
RECENT ADJUDICATION

ASYLUM LAW — MEMBERSHIP IN A PARTICULAR SOCIAL GROUP — BOARD OF IMMIGRATION APPEALS HOLDS THAT GUATEMALAN WOMAN FLEEING DOMESTIC VIOLENCE MEETS THRESHOLD ASYLUM REQUIREMENT. — *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

For more than two decades, U.S. immigration authorities and courts have struggled with the question of whether victims of domestic abuse qualify for asylum.¹ Asylum applicants must show that one of five statutorily enumerated grounds — “race, religion, nationality, membership in a particular social group, or political opinion” — “was or will be at least one central reason for” their persecution.² Advocates and government lawyers have offered various formulations of “particular social groups” that would encompass victims of domestic violence and thereby render them eligible for asylum.³ But the Board of Immigration Appeals, the administrative appellate body responsible for interpreting U.S. asylum law, did not endorse any formulation in a precedential published opinion until recently, in *Matter of A-R-C-G-*.⁴ In *A-R-C-G-*, the Board held that an applicant can qualify for asylum as a member of a particular social group of “married women in Guatemala who are unable to leave their relationship.”⁵ While *A-R-C-G-* does not answer all of the questions that have caused inconsistency in the adjudication of domestic violence–based asylum claims, it unambiguously establishes that women fleeing domestic violence can be eligible for particular social group–based asylum, and it will prove to be a boon to future asylum applicants.

A-R-C-G- concerned an asylum application filed by Ms. C.G., a native Guatemalan and mother of three.⁶ C.G. married her husband when she was seventeen,⁷ and he abused her throughout their marriage: He beat her every week. He broke her nose. He burned her with paint thinner. He raped her.⁸ C.G. attempted to escape the

¹ See, e.g., Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2528–30 (2014).

² 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

³ See, e.g., DHS’s Supplemental Brief at 14, *Matter of L-R-* (B.I.A. 2009) (unpublished), <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf> (proposing a group defined as “Mexican women who are viewed as property by virtue of their positions within a domestic relationship”) (internal quotation marks omitted).

⁴ 26 I. & N. Dec. 388 (B.I.A. 2014).

⁵ *Id.* at 392–94 (internal quotation marks omitted).

⁶ *Id.* at 389. The decision also encompasses the asylum applications of C.G.’s children, but their applications were derivative of their mother’s application. See *id.* at 389 n.7.

⁷ *Id.* at 389.

⁸ *Id.*

abuse. She called the police multiple times, but they refused to interfere in a marriage relationship; her husband threatened to kill her if she called them again.⁹ She left to live with her father; her husband threatened to kill her if she didn't return.¹⁰ She escaped to Guatemala City; her husband convinced her to come back by promising to change his ways, only to resume the abuse once she returned.¹¹ She finally fled Guatemala, entering the United States on Christmas Day 2005 and filing her application for asylum soon thereafter.¹²

At C.G.'s initial hearing, the immigration judge denied her application for asylum.¹³ The judge found C.G.'s testimony about her experiences to be credible, but determined that C.G. nonetheless failed to establish the required elements of an asylum claim.¹⁴ First, the abuse C.G. endured was not persecution; rather, it was a series of "criminal acts."¹⁵ Second, C.G.'s membership in her proffered particular social group was not the "reason" that she suffered the abuse — her husband acted "arbitrarily" and "without reason."¹⁶ C.G. appealed to the Board of Immigration Appeals.¹⁷

On appeal, the Board asked for supplemental briefs from C.G., the Department of Homeland Security (DHS), and amici curiae on the issue of whether asylum applicants can base their claims on domestic violence.¹⁸ DHS conceded that C.G.'s abuse rose to the level of persecution and that the reason for this persecution was her membership in a particular social group of "married women in Guatemala who are unable to leave their relationship."¹⁹ Still, DHS requested that the matter be remanded to the immigration judge for additional factual determinations.²⁰ C.G. opposed remand.²¹

Writing for a unanimous Board panel, Vice Chairman Adkins-Blanch²² held that C.G.'s proffered particular social group could form the basis of her asylum claim.²³ The Board began its analysis by look-

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.* C.G. also applied for withholding of removal, *id.*, and the Board's analysis applies equally to the asylum and withholding applications.

