



How the U.S. Attorney General Tried (But Failed) to Stop Domestic-Violence-Based Asylum Claims

By Ruby Robinson

Four years ago, immigration advocates were heralding the start of a new era following the precedent-setting decision by the Board of Immigration Appeals, *Matter of A-R-C-G-*, which confirmed that immigration judges could find someone eligible for asylum for being a survivor of domestic violence.¹ For nearly 20 years before that decision, immigration advocates had steadily and incrementally been expanding the interpretation of protections available to victims of gender-based violence.² With *A-R-C-G-*, the Board recognized a particular social group of “married women in Guatemala who are unable to leave their relationship.”³ This paradigm-shifting case opened up real possibilities of success for survivors of domestic and gender violence.

Immediately after President Trump took office, his administration began implementing its policy agenda severely restricting immigration to the United States and drastically expanding removal efforts for those already here.⁴ On June 11, 2018, the protections for domestic violence survivors were set

back when former Attorney General Jeff Sessions decided *Matter of A-B-*, which overruled *A-R-C-G-*.⁵ This article analyzes what the decision means for advocates working with non-citizen survivors of gender and domestic violence seeking humanitarian protection in the United States.

Why does the attorney general get to decide immigration cases?

In 1983, the Executive Office for Immigration Review, the nation’s immigration court system—now with 58 local courts and one appellate body, the Board of Immigration Appeals—was created. The Board has authority to create binding precedent decisions across the country not only for local immigration courts, but also Department of Homeland Security agencies.⁶ These agencies must abide by the precedent case-law determinations of the Board, such as for adjudicating applications and petitions, performing credible and reasonable

AT A GLANCE

Despite former U.S. Attorney General Jeff Sessions's precedent-setting decision, *Matter of A-B-*, on June 11, 2018, overruling prior asylum caselaw that afforded greater protections to survivors of domestic violence, his attempt to limit relief nationally failed. Survivors of domestic violence—and their advocates—may still pursue (and prevail with) claims on the basis of membership in particular social groups that combine gender-plus formulations.

fear interviews, and making decisions about someone's deportability from or admissibility to the United States. At the same time, the attorney general may, in his discretion, direct the Board to refer *any* case to him for review and, accordingly, make his own decision.⁷ (Emphasis added.)

In 2018, the attorney general referred nine cases to himself for review and issued five decisions.⁸ Four of those concerned procedural matters and, while those will negatively affect survivors of domestic and gender violence, it is the substantive developments from the attorney general's decisions that will create the harshest consequences for survivors.

Matter of A-B- examined

A-B- was born in El Salvador in 1971.⁹ She met her husband when she was in her 20s, and over the next 15 years, the couple had three children. During that time, she was subjected to horrific physical, sexual, and emotional violence; A-B- sought assistance from the police after one incident and was instructed to flee. She moved two hours away, but her husband found her and the abuse escalated. Ultimately, A-B- had no safe choices available to her in El Salvador, so she fled to the United States to seek protection.¹⁰ Upon making a claim for protection at the border, A-B- passed a credible fear interview in July 2014 and was placed in removal proceedings thereafter.¹¹ She applied for asylum using the particular social group of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners."¹² On December 1, 2015, an immigration judge denied A-B- all relief and ordered her deported, finding that (1) A-B- was not credible; (2) the particular social group did not qualify; (3) even if it did qualify, A-B- did not demonstrate that her membership in the group was one central

reason for the persecution; and (4) A-B- failed to show that the El Salvadoran government was unable or unwilling to help her.¹³

A-B- appealed the decision to the Board of Immigration Appeals, which reversed and remanded in December 2016. In its order, the Board found the immigration judge's credibility determinations to be clearly erroneous, that this was a cognizable social group for which she was persecuted, and that the El Salvadoran government was unable or unwilling to protect her.¹⁴ On March 7, 2018, the attorney general directed the Board to refer the case to himself for review.¹⁵

In his June 11, 2018, decision, the attorney general opined that:

[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.¹⁶

The attorney general's reason for vacating the decision was that the Board "should not have issued *A-R-C-G-* as a precedential opinion because [the U.S. Department of Homeland Security] conceded most of the relevant legal questions" instead of requiring the respondent to demonstrate each element before the court.¹⁷ The attorney general then found fault with each element of the *A-R-C-G-* framework, beginning with whether there was a cognizable particular social group.¹⁸ For example, he stated that "social groups defined by their vulnerability to private criminal activity likely lack the particularity required...given that broad swaths of society may be susceptible to victimization."¹⁹ In other words, he stated that Guatemalan women who are unable to leave their relationships do not form a distinct or cognizable group in Guatemalan society; rather, each person is a "victim of a particular abuser in highly individualized circumstances,"²⁰ and that a particular social group cannot be defined by the harm suffered or feared.²¹

