AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

Matter of W-Y-C & H-O-B and Articulating Particular Social Groups Before the Immigration Judge

By AILA's Asylum and Refugee Committee

On January 19, 2018, the Board of Immigration Appeals (BIA) issued a precedential decision, *Matter of W-Y-C & H-O-B*, 27 I&N 189 (BIA 2018), holding that an applicant for asylum or withholding of removal making a particular social group (PSG) claim, must articulate the PSG claim(s) before the Immigration Judge (IJ), and cannot advance a new PSG on appeal. This practice pointer addresses the potential effects of this decision on how practitioners should prepare PSG-based asylum claims.

The Holding

In *W-Y-C & H-O-B*, the respondent was represented both before the IJ and on appeal though it is not clear from the decision whether it was the same attorney at both stages of the proceeding. The respondent sought asylum before the IJ based on the PSG, "[s]ingle Honduran women age 14 to 30 who are victims of sexual abuse within the family and who cannot turn to the government." The IJ denied asylum, finding that this was not a cognizable PSG and that the respondent had not demonstrated that the harm she suffered was on account of her membership in this "claimed group." On appeal, the applicant conceded that the first PSG was not cognizable and advanced a new PSG, "Honduran women and girls who cannot sever family ties."

The decision is short on facts but, presumably, the same facts were cited to support the second PSG as were cited for the first. The Board denied the appeal finding the "importance of articulating the contours of any proposed social group before the Immigration Judge is underscored by the inherently factual nature of the social group analysis." *W-Y-C & H-O-B*, at 191. In other words, since the IJ must analyze the facts to determine whether there is a viable PSG, the Board determined that it could not make PSG determinations in the first instance. Thus, it refused to consider the newly advanced PSG and denied the appeal. The Board also refused to deem the request to consider a newly articulated PSG as a motion to remand since the new PSG was not based on previously unavailable facts.

Effect on Practice – Master Hearing

W-Y-C & H-O-B does not specify at what point in the proceeding the asylum seeker must articulate the PSG(s) on which the claim is based. The Board's reasoning for its holding is that the IJ must engage in an analysis that is "factual [in] nature." Since these facts will enter the record through the testimony of the respondent and other witnesses, as well as written submissions, there is no reason to believe that *W-Y-C & H-O-B* requires the asylum seeker to articulate their PSG(s) ***before***

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the individual hearing. Nevertheless, AILA members have reported that some IJs are now requiring the respondent to state their PSG at a master calendar before setting an individual hearing date.

Practitioners should argue on the record that *W-Y-C & H-O-B* only requires the PSG(s) to be articulated prior to appeal, not prior to being scheduled for an individual hearing. In many courts, it is taking several years for respondents to be scheduled for individual hearings, and with the law governing PSG claims constantly in flux, it would violate the applicant's right to due process to be locked into one PSG when another may be a better option by the time of the individual hearing. Likewise, as the practitioner works with the asylum seeker over time and in preparation for the hearing, new facts may come out which the applicant was reluctant to share in initial meetings (such as a history of domestic violence, or identification as LGBT). At a minimum, if a practitioner puts the PSG(s) on the record at a master calendar, the practitioner should state on the record that they are reserving the right to add to or amend the PSG(s) at the individual hearing.

Before the individual hearing, practitioners should review *Matter of Fefe*, 20 I & N Dec. 116 (BIA 1989),[1] a Board decision which lays out the duties of the IJ in providing a full hearing. (*See* also *Oshodi v. Holder*, 729 F.3d 883, 890 (9th Cir.2013); *Kuschchak v. Ashcroft*, 366 F.3d 597, 606 (7th Cir. 2004); *Mohamed v. Attorney General United States*, 705 Fed.Appx. 108, 114 (3rd Cir. 2017); *Ramirez-Canenguez v. Holder*, 528 Fed.Appx. 853, 855 (10th Cir. 2013) citing *Matter of Fefe* favorably.) In relying on *Fefe* practitioners should be prepared to argue that the IJ must hear testimony on each claim an asylum applicant may have. In *Fefe*, the BIA stressed that the "full examination of an applicant [is] an essential aspect of the asylum adjudication process for reasons related to fairness to the parties and to the integrity of the process itself." *Id*. at 118. The BIA also stated that in most instances, an IJ should not rely on an asylum seekers written application alone, but should solicit oral testimony from the applicant. *See id*. According to the BIA, this serves two purposes. First, it enables an IJ to determine when an asylum seeker has fabricated a claim in his written application. *See id.* Second, it allows an asylum seeker to "establish[ ] eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone." *Id.* Similarly, if an IJ is now claiming that an asylum seeker cannot raise a PSG at the individual hearing if she did not identify it at a master calendar, the advocate should argue that *Fefe* requires the IJ to take testimony on all potential claims.

