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

Published Federal Courts of Appeals Decisions (January 1, 2019 to March 31, 2019)

The following is a non-exhaustive selection of published federal court of appeals decisions issued between January 1, 2019 and March 31, 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.

Positive precedent decisions

***Cabrera Vasquez v. Barr*, 919 F.3d 218, 220, 222-24 (4th Cir. 2019):** The court held that the BIA had erred in its "wholesale failure to fully consider" country conditions evidence showing government acquiescence for purposes of CAT protection (internal quotation marks omitted). The petitioner reported death threats from 18th Street gang members to the local police in El Salvador, but they told her that they could not help her without proof of the threats. Petitioner returned to the police when gang members continued to threaten her, this time presenting written notes. However, the police laughed at her and told her to "go back home" (internal quotation marks omitted). The IJ found the petitioner had failed to establish acquiescence of government officials, determining that "widespread problems appeared 'to flow from a weak central government, as opposed to a conscious effort by the government to leave populations vulnerable.'" In its brief analysis, the BIA affirmed the IJ's conclusion because country conditions evidence "showed the government was making efforts to fight the gangs." The Fourth Circuit held that the BIA and the IJ had failed to address the petitioner's testimony that the police had turned her away twice, laughing at her the second time, evidence material to her claim that officials "turned a 'blind eye'" to the threats. In a footnote, the court also noted that the IJ "summarily concluded, without analysis" that the death threats petitioner received did not rise to the level of persecution. It instructed the agency to provide "meaningful reasoning" on remand for this conclusion because "death threats to one's self or others may constitute torture under the CAT."

***Rodriguez-Arias v. Whitaker*, 915 F.3d 968, 973-74 (4th Cir. 2019):** The court joined the Third and Ninth Circuits to hold that "the risks of torture from all sources should be combined when determining whether a CAT applicant is more likely than not to be tortured in a particular country." It noted that no other circuit has disagreed with this "aggregation analysis." In this case, petitioner feared torture in El Salvador from the police, rival gangs, and vigilante groups due to his gang-related tattoos. The court found that the IJ failed to "consider the aggregated risk caused by all three entities in unison by adding the probability of torture from each entity and determining whether that sum exceeded 50%." With respect to acquiescence by a public official, the court held that the IJ erred by failing to meaningfully consider petitioner's "extensive evidence about the government's willingness to use torture on suspected gang members or its

willingness to turn a blind eye to the extreme violence between rival gangs and between gangs and vigilante groups" in El Salvador. Therefore, the court directed the BIA to engage "seriously with the full panoply of the risk-of-torture evidence submitted by [petitioner], recognizing that country conditions alone can play a decisive role in granting relief under the CAT" (internal quotation marks and alterations omitted).

***Arrey v. Barr*, 916 F.3d 1149, 1159-61 (9th Cir. 2019):** The court held that the BIA had erred in finding that the petitioner, a Cameroonian woman, was firmly resettled in South Africa. The petitioner suffered physical and sexual abuse and death threats at the hands of a man she lived with for 26 years. She eventually escaped to South Africa, where received refugee status and lived for seven years. While in South Africa, the petitioner was robbed and assaulted, and her brother was shot and killed. She returned to Cameroon with her brother's body for his burial. Although petitioner stayed in hiding while in Cameroon, her abuser found her and attempted to rape her. The court found that the BIA misapplied the "firm resettlement" rule because it noted only that petitioner received an offer of refugee status in South Africa, but it did not consider whether the conditions of residence were too restricted. Specifically, the BIA failed to consider petitioner's claim that she experienced past persecution in South Africa, contrary to court precedent in *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996), that "firmly resettled aliens are by definition no longer subject to persecution" (internal quotation marks omitted). The court further found the BIA applied the firm resettlement rule to limit the evidence it considered for purposes of asylum and withholding of removal, instead of as a mandatory bar to asylum. With respect to petitioner's CAT claim, the court held that substantial evidence did not support the BIA's conclusion that petitioner could safely relocate within Cameroon. Petitioner's abuser, an influential businessman, sometimes convinced the police to detain her based on false accusations. The BIA and the IJ found that the fact that the abuser "is a businessman and has lots of friends" does not mean petitioner cannot internally relocate (internal quotation marks omitted). The court rejected this conclusion as "bare speculation," noting that the BIA found petitioner credible and did not rebut her testimony that she could not escape her abuser due to his connections with any evidence in the record. The court further highlighted evidence that even when petitioner was in hiding in a different city in Cameroon, her abuser tracked her down and attempted to rape her.

