Matter of *A-R-C-G-* and Domestic Violence as Persecution: Assessing the First Two Years After a Landmark Decision

by Alicia Triche

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[T]he legal holding in the case is narrow and fact-specific, leaving immigration judges a great deal of discretion. This latitude … has led to a hodgepodge of jurisprudence that undermines confidence in the fairness and efficiency of the U.S. asylum system.

—Blaine Bookey, Co-Legal Director, UC Hastings Center for Gender & Refugee Studies[1]

If possession is nine-tenths of the law, application might be nine-tenths of jurisprudence. In August 2014, the Board of Immigration Appeals (BIA) published a landmark decision, *Matter of A-R-C-G-,* holding for the first time that survivors of domestic violence could be considered members of a "particular social group" under U.S. asylum law.[2] The ruling did not mean that other legal requirements were excluded—issues such as credibility, burden of proof, and a government "unwilling or unable to protect" the applicant remained important prerequisites for a grant of asylum. However, the BIA did hold that "[d]epending on the facts and evidence … 'married women in Guatemala who are unable to leave their relationship' can constitute a cognizable particular social group."[3]

If the purpose of *A-R-C-G-* is to require legal protection for domestic violence survivors who meet the refugee definition, it is falling far short of the goal line. In application, the decision is leading to substantially divergent results. Conducting "the initial study of *A-R-C-G-*'s jurisprudence," Blaine Bookey at the UC Hastings Center for Gender & Refugee Studies (CGRS) found widespread "inconsistent and arbitrary decision-making" among adjudicators.[4] This situation was already well-documented in general in U.S. refugee law;[5] but in the context of domestic violence, it rings particularly acute. Too-extensive inconsistency in refugee law will generally raise concerns of fairness and due process, but in the case of *A-R-C-G-,* it flies in the face of the acknowledgment so long sought by the advocacy community: that severe domestic violence is a cultural atrocity worthy of inclusion in the refugee definition.

The phrase "particular social group" originated in the United Nations (U.N.) Convention Relating to the Status of Refugees,[6] which is commonly referred to as the "CSR" or "Refugee Convention." The CSR was drafted in the aftermath of the atrocities of World War II, as part of the initial birth of international human rights law. The moral assertions contained in the CSR were the result of a collective, long-term effort—an "expression of conviction by the comity of nations."[7] The first paragraph of the CSR's preamble expresses the intent to affirm "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination."

It is well known among CSR scholars that the phrase "particular social group" is not meaningfully explained in the drafting history of the U.N. Convention. The definition of "refugee" passed through numerous U.N. structures and international committees before reaching its final form, ending ultimately with unanimous approval at a Conference of Plenipotentiaries in Geneva in July 1951.[8] It was not until the final drafting phase at the Geneva Conference that the Swedish delegate, Sture Petrén, proposed (without further explanation) that "membership of a particular social group" should be added to the definition of refugee.[9] The amendment did pass, but the transcript of the summary records indicates no discussion whatsoever regarding what "particular social group" meant to the delegate who approved its addition.[10] Top CSR commentators have posited that "contemporary examples … may have been in the minds of the drafters, such as resulted from the 'restructuring' of society then being undertaken in the socialist states and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families."[11] Another commentator believes the Swedish delegate was "more likely" referencing persecution of groups "as had happened

in Nazi Germany," Roma ("Gipsies"), "asocial persons," and "homosexuals."[12] At the time, posits Terje Einarsen, it would have been a delicate matter to mention these groups explicitly, but it was well-known that Nazi Germany had particularly targeted such vulnerable groups.[13]

