

Jul 13 Matter of A- B- Being Misapplied by EOIR, DHS

One month after Attorney General Jeff Sessions issued his cruel, misguided decision in *Matter of A-B-*, we are seeing the first signs of how the decision is being implemented by the BIA, USCIS, and ICE.

There is no question that Sessions' intent was to eliminate domestic violence and gang violence as bases for asylum. How can I be so certain of this? While *Matter of A-B-* was pending before him, Sessions told a Phoenix radio station in March: "We've had situations in which a person comes to the United States and says they are a victim of domestic violence, therefore they are entitled to enter the United States. Well, that's obviously false but some judges have gone along with that" (here's the link: <https://ktar.com/story/2054280/ag-jeff->

sessions-says-closing-loopholes-can-fight-illegal-immigration/
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However, Sessions chose to attempt to achieve this goal by issuing a precedent decision. A decision is not a fiat. It must be analyzed in the same manner as any other legal decision and applied to the facts accordingly.

Asylum experts and advocacy groups analyzing the decision have reached the following conclusions. The main impact of Sessions' decision is to vacate the Board's 2014 precedent decision, *Matter of A-R-C-G-*, holding that a victim of domestic violence was eligible for asylum as a member of a particular social group. Therefore, asylum applicants can no longer rely on that decision.

However, Sessions' decision otherwise cobbled together already existing case law (which was taken into consideration in deciding *Matter of A-R-C-G-*), and added non-binding dicta, i.e. his statement that "generally, claims by aliens pertaining to domestic violence or gang violence...will not qualify for asylum." (Note the use of the pejorative "aliens" to describe individuals applying for asylum.)

Furthermore, most of the items covered by Sessions involved questions of fact (which are specifically dependent on the evidence in the individual case, and which the BIA and AG have very limited ability to reverse on appeal) as opposed to questions of law, which can be considered de novo on appeal and have more general applicability. The questions of fact raised by Sessions include whether the persecutor was aware of the existence of the group and was motivated to harm the victim on account of such membership; whether the society in question recognizes the social group with sufficient distinction; whether the authorities in the home country are unable or unwilling to protect the victim, and whether the victim could reasonably relocate to another part of the country to avoid the feared harm.

So in summary, Sessions felt that the Board's decision in *Matter of A-R-C-G-* did not provide a sufficiently detailed legal analysis, therefore vacated it, and laid out all of the legal analysis that future decisions must address. Domestic violence and gang violence claims still remain very much grantable, provided that all of the requirements laid out by the Attorney General are satisfied. Hearings on these cases may now take much longer, as testimony will need to be more detailed, additional social groups will need to be proposed and ruled on,

more experts must be called, and more documents considered. But nothing in *A-B-* prevents these cases from continuing to be granted.

Therefore, how discouraging that the first decision of the BIA to apply this criteria failed to do what is now required of them. A single Board Member's unpublished decision issued shortly after *A-B-*'s publication did not engage in the detailed legal analysis that is now warranted in domestic violence cases. Instead, the decision noted that the case involved a social group "akin to the group defined in *Matter of A-R-C-G-*." The Board then found that the AG's decision in *A-B-* "has foreclosed the respondent's arguments," because "the Attorney General overruled *Matter of A-R-C-G-* and held that it was wrongly decided."

What is particularly dispiriting is that the decision was authored by Board Member Linda Wendtland. A former OIL attorney whose views are more conservative than my own, I have always respected her scholarly approach and her intellectual honesty. At the BIA, staff attorneys draft the decisions which the Board Members then edit. Judge Wendtland always took the time to write her edits as academic lessons from which I always learned something. She recently authored the lone dissenting opinion in a case involving a determination of whether a woman was barred from relief for having provided material support to terrorists; Judge Wendtland correctly determined that the cooking and cleaning that the woman was forced to perform after having been kidnapped by rebels did not constitute "material support." It is therefore perplexing why she would sign the post-*A-B-* decision that so sorely lacked her usual degree of analysis.

In addition to the BIA, on July 11, both USCIS and ICE issued guidance on applying *A-B-* to asylum adjudications. Much like the BIA decision, the USCIS guidelines to its asylum officers, which serve as guidance not only in adjudicating asylum applications, but also for making credible fear determinations, seem to apply the personal opinion of Sessions rather than the actual legal holdings of his decision. USCIS decided to print in boldface Sessions' nonbinding dicta that such cases will generally not establish eligibility for asylum, refugee status, or credible or reasonable fear of persecution.

Credible fear interviews are conducted right after an asylum seeker arrives in this country, while they are detained, scared, often unrepresented by counsel, before having a chance to understand the law or gather documents or witnesses. The interviewer is supposed to find credible fear if there is a

significant possibility that the applicant will be able to establish eligibility for relief at a future hearing before an immigration judge. It is likely that, at such future hearing, the applicant will have an attorney who will make the proper legal arguments, call expert witnesses, formulate the particular social group according to the requirements of case law, submit other supporting evidence, etc. But now asylum officers are being instructed to ignore all of that and deny individuals the chance to even have the opportunity to apply for asylum before an immigration judge essentially because Jeff Sessions doesn't believe these are worthy cases.

ICE (through its Office of the Public Legal Advisor) has issued guidance that, while probably reflecting internal conflict within the bureau, is nevertheless somewhat more reasonable than the interpretations of either USCIS or the Board. The ICE guidance does ask its attorneys to hold asylum applicants to some exacting legal standards, to look for flaws in supporting evidence, and to question asylum applicants in great detail. It also asks its attorneys not to opine on whether gender alone may constitute a PSG until further guidance is offered (again, probably reflecting internal conflict within the bureau on the issue). But the guidance does not simply conclude that all domestic violence and gang violence cases should be denied. It even encourages attorneys to employ a "collaborative approach" by pointing out flawed social groups offered by pro se applicants in the hope that the IJ might help the applicant remedy the situation early on.

However, let's remember that ICE stipulated to grants of asylum for victims of domestic violence in both *Matter of R-A-* (during the Bush administration, and to the consternation of then Attorney General John Ashcroft), and in *Matter of A-R-C-G-*. ICE argued in its brief to Sessions in *Matter of A-B-* that *Matter of A-R-C-G-* was good law and should not be vacated. So then shouldn't ICE be applying these same principles to its guidance to attorneys?

It should also be noted that ICE and USCIS could see a way to granting worthy cases in spite of Sessions' decision. In the early 1990s, then INS General Counsel Grover Joseph Rees III took exception with the BIA's precedent decision holding that forcible abortions and sterilization under China's family planning policies did not constitute persecution on account of a protected ground. Rees instructed his attorneys to seek to remand cases involving such claim to the INS Asylum Office, where per his instructions, such claims were granted affirmatively by asylum officers. There is no reason that a similar practice could not be employed now, particularly as

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