

PAVING THE WAY TO BETTER PROTECTION: *MATTER OF A-R-C-G-*

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For many years it has been unclear whether domestic violence could ever provide a basis for a claim of asylum in the United States. In Matter of A-R-C-G-, the Board of Immigration Appeals resolved that question by holding that an applicant could base a claim for asylum on persecution in the form of domestic violence.

A-R-C-G-, a Guatemalan woman, fled her physically and sexually abusive husband by immigrating to the United States, where she filed a claim for asylum. Relevant statutory and regulatory provisions do not provide guidance as to whether her claim is meritorious, but a previous Board of Immigration Appeals' decision, Matter of R-A-, indicated that domestic violence was not a proper basis for an asylum claim because it did not rise to the level of persecution. However, proposed regulations promulgated by Attorney General Reno but never finalized manifested the intent of the executive branch to treat domestic violence as a valid basis for asylum claims.

In holding that an individual could qualify for asylum based on the domestic violence she suffered at the hands of her husband, the Board of Immigration Appeals recognized a narrow form of gender-based persecution. The holding of Matter of A-R-C-G- will be applied on a case-by-case basis to all similar applications for asylum, and so does not constitute an automatic fortress for victims fleeing their intimate partners. However, the decision is a significant step toward more women being able to attain safety in the United States when they suffer persecution due to their gender.

INTRODUCTION

An estimated 7,669 women were murdered in Guatemala between the years 2000 and 2012¹—and Guatemala is by no means the only country where gendered violence against women is endemic.² Women who have fled to the United States for safety from such violence have not been met with the warm, protective embrace one might expect from the country where the Statue of Liberty proudly invites: “Give me your tired, your poor, your huddled masses yearning to breathe free . . . I lift my lamp beside the golden door.”³

1. Marilyn Thomson, *Guatemala: Region's Highest Rate of Femicide*, LATIN AM. BUREAU (Mar. 27, 2013), <http://lab.org.uk/guatemala-regions-highest-rate-of-murder-of-women>.

2. See *Violence Against Women: Key Facts*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs239/en/> (last visited Feb. 16, 2015) (“Recent global prevalence figures indicate that 35% of women worldwide have experienced either intimate partner violence or non-partner sexual violence in their lifetime.”).

3. Emma Lazarus, *The New Colossus*, POETRY FOUND.,

Immigration Courts had failed to settle the matter of whether domestic violence qualifies as a basis for asylum until the recent decision of *Matter of A-R-C-G-*.⁴ The Board of Immigration Appeals (B.I.A.) cleared up some of the confusion with this precedent-setting case that will make it significantly easier for applicants to seek and gain asylum from persecution in the form of domestic violence.⁵ In *Matter of A-R-C-G-*, the BIA correctly held that married women who have been victims of domestic violence may qualify for asylum.⁶ This Comment will first discuss the facts and procedural history of *Matter of A-R-C-G-*; second, it will explore the legal background for asylum claims based on domestic violence; third, it will review in detail the BIA's holding and the reasoning behind its conclusions; and finally, it will comment on the implications and limitations of the BIA's holding.

I. FACTS

The woman seeking asylum in *Matter of A-R-C-G-* is a Guatemalan woman who was married at the age of 17 and suffered "repugnant abuse" at the hand of her husband for years.⁷ He beat her weekly, raped her, and threw dangerous chemicals on her.⁸ During that time, she made numerous attempts to end the abuse or leave her husband.⁹ When she called the police, they came to the family's home, but they did not arrest the abuser.¹⁰ When she fled to her father's house, her abuser always came to get her.¹¹ And when she finally fled to Guatemala City, he followed her and convinced her to return to him with false promises that the abuse would stop.¹²

The abuse resumed, however, and the respondent woman and her three children fled to the United States in 2005.¹³ They entered the country

<http://www.poetryfoundation.org/poem/175887> (last visited Feb. 19, 2015).

