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Grace v. Whitaker: Advancing Refugee Rights Beyond the Credible Fear Interview

Richard A. Boswell
UC Hastings College of the Law, boswellr@uchastings.edu

Elisa Vari
UC Hastings College of the Law, evari@uchastings.edu

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by Elisa Vari and Richard A. Boswell

In December 2018, federal judge Emmett Sullivan of the U.S. District Court for the District of Columbia issued a decision with great significance for asylum-seekers at the credible fear interview stage and, as argued in this paper, in asylum proceedings generally. While the case, *Grace v. Whitaker*, is currently on appeal, its mandate has not been stayed, and both the U.S. Citizenship and Immigration Services ("USCIS") and the Executive Office for Immigration Review ("EOIR") have issued revised guidelines to officers and immigration judges on how the decision is to be implemented.[1] In *Grace*, Judge Sullivan reviewed the far-reaching case of *Matter of A-B-*, which had been decided by Attorney General Sessions in June 2018, as well as the USCIS Policy Memorandum issued the following month instructing officers on its implement at the credible fear interview ("CFI") stage.[2]

With *Matter of A-B-*, Sessions sought to curtail protections for asylum-seekers fleeing their country due to domestic or gang-based violence by overruling *Matter of A-R-C-G-*, which recognized gender-based violence as a valid ground for persecution, and by essentially reinterpreting U.S. asylum law in a way that, as Judge Sullivan wrote, is inconsistent with existing precedents and Congress' intent in passing the 1980 Refugee Act.[3]

This paper will briefly discuss the significance of *Matter of A-B-* and the resulting USCIS memorandum. It will then explain *Grace v. Whitaker* and how the decision is of great importance not only for credible fear ("CF") proceedings, but also for asylum applications in general, as the language used by Judge Sullivan, while not binding in other contexts, can still be relied on by practitioners as persuasive authority.

Background on Matter of A-B-

In the summer of 2018, Attorney General Jeff Sessions used his "certification" powers and assumed the role of decision maker in *Matter of A-B-*, thus exercising a power that is not commonly used.[4] When the decision was first issued in June, many advocates saw it as severely limiting protections for survivors of "private" violence, making it virtually impossible for those fleeing domestic abuse or gangs to succeed in their claims for asylum.[5]

In his decision, Sessions reversed *Matter of A-R-C-G-*, sharply criticizing the Board of Immigration Appeals' ("BIA") failure to engage in a meaningful

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[1] Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018); Grace v. Whitaker — EOIR Guidance re Grace Injunction, December 19, 2018, https://www.aclu.org/legal-document/grace-v-whitaker-eoir-guidance-re-grace-injunction, https://perma.cc/C5B9-R272; Grace v. Whitaker — USCIS Guidance Re Grace Injunction, December 19, 2018, https://www.aclu.org/legal-document/grace-v-whitaker-uscis-guidance-re-grace-injunction, https://perma.cc/LMK6-86GA.

[2] Matter of A-B-, 27 I. & N. Dec. 316, 320 (2018); *see also* Center for Gender and Refugee Studies, *CGRS Practice Advisory: Matter of A-B-* (July 6, 2018); U.S. Citizenship and Immigration Services, Policy Memorandum PM-602-0162: *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with* Matter of A-B- [hereinafter "USCIS Policy Memo"] (July 11, 2018), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf, https://perma.cc/8ZDH-8X55; 23 Bender's Immigr. Bull. 872 (App. E) (Aug. 1, 2018).

[3] 344 F. Supp. 3d at 126; *see also* Matter of A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014).

[4] 8 C.F.R. §1003.1(h)(1); *see also* Press Release, Center for Gender and Refugee Studies, CGRS Files Suit Seeking Information on Sessions' Intervention in *Matter of A-B-* (March 7, 2019), https://cgrs.uchastings.edu/news/cgrs-files-suit-seeking-information-sessions%E2%80%99-intervention-matter-b, https://perma.cc/VYB2-9EGP.

