NATIONAL IMMIGRANT JUSTICE CENTER
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Matter of A-R-C-G-; Matter of A-B- I and *II*; and *Matter of L-E-A- II*: A Quick Reference Guide

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Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014)

What it Held and Said

- Based on the evidence presented and the particular circumstances of the country in question, the particular social group (PSG), "married women in Guatemala who are unable to leave their relationship" is cognizable.
- Relationship status (in this case, marital status) can be immutable where the individual is unable to leave the relationship.
- Determining the immutability of a relationship involves analyzing a range of factors, including religious, cultural, or legal constraints, the respondent's experiences, and country condition evidence.
- This PSG is particularly defined when consider within the facts of this case because the definition is based on terms that have commonly accepted definitions within Guatemalan society, including societal expectations and legal constraints.
- The group is socially distinct because the evidence shows that Guatemalan society meaningfully distinguishes members of this group within society. This record evidence includes evidence of a culture of machismo and domestic violence in Guatemala, that sexual offenses are a serious problem, and that the police often fail respond to domestic violence complaints
- The group is not defined by the fact that the respondent has been subjected to domestic violence.

Impact in the Seventh Circuit

- Chicago Immigration Judges and Asylum Officers regularly granted asylum in gender violence-based cases prior to the issuance of *A-R-C-G-*, in part because the Seventh Circuit had not deferred to the BIA's social distinction/visibility and particularity tests and only required that a group be based on a characteristic group members could not change or should not be required to change.
- Nonetheless, *A-R-C-G-* helped make adjudicators more comfortable with granting asylum in family violence claims and often simplified the adjudication of these cases.

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018) (*A-B- I*)

What it Held and Said

- *A-R-C-G-* is overruled because (according to former AG Sessions), the decision was the product of concessions by the Department of Homeland Security (DHS), not applications of law by the BIA, specifically regarding social distinction and particularity.
- The PSG posited in *A-B- I* itself, "El Salvadorian women who are unable to leave their domestic relationships where they have children in common," is likely not cognizable either.

While the holding in A-B- I was narrow, the decision contained copious, mean-spirited, non sequitur dicta that cast doubt more broadly on the viability of domestic violence-based PSG claims and other claims involving violence by non-state actors. This included:

- Implying that in asylum claims involving non-state actors, it may be necessary to show that the government "condones" or is helpless to protect victims, rather than that the government was simply unable or unwilling to control the persecutor.
- Claiming that domestic violence claims involve violence that is "private" and related to a "personal relationship."
- Suggesting that asylum seekers must provide evidence that the persecutor is aware of the PSG's existence to prove nexus, rather than just evidence that the persecutor targeted the asylum seeker on account of the characteristic she shares with other group members.
- Alleging that the PSGs in *A-R-C-G-* and other gender violence-based asylum claims fail because they are defined by the harm the group members suffered or fear and therefore do not exist independently of the persecution, while failing to acknowledge that there may be many reasons (economic, familial, cultural) why a woman is unable to leave a relationship, which in turn make her a target of persecution by her partner.

Impact in the Seventh Circuit

- As with *A-R-C-G-*, *A-B- I* generally had a limited impact on adjudications before the Chicago Immigration Court because, as noted above, the Seventh Circuit has rejected the BIA's social distinction and particularity tests and affirmed a pure, *Acosta*-only approach.
- Some Chicago Immigration Judges believed themselves bound by *A-B- I*'s broader criticism of "unable to leave the relationship" PSGs and refused to consider similar groups on that basis, but would grant gender-based asylum claims based on PSGs that were defined by other characteristics, such as family membership or resistance to gender norms.
- NIJC pro bono attorneys continued to successfully present gender violence-based asylum claims with PSGs based on relationship status, while also arguing claims based on simple gender/nationality groups (e.g., "Guatemalan women") and groups based on a failure to comply with gender norms in a particular country.

Matter of A-B-, 28 I&N Dec. 199 (A.G. 2021) (*A-B- II*)

What it Held and Said

- The citations in *A-B-I* to decisions using the words "condoned" and "complete helplessness" did not demonstrate an intent to depart from the "unable or unwilling" standard. Rather, the two descriptions "are interchangeable formulations" with "condone" simply meaning "to permit the continuance of" (like unwilling) and "completely helpless" simply referring to "governments that are actually unable to protect persons," (like unable).
- Briefly discussed a different, prior decision, *Matter of L-E-A-*, 27 I&N Dec. 40, 43-44 (BIA 2017) ("*L-E-A- I"*), and claimed it "refined" a two-prong test for determining whether a protected ground is one central reason for the persecution: if the protected ground is "a but-for cause of the wrongdoer's act" and "is not incidental or tangential to another reason for the act." (This was the first time the BIA or AG had claimed that *L-E-A- I* clarified a new, two-part test for nexus and this appeared directed specifically at a line of Fourth Circuit decisions.)

Impact in the Seventh Circuit

- Given the timing of *A-B- II* and the slowdown in immigration court merits hearings due to COVID restrictions, there has been little opportunity to see an impact of *A-B- II* on adjudications before the Chicago Immigration Court and Asylum Office.
- As with prior decisions, NIJC pro bono attorneys did not significantly modify their case filings or arguments in response to this decision.