4. *Domestic Violence: Groundbreaking Ruling Recognizes Domestic Violence as Basis for Asylum*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrs.uchastings.edu/our-work/domestic-violence> (last visited Oct. 12, 2014).

5. *Id.*; Amy Grenier, *Landmark Decision on Asylum Claims Recognizes Domestic Violence Victims*, AM. IMMIGRATION COUNCIL (Sept. 2, 2014), <http://immigrationimpact.com/2014/09/02/landmark-decision-on-asylum-claims-recognizes-domestic-violence-victims/>.

6. *A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

7. *Id.* at 389.

8. *Id.*

9. *Id.*

10. *Id.*

11. *A-R-C-G-*, 26 I. & N. Dec. 389 (B.I.A. 2014).

12. *Id.*

13. *Id.*

“without inspection,” and when proceedings for “removal” were initiated against her, she applied for asylum.¹⁴

The immigration judge (IJ) determined that she had not suffered persecution, and that she did not have a well-founded fear of future persecution based on her membership in a particular social group.¹⁵ Categorizing her abuse as “criminal acts” that were perpetrated against her “arbitrarily” and “without reason”—rather than as “persecution” due to her inclusion in any particular social group—led the IJ to deny her claim for asylum.¹⁶

A-R-C-G- appealed to the BIA.¹⁷ The Department of Homeland Security (DHS) initially supported the holding of the IJ; however, before the BIA considered the case, DHS changed its position and agreed with the respondent A-R-C-G- that her abuse rose to the level of persecution, and that the persecution resulted from her membership in a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.”¹⁸ Despite its change of heart as to those issues, the DHS still sought remand of her case, seeking further factual development of the record for determining her eligibility for asylum.¹⁹

II. LEGAL BACKGROUND

Eligibility for asylum is governed by a complicated set of statutes, regulations, and case law.

A. *Basic Legal Framework*

Federal statutes and regulations provide the basic outline for what an applicant must show to establish eligibility for asylum.

8 U.S.C. § 1158 provides that aliens who are present in the United States may apply for asylum in this country whether or not they entered the country legally.²⁰ To be eligible for asylum, an individual must show that he or she is a refugee as that term is defined in 8 U.S.C. § 1101(a)(42)(A).²¹ Section 1158 then explains that to qualify as a refugee under the statutory framework, an immigrant must “establish that race, religion, nationality, membership in a particular social group, or political

14. *Id.*

15. *Id.*

16. A-R-C-G-, 26 I. & N. Dec. 390 (B.I.A. 2014).

17. *Id.*

18. *Id.*

19. *Id.*

20. 8 U.S.C. § 1158(a)(1) (2014).

21. *Id.* § 1158(b)(1)(A).

opinion was or will be at least one central reason” for persecution that has been or may be perpetuated against him or her.²²

A woman fleeing an abusive partner will not be able to show that she was persecuted on account of race, religion, nationality, or political opinion.²³ Neither the statutes nor existing regulations mention gender-based persecution as a basis for an asylum claim.²⁴ As a result, victims of domestic abuse seeking asylum must show that they belong to a “particular social group.”²⁵

B. Making a Claim for Asylum Based on Membership in a Particular Social Group

An applicant seeking asylum based on membership in a particular social group must establish three elements. First, the applicant must show that he or she has suffered past persecution or has a “well-founded fear of future persecution” in the applicant’s home country.²⁶ Second, the applicant must show that he or she is a member of a “particular social group.”²⁷ Finally, the applicant must show that a sufficient nexus exists between membership in the particular social group and the persecution that the applicant suffered or fears.²⁸

1. Definition of “Persecution”

The BIA has recognized that “persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.”²⁹

2. Definition of “Particular Social Group”

Neither statutes nor regulations explaining the requirements for asylum define the term “particular social group,”³⁰ a term which the Ninth

22. *Id.* § 1158(b)(1)(B)(i).

