CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

SESSIONS LIKELY TO END ASYLUM ELIGIBILITY FOR VICTIMS OF DOMESTIC VIOLENCE: HOW COURTS CAN RESIST

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Violence against women is the most pervasive and underreported human rights violation in the world. Whether you live on the Upper East Side or in Gugulethu, South Africa, you likely know a woman or girl who has been the victim of sexual or gender-based violence. Maybe you are that woman or girl.

International asylum frameworks have long grappled with how to address this gender-based persecution. After years of debating whether victims of domestic violence have a legitimate claim to asylum, the US Board of Immigration Appeals (BIA) finally recognized in 2014 that married women who are unable to leave their relationships may constitute a cognizable particular social group for the purposes of seeking asylum. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); see also *Matter of D-M-R-* (BIA June 9, 2015) (clarifying that a victim of domestic violence need not be married to her abuser). Although some advocates argue the decision does not go far enough, the protections and opportunities that *Matter of A-R-C-G-* have provided to thousands of women cannot be understated. Despite these advancements, Attorney General Jeff Sessions has questioned whether such claims to asylum are legitimate by referring to himself a BIA case, *Matter of A-B-* (BIA Dec. 8, 2016), where the Board found that a victim of domestic violence was indeed eligible for asylum. Pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2017), Sessions may refer a case to himself for review, and has asked each party to submit briefs on "hether, 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." *Matter of A-B-*, I&N Dec. 227 (A.G. 2018).

As brief background, in order to be granted asylum, the applicant must show

that they have suffered past persecution or have a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion, and that he or she is unable or unwilling to return to, or avail himself or herself of the protection of, their country of origin owing to such persecution. 8 C.F.R. § 1208.13(b)(1) & (2). To be granted asylum based on one's membership in a particular social group, the applicant must show that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of A-R-C-G-*, 26 I. & N. at 392. As set forth in *Matter of Acosta*, 19 I&N Dec. 211, 212 (BIA 1985), a "common immutable characteristic" is defined as "a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed." Under *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) and clarified in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), the social group must be defined with "particularity," or be defined by boundaries of who is actually a member of the group. Finally, as explained in *Matter of W-G-R-*, "social distinction" is defined as the 'recognition' or 'perception' of the particular social group in society. 26 I&N Dec. at 216. The applicant must also show that her persecution was on account of her membership in the social group, and that the government in her country of origin is unable or unwilling to afford her protection from such persecution.

In *Matter of A-R-C-G-*, the Board found that the lead respondent had met her burden in establishing eligibility for asylum, and held that "epending on the facts and evidence in an individual case, 'married women in Guatemala who are unable to leave their relationship' can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal." 36 I&N Dec. at 388. In this case, the lead respondent was married to a man who regularly beat her, raped her, and on one occasion, burned her. She had contacted local authorities several times to escape her abuser, but was told that the police would not interfere with domestic matters. The respondent had even moved out, but her husband found her and threatened to kill her if she did return. Fearing for her life, and knowing that she could not be safe if she stayed in Guatemala, the respondent fled to the United States.

The Immigration Judge in *Matter of A-R-C-G-* found that the respondent's abuse was the result of "criminal acts, not persecution," and further found that the

respondent was not eligible for asylum. On appeal, the BIA found that "married women in Guatemala who are unable to leave their relationship" is indeed a cognizable social group. First, the BIA asserted that the immutable characteristic in this matter was "gender," and also found the marital status would satisfy the requirement where the woman is unable to leave the relationship. Second, the BIA found that the particular social group had been defined with particularity, where "married," "women," "who are unable to leave their relationship" have commonly accepted definitions in Guatemala, stating that it was particularly significant that the respondent had sought protection from the police but was denied protection due to her social group. Finally, the BIA found that the group was socially distinct in society, where Guatemala has a culture of "machismo and family violence," where the respondent's social group is easily perceived and recognized in Guatemalan society, and where Guatemala has created laws to protect the respondent's social group, but has failed to successfully implement them. The BIA cautioned in their decision that particular social group analyses in cases that involve victims of domestic violence will depend heavily on the facts, including country conditions.

