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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of L-E-A-, *Respondent*	27 I&N Dec. 494 (A.G. 2018) In Removal Proceedings

Amicus Curiae Brief
of the Immigration Reform Law Institute

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including *Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (2017); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

ISSUE PRESENTED

> Whether, and under what circumstances, an alien may establish persecution on account of membership in a "particular social group" under 8 U.S.C. § 1101(a)(42)(A) based on the alien's membership in a family unit.

ARGUMENT

An alien could show persecution on account of membership in a "particular social group" based on the alien's membership in a family unit only in very rare circumstances. The vast majority of families lack sufficient visibility in their societies to be considered socially distinct, and thus are not particular social groups. Even if that were not so, to establish persecution on this basis, an alien would have to show 1) that his or her family membership motivated persecution, and 2) that the government either committed that persecution or was unwilling, or unable, to protect the alien from it. Both showings are very difficult to make.

I. Most Families Lack The Social Visibility Necessary To Constitute A Socially Distinct Group.

Of the five grounds protected under 8 U.S.C. § 1101(a)(42)(A), "membership in a 'particular social group' is the least well-defined" and "courts have struggled to apply it." *Koudriachova v. Gonzales*, 490 F.3d 255, 260 (2d Cir. 2007). The legislative history provides no guidance at all on what "a particular social group" means, let alone whether a family can qualify as one. S. Rep. 96-256 (1979); S. Rep. 96-590 (1979); H.R. Rep. 96-608 (1979); H.R. Rep. 96-781 (1980); *see also Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (holding the interpretation of the Board of Immigration Appeals (Board) was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

In *Matter of Acosta*, the Board found that members of a particular social group must have in common an immutable characteristic, that is, a characteristic that they either cannot change or should not be required to change. 19 I. & N. Dec. 211, 233 (B.I.A. 1985). In recent years, the Board has clarified the *Acosta* definition, finding that the particular social group must be: (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question and (3) defined with particularity. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014) (determining that "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose gangs" is not a particular social group for an asylum claim).

The Board in this case, and also some circuit courts, has held that nuclear families generally will meet this test. *E.g.*, *Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017) ("'[M]embership in a nuclear family qualifies as a protected ground for asylum purposes.'") (quoting *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015)). The contrary view is far more reasonable, however, if only because the vast majority of families fail to meet the second criterion. While governments generally "recognize" individual families through marriage and birth records, and families may be recognized by neighbors and others in particular social networks, few families are socially visible to a degree that would make them socially distinct

within their society as a whole. *See Perkeci v. United States AG*, 446 Fed. Appx. 236, 239 (2011) ("The BIA's decision in this case is a reasonable application of the principles set out in *Acosta* and [*Castillo-Arias v. United States Attorney General*, 446 F.3d 1190 (11th Cir. 2006)]. The BIA found that there was no evidence showing that the Perkeci family, as targets of a blood feud, were sufficiently visible to Albanian society as a whole to constitute a 'particular social group' under the INA."). Of course, some families – the Romanovs being an obvious example – may have enough societal recognition to form a socially distinct group in their respective societies, but the vast majority of families do not.

II. A Family Member Would Have To Show Persecution On Account Of Family Membership.

After establishing that an applicant's family is a particular social group, an applicant for asylum must demonstrate that he or she was persecuted "on account of" his or her family membership. 8 U.S.C. § 1101(a)(42)(A). The REAL ID Act clarified this nexus requirement by providing that the protected ground must be "at least one central reason" for the harm suffered. Pub. L. No. 109-13, div B, 119 Stat. 231 (2005); *see also Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A.1988) (holding that the asylum applicant "bear[s] the burden of establish facts on which a reasonable person would fear that the danger rises on account of" their membership in the specific social group). The Board has stated that the persecutor's group-related motives must not be "incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of J-B-N- & S-M-,* 24 I. & N. Dec. 208, 214 (B.I.A. 2008)).

Because the applicant must prove that the harm was suffered "'*because of*' a protected ground,'" the persecutor's motives must be assessed. *Parussimova v. Mukasey*, 555 F.3d 734, 739 (9th Cir. 2009) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1982)) (emphasis in original). The protected ground must be "essential" to the decision to persecute the applicant. *Parussimova*, 555 F.3d at 739; H. Rep. No. 109-72, at 162 ("As the Supreme Court has held: 'since the statute makes

motive critical, [an asylum applicant] must provide some evidence of it, direct or circumstantial.' *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1982)."). Conjecture about the link between the harm and a protected ground will not suffice for establishing the nexus requirement. *Singh v. Mukasey*, 543 F.3d 1, 6 (1st Cir. 2008) (determining that proposed persecutors were economically motivated rather than motivated by a protected ground when they assaulted respondent and eventually occupied part of his home after he left India).