¹³ *Id.* at 389–90. Asylum applications cannot be publicly disclosed. *See* 8 C.F.R. § 208.6(a) (2012). Thus, the only details of the immigration judge's decision that are available are those disclosed in the Board's decision.

¹⁴ *A-R-C-G-*, 26 I. & N. Dec. at 389.

¹⁵ *Id.* at 390.

¹⁶ *Id.*

¹⁷ *Id.* at 388.

¹⁸ *Id.*

¹⁹ *Id.* (internal quotation marks omitted).

²⁰ *Id.*

²¹ *Id.*

²² Vice Chairman Adkins-Blanch was joined by Board Members Miller and Greer.

²³ *See A-R-C-G-*, 26 I. & N. Dec. at 388–89.

ing to *Matter of R-A-*,²⁴ a prior case in which the Board considered the validity of a domestic violence–based asylum claim.²⁵ When the Board initially decided *R-A-* in 1999, it rejected an applicant’s proffered particular social group — “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” — on the ground that the applicant had failed to show that Guatemalan society recognized such a group.²⁶ However, Attorney General Janet Reno vacated that decision in anticipation of regulations that would have provided interpretive guidance.²⁷ These regulations were never finalized, but an immigration judge eventually granted the asylum application after DHS stipulated to the applicant’s eligibility.²⁸ The disposition of *R-A-* left adjudicators without binding precedent that spoke directly to asylum claims based on domestic violence.

Having discussed the resolution of *R-A-*, Vice Chairman Adkins-Blanch turned to C.G.’s claim, examining whether C.G.’s proffered group — “married women in Guatemala who are unable to leave their relationship” — constitutes a valid particular social group under the Board’s doctrinal framework. The asylum applicant must establish that the particular social group is (1) “composed of members who share a common immutable characteristic,” (2) “defined with particularity,” and (3) “socially distinct within the society in question.”²⁹ C.G.’s group, Vice Chairman Adkins-Blanch wrote, meets all three requirements. First, the Board held that the group shares immutable characteristics, which are defined as traits “that either cannot be changed or that the group members should not be required to change.”³⁰ Gender, the Board stated, is an immutable characteristic.³¹ Marital status is immutable too, at least when an individual can’t leave the marriage relationship.³² The Board instructed future adjudicators determining whether marriage is an immutable characteristic to consider the legal and social constraints on dissolution, the applicant’s personal experiences, and background country information.³³

Second, the Board held that the group is defined with particularity. Each of the elements of the group definition (“married,” “women,” and “unable to leave the relationship”), Vice Chairman Adkins-Blanch ex-

²⁴ 22 I. & N. Dec. 906 (B.I.A. 1999).

²⁵ See *A-R-C-G-*, 26 I. & N. Dec. at 391.

²⁶ *Id.* (internal quotation marks omitted); see also *R-A-*, 22 I. & N. Dec. at 918–19.

²⁷ See *Matter of R-A-*, 22 I. & N. Dec. 906, 906 (A.G. 2001).

²⁸ See *A-R-C-G-*, 26 I. & N. Dec. at 391 & n.12.

²⁹ *Id.* at 392.

³⁰ *Id.* (quoting *Matter of W-G-R-*, 26 I. & N. Dec. 208, 213 (B.I.A. 2014)).

³¹ *Id.*

³² *Id.* at 392–93.

³³ *Id.* at 393.

plained, “have commonly accepted definitions within Guatemalan society.”³⁴ The Board held that these terms can (and, in this case, do) combine to describe a group with distinct boundaries.³⁵ The Board noted that both social expectations and legal constraints impact whether married women are able to leave their relationships.³⁶ Evaluating the evidence supporting particularity in C.G.’s case, the Board looked to the prevalence of sexual assault in Guatemala and the police’s refusal to intervene in C.G.’s marital relationship.³⁷

Third, the Board held that the group is “socially distinct” because “society in general perceives, considers, or recognizes persons sharing the particular characteristic[s] to be a group.”³⁸ The Board explained that evidence supporting social distinction includes evidence regarding the legal protections the society offers victims of domestic violence, as well as “other sociopolitical factors.”³⁹ To support its holding in this case, the Board looked to the ways in which Guatemalan society treats individuals with the proffered group’s characteristics: Guatemala has a culture of “machismo and family violence,” spousal rape is common, and Guatemalan police often do not enforce domestic violence laws.⁴⁰