[5] *Jeff Sessions is Hijacking Immigration Law*, Slate.com (June 13, 2018), https://slate.com/news-and-politics/2018/06/in-matter-of-a-b-jeff-sessions-hijacked-immigration-law-by-abusing-a-rarely-used-provision.html, https://perma.cc/9AKB-SDA4; *Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum*, NY Times (June 11, 2018), https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html, https://perma.cc/52LV-3DTZ.

analysis of the case before it.[6] Specifically, in *A-R-C-G-* the BIA had recognized "married women in Guatemala who are unable to leave their relationship" as a particular social group ("PSG") by giving, according to Sessions, "insufficient deference to the factual findings of the immigration judge."[7] Sessions reiterated the general requirements to establish cognizability of and membership in a PSG, namely immutability, particularity, and social distinction, but then outlined blanket rules as to how these are to be satisfied when the persecutor is a private actor.[8]

Sessions' statement that "in practice [claims based on violence inflicted by private actors] are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address" was particularly problematic.[9] The Attorney General, in fact, seemed to assume that if persecution is not inflicted by a governmental body or individual connected to the state, rarely could it count as persecution, even though, as *Grace* discusses and as explained *infra*, numerous judicial precedents support the cognizability of PSGs when the government is not involved. Sessions stressed that, when the government is not the persecutor, the applicant must show that the government "condoned" the persecution or demonstrated a "complete helplessness" in providing protection.[10] This was criticized as a distortion of and higher standard than the ordinarily applied "unable or unwilling to protect" standard.[11]

Another problematic element of the decision was Sessions' take on the "one central reason" standard for the nexus requirement of asylum applications. In fact, Sessions seemed to suggest that just because the persecuting private actor has a pre-existing relationship with the asylum-seeker, as is clearly the case with domestic-violence based claims, an applicant for asylum cannot prove that membership in a particular social group constitutes "one central reason" for persecution, because the persecutor would have ulterior motives to harm her.[12]

Further, *Matter of A-B-* stressed the importance of avoiding circular PSGs, that is PSGs defined by the harm inflicted on the applicant. As Sessions explained, the PSG articulated by Ms. A-B-, "El Salvadoran women who are unable to leave their domestic relationships where they have children in common," was impermissibly circular because it relied on the "unable to leave" element.[13] That element, according to Sessions, is part of the persecution inflicted on the member and makes the PSG dependent on the harm and therefore not cognizable.[14]

Lastly, and more problematically, Sessions provided a series of additional requirements throughout the decision, stating, for example, that all PSGs the applicant is relying on need to be delineated at the inception of the case and may not be added on appeal; he also stated that when only a few individuals are persecuting the applicant, relocation is likely more reasonable.[15] Sessions also stressed that, in exercising discretion, adjudicators should take into consideration, *inter alia*, whether the applicant engaged in the "circumvention of orderly refugee procedures."[16] Finally, the Attorney General stated that an adverse credibility finding may result even when there are only a few discrepancies and omissions in the applicant's claim.[17]

Sessions' sweeping statements on *Matter of A-B-*, however, were, as discussed below, soon challenged, and advocates indicated that, in any case, much of what was in the decision should be treated as *dictum* since for the most part it discussed hypothetical scenarios rather than Ms. A-B-'s specific case.[18]

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[6] *Matter of A-B-*, 27 I. & N. Dec. at 320.

[7] 26 I. & N. Dec. at 389; *Matter of A-B-*, 27 I. & N. Dec. at 320.

[8] *Matter of A-B-*, 27 I. & N. Dec. at 320.

[9] *Id.* at 320.

[10] *Id.* at 337 (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000)).

[11] Immigrant Legal Resource Center, Matter of A-B- *Considerations* 4, https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf ["ILRC Practice Advisory"], https://perma.cc/9BEM-NCR3; American Immigration Lawyers Association, *AILA Policy Brief: USCIS Guidance on* Matter of A-B- *Blocks Protections for Vulnerable Asylum Seekers and Refugees* (July 23, 2018), https://www.aila.org/File/DownloadEmbeddedFile/76742, https://perma.cc/3XDW-H66K; *Exclusive: how asylum officers are being told to implement Sessions' new rules*, Vox.com (June 19, 2018), https://www.vox.com/policy-and-politics/2018/6/19/17476662/asylum-border-sessions, https://perma.cc/X86X-NK2G.