23. *See, e.g.*, R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999) (noting that those four characteristics “are ones that typically separate various factions within countries”).

24. *See* 8 U.S.C. § 1158(b)(1)(A) (outlining conditions for granting asylum eligibility); *see also* 8 U.S.C. § 1101 (2013) (giving definition of refugees referred to under § 1158); 8 C.F.R. § 208.13 (2013) (establishing asylum eligibility).

25. *See* R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999).

26. 8 C.F.R. § 208.13(b) (2013).

27. *Id.* § 208.13(b)(2)(i)(A).

28. *Id.* § 208.13(b)(2)(iii)(A).

29. *Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

30. *See* 8 C.F.R. § 208.13; 8 U.S.C. § 1158 (listing “particular social group” with race,

Circuit deemed “ambiguous.”³¹ Courts previously developed a four-part test for determining who qualified as a member of a particular social group.³² Under this test, an applicant had to “(1) identify a cognizable social group; (2) prove that the applicant is a group member; (3) prove that the persecution is aimed at one of the group’s unifying characteristics; and (4) show “special circumstances” that merit the recognition of a group-based claim.”³³

This test was later reformed in *In re Acosta*.³⁴ Under the *Acosta* reasoning, an applicant needed to show that the particular social group shared a “common immutable characteristic” and that the persecution the applicant suffered or feared was directed at that immutable characteristic.³⁵ Such characteristics needed to be of a quality that “cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”³⁶ The *Acosta* decision explicitly contemplated “sex” as one such immutable characteristic.³⁷ However, no claim for asylum has been successful based on membership in a social group defined solely by the person’s sex.³⁸

The BIA further refined the meaning of “particular social group” in *Matter of C-A*³⁹ and *Matter of A-M-E & J-G-U*.⁴⁰ These cases required a person seeking asylum to prove “social visibility” and “particularity” of a social group.⁴¹ Subsequent cases interpreted “social visibility” to mean that “the shared characteristic of the group should generally be recognizable by others in the community” and “particularity” to mean “a discrete class of persons.”⁴²

Two cases decided by the BIA in 2014 further clarify what is now required to establish a particular social group.⁴³ These cases clarify that an

religion, nationality, and political opinion as one of the reasons for persecution).

31. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc).

32. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); see also Stacey Kounelias, *Asylum Law and Female Genital Mutilation: “Membership in a Particular Social Group” Inadequately Protecting Persecuted Women*, 11 SCHOLAR 577, 587-88 (2009) (describing the four-part test used to determine membership).

33. *Sanchez-Trujillo*, 801 F.2d at 1576-77.

34. *Acosta*, 191 I. & N. Dec. 211, 233 (B.I.A. 1985); see also Kounelias, *supra* note 32, at 589 (explaining the new test for how a woman can establish her social group).

35. *Acosta*, 191 I. & N. Dec. at 233.

36. *Id.*

37. *Id.*

38. See Kounelias, *supra* note 32, at 588 (“Gender, however, is successfully used when it is only part of the social group characteristic.”).

39. 23 I. & N. Dec. 951 (B.I.A. 2006).

40. 24 I. & N. Dec. 69 (B.I.A. 2007).

41. *C-A*, 23 I. & N. Dec. 951, 956, 961 (B.I.A. 2006).

42. *S-E-G*, 24 I. & N. Dec. 591, 595-96 (B.I.A. 2012).

