National Immigration Litigation Alliance
Immigrant justice through the courts

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CILA Children's Immigration Law Academy

Litigation for Unaccompanied Children: Updates and Foundational Cases

A webinar series presented by:
The ABA Children's Immigration Law Academy (CILA) and
The National Immigration Litigation Alliance (NILA)

Webinar 3 of 4, Written Materials

Wednesday, July 20, 2022

Cases reviewed:

Bertrand v. Garland

36 F.4th 627 (5th Cir. 2022) (denying PFR where substantial evidence supported BIA determination that the Haitian government was not unable or unwilling to protect noncitizen; finding "unable to control" and "complete helplessness" standards for assessing such persecution to be identical)

Facts:

Petitioner Lamy Bertrand is Haitian and challenged the BIA's conclusion that the Haitian government was not unable or unwilling to prevent the violence committed against him. Bertrand stated that he began receiving telephone threats in 2009, some of which he reported to the police. The same year, a group entered his clothing shop, beat him up, cut him with a machete, and started to pour gasoline on him before a police car passed by. Bertrand was not able to identify the assailants, who destroyed his shop while he was hospitalized.

The violence escalated, with murders of Bertrand's sister, his daughter, and another woman at his home. He fled to live with his mother in another Haitian city. At that location, a group entered his mother's house, beat her, and burned the house down. Bertrand escaped, though his mother was hospitalized, and they both fled to the Dominican Republic. All incidents were reported to police, who investigated to some degree.

Bertrand filed a petition for review of the BIA's decision affirming the IJ's denial of asylum, withholding of removal, and Convention Against Torture relief.

Notable Holding and Rationale:

Reviewing de novo for correct legal standard and for substantial evidence on the facts, the Fifth Circuit affirmed the BIA's conclusions that Bertrand failed to establish that the Haitian government was unable or unwilling to protect him, emphasizing that the police responded after each instance of violence Bertrand reported. Police also took him to the hospital, interviewed witnesses, and visited the crime scenes. Moreover, "crucially, neither Bertrand nor any witnesses were ever able to identify the attackers. A government is not 'unable or unwilling' to protect against private violence merely because it has difficulty solving crimes or anticipating future acts of violence." 36 F.4th at 632.

The court distinguished *Matter of O-Z- & I-Z-*, 22 I. & N. Dec. 23 (BIA 1998), on three grounds in a lengthy footnote. First, unlike the Haitian police here, in that case the police only wrote reports, which provides "stronger evidence of an unwillingness to help." *Id.* at 632 n.6. According to the court, "a government will likely only be 'unable' to help if it is first willing to do so." *Id.* Second, the persecution in *O-Z- & I-Z-* occurred over a longer period and "apparently" within the same geographic area. *Id.* Finally, in *O-Z- & I-Z-* there was evidence of who the attackers were, which is missing in Bertrand's case.

The key holding is responsive to an *amici curiae* brief filed by law professors who argued that a government's inability to control persecutors should not be analyzed under the Fifth Circuit's "complete helplessness" standard. *Id.* at 633. Instead, *amici* urged focus on whether the government can provide the applicant with "effective protection." The court rejected this argument because "the 'unable or unwilling' standard already does that. This standard looks at whether the government is 'completely helpless' to protect the applicant, *i.e.*, completely helpless

to provide the applicant with effective protection." *Id.* at 633 n.8. The panel noted that it was in any event powerless to depart from circuit precedent.

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:
- Mandate issue date is 07/26/2022.
- Before the petition came to the Fifth Circuit a second time, the government filed an unopposed motion to remand to the BIA for it to consider "whether further briefing would be appropriate in light of [Bertrand's] claim that the Haitian Government was unable or unwilling to control private actors who threatened [Bertrand]." Although the Fifth Circuit is known to regularly deny even unopposed motions to remand, the motion was successful in this case although the BIA reaffirmed its ruling.
- The opinion begins by noting that arguments regarding CAT relief and withholding were forfeited by not being raised in Petitioner's opening brief.
- In footnote 4, the court flags that the Supreme Court in *Patel* limited review of factual claims regarding discretionary relief, but that asylum is specifically exempted under the statutory provision addressing such jurisdiction, and that mixed questions of law and fact are always reviewable as "questions of law."
- Footnote 5 addresses procedural hopscotch because the current Attorney General vacated *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("*A-B-I*"), and *Matter of A-B-*, 28 I&N
- Dec. 199 (A.G. 2021) ("*A-B-II*"). *See Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) ("*A-B-III*") (reverting "unable or unwilling to control" analysis to pre-*A-B-I* precedent, including *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014)). Because Fifth Circuit precedent tracks *A-B-I*, however, *see Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019), the change in agency law has no effect in that circuit.

