

**Immigration Court: A.G.****Case:** *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018)**Date:** June 11, 2018**Notes:**

- (1) *Overrules Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014)
- (2) *Vacated by Grace v. Whitaker*, USDC of DC, Dec. 17, 2018

**Adjudicated by:** Jeff Sessions**Tags:** Domestic Violence, asylum, persecution, particular social group, government inability, circularity, gang violence, private actors**Question Presented:** Is respondent eligible for asylum if her abuser was her husband? (“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,” 317).**Holdings:** A-B- is not eligible for asylum.

- *Matter of A-R-C-G-* [DV Asylum case, PSG = married Guatemalan women who cannot leave] was wrongly decided and is overturned.

**Rationale:**

- (1) Membership in a social group must be a central reason for persecution in an asylum claim (persecutor’s motives determine this).
- (2) Membership in a social group cannot be defined by the persecution.
- (3) “If an asylum application is fatally flawed in one respect, an immigration judge or the Board need not examine the remaining elements of the asylum claim.” (316)
- (4) Government must be shown to condone or be utterly unable to protect victim if persecution comes from a private actor. (p.337)

**Facts:** A-B- tried to claim asylum because she was part of a particular social group made up of Honduran women who could not leave their intimate relationship because she shared children with her partner.**History of the Case:** IJ had denied asylum claim, then on appeal BIA had granted respondent’s application for asylum in 2016, citing *A-R-C-G-*. Sessions requested to review the decision and vacated it.**Appeals to Statute & Precedent:**

- **8 U.S.C. §1101(a)(42)(A):** Asylum statute
- **8 U.S.C. §1158(b)(1)(a), (b)(i):** Asylum statute
- ***Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985):** immutability; gov’t unable & unwilling to protect

- ***Matter of R-A-*, 22 I&N Dec. 906, 917-23 (BIA 1999)**: DV asylum & PSG—not just immutable characteristic, but also socially recognized group (this case was vacated, but “despite the vacatur of *R-A-*, both the Board and the federal courts have continued to treat its analysis as persuasive”).
- ***Matter of M-E-V-G*, 26 I&N Dec. 227, 237 (BIA 2014)**: immutability + particularity + socially distinct
- ***Matter of W-G-R-*, 26 I&N Dec. 208, 224 (BIA 2014)**: membership in PSG must be a central reason for their persecution.
- ***Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014)**: new PSG = married women in Guatemala who cannot leave relationship
- **Adverse rulings from Circuit Courts re. DV Asylum** (failed to prove membership in PSG, or that PSG was a central reason for persecution):
  - ***Fuentes-Erazo v. Sessions*, 848 F.3d 847, 853 (8<sup>th</sup> Cir. 2017)**
  - ***Cardona v. Sessions*, 848 F.3d 519, 523 (1<sup>st</sup> Cir. 2017)**
  - ***Marikasi v. Lynch*, 840 F.3d 281, 291 (6<sup>th</sup> Cir. 2016)**
  - ***Vega-Ayala v. Lynch*, 833 F.3d 34, 40 (1<sup>st</sup> Cir. 2016)**
  - ***Velasquez v. Sessions*, 866 F.3d 188 (4<sup>th</sup> Cir. 2017)**: personal, private conflict rather than persecution on protected ground.

#### Quotes:

- “Such applicants must...demonstrate that their persecutors harmed them on account of their membership in [a particular social group] rather than for personal reasons, and establish that the government protection from such harm in their home country is so lacking that their persecutors’ actions can be attributed to the government.” (317)
- “Because *Matter of A-R-C-G-* . . . recognized a new particular social group without correctly applying these standards, I overrule that case and any other board precedent to the extent those other decisions are inconsistent with the legal conclusions set forth in this opinion.” (317)
- “An alien may suffer threats and violence in a foreign country for any number of reasons relating to her social, economic, family, or other personal circumstances. Yet the asylum statute does not provide redress for all misfortune.” (318)
- “I do not believe *A-R-C-G-* correctly applied the Board’s precedents, and I now overrule it. **The opinion has caused confusion because it recognized an expansive new category of particular social groups based on private violence.**” (319)
- “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.” (320)
- “Subsequent Board decisions, including the decision certified here, have read *A-R-C-G-* as categorically extending the definition of a ‘particular social group’ to encompass most Central American domestic violence victims.” (332)