43. *M-E-V-G*, 26 I. & N. Dec. 227 (B.I.A. 2014); *W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014).

applicant does not need to show that a group is visible “onsight,” or in a literal sense, in order to establish a particular social group. They rename the “social visibility” element to “social distinction” in order to remove confusion surrounding the word “visibility.”⁴⁴ Despite resolving ambiguity in favor of a more lenient standard for finding the existence of a particular social group, *Matter of W-G-R-* and *Matter of M-E-V-G-* reconfirm that seekers of asylum under the theory of membership in a particular social group must meet the criteria of “particularity” and “social distinction.”⁴⁵

III. ESTABLISHING A SUFFICIENT NEXUS BETWEEN THE PERSECUTION AND MEMBERSHIP IN THE PARTICULAR SOCIAL GROUP

Finally, to be eligible for asylum, an applicant must show a sufficient nexus between his or her membership in the particular social group and the persecution that the applicant suffered or fears. The required nexus has been stated in several ways. The asylum statute requires an applicant to show that “membership in a particular social group” or other listed attribute is “at least one central reason” for the persecution.⁴⁶ Regulations construing the statute indicate that the applicant must show that persecution is “on account of” his or her membership in a particular social group.⁴⁷

Neither the statutes nor regulations clarify the level of relationship an applicant for asylum must show between their membership in a refugee group and persecution. Courts have therefore interpreted these provisions to require proof of the persecutor’s subjective motivations, which is often difficult to establish.⁴⁸

A. Proposed Regulations

Proposed regulations promulgated by the U.S. Attorney General could favorably influence the application of these requirements to situations of applicants seeking asylum from domestic violence.⁴⁹ Former Attorney

44. W-G-R-, 26 I. & N. Dec. 208, 211-12, 216-17 (B.I.A. 2014).

45. *Id.* at 212.

46. 8 U.S.C. § 1158(b)(1)(B)(i).

47. 8 C.F.R. § 208.13.

48. *I.N.S. v. Zacarias*, 302 U.S. 478, 483-84 (1992).

49. See 65 Fed. Reg. 76588 (Dec. 7, 2000). As the summary of the rather long proposed regulation indicates, the regulation was specifically intended to clarify that domestic violence could support a claim for asylum:

This rule proposes to amend the Immigration and Naturalization Service (Service) regulations that govern establishing asylum and withholding eligibility. This rule provides guidance on the definitions of “persecution” and “membership in a particular social group,” as well as what it means for persecution to be “on account of” a protected characteristic in the definition of a refugee. It restates that gender can form the basis of a particular social group. It also establishes

General Janet Reno proposed these regulations to “provide guidance on the definitions of ‘persecution’ and ‘membership in a particular social group,’ as well as what it means for persecution to be ‘on account of’ a protected characteristic.”⁵⁰

The summary of the proposed rule makes explicit reference to *Matter of R-A-*, and “restates that gender can form the basis of a particular social group.”⁵¹ It similarly notes that “the factors considered in cases in the Court of Appeals for the Ninth Circuit regarding membership in a particular social group are not determinative.”⁵² This rule was intended particularly to “aid in the assessment of claims made by applicants who have suffered or fear domestic violence.”⁵³

The “background” section of the rule more thoroughly addresses the difficulty posed in applying the legal requirements of asylum to domestic violence cases, and bluntly states that “[t]his proposed rule removes certain barriers that the *In re R-A-* decision⁵⁴ seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.”⁵⁵ Though the regulation does not define what “precise characteristics of the particular social group might be,”⁵⁶ the regulation clearly indicates that domestic violence victims may seek asylum by establishing membership in some particular social group, and that the rules and regulations governing asylum intend for such applications to be granted, at least when the applicant establishes that her government is unwilling or unable to protect her from persecution.

principles for interpretation and application of the various components of the statutory definition of “refugee” for asylum and withholding cases generally, and, in particular, will aid in the assessment of claims made by applicants who have suffered or fear domestic violence.

Id.

50. *Id.*; see also Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1251 (2009) (“These [proposed] principles take into account our understanding of the circumstances surrounding persecution against women and clarify interpretive issues that could impose barriers to gender-related and domestic violence claims.”).

51. 65 Fed. Reg. 76588 (Dec. 7, 2000).