Biden v. Texas (MPP Case)

***142 S. Ct. 2528 (2022)** (reversing and remanding Fifth Circuit decision affirming injunction of the recission of the Remain in Mexico program/Migrant Protection Protocols).*

Facts:

In 2019, the Department of Homeland Security (DHS) began implementing a policy called the Migrant Protection Protocols (MPP), also referred to as Remain in Mexico. That policy, based on 8 U.S.C. § 1225(b)(2)(C), forced many asylum seekers not originally from Mexico who entered or sought admission to the United States by land to remain in Mexico while removal proceedings under 8 U.S.C. § 1229a were ongoing.

The Biden administration sought to rescind MPP. On June 1, 2021, DHS officially terminated MPP via a memorandum. Subsequently, after a district court enjoined the initial termination memorandum, DHS again terminated MPP via new and more detailed memoranda on October 29, 2021, which would be "implemented as soon as practicable after a final judicial decision to vacate" the injunction of the June memorandum. 142 S. Ct. at 2537.

This decision involves the challenge by two states to the Biden administration's recission of MPP, alleging violations of the Immigration and Nationality Act (INA) and Administrative Procedure Act (APA). In August 2021, the U.S. District Court for the Northern District of Texas enjoined the June memorandum. Defendants appealed to the Fifth Circuit. In addition, after the DHS issued the October memoranda, Defendants sought vacatur of the injunction, arguing that the October memoranda had superseded the prior termination memorandum (which was subject to the injunction). The Fifth Circuit affirmed the district court and also held that vacatur based on October memoranda was not warranted. The Supreme Court granted certiorari.

Notable Holding and Rationale:

In a 5-4 decision, the Supreme Court reversed and remanded the Fifth Circuit decision after recognizing jurisdiction over the case.

First, the Court found that 8 U.S.C. § 1252(f)(1), a statute which bars courts, other than the Supreme Court, from "enjoin[ing] or restrain[ing] operation of [8 U.S.C. §§ 1221-1232], other than with respect to" applying those statutes to an individual in removal proceedings, barred the district court from the issuing the injunction in the case. However, that statute did not strip the courts of subject matter jurisdiction over the case, nor did it bar the Supreme Court from issuing injunctive relief.

Next, the Court found that the lower courts erred in holding that the INA barred recission of MPP. The lower courts had found that, although the language of 8 U.S.C. § 1225(b)(2)(A), the MPP statute, was discretionary, it essentially should be treated as mandatory due to statutory context. Specifically, the lower courts found that would be unlawful to terminate the program because, absent MPP, many individuals subject to purportedly "mandatory" detention under 8 U.S.C. § 1225(b)(2)(A) had been released from detention into the United States. The Supreme Court disagreed, finding that 8 U.S.C. § 1225(b)(2)(C) is clearly discretionary, regardless of any purported violation of 8 U.S.C. § 1225(b)(2)(A).

Finally, the Supreme Court found that the Fifth Circuit erred in its treatment of the October termination memoranda. The Fifth Circuit found that the October memoranda did not constitute a

new final agency action subject to judicial review (which would be relevant to determine if the memoranda provided a basis to vacate the injunction finding that the June termination memorandum was arbitrary and capricious in violation of the APA). The Supreme Court disagreed and found that the October memoranda did constitute a final agency action subject to APA review.

Practice Pointers:

- Note that this decision does not mark the end of proceedings in the case—the Supreme Court remanded for further review, including whether the October termination memoranda comply with relevant provisions of the APA.
- Also note that the Supreme Court decision did not result in the immediate cessation of MPP:
    - As of July 18, 2022, DHS' website states that "DHS is continuing its efforts to terminate [MPP] as soon as legally permissible. For now, those in MPP should continue to follow instructions regarding next steps in their cases."
    - The Supreme Court's judgement has not yet issued, and the district court injunction remains in place.