DHS conceded the nexus requirement by agreeing that the respondent had indeed suffered past persecution on account of her membership in a particular social group. The BIA noted that "the issue of nexus will depend on the facts and circumstances of an individual claim." *Id.* at 395. The BIA then remanded to the Immigration Judge for determination of whether the Guatemalan government was "unable or unwilling" to stop the respondent's abuser. On remand, the Immigration Judge granted asylum upon the stipulation of the parties (and thus did not provide a reasoned analysis as to the Guatemalan government's inability or unwillingness to protect the respondent from her abuser).

Relying on the precedent in *Matter of A-R-C-G-*, the respondent in *Matter of A-B-* similarly contended that she was eligible for asylum based on her membership in a particular social group, namely "El Salvadoran women who are unable to leave their domestic relationships where they have children in common." *Matter of A-B-,* at 2. The Immigration Judge below found that the respondent had not met her burden in establishing eligibility for asylum, finding that her proposed particular social group was not cognizable, that even if the social group was cognizable, that she did not establish a nexus between the harm suffered and her membership in the social group, and finding that the respondent had not

demonstrated that the El Salvadoran government was unable or unwilling to protect her from harm. *Id.* at 3. On appeal, the BIA found that the proposed social group was cognizable, where it was "substantially similar" to the proposed group in *Matter of A-R-C-G-* and further found that the respondent had met her burden in establishing particularly and social distinctness by way of a submitted country conditions report. *Id.* at 2. Moreover, the BIA found that the respondent had indeed shown a nexus between her abuse and her membership in the particular social group where the "record indicates that the ex-husband abused her from his position of perceived authority, as her ex-husband and the father of her children…" *Id.* at 3. The BIA also found that the respondent had sufficiently demonstrated that the El Salvadoran government was unable and unwilling to protect her from harm where although the respondent had previously obtained two orders of protection against her abuser, there were several occasions where local police authorities refused to intervene and afford the respondent protection. Moreover, the respondent's brother-in-law, who also frequently threatened violence against her, was a police officer, and thus strengthened respondent's claim that the government would not provide her with protection. The BIA held that the respondent had demonstrated past persecution on account of her membership in a cognizable particular social group, and sustained the respondent's appeal, remanding for completion of background checks.

Despite the BIA's findings, and decades of tireless efforts by advocates, Attorney General Sessions now refers the case to himself and has asked parties to submit briefs on "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." *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). There may have been bad faith on the part of the Immigration Judge below who held up A-B-'s case on remand, then sent it back to the BIA eight months later by raising a "facially bogus legal issue," only to have AG Sessions refer the case to himself and stripping the BIA of jurisdiction.

Sessions has made clear his animus against immigrants, especially those fleeing persecution and seeking asylum in the United States, along with their 'dirty' immigration lawyers. The referral of the *A-B-* case to himself is yet another instance of such xenophobia on full display, where he seeks to deny protection to some of the most vulnerable populations in the world. While we hope this is not the case, Sessions will likely reverse the BIA's findings on the

Matter of A-B- case and declare that victims of domestic violence are no longer eligible for asylum in the United States, thus uprooting *Matter of A-R-C-G-* and particular social group claims based on domestic violence. Indeed, attempting to reverse the ability of a victim of domestic violence to seek asylum goes beyond being anti-immigrant. It is a full-frontal attack on human rights and undermines international obligations to provide protection to people fleeing persecution. The respondent in *Matter of A-B-* will thus need to appeal to a federal appellate court to overrule Sessions.

One can hope that if successful on appeal, *Matter of A-B-* has the potential to broaden asylum eligibility for victims of domestic violence by returning to the *Acosta* definition of particular social group, and clarify what *Matter of A-R-C-G-* left untouched, such as the nexus requirement and the inability or unwillingness of governments to provide victims protection from their abuses.

Returning to the Acosta definition of Particular Social Group

Before *Matter of M-E-V-G-* and *Matter of W-G-R-*'s additional particularity and social distinction requirements, *Matter of Acosta* dictated the proper particular social group analysis. The BIA in *Matter of Acosta* held,

> *"Persecution on account of membership in a particular social group" refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic. i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed*...
>
> *The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.*

19 I&N Dec. at 212, 233.

Applying the doctrine of *ejusdem generis*, the BIA reasoned that the particular social group category, like the other four enumerated grounds (race, religion, nationality, and political opinion), should be defined by immutable characters that cannot, or ought not to, be changed. *Id.* at 233.