[12] *Matter of A-B-*, 27 I. & N. Dec. at 338-39.

[13] *Id.* at 343.

[14] Id. at 334-36

[15] *Id.* at 344-45; *see also* ILRC Practice Advisory, *supra* note 11.

[16] *Matter of A-B-*, 27 I. & N. Dec. at 345 n.12.

[17] *Id.* at 342.

[18] ILRC Practice Advisory, *supra* note 11, at 3.

USCIS Policy Memo of July 2018

Despite the disputed value of Sessions' ruling, USCIS rapidly issued a policy memorandum in July 2018 directing its officers on the implementation of the decision in the context of CFIs and reasonable fear interviews at the expedited removal stage.[19] The memo instructed officers to adopt the standards outlined in *Matter of A-B-* and to abandon reliance on *Matter of A-R-C-G-*. It also directed the application of a "condoned or demonstrated complete helplessness" standard for nongovernment persecution.[20] Specifically, it explained that showing that a country has issues in addressing crime "cannot, by itself, establish eligibility for asylum."[21]

The Policy Memo also suggested, in accordance with *Matter of A-B-*, that terms such as "'married,' 'women,' and 'unable to leave the relationship' are unlikely to be sufficiently particular" for purposes of establishing a PSG.[22] USCIS explained to its officers that when the applicant is vulnerable to generalized crime, groups based on such vulnerability "are not a subdivision of the society, but instead are typical of the society as a whole."[23] It concluded, therefore, that members of groups victimized by private activity will likely fail to meet the particularity required to establish a cognizable PSG.

USCIS then discussed the requirement that a PSG is defined independently from the harm asserted by the applicant. Relying heavily on Sessions' language, USCIS instructed its officers that a group such as "married women in Guatemala who are unable to leave their relationship" is impermissibly circular because the applicant's inability to leave is created by the harm alleged.[24]

USCIS also took *Matter of A-B-* and fully adopted its view that, generally, "claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum."[25] It also reiterated Sessions' assumptions that, if there is a pre-existing relationship between the persecutor and the applicant, then the applicant's membership in a PSG will often fail to meet the "one central reason" standard for nexus, and that internal relocation is likely more reasonable where the persecutor is not the government.[26]

Finally, the Policy Memo instructed USCIS agents to weigh an applicant's illegal entry as a ground for a negative exercise of discretion, or if the applicant "demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities."[27]

Both the USCIS Memo and *Matter of A-B-*, however, were largely conscribed by the *Grace* decision discussed below.

Grace v. Whitaker

In August 2018, the American Civil Liberties Union and the Center for Gender and Refugee Studies at the University of California, Hastings challenged the validity of Sessions' decision and the resulting USCIS Policy Memo in the U.S. District Court for the District of Columbia on behalf of twelve named plaintiffs.[28] The plaintiffs, who had received a negative credible fear interviews and were ordered removed, alleged, *inter alia*, that *Matter of A-B-* and the USCIS Policy Memo impermissibly heightened and distorted the relatively low standards that are typical of CFIs. For the most part, Judge Sullivan agreed with the plaintiffs' main argument and issued an order, narrowing the Attorney General's decision and signaling to the administration that the powers of the Attorney General to change the law are not unfettered.

Plaintiffs' Complaint

The plaintiffs sought declaratory and injunctive relief to prevent implementation of aspects of both

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[19] *See* USCIS Policy Memo, *supra* note 2.

[20] USCIS Policy Memo, *supra* note 2, at 2.

[21] *Id.* at 6.

[22] *Id.* at 3.

[23] *Id.* at 4 (relying on *Matter of A-B-*, 27 I. & N. Dec. at 335).

