

June 15, 2018

## **ASYLUM UNDER THREAT: THE AG'S DECISION IN *MATTER OF A-B-***

On June 11, 2018, Attorney General Jeff Sessions announced his decision in [Matter of A-B-](#), the case of an asylum applicant seeking protection from severe domestic violence. This document provides background about asylum, the legal arguments in this case, and the implications of the decision.

### **BACKGROUND ON ASYLUM**

The definition of who should qualify as a refugee is derived from a treaty called the International Refugee Convention and is incorporated into U.S. immigration law. Anyone granted asylum must meet the narrow, stringent definition of a refugee and satisfy many other criteria. In simplest terms, a refugee is defined as someone who has suffered persecution or fears persecution on account of his or her religion, national origin, political opinion, race, or membership in a particular social group, and whose persecutor is someone her government cannot or will not control.

“Social group” is a term of art that has been defined and narrowed over several decades through a series of legal decisions. Though gender has not yet been recognized as a social group in the U.S., [courts have found](#) that women may belong to a social group if they meet certain restrictive and specific criteria. They then must show a nexus between the persecution and their membership in the social group.

The Department of Homeland Security (DHS) [has itself long argued](#) that women who are escaping domestic violence may qualify for asylum, and has contributed significantly to the development of a framework for identifying whether social groups exist in specific cases. Although many women fleeing domestic violence had won asylum based on social group membership, acceptance of a common framework had been spotty. In 2014, the Board of Immigration Appeals (BIA) issued a precedent-setting decision in [Matter of A-R-C-G-](#) that restated the law as it had been applied in many asylum cases of women fleeing domestic violence up to that point.

### **THE AG'S CERTIFICATION TO HIMSELF**

On March 7, 2018, the AG took up for reconsideration a case called *Matter of A-B-*. Because the immigration courts and BIA are part of the Executive Office for Immigration Review (EOIR), which is a part of the Department of

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Justice, the AG has the power to “certify” a case to himself, or pluck a case off the desk of the BIA and choose to reconsider the decision.

*Matter of A-B-* is [the petition for asylum](#) of a woman from El Salvador whose initials are A.B. and who experienced extensive physical and emotional abuse at the hands of her domestic partner. The case was tried before an immigration judge in North Carolina. The judge denied the case, and Ms. A.B. appealed to the BIA, the sole appellate court for all immigration cases across the country. In December 2016, the BIA ruled that Ms. A.B. should receive asylum. The BIA found that a) the applicant was credible; b) she suffered abuse that rises to the level of persecution; c) she is a member of a social group that is “substantially similar” to one found in *Matter of A-R-C-G-*; d) the government of El Salvador was unable or unwilling to effectively protect Ms. A.B.; and e) all other factors were satisfied.

In his March 7 announcement, the AG invited advocates to submit legal briefs to address this question: “Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal.” The question is framed very broadly and uses terms that are not referenced in asylum law. Furthermore, the AG did not release the underlying BIA decision. Advocates independently obtained information through the attorney for Ms. A.B. The cloak-and-dagger manner of the announcement, coupled with the odd framing of the question, was highly irregular and left advocates guessing at the possible scope of the decision.

## **BRIEFING IN *MATTER OF A-B-***

[Legal briefs were submitted](#) by DHS and lawyers for Ms. A.B., as well as twelve amici curiae, or “friends of the court,” parties and organizations with an interest in the outcome of the case.

### ***The Parties’ Briefs***

Ms. A.B.’s opening brief recounted the sobering facts of fifteen years of abuse, including repeated rape and death threats, unenforced protective orders in El Salvador, and attempts to hide and divorce followed by more assaults and threats. It raised several distinct arguments:

- The AG lacks jurisdiction to review since AG can only review cases referred from the BIA, and the case was still before the IJ.
- The question the AG certified was never raised or adjudicated in Ms. A.B.’s case, and the AG refused to say whether he intends to overrule *A-R-C-G-*, so it would violate notice requirements of due process to address the certified question or overrule *A-R-C-G-*.
- If he does reach the certified question, he should rule that, like any other applicant for asylum, a victim of “private criminal activity” may be eligible for asylum if they can meet the requirements.

- Ms. A.B. does meet the requirements for asylum and protection under the Convention Against Torture.

DHS also filed an opening brief, and agreed with the framework set out in *A-R-C-G-*. It urged the AG to reverse the BIA's decision on grounds related to improper fact-finding by the appellate court. It also urged the AG to not decide the certified question, but made the following arguments:

- Being a victim of “private criminal activity” does not necessarily make one eligible for a particular social group, but such a victim may be eligible for asylum.
- In matters involving domestic violence, the AG should “consider mandating that the applicant provide specific information about the putative persecutor (or a reasonable explanation as to why such information cannot be provided)” including details about the abuser's history, family, addresses, military service, physical attributes, visits to the US, violence towards anyone else, and details of direct or indirect contact.
- The elements of asylum have or should have high burdens of proof.
- The AG should not abrogate *A-R-C-G-*, but should remand to the IJ to reconsider and enter an order.

