Practice Advisory:
Navigating Family-Based Claims Following *Matter of M-R-M-S-*[1]

December 21, 2023

I. Introduction

On December 1, 2023, the Board of Immigration Appeals (BIA or Board) issued a precedential decision, *Matter of M-R-M-S-*, 28 I&N Dec. 757 (BIA 2023) in a family-based asylum case, which interpreted the nexus element very narrowly. Building on the negative "means to an end" language of *Matter of L-E-A- I*, 27 I&N Dec. 40 (BIA 2017),[2] the BIA interprets the "one central reason standard" in a manner that is inconsistent with the statute and appears to be designed to narrow the circumstances under which family-based asylum claims may succeed. This practice advisory analyzes the decision and provides tips on how practitioners should approach family-based claims in light of *M-R-M-S-*.

II. Brief Facts of *Matter of M-R-M-S-*

The BIA provides a limited description of the facts in this case. It is worth noting that in an area of law that is very fact-specific, the BIA's eight-page decision includes only two short factual paragraphs. In its factual recitation, the BIA states that the applicants, three adult respondents, and two minor children from Mexico, resided in the same household, along with the lead respondent's grandson. *Matter of M-R-M-S-* at 757. The decision says that the cartel forced the family off their land because it wanted the land "for their own purpose." *Id.* at 758. According to the cartel killed the lead respondent's grandson "for unknown reasons," which the family believed were related to the cartel's desire to control their land. The immigration judge (IJ) denied the asylum application, finding that the cartel was motivated by a desire to control the land, not by the applicants' family membership.

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[2] *Matter of L-E-A- I* was overruled by *Matter of L-E-A- II*, 27 I&N Dec. 581 (A.G. 2019). *Matter of L-E-A- II* was subsequently overruled by *Matter of L-E-A- III,* 28 I&N Dec. 304 (A.G. 2021), which restored *Matter of L-E-A- I* as precedent.

III. Narrow Holding of *Matter of M-R-M-S-*

First, while this case is based on a family particular social group (PSG), the decision does not address the viability of the PSG at all—it is entirely about the nexus, or "on account of" element of the asylum claim. The PSGs raised by the M-R-M-S- family were "members of their family and perceived members of their household in their hometown." *Id.* at 758.[3] The BIA did not discuss the PSGs themselves, other than noting in a footnote that *Matter of L-E-A- III* was decided during the pendency of the appeal, restoring the PSG holding of *L-E-A- I*. *Id.* at 758, n. 2. Thus there is nothing in *M-R-M-S-* that limits the viability of family group membership as a PSG.

The narrow holding in this case is that the "Immigration Judge's finding that the cartel was motived [sic] by a desire to control the respondents' land rather than their family membership is a permissible view of the evidence and is not clearly erroneous." *Id.* at 762. The deferential standard of review here is important: the BIA limits its own holding by affirming the IJ's view of the evidence, in this case. In other words, there could be other cases involving family groups and land ownership that present different evidence where an IJ could reach a different decision and those factual determinations would be owed the same level of deference on appeal. The BIA explains its reasoning further, "[w]hile the respondents' claim necessarily focuses on their family status, the cartel's actions reflect that its focus—the impetus for its conduct—was the desire to take control of the family's land, not the family itself." *Id.* at 763. Of course, the challenge is for an asylum seeker to demonstrate the specific "impetus" for the persecutor's actions in mixed motive cases, given that the persecutor may not always make their primary motivation explicit. Here, the Board finds that, "although one family member [of the M-R-M-S- family] was killed by the cartel and others were threatened, the respondents cannot establish a claim simply by showing that they and some other family members faced similar harm." *Id.* While it may seem obvious to asylum seekers that if their family member(s) have been killed, and they themselves have been threatened, the family relationship is putting them in danger, the BIA is requiring family-based asylum seekers to make a further nexus showing.