52. *Id.*

53. *Id.*

54. See *infra* notes 76-86 and accompanying text regarding the facts and holding of *In re R-A-*.

55. *Id.*

56. *Id.*

B. *Application of Particular Social Group Analysis to Gender-Based Claims for Asylum*

Because neither sex nor gender appear in the list of other attributes on which a claim for asylum may be based,⁵⁷ those who seek asylum from persecution that is related to their gender must attempt to establish membership in a particular social group. Immigration Courts and the BIA have applied the particular social group analysis to a number of such cases prior to *Matter of A-R-C-G-* with varying and inconsistent results.

C. *Matter of Kasinga*

In *Matter of Kasinga*, the asylum applicant came to the United States from Togo, where she had been forced into a polygamous marriage.⁵⁸ Her aunt and her husband intended to subject her to Female Genital Mutilation (FGM) before they consummated the marriage.⁵⁹ With the help of her sister, she obtained the means to travel to the United States and immediately requested asylum when she arrived.⁶⁰

During her hearing, the applicant testified that law enforcement in Togo was aware of FGM and that they would not protect young women from the practice.⁶¹ She also produced evidence that the Togo police were looking for her and would deliver her back to her husband if they found her, and that her husband would force her to undergo FGM if that came to pass.⁶² Other evidence in the record spoke to the extreme nature of the FGM practiced by the applicant's tribe and its pervasiveness in the culture.⁶³

Ultimately, the IJ denied her application for asylum.⁶⁴ The IJ determined that her testimony lacked "rationality," "persuasiveness," and "consistency."⁶⁵

On appeal, the BIA reversed and granted her asylum.⁶⁶ First, the BIA determined that she was a credible witness.⁶⁷ Next the court evaluated whether FGM constituted "persecution" and held that the practice did rise

57. See 8 U.S.C. § 1158(b)(1)(B)(1).

58. *Kasinga*, 21 I. & N. Dec. 358 (B.I.A. 1996).

59. *Id.* at 358.

60. *Id.* at 359.

61. *Id.*

62. *Id.*

63. *Id.* at 361.

64. *Id.* at 357.

65. *Id.* at 364.

66. *Id.* at 357.

67. *Id.* at 365.

to the level of persecution,⁶⁸ and that the applicant had a well-founded fear of being subjected to that persecution should she return to Togo.⁶⁹

Turning next to the question of “particular social group,” the court held that the applicant belonged to a particular social group consisting of “women of the Tchamba-Kunsuntu Tribe [in Togo] who have not had FGM, as practiced by that tribe, and who oppose the practice.”⁷⁰ This characterization met the requirements under *Matter of Acosta* because the characteristics of being a “young woman” who was a member of a particular tribe in Togo are immutable, and “the characteristic of having intact genitalia” is “so fundamental” to a young woman’s identity “that she should not be required to change it.”⁷¹

Finally, the BIA determined that the persecution feared by the applicant was “on account of” her membership in that particular social group.⁷² Evidence in the record established “no legitimate reason for FGM,” and that it is used mainly as a form of “sexual oppression” used to “assure male dominance and exploitation” of “women’s sexuality.”⁷³ Therefore, the BIA determined that FGM, the persecution applicant feared, was perpetrated against those in her particular social group—young women of her tribe in Togo who have not had FGM—to “overcome sexual characteristics of young women” like the applicant who do not wish to undergo FGM.⁷⁴

Based on this analysis, the BIA ordered that she be admitted to the United States as an asylee. *Matter of Kasinga* was a step forward toward extending asylum to women for protection against gender-based persecution.⁷⁵

D. *Matter of R-A-*

Five years after *Matter of Kasinga*, the BIA appeared to have experienced a change of heart. In *Matter of R-A-*, the BIA retreated from the recognition of gender-based claims for asylum.⁷⁶

68. *Id.* The court agreed with the parties that FGM could rise to the level of persecution in this case. *Id.*

69. *Id.* at 366.

70. *Id.* at 357. Again, both parties stipulated that a particular social group existed in this case and proposed formulations similar to the one declared by the court. *Id.*

71. *Id.* at 366.