***Singh v. Whitaker*, 914 F.3d 654, 660-61 (9th Cir. 2019):** The court held that the BIA erred in failing to conduct a sufficiently individualized analysis of petitioner's ability to relocate within India outside the state of Punjab, where he had suffered past persecution. The court rejected petitioner's argument that DHS had to propose a more specific area of relocation than "outside Punjab." Nonetheless, it found that the BIA focused too narrowly on "whether the Punjabi police would follow [petitioner] outside of Punjab based on his past political activity," instead of considering persecution he may face from local authorities outside of Punjab based on his future political activities. The BIA failed to apply a "nationwide presumption" of well-founded fear, i.e., that the threat of persecution "exists nationwide" (internal quotation marks omitted). The BIA also failed to address petitioner's intent to continue to engage in political activities wherever he went. However, the court affirmed the BIA's denial of petitioner's humanitarian asylum argument and CAT protection claim.

Negative precedent decisions

***Qorane v. Barr*, 919 F.3d 904, 910-11 (5th Cir. 2019):** The court affirmed the BIA's denial of asylum and withholding of removal to the petitioner after finding he had failed to establish past persecution or a well-founded fear of future persecution. The petitioner belongs to a minority clan in Somalia, the Ashraf. Members of the dominant clan, the Ayr, verbally abused, slapped, and shoved petitioner, resulting in a hip injury that did not require medical attention. The court concluded that this mistreatment did not rise to the level of persecution. Petitioner also received a death threat at the hands of an Ayr customer. The court held that it "previously treated death threats as a question of future—not past—persecution. . . . [b]ut even assuming threats can constitute past persecution, threats that are 'exaggerated, non-specific, or lacking in immediacy' should not suffice." Here, the court found the death threat insufficient because it arose in the context of a business dispute and the petitioner did not have further conflict with his customer. With respect to future persecution, the court found that the customer did not seek out the petitioner to make good on his threat and that the country conditions evidence "hardly establishes a present-day pattern or practice of persecution" against the Ashraf. The court also affirmed the BIA's denial of CAT protection. Because the past incidents did not amount to persecution, "[i]t follows *a fortiori* they do not constitute torture." The court also noted the general country conditions evidence did not demonstrated a particularized risk of torture to petitioner. With respect to state involvement, it rejected petitioner's argument that Ayr clan members are "public officials" as the *de facto* government in the area: "[t]o the contrary, a power vacuum does not make private conduct public because warring clans do not exercise 'official power.'" The court also did not find acquiescence by a public official, holding that the Somali "government's inability to protect its citizens does not amount to acquiescence."

***Barry v. Barr*, 916 F.3d 666, 670-71 (7th Cir. 2019):** The court upheld the BIA's denial of CAT protection to petitioner, who feared torture due to his bisexuality and his father's political affiliation. When petitioner was a child, Guinean soldiers stabbed and threatened him to force him to disclose his father's whereabouts. The court stated that the IJ "must consider potential past torture in the context of the *entire* record; past torture alone is not dispositive" (emphasis added). Accordingly, it agreed with the BIA and IJ that petitioner was not likely to face torture based on his father's political ties, because the events occurred more than 20 years ago, petitioner is no longer in touch with his father, and a different political party is in power in Guinea today. With respect to petitioner's fear of torture based on his sexual orientation, the court noted that his mother's testimony about physical violence against LGBT individuals when she lived in Guinea 20 years ago was dated. Petitioner submitted a more recent State Department Country Report, which mentioned the criminalization of, and "[d]eep religious and cultural taboos[,] against same-sex sexual conduct" (internal quotation marks omitted). However, the court noted that the report did not describe torture against any individual engaging in same-sex sexual conduct and contained "only generalized findings" insufficient to show petitioner's "particularized risk of torture."

