STATEMENT FOR THE RECORD

On

Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts

Subcommittee on Immigration and Citizenship

January 29, 2020

By the Center for Gender & Refugee Studies

The Center for Gender & Refugee Studies (CGRS) welcomes the opportunity to submit a statement for the record for this important hearing regarding the state of independence and due process within U.S. Immigration Courts. While CGRS has many concerns about U.S. Immigration Courts' lack of due process and judicial independence, we have limited this statement to our particular concern with the misuse of the Attorney General's certification process as a means to achieve political goals, resulting in denial of due process to asylum-seekers inconsistent with longstanding U.S. law, and failure to abide by our international treaty obligations.

CGRS was founded in 1999 by Karen Musalo following her groundbreaking legal victory in *Matter of Kasinga*[1] to meet the needs of asylum seekers fleeing gender-based violence. CGRS protects the fundamental human rights of refugee women, children, LGBTQ individuals, and others who flee persecution and torture in their home countries. CGRS is an internationally respected resource for asylum, renowned for our knowledge of the law and ability to combine sophisticated legal strategies with policy advocacy and human rights interventions. We take the lead on emerging issues, participate as counsel or *amicus curiae* in impact litigation to advance the rights of asylum seekers,[2] produce an extensive library of litigation support materials, maintain an unsurpassed database of asylum records and decisions, and work in coalitions with immigrant, refugee, LGBTQ, children's, and women's rights networks. Since our founding, we have also engaged in international human rights work to address the underlying causes of forced migration that produce refugees—namely, violence and persecution committed with impunity when governments fail to protect.

As a critical part of our mission, CGRS serves as a resource to decision makers to promote laws and public policies that recognize the *bona fide* asylum claims of those fleeing persecution, with a special focus on women, children and LGBTQ refugees. Our goal is to create a U.S. framework of law and policy that responds to the rights of these groups and aligns with international law.

CGRS is troubled that former Attorney General Jeff Sessions used the self-certification process to reverse decades of established asylum law in order to accomplish the Administration's impermissible goal of

[1] 21 I&N Dec. 357 (BIA 1996).
[2] *See, e.g., Innovation Law Lab v. McAleenan,* 924 F.3d 503 (9th Cir. 2019); No.3:19-cv-00807-RS (D.N.Cal.) (pending); *Damus v. McAleenan*; No. 1:18-cv-00578-JEB (D.D.C.) (pending); *see also Damus v. Nielsen*, No. 18-578, 313 F.Supp.3d 317 (D.D.C. Jul. 2, 2018); *Grace v. Barr,* 344 F.Supp.3d 96 (D.D.C. Dec. 18, 2018), *appeal docketed*, No. 195013 (D.C.Cir. Jan. 30, 2019)); and *Matter of A-B,* 27 I&N Dec. 316 (A.G. 2018).

deterring asylum seekers and expediting their deportation, aimed in particular at women fleeing domestic violence in Central America. In so doing, Sessions overturned a grant of asylum to our client, Ms. A.B., in *Matter of A-B-* (A.G. 2018), following what he himself recognized was an irregular procedure by which the immigration judge defied the Board of Immigration Appeals' (BIA) instruction to grant asylum and instead brought the case to the Attorney General's attention. This is an overt example of the lack of independence of the Immigration Court system that has led to both violations of U.S. and international refugee law and denials of due process for domestic violence survivors and other seeking safety and protection in the United States.

Matter of A-B-

In 2018, Sessions exercised what was formerly a rarely used power of his office to self-certify an approved asylum appeal in *Matter of A-B-.* In doing so, he unraveled decades of legal precedent protecting women from domestic violence.[3] Our client, Ms. A.B., had credibly testified that she had endured 15 years of abuse by her husband including beatings, rapes, and specific, detailed threats on her life. She had fled to different parts of El Salvador, divorced her husband, and twice taken out restraining orders against him, yet her husband continued to track her down and abuse and threaten to kill her without consequence.

While the immigration judge denied her claim, the BIA found that protection was warranted based on established legal precedent and the horrific violence Ms. A.B. had endured. In June 2018, Sessions reversed the BIA's grant of asylum to Ms. A.B., vacated the previously controlling BIA precedent decision in *Matter of A-R-C-G-* (BIA 2014), and effectively attempted to slam the door in the face of women seeking protection from domestic violence.

***Matter of A-B-* Found Unlawful as Applied to Credible Fear Screenings**

In December 2018, the D.C. district court granted a nationwide injunction requested by CGRS and co-counsel which blocked the application of the legal standards articulated in *Matter of A-B-* in credible fear interviews, the initial screening process for asylum seekers in expedited removal. In *Grace v. Whitaker*,[4] the federal district court found *Matter of A-B-*'s standards to be **inconsistent with existing legal precedents and Congressional intent behind the enactment of the Refugee Act of 1980,** which was to bring the U.S. into compliance with its international treaty obligations. The injunction remains in effect, prohibiting asylum officers from using the *Matter of A-B-* standards in the credible fear process, although the government has appealed the decision, which remains pending at the D.C. Circuit.

