioner failed to show past torture with the consent or acquiescence of a public official. It noted that petitioner failed to report the threats directly to the police. Although he told the mayor, the court reasoned that he did not testify that the mayor could mobilize the police, that he asked the mayor to have the police investigate the incident, or that the mayor refused to do so. The court further highlighted that the Honduran authorities had attempted to combat criminal activity by detaining and planning to prosecute Edis until he escaped from custody and that they were taking steps to "reform its criminal justice institutions and better 'tackle the crime situation'" more broadly. *Id.* at 229. It acknowledged that petitioner, at most, "demonstrated Honduras was unable to provide [him] and other citizens complete protection from criminals," but concluded that government inability to protect does not amount to acquiescence. *Id.* at 229.