IV. Flawed Analysis and Broad Dicta in *Matter of M-R-M-S-*

The BIA seems to be creating a heightened standard in family-based cases that the asylum seeker must demonstrate animus towards all or most of the family group, when such a standard does not exist for other protected characteristics. Much of the damaging language in *M-R-M-S* is arguably dicta, because the BIA opines on issues that are not necessary for it to reach a decision in the case, and at times opines on issues not presented by the case at all. Practitioners should anticipate, however, that IJs may erroneously read the decision broadly to mean that family group membership is generally not "at least one central reason" for persecution in mixed motive cases. It is therefore important to understand the BIA's analysis to be able to formulate arguments to distinguish *M-R-M-S-*.

The longest section of the *M-R-M-S-* decision, "Nexus to Family-Based Particular Social Group," does not discuss the M-R-M-S- family's case at all; instead, the BIA spends three pages

[3] Apparently, the M-R-M-S- family also raised a political opinion claim and other PSGs before the immigration judge but did not argue them before the BIA so the other proposed protected characteristics were deemed waived.

generally discussing prior case law. *Id.* at 759-62. This section begins with a summary of *Matter of L-E-A- I* which, like *M-R-M-S-,* narrowly interpreted nexus in a family-based asylum claim. In *L-E-A- I* , the BIA found that the motivation of the Mexican cartel was not to harm Mr. L-E-A-'s family, but rather to gain access to the family store to sell drugs. In *L-E-A- I*, the BIA held that "the cartel's motive to increase its profits by selling contraband in the store was one central reason for its actions against the respondent and his family. Any motive to harm the respondent because he was a member of his family was, at most, incidental." 27 I&N Dec. at 46. The holding of *M-R-M-S-* is thus very similar to the existing precedent established by *L-E-A- I,* but makes its limiting language more explicit.

The analysis in *M-R-M-S-* appears to be driven by a desired result—to make it more difficult to establish nexus in family-based asylum cases. The reasoning could be applied to any mixed motive case to find that the protected characteristic is not "at least one central reason" for the harm. For example, in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), one of the BIA's seminal asylum decisions, arguably the reason for the persecutor's desire to engage in female genital mutilation of Ms. Kasinga was not personal animus toward her, but rather a desire to uphold (flawed) community moral standards. On the other end of the spectrum, practitioners sometimes see IJs denying domestic violence cases, specifically because the harm is based on personal animus, rather than animus more generally towards the group, such as women from El Salvador.

In reaching its conclusion that family group membership was not one central reason for the harm in *M-R-M-S-*, the BIA finds it significant that there were other members of the family who were not harmed. But there is no requirement in asylum law to prove that everyone with a protected characteristic must be harmed in the same way. For example, if a gay man is beaten by a mob, but his boyfriend has never suffered a gay bashing, the fact that his boyfriend has not been harmed does not mean that the gay man who was beaten was not beaten for being gay. Similarly, the fact that the police may round up and arrest dozens of political protestors while leaving free hundreds of other protestors does not mean that those who were arrested were not arrested on account of their political opinion. This type of reasoning is nonsensical. Clearly there can be many reasons for a persecutor to attack one person based on a protected characteristic but not attack every person who may share that characteristic.[4]

V. U.S. Court of Appeals Cases Discussed in *Matter of M-R-M-S-*

The BIA discusses several federal circuit cases in its discussion of nexus. It relies heavily on *Orellana-Recinos v. Garland*, 993 F.3d 851 (10th Cir. 2021) since *M-R-M-S-* arises in the Court of Appeals for the Tenth Circuit. In *Orellana-Recinos*, the MS-13 gang in El Salvador was seeking to recruit Ms. Orellana-Recinos's son Kevin as a member. When he refused, the gang threatened both Ms. Orellana-Recinos and her son with death. Ms. Orellana-Recinos argued that the harm she suffered was on account of her familial relationship to Kevin, claiming that the