Matter of L-E-A-, 27 I&N Dec. 581 (A.G. 2019) (*LEA II*)

What it Held and Said

- Reversed a conclusion made by the BIA in *L-E-A- I* regarding the viability of a family-based PSG because the AG alleged that the BIA's conclusion was the result of concessions by DHS and not based on a case-by-case analysis. Did not otherwise address the holding in *L-E-A- I*, which related to nexus and not PSG.
- Reasserted the fairly uncontroversial rule (outside of the Seventh Circuit), that family-based PSGs, like all PSGs, must meet the three requirements established by the BIA: (1) immutability; (2) particularity; and (3) social distinction.
- Claimed, without any legal or evidentiary support, that many asylum seekers with family-based PSGs will find it difficult to establish that their family-based group is seen as distinct within their societies: "[I]n the ordinary case, a nuclear family will not, without more," qualify." Thus, their PSG will fail.

Impact in the Seventh Circuit

- As with the other decisions, the impact in the Seventh Circuit was limited because *L-E-A- II* focused on the alleged problems with the social distinction of family-based PSGs and the Seventh Circuit has not deferred to the BIA's social distinction test.
- Any impact was further weakened the AG's explicit statement in *L-E-A- II* recognizing that different law is followed in the Seventh Circuit: "[T]he Seventh Circuit has declined to apply the particularity and social distinction requirements, requiring only that members of particular social groups share a common, immutable characteristic."
- Nonetheless, a few immigration judges, seeming to misunderstand the AG's statement, have applied the social distinction and particularity tests, sometimes only in the context of family-based PSGs. The Chicago Asylum Office also seemed to apply *L-E-A- II* to reject some family-based PSGs.

Matter of L-E-A-, 28 I&N Dec. 304 (A.G. 2021) (*L-E-A- III*), *issued June 16, 2021*

What it Held and Said

- Vacated *L-E-A- II* in its entirety and returned the immigration system to the preexisting state of affairs; adjudicators should no longer follow *L-E-A- II*.
- *L-E-A- II* is inconsistent with the decisions of several other courts of appeals that have recognized family-based PSGs. It was also effectively an advisory opinion since the analysis of the PSG in *L-E-A- II* was unnecessary to decide the case.
- Rulemaking to address the PSG definition is the preferable process for considering the PSG issue.

Impact in the Seventh Circuit

- Since *L-E-A- II* had a limited impact on Seventh Circuit case law (as the AG himself recognized in *L-E-A- II*), the vacatur of *L-E-A- II* – while very welcome – should have limited impact on the preparation and adjudication of asylum case before the Chicago Immigration Court.
- It may have a slightly more significant impact before the Chicago Asylum Office, which generally deferred to BIA and AG case law, irrespective of Seventh Circuit opinions.
- Attorneys with family-based claims before the Chicago Asylum Office and Chicago Immigration Court can explain to adjudicators that while *L-E-A- II* did not impact Seventh Circuit case law (as the AG himself recognized), the vacatur of that decision erases any confusion and makes clear that family-based PSGs are viable PSGs, as the Seventh Circuit has consistently recognized.
- NIJC pro bono attorneys with family-based asylum cases pending at the BIA should contact their NIJC point-of-contact to discuss next steps.

Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) (*A-B- III*), *issued June 16, 2021

What it Held and Said

- *A-B- I* and *A-B- II* are vacated in their entirety. Adjudicators should no longer follow *A-B- I* or *A-B- II* and should instead follow pre-*A-B- I* precedent, including *A-R-C-G-*.
- Vacating these decisions will ensure the Departments have flexibility to engage in rulemaking on these issues.
- The broad statement in *A-B- I* that claims victims of private criminal activity will not qualify for asylum except in exceptional circumstances could be read to create a strong presumption against asylum claims based on "private conduct" and therefore, the decision "threatens to create confusion and discourage careful case-by-case adjudication of asylum claims."
- Other portions of *A-B- I* have "spawned confusion" regarding, for example, whether the decision changed the "unable or unwilling to control" standard.
- *A-B- II* attempted to resolve some of this confusion but did so without "a thorough consideration of the issued involved."

Impact in the Seventh Circuit

- As with *L-E-A- III*, the vacatur of *A-B- I* and *II* is very welcome, but should have limited impact on the preparation and adjudication of asylum cases before the Chicago Immigration Court and Chicago Asylum Office.
- Attorneys with gender violence-based claims before the Chicago Asylum Office and Chicago Immigration Court can explain to adjudicators that while *A-B- I* and *II* did not impact Seventh Circuit case law, the vacatur of those decisions erases any confusion and makes clear that relationship-based PSGs are viable PSGs when the relationship status or perception of a relationship status is immutable.
- *A-B- III* also emphasizes that the "unable or unwilling to control" test remains the binding test for establishing asylum claims based on persecution by non-state actors. 28 I&N Dec. at 307.
- NIJC pro bono attorneys with gender-based asylum cases pending at the BIA should contact their NIJC point-of-contact to discuss next steps.

For more information on representing asylum seekers, please review the resources on NIJC's website.