***Herrera-Garcia v. Barr*, 918 F.3d 558, 562 (7th Cir. 2019):** The court upheld the BIA's denial of CAT protection, finding the petitioner did not provide evidence of past torture. During the Salvadoran civil war, guerillas frequently stopped the petitioner, a child at the time, to inquire about individuals in the neighborhood who might be working for the military. The court noted,

"[t]hough his interactions with guerrillas when he was a child may have been stressful, they do not rise to the level of 'severe pain or suffering.'" It also found the petitioner's fear of future torture at the hands of gang members and corrupt government authorities in El Salvador "too speculative." It emphasized that "there must be a substantial risk that the petitioner will be targeted *specifically*" (emphasis in original) (internal quotation marks omitted). The court noted that the petitioner's fear was unrelated to his own past interactions with guerrillas over 27 years ago; rather, it was based on "a general fear of violence that any person moving to El Salvador might have." With respect to the petitioner's argument that gangs would target him because of his American accent, the court acknowledged that there is some evidence that gangs have extorted Americans but noted that his U.S. citizen parents had not faced harm during their regular trips to El Salvador and his extended family members remained unharmed. Moreover, the court found insufficient evidence that "any extortion would rise to the level of torture." Finally, the court concluded that petitioner had failed to establish that the Salvadoran government would acquiesce to any torture he would face at the hands of gang members. In the proceedings below, the IJ cited to the government's "extraordinary measures to thwart the rising gang violence, including focusing on moving gang members to maximum security prisons, putting up cell phone signal blockers around the prisons, and conducting coordinated law enforcement operations" (internal quotation marks omitted). The court noted that, although these efforts are "not dispositive of a lack of government acquiescence," petitioner did not provide any evidence of government complicity in gang violence "besides broad allegations that 'gangs operate with impunity throughout El Salvador.'"

***De Guevara v. Barr*, 919 F.3d 538, 540 (8th Cir. 2019):** The court affirmed the BIA's denial of asylum to a Salvadoran woman who received a phone call and a letter from the Mara 18 gang demanding money and threatening to kill her and her children if she did not comply. The court agreed with the BIA that the phone call and letter did not amount to past persecution. It also agreed with the BIA that the petitioner did not have a well-founded fear because her family remained unharmed in El Salvador and "[a] generalized fear of gang violence is not a basis for asylum." The court further found that the BIA did not err in rejecting "Salvadoran female heads of households" as a cognizable particular social group. Although petitioner presented country conditions evidence that "women are targeted by gangs for violence and extortion, and that she has personally experienced the dangers of living as a single woman in these conditions," the court found this insufficient to establish that "female heads of household are recognized in El Salvador as a particular, socially distinct group" (internal quotation marks omitted). Because the petitioner did not separately argue withholding of removal or CAT protection on appeal, the court held that the asylum denial foreclosed these other claims.

***Juarez-Coronado v. Barr*, 919 F.3d 1085, 1089 (8th Cir. 2019):** The court affirmed the BIA's determination that the Guatemalan government was or would be able and willing to protect petitioner, a domestic violence survivor. After a Guatemalan judge issued the petitioner a six-month restraining order, her abusive ex-partner continued to beat and threaten her. The petitioner called the police once, and they came to look for her abuser but could not find him. The court concluded that "the fact that the police could not find [the abuser] when [petitioner] sought to enforce the protective order does not compel the conclusion that the Guatemalan authorities were unable to protect her, especially in light of the fact that she never sought their aid again." The court affirmed the denial of asylum and withholding of removal, and also affirmed the denial of

CAT protection, finding no evidence that the Guatemalan government would be willfully blind to petitioner's torture at the hands of her abuser.

***Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028-30 (9th Cir. 2019):** The court affirmed the BIA's denial of asylum and withholding of removal to a former Mexican police officer who had received two death threats from a group of *sicarios* (i.e., hitmen) affiliated with the Sinaloa drug cartel. The court noted that, "[a]lthough . . . credible death threats alone can constitute persecution, . . . they constitute persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm" (internal citations and quotation marks omitted). It distinguished between cases "where threats are repeated, specific and combined with confrontation or other mistreatment" and "cases with threats alone, particularly anonymous or vague ones." Here, the court found the record did not compel the conclusion that the threats amounted to persecution because the *sicarios* did not carry out any other acts of violence against the petitioner or his family and the petitioner did not know if the *sicarios* ever carried out threats against other officers. With respect to well-founded fear of future persecution, the court found the petitioner failed to show internal relocation would not be possible or reasonable. The court also affirmed the BIA's denial of CAT protection, noting the lack of evidence that "anyone has sought [petitioner] or has any continuing interest in him" since he left his hometown.

***Martin Martin v. Barr*, 916 F.3d 1141, 1144-45 (9th Cir. 2019):** The court affirmed the BIA's denial of asylum to a Guatemalan indigenous Mam man. During the Guatemalan civil war, petitioner's grandfather was killed, and his family lost their home and land. Petitioner continued to face discrimination due to his ethnicity shortly after the war. Between 2008 and 2010, the Zetas also extorted petitioner and threatened to kidnap, kill, or force him to grow drugs for them if he refused to support the gang. After petitioner fled to the United States, gangs killed his cousin and began to recruit his son. The court concluded that the property loss, discrimination, and extortion threats did not amount to past persecution. It also did not find well-founded fear of future persecution because of insufficient evidence that petitioner faces "the same potential risk of harm" as the two family members who had been killed (internal quotation marks omitted). With respect to protected grounds, the court did not find nexus to ethnicity because petitioner did not suffer harm based on his ethnicity since the 2005 peace accords and Guatemalan law "recognizes the rights and cultures of indigenous communities and their organized government bodies" (internal quotation marks omitted). The court did not find nexus to membership in a particular social group (formulation not specified) because the Zetas sought to "further the gang's own criminal goals rather than to overcome a protected characteristic" (internal quotation marks omitted). Finally, the court affirmed the BIA's denial of withholding of removal and CAT protection because the standards for those claims are more onerous than asylum.

***Rayamajhi v. Whitaker*, 912 F.3d 1241, 1244-45 (9th Cir. 2019):** The court upheld the BIA's finding that petitioner was ineligible for asylum and withholding of removal because he provided "material support" to a terrorist organization under INA § 212(a)(3)(B)(iv)(VI). In Nepal, a Maoist demanded money from petitioner. Petitioner gave the man an equivalent of about $50 out of fear of harm if he did not comply because the same man had beaten him before with other Maoists. The court held at the outset that its precedent, *Annachamy v. Holder*, 733 F.3d 254, 267 (9th Cir. 2013), forecloses petitioner's argument that a "duress" exception to the material support

bar applies. It then rejected petitioner's argument that there is an exception for "de minimis" funds. First, the court found that, under the plain text of the statute, "'funds' knowingly given to a terrorist organization are 'material support,' regardless of the amount given." It noted that the statute lists "funds" as an example of "material support," without indicating "any numerical threshold." Second, the court held that, even if the statute is unambiguous, the BIA's holding that there is no de minimis exception merits *Chevron* deference. It referenced the lack of support in legislative history for "'a quantitative approach' to defining 'material support.'" It further concluded that DHS's discretionary authority under the statute to grant waivers "to address . . . support provided under duress or to only a de minimis degree" would be meaningless if "material support" already included a de minimis exception (internal quotation marks omitted).