It is precisely in this spirit of combatting recognized atrocity—in other words, state-sanctioned behaviors unacceptable to the international community—that CGRS and other groups fought for inclusion of domestic violence as a legal aspect of the refugee definition. However, as Bookey well documents, the application of *A-R-C-G-* has been erratic and unpredictable. One particular problem has been whether a survivor must be technically married to assert a viable particular social group—after all, the decision itself references "married women in Guatemala."[14] Bookey reports that a "split in jurisprudence" has surfaced on this issue—reflected not only in decisions of immigration judges, but even unpublished decisions of the BIA.[15] An even bigger problem is that the central holding of the case is still being "distinguished." In *A-R-C-G-,* the immigration judge found that the abuse was "the result of 'criminal acts, not persecution' … perpetuated 'arbitrarily' and 'without reason.'"[16] The BIA specifically overruled that decision, accepting both nexus and "particular social group" had been established.[17] Yet, Bookey reports at least one case in which "the judge found that the [domestic] abuse was related to [the perpetrator's] *own criminal tendencies and jealousy.*"[18]

Is *A-R-C-G-* really so unclear that even its central theme is up for debate? In application, it would certainly seem so. The open-ended, fact-specific nature of the decision, especially the enduring requirements of "particularity" and "social distinction," have left in place a "protector" without any teeth. If the intent of *A-R-C-G-* is to effectively protect domestic violence survivors who meet the refugee definition, its guidance will need to be strengthened through forceful and consistent clarification. ⊙

Endnotes

[1]Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law,* 22 Sw. J. Intl. L 1, 4 (2016).

[2]*Matter of A-R-C-G-,* 26 I&N Dec. 388 (BIA 2014). The U.S. refugee definition includes persons who experience and/or fear persecution "on account of…race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(B); I.N.A. § 101(a)(42)(B) (Westlaw 2016).

[3]26 I&N Dec. at 388.

[4]Bookey, *supra* note 1, at 19.

[5]*See, e.g.,* Jaya Ramji-Nogales et al., Lives in the Balance: Asylum Adjudication by the Department of Homeland Security (2014).

[6]July 28, 1951, 189 U.N.T.S. 150. The United States is bound by Articles 2 through 34 as a party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 ('Protocol'). A Convention refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion…is unable or…owing to such fear, is unwilling to return" home. CSR Art. 1A(2).

[7]Nehemiah Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation 6 (1953).

[8]Alicia Triche Naumik, *International Law and Detention of US Asylum Seekers,* 19(4) Int. J. Refugee L. 661, 662 (2007).

[9]Terje Einarsen, *Drafting History of the 1951 Convention and the 1967 Protocol,* in The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary 37, 52 (Andreas Zimmermann ed., 2011), *citing* UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-second Meeting,* A/CONF.2/SR.22, (Nov. 26, 1981) *available at* www.refworld.org/docid/3ae68cde10.html (last visited Apr. 11, 2016).

[10]*See id.* at 52-54. 11 Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International law 74 (3d ed. 2007).

[12]Einarsen, *supra* note 9, 55-56.

[13]*Id.*

[14]26 I&N Dec. at 388; *see* Bookey, *supra* note 1, at 13-14.

[15]*Id.*

[16]26 I&N Dec. at 390.

[17]*Id.*

[18]Bookey, *supra* note 1, at 17. Unfortunately, Bookey's data is not comprehensive because neither unpublished BIA decisions nor decisions of immigration judges are made available in the public context. Her account is based on 67 cases provided privately to CGRS by attorneys. *Id.* at 11. The Immigrant Legal Resource Center also maintains an "Index of Unpublished Decisions of the Board of Immigration Appeals," which includes asylum cases provided to ILRC by private parties. As of April 10, 2016, Westlaw reported two federal "citing references" for *A-R-C-G-,* neither of which examined the case in the domestic violence context. *See Aguilar-Aguilar v. Lynch*, 620 Fed. Appx. 528 n.3 (6th Cir. 2015) (ruling *A-R-C-G-* did not overrule two previous BIA cases regarding particular social group); *Gonzalez Cano v. Lynch*, 809 F.3d 1056, 1059 (8th Cir. 2016) (under *A-R-C-G-,* "Mexican child laborers who have escaped their captors" are not a particular social group).

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