

Restoring Protection for Victims of Gender-Based Violence

In Children's Best Interests

Professor Karen Musalo, UC Hastings College of Law

Center for Gender & Refugee Studies

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Historical barriers to protection for women fleeing gender violence

1. Harms inflicted on women – such as female genital cutting, forced marriage, domestic violence often seen as cultural or religious norms and not persecution
2. Refugee Act requires “nexus” or connection between harm and race, religion, nationality, political opinion, or membership in a particular social group and gender is not one of the five grounds
3. Perpetrator is often a non-government actor

UNHCR Guidance – International Norms

Beginning in 1985 UNHCR began to give guidance in claims involving violations of women's rights

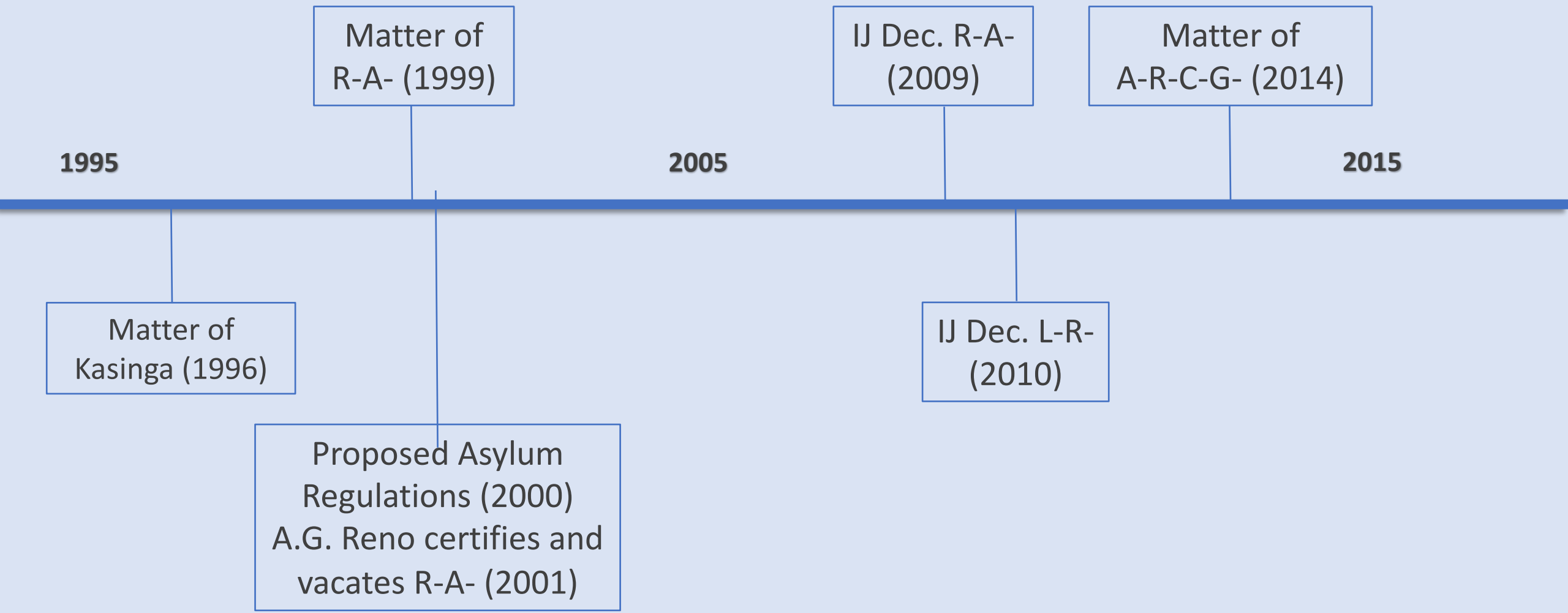
1. Harm as persecution - Gender-related human rights violations should be recognized as persecution
2. Persecution must be on account of one of the five grounds – the “particular social group” ground could include groups defined by gender
3. Persecution need not be by the State itself, when the State is unable or unwilling to protect

United States – Advances and Retreats from Protection

In 1996, BIA issues first positive precedent gender case, reversing IJ denial and granting asylum for persecution of female genital cutting – *Matter of Kasinga*



More Contentious Route to Recognition for Domestic Violence Survivors



Matter of A-R-C-G- (2014)

First precedent decision recognizing domestic violence as a valid basis for asylum

Narrow legal holding: Recognized “married women in Guatemala who are unable to leave their relationship” as a valid particular social group

Was applied more broadly to claims involving unmarried women, women forced into relationships with gang members, child abuse survivors

Sessions, while A.G. reversed *A-R-C-G-* in *Matter of A-B-*

Sessions “certified” the case *Matter of A-B-* to himself on 3/7/18

Using *A-B-* as the vehicle, Sessions overruled *A-R-C-G-* finding the BIA’s decision lacked “rigorous analysis”

Having overruled *A-R-C-G-*, Sessions reversed the grant of asylum to Ms. A.B.