[24] *Id.* at 5.

[25] *Id.* at 6.

[26] *Id.*

[27] *Id.* at 8.

[28] Because the case involved a challenge to the application of expedited removal the statute limits review to an action filed in the U.S. District Court for the District of Columbia, the only court that can entertain jurisdiction over "a systemic challenge to the legality of a 'written policy directive, written policy directive guideline, or written procedure issued by or under the authority of the Attorney General to implement' the expedited removal process." *Grace v. Whitaker*, 344 F. Supp. at 108; *see* 8 U.S.C. §1252(e)(3)(A).

the Attorney General's decision in *Matter of A-B-* and the resulting USCIS Policy Memo written in July 2018. They argued that the decision as well as the Memo effectively toughened the CFI process, even though Congress intended for such proceedings to entail a lower standard, that is "a possibility ... that the alien could establish eligibility for asylum."[29]

First, the decision and Memo allegedly had made blanket-rule statements creating an "unlawful presumption" against the cognizability of PSGs based on private persecution.[30] This, the plaintiffs argued, violated the requirement that asylum claims be analyzed case by case and was a departure from existing precedents and prior policy. Second, they allegedly changed the standards for asylum by requiring that applicants show that the foreign government "condoned or demonstrated complete helplessness" and by making the nexus standard more difficult to meet for members of PSGs. The "condoned or demonstrated complete helplessness" standard, the plaintiffs argued, is inconsistent with the text and context of the Refugee Act and Congress' intent to conform to international norms. Furthermore, precedents provide that an applicant can meet the "unable or unwilling" standard even when she cannot show that her government condoned persecution or was helpless to provide protection against nongovernmental persecutors.[31]

In challenging *Matter of A-B-*'s nexus requirement, the plaintiffs argued that the INA provides that a persecutor could have mixed motives in inflicting harm on the applicant, and thus a preexisting relationship should not defeat a claim. Moreover, they maintained that Sessions' finding that including "unable to leave" in the PSG formulation renders the group dependent on the harm alleged and thus makes it impermissibly circular was mistaken. Inability to leave is in fact the result of several factors aside from the harm, including cultural and societal norms that the persecutor may believe in and circumstances that affect applicants in their own countries and make women subordinate to men in the eyes of society.[32]

In addition, the directives imposed by *Matter of A-B-* and the USCIS Policy Memo required applicants to articulate PSGs at the credible fear stage, a requirement the plaintiffs alleged was wholly unreasonable, unprecedented, and unlawful. "[D]efining and establishing membership in a particular social group is one of the most complex and difficult questions in asylum law," the plaintiffs argued, and it cannot be expected that applicants will be able to articulate such a nuanced aspect of their claim as soon as they arrive at the border, especially at a "truncated, nonadversarial" stage such as that of the CFI.[33]

In altering and toughening requirements for asylum seekers fleeing domestic abuse and gang-based violence, in short, the plaintiffs contended that *Matter of A-B-* and the USCIS Policy Memo put protections for asylum seekers in general at serious risk and deprived the plaintiffs and those similarly situated of meaningful avenues to seek protection even if their asylum claims were meritorious.[34]

The Decision

The district court found that the policies introduced by *Matter of A-B-* and USCIS' Policy Memo deviated from prior policies and were therefore an arbitrary and capricious interpretation of the law such that they violated the Administrative Procedure Act ("APA") and the INA.[35] The court held that while "Congress has not spoken directly on the precise question of whether victims of domestic or gang-related persecution fall into the particular social group category ... the legislative history [of the 1980 Refugee Act] does make clear that Congress intended to bring United States refugee law into conformance with the [Protocol]."[36] Specifically, the court stressed that the 1980 Refugee Act was enacted in accordance with the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands [and] it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible.'"[37] Therefore, even though ultimately the court found the statute to be ambiguous, it stressed the importance of looking not only at the Protocol but also at the U.N. High Commissioner for Refugees' ("UNHCR") Handbook, which "codified the United Nations' interpretation

[29] Pls.' Compl. ¶ 4 (citing 8 U.S.C. §1225(b)(1)(B)(v)).

