

The Struggle for Equality: Women's Rights, Human Rights, and Asylum Protection

Immigration in the Trump Era

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International Origins of Domestic Refugee Law

- Came into existence in wake of World War II
- 1951 Refugee Convention (geographic and temporal limitations)
- 1967 Refugee Protocol
- Art. 1.A (2) defines a refugee as an individual with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”

U.S. Ratification and Execution

- U.S. became party to the 1967 Protocol in 1968
- Twelve years later Congress enacted 1980 Refugee Act
- Refugee Act adopted international definition of “refugee” virtually verbatim as an individual with a “well-founded fear of [future] persecution” on account of race, religion, nationality, political opinion and membership in a particular social group
- Any individual “who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival. . .*), “irrespective” of such person’s status, may apply for asylum. INA 208, 8 USC 1158

Historical Context – Conceptual Barriers to Protection from Gender-Based Harms

- *Harms* inflicted on women – such as female genital cutting, forced marriage, repressive social norms, which prohibit women from education or employment – were often seen as cultural or religion norms and not *persecution*
- Refugee Act requires “*nexus*” or connection between the harm and race, religion, nationality, political opinion, or membership in a particular social group and gender is not one of the five grounds
- Persecution is often at the hands of individuals and not the government

UNHCR Guidance – International Norms

- Beginning in 1985 United Nations High Commissioner for Refugees began to give guidance in claims involving violations of women's rights

Harm as persecution - Gender-related human rights violations should be recognized as persecution

- Persecution must be on account of one of the five grounds – the “particular social group” ground could include groups defined by gender
- Persecution need not be by the State itself, when the State is unable or unwilling to protect
- UNHCR called on parties to the Refugee Convention and Protocol to issue guidelines for their adjudicators. Canada did so in 1993, and the US in 1995

United States – Advances and Retreats from Protection

- In that same year that the US issued gender guidelines (1995) an immigration judge in Philadelphia denied asylum to a young woman from Togo fleeing female genital cutting (FGC) and forced marriage [Photos below: Fauziya in immigration detention; Fauziya after her release]



Matter of Kasinga

- In 1996 the Board of Immigration Appeals (BIA) reversed the IJ and granted asylum – case is known as *Matter of Kasinga*
- FGC is persecution even though it is a cultural rite
- It was inflicted on account of “social group membership” defined in part by gender
- Government was unable and unwilling to protect; police would have returned her to her “husband”
- Rationale of decision opened the door to other claims of gender-related persecution

***Matter of R-A-*: U.S. Retreats from Protection**

- Rody Alvarado, Guatemalan asylum seeker
- Husband, former soldier, brutally abused her over ten year period; police and courts turned her away
- Relying on the positive precedent in *Kasinga* case, an immigration judge granted her asylum in 1996; the US government appealed the grant
- In 1999 the BIA – same court that granted to Fauziya Kasinga – reversed the grant of asylum to Rody Alvarado, in a case known as *Matter of R-A-*

Rody Alvarado was Fortunately not Detained During the Litigation of her Claim for Protection



Decades Long Wait: Steps Forward with *Matter of A-R-C-G-*

- After more than a decade of waiting, Rody Alvarado was finally granted asylum in 2009
- Between 1999 and 2009 when she was granted, 3 separate Attorneys General intervened in her case: Janet Reno, John Ashcroft and Michael Mukasey
- The 2009 grant of asylum to Rody Alvarado was at the level of the IJ, so it did not constitute binding precedent
- It was not until August of 2014 – 18 years after the *Kasinga* decision – that the Board of Immigration Appeals, in a case known as *Matter of A-R-C-G-*, issued a precedent (i.e. binding) decision in a case involving domestic violence

The Trump Administration's Reversal of Protection: *Matter of A-B-*

- The Attorney General “certified” the case *Matter of A-B-* to himself on 3/7/18
- Strong facts: Salvadoran woman, married to abuser, with whom she had three children; abuser’s brother was member of the police
- Suffered extreme physical abuse, including beatings, rapes, threats with loaded gun or knife
- Police were largely unresponsive
- Moved away and abuser tracked her down
- After divorce he continued to abuse her; he and his brother said that the divorce would never set her free from him