A-B- had an immediate adverse effect on all persons seeking protection as survivors of domestic- and gender-based violence as well as their advocates. Two days after the decision, U.S. Citizenship and Immigration Services (USCIS) issued interim guidelines that became finalized one month later, instructing its officers how to interpret and apply *Matter of A-B-* in affirmative asylum, credible fear, and reasonable fear interviews.²² USCIS reiterated that it is unlikely for an applicant

to demonstrate a “significant possibility” of establishing eligibility for asylum because of the heightened factual burden created by *Matter of A-B*.²³ Accordingly, many applicants for asylum and those seeking credible and reasonable fear interviews before USCIS’s asylum officers were denied protection.

The American Civil Liberties Union and others filed suit challenging these interpretations in *Grace v Whitaker*.²⁴

What does this decision mean for survivors of domestic and gender violence?

First, humanitarian relief like asylum and withholding of removal for survivors of domestic and gender violence is still available post *A-B*. The attorney general’s proposition that domestic violence claims generally do not qualify for asylum relief must be read as non-binding dicta, and therefore, does not preclude applicants from succeeding. Applicants must work through each step to prove the elements in their cases; previously, they could rely on a pre-formulated particular social group. A memorandum for U.S. Immigration and Customs Enforcement trial attorneys, issued on the same day as the policy memorandum from USCIS, confirms this:

[A]lthough the AG overruled *A-R-C-G*, he did not conclude that particular social groups based on status as a victim of private violence could *never* be cognizable, or that applicants could never qualify for asylum or statutory withholding of removal based on domestic violence.²⁵ (Emphasis added.)

Advocates must apply and use the particular social group framework applicable to all asylum seekers that focuses on immutability, particularity, and social distinction.²⁶ Formulating particular social groups that avoid focusing on harm but combine gender, nationality, treatment of women as property,

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or political opinion will be the means by which these claims are successful.²⁷

Formulations of particular social groups like “Guatemalan women,” “Guatemalan women unable to leave their relationships,” and “Guatemalan women viewed as property” can be sufficient provided the advocate can demonstrate the immutable, particular, and social distinctiveness of each. None of these formulations directly seek relief based on being a survivor of gender or domestic violence. Rather, they are examples of groups based on gender and nationality plus another characteristic (like the socially constructed inability to leave and status as male property) that previously were and continue to be cognizable particular social groups.²⁸

Further, framing “inability to leave” as social and cultural expectations that assign women and men different roles in a relationship (subordinate and controlling, respectively), restrict women’s practical opportunities outside the relationship, and view ending the relationship as taboo changes the phrase from a description of risk factors for criminal activity to shorthand for the inferior social status assigned to women. Thus, a woman in a relationship with the father of her child(ren) would be a member of that group even if her partner had never harmed her.

Second, the *Grace* court has ruled that the near-blanket prohibition against positive credible fear determinations for domestic-violence-based claims is arbitrary and capricious and not a permissible interpretation of the asylum statute.²⁹ Further, the court found that this approach runs contrary to the individualized analysis required for each claim under the Immigration and Nationality Act and impermissibly heightens

the standard required to pass credible fear.³⁰ Accordingly, the court ordered that the USCIS guidance regarding credible fear and affirmative asylum interviews be revised (read: redacted) consistent with its ruling.³¹

Third, it will take time for a new precedent decision to emerge for these types of claims. Slowly, courts of appeals around the country are starting to take up these cases. In an unpublished Sixth Circuit U.S. Court of Appeals decision from July 24, 2018, the Court held that the petitioner did not establish membership in or a nexus related to her social group of “married women in Honduras who are unable to leave their relationship.”³² This does not mean such a formulation cannot exist. Outside the Sixth Circuit, there has been a little more traction reading the statements in *A-B-* as dicta; claims like Salvadoran women in domestic relationships who are unable to leave are not “automatically defeat[ed]” but rather are being remanded for further fact finding.³³ Given the time it takes to go through litigation at the Board of Immigration Appeals and circuit court levels, it is not expected that any decision that has done ample fact finding under the *A-B-* framework will be published (or even released) until several more months into the future.