[30] *Id.* at ¶ 55.

[31] *Id.* at ¶ 58.

[32] *Id.* at ¶ 60.

[33] *Id.* at ¶ 62. (internal quotation marks omitted).

[34] *Id.* at ¶ 80-83.

[35] *Grace*, 344 F. Supp. 3d at 120.

[36] *Id.* at 123–24 (internal quotation marks omitted).

[37] *Id.* at 124 (citing Maharaj v. Gonzales, 450 F.3d 961, 983 (9th Cir. 2006) (O'Scannlain, J. concurring in part and citing Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102)).

of the term 'particular social group' ... construing the term expansively."[38]

The district court concluded that *Matter of A-B-* was not "the product of reasoned decisionmaking" and its blanket-rule statements were arbitrary and capricious interpretations of the INA, because they are contrary to precedent and at odds with Congress' intent to make the CFI screening a lower standard.[39] Specifically, the court held that "[a] general rule that effectively bars the claims based on certain categories of persecutors (i.e. domestic abusers or gang members) or claims related to certain kinds of violence is inconsistent with Congress' intent to bring United States refugee law into conformance with the [P]rotocol."[40] The court concluded that, because the Attorney General had interpreted "PSG" in a way that resulted in a general and overbroad rule, he was operating outside of a permissible interpretation of the law. The Attorney General's statement that gang-based violence could rarely, if ever, be cognizable directly conflicted with Congress' intent as well as the BIA's and circuit precedents indicating that the cognizability of a PSG is to be determined case by case.[41]

Further, the court agreed with the plaintiffs that *Matter of A-B-* "impermissibly heightened the standard at the credible fear stage."[42] The provisions of the INA relative to CFI proceedings, in fact, point to Congress' intent that such proceedings be nonadversarial and require only that the applicant show a significant possibility (a one in ten chance) of persecution.[43] That means that a CFI requires only a fraction of what a full asylum screening usually requires. Because Sessions' overbroad statements were "neither adequately explained nor supported by agency precedent," the court concluded that they violated immigration law.[44]

Judge Sullivan then held that the government's interpretation of persecution was inconsistent with the statute.[45] Specifically, the standard imposed — that an applicant show that the government condoned or displayed complete helplessness — is a much more stringent standard than the "unwilling or unable" one and would mean that "no asylum applicant who received assistance from the government, regardless of how ineffective that assistance was, could meet the persecution requirement when the persecutor is a non-government actor."[46] Accordingly, the government's interpretation of the term "persecution" to require that a foreign government condoned the violence or was completely helpless in providing protection to an applicant was erroneous.

As to nexus, the court agreed with the government that its interpretation of the nexus requirement was reasonable.[47] According to the court, the government relied on the "one central reason" standard and merely stated that harm based on purely personal disputes will not satisfy the nexus requirement.[48] The court thus held that the government's interpretation is not inconsistent with the INA. At the same time Judge Sullivan stressed that, "although the nexus standard forecloses cases in which ***purely*** personal disputes are the impetus for the persecution, it does not preclude a positive credible fear determination simply because there is a personal relationship between the persecutor and the victim, so long as the one central reason for the persecution is a protected ground."[49]

The court then addressed whether the government's application of the rule against circularity in the USCIS Policy Memo was in compliance with the Refugee Act. It held that it was not, as "it ensures that women unable to leave their relationship will always be circular."[50] This, Sullivan explained, seemed like a misinterpretation of that rule as well as "faulty assumptions about the analysis in *Matter of A-B-*" with no

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[38] *Id.* at 124.

[39] *Id.* at 125.

[40] *Id.* at 126 (internal quotations omitted).