- “If a group is defined by the persecution of its members, then the definition of the group moots the need to establish actual persecution.” (335)
- “Social groups defined by their vulnerability to private criminal activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization.” (335)
- “...there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society, rather than as a victim of a particular abuser in highly individualized circumstances.” (336)
- “When private actors inflict violence based on a personal relationship with a victim, then the victim’s membership in a larger group may well not be ‘one central reason’ for the abuse.” (339)
- “Neither immigration judges nor the Board may avoid the rigorous analysis required in determining asylum claims, especially where victims of private violence claim persecution based on membership in a particular social group.” (340)

#### Commentary:

- Discussion (mainly dicta) spends a lot of time on gang violence, which was not in view in A-B-’s case. Suggestion is that a PSG is hard to see as a central reason for persecution by gang violence.
- Says that *M-E-V-G-* and *W-G-R-* properly limited PSG to what was distinct within the society, and that *A-R-C-G-* improperly departed from these standards by creating a new PSG out of married women in Guatemala who were unable to leave their relationship.
- Doesn’t think *A-R-C-G-* should have been a precedential decision because the BIA conceded so many legal questions (too passive). (In a footnote, he also disses *L-E-A-* for concessions about membership in a PSG comprised of family members.)
- Since BIA conceded membership in a PSG, it didn’t have to try to decide “whether A-R-C-G- could establish the existence of a cognizable particular social group without defining the group by the fact of persecution.” (334)
- Isn’t impressed with the cursory assertion that Guatemala has a culture of machismo.



#### My Summary:

- So the bottom line is that Sessions objects to all the concessions made by DHS in *A-C-R-G-*, because precedent shouldn’t rest on concessions and they did a bad job of determining the PSG of the plaintiff.
- The legal result is a series of semi-dicta guidelines that eventually got semi-codified in DHS’s Policy Memorandum:
  - DV & gang-related violence are usually not going to qualify an alien for asylum

- “Married women from \_\_\_ who are unable to leave the relationship” is not a cognizable PSG—nobody in the country would recognize it
- The abuser in a DV case isn’t abusing the woman because she’s in a PSG, so you can’t say the PSG is a central factor in the persecution she’s claiming
- The element “unable to leave” is a part of the abuse, so this PSG is defined by its persecution, which is circular
- If the abuse comes from a non-governmental actor, the plaintiff has to show that the gov’t *condoned* or was *utterly helpless* to stop the violence.

### **Grace v. Whitaker, Dec. 17, 2018 (USDC of DC)**

- Judge Sullivan vacated *Matter of A-B-*, finding that it heightened the threshold for credible fear determinations in a number of respects. Also the subsequent Policy Memorandum added burdens that should not exist.
- Specifically, the plaintiffs prevailed on these challenges:
  - There shouldn’t be a sweeping dismissal of asylum cases based on DV and gang-related violence, since every case should be evaluated on an individual basis.
  - The gov’t’s inaction should only rise to the level of “unable or unwilling,” not “condoning or helpless to prevent.”
  - The “inability to leave” clause does not make a case fail because of circularity; it’s still possible for this to involve a cognizable social group.
  - The Policy Memorandum should not restrict the adjudicator’s case law supports to only those that support the decision in *Matter of A-B-*, since they should be looking to lower the threshold for credible fear interviews.

### **My comments:**

- Maybe I’m missing a beat, but Jeff Sessions didn’t mention credible fear interviews once in *Matter of A-B-*. Maybe this was disingenuous? Or maybe he gets there when he talks about asylum officers (as opposed to IJs or Board—but he seems mainly to talk about IJs). *Grace* assumes that all of the guidelines from this opinion and from the DHS’s Policy Memorandum are being applied *at the credible fear determination* stage, which is why the opponents could argue in the District Court that these expectations are impermissible because they heighten the standard at that point. Would they still be impermissible before an IJ at a hearing? Sessions is critical of the *legal argument* made before the IJ in A-B-’s case, but he has nothing to say about what the asylum officer decided at the credible fear hearing (which got her before the IJ in the first place), just gives general directions to IJ’s, Board, and “asylum officers” to follow *Matter of A-B-* now. So what, exactly, was vacated?
- Also, nobody has brought up the DHS’s Supplementary Brief for *Matter of L-R-* in any of these cases. Sessions says in *A-B-* that he overrules “that case and any other Board precedent to the extent that those other decisions are inconsistent with the legal conclusions set forth in this opinion,” but I don’t know if the guidelines from the DHS count as precedential.