

7-2021

Immigration Law

Bianca N. DiBella

Andrew J. Mueller

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Immigration Law Commons](#)

Recommended Citation

DiBella, Bianca N. and Mueller, Andrew J. (2021) "Immigration Law," *Mercer Law Review*. Vol. 72 : No. 4 , Article 12.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol72/iss4/12

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Immigration Law

by Bianca N. DiBella *

and Andrew J. Mueller **

This Article surveys cases from the United States Court of Appeals for the Eleventh Circuit from January 1, 2020 through December 31, 2020, in which immigration law was a central focus.¹ During this time, the Eleventh Circuit decided hundreds of cases on immigration law related issues. The cases discussed herein are those that announce important issues, add flourishes to the existing standards and rules, offer important reminders of precedent and practice points, or otherwise illuminate the boundaries of the Eleventh Circuit's immigration jurisprudence. This Article discusses: (1) the standard of judicial review of administrative decisions; (2) the procedural and jurisdictional limitations in immigration cases; (3) asylum relief; and (4) other important immigration issues. Finally, it concludes with potential trends to watch in the Eleventh Circuit's next term.

* Associate, Troutman Pepper Hamilton Sanders LLP, Atlanta, Georgia. University of Florida (B.A., 2014); Vanderbilt University Law School (J.D., 2017). Member, State Bar of Georgia.

** Associate, Troutman Pepper Hamilton Sanders LLP, Atlanta, Georgia. Furman University (B.A., 2014); Emory University School of Law (J.D., 2020). Member, State Bar of Georgia. The authors would like to thank Teri Townsend, Research Librarian, Troutman Pepper Hamilton Sanders LLP; University of Nevada-Las Vegas (B.A. 2001); University of the Pacific-McGeorge School of Law (J.D., 2004); Florida State University (M.L.I.S., 2007). Her invaluable assistance made this effort possible. Thank you for all you do, Teri.

¹ For an analysis of immigration law during the 2018 period, see Emily Wright, *Immigration Law*, 70 MERCER L. REV. 1083 (2019). Lawyers from Troutman Pepper Hamilton Sanders LLP, including the principal author of this Article, represented asylum seekers before Eleventh Circuit panels during this term. Of note, Troutman Pepper attorneys represented Abdirahman Salad Warsame before the United States Court of Appeals for the Eleventh Circuit this term. See generally *Warsame v. U.S. Att'y Gen.*, 796 F. App'x 993, 996 (11th Cir. 2020), discussed *infra*.

I. STANDARD OF REVIEW

Little has changed this term regarding the Eleventh Circuit's standards of review for administrative proceedings. The Eleventh Circuit, despite some debate, is generally unwilling to review (or rule contrary to) an opinion issued by a U.S. official with congressional authorization to adjudicate immigration cases outside of the usual bureaucracy, such as the U.S. Attorney General and Secretary of Homeland Security.²

In *Bourdon v. U.S. Department of Homeland Security*,³ the Eleventh Circuit declined to review an administrative decision arising under 8 U.S.C. § 1154(a)(1)(A)(i), the Adam Walsh Act.⁴ Bourdon was convicted of a specified offense under the Act causing the government to flag and review any applications he filed for immigrant status on behalf of immediate family.⁵ Years later, he married a citizen of Vietnam and submitted an I-130 Petition for Alien Relative on her behalf.⁶ When the United States Citizenship and Immigration Services (USCIS) determined that Bourdon did not prove beyond a reasonable doubt that he posed no risk to his wife's safety, USCIS denied his petition, leading to a federal lawsuit that landed before the Eleventh Circuit.⁷

The dissent would have reviewed the Secretary of Homeland Security's decision denying Bourdon's application.⁸ In her dissent, Judge Beverly Martin⁹ argued that the statute's language granting "sole and

² See generally *Bourdon v. U.S. Dep't of Homeland Sec.*, 983 F.3d 473 (11th Cir. 2020).

³ *Id.*

⁴ *Id.* at 474. Under 8 U.S.C. § 1154(a)(1)(A)(i), "any citizen of the United States" may file a petition with the Attorney General seeking immigrant status on behalf of his non-citizen immediate family members. This congressional provision was modified in 2006 to except citizens who have been "convicted of a specified offense against a minor." Pub. L. No. 109-248, § 402 (2), 120 Stat. 587 (codified at 8 U.S.C. § 1154(a)(1)(A)(viii)(I)). Pursuant to this exception, the statute allows a citizen with such a conviction to petition the Secretary of Homeland Security, who may in his or her "sole and unreviewable discretion determine[] that the citizen poses no risk to the" noncitizen on whose behalf the citizen petitions. *Bourdon* 983 F.3d at 476. Moreover, 8 U.S.C. § 1252, on aliens and nationality, appears to preclude judicial review of discretionary immigration decisions. 8 U.S.C. § 1252(a)(2)(B)(ii) ("Notwithstanding any other provision of law (statutory or non-statutory), . . . no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . .").

⁵ *Bourdon*, 983 F.3d at 476.

⁶ *Id.*

⁷ *Id.* at 476-77.