Cardona-Franco v. Garland

35 F.4th 359 (5th Cir. 2022) (dismissing/denying PFRs of (1) BIA denial of appeal and (2) motion to reconsider; finding lack of exhaustion, failure to establish bias by IJ, no compelled finding that IJ erred on credibility on asylum claim)

Facts:

Petitioner Josue Esteban Cardona-Franco is a Salvadoran who applied for asylum based on gang targeting on account of his religion. The IJ made an adverse credibility determination, and the BIA affirmed.

Cardona-Franco entered the United States as a minor, and one of his sisters became his sponsor. He affirmatively applied for asylum as an adult and noted that his twin brother was affected by the claimed persecution. In early 2019, the IJ found his testimony and that of his sister not to be credible and alternatively denied his relief applications on the merits.

On appeal to the BIA, Cardona-Franco submitted his brother's September 2018 grant of asylum by USCIS. The BIA denied remand, as the evidence could have been presented to the IJ, as well as on the alternative ground that it would not have affected the outcome. The Board also affirmed on the merits.

Cardona-Franco petitioned for review and also filed a motion to reconsider. The motion was rejected for lack of fees/fee waiver and, consequently, was filed late. The BIA denied on timeliness and alternatively on the merits. He filed a second petition for review, and the Fifth Circuit consolidated the two petitions.

Notable Holdings and Rationale

In the Fifth Circuit, an issue raised for the first time in a motion to reconsider that could have been raised earlier is unexhausted. The court therefore dismissed Cardona-Franco's claim that the BIA should have taken his brother's asylum grant into account because "[h]e did not raise the argument initially before the BIA, despite the fact that he was in possession of the pertinent documents." 35 F.4th at 363. This appears in tension with the BIA's ruling on the new evidence as part of its appeal dismissal.

Reaching the remaining merits, the court rejected Cardona-Franco's IJ bias claim due to lack of "obvious bias." *Id.* at 364. On credibility, the court concluded that substantial evidence supported the agency determination, inter alia because of inconsistency between testimony and portions of testimony being vague or inexact. The court found these grounds satisfied the circuit standard.

Finally, the court found that Cardona-Franco's motion to reconsider—which the court held was untimely—contained new evidence that should be construed as a motion to reopen. But the court concluded that the agency did not abuse its discretion in denying that motion because the "'new' evidence would not have changed the outcome of Cardona-Franco's case." *Id.* at 366.

Practice Pointers

- Be aware of ongoing developments in this case and this area of law, although the mandate has issued.
- There is a circuit split on whether a motion to reconsider can be required for exhaustion. Note that motions to reconsider are not a "remedy as of right" under the statute and

regulations, *see* 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the [noncitizen] has exhausted all administrative remedies available to the [noncitizen] as of right."). The same regulation that renders a motion to reopen discretionary also applies to motions to reconsider. *See* 8 C.F.R. § 1003.2(a).

- A pending cert. petition challenging the motion-to-reconsider exhaustion holding in *Santos-Zacaria v. Garland*, 22 F.4th 570 (5th Cir. 2022), addresses that circuit split. *See* No. 21-1436 (filed May 10, 2022).
- The court's bias discussion may be useful in other cases by sketching what could elsewhere be upheld as a due process violation, for example, "hostility to . . . faith" or "'hostility due to extrajudicial sources' or 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" 35 F.4th at 364 (quoting *Wang v. Holder*, 569 F.3d 531, 540-41 (5th Cir. 2009)); *see also id.* at 365 n.3 (discussing bias and religion).
- Note the court's footnoted approval that the IJ also doubted Cardona-Franco's sister's testimony as "even more unreliable" because she "had no firsthand knowledge of any of the harms experienced" by Cardona-Franco. *Id.* at 364 n.2 (concluding that "Cardona-Franco offers no persuasive reasons to doubt those findings"). This conflates weight-of-evidence analysis with credibility.

- Although the court cites an unpublished Second Circuit case concluding that the BIA properly declined to remand for consideration of new evidence of an asylum grant to an applicant's brother, there is also out-of-circuit law holding that like cases must be treated alike.

Lopez-Perez v. Garland

35 F.4th 953 (5th Cir. 2022) *(denying PFR where remand of asylum claim would have been futile as particular social group (PSG) would not have been cognizable; addressing sufficiency of notice of appeal and exhaustion).*

Facts:

Petitioner Yolanda Lopez-Perez is a Salvadoran who entered without inspection. Her asylum and withholding of removal applications for relief in immigration court were based on a particular social group defined as "Salvadoran women in [a] domestic relationship who are unable to leave" or "Salvadoran women who are viewed as property by virtue of their position in a domestic relationship." 35 F.4th at 955. Although Lopez-Perez identified her ex-partner as her abuser, she did not describe "any specific incident of abuse" on her application.