[4] Moreover, in *M-R-M-S-* itself, the lead respondent's grandson was murdered by the cartel, but the BIA found that that murder was for "unknown reasons," even though "the respondents believe it was related to the cartel's efforts to obtain their land." *M-R-M-S-* at 758. The BIA engages in no analysis of why it concluded that the grandson was murdered for "unknown reasons," nor does it discuss the evidence presented by the family regarding the cartel's possible motivation for the murder.

gang targeted her specifically because she was Kevin's mother and in that familial role exercised unique control over her son. The Tenth Circuit rejected this argument, finding that targeting Ms. Orellana-Recinos was merely a "means to an end" for the gang whose ultimate objective was to increase gang membership. The Tenth Circuit wrote:

> In other words, it would be reasonable to find that the gang members had no animus against Kevin's family per se. They would have the same attitude toward anyone—teacher, good friend, employer—who they thought could influence Kevin to join the gang. There is no evidence that if Kevin decided to join, the gang would still pursue Ms. Orellana-Recinos or any other member of his family. *Id.* at 858.

The court also found it significant that the gang did not threaten Kevin's sister, reasoning that if the gang bore animus against the family, it would have sought to harm other family members. *Orellana-Recinos v. Garland*, 993 F.3d 851, 858 (10th Cir. 2021).

In *M-R-M-S-* the BIA spends an entire page explaining why it believes the Tenth Circuit approach is better than the approach taken by the Fourth Circuit in a case with similar facts, *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015). In *Hernandez-Avalos*, the asylum seeker's son, also named Kevin, was being recruited by the Mara 18. When he refused to join, his mother, Ms. Hernandez-Avalos, was threatened with death at gunpoint by the gang on several occasions. The IJ and BIA denied asylum, finding that the gang threatened Ms. Hernandez-Avalos, not because of her familial relationship, but rather because she would not let her son join the gang. The Fourth Circuit held that her family relationship was at least one central reason, determining that:

> Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities. The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. *Hernandez-Avalos* at 950.

In comparing *Hernandez-Avalos* and *Orellana-Recinos*, the BIA finds that the "question asked under the Fourth Circuit's approach—why an applicant, and not others, is targeted—is relevant in evaluating the reasons for harm, but it is not the end of the analysis." *M-R-M-S-* at 761. The BIA goes on to broadly opine that "when a persecutor's threats to harm family members are contingent on one or more of the family members acting or failing to act in a certain way—such as failing to comply with demands for money or other property—family membership is unlikely to be one central reason for that harm and instead will be merely a means to another end." *M-R-M-S-* at 762. This sweeping statement is not necessary to the outcome in *M-R-M-S-* and practitioners should emphasize that this sentence is dicta, insofar as it predicts what is likely or "unlikely" in other cases, if it is relied upon in Immigration and Customs Enforcement's Office of the Principal Legal Advisor (OPLA) briefs or by IJs. Nonetheless, practitioners should be

prepared to demonstrate animus to the family itself and should not rely on arguments that "but for" the family relationship the persecutor would not have targeted the asylum seeker.[5]

Practitioners should also make note of *M-R-M-S-'s* favorable citation of *Perez-Sanchez v. U.S. Att'y Gen*., 935 F.3d 1148, 1150 (11th Cir. 2019) as illustrative of the type of family-based case that does demonstrate animus toward the family. The Board quotes from *Perez-Sanchez* stating that family membership may be one central reason for harm "where a persecutor's animus directed against one family member is intertwined with mistreatment of another family member." *M-R-M-S-* at 760. It is therefore helpful to be familiar with *Perez-Sanchez* and, where appropriate, to argue that the facts of the asylum seeker's case are similar to its facts. In *Perez-Sanchez*, the asylum seeker's father-in-law had stolen money from a powerful Mexican cartel. 935 F.3d at 1150-51. Although Mr. Perez-Sanchez did not know of his father-in-law's role with the cartel, after the father-in-law had fled the country, the cartel came to Mr. Perez-Sanchez to collect the debt owed by his father-in-law. *Id.* The cartel beat Mr. Perez-Sanchez and threatened him with death. *Id.* at 1151. When Mr. Perez-Sanchez agreed to make monthly payments on his father-in-law's debt, the cartel stopped harming him, but once Mr. Perez-Sanchez realized he could no longer make the payments, he fled to the United States with his partner. *Id.* The IJ found that the cartel's motive was to increase its profits and obtain repayment of the father-in-law's debts, and that the familial relationship "was, at most, incidental" and the BIA upheld that finding. *Id.* at 1152.