⁸ See generally *id.*

⁹ Judge Martin recently announced her retirement from the Eleventh Circuit. See Kathryn Tucker, *Judge Beverly Martin Tells Why She's Leaving the 11th Circuit*, DAILY

unreviewable discretion” to the Secretary to make no-risk determinations was not the same as an “explicit preclusion of judicial review;” therefore, the Act contained no “explicit jurisdiction-stripping language” in Judge Martin’s estimation, and the court was free to review the USCIS decision denying Bourdon’s petition.¹⁰ Judge Martin also found no implicit preclusion of judicial review of a USCIS decision in the statute.¹¹ The standard to review USCIS decisions, according to her dissent, was dictated by the *Accardi* doctrine: “[W]hen final agency action is committed to agency discretion,” as in this case, according to Judge Martin, “an agency must abide by its own regulations,” which failure thereof constitutes “the basis for judicial review of [its] actions.”¹²

Judge Britt Grant, concurring with the majority, found that the statute’s “sole and unreviewable” language applied to this case and other appeals of decisions issued pursuant to the Act.¹³ The most persuasive fact, in Judge Grant’s opinion, was that “every circuit to consider this issue has disclaimed jurisdiction over claims like Bourdon’s.”¹⁴ Accordingly, she joined the majority of the court sitting en banc, and declined to exercise jurisdiction in the context of the statute.¹⁵ As a result, the Eleventh Circuit is unlikely to adopt the dissent’s argument that the *Accardi* doctrine should apply in USCIS appeals—or that they should entertain those appeals at all.

REP. (May 20, 2021), <https://www.law.com/dailyreportonline/2021/05/20/judge-beverly-martin-tells-why-shes-leaving-the-11th-circuit/> (last visited Aug. 19, 2021). Judge Martin’s resignation in 2021 will mark the departure of an outspoken critic of immigration policy and proponent of shifts in rhetoric around non-citizens in an effort to humanize them and their circumstances. See Jennifer Doherty, *Circuit Judges Spar Over The Term ‘Alien’ In Opinions*, LAW 360 (Jul. 8, 2021), <https://www.law360.com/articles/1401539/circuit-judges-spar-over-the-term-alien-in-opinions> (last visited Aug. 19, 2021).

¹⁰ *Id.* at 481 (citing *Bourdon v. U.S. Dep’t of Homeland Sec. (DHS)*, 940 F.3d 537, 546 n. 4 (11th Cir. 2019); *id.* at 548 (“[T]he [statute] . . . contains its own jurisdiction-stripping provision . . .”).

¹¹ *Bourdon*, 983 F.3d at 481–82.

¹² *Id.* at 482–83 (quoting *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1386 (5th Cir. 1979) (adopted by Eleventh Circuit pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981)); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 605 (2006)).

¹³ *Id.* at 475 (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015); 8 U.S.C. § 1154(a)(1)(A)(viii)(I)).

¹⁴ *Id.* (citing *Bakran v. Sec’y, U.S. Dep’t of Homeland Sec.*, 894 F.3d 557, 562–64 (3d Cir. 2018); *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018); *Privett v. Sec’y, Dep’t of Homeland Sec.*, 865 F.3d 375, 381(6th Cir. 2017); *Roland v. U.S. Citizenship & Immigr. Servs.*, 850 F.3d 625, 628–30 (4th Cir. 2017); *Bremer v. Johnson*, 834 F.3d 925, 929–31 (8th Cir. 2016)).

¹⁵ *Id.*

II. PROCEDURE AND JURISDICTION

Often, federal court review of administrative immigration decisions serves as a procedural safeguard that can save or revive an immigration case. As the American Immigration Counsel opines, “[f]ederal court review adds an important layer of protection—courts can catch inadvertent government mistakes and help ensure that the government is properly interpreting and applying the immigration laws.”¹⁶ But procedure is a double-edged sword:

At the same time, . . . the immigration removal system lacks nearly all of the procedural safeguards we rely on and value in the U.S. justice system. Immigrants facing deportation have neither a right to appointed counsel nor a right to a speedy trial. Harsh immigration laws may apply retroactively, unlawfully obtained evidence is often admissible to prove the government’s case, and advisals of fundamental rights are given too late to be meaningful. Moreover, after receiving an order of removal, immigrants have limited ability to challenge their deportation in court. Given the potentially severe consequences of removal—which can range from permanent separation from family in the United States to being returned to a country where a person fears for his life—the lack of procedural safeguards deprives countless individuals of a fair judicial process.¹⁷

This term, with few exceptions, procedure worked against applicants for asylum, withholding of removal, and relief under the Convention against Torture (CAT).¹⁸ This part details some of those cases.

A. *Exhaustion*

While not announcing a new principle of law, the Eleventh Circuit reminded litigants of an old precedent: it will not entertain an appeal of an issue not raised before the Board of Immigration Appeals (BIA).¹⁹

¹⁶*Background on Judicial Review of Immigration Decisions*, AMERICAN IMMIGRATION COUNCIL, (June 1, 2013), <https://www.americanimmigrationcouncil.org/research/background-judicial-review-immigration-decisions> (last visited Apr. 22, 2021).