[41] Matter of M-E-V-G-, 26 I. & N. Dec. 227, 251 (BIA 2014); Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985); *see also* Pirir-Boc v. Holder, 750 F.3d 1077, 1084 (9th Cir. 2014) ("To determine whether a group is a particular social group for the purposes of an asylum claim, the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question."); Serrano-Alberto v. Att'y Gen., 859 F.3d 208, 212 n.2 (3d Cir. 2017) (same); Reyes v. Lynch, 842 F.3d 1125, 1131 (9th Cir. 2016) (same); Paiz-Morales v. Lynch, 795 F.3d 238, 245 (1st Cir. 2015) (same).

[42] 344 F, Supp. 3d at 126.

[43] *Id.* at 127.

[44] *Id.*

[45] *Id.* at 127-28.

[46] *Id.* at 129.

[47] *Id.* at 130-31.

[48] *Id.* at 131.

[49] *Id.*

[50] *Id.* at 133.

reasoned explanation for such a change.[51] Because USCIS's interpretation went "well-beyond" what was expressed in *Matter of A-B-* and had no basis in law, the court found it to be arbitrary, capricious, and contrary to immigration law.

The court further held that neither *Matter of A-B-* nor the Policy Memo directed officers to exercise discretion at credible fear proceedings, but it did find that the Policy Memo impermissibly required applicants to delineate specific PSGs at that stage in a way that is an arbitrary and capricious interpretation of the law.[52] It also held that the Policy Memo's direction to USCIS officers to ignore relevant circuit law and look at only the law of the circuit where the CFI takes place violated *Brand X*,[53] a Supreme Court case that established that where "an agency is not entitled to deference or if the agency's interpretation is unreasonable, a court's prior decision interpreting the same statutory provision controls."[54] Accordingly, the court found USCIS' direction to be arbitrary and capricious and in violation of the statute.[55]

As a result of its findings, the D.C. District Court issued a permanent injunction stopping the implementation of the policies delineated in *Matter of A-B-* and in the USCIS Policy Memo and ordered new interviews for the plaintiffs.[56] In complying with *Grace* USCIS and EOIR thus issued new guidance for CF proceedings. USCIS directed its officers to evaluate each claim on its merits as no general rule for domestic violence and gang-related violence exists, to use the "unable or unwilling" standard and not the "condoned" or "complete helplessness" formulation, to accept that PSGs that include "inability to leave" may be cognizable and not circular and no general rule against them exists. It directed them not to require applicants to delineate or formulate PSGs and not to disregard contrary circuit law and or limit the analysis to circuit law where the applicant is located during the CFI.[57] Similarly, EOIR pointed out to immigration judges conducting credible fear review hearings that they are enjoined from applying certain aspects of *Matter of A-B-* and interpretations by USCIS of that case.[58]

Grace's Application Beyond the Credible Fear Stage

Many of the court's conclusions in *Grace* could be applied to asylum claims more generally. Several portions of the decision, even those geared primarily towards the CFI process, can be persuasive authority for asylum applications in other contexts, thanks to the court's statutory interpretation and reliance on administrative law principles.

Judge Sullivan reiterated extensively how the Refugee Act was enacted in order to bring U.S. law into compliance with international law, and that not only the Protocol, but also the UNHCR Handbook's expansive interpretation of PSGs and of persecution can be relied on to interpret U.S. law in matters of asylum.[59] In fact, "the language in the Act should be read consistently with the United Nations' interpretation of the refugee standards," and "[t]he clear legislative intent to comply with the Protocol and Congress' election to not change or add qualifications to the U.N.'s definition of 'refugee' demonstrates that Congress intended to adopt the U.N.'s interpretation of the word 'refugee.'"[60] The court also stressed that "the Refugee Act was enacted to further the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands [and] it is the policy of the United States to encourage all nations to provide assistance and resettlement opportunities to refugees to the fullest extent possible."[61]

These statements lend strong support for a more expansive view of how asylum applications should be considered, given that international refugee law as applied by UNHCR is, in many respects, more generous than U.S. asylum law.[62] Reminding the government that the Refugee Act was drafted with international standards of protection in mind, therefore, is an

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[51] *Id.*

[52] *Id.* at 134-35.