The Eleventh Circuit reversed, finding that the familial relationship was at least one central reason for the harm Mr. Perez-Sanchez suffered. The court held:

> A family debt wrongly inherited is still an inheritance. Absent the familial relationship between Mr. Perez-Sanchez and Mr. Martinez-Carasco, the cartel would never have hunted him and his partner down to begin with or continued persecuting them for months. The evidence compels us to reject the BIA's conclusion that Mr. Perez-Sanchez's relationship to his father-in-law played only an 'incidental' role in the cartel's decision to persecute him. *Id.* at 1158.

In *M-R-M-S-,* the BIA cited to *Perez-Sanchez* for the notion that the harm suffered by Mr. Perez-Sanchez was "intertwined" with the animus directed toward another family member here, the father-in-law. It is therefore critical (where supported by the facts) to frame the persecutor's motives toward the initially targeted family member as demonstrating animus. The Eleventh Circuit found that the cartel bore animus toward the father-in-law who had lost a shipment of the cartel's cocaine. Therefore, although the cartel sought money from Mr. Perez-Sanchez, the Eleventh Circuit found that he was not merely being forced to repay a monetary debt (as the IJ

[5] *See* Jeff Chase, The Proper Test for Nexus (Dec. 21, 2021) https://www.jeffreyschase.com/blog/2021/12/21/the-proper-test-for-nexus1. (Noting that in *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020), the U.S. Supreme Court analyzed "because of" language in a Title VII case and found it to be the equivalent of "on account of." "The Court continued that the standard requires a court to apply the "simple" and "traditional" "but-for" test. As the Court explained, 'a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.'"). Practitioners may want to cite to *Bostock* to argue that the analysis of *M-R-M-S-* is wrong and to follow the Supreme Court's analysis, changing each element of the claim, including the family membership, to argue the outcome would have been different without it.

and BIA found) but that he was being targeted specifically based on animus toward the family, which here originated through the loss of the cartel's money.

VI. Effect of *M-R-M-S-* in U.S. Courts of Appeals with Favorable Precedent

Practitioners in the Fourth Circuit, and other circuits where precedent on nexus is more favorable than the rule laid out in *M-R-M-S-*, are likely wondering what law will control going forward, the prior circuit precedent or the newly announced agency precedent? This is a complex question of administrative law[6] over which the courts of appeals have been fighting for some time, and providing a definitive answer to these questions is beyond the scope of this practice advisory. Indeed, the Supreme Court will decide *Loper Bright Enterprises v. Raimondo* in the next term, which may dramatically alter or end the scope of *Chevron* deference that courts of appeals give to agency decisions. Thus, the brief discussion below is intended to provide background but practitioners must engage in their own research on these complicated and evolving issues of interpretation.

The BIA held in a 1989 precedential decision that it will generally acquiesce to a prior court of appeals decision even if the agency subsequently issues a decision with a different outcome. *Matter of Anselmo*, 20 I&N Dec. 25, 31(BIA 1989) ("Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit. But, we have historically followed a court's precedent in cases arising in that circuit.").

Anselmo generally remains good law, unless the agency is interpreting a statute which is ambiguous. The Supreme Court weighed into this issue in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), the holding that:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. Chevron's premise is that it is for agencies, not courts, to fill statutory gaps. *Brand X* at 982.