¹⁷ *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, AMERICAN IMMIGRATION COUNCIL (March 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/aic_twosystemsofjustice.pdf. These issues go beyond the scope of this Article. Nevertheless, it bears keeping them in mind when considering whether, and to what extent, procedure works against the interests of justice that underpin the American legal system.

¹⁸ See discussion *infra* on Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S 85, 113.

¹⁹ See *generally* *Srikanthavasan v. U.S. Att’y Gen.*, 828 F. App’x 590 (11th Cir. 2020).

Adding a flourish to that rule, even if the BIA considers a given issue *sua sponte*, the Eleventh Circuit will not entertain it if the petitioner did not himself raise it.²⁰ In *Srikanthavasan v. U.S. Attorney General*,²¹ Srikanthavasan, a Sri Lankan native, petitioned for review of the BIA's dismissal of his application.²² Srikanthavasan challenged, among other things, the BIA's decision adopting the IJ's finding that Sri Lanka was "able and willing to protect him from persecution" and rejecting his claim for relief under the CAT.²³

The court declined jurisdiction to review Srikanthavasan's appeal on this point, citing the oft-cited provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252,²⁴ which mandates that the judiciary cannot review a claim where the petitioner has failed to exhaust "all administrative remedies available to [him] as of right."²⁵ The court elaborated that "the exhaustion doctrine exists to 'avoid premature interference with the administrative processes' Reviewing a claim 'that has not been presented to the [BIA], even when the [BIA] has considered the underlying issue *sua sponte*, frustrates these objectives."²⁶ As a result, the court dismissed Srikanthavasan's CAT claim, making clear that it will not overturn the BIA's decision on an issue it decided to take up and adjudicate.²⁷

B. Procedural Due Process

Srikanthavasan also petitioned the Eleventh Circuit to review whether he was afforded proper due process.²⁸ Despite Srikanthavasan's claim that the IJ improperly curtailed his counsel's questioning, the court

²⁰ *Id.* at 594.

²¹ *Id.* at 590.

²² *Id.* at 594.

²³ *Id.* at 596.

²⁴ 8 U.S.C. § 1252(d)(1) (2005).

²⁵ *Srikanthavasan*, 828 F. App'x at 596 (quoting 8 U.S.C. § 1252(d)(1)). Several other cases this term have resulted in denied petitions for review due to a party's failure to exhaust an issue. *See e.g.*, *Landaverde v. U.S. Att'y Gen.*, 828 F. App'x 613, 617 (11th Cir. 2020) (declining jurisdiction to consider argument that petitioner's uncle's military service was central reason for gang's threats to harm him and his family because petitioner failed to raise the argument before the BIA); *Andres-Mendez v. U.S. Att'y Gen.*, 829 F. App'x 444, 447–48 (11th Cir. 2020) (failing to exhaust IJ's determination that particular social group was circularly defined and that petitioner was ineligible for CAT relief and withholding of removal).

²⁶ *Srikanthavasan*, 828 F. App'x at 596 (quoting *Amaya-Artunduaga v. U.S. Att'y Gen.*, 463 F.3d 1247, 1250 (11th Cir. 2006)) (emphasis in the original).

²⁷ *Id.* at 597.

²⁸ *Id.* at 598.

was not convinced.²⁹ The IJ told Srikanthavasan's counsel to ask only a "few" questions in light of the documentary evidence he had already submitted.³⁰ The court held the IJ's decision was within its discretion—the right to a "fair [hearing] in a fair tribunal" had not been curtailed, and he had not been "deprive[d] of his right to present a fair case."³¹ Put simply, an IJ need not "address every piece of evidence."³²

C. Discretionary Relief from Removal and Subject Matter Jurisdiction

The Eleventh Circuit recounted its precedent regarding jurisdiction to hear appeals of discretionary decisions under the INA in *Patel v. U.S. Attorney General*.³³ Although, when the court had interpreted a predecessor version of 8 U.S.C. § 1252(a)(2)(B),³⁴ it had drawn a distinction between "appellate review of discretionary decisions" and "review of non-discretionary legal decisions that pertain to statutory eligibility for discretionary relief," its prior precedent became "unmoored from the current statutory language."³⁵

The court overruled all prior precedent regarding appeals under § 1252, and held that it is "precluded from reviewing 'any judgment regarding the grant[] of relief under [8 U.S.C. §§] 1182(h), 1182(i), 1229b, 1229c, or 1255' except to the extent that such review involves constitutional claims or questions of law."³⁶ In supporting its opinion, the court detailed extensively the history of Congress's regulation of immigration and the Executive Branch's discretionary powers in the same arena since 1875.³⁷ Its conclusion was simple: "Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances."³⁸ In this circumstance, the court determined that Congress stripped it of its

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 598–99.

³² *Id.* at 599.

³³ 971 F.3d 1258, 1262 (11th Cir. 2020).

³⁴ 8 U.S.C. § 1252(a)(2)(B) (2005).

³⁵ *Patel*, 971 F.3d at 1262.

³⁶ *Id.* (punctuation omitted).