Having found that C.G. was a member of a particular social group,⁴¹ the Board noted that DHS had conceded that C.G. suffered past persecution and that her membership in the particular social group was “at least one central reason” for her persecution.⁴² With these threshold matters thus established, the Board remanded the case to the immigration judge for further factual findings.⁴³

A-R-C-G- is the first published precedential decision from the Board that affirms the validity of a particular social group encompassing victims of domestic violence.⁴⁴ While *A-R-C-G-* provides definitive answers to some questions that have split immigration judges, it provides less guidance on others; accordingly, it leaves open important questions about *which* victims of domestic violence will qualify for asylum. But even though the Board declined to comprehensively ad-

³⁴ *Id.* The Board specifically noted that DHS conceded this point. *See id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 393–94 (quoting *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)) (internal quotation mark omitted).

³⁹ *Id.* at 394.

⁴⁰ *Id.* (quoting another source) (internal quotation marks omitted).

⁴¹ Because it affirmed the validity of this group, the Board explained, it needn’t address amici’s proposal for a particular social group defined by gender alone. *See id.* at 395 n.16.

⁴² *Id.* at 395.

⁴³ *Id.* These findings included whether the Guatemalan government was unwilling or unable to control C.G.’s husband, whether changed circumstances in Guatemala have negated C.G.’s fear of persecution, and whether C.G. could relocate within Guatemala and avoid persecution. *See id.*

⁴⁴ *See* DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* § 5:50 (2014 ed.).

dress the issues that have vexed adjudicators of domestic violence-based asylum claims, *A-R-C-G-* is still a boon to domestic violence-based asylum applicants. This decision will allow asylum applicants to establish particular social groups comprised of women in many types of intimate relationships and from many different countries.

In the years leading up to *A-R-C-G-*, immigration judges varied considerably in how they understood the law to apply to domestic violence-based asylum claims. While adjudicator-to-adjudicator inconsistency regarding asylum applications pervades the entire asylum process,⁴⁵ the disorder surrounding domestic violence-based asylum has been (perhaps unusually⁴⁶) due to disagreements about substantive law. Although regulations mandating the confidentiality of asylum proceedings make evaluation of immigration judges' decisions difficult, an analysis by Professor Blaine Bookey of 206 voluntarily disclosed asylum outcomes offers some insights. In the years following the 2001 vacatur of *R-A-*, immigration judges were clearly divided in their understandings of the law governing domestic violence claims: while some judges granted these claims, others seemed to indicate that the claims were categorically invalid under the law.⁴⁷

Starting in 2004, however, a series of legal developments⁴⁸ offered support for the notion that courts should recognize certain domestic violence-based asylum claims. In the ensuing years, a consensus seemed to build among immigration judges that victims of domestic violence could qualify for asylum on the basis of membership in particular social groups defined by reference to gender, nationality, and relationship status.⁴⁹ However, a number of immigration judges continued to reject domestic violence-based asylum claims on various legal grounds. Some judges indicated they believed particular social group-based asylum was categorically inapplicable to the domestic vi-

⁴⁵ See generally Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (analyzing over four hundred thousand asylum decisions and finding "disconcerting variability among individual adjudicators," *id.* at 303).

⁴⁶ See *id.* at 379 (suggesting that adjudicators' personal qualities like political philosophy and gender — and *not* "disagreements about substantive law" — account for disparities in the amount of asylum applications they approve).

⁴⁷ See Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107, 127–32 (2013).

⁴⁸ See *id.* at 114–17. These developments include a DHS brief arguing that "under some limited circumstances, a victim of domestic violence can establish eligibility for asylum," see DHS's Position on Respondent's Eligibility for Relief at 2, Matter of R-A-, 23 I. & N. Dec. 694 (A.G. 2005), <http://cgrs.uchastings.edu/sites/default/files/Matter%20of%20R-A-%20DHS%20brief.pdf>; another DHS brief offering specific articulations of valid particular social groups, see DHS's Supplemental Brief, *supra* note 3, at 14; and the December 2009 grant of asylum to the applicant in *R-A-*, see *A-R-C-G-*, 26 I. & N. Dec. at 391 & n.12.