Thus to determine whether or not the prior court of appeals decision survives a subsequent agency reversal, one must look at the prior judicial opinion to determine whether or not it found that the statute it was interpreting was ambiguous. If there is no ambiguity and the court of appeals was interpreting the statute, then the court owes no *Chevron* or *Brand X* deference to the subsequent agency interpretation. However, if the court determined that it was reviewing an ambiguous statute, then *Brand X* applies. Unfortunately, applying the rule set forth in *Brand X* is

[6] Although somewhat dated, and merely an interpretation of the law as of its writing, practitioners may find this internal memo by the Department of Justice on Agency Deference and *Brand X* to be helpful background reading, as well as to provide insight into the agency's position on *Brand X*. https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/agency-deference.pdf. *See also,* this practice advisory, which is also dated. Katherine Brady, Who Decides? Overview of Chevron, Brand X and Mead Principles, ILRC (Feb. 2011) https://www.ilrc.org/sites/default/files/resources/overview_of_chevron_mead__brand_x.pdf.

not always straightforward since the initial federal court decision may not explicitly reference *Chevron* or discuss whether the law it is interpreting is ambiguous. Furthermore, even if the court states or implies that the statute is ambiguous, the deference owed to the agency is not blind; the agency's interpretation must be "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 843, (1984).

In *Hernandez-Avalos v. Lynch*, the Fourth Circuit found that the BIA's determination that Ms. Hernandez-Avalos's family group membership was not at least one central reason for the persecution she suffered was "manifestly contrary to law and an abuse of discretion." *Hernandez-Avalos* 784 F.3d at 950. Practitioners arguing that *Hernandez-Avalos* trumps *M-R-M-S-* should argue first that the Fourth Circuit has not deemed the "one central reason" standard to be ambiguous and that, even if it had, the interpretation in *M-R-M-S-* is an impermissible construction of the statute since it found a similar interpretation by the BIA in *Hernandez-Avalos* to be "manifestly contrary to law." If practitioners successfully argue that the Fourth Circuit has found no ambiguity in the "one central reason" term, then the BIA should "acquiesce" to prior circuit court precedent, pursuant to *Matter of Anselmo* rather than following *M-R-M-S-*.

A separate question that arises in the *Brand X* context is whether a newly announced agency decision applies retroactively or only prospectively.[7] As a judge on the Tenth Circuit (where *M-R-M-S-* arises), then Judge Gorsuch, wrote a lengthy decision discussing the potential retroactive effect of agency decision-making that upends settled expectations. Taking as a given that the agency does have the authority to change its interpretation prospectively and that federal courts must abide by the new agency authority, Gorsuch writes regarding retroactivity:

> We can see no good reason to reach the (highly anomalous) conclusion that it's reasonable for a party to rely on prior circuit (maybe even Supreme Court) precedent in the face of foreseeable revision by our policymaking principal (Congress), but not in the face of foreseeable revision by its agent (the BIA). In an age where there is so much law and so many lawmaking authorities, trying to figure out what the controlling rule is and how to order your affairs accordingly can be tough enough. To suggest that even when you find a controlling judicial decision on point you can't rely on it because an agency (mind you, not Congress) could someday act to revise it would be to create a trap for the unwary and paradoxically encourage those who bother to consult the law to disregard what they find. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1178–79 (10th Cir. 2015).

In *De Niz Robles* the Tenth Circuit ultimately found that the rule as articulated by the Tenth Circuit concerning eligibility for adjustment of status in effect at the time Mr. De Niz Robles *filed* his adjustment application should control the decision in his case. Practitioners in jurisdictions with precedent that is more favorable than *M-R-M-S-* should therefore argue that the

[7] A separate question, beyond the scope of this practice advisory, is when a prospective rule is applied. Even if the court of appeals finds that the newly announced rule should only be applied prospectively, there remains a question whether the new rule only attaches to applications *filed* after the new rule or whether it attaches to agency decisions *adjudicated* after the new rule.

precedent that was in effect at the time of filing controls, where circuit law supports such an argument.[8]

VII. Practice Tips

There is little doubt that in issuing *M-R-M-S-* as a precedential decision the BIA intended to make it more difficult for asylum seekers, especially those with family-based claims, to win their claims. Practitioners representing clients whose primary fear is based on their family group membership should continue to put claims forward, but must be ready to push back against efforts by OPLA or the IJ to read *M-R-M-S-* broadly. Here are some practical tips on framing cases after the *M-R-M-S-* decision.