Attorneys for Ms. A.B. had an opportunity to reply to DHS, and argued:

- DHS' arguments about fact-finding are contrary to 4<sup>th</sup> Circuit precedent.
- Since it raises no arguments relating to Ms. A.B.'s eligibility for asylum, it has waived them.
- DHS raised a lot of issues that are irrelevant to this case and the AG should not rule on its “wish-list,” especially on the issue of whether domestic violence victims should be required to provide new levels of evidence.

DHS provided no response to A.B.'s brief in its reply brief; rather it only addressed issues raised in amicus briefs. As to Harvard's amicus brief noting that DHS does not rebut gender as a basis for a particular social group, DHS stated that the issue was beyond the scope of the AG's direction. As to Tahirih's amicus brief noting that DHS was seeking to impose heightened evidentiary standards on domestic violence cases, DHS argued that it was simply offering some suggestions to the AG for lines of inquiry that could be pursued.

### ***Amicus Briefs***

- NIJC et al: Because the AG refuses to give amici information about the context of the case, and because his question is flawed, the process of amicus briefs cannot stand in for notice and comment in the event of a regulatory challenge. Also, notes that the question incorrectly conflates the fundamental elements of asylum.
- Tahirih et al: Domestic violence can and sometimes does constitute persecution under the INA as evidence from around the world, and as years of court and BIA precedent have shown. Whether the persecution is inflicted by a “private” actor has no bearing on whether an applicant can show she belongs to a particular social group. And finally, DHS' effort to impose substantial and new evidentiary requirements on victims of domestic violence should be rejected.

- Immigration Law Professors: Documents substantial and unanimous caselaw from BIA, Circuit Courts and Supreme Court holding that acts by private actors can be persecution, and that harms inflicted by private actors on account of membership in a particular social group can be the basis for asylum.
- Innovation Law Lab: Sessions is biased and cannot fairly adjudicate an issue he has already pre-judged.
- CLINIC et al: A decision that victims of private crime cannot qualify for asylum would exclude many asylees who seek asylum based on religious persecution and is contrary to law.
- GW Law School Immigration Clinic: Limiting asylum to victims of government action is impermissible agency action because it is contrary to the statute.
- Former IJs: AG should dismiss the case because of procedural issues inherent in deciding an issue that the IJ never considered and that the BIA did not properly consider.
- ABA et al: Both statute and long history of circuit court case-law demonstrate that private violence can be the basis for asylum – discusses granted asylum claims in cases of human-trafficking, FMG, rape, and incest.
- Gonzalez Law Firm & Counseling Center: AG’s question conflates elements of statutory asylum and a decision excluding victims of private violence would do great harm to all asylees.
- Harvard, KIND, et al: Membership in a PSG may be met by gender alone.

In the only amicus brief filed that advocated for the position the AG ultimately took, the Immigration Reform Law Institute argued that “victims of private criminal activity” do not constitute a particular social group. Further, *A-R-C-G-* was wrongly decided because the harm inflicted was not on account of one of the immutable characteristics of the class when the applicant there was free to leave, and when the abuse happened because of the personal relationship.

### ***The AG’s Decision***

In his decision, the AG overturned the 2016 Board of Immigration Appeals’ (BIA) decision that Ms. A.B. should receive protection and sent the case back to the Immigration Judge (IJ) with instructions to deny her asylum. In addition, the AG overruled the BIA’s decision in *Matter of A-R-C-G-*. The AG also overruled all other decisions inconsistent with his opinion in *A-B-*.

The decision may deter women from seeking asylum and is likely to result in border agents turning away even more women and their children who need protection. Asylum officers who conduct screening interviews, called credible fear interviews, with women who make it past border agents will apply a much more stringent standard. This will have the impact of keeping some women and their children who are fleeing gender-based violence out of the country.

Because no government agency tracks the number of women seeking or receiving asylum based on domestic or other gender-based violence, it is impossible to predict the exact

number of individuals or families this will impact. However, with thousands of mothers and children approaching the border fleeing well-documented and unchecked domestic violence, rape, and femicide in Honduras, Guatemala, and El Salvador, and with many cases pending in the courts, there will undoubtedly be women turned away who would have merited protection prior to the AG's decision.

It is still possible for individuals fleeing domestic and gender-based violence to apply for asylum and even to succeed in their asylum claims. There are many arguments that were made prior to *A-R-C-G-* that can be raised again. However, many more cases are likely to be denied because of the assertions and holding in this decision. Cases already taking many years to be adjudicated by IJs will be pushed into appeals, delaying protection and further disadvantaging unrepresented women.

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