³⁷ *See generally id.* at 1265–69. The detail included in the Eleventh Circuit's opinion exceeds the scope of this Article, but it is worth noting that litigants advancing cases controlled by § 1252 of the INA would be well-served in reviewing *Patel*.

³⁸ *Id.* at 1266. "[E]ligibility in no way limits the considerations that may guide the Attorney General in exercising her discretion to determine who, among those eligible, will be accorded grace." *Immigration and Naturalization Serv. (INS) v. Yueh-Shaio Yang*, 519 U.S. 26, 31 (1996).

jurisdiction to review administrative factual determinations under § 1252(a)(2)(B)(i).³⁹ As a result, the court overruled prior inconsistent case law, requiring “at least a colorable constitutional violation” to invoke jurisdiction to hear constitutional claims or questions under § 1252(a)(2)(D).⁴⁰

III. ASYLUM

Part III provides a sample of cases that highlight the finer points of the analysis for asylum relief.⁴¹ In particular, this term, several applicants were denied asylum for want of credibility and corroboration of past persecution, failing to demonstrate a nexus between the alleged persecution and a protected ground, failing to define a cognizable particular social group (PSG), and being unable to demonstrate a well-founded fear of future persecution.

A. Credibility

Absent corroborative evidence, consistency in an applicant’s story is key to his or her success. In *Ratnam v. U.S. Attorney General*,⁴² the Eleventh Circuit upheld a finding that petitioner Ratnam lacked both corroborative evidence and consistency.⁴³ Ratnam claimed that he and his family were beaten by the Sri Lankan army; that the army killed his sister, brother, and father; and that he was detained by the army and brutally tortured.⁴⁴ He also testified to interacting with immigration officials in various countries on different occasions before entering the U.S., none of which was reflected on his passport.⁴⁵ The court held that, because the record contained some inconsistencies and because Ratnam did not bring evidence to corroborate his minority ethnicity, substantial

³⁹ *Id.* at 1273.

⁴⁰ *Id.* at 1275–76 (quoting *Arias v. U.S. Att’y Gen.*, 482 F.3d 1281, 1284 (11th Cir. 2007) (“A petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking an abuse of discretion argument in constitutional garb.”)).

⁴¹ To be eligible for asylum, an applicant must demonstrate that he is a “refugee”—someone who is unable or unwilling to return to and avail himself of the protection of the country of his nationality “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. §§ 1158(b)(1)(A) & 1101(a)(42)(A); *see generally* *Sanchez Jimenez v. U.S. Att’y Gen.*, 492 F.3d 1223 (11th Cir. 2007).

⁴² 831 F. App’x 928 (11th Cir. 2020).

⁴³ *Id.* at 929.

⁴⁴ *Id.*

⁴⁵ *Id.*

evidence supported the BIA's and IJ's adverse credibility determination, precluding asylum relief.⁴⁶

Similarly, in *Garcia v. U.S. Attorney General*,⁴⁷ petitioner Garcia was unable to persuade the IJ and BIA that his story of persecution was credible.⁴⁸ The IJ found, and the BIA agreed, that Garcia could not provide sufficient detail regarding his political activities in Nicaragua to corroborate his version of events—namely, the persecution he allegedly suffered at the hands of the Sandinista regime.⁴⁹ The medical records which documented his treatment in Nicaragua did not attribute his injuries to the alleged persecution; he failed—in the IJ's and BIA's estimation—to submit testimony from his brother who was living in the U.S. at the time of Garcia's appeal and the two letters he provided from Nicaraguan contacts did not deliver sufficient detail about his alleged persecution.⁵⁰ The Eleventh Circuit affirmed the IJ's and BIA's findings, holding that substantial evidence supported their determination that Garcia was not credible and did not sufficiently corroborate his testimony.⁵¹

Often, the Eleventh Circuit will decline to even consider the merits of these arguments if the applicant's story fails to meet the credibility “sniff test.” In *Uddin v. U.S. Attorney General*,⁵² reviewing both the IJ's and the BIA's findings to the extent of their agreement, the Eleventh Circuit found that the applicant had not met his burden of showing that their decisions were “not supported by specific, cogent reasons or . . . substantial evidence.”⁵³ Because the applicant provided “evasive, vague and internally inconsistent testimony” when questioned, the IJ rendered an adverse credibility determination (and the BIA affirmed).⁵⁴ “Without . . . credible testimony,” the court concluded, the applicant could not “sustain his burdens for asylum, withholding of removal or CAT relief,” and the court declined to reach the merits of the case.⁵⁵

Ratnam and *Garcia*, taken together, underscore the importance of crafting the most robust and detailed application for asylum possible in the first instance, and bolstering it with detailed, noncontradictory, and

⁴⁶ *Id.* at 932.

⁴⁷ 831 F. App'x 450 (11th Cir. 2020).

⁴⁸ *Id.* at 451.

⁴⁹ *Id.* at 452.

⁵⁰ *Id.* at 454.

⁵¹ *Id.*

⁵² 829 F. App'x 484 (11th Cir. 2020).

⁵³ *Id.* at 486.

