

SPECIAL BULLETINS

Practice Pointers on Responding to *Matter of A-B-* in the Fourth Circuit

On June 11, 2018, Attorney General Sessions issued his decision in [*Matter of A-B-*](#), 27 I&N Dec 316 (A.G. 2018). The case significantly changes the asylum law landscape. It will be some time before all potential impacts of *Matter of A-B-* are understood, as litigants will test the case at the immigration court and appellate levels.

This practice alert provides preliminary advice on affirmative steps to take for active asylum cases in the wake of *Matter of A-B-*. As more guidance becomes available, we will update you and this practice alert.

WHAT IS MATTER OF A-B-?

Matter of A-B- is a decision by the Attorney General overruling a prior decision by the Board of Immigration Appeals (“BIA”) establishing asylum protection for women fleeing severe domestic violence. The decision of the Attorney General:

- Overruled BIA precedent establishing that women and girls who seek asylum based on domestic violence are eligible for asylum based on the particular social group of “married woman in Guatemala who are unable to leave their relationship” See, *Matter of A-R-C-G*, 26 I&N Dec. 338 (BIA 2014);
- Held that if an asylum claim is flawed in one respect an adjudicator does not need to hold a hearing to examine the remaining elements of the claim;
- Held that that the fact that a country may have problems policing certain crimes or that certain sub-sections of the population are more likely to be victims of crime is not the basis for an asylum claim; and,
- Held that an applicant seeking to establish persecution based on conduct of a private actor must show that the government condoned the private actions or demonstrated an inability to protect the victims.

IS THIS THE END OF ASYLUM CASES?

No. The Attorney General's interpretation of asylum law will certainly make many cases more difficult, especially those where the client is persecuted by a private actor. However, in the Capital Region there is still BIA precedent and Fourth Circuit precedent that you can use to make asylum arguments for asylum seekers who have been persecuted by private actors.

I HAVE A PENDING ASYLUM CASE FOR WHICH I HAVE ALREADY FILED MY BRIEFING. WHAT SHOULD I DO?

In an asylum case before an Immigration Judge, court rules allow you to supplement your briefing up to the date of the hearing with a motion requesting that the court accept a late filing.

Similarly, for a children's case at the asylum office, you may supplement your briefing at any time that is at least seven calendar days prior to the asylum interview.

Ultimately, the decision whether to supplement is a strategic one that must be thought through carefully. We recommend reviewing the case law outlined in this practice alert and speaking to your CAIR Coalition mentor regarding whether you should supplement your filing.

WHAT SHOULD I ARGUE IN GENERAL IN PREPARING MY CLIENT'S CASE?

There are three general-principle arguments that every asylum seeker in the Capital region should argue. First, you should argue that *Matter of A-B-* should be applied narrowly and is inapplicable to your client's case. Look for ways to distinguish your case from *Matter of A-B-* (*See more below*).

Second, emphasize the rule that asylum claims are not adjudicated categorically, but instead, are adjudicated case-by-case. In particular, whether or not a given PSG is cognizable is a fact-specific inquiry and a failure of a PSG in a given case does not foreclose that PSG in a different case.

Lastly, acknowledge *Matter of A-B-* but remind the adjudicator that Fourth Circuit law is the controlling authority and that it supersedes the AG's decision. See below on which Fourth Circuit case law to assess for making this argument stronger.

For all cases, we also recommend taking the following steps in working with your client on their asylum case:

- Do not rely on one formulation of a PSG. Put forth all viable PSG formulations in your briefing at the immigration Court level, as is now essential under *Matter of W-Y-C & H-O-B-*, 27 I&N Dec. 189 (BIA 2018). Any formulations not briefed at the immigration court level are likely waived and cannot be raised later.
- Do not propose circular PSGs, those that are defined by the harm that your client faced. For example, do not use "female Honduran youth who are trafficking victims" because it defines the group by the harm.
- Ensure that you make a strong argument that your client is eligible for relief under the Convention against Torture (CAT), which does not require a protected ground. For more information on this, please contact your CAIR Coalition mentor.
- Parse out the dicta and holdings in *Matter of A-B* – and distinguish dicta from holding. The adjudicator in your case should not rely on the political or social statements made by the Attorney General.
- Always preserve in the record for appeal an argument that *Matter of A-B-* is arbitrary and capricious and should not receive deference.
- Secure a country conditions expert and country conditions evidence to shore up your arguments that your client's persecution are not issues of generalized violence. This helps overcome the holding that problems policing domestic violence/child abuse/gang violence/general violence are not enough to establish a basis for asylum.
- Review carefully the arguments in *Matter of A-B-* requiring that your client establish persecution by focusing on three specific elements: (1) intent to target; (2) severity of harm; and (3) the level of government participation in the harm. This is not only a departure from the standard set out from the standard set out in the REAL ID Act but also conflates other parts of the asylum analysis into the persecution analysis.
- Rely on Fourth Circuit law on nexus (the casual connection between persecution and protected ground), which holds differently than *Matter of A-B-*. See *Zavaleta-Policiano v. Sessions*, 873 F.3d 241 (4th Cir. 2017); *Oliva v. Lynch*, 807 F.3d 53 (4th Cir. 2015); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947 (4th Cir. 2015); *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014).
- With respect to private actors and the government's willingness to control them, rely on *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2012), which held the BIA's analysis to be defective when it concluded that the Salvadoran government's efforts to "focus[] law enforcement efforts on suppressing gang violence" was sufficient to show that the