- ***Argue that the persecutor has exhibited animus towards the family.*** In *M-R-M-S-,* the BIA states "[t]o be successful in an asylum claim based on family membership, an applicant must demonstrate that the persecutor's motive for the harm is a desire to overcome the protected characteristic of the family or otherwise based on animus against the family." *M-R-M-S-* at 760. An IJ is required to follow Board precedent even when they may agree that *M-R-M-S-* was wrongly decided. Thus the best chance for an asylum applicant to win before the IJ or the BIA is to meet the standard articulated in *M-R-M-S-*. While the case will be strongest where the asylum seeker can clearly demonstrate animus by the persecutor, it is established law that an asylum applicant need not show with certainty the motive of the persecutor but rather may provide "direct or circumstantial evidence" making reasonable their assertion that they were targeted on account of a protected ground. *See Matter of S-P-,* 21 I&N Dec. 486, 491 (BIA 1996).

  There are several things practitioners can look at to provide the necessary "direct or circumstantial evidence." If there is evidence of animus toward the family in the particular case a practitioner is litigating, the practitioner should highlight that evidence and argue that the asylum seeker meets the standard laid out in *M-R-M-S-*.

  - If the persecutor used **language** that exhibited animus toward the family or the initially targeted family member (as opposed to a desire to achieve some other end), it will be important for the respondent or other witnesses to describe that language. Practitioners may ask questions of the applicant such as:
    - "What did [the persecutor] say to you?"
    - "What was [the persecutor] doing when they said this?"
    - "What did you understand that to mean?"
    - "Why do you believe they said that to you?"
    - "How do you think [the persecutor] viewed your family?"[9]

  - If the persecutor did not make any statements highlighting their animus toward the family, practitioners will need to identify **circumstantial evidence** to

[8] Practitioners must conduct further research to determine how their circuit has addressed retroactivity issues following agency decision-making.

[9] While this last question calls for speculation by the witness, *M-R-M-S-* requires the asylum seeker to argue that the persecutor bore animus so the IJ should allow this type of question for the asylum seeker to meet their burden.

demonstrate that at least one central reason for the persecutor's actions was animus. Practitioners will need to probe with their client why they believe that family motivated the harm and not primarily some other goal that the persecutor had.

- For example, if a gang is threatening a mother because her son will not join the gang, the adjudicator might determine that the gang does not have animus toward the mother, but rather that the gang is using the threats to the mother as a means to an end of having the son join the gang. However, if the son has fled the country and the mother continues to receive threats, then the mother would have a clearer argument that the gang is directing animus toward her, as the son's mother, rather than using her to achieve their goal of filling the ranks of the gang, since there would no longer be a possibility that the gang could achieve its end of having the son who has fled join.

- Similarly, if the gang has already attempted to kill or killed the initially targeted family member prior to, or in addition to, threatening the family member, this can also indicate that the motive has evolved from the initial motivation (financial, recruitment, etc.) to animus or punishment. The gang cannot obtain money from or recruit someone they have already killed.[10] Practitioners may ask questions of the applicant such as:

    - "What do you think would have happened at this point if you gave the gang money?"
    - "Why do you believe they would still want to harm you?"
        - If the applicant is able to explain that giving the persecutor the money, the land, the recruited son, etc. ("the end" that the persecutor supposedly desired) would not be enough, that response would provide strong circumstantial evidence that the persecutor's motive was animus and punishment over financial or recruitment motives.