⁵⁴ *Id.* at 487.

⁵⁵ *Id.* at 488.

corroborating evidence of persecution. Of course, the applicant's testimony must first be deemed credible, unlike the applicant in *Uddin*.⁵⁶

B. Nexus

The court resolved several asylum applications by finding that the applicant did not adequately demonstrate a nexus between the persecution alleged and the protected ground. For example, in *Castillo-Perez v. U.S. Attorney General*,⁵⁷ Castillo-Perez petitioned the Eleventh Circuit for review of her dismissed asylum appeal, arguing that she was entitled to asylum and withholding of removal based on being a member of her family and having suffered threats against her and her brother by neighbors who believed the siblings had poisoned their father.⁵⁸ Castillo-Perez's principal argument on appeal was that the IJ erred in finding that she did not establish a nexus between the alleged persecution and her membership in her proposed PSG, her family.⁵⁹ Because the threats were made against her and her brother, and not her entire family, and because no actual harm had been done, the court agreed that substantial evidence supported a finding that no nexus existed between the alleged persecution and the protected ground.⁶⁰

But, in at least one notable case, *Warsame v. U.S. Attorney General*,⁶¹ the Eleventh Circuit remanded petitioner Warsame's case because the IJ and BIA did not consider "the possibility of [a] mixed motives" analysis with respect to establishing the nexus of his persecution and protected ground.⁶² Warsame suffered countless death threats, bomb attacks, kidnapping and torture at the hands of al-Shabaab, a terrorist group in Somalia.⁶³ He sought asylum based on implied and actual political opinion and PSG, which the IJ, and later BIA, denied.⁶⁴ The Eleventh Circuit held that if the IJ determined Warsame's claim failed because al-Shabaab's reasons for their attacks and threats lacked the requisite identity of motive, then necessarily the IJ's analysis did not consider a mixed motives analysis, which was improper.⁶⁵ Practically speaking, this means that applicants who seek asylum under multiple protected

⁵⁶ *Id.* at 487.

⁵⁷ 829 F. App'x 456 (11th Cir. 2020).

⁵⁸ *Id.* at 457.

⁵⁹ *Id.*

⁶⁰ *Id.* at 458.

⁶¹ 796 F. App'x 993 (11th Cir. 2020).

⁶² *Id.* at 1007.

⁶³ *Id.* at 996.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1007.

grounds do not necessarily need to delineate which instance of persecution at a given point in time coincides with one protected ground or the other. In other words, it is possible that one instance of persecution—or several, in Warsame’s case—can relate to more than one protected ground.

C. Particular Social Group

Defining a viable PSG continues to be an uphill battle. A PSG must be: (1) composed of “a group of persons all of whom share a common, immutable characteristic”; (2) “defined with particularity”; and (3) “socially distinct within the society in question.”⁶⁶

In *Alvarado v. U.S. Attorney General*,⁶⁷ Alvarado and her daughters petitioned for review of the BIA’s and IJ’s decisions that their two proposed PSGs were not cognizable.⁶⁸ First, they proposed “Honduran women who are unable to leave a domestic relationship”; and second, they proposed “Honduran women who are viewed as property.”⁶⁹ The BIA agreed with the IJ that the proposed PSGs both fail because the first was “impermissibly circularly defined” and the second did not lack the requisite particularity.⁷⁰ Retroactively applying *Matter of A-B-*, in which then Attorney General William Barr held that applicants must “establish membership in a particular and socially distinct group that exists independently of the alleged underlying harm,” the Eleventh Circuit agreed that Alvarado’s first proposed PSG was overbroad and circularly defined because its members were defined by their alleged underlying harms.⁷¹ As for the second proposed PSG, the court determined it to be overbroad and unclearly defined.⁷² *Alvarado* thus serves as a cautionary tale for litigants: PSGs must be carefully defined, and even the best PSG may be susceptible to a retroactive application of the Attorney General’s latest interpretation of immigration law.

Whether an applicant’s family unit could meet this definition to qualify as a viable PSG had previously remained an open and hotly

⁶⁶ *Perez-Zenteno v. U.S. Att’y Gen.*, 913 F.3d 1301, 1308–09 (11th Cir. 2019) (quotation marks omitted).

⁶⁷ 829 F. App’x 492 (11th Cir. 2020).

⁶⁸ *Id.* at 493–94.

⁶⁹ *Id.* at 494.

⁷⁰ *Id.* at 496 (quoting *A-B-*, 27 I. & N. Dec. 316 Op. Att’y Gen.(2018)). For more about agency interpretation of PSG, see *M-E-V-G-*, 26 I. & N. Dec. 227, 237 BIA (2014). For a more thorough discussion of *A-B-*, see *Alvarado*, 829 F. App’x at 497–98.

⁷¹ *Alvarado*, 829 F. App’x at 498. (quoting *A-B-*, 27 I. & N. Dec. at 317).