government was willing and able to control those private actors. This is a factual question that must be addressed in each case.

WHAT SHOULD I ARGUE FOR MY CLIENT'S FAMILY-BASED ASYLUM CASE?

Acknowledge *Matter of A-B-* but articulate that your client's claim is not impacted, as *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2012) is binding Fourth Circuit law. Be sure to review *Crespin-Valladares* and *Matter of L-E-A*, 27 I&N Dec. 40 (BIA 2017). Also review and cite to the good Fourth Circuit Court caselaw in this area in *Hernandez-Avalos v. Lynch*, 784 F. 3d 944 (4th Cir. 2015) and *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017).

WHAT SHOULD I ARGUE FOR MY CLIENT'S DOMESTIC VIOLENCE-BASED ASYLUM CASE?

Review the [DHS brief](#) from the pending BIA case *Matter of L-R* and the PSG formulation using the language about women viewed as property by virtue of their status in a domestic relationship. This PSG was not the basis for *A-R-C-G* but still has been accepted by adjudicators.

It is essential that you shore up the evidentiary record in your case to support the nexus prong in your case (e.g. evidence that show the laws in the client's home country treat women as property, such as lack of recognition of spousal rape as a crime, divorce and custody laws that favor patriarchal structures, and information on cultural norms subordination of girls and women). This will help you preserve any arguments challenging domestic violence asylum cases are motivated by personal vendettas, or private criminal activity, as opposed to part of a larger context of entrenched gender-based violence in the client's home country.

You may also consider assessing the viability of about humanitarian asylum, which appeals to the adjudicator's discretionary powers. Where asylum may not be viable, humanitarian asylum may be, though you still have to formulate a viable PSG. There are two ways to seek humanitarian asylum, either when the "applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution," or when the applicant "has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(A)-(B); *Matter of L-S-*, 25 I&N Dec. 705, 713 (BIA 2012); *see also, Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

WHAT SHOULD I ARGUE FOR MY CLIENT'S MENTAL HEALTH-BASED ASYLUM CASE?

Review CAIR Coalition case *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014). *Temu* provides that the particular social group “individuals with bipolar disorder who exhibit erratic behavior” is immutable, particular, and socially visible, and not requiring ocular or “on sight,” visibility. The Fourth Circuit found that a group is socially distinct if it is singled out for worse treatment than other groups, countermending the holding of *Matter of A-B-* that certain populations are more likely to be victims of crime. *Temu* further provides a strong basis to challenge the nexus analysis in *Matter of A-B-* where the Board fixates on the large size of a particular social group and conflates nexus with social visibility. In *Temu*, simply because a particular social group is large, and that there is evidence that persecutors target the entire population, does not mean that it lacks social visibility.

WHAT SHOULD I ARGUE FOR MY CLIENT'S GANG-BASED ASYLUM CASE?

Distinguish *Matter of A-B-* from your gang-based claim by rigorously defining your PSG and articulating compelling facts for nexus and the client's home country government's inability or unwillingness to protect your client. The INA and the Fourth Circuit have long recognized that persecution encompasses harm from private actors. See, e.g., *Hernandez-Avalos v. Lynch*, 784 F. 3d 944 (4th Cir. 2015). Emphasize that *Matter of A-B-*'s central holding concerns domestic violence claims primarily, and the Attorney General's reasoning with respect to gang-based claims does not depart from Board and Fourth Circuit precedent on PSG formulation, nexus, and the government's effective role in protecting victims. Recall that in the Fourth Circuit, nexus and the government's willingness or ability to control private actors are factual questions under *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2012), which means that a well-developed record and on-point country conditions evidence will be pivotal.

For more information, please contact your CAIR Coalition staff mentor or [Kelly White](mailto:kelly@caircoalition.org) at kelly@caircoalition.org or [Michael Lukens](mailto:michael@caircoalition.org) at michael@caircoalition.org.

If you have an appeal pending before the BIA or the Fourth Circuit that may be impacted by *Matter of A-B-*, please reach out to [Adina Appelbaum](mailto:adina@caircoalition.org) at adina@caircoalition.org for further guidance.