- ***Argue that the family PSG is "intertwined" with another protected characteristic.*** When *Matter of L-E-A- II* was published, seemingly indicating that noncitizens had to meet a heightened standard of social distinction for a family PSG to be cognizable, some practitioners had success arguing that there was, in fact, something exceptional about the particular family in their case. Likewise, in *M-R-M-S-,* in dicta, the BIA posits that "one possible way for an applicant to establish that family status is one central reason for the claimed harm is by showing it is connected to another protected ground—such as political opinion—that is intertwined with or underlies the dispute." *M-R-M-S-* at 760. Although the BIA says that this double nexus is "not necessary to succeed on a family claim," *id.,* in those instances where one family member is being targeted based on

[10] *See*, *Matter of S-P-,* 21 I&N Dec. 486, 493 (BIA 1996). ("Evidence that punishment for a politically related act would be disproportionate to the crime would indicate persecution on grounds of political opinion rather than prosecution.").

another protected characteristic, practitioners should highlight the existence of the other characteristic. For example, the initially targeted family member may be politically active, may be a recognized religious figure, or may be targeted based on their PSG such as being LGBT. Practitioners should highlight this double nexus where it exists.

- ***Remember M-R-M-S- is about nexus, not particular social group.*** There is no discussion whatsoever about the proposed PSG in *M-R-M-S-.* Practitioners should emphasize this point to OPLA attorneys or IJs who erroneously read the case as narrowing the scope of family membership as a cognizable particular social group.

- ***Explore all non-PSG protected grounds.*** Even though *M-R-M-S-* concerns nexus and not the PSG itself, the decision may be wrongly interpreted to narrow PSG claims, especially those based on family PSGs. Particular social group claims face unique challenges, including frequent appellate decisions that change case analysis. Practitioners should always explore other protected characteristics that may have been one central reason for the harm the asylum seeker faced. For example, in some circumstances, defying gangs or standing up to an abusive spouse or partner may be framed as asserting a political opinion.[11] Claims filed by Indigenous asylum seekers can be framed as based on race rather than, or in addition to, PSG claims.

- ***In cases that can be framed as the family persecution serving as a "means to an end" to some other goal by the persecutor, work backward from "the end" to determine if achieving it was the persecutor's primary goal.*** In *Matter of L-E-A- I,* the BIA found that the cartel's primary motivation was to gain control of Mr. L-E-A-'s father's store. Likewise, in *M-R-M-S-*, the BIA found that the cartel's primary motivation was to obtain possession of the family land, not to punish the family. Thus practitioners should first identify "the end" that OPLA or the IJ may focus on as the primary motivation for the harm, and then develop the facts with their client(s) about what would happen to the family if the persecutor achieved that "end."

    - Practitioners may engage in questioning of the applicant such as[12]:

        - "Why do you think [the persecutor] targeted you?"
            - "*They wanted my land and they wanted to hurt my family."*
        - "Do you think [the persecutor] would leave your family alone if you gave them the land?"
            - "*No, now they just want to kill us."*
        - "Why?"

[11] *See*, for example, *Hernandez-Chacon v. Barr,* 948 F.3d 94, 102–03 (2d Cir. 2020) ("Here, Hernandez-Chacon contends that if she is returned to El Salvador she will be persecuted by gang members because of her political opinion—her opposition to the male-dominated social norms in El Salvador and her taking a stance against a culture that perpetuates female subordination and the brutal treatment of women. She argues that when she refused to submit to the violent advances of the gang members, she was taking a stance against a culture of male-domination and her resistance was therefore a political act. There is ample evidence in the record to support her claim.").

[12] Of course, this is just a proposed sample line of questions; witnesses must answer truthfully based on the facts of their own case.