⁷² *Id.* at 499.

debated question.⁷³ In 2019, then Attorney General Barr weighed in.⁷⁴ In *Matter of L-E-A-*, Barr overturned the BIA's finding that the asylum seeker's family status—specifically, that he was a member of his father's immediate family—constituted a PSG.⁷⁵ Family, he concluded, could not be said to meet the three-part PSG definition, at least not in this case.⁷⁶ Here, Barr found that the BIA had inappropriately relied upon the parties' agreement that the applicant's family constituted a PSG instead of conducting its own fact-based inquiry; so, the decision had to be reversed.⁷⁷ Whether *Matter of L-E-A-*, foreclosed family ties as a PSG was left an open question in 2020.

This term, the Eleventh Circuit weighed in. In *Castillo-Perez*, the court was faced with a PSG defined as family membership.⁷⁸ Without deciding whether *Castillo-Perez* alleged a satisfactory PSG, the BIA assumed, *arguendo*, that she had and held instead that she did not show a nexus between that PSG and the persecution she claimed.⁷⁹ The Eleventh Circuit held that substantial evidence supported the BIA's determination that petitioner failed to establish a nexus.⁸⁰ The court issued its opinion after Attorney General Barr released his opinion in *Matter of L-E-A-*, and thus, its choice not to address the BIA's assumption that *Castillo-Perez*'s family constituted a PSG may signal its willingness to consider family membership as a viable PSG, or at least distinguish *Matter of L-E-A-*.

The court further signaled its likely willingness to allow family (or, “kinship ties”) to succeed as a potentially viable PSG in *Warsame*, discussed *supra*.⁸¹ There, *Warsame* asserted his PSG was comprised of members of his family—specifically, he claimed he was persecuted by Somalian terrorist group al-Shabaab “because of his father,” who was a police officer and known in their community for his ties to the government and vocal opposition to al-Shabaab.⁸² The IJ and BIA had *sua sponte* created different PSGs (which they found were not viable), and thus, did not consider the more appropriate kinship ties PSG.⁸³ The

⁷³ See, e.g., *Warsame*, 796 F. App'x 993; *Castillo-Perez*, 829 F. App'x 456.

⁷⁴ See generally *L-E-A-*, 27 I. & N. Dec. 581 Op. Att'y Gen. (2019). Because this case falls outside of the scope of this Article, its holding has been provided only to aid in the interpretation of cases bearing on the same issue in 2020.

⁷⁵ *Id.* at 582.

⁷⁶ *Id.* at 594.

⁷⁷ *Id.* at 586.

⁷⁸ *Castillo-Perez*, 829 F. App'x at 456.

⁷⁹ *Id.* at 457.

⁸⁰ *Id.* at 458.

⁸¹ 796 F. App'x 993, 1002.

⁸² *Id.* at 1005.

⁸³ *Id.* at 1005–06.

Eleventh Circuit remanded for the BIA to review his proposed kinship ties PSG given *Matter of L-E-A-*, which was issued after oral argument but before the court rendered its opinion.⁸⁴ On remand, the IJ granted Warsame asylum on all grounds in light of *Matter of L-E-A-* and per the Eleventh Circuit's instruction. Therefore, future asylum applicants and counsel should note and consider employing an effective "mixed-motives" analysis when arguing that multiple grounds for asylum apply.

D. Well-Founded Fear of Future Persecution

In *Srikanthavasan*, whether Srikanthavasan demonstrated a well-founded fear of future persecution was a central issue.⁸⁵ Srikanthavasan argued that the IJ and BIA failed to address whether Tamils, the ethnic minority to which Srikanthavasan belonged, would be persecuted if they returned to Sri Lanka.⁸⁶ The IJ found that Srikanthavasan had not sufficiently demonstrated that returning Tamils would be persecuted in Sri Lanka, and the BIA concluded that he had failed to prove that returning Tamil asylum seekers have a well-founded fear of persecution.⁸⁷ The court held that this "reasoned consideration" of Srikanthavasan's claim hung on "basic logic."⁸⁸ Because the IJ and BIA found that a "specific subset of Tamils were not subject to a pattern or practice of persecution," Srikanthavasan had logically failed to prove (and the IJ and BIA implicitly determined) that there was not a "pattern of prosecution against all Tamils."⁸⁹ As a result, his proffer of general evidence of Tamil mistreatment had failed to prove a well-founded fear of persecution.⁹⁰

This case reveals the Eleventh Circuit's laser focus on the petitioner's proof and to what extent the lower courts considered it. If the IJ and BIA have given "reasoned consideration" to the petitioner's argument and evidence, the court will look beyond the IJ's explicit judgment and uphold findings "implicit" to the IJ's decision.⁹¹ But if they have not, the court will remand for further consideration.⁹² And, importantly, the Eleventh Circuit and lower Immigration Courts have signaled willingness to

⁸⁴ *Id.* at 1006.

⁸⁵ *Srikanthavasan*, 828 F. App'x at 592.

⁸⁶ *Id.* at 595.

⁸⁷ *Id.* (emphasis added).

⁸⁸ *Id.*

⁸⁹ *Id.* (emphasis in original).

⁹⁰ *Id.* at 596.

⁹¹ *Id.*

⁹² See *Warsame*, 796 F. App'x 993.

consider a “mixed-motives” analysis—that one or more instances of persecution can be connected to multiple valid PSGs.