Fortunately, it appears rare for individuals to be persecuted *because* they are members of a particular family. Often, if a criminal or criminal group targets different members of the same family, it is not because of animus toward that family *per se*, but for reasons of opportunity, as in the instant case, where the Board upheld the finding of the Immigration Judge that the respondent and his father were both pressured to sell drugs in the father's store not because of their family membership, but because they both had access to the store, *In re L-E-A-,* 27 I. & N. Dec. 40, 46 (B.I.A. May 24, 2017), or because the family is well-off, *see Cambara-Cambara v. Lynch*, 837 F.3d 822 (8th Cir. 2016) (holding that extortion against multiple members of a wealthy landowning family was not on account of family membership), *cited by In re L-E-A-,* 27 I. & N. Dec. at 46. That said, a politically-prominent family such as the Romanovs (that is, a family that could actually show it was a particular social group) might well be a target of family-based animus, and blood feuds between families are not unknown. *See Perkeci, supra*.

Claims of family-based persecution should be distinguished from situations in which an individual's family members are targeted or threatened as a means of influencing that individual, or exacting revenge against him or her. In such a case, where it is not hostility to a particular family that motivates the harm, but the desire to harm or threaten the individual, group-related motives are at most "subordinate to another reason for harm." *Matter of J-B-N- & S-M-,* 24 I. & N. Dec. at 214. By this standard, for example, the validity of an asylum claim by South Africans who "emphasized their fear of persecution because of . . . their kinship with

. . . 'Boss Ronnie,' a white South African who allegedly held racist views and mistreated black workers at the company at which he was a foreman," *Gonzales v. Thomas*, 547 U.S. 183, 184 (2006), would depend on whether persecution was motivated by animus against the family *per se* or was meant to influence or take revenge on Boss Ronnie as an individual. Similarly, *United States v. Reyes-Romero*, 327 F. Supp. 3d 855, 888 (W.D. Pa.), which held that "[t]he Defendant is clearly at risk of further persecution on account of membership in a particular social group, his family in which members testified against rapists," might have been wrongly decided, unless the family itself had come to seem so obnoxious or threatening to the rapists that they targeted it as a unit.

III. That Private Crime Occurs Is Not Proof That The Government Is Unable Or Unwilling To Control It.

The final requirement an applicant must establish for asylum is either that harm is inflicted by the government or that the government is unable or unwilling to control the persecutors. *Matter of Acosta*, 19 I. & N. Dec. at 222. Except (again) in cases such as the Romanovs, this would be a hard showing for an alien claiming family-based persecution to make. If an applicant cannot show persecution by the government itself, he or she must show more than just its "difficulty controlling behavior" or ineffectiveness in enforcement of protective laws. *Salman v. Holder*, 687 F.3d 991, 995 (8th Cir. 2012); *see Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (stating that the applicant must show that the government "condoned [the persecution] or at least demonstrated a complete helplessness to protect the victims"); *In re McMullen*, 17 I. & N. Dec. 542, 546 (B.I.A. 1980) (finding difficulty authorities had in controlling private behavior insufficient); *Salman*, 687 F.3d at 995 ("[The applicant] must demonstrate that the government condoned the private behavior or at least demonstrated a complete helplessness to protect the victims. In particular, the fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal

activity, because there may be reasonable basis for inaction.") (citations and internal quotation marks omitted). If the government is actively striving to stop the violence that is occurring, this final element of the asylum analysis is unfulfilled. *Lemus v. Lynch*, 611 Fed. App'x 813, 815-16 (citing 8 C.F.R. § 1208.13(b)(2)(iii)); *Gjura v. Holder*, 502 Fed. Appx. 91, 92 (2012) (same).

Perfect protection from harm is not the standard by which this requirement is judged. *E.g.*, *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009). The fact that private criminal actions occur and the government cannot completely "eradicate" them does not negate the government's efforts to curb criminal behavior. *Id.* State Department Country Reports may reflect efforts by the government to address different types of private criminal behavior or criminal behavior generally. That efforts are not as effective as hoped does not mean that the government is helpless or unwilling to control the criminal activity. *Burbiene*, 568 F.3d at 255–56 (finding that while a country may experience setbacks in combating crime, such setbacks are not indicative of government persecution on account of a protected ground). Change takes time, and a country's initiatives should be acknowledged and respected in asylum proceedings.

CONCLUSION

For the foregoing reasons, aliens will rarely be able to establish persecution on account of membership in a particular social group based on their membership in a family unit.

Respectfully submitted, January 18, 2019

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CERTIFICATE OF SERVICE

I certify that, on January 18, 2019, I electronically submitted the foregoing *amicus curiae* brief to the United States Department of Justice via email to AGCertification@usdoj.gov, and caused three copies to be sent, via first class mail, to the United States Department of Justice, Office of the Attorney General, Room 5114, 950 Pennsylvania Avenue, NW, Washington, DC 20530 for distribution to the parties.

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