Matter of A-B-* has resulted too often in a *categorical prejudgment of asylum claims

While the use of Sessions' *Matter of A-B-* ruling is currently enjoined in credible fear screenings, it continues to be applied in asylum decisions on the merits, leading to widely disparate outcomes that have resulted in domestic violence survivors being deported to persecution or death.[5] Both the Department of Homeland Security in its training of asylum officers and the Department of Justice in its guidance to immigration judges and the BIA have instructed that *Matter of A-B-* must be used in

[3] *See, e.g.,* Blaine Bookey, *Gender-based Asylum Post-Matter of A-R-C-G-: Evolving Standards of the Law*, 1 SOUTHWESTERN J. INT'L L. 22 (2016); Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARVARD INT'L REV. (2014).
[4] *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).
[5] *See* Kate Jastram and Sayoni Maitra, *Matter of A-B- One Year Later: Winning Back Gender-Based Asylum Through Litigation and Legislation*, 18 SANTA CLARA J. INT'L L. 48 (2020).

adjudicating asylum claims on their merits. As a result*,* many adjudicators summarily and categorically foreclose protection in these cases as a "matter of law" because they involve domestic violence, "instead of considering individual facts and fair application of law to those individual facts."[6]

Immigration Judges have been reported:[7]

- pretermitting or threatening to pretermit cases based on the case "type."
- discouraging respondents from requesting relief.
- successfully convincing asylum-seekers that their claims will inevitably fail, so it is in their best interest to give up without looking for an attorney and instead take voluntary departure orders.
- issuing removal orders without holding merits hearings; one judge writes denial orders before a hearing has been completed.

This prejudgment and lack of individualized determination has led to a complete failure of due process for asylum seekers and of an opportunity to fully and fairly litigate their claims, in particular those from Central America, many of whom are fleeing domestic violence. In fact, following the issuance of *Matter of A-B-*, asylum grant rates for individuals from El Salvador, Guatemala, and Honduras fell to an average of 15 percent compared to a 24 percent grant rate in the year prior to the decision.[8] All other countries saw virtually no change in grant rates during that time frame.

There is no doubt that this was the Trump Administration's desired result. Attorney General Sessions' goal was to deter any foreign national from coming to the U.S. border, without regard for U.S. obligations found in the 1951 Convention Relating to the Status of Refugees, whose provisions are binding on the U.S. through our ratification of its 1967 Protocol. In fact, the same day that he announced the *Matter of A-B-* decision, he expounded on the virtues of the "zero tolerance" policy which left children separated from their parents and prosecuted thousands of genuine asylum-seekers.[9]

Recommendations for Congress

Congress passed the Refugee Protection Act of 1980 to bring the U.S. into compliance with its international treaty obligations as a party to the Refugee Protocol. Accordingly, interpretation of or changes to U.S. asylum law should comport with United Nations High Commissioner for Refugees (UNHCR) guidelines and principles. While a nation has the sovereign right to decide who can enter and remain in its territory, these policies must be consistent with treaty obligations. In this case, UNHCR guidance and international law reflect that domestic violence can form the basis of asylum protection when all other elements of the refugee definition are met, as they were in Ms. A.B.'s case. **On this basis, CGRS requests that Congress adhere to UNHCR guidelines and principles to solve the issues created by the *Matter of A-B-* decision and do the following:**

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[6] See "The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool," June 29, 2019 available at https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool.

[7] *Id.*

[8] According to data from the Syracuse University Transactional Records Access Clearinghouse (TRAC) Asylum Decision tool, available at https://trac.syr.edu/phptools/immigration/asylum/.

[9] https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history.

<u>Define the "particular social group" category for asylum and "on account of " requirement</u>: Excessively restrictive interpretations of the particular social group ground for asylum, and the "nexus" or "on account of" language in the refugee definition, found in the Immigration and Nationality Act (8 U.S.C. 1101(a)(42)) have led to erroneous results in U.S. asylum jurisprudence. Simple legislative amendments included in the Refugee Protection Act of 2019, H.R. 5210, will clarify the particular social group definition and the requirements for establishing nexus in line with international law. [10] These clarifications would prevent continuing confusion and wasted resources due to legally flawed new interpretations, such as those in *Matter of A-B-*, which result in numerous appeals and remands in the already overburdened immigration court system.

<u>Rescind or defund *Matter of A-B-*</u>: As District Judge Emmet Sullivan concluded in *Grace*, *Matter of A-B-* is inconsistent with Congressional intent. Moreover, the consequences of continuing to implement *Matter of A-B-* are a matter of life and death for domestic violence survivors. Accordingly, Congress should direct the Department of Justice to rescind the decision or appropriators should use their power to instruct the Departments of Justice and Homeland Security that they may not use appropriated funds to implement it.

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[10] *See* Jastram and Maitra, n. 5 above.