IV. OTHER COMMON ISSUES

Because immigration law is so multifaceted, there exists a corresponding multiplicity of areas that don’t fit neatly into any of the aforementioned categories. Those are detailed here, including illustrations of some of the more notable cases.

A. *Habeas Corpus*

In *Patel*, discussed *supra*, the Eleventh Circuit detailed the history of habeas review, among its several other pronouncements.⁹³ Reminding litigants that habeas review is still a valid option for relief from removal, the court explained that, despite some of the limitations on review of discretionary Executive Branch decisions, the limitations on judicial review written into certain statutes by Congress “[do] not bar jurisdiction under 28 U.S.C. § 2241, the general habeas statute.”⁹⁴

The Eleventh Circuit also reminded litigants this term that habeas review and judicial review should not be confused.⁹⁵ In *Bourdon*, discussed *supra*, Judge Grant criticized Judge Martin for relying on habeas review cases to bolster her dissent regarding judicial review of an administrative decision.⁹⁶ As a result, *Bourdon* serves as a simple warning to litigants: Choose your case law carefully.

In *Mehmood v. U.S. Attorney General*,⁹⁷ Mehmood appealed a district court’s denial of his petition for writ of habeas.⁹⁸ Principally, Mehmood argued that his prolonged pre-final-removal-order detention per 8 U.S.C. § 1226(c), absent a bond hearing, violated the Due Process Clause.⁹⁹ The IJ, and later the BIA, declined to entertain Mehmood’s arguments for deferral of removal.¹⁰⁰ The Eleventh Circuit acknowledged that Mehmood’s initial appeal of this decision before the United States Court of Appeals for the Ninth Circuit was never fully resolved; nevertheless, because he had been removed to Pakistan and was “no longer detained by or in the custody” of the U.S. government, his appeal was moot.¹⁰¹

⁹³ 971 F.3d 1258, 1270–71 (11th Cir. 2020).

⁹⁴ *Id.* at 1271.

⁹⁵ *Bourdon*, 983 F.3d at 475.

⁹⁶ *See id.*

⁹⁷ 808 F. App’x 911 (11th Cir. 2020).

⁹⁸ *Id.* at 911–12.

⁹⁹ *Id.* at 912.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 912–13.

Because the crux of his (or any) habeas petition was relief from detention, and such relief could no longer be provided, the court held it had “nothing . . . to remedy, even if [it] were disposed to do so.”¹⁰² Accordingly, a habeas petition will not hold water if the petitioner has been removed.

B. Naturalization

In *Bueno v. USCIS Kendall Field Office*,¹⁰³ Bueno appealed a district court’s order granting summary judgment in favor of USCIS.¹⁰⁴ Because Bueno failed to directly challenge one of the grounds upon which the lower court relied—that she used a fraudulent Costa Rican passport to obtain entry into the U.S.—and because she failed to properly raise her second argument—that she was admitted pursuant to prior administrations’ policies, which should be afforded deference—the court refrained from considering these items.¹⁰⁵ While the court hinted that there might have been some merit to Bueno’s naturalization argument, she could not overcome that argument’s procedural deficiencies.¹⁰⁶

Naturalization can also be contingent on the citizenship of the applicant’s parent.¹⁰⁷ In *Pierre v. U.S. Attorney General*,¹⁰⁸ David Pierre, a Haitian citizen, petitioned the Eleventh Circuit for review of the BIA’s decision affirming the IJ’s order finding him removable and ineligible for derivative citizenship.¹⁰⁹ The case depended on whether Pierre’s parents had separated by the time his mother became a naturalized citizen.¹¹⁰ According to the Eleventh Circuit, “every circuit and the board have agreed that legal separation requires some degree of formal government action—whether a divorce decree or some other government action short of divorce.”¹¹¹ The court agreed with the BIA that Pierre had not adequately proven his parents were separated by offering middle school records reflecting declarations of his mother and father as these were not “formal government actions” supporting separation.¹¹² Furthermore,

¹⁰² *Id.* at 913–14 (quoting *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)).

¹⁰³ 809 F. App’x 651 (11th Cir. 2020).

¹⁰⁴ *Id.* at 652. Bueno filed a petition for naturalization in 2012, and USCIS denied it, finding that she had not been lawfully admitted under 8 U.S.C. § 1429, the lawful permanent residence statute, because she obtained entry to the U.S. by fraud under 8 U.S.C. § 1182(a)(6)(C)(i).

¹⁰⁵ *Id.* at 656.

¹⁰⁶ *Id.* at 655.

¹⁰⁷ *See, e.g.*, *Pierre v. U.S. Att’y Gen.*, 813 F. App’x 418 (11th Cir. 2020).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 419.

¹¹⁰ *Id.* at 420–21.

¹¹¹ *Id.* at 421.

¹¹² *Id.* at 422.

because of the dearth of federal common law defining “legal separation,” the court affirmed the BIA’s decision to rely on Florida common law and Haitian common law, the places of his parents’ divorce and marriage, respectively, to define it.¹¹³ Accordingly, in a naturalization appeal based upon derived citizenship, petitioners would be well-advised to track down these difficult-to-find documents from either their home country or the place of their parents’ naturalization or divorce.