While nothing is perfect, the *Acosta* particular social group analysis worked well for the next two decades. However, after the 2003 BIA purge of liberal-leaning

judges, the asylum system experienced a dramatic shift in particular social group analysis. The BIA in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), for example, added that in addition to demonstrating the shared immutable characteristic that defines the particular social group, an asylum applicant would also need to show that the group was "socially visible" in society. *Matter of C-A-,* 23 I&N Dec. at 951. Social visibility was later refined in *Matter of M-E-V-G-* and *W-G-R-*, which clarified that the group needs to be "socially distinct" as to be perceived by society, and not necessarily "ocularly" visible. *Matter of W-G-R-*, 26 I&N Dec. at 216.

On appeal, *Matter of A-B-* ought to advocate for the return of the pure *Acosta* particular social group analysis and rejection of the *Matter of C-A-* social visibility requirement. Indeed, some circuits have rejected this requirement. In *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), the Seventh Circuit declined *Chevron* deference to the BIA's denial of an asylum case and rejected the social visibility requirement, finding that it "makes no sense." Similarly in *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011), the Third Circuit found that the social visibility requirement had no place in particular social group analysis, reasoning that

> n the wake of *Acosta*, the BIA recognized a number of groups as "particular social groups" where there was no indication that the group's members possessed "characteristics that were highly visible and recognizable by others in the country in question" or possessed characteristics that were otherwise "socially visible" or recognizable. Indeed, we are hard-pressed to understand how the "social visibility" requirement was satisfied in prior cases using the *Acosta* standard. By way of examples noted above, the BIA has found each of the following groups to constitute a "particular social group" for purposes of refugee status: women who are opposed to female genital mutilation (*Matter of Kasinga*), homosexuals required to register in Cuba, (*Matter of Toboso-Alfonso*), and former members of the El Salvador national police (*Matter of Fuentes*). Yet, neither anything in the Board's opinions in those cases nor a general understanding of any of those groups, suggests that the members of the groups are "socially visible." The members of each of these groups have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to make that

characteristic known.

Although the BIA has since clarified in *M-E-V-G-* and *W-G-R-* that social distinction does not require ocular visibility, advocates have found this clarification disingenuous and that it often contradicts the particularity requirement.

Clarifying the Nexus Requirement

As explained above, DHS conceded the nexus requirement in *Matter of A-R-C-G-* by agreeing that the respondent had indeed suffered past persecution on account of her membership in a particular social group. 26 I&N Dec. at 395. The BIA noted that "the issue of nexus will depend on the facts and circumstances of an individual claim." *Id*.

In the recent case, *Matter of L-E-A–,* 27 I&N Dec. 40 (BIA 2017), the BIA denied asylum to a respondent for failing to meet the nexus requirement. As we have previously blogged, the respondent here was a native and citizen of Mexico whose father owned a general store in Mexico City. Members of a drug cartel approached the respondent's father to ask if they could sell drugs in the store as they viewed it as a favorable distribution location. The respondent's father refused. The members of the drug cartel approached respondent to see whether he would sell drugs for them at his father's store. Upon respondent also refusing, the members of the cartel tried to grab him and put him in their car, but he was able to get away. The respondent left for the border and successfully crossed into the United States. The BIA reasoned that the respondent was not entitled to relief because even if the persecutor had harmed the respondent, it was done so as a means to an end, i.e. to sell drugs. In other words, the persecution would not have been due to the respondent's membership in a particular social group and animus towards the family, but rather because he was interfering in their drug trade.