72. *Id.* at 367.

73. *Id.* at 366.

74. *Id.* at 367.

75. Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURV. Q. (2010).

76. R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999).

Like the applicant in the instant decision, the applicant in *Matter of R-A-* was a young Guatemalan woman who suffered “heinous” physical and sexual abuse at the hands of her husband before she escaped to the United States.⁷⁷ She was repeatedly and brutally beaten and raped by her husband, her pleas for help from Guatemalan law enforcement and courts fell on deaf ears, and her attempts to leave proved futile until she was able to leave the country entirely.⁷⁸

The immigration judge, relying on *Kasinga* and *Acosta*,⁷⁹ granted her application for asylum based on a determination that she had been “persecuted because of her membership in the particular social group of ‘Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.’”⁸⁰

The BIA agreed that the applicant had suffered severe and egregious conduct that rose to the level of “persecution,” and that her country had failed to protect her.⁸¹ However, the BIA held that the applicant failed to establish that the harm she suffered was on account of either her membership in a particular social group or her political opinion.⁸² Not only did an applicant need to meet the *Acosta* requirements of showing immutable or fundamental characteristics of a group, but to be eligible for asylum, the applicant also had to establish that the group was “recognized and understood to be a societal faction.”⁸³

The BIA further held that even if the applicant had established a particular social group to which she belonged that was cognizable for purposes of asylum law, she still failed to show that her husband persecuted her due to membership in the group.⁸⁴ Even if the applicant could show a bias against women in intimate relationships with men within Guatemalan society and government, that would not affect the court’s analysis regarding the husband’s motivation for abusing her.⁸⁵ This holding was a significant departure from *Kasinga*, in which the BIA looked at the social

77. *Id.* at 907-08.

78. *Id.* at 908-09.

79. Musalo, *supra* note 75, at 56.

80. *R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999).

81. *Id.* at 914.

82. *Id.* The immigration judge determined that the applicant suffered abuse at the hands of her husband not only due to her particular social group, but also due to the “political opinion” he “imputed” to her that “women should not be dominated by men.” *Id.* at 911. The BIA rejected this basis for granting asylum because the applicant’s testimony did not establish that her husband knew or cared about her political opinions. *Id.* at 914-15.

83. *Id.* at 918; Musalo, *supra* note 75, at 57.

84. *Id.* at 923.

85. *Id.*

context in which the persecution took place to determine the motivations of the persecutor for purposes of establishing the required nexus.⁸⁶

Matter of R-A- did not end with the BIA's decision. In response to criticism surrounding the outcome of the case, former Attorney General Reno proposed regulations favoring gender-based claims.⁸⁷ Then she certified the case to herself, vacated the decision of the BIA, and remanded it to that tribunal with instructions to stay the case until the regulations were finalized.⁸⁸

The case was not resolved at that time, however, because the regulations were never finalized.⁸⁹ When John Ashcroft became the U.S. Attorney General, he also certified the case to himself and requested rebriefing by both parties.⁹⁰ At this point, the government changed its position and agreed that the applicant had established statutory eligibility for asylum.⁹¹ Ashcroft then sent the case back to the BIA to be decided, once again staying any decision until the proposed regulations were finalized.⁹²

But once again, the regulations proposed by former Attorney General Reno failed to be finalized.⁹³ The subsequent Attorney General, Michael Mukasey, instructed the BIA that they need not wait for the regulations to be finalized to issue a decision in the case.⁹⁴ The BIA finally sent the case back to an immigration judge, who issued a one-sentence decision granting her application for asylum.⁹⁵ Although the decision was a victory for the applicant in *R-A-*, it had no precedential value.⁹⁶

IV. INSTANT DECISION

Matter of A-R-C-G- enables victims of domestic violence to seek asylum by showing that they were persecuted because they are members of a particular social group.