The main takeaway for advocates is that while the protections for survivors of domestic violence in asylum law did not disappear, they dimmed a little. Continued determination and coordination from advocates are required to expand these protections. ■



Ruby Robinson is a co-managing attorney at the Michigan Immigrant Rights Center, a legal resource center for Michigan's immigrant communities. While he is happy to consult in almost all areas of immigration law, he concentrates in naturalization and relief available to survivors of domestic violence.

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ENDNOTES

1. *In re A-R-C-G-*, 26 I&N Dec. 388 (2014).
2. See, e.g., *In re Kasinga*, 21 I&N Dec. 357 (BIA 1996); *In re R-A-*, 22 I&N Dec. 906 (BIA 1999); *In re R-A-*, 24 I&N Dec. 629 (A.G. 2008); Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 *Hasting Women's Law J* 107 (2013); and Dep't of Homeland Security's Position on Respondent's Eligibility for Relief, *In re Alvarado-Pena*, File No. A 73 753 922, US Dep't of Justice (February 19, 2004).
3. *In re A-R-C-G-*.

4. See generally Exec Order 13767, 82 FR 8793 (January 25, 2017); Exec Order 13768, 82 FR 8799 (January 25, 2017); and Exec Order 13769, 82 FR 8977 (January 27, 2017).
5. *In re A-B-*, 27 I&N Dec. 316 (2018).
6. 8 CFR 1003.1(g).
7. 8 CFR 1003.1(h). See also Gonzales & Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 *Iowa L. Rev.* 841 (2016) <<https://ilr.law.uiowa.edu/print/volume-101-issue-3/advancing-executive-branch-immigration-policy-through-the-attorney-generals-review-authority/>> [https://perma.cc/E5XB-K8NB]. All websites cited in this article were accessed May 18, 2019.
8. See generally *Mendoza-Hernandez and Capula-Cortez*, 27 I&N Dec. 250 (2019).
9. *Backgrounder and Briefing on Matter of A-B-*, Center for Gender and Refugee Studies (2018) [which includes briefs submitted by A-B-'s attorneys on her behalf] <<https://cgis.uchastings.edu/matter-b/backgrounder-and-briefing-matter-b/>> [https://perma.cc/6EHN-8EQG].
10. *Id.*
11. *In re A-B-* at 320.
12. *Id.* at 321.
13. *Id.*
14. *Id.*
15. *In re A-B-*, 27 I&N Dec. 227 (2018).
16. *In re A-B-*, 27 I&N Dec. 316, 320.
17. *Id.* at 333.
18. *Id.* at 334–335.
19. *Id.* at 335.
20. *Id.* at 336.
21. *Id.* at 335.
22. *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, Policy Memorandum 602-0162, US Citizenship and Immigration Services (July 11, 2018) <<https://www.uscis.gov/sites/default/files/USCIS/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF>> [https://perma.cc/S2JD-BM9Q].
23. *Id.* at 8, 10.
24. *Grace v Whitaker*, 344 F Supp 3d 96 (D D.C., 2018). See also the redactions to *Guidance for Processing Reasonable Fear, Credible Fear* following this opinion <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B_Redacted_12-19-201.pdf> [https://perma.cc/3U8P-XHKV].
25. *Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-*, Memorandum, US Immigration and Customs Enforcement (July 11, 2018) <<http://www.documentcloud.org/documents/4597904-OPLA-Memo-on-Matter-of-A-B.html>> [https://perma.cc/2V9L-P6J4].
26. *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).
27. See, e.g., *Matter of A-B- Considerations*, Practice Advisory, Immigrant Legal Resource Center (October 2018) <https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf> [https://perma.cc/33YW-J3SB] and National Immigrant Justice Center's *Asylum Practice Advisory: Applying for Asylum After Matter of A-B-*, Nat'l Immigrant Justice Ctr (January 2019) <<https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20%202019%20Update%20%20Final.pdf>> [https://perma.cc/N3P9-X57S].
28. *Id.*
29. *Grace v Whitaker*, 344 F Supp 3d at 56.
30. *Id.* at 56–59.
31. *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-*, Policy Memorandum 602-0162, US Citizenship and Immigration Services (July 11, 2018) <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B_Redacted_12-19-201.pdf> [https://perma.cc/7GYV-A7K2].
32. *Martinez-Martinez v Sessions*, 743 F App'x 629, 634 (CA 6, 2018).
33. *Padilla-Maldonado v US Attorney General*, 751 F App'x 263, 268 (CA 3, 2018).