This term, when seeking naturalization via Form N-400, the Eleventh Circuit cautioned that an applicant must include all criminal charges, even those that were dismissed as “legal nullit[ies].”¹¹⁴ Appealing the district court’s criminal conviction, based, in part, upon the ruling he was required to disclose a Brazilian murder charge on his Form N-400, De Souza argued that the charge, which had been dismissed on statute of limitations grounds, was a legal nullity under Brazilian law and did not need to be disclosed.¹¹⁵ Reviewing the ruling *de novo*, the Eleventh Circuit agreed with the district court.¹¹⁶ Contrasting *Garces v. U.S. Attorney General*,¹¹⁷ in which the court held that a past conviction vacated for procedural defects did not count as a “conviction” for immigration and naturalization purposes,¹¹⁸ the Eleventh Circuit noted that “United States law governs whether the statements De Souza made on his Form N-400 violated § 1015(a).”¹¹⁹ The naturalization application asks about “charges,” and per U.S. law, that encompasses all criminal

¹¹³ *Id.* (citing *Brissett v. Ashcroft*, 363 F.3d 130, 133–34 (2d Cir. 2004) (While normally immigration law is “construed according to a federal, rather than state, standard[,] . . . [w]here, as here, there is no extant body of federal common law in the area of law implicated by the statute, we may use state law to inform our interpretation of the statutory language.”); *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), *superseded by statute*, 17 USCS § 304, *as recognized in* *Broad. Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 768 (6th Cir. 2005). (“The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.”) (citations omitted); *Minasyan v. Gonzales*, 401 F.3d 1069, 1076 (9th Cir. 2005) (“Although uniformity is an important concern in federal statutory interpretation, . . . where the term in question involves a legal relationship that is created by state or foreign law, the court must begin its analysis by looking to that law.”) (citation omitted); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000) (noting that “the INS determines the existence, validity, and dissolution of wedlock using the legal rules of the place where the marriage was performed (or dissolved)”)).

¹¹⁴ *See* *U.S. v. De Souza*, 811 F. App’x 575, 579–81 (11th Cir. 2020).

¹¹⁵ *Id.* at 580–81.

¹¹⁶ *Id.* at 581.

¹¹⁷ 611 F.3d 1337 (11th Cir. 2010).

¹¹⁸ *Id.* at 1339.

¹¹⁹ *De Souza*, 811 F. App’x at 581.

charges—even those that were dismissed under noncontrolling Brazilian law.¹²⁰

V. CONCLUSION

This Article—surveying the law of 2020—would be remiss not to refer to the unique and far-reaching effects of the COVID-19 global pandemic or the change in presidential administrations. As early as March 15, 2020, the Eleventh Circuit began restricting attorneys’ and litigants’ access to the court’s buildings.¹²¹ Shortly thereafter, on March 23, 2020, the Eleventh Circuit ordered oral arguments to be conducted by audio or teleconferencing “[w]here feasible.”¹²² The well-documented global uncertainty surrounding the virus, which requires no citation, sent the Eleventh Circuit, as well as the IJ, BIA, and courts elsewhere in flux, delaying immigration litigation in the process.

Likewise, on January 20, 2021, President Joe Biden was inaugurated as the forty-sixth U.S. President, replacing Donald J. Trump. Biden’s early days in office have been hallmarked by several executive orders repealing Trump era orders and policy, including three targeting immigration: (1) an order appointing a task force to “find ways to reunite children in the U.S. with their parents[] who were deported without them”; (2) an order addressing the asylum backlog and aimed at examining how to replace the Migrant Protection Protocols program; and (3) an order mandating agencies to review recent immigration regulations and guidance.¹²³ While immigrant advocates called for more action, the orders signal an about-face of the last administration’s policies.

As the courts adjust to the realities of post-COVID-19 litigation and as the Biden Administration evaluates and potentially repeals more Trump era immigration orders, regulations, and guidance, there will likely be an uptick in immigration litigation. But even amid increased access to the courts, immigrants face steep precedential barriers to asylum, naturalization, and other relief rooted in immigration law.

¹²⁰ *Id.*

¹²¹ *Notice of Restricted Access to the Tuttle Courthouse and Godbold Federal Building*, ELEVENTH CIRCUIT COURT OF APPEALS (Mar. 15, 2020), <https://www.ca11.uscourts.gov/news/eleventh-circuit-general-order-no-44-and-notice-restricted-access-courts-buildings>.

¹²² *General Order No. 45*, ELEVENTH CIRCUIT COURT OF APPEALS (Mar. 20, 2020), <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/GeneralOrder45.pdf>.

¹²³ Franco Ordonez and Joel Rose, *Biden Signs 3 Immigration Executive Orders. Activists Want More.*, NPR.ORG (Feb. 2, 2021, 5:01 AM), <https://www.npr.org/sections/president-biden-takes-office/2021/02/02/962995562/here-are-the-immigration-actions-president-biden-plans-to-sign> (last visited Apr. 22, 2021).