⁴⁹ See Bookey, *supra* note 47, at 143–44.

olence context.⁵⁰ Other judges rejected groups defined with reference to inability to leave a domestic relationship as “impermissibly circular”⁵¹ and as failing to meet the particular social group requirements of particularity and social visibility.⁵² Yet other judges denied claims on the grounds that applicants failed to establish that their membership in a particular social group was “at least one central reason for” their persecution⁵³ and because “the action of one man on his own” could not amount to persecution.⁵⁴ While some of these rejected claims might have failed in front of any judge, it seems that at least some would have succeeded in front of a judge with an understanding of the law more in line with the growing consensus.⁵⁵

A-R-C-G- clarifies how the law of asylum applies to some of the issues that have divided immigration judges, but it leaves others unaddressed. Of the three elements of a *prima facie* asylum claim — (1) persecution (2) on account of (3) membership in a particular social group — *A-R-C-G-* provides no clarity on how two of the elements apply in the domestic violence context. The Board declined to analyze whether (1) the harm C.G. suffered amounted to persecution or (2) her membership in the particular social group was “at least one central reason” for her persecution; the Board relied upon DHS’s concession of these issues and explicitly affirmed that they will continue to be fact-dependent determinations.⁵⁶ Nevertheless, *A-R-C-G-* does bring clarity to the disorder surrounding the evaluation of particular social groups in the domestic violence context. As a threshold matter, the Board unambiguously clarified that victims of domestic violence can in some circumstances make out particular social group-based asylum claims. Furthermore, it squarely rejected the idea that groups defined by reference to the woman’s “inability to leave” are impermissibly circular.⁵⁷ And while some inconsistency in the evaluation of particular social groups is likely to persist — indeed, the Board cautions that it is not announcing a general rule that *all* particular social groups based on

⁵⁰ See *id.* at 141 & n.144. Additionally, some DHS attorneys had argued the same even after DHS took the position (before the Board) that domestic violence could form the basis of asylum claims. See *id.* at 144–45.

⁵¹ *Id.* at 142.

⁵² See *id.* at 141–42.

⁵³ 8 U.S.C. § 1158(b)(1)(B)(i) (2012); Bookey, *supra* note 47, at 142.

⁵⁴ See Bookey, *supra* note 47, at 143.

⁵⁵ For example, while some judges seem to believe that those who commit the harms of domestic violence do so for no reason, see, e.g., *A-R-C-G-*, 26 I. & N. Dec. at 390, DHS has explained that one reason a domestic abuser may harm his victim is because of her status in the relationship, DHS’s Position on Respondent’s Eligibility for Relief, *supra* note 48, at 35.

⁵⁶ *A-R-C-G-*, 26 I. & N. Dec. at 395. The Board’s decision not to analyze these issues is significant in light of the fact that the immigration judge had rejected C.G.’s claim on these grounds and not because C.G. failed to state a cognizable particular social group. See *id.* at 389–90.

⁵⁷ See *id.* at 393 & n.14.

domestic violence are cognizable⁵⁸ — its analysis provides a framework that will enable applicants to establish particular social groups beyond the single group endorsed in *A-R-C-G-*.

Even though *A-R-C-G-* affirms only a particular social group of *married* women, a close look at the Board's reasoning demonstrates that applicants from Guatemala who are unable to leave their *nonmarital* relationships will be able to satisfy the three particular social group requirements. First, in holding that marital status can be immutable, *A-R-C-G-* makes clear that "[a] range of factors [can] be relevant" to determining whether this requirement is met.⁵⁹ Nonmarried asylum applicants will be able to establish the immutability of being unable to leave a nonmarital relationship by pointing to "background country information" (like too few domestic violence shelters⁶⁰) as well as their "own experiences" of being unable to leave their abusers.⁶¹ Second, *A-R-C-G-* found sufficient particularity by looking to evidence that "sexual offenses against women [are] a serious societal problem in Guatemala," as well as the police's refusal to "interfere in a marital relationship."⁶² Nonmarried asylum applicants can similarly demonstrate that their group meets the particularity requirement by explaining that Guatemala's domestic violence laws punish men who "[have] tried unsuccessfully, repeatedly and continuously, to . . . re-establish a couple's or intimate relationship with the victim."⁶³ The fact that Guatemalan law contemplates the punishment of men who refuse to let their nonmarried partners leave their relationships would seem to be particularly compelling evidence that the group has "discrete and definable boundaries."⁶⁴ Third, the Board's social-distinction analysis emphasized that evidence of whether and to what extent a society offers legal protections to domestic violence victims can demonstrate that the society views such victims as a group.⁶⁵ Asy-

⁵⁸ *Id.* at 394–95.