First, the BIA held that the applicant established that the abuse she experienced at the hands of her husband constituted "persecution."⁹⁷ In this case, both the applicant and the government stipulated that the abuse she

86. Musalo, *supra* note 75, at 58.

87. *Id.* See *supra* Part III, Section C (concerning the proposed regulations).

88. Musalo, *supra* note 75, at 58.

89. *Id.*

90. *Id.*

91. *Id.* at 58-59.

92. *Id.* at 59.

93. Musalo, *supra* note 75, at 59.

94. *Id.*

95. *Id.* at 47.

96. *Id.*

97. *A-R-C-G-*, 26 I. & N. Dec. 395 (B.I.A. 2014).

suffered rose to the level of persecution, so the BIA did not give this issue serious consideration but simply “accept[ed] the parties’ position” on the matter.⁹⁸

Second, the BIA held that Guatemala has a particular social group of “married women” who are “unable to leave the relationship.”⁹⁹ This social group meets the *Acosta* requirements of a common immutable characteristic because “gender” is immutable, as is “marital status” where “the individual is unable to leave the relationship.”¹⁰⁰ Additionally, the group was defined with “particularity” because the terms used all have “commonly accepted definitions within Guatemalan society based on the facts of this case.”¹⁰¹ The BIA also determined that the group of “married women” “unable to leave their relationship” is “socially distinct” within Guatemalan society because Guatemala “makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship she cannot leave.”¹⁰² In support of that determination, the BIA cited Guatemalan laws against domestic violence and the general ineffectiveness of such laws; additionally, a number of studies in the record demonstrated that Guatemala has a culture of “machismo and family violence.”¹⁰³

Finally, the BIA concluded that the applicant suffered persecution by her husband “on account of” her membership in the particular social group of married women in Guatemala who are unable to leave their relationship.¹⁰⁴ Once again, the government conceded that she had established the nexus required between the persecution and her membership in a particular social group.¹⁰⁵

98. *Id.* at 390.

99. *Id.* at 388-89.

100. *Id.* at 392-93.

101. *See id.* at 393 (noting that “[t]he [Department of Homeland Security] concede[d] that the group in this case is defined with particularity”).

102. A-R-C-G-, 26 I. & N. Dec. 394 (B.I.A. 2014).

103. *Id.* (quoting *Guatemala Failing its Murdered Women: Report*, CBCNEWS.CA (Jul. 18, 2006, 11:06 AM), <http://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240>).

104. *Id.* at 392.

105. *Id.* It is clear from the analysis of the BIA that the change in the government policy regarding claims like the one in the instant case greatly influenced the outcome of this case. Although the court conducted an independent analysis of whether a social group of “married women in Guatemala who are unable to leave their relationship” existed, it ultimately adopted the government’s definition of the social group as well as its “position” that such a group exists. *Id.* at 392-93.

V. COMMENT

Matter of A-R-C-G- sets precedent that married women who are victims of domestic violence can qualify for asylum under the current legal framework.¹⁰⁶ This decision marks a significant victory for the viability of gender-based claims for asylum. It may also signal more favorable change to come, as it is the product of a significant shift in the position of DHS with regard to such claims.¹⁰⁷

The holding of *Matter of A-R-C-G-* is still somewhat narrow, however, because every application for asylum will be analyzed on a case-by-case basis.¹⁰⁸ The BIA, in this case, explicitly states that in “the domestic violence context, the issue of social distinction [of a particular social group] will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent’s past experiences; and other reliable and credible sources of information.”¹⁰⁹ Because of the nature of this inquiry, an immigration judge in each case will have to evaluate the distinctiveness and societal recognition of the group of ‘married women who are unable to leave the relationship’ in that applicant’s nation.

The particular social group found in this case further narrows its potential application. By defining the social group as “married women” who are unable to leave, the decision does not indicate whether women in nonmarital intimate relationships who are abused by their partners may seek asylum as a member of a socially distinct and particular social group.