The respondent in *Matter of A-B-* ought to distinguish the finding in *Matter of L-E-A-* preemptively on appeal, and seek to definitively establish what the nexus requirement ought to be in domestic violence cases. In particular, they will want to avoid an *L-E-A*-type finding which would reason that the persecution was not due to the woman's membership in a particular social group, but rather because the persecutor was violent. This was the conclusion of the BIA in *Matter of R-A-*, 22 I&N 906 (BIA 1999), a decision pre-dating *A-R-C-G-*, which denied asylum to a victim of domestic violence. This erroneous finding continues to be encountered today, where Immigration Judges continue to find

that it is an abuser's jealousy or own violent behaviors that motivated the harm, not the victim's membership in a particular social group. As pointed out by Blaine Bookey, "this rationale defies logic: an abuser's 'jealousy' is inherently linked to a woman's gender and status in a relationship as the property of her partner."

Clarification on this issue is imperative for uniform adjudication of domestic violence asylum cases. The Court handling the *Matter of A-B-* appeal may look at how other countries have interpreted the nexus requirement under international law. In New Zealand, for example, the Refugee Status Appeals Authority found,

> he words "for reasons of" require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reason of the person's membership or perceived membership of the particular social group…
>
> he nexus between the Convention reason and the persecution can be provided either by the serious harm limb or by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (e.g. husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, **but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied**. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because "persecution" is a construct of two separate but essential elements, namely risk of serious harm and failure of protection.

(emphasis added).

The United Kingdom came to a similar understanding of the nexus requirement in the seminal case, *Islam and Shah v. Secretary of State for the Home Department,* 2 A.C. 629 (H.L.), finding that the requirement is satisfied where the applicant can show that the harm was motivated by her membership in a particular social group, or by showing that the state failed to provide her with protection from that harm due to her membership in that particular social group. The US

Courts have an opportunity to expand asylum eligibility for victims of domestic violence by adopting a similar understanding of the nexus requirement, where an applicant can satisfy the nexus requirement via the abuser's conduct or by the state's failure to provide protection from this conduct due to her membership in a particular social group.

Clarifying the State Protection Analysis

State protection, or the lack thereof, is critical in successfully arguing particular social group cases when the persecution is committed by private actors. However, *Matter of A-R-C-G-* did not provide definitive guidance for assessing the adequacy of state protection. As explained, the BIA remanded the case back to the Immigration Judge for determination of whether the Guatemalan government was "unable or unwilling" to stop the respondent's abuser. On remand, the Immigration Judge granted asylum at stipulation of the parties and thus did not provide a reasoned analysis as to the Guatemalan government's inability or unwillingness to protect the respondent from her abuser.

On appeal, *Matter of A-B-* can seek to clarify how adjudicators ought to analyze the lack of state protection for victims of domestic violence. Advocates have reported inconsistent adjudication in state protection analyses, where some Immigration Judges fail to take country conditions into consideration or fail to understand that although a woman obtained orders of protection against her abuser that the state nevertheless failed to protect her from future abuse when the partner violated the order. Accordingly, uniform guidance is warranted to allow for seamless and consistent adjudication, such as the consideration of country conditions evidence, testimony from the applicant about whether she reasonably could have sought protection in her home country, and evidence of lackluster implementation of domestic violence laws at the state and local levels.

AG Sessions will undoubtedly deny the applicant's asylum in *Matter of A-B-* and seek to radically change the adjudication of asylum cases based on domestic violence, and perhaps all particular social group cases based on private criminal activity. However, *Matter of A-B-*, on appeal, can not only overcome Sessions' erroneous reading of the law, but can help to expand the eligibility of asylum for victims of domestic violence and clarify those issues which were left untouched by *Matter of A-R-C-G-*. Critically, the respondent in *Matter of A-B-* can raise the question of where the Courts wish to fall morally. Do we want to be a

country that denies asylum to victims of domestic violence whose countries do little to nothing to protect them? Do we want to stand in stark contrast to nations such as Canada, which has long recognized eligibility for victims of domestic violence, or the United Kingdom, which has similarly recognized such eligibility and does not impose stringent cohesive requirements in their particular social group analyses? The eventual appeal of *Matter of A-B-* will grant the Courts another opportunity to resist the anti-immigrant policies of this administration that have undermined the notion of America as being the beacon of hope for the persecuted.

It must be noted that men and boys are also severely affected by sexual violence. Women and girls, however, constitute the vast majority of victims worldwide and are the population of concern contemplated in *Matter of A-R-C-G-*, and are thus the population discussed in this article.