

JEFFREY S. CHASE OPINIONS/ANALYSIS ON IMMIGRATION LAW (/)

Jun 3 3rd- Generation Gangs and Political Opinion

When Attorney General Jeff Sessions issues his decision in *Matter of A-B-* (the case he certified to himself to decide whether “being a victim of private criminal activity” can constitute a particular social group for asylum purposes), it may negatively impact those asylum applicants who fear gang violence on account of their membership in a particular social group. Attorneys representing such claimants should consider whether their clients may alternatively claim a well-founded fear of persecution based on their political opinion under a “third-generation gang” theory, supported by country condition evidence.

In their article *‘Third Generation’ Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground*,¹ Deborah Anker and Palmer Lawrence make a very important point: that “the Refugee Convention’s concept of political opinion incorporates ‘any opinion on any matter in which the machinery of the State, government, and policy may be

AILA Doc. No. 18060835. (Posted 6/8/18)

engaged, or that of other persecutory agents where the state is unwilling or unable to provide protection” (citing *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 716 (Can)).

JEFFREY S. CHASE OPINIONS AND ANALYSIS ON IMMIGRATION LAW (/)

Relying on this broad interpretation of political opinion, Anker and Lawrence next note that some military and law enforcement experts have concluded that the larger Central American gangs (including MS-13 and Mara 18) “have developed a degree of politicization, sophistication, and international reach to qualify them as ‘third generation gangs,’” which “function as de facto governments, controlling significant territory (competing with the state for power).”

Anker and Lawrence cite Lieutenant Colonel Howard L. Gray, *Gangs and Transnational Criminals Threaten Central American Stability*, 7 U.S. Army War College, Strategy Research Project (2009)); in documenting such claims, practitioners should also reference John P. Sullivan and Robert J. Bunker, “Third Generation Gang Studies: An Introduction,” 14-4 *Journal of Gang Research* 1 (Summer 2007), and “Third General Gangs Strategic Note No. 1: Mara Salvatrucha (MS-13) 500 Man Commando Unit Planned for El Salvador,” *Small Wars Journal*, Sept. 10, 2016. The last article quotes Douglas Farah, Visiting Senior Fellow, National Defense University Center for Complex Operations as stating that “The MS has strong political and military ambitions and now views itself as political/military rather than a gang...MS 13 now has troops, weapons, and a cause...efforts to form a joint force with the 18 is less likely but both sides are in discussion to at least have lines of communication open.”²

Under the definition of political opinion cited above, gangs such as MS-13 and Mara 18 are at least other persecutory agents from which the state is unable or unwilling to provide protection. Such gangs might also be the *de facto* “state” itself in areas they control. The idea that opinions or matters that engage such gangs might constitute political opinion finds support from the Office of the United Nations High Commissioner for Refugees (UNHCR), which has recently published Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Guatemala (January 2018), El Salvador (March 2016), and Honduras (July 2016).

These can be found on the website Refworld.org. UNHCR has been described as “the entity that most resembles a supervisory body of the [1951] Convention.”³ Although U.S. courts and the BIA have been inconsistent in the deference accorded to its opinions, given the clearly stated intent of Congress in passing the Refugee Act of 1980 to conform U.S. asylum law to the language of the 1951 Convention (which was binding on the

U.S. based on its ratification of the 1967 Protocol Relating to
AILA Doc. No. 18060835. (Posted 6/8/18)

the Status of Refugees), it has been argued that courts should defer more consistently to UNHCR's interpretations of the

JEFFREY S. CHASE OPINIONS AND ANALYSIS ON IMMIGRATION LAW (//

UNHCR's 2016 Eligibility Guidelines for El Salvador includes an "Assessment of International Protection Needs of Asylum-seekers from El Salvador." The agency concludes that "depending on the particular circumstances of the case, UNHCR considers that persons perceived by a gang as contravening its rules or resisting its authority may be in need of international protection on the grounds of their (imputed) political opinion..."⁵ The UNHCR Guidelines report at p. 12 that "gangs are reported to exercise extraordinary levels of social control over the population of their territories."

According to UNHCR, residents in such gang-controlled zones "are reportedly required to 'look, listen and keep quiet' ('mirar, oír, callar'), and often face a plethora of gang-imposed restrictions on who they can talk with and what about, what time they must be inside their homes, where they can walk or go to school, who they can visit and who can visit them, what they can wear, and even, reportedly, the color of their hair."

At p. 28 of its Guidelines, UNHCR states:

The ground of political opinion needs to reflect the reality of the specific geographical, historical, political, legal, judicial, and sociocultural context of the country of origin. In contexts such as that in El Salvador, expressing objections to the activities of gangs may be considered as amounting to an opinion that is critical of the methods and policies of those in control and, thus, constitute a "political opinion" within the meaning of the refugee definition. For example, individuals who resist being recruited by a gang, or who refuse to comply with demands made by the gangs, such as demands to pay extortion money, may be perceived to hold a political opinion.

Anker and Lawrence note in their conclusion that many denials of such claims "reflect adjudicators' and courts' lack of knowledge (often because they are not presented with evidence) of regarding the political nature and context of the present conflict in that region." This is an extremely important point. The U.S. Court of Appeals for the Second Circuit stated in *Castro v. Holder*⁶ that "a claim of political persecution cannot be evaluated in a vacuum..." The court noted that it has "remanded cases in which the agency denied an application for asylum based on its failure to properly engage in the "complex and contextual factual inquiry" that such claims often

require...Nevertheless, in this case, the agency has once again embraced an ‘impoverished view of what political opinions are, especially in a country where certain democratic rights are only a tenuous hold’ in denying the asylum claim “without any coherent examination of the surrounding political environment.”