    - "*You have to do what they say and we defied them, so they want to make an example of us."*
- "Were other members of your family harmed?"
    - "*Yes, they threatened my sister."*
- "Did she have control over the land?"
    - "*No, she lives in an apartment an hour away."*
- "What did [the persecutor] say to her?"
    - "*That they knew she was my father's child and they wanted to teach him a lesson."*

- ***Argue that M-R-M-S-* was wrongly decided.** The IJ is bound by the holding of *M-R-M-S-*. Thus practitioners must make their best arguments to win the case within the confines of the *M-R-M-S-* decision. Nonetheless it is important for practitioners to include at least a paragraph in their brief arguing that the case was wrongly decided to preserve the issue for appeal. Practitioners may want to argue that requiring animus by the persecutor is contrary to established law.[13] Practitioners should research the law of the U.S. court of appeals with jurisdiction over the case on the animus requirement and any other issue which may conflict with the holding in *M-R-M-S-*. [14]

- ***Argue for the "a reason" standard in withholding of removal cases.*** In footnote 5 of *M-R-M-S-*, the Board acknowledges that some U.S. courts of appeals have found that the "one central reason" nexus standard that applies in asylum cases does not apply in withholding of removal cases. The BIA notes that "it is particularly important for Immigration Judges in such jurisdictions to make clear findings on whether family membership is a reason for the claimed persecution, even if it is merely incidental or tangential to some other motive." *M-R-M-S-*, n. 5 at 759. While the BIA itself acknowledges that this standard is not at issue in *M-R-M-S-*, the BIA's statement strongly implies that an incidental or tangential connection to the family group membership would suffice for the lower "a reason" nexus standard in withholding cases, within the jurisdiction of some U.S. courts of appeals. Of course, the applicant for withholding will still have to meet the higher "more likely than not" standard for proving the likelihood of future persecution. U.S. courts of appeals that have found "a reason" to meet the nexus requirement in withholding cases include the Ninth Circuit and Sixth Circuit.[15]

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[13] In *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996), the BIA stated, "As observed by the INS, many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution."

[14] Some circuits have held that a persecutor need not have animus, but rather the key is whether the asylum seeker experiences the actions as harm, here the BIA uses language indicating that the persecutors themselves must demonstrate animus towards the asylum seeker. *See*, *Pitcherskaia v. I.N.S.,* 118 F.3d 641, 646 (9th Cir. 1997) ("Neither the Supreme Court nor this court has construed the Act as imposing a requirement that the alien prove that her persecutor was motivated by a desire to punish or inflict harm.").

[15] *See Barajas-Romero v. Lynch,* 846 F.3d 351, 360 (9th Cir. 2017)*; Guzman-Vazquez v. Barr,* 959 F.3d 253, 272–74 (6th Cir. 2020). Courts that have found that applicants for withholding must demonstrate that the protected characteristic is "one central reason" include: *Vazquez-Guerra v. Garland*, 7 F.4th 265, 271 (5th Cir. 2021); *Gonzalez-Posadas v. Att'y Gen. U.S.*, 781 F.3d 677, 685 n.6 (3d Cir. 2015). This is an evolving area of the law and practitioners should conduct their own research about the legal standard in their circuit.

- ***Always argue for CAT protection***. Practitioners should always include evidence about possible future torture of the applicant. In cases where the IJ does not find a nexus to a protected characteristic, the judge may be willing to grant withholding of removal under the Convention Against Torture. Remember, every family member must submit their own I-589 application to be considered for CAT protection since there is no CAT derivative status.

VIII. Conclusion

While *M-R-M-S-* may make winning family-based asylum cases more difficult than they already are, it should still be possible to prevail in these cases. It is critical for practitioners to not view *M-R-M-S-* as a bar to asylum, but rather to understand that the holding itself is relatively narrow, and the dicta is broad. Practitioners must focus on the language of the holding, rely on better U.S. courts of appeals decisions if the case arises within the jurisdiction of a U.S. courts of appeals with better law, and develop the record to demonstrate to the IJ how the family group membership is central to the motivation of the persecutor.