At her merits hearing, Lopez-Perez detailed extensive and severe abuse. She testified that she did not report a relevant incident because her ex-partner had friends in the police force. She also gave examples of futility in reporting based on experiences of her sister and friend. Lopez-Perez left her abuser in 2015 to seek refuge at her mother's house but returned to him after he followed. She was threatened with death if she left again.

The IJ denied her applications for relief, though found her credible. He distinguished *Matter of A-R-C-G-*, 26 I. & N. Dec. 338 (BIA 2014), because Lopez-Perez did not report the abuse to the police. The IJ also made a finding that she had not shown the Salvadoran government is unable or unwilling to control such violence and, "[w]ithout explanation, . . . further found that she did not establish the requisite nexus between her harm and her particular social group." *Id.* at 956. The BIA affirmed without opinion after denying a motion to extend briefing. Lopez-Perez did not file a brief at the Board.

Notable Holdings and Rationale:

The Fifth Circuit began by holding, in agreement with the Seventh Circuit in *Kokar v. Gonzales*, 478 F.3d 803 (7th Cir. 2007), that if reasons for appeal from an IJ to the BIA are sufficiently identified in a petitioner's Notice of Appeal—even if no brief is then filed—the issues are exhausted. *Kokar*'s requirement, which the court quotes, is to identify "the findings of fact, the conclusions of law, or both, that are being challenged. If a question of law is presented, supporting authority must be cited. If the dispute is over the findings of fact, the specific facts contested must be identified." 35 F.4th at 957 (quoting *Kokar*, 478 F.3d at 813).

Applying that standard, the court named two exhausted issues for its review: whether *A-R-C-G-* was applied correctly by the IJ and whether the IJ correctly decided that the government of El Salvador was willing and able to protect Lopez-Perez.

Neither issue was necessary to decide, however, as the court alternatively denied the petition on the IJ's cursory mention of a missing nexus. While the court concluded that the IJ erred under Fifth Circuit precedent by accepting Lopez-Perez's proposed particular social groups, as "circularly defined social groups are not cognizable," 35 F.4th at 958 (citing *Jaco v. Garland*, 24 F.4th 395,

401 (5th Cir. 2021)), remand was unnecessary because it would be futile for the IJ simply to rule that Lopez-Perez lost on that basis.

Practice Pointers:

- Be aware of ongoing developments in this case and this area of law:
  - Mandate issue date is 07/25/2022.
- Footnote 2 addresses Lopez-Perez's request for a remand based on intervening authority.
  - First, the court—as in *Bertrand v. Garland*—emphasized that Fifth Circuit precedent tracks the now-vacated *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), *see Gonzales-Veliz v. Barr*, 938 F.3d 219, 233 (5th Cir. 2019), so the recent change in agency law after the AG certification in *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021), has no effect in the Fifth Circuit.
  - Second, due to *Gonzales-Veliz v. Barr*, 938 F.3d 219 (5th Cir. 2019), *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *aff'd in part*, *rev'd in part sub nom. Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020), which addresses PSG, does not apply in the Fifth Circuit.
- Even though the Notice of Appeal holding allowed Lopez-Perez's contentions to be reviewed, the *Kokar* requirements quoted above are still demanding. There is no indication that Lopez-Perez was proceeding pro se before the BIA; if a client is unrepresented that may be important to foreground.

Patel v. Garland
No. 20-979, 142 S. Ct. 1614 (2022))

NILA has previously released a practice advisory on the *Patel* case: Judicial Review of "Discretionary" Relief after *Patel v. Garland*.

Ramirez v. ICE

568 F. Supp. 3d 10 (D.D.C. 2021) *(order providing for final judgment and relief in case addressing DHS' failure to consider placement in least restrictive setting when individuals who enter United States as unaccompanied children turn 18 years old).*

Facts:

Immigrant teenagers who entered the United States as unaccompanied children as defined in 6 U.S.C. § 279(g)(2) brought a nationwide class action against the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE), challenging the agencies' treatment when unaccompanied children age out of Office of Refugee Resettlement (ORR) custody. Specifically, they argued that ICE and DHS did not consider their statutory obligation under amendments to the Trafficking Victims Protection Reauthorization Act (TVPRA) to "consider placement in the least restrictive setting available after taking into account the [noncitizen's] danger to self, danger to the community, and risk of flight," 8 U.S.C. § 1232(c)(2)(B), and instead automatically transferred the teenagers to adult immigration detention custody. Their complaint argued that this treatment violated the Administrative Procedure Act (APA).