[1] The Attorney General just issued a decision *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) vacating a more recent BIA precedent, *Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014), which similarly instructed IJs on the need to conduct a full hearing on all potential claims for relief. The fact that the Attorney General vacated *E-F-H-L-* may signal further efforts on his part to erode due process rights in immigration court. *E-F-H-L-* cited two circuit court cases which the practitioner should review to put forth arguments about the ongoing due process requirement for IJs to conduct full hearings on all cases. *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006); *Mekhoukh v. Ashcroft*, 358 F.3d 118, 129 & n.14 (1st Cir. 2004).

If an immigration judge in your jurisdiction is requiring asylum seekers to articulate their PSGs at a master calendar hearing, please complete this survey- Call for Examples: IJs Requiring Asylum Seekers to Articulate PSG at Master Calendar Hearing, AILA Doc. No. 18031332.

Effect on Practice – Individual Hearing

Courts and the BIA are constantly modifying the boundaries of what constitutes a viable PSG. While a few PSGs are firmly established (LGBT identity, members of a tribe who are opposed to FGM, women who are unable to leave a relationship; family members) most PSGs are analyzed on a highly individualized basis. The holding in *W-Y-C & H-O-B* leads to a conclusion that regardless of the facts of the case, a legitimate asylum seeker could lose her claim based on her inability to adequately wordsmith her PSG.[2] Best practice may now be to set forth every conceivable PSG at the individual hearing rather than focusing on what appears to be the strongest claim. An excellent resource on PSGs is the AILA page Asylum Cases on Social Group.[3] Reviewing unpublished BIA decisions is also an excellent way to track trends in PSG law.[4] Practitioners should also speak with other practitioners in their area to understand which PSGs have the greatest likelihood of success before the particular IJ who will be hearing the case. And, practitioners should always consider putting forward a claim for withholding under the Convention against Torture in the event the applicant fears extreme harm, but the IJ does not find a nexus to a protected characteristic.

Effect on Pro Se Litigants

Perhaps the most troubling aspect of the *W-Y-C & H-O-B* holding is its potential effect on pro se litigants. Asylum law is extremely complicated, and the law governing PSGs is in constant flux. For an asylum seeker who is not represented before the immigration court, it will often be impossible to articulate a PSG that meets the three-part test laid out in *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) & *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014). The PSG requirements of immutability, social distinction, and particularity, each of which is a legal term of art that involves an analysis of law and fact, would be nearly impossible for an unrepresented applicant to meet. Because the Board noted in *W-Y-C & H-O-B* that the respondent was represented both before the IJ and before the BIA, it may be possible for practitioners to make arguments before the Board that an asylum seeker who was unrepresented before the IJ, be given greater leeway to articulate a

[2] For an interesting blog post on this issue by former immigration judge Jeffrey Chase, *see* https://www.jeffreyschase.com/blog/2018/1/26/0sg8ru1tl0gz4becqimcrtt4ns8yjz.

[3] Asylum Cases on Social Group, AILA Doc. No. 13010150, *available at* http://www.aila.org/infonet/asylum-cases-on-social-group?utm_source=aila.org&utm_medium=InfoNet%20Search.

[4] An excellent resource for unpublished BIA decisions is the Immigrant & Refugee Appellate Center. http://www.irac.net/unpublished/index/. Remember to include a printed copy of any unpublished BIA decision that is cited as persuasive. Another great resource on PSGs is the Center for Gender and Refugee Studies, https://cgrs.uchastings.edu/our-work/technical-assistance-training. They provide country conditions materials and can provide technical assistance, including helping attorneys strategize about effective PSGs.

new PSG, or at least to seek remand to the IJ. It remains to be seen how the impact of *W-Y-C & H-O-B* will play out.