Additionally, the parties in this case stipulated that A-R-C-G- established that she was persecuted, and that her persecution was sufficiently connected to her membership in the social group.¹¹⁰ As a result, this case provides little guidance for what domestic abuse may be deemed sufficient to rise to the level of persecution, or how an applicant may establish that her persecution was “on account of” her membership in a particular social group if the government disputes those elements of her claim. The individualized inquiry into what constitutes persecution and when it is on account of membership in a particular social group combined with a lack of guidance on those issues from *Matter of A-R-C-G-* leaves much room for judges to use their discretion in applying the holding from this case; this broad and unguided discretion could lead to decisions that are inconsistent with the spirit in which the case was decided.

106. See generally *A-R-C-G-*, 26 I. & N. Dec. (B.I.A. 2014).

107. See Musalo, *supra* note 75, at 62; see *supra* note 91 and accompanying text.

108. See *A-R-C-G-*, 26 I. & N. at 394-95 (discussing the approach the court will take in making these decisions).

109. *Id.*

110. *Id.* at 395.

Despite these limitations, *Matter of A-R-C-G-* may be a step toward recognizing other gender-based claims for asylum.

Immigration judges and the BIA have been reluctant to grant other gender-based or gender-related asylum applications. For instance, women who have been victims of attempted sex trafficking have frequently been unsuccessful on their applications for asylum.¹¹¹ Similarly, victims or would-be victims of female genital mutilation also meet strong and unrelenting barriers to asylum under current jurisprudence, *Matter of Kasinga* notwithstanding.¹¹² The willingness of both the BIA and DHS to recognize that at least some domestic violence victims are eligible for asylum due in part to the gendered nature of the violence bodes well for victims of other types of gender-related persecution.

Of course, building off of *Matter of A-R-C-G-*'s narrow holding to extend asylum to other categories of gender-related persecution will likely prove to be a long and treacherous path. The particular social group analysis, with its "visibility" or "social distinction" requirement is an awkward and unsuitable vehicle for victims to bring these claims. By their very nature, FGM, domestic violence, and sex trafficking are often quiet or invisible forms of persecution, and their victims are often unknown or anonymous. But that does not make the persecution any less heinous or deadly, nor its cause any less related to the immutable characteristic that victims can neither change nor hide—their sex. These claims merit the protection of the asylum provisions of the United States, but the development of asylum jurisprudence has effectively stacked the deck against their success.

These pitfalls have other solutions. Perhaps the easiest (and least feasible) alternative may be to simply include "gender" in the list of protected categories designated by the statutes and regulations governing refugee and asylum law. Then victims of gendered violence would not have to attempt to mold their situations to an ill-fitting analytical tool. Instead, they would be eligible for asylum when they show that they experienced or feared persecution due to their gender, just as members of a particular race, religion, or nationality are eligible for asylum when they show that they experienced or feared persecution on account of their race, religion, or nationality.

A less ideal but more realistic solution would be to finalize the regulations proposed by former Attorney General Reno,¹¹³ which strongly indicated that claims based on domestic violence were proper bases for asylum.

111. Kelly Karvelis, *The Asylum Claim for Victims of Attempted Trafficking*, 8 Nw J.L. & Soc. POL'Y 274, 278 (2013).

112. Kounelias, *supra* note 32, at 578-79, 589.

113. *See supra* Section III, Part C.

CONCLUSION

In *Matter of A-R-C-G-*, the BIA correctly decided that a domestic violence victim can qualify for asylum by establishing that she was persecuted because of her membership in the particular social group of married women who cannot leave their relationships. Although the decision is specific to the social context of Guatemala, this important precedent will make it substantially easier for domestic violence victims from other nations to succeed in their applications for asylum as well. The decision may also indicate that the BIA and DHS are thawing to gender-based asylum applications.

While this decision is certainly a step in the right direction, more strides are needed before victims of gendered violence can count on this country to provide them refuge from the persecution they fear.

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