The Administration's Reversal of Protection – Procedural Context

- 12/1/15: Ms. A-B- denied protection by IJ V. Stuart Couch in Charlotte, N.C. who has one of the highest denial rates in the country; ruled she was not credible and did not meet legal standard
- 12/8/16: BIA reversed; found her credible, analogized to 2014 *A-R-C-G-* decision and found she met the legal standard
- BIA remanded to the IJ for sole purpose of background check and grant of asylum
- The IJ refused to grant; may have been in communication with Sessions to flag case for certification
- 6/11/18 – Sessions certified to himself and issued decision vacating *Matter of A-R-C-G-*, and reversing BIA grant of asylum to Ms. A-B-

***Matter of A-B-* : What it Does; What it Intends to Do**

- It strongly signals that no DV or fear of gang case will qualify for asylum, with statements such as: *“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”*
- It sends the message that these claims will not meet the lower credible fear screening standard in expedited removal, which permits an individual to apply for asylum

***Matter of A-B-* : What it Does; What it Intends to Do**

- It reverses *Matter of A-R-C-G-*
- It holds that the particular formulation of “particular social group” which is often relied upon in DV cases is not legally viable
- It holds that the showing necessary for a failure of state protection (necessary in cases of persecution by non-State actors) is higher than “unable and unwilling,” requiring a showing of “complete helplessness” or “condonation”

Developments and Challenges Post-A.B.

- On July 11, 2018 US Citizenship and Immigration Services issued *Guidance for Processing Reasonable Fear, Credible Fear, Asylum and Refugee Claims in Accordance with A-B-*
- The Guidance repeated the broad sweeping statement in the A.G.'s decision – that generally DV and fear of gang cases would not qualify for protection
- Many adjudicators (Asylum Officers, Immigration Judges, Board of Immigration Appeals) viewed the decision and its guidance as blanket preclusions of DV and fear of gang cases, both in merits as well as credible fear

Challenges Post *A-B-*

Litigation -

- Direct appeal in Ms. *A-B-*'s case: IJ / BIA / federal circuit courts of appeal (remand to IJ who denied; pending at BIA)
- Identification of similar cases denied under *A-B-* and headed to BIA or circuit courts of appeal
- Unique challenge arising from its application in the expedited removal/credible fear process – lawsuit – *Grace v. Sessions*

Grace v. Sessions, subsequently Grace v. Whitaker

- 8 U.S.C. § 1252(e)(3) permits a challenge to written directives, policies, etc. related to expedited removal; exclusive jurisdiction is in district court of District of Columbia
- *Matter of A-B-* and the USCIS Guidance apply in the credible fear interview stage of expedited removal and could thus be challenged under this INA provision
- Plaintiffs were twelve asylum seekers from El Salvador, Guatemala, and Honduras who received negative credible fear determinations under *Matter of A-B-* and the subsequent USCIS Guidance; they challenged the decision and the Guidance as applied to credible fear proceedings

Grace v. Whitaker

- The Court entered a permanent injunction on December 19, 2018, finding the challenged policies to be unlawful, arbitrary and capricious, and prohibiting the government from applying the unlawful provisions in any credible fear processes on or after that date, including both credible fear interviews by asylum officers and credible fear review hearings by immigration judges
- Although the decision in *Grace* is limited to credible fear proceedings, the major legal findings do not depend on the nature of expedited removal for its conclusions
- Advocates can, and should argue that any of the findings not specifically related to the nature of CFI (low screening standard) be applied in merits proceedings

Grace v. Whitaker

Judge Sullivan found the following policies to be arbitrary, capricious and in violation of the law:

1. The general rule against claims relating to domestic and gang violence.
2. The requirement that a noncitizen whose claim involves non-governmental persecutors “show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim.”
3. The Policy Memorandum’s rule that domestic violence-based particular social group definitions that include “inability to leave” a relationship are impermissibly circular and therefore not cognizable.
4. The Policy Memorandum’s requirement that individuals must delineate or identify any particular social group in order to satisfy credible fear based on the particular social group protected ground.
5. The Policy Memorandum’s directive that asylum officers should apply federal circuit court case law only “to the extent that those cases are not inconsistent with Matter of A-B-.”
6. The Policy Memorandum’s directive that asylum officers should apply only the case law of “the circuit” where the individual is “physically located during the credible fear interview.

Ms. A-B- has chosen to Protect her Identity, but Shared her Story with NPR and in an HRW/CGRS Video



Information & Resources

- For assistance with gender-based cases, request assistance from the Center for Gender & Refugee Studies at <https://cgrs.uchastings.edu/our-work/expert-consultation-training>
- For more information about the campaign around gender asylum, visit <https://www.immigrantwomentoo.org/>
- To view the HRW/CGRS video, go to
- <https://www.youtube.com/watch?v=QRQpXRWlQL0&feature=youtu.be>