The U.S. District Court for the District of Columbia held a trial and, in July 2020, issued its Findings of Fact and Conclusions of Law concerning liability, finding that ICE's failure to consider less restrictive settings before transferring the teenagers into ICE custody was unlawful under the APA and 8 U.S.C. § 1231(c)(2)(B). *See Ramirez v. ICE*, 471 F. Supp. 3d 88 (D.D.C. 2020). Subsequently, the court issued a final injunction in September 2021, clarified in November 2021, setting forth relief in response to ICE's ongoing pervasive violations of the TVPRA.

Notable Holdings:

consider placing aging out unaccompanied children in less restrictive settings, which is to say that they generally should not be transferred from ORR to ICE custody absent some evidence that they will be a flight risk or danger that could not be mitigated through a less restrictive setting.

Additionally, the ruling sets forth training requirements for ICE officers to facilitate compliance with the relevant statutory obligations, specific documentation requirements for ICE to complete regarding class members' custody decisions, and ongoing reporting requirements to *Ramirez* class counsel.

Practice Pointers:

- If you have a client who will soon age out of ORR custody, you may wish to review and follow the guidance set forth in *Ramirez* class counsel's Frequently Asked Questions, including suggestions for advocacy in advance of ICE's Age-Out custody determination for your client. The FAQ is available at https://immigrantjustice.org/for-attorneys/legal-resources/file/faq-what-garcia-ramirez-v-ice-decision-means-unaccompanied.
    - An appeal remains pending in this case. *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020), which addresses PSG, does not apply in the Fifth Circuit.
- Even though the Notice of Appeal holding allowed Lopez-Perez's contentions to be reviewed, the *Kokar* requirements quoted above are still demanding. There is no indication that Lopez-Perez was proceeding pro se before the BIA; if a client is unrepresented that may be important to foreground.

Saravia v. Barr

No. 3:17-cv-03615-VC (N.D. Cal.) *(settlement requiring hearings and other protections for children released from ORR and subject to re-arrest based on gang allegations).*

Facts:

Unaccompanied children entering the United States are entitled to certain legal protections under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), including transfer to the Office of Refugee Resettlement (ORR) custody and placement in the least restrictive setting in their best interest, subject to certain limited considerations. However, if those children are released to sponsors and then subsequently re-arrested due to, for example, gang-related allegations, the U.S. Department of Homeland Security (DHS) and other agencies may not apply the same protections.

In 2017, noncitizen minors in this situation—originally in ORR custody as unaccompanied children, released to sponsors, and then subject to re-arrest due to gang-related allegations—filed a class action complaint in the U.S. District Court for the Northern District of California challenging their treatment following such re-arrests. The district court granted class certification and a preliminary injunction, which was affirmed by the Ninth Circuit. *See Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017), *aff'ed* 905 F.3d 1137 (9th Cir. 2018).

Ultimately, the parties proposed a settlement, which was approved by the district court in January 2021.

Notable Settlement Terms:

Under the *Saravia* settlement, minors originally detained by ORR, released to sponsors, and then subject to re-arrest under a removability warrant based on gang allegations are entitled to a variety of procedural protections. These include:

- Prompt notice to the child and their counsel of the specific acts or conduct alleged to be the basis for the re-arrest (within 48 hours);
- Prompt custody re-determination hearings (within 10 days), with the burden on DHS to establish a change of circumstances, regarding whether re-detention is justified based on flight risk or danger to the community;
- Procedural protections in those hearings, including the rights related to venue selection, continuances, and, in certain circumstances, prompt re-release to a prior ORR sponsor;
- Protections regarding the use of unsubstantiated gang allegations in denying certain forms of immigration benefits (SIJS, T-visas, U-visas, and asylum).

The settlement also sets forth training and monitoring requirements for the agencies subject to the agreement.

Practice Pointers:

- The settlement agreement subsequently proposed to and approved by the court is available online: https://www.aclunc.org/sites/default/files/Saravia_Settlement_Agreement.pdf