Immigration judges dealing with seriously overloaded dockets, limited authority to grant continuances, and completion quotas will be hard pressed to engage in “complex and contextual factual inquiry.” Practitioners should do their best to educate adjudicators through country condition evidence, expert testimony, memoranda of law, and through detailed direct examination of the asylum-seeker.

Practitioners should also rely on the BIA’s precedent decision in *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996), which held that imputed political opinion may satisfy the refugee definition (relying in part on the UNHCR *Handbook and Procedures for Determining Refugee Status under the 1951 Convention*; and that asylum applicants need not show conclusively why persecution may occur, but need only produce facts to establish that a reasonable person would fear that the danger arises on account of a protected ground. The Board in *S-P-* also set forth five elements to consider in identifying motive, including “indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct (e.g., statements or actions by the perpetrators or abuse out of proportion to nonpolitical ends)” (Id. at 494). With the support of the UNHCR Guidelines, a strong argument can be made that death threats or actual killings for offenses such as “looking mistrustfully at a gang member,” “wearing certain clothing,” or “accidentally turning up uninvited in a gang zone” constitute “statements or actions...out of proportion to nonpolitical ends” under the criteria found in *Matter of S-P-*.⁷

Where another motive exists for the feared harm, practitioners should argue that mixed motives will support a grant of asylum where one of the motives is tethered to a statutory ground. See *Matter of S-P-*, supra at 495. In *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994), the U.S. Court of Appeals for the Second Circuit responded to INS’ argument that a labor union leader could not establish a nexus to political opinion because his dispute with the Guatemalan government was economic in nature by finding “any attempt to unravel economic from political motives is untenable in this case.” The court concluded that the petitioner’s union activities “imply a political opinion,” concluding that “the Government’s view of what constitutes a political opinion is too narrow.” Or, as Anker and Lawrence

explain, “gangs can, for example, view a person who refuses extortion as an enemy opposing them and, at the same time,

show us the funds”

JEFFREY S. CHASE OPINIONS AND ANALYSIS ON IMMIGRATION LAW (//


Copyright 2018 Jeffrey S. Chase. All rights reserved.

Notes:

1. 14-10 Immigration Briefings 1 (October 2014).
2. I first heard Farah speak at a country condition training on gang violence in the Northern Triangle held by USCIS for its asylum officers; at my invitation, Farah was a speaker on the same topic at the 2015 EOIR Training Conference for its immigration judges and BIA staff.
3. American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis (Note), 131 HARVARD L.R. 1399 (March 2018).
4. See, e.g., American Courts and the U.N. High Commissioner for Refugees, *supra*; Bassina Farbenblum, Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron,” 60 DUKE L.J. 1059 (2011); Joan Fitzpatrick, The International Dimension of U.S. Refugee Law, 15 BERKELEY J. INT’L L. 1 (1997).
5. UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador (March 2016) at 30. <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=56e706e94&skip=0&query=guidelines%20on%20&coi=SLV> (<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=56e706e94&skip=0&query=guidelines%20on%20&coi=SLV>)
6. 597 F.3d 93 (2d Cir. 2010).
7. See UNHCR Guidelines on El Salvador at 29; Matter of S-P-, *supra* at 494.

JEFF CHASE ([/?author=593d84181b10e33a7a33426b](https://www.facebook.com/sharer/sharer.php?u=https%3A%2F%2Fwww.jeffreyschase.com%2Fblog%2F2018%2F6%2F3%2F3rd-generation-gangs-and-political-opinion))

 ([HTTPS://WWW.FACEBOOK.COM/SHARER/SHARER.PHP?U=HTTPS%3A%2F%2FWWW.JEFFREYSCHASE.COM%2FBLOG%2F2018%2F6%2F3%2F3rd-generation-gangs-and-political-opinion](https://www.facebook.com/sharer/sharer.php?u=https%3A%2F%2Fwww.jeffreyschase.com%2Fblog%2F2018%2F6%2F3%2F3rd-generation-gangs-and-political-opinion))

 ([HTTPS://TWITTER.COM/INTENT/TWEET?URL=HTTPS%3A%2F%2FWWW.JEFFREYSCHASE.COM%2FBLOG%2F2018%2F6%2F3%2F3rd-generation-gangs-and-political-opinion](https://twitter.com/intent/tweet?url=https%3A%2F%2Fwww.jeffreyschase.com%2Fblog%2F2018%2F6%2F3%2F3rd-generation-gangs-and-political-opinion))

AILA Doc. No. 18060835. (Posted 6/8/18)



JEFFREY S. CHASE OPINIONS/ANALYSIS ON IMMIGRATION LAW (/)



May 28 Amicus Brief Filed in W-Y-C- & H-O-B- Appeal

[\(/blog/2018/5/28/amicus-brief-filed-in-w-y-c-h-o-b-appeal\)](/blog/2018/5/28/amicus-brief-filed-in-w-y-c-h-o-b-appeal)

Jeffrey S. Chase is an immigration lawyer in New York City. Jeffrey is a former Immigration Judge, senior legal advisor at the Board of Immigration Appeals, and volunteer staff attorney at Human Rights First. He is a past recipient of AILA's annual Pro Bono Award, and previously chaired AILA's Asylum Reform Task Force.

[Blog \(/blog\)](/blog) [Archive \(/archive-foundry\)](/archive-foundry) [Contact \(/contact\)](/contact)

Powered by Squarespace (http://www.squarespace.com?channel=word_of_mouth&subchannel=customer&source=footer&campaign=4fd1028ee4b02be53c65dfb3)

[Newsletter \(/newsletter/\)](/newsletter/)