“Back to the Dark Ages:” Sessions’s asylum ruling reverses decades of women’s rights progress, critics say, Wash. Post, June 12, 2018



Ms. A.B.



Ms. A.B.'s Case

Strong facts: Salvadoran woman, married to abuser, with whom she had three children; abuser's brother was member of the police

Suffered extreme physical abuse, including beatings, rapes, threats with loaded gun or knife

Police were largely unresponsive

Moved away and abuser tracked her down

After a divorce he continued to abuse her; he and his brother said that the divorce would never set her free from him

Sessions tried to foreclose DV (and fear-of-gang) claims

- “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.” *A-B-*, 27 I. & N. Dec. at 320.

Main aspects of *A- B-* holding

- Rejects particular social group formulation proposed by DHS decades ago and approved in *A-R-C-G-* [married women in Guatemala unable to leave the relationship]
- Challenges nexus analysis by characterizing DV as “personal” rather than gender-motivated

Main aspects of *A-B*- holding

- Tries to heighten the standard for proving government is “unable or unwilling to protect” by substituting “completely helpless” for unable, and “condonation” for unwilling
- Suggests that internal relocation is more feasible when the persecutor is non-governmental
- **But *A-B*- cannot eradicate decades of relevant precedent**

Post *A-B-*

- Challenges in expedited removal
- Litigation of Ms. *A-B-s* individual case
- Nationwide trends in decision-making
- Strategies

Challenges in expedited removal - *Grace v. Whitaker*

- Challenge to application in the **credible fear determination** process
- A-B- and USCIS Guidance included language that suggested individuals with DV or fear-of-gang cases could not pass credible fear standard
- *Grace v. Whitaker*, 344 F. Supp. 96 (D.D.C. 2018), nationwide injunction against use of key A-B- holdings in credible fear determinations: 1) no general rule against DV & gang cases; 2) no heightened failure of state protection burden; 3) PSG w/ inability to leave not circular; 4) rule that only case law that applies is that not inconsistent with A-B-

Litigation of Ms. A.B.'s individual claim

- Remanded to immigration court; denied Oct. 10, 2018
- Appealed to BIA; briefing submitted in Jan. 2020
- If denied, will be appealed to the Fourth Circuit Court of Appeals

Nationwide trends in decision-making (June 2018 - June 2019 – from CGRS tracking)

BIA

- 50 unpublished BIA decisions; 37 denials and 13 remands
- BIA generally cites to *Matter of A-B-*, does superficial analysis

Immigration court

- 170 asylum or withholding grants in DV, partner abuse, child abuse cases – although many denials reported (at least 145)
- Interesting development – some immigration judges grant on basis of PSGs defined by nationality and gender alone

Circuit Court decisions

- *Padilla Maldonado v. U.S. A.G.*, 751 F. App'x 263 (3d Cir. 2018), “while the overruling of *A-R-C-G-* weakens Padilla-Maldonado’s case, it does not automatically defeat her claim that she is a member of a particular social group.”
- *Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. 2018), remanded, rejecting reasoning that proposed PSG of “women in El Salvador” was too broad

Circuit Court decisions

- *Hernandez-Chacon v. Barr*, No. 17-3903 (2d Cir. 2020) remands for consideration of claim based on political opinion
- *Gonzales-Veliz v. Barr*, 938 F. 3d 219 (5th Cir. 2019), Agreed that A.G. did not create a categorical ban against DV groups, but found BIA reasonably relied on rationale in *Matter of A-B-* to deny group defined as Honduran women unable to leave their relationship

Circuit Court decisions

- *Amezcuca-Preciado v. A.G.*, No. 18-14788 (11th Cir. 2019), Particular social group of “women in Mexico unable to leave relationship,” A.G. entitled to *Chevron* deference.

Strategies

Courts - Litigation – tracking cases nationwide and intervening at the circuit court and BIA levels

Upcoming consolidation of 5 cases in Ninth Circuit raising similar issues

Executive – planning around change in administration

“Big Book” coordinated by Immigration Hub – with chapter on humanitarian protection – includes call for reversal of *A-B-* and other A.G. decisions

Major candidates have pledged to reverse *A-B-*

Strategies

- **Legislative** – Refugee Protection Act – would fix key terms in refugee definition to restore protection (particular social group, on account of)
- A number of congressmembers interested in stand-alone bills to address *A-B-*

Strategies

Public Education and Messaging –

ImmigrantWomenToo website to tell the stories

<https://www.immigrantwomentoo.org/>

Local resolutions – Approved in San Francisco, Los Angeles County, Cambridge and Somerville, MA, Minn., St. Paul; pending in other cities

Resources

- Assistance and consultation on cases

<https://cgrs.uchastings.edu/request-assistance/requesting-assistance-cgrs>

- Help us track outcomes in cases

CGRS-ABTracking@uchastings.edu

- Visit our Immigrant Women website

<https://www.immigrantwomentoo.org/>

- Become an expert or find an expert through our database

• <https://cgrs.uchastings.edu/expert/search>

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) at

<https://digitalcommons.law.scu.edu/scujil/vol18/iss1/2>