⁵⁹ *Id.* at 393.

⁶⁰ See U.S. DEP'T OF STATE, BUREAU OF HUMAN RIGHTS, DEMOCRACY & LABOR, GUATEMALA 2013 HUMAN RIGHTS REPORT 16 (2014), <http://www.state.gov/documents/organization/220657.pdf> [<http://perma.cc/EV3D-TD69>].

⁶¹ *A-R-C-G-*, 26 I. & N. Dec. at 393.

⁶² *Id.*

⁶³ Immigration & Refugee Bd. of Can., *Guatemala: Domestic Violence, Including Legislation, State Protection, and Services Available to Victims*, REFWORLD (May 14, 2012), <http://www.refworld.org/docid/4fc4aa872.html>.

⁶⁴ *A-R-C-G-*, 26 I. & N. Dec. at 393. In an unpublished immigration court decision, Judge Alison M. Brown similarly analyzed these laws and granted asylum on the basis of the applicant's membership in a particular social group of "Guatemalan women who are unable to leave a common law relationship." *Matter of [Redacted]*, slip op. at 15–17 (Cleveland Immigration Ct. Feb. 24, 2014), <https://dl.dropboxusercontent.com/u/27924754/Cleveland%20IJ%20Brown%20asylum%20Guatemala%202-24-14%20%281%29.pdf>.

⁶⁵ *A-R-C-G-*, 26 I. & N. Dec. at 394.

lum applicants will be able to point to the frequency of gender-related violence in Guatemala and, again, to Guatemala's domestic violence laws criminalizing violence in nonmarital relationships to establish that groups of nonmarried women are socially distinct.⁶⁶ Accordingly, nonmarried applicants may be able to convince immigration judges to apply the *A-R-C-G-* framework to a broader group of nonmarried Guatemalan women.

Moreover, while the recognition of such groups of women beyond Guatemala will vary based upon the social realities in each country, applicants from other countries will be able to point to evidence that mirrors the evidence cited in *A-R-C-G-*. Most countries have laws against domestic violence.⁶⁷ And even when those laws do not explicitly criminalize abuse in nonmarital domestic relationships, the society at issue may still recognize the victims as members of a distinct group. For instance, in Turkey, where laws speak to only marital abuse, some judges nonetheless grant protection orders to unmarried and divorced victims.⁶⁸ To the extent that similar circumstances hold in other countries,⁶⁹ asylum applicants should be able to convince immigration judges to extend *A-R-C-G-* to recognize particular social groups in countries beyond Guatemala.

While it leaves open some important questions, *A-R-C-G-* makes clear that at least *some* victims of domestic violence can qualify for asylum. Furthermore, its analysis will enable domestic violence-based asylum applicants to argue forcefully for recognition of particular social groups beyond the specific group affirmed in the decision. Accordingly, *A-R-C-G-* meaningfully moves the law of asylum toward more consistent and expansive recognition of domestic violence-based asylum claims.

⁶⁶ Cf. *Matter of [Redacted]*, slip op. at 15–16. Judge Brown's determination that these victims are "targeted for a specific type of treatment," *id.* at 16, mirrors *A-R-C-G-*'s focus on evidence of differential treatment, see *A-R-C-G-*, 26 I. & N. Dec. at 394.

⁶⁷ As of 2011, 125 countries had outlawed domestic violence. See UN WOMEN, PROGRESS OF THE WORLD'S WOMEN 2011–2012, at 24 (2011).

⁶⁸ HUMAN RIGHTS WATCH, "HE LOVES YOU, HE BEATS YOU": FAMILY VIOLENCE IN TURKEY AND ACCESS TO PROTECTION 5 & n.1 (2011), <http://www.hrw.org/sites/default/files/reports/turkey0511webwcover.pdf> [<http://perma.cc/QGW2-MNQW>].

⁶⁹ Immigration judges' grants of domestic violence-based asylum applications of women from various countries seems to indicate that they do. See Bookey, *supra* note 47, at 143–44. Furthermore, a ten-country study that found higher rates of domestic abuse in nonmarriage relationships than in marriage relationships provides circumstantial evidence for the notion that these conditions exist globally. See WORLD HEALTH ORG., WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN 33 (2005), http://www.who.int/gender/violence/who_multicountry_study/en [<http://perma.cc/23Q5-UDS5>].