[53] National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967 (2005).

[54] 344 F. Supp. 3d at 137.

[55] *Id.* at 137-38.

[56] *Id.* at 146.

[57] *See* USCIS Grace v. Whitaker Guidance, *supra* note 1.

[58] *See* EOIR Grace v. Whitaker Guidance, *supra* note 1.

[59] 344 F. Supp. 3d at 123-24.

[60] *Id.* at 124.

[61] *Id.* (internal quotation marks omitted).

[62] *See e.g.*, Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l Law. 1, 25 (1997) ("Even where the international standard is clear and peremptory . . . , embodied in a ratified treaty, and specifically implemented in domestic legislation for the express purpose of fulfilling international obligations, both administrators and courts resist giving international law its full effect").

important success for advancing more progressive asylum and refugee law policies domestically that reflect those standards.

Other courts have rightfully relied on UNHCR guidelines.[63] The recognition that countries are to protect individuals fleeing persecution was an important development in human rights law, and the U.S. committed itself to providing that protection when it signed the Protocol. When the administration enforces policies that so clearly go against the spirit of not only the Refugee Act but also the Protocol and other international human rights commitments, such policies ought to be challenged because there is a strong basis to reject them.

Another important and far-reaching holding in *Grace* is the court's reminder to the government that it cannot prevent entire groups or categories of applicants from presenting colorable claims for asylum. This is true not only at the credible-fear stage, but also during asylum interviews or hearings. No such rule can exist, because it would be contrary to the statute, especially when looked at in light of international standards, which understand PSGs to be construed broadly.[64] Moreover, that PSGs have to be evaluated by adjudicators on a case-by-case basis is a firmly established principle, and *Grace* lends further support for this proposition and should be used to continue to advance PSGs based on domestic-abuse and gang-related violence.[65]

The court's reliance on the UNHCR Handbook is also significant to explain that the term "persecution" is clearly defined and was never meant to require the "condone or show complete helplessness" standard:

> the UNHCR Handbook stated that persecution included "serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer *effective* protection." *See* UNHCR Handbook ¶65 (emphasis added). It was clear at the time that the Act was passed by Congress that the "unwilling or unable" standard did not require a showing that the government "condoned" persecution or was "completely helpless" to prevent it."[66]

Lastly, the court's statements regarding the rule against circularity and the nexus requirement rely on BIA and circuit precedents applicable to asylum requests in general.[67]

Therefore, while this case was only a challenge to credible fear determinations in the expedited removal process, the legal conclusions, if upheld, can support how future courts limit *Matter of A-B-*.

Conclusion

While *Grace* is on appeal, the injunction has not been, and it signifies a big blow to the sweeping statements made by the former Attorney General and USCIS. To be sure, even before *Grace* was decided, it was reported that between June 12, 2018, and November 30, 2018, there were at least twenty-nine grants for domestic violence claims and at least seventeen grants for fear-of-gang claims in asylum offices across the country, and at least forty-one grants of asylum or withholding for domestic violence claims and at least thirty-five grants of asylum or withholding for fear-of-gang claims at the immigration court level, indicating that the view that *Matter of A-B-* does not preclude domestic violence and gang-related claims has strong support among adjudicators everywhere.[68]

Grace thus represents an important tool to push back on the restrictions imposed by the government on asylum applications for victims of nongovernmental persecution. While geared towards credible fear interviews and hearings, the decision's language lends itself

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[63] See, e.g., the seminal Supreme Court opinion in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (the UNHCR Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform [and] has been widely considered useful in giving content to the obligations that the protocol establishes.").

[64] *Grace*, 344 F. Supp. 3d at 126 ("Credible fear determinations, like requests for asylum in general, must be resolved based on the particular facts and circumstances of each case.").

[65] See the cases cited *supra* note 41.

[66] 344 F. Supp. 3d at 128.

[67] *Id.* at 131, 133 ("courts have routinely found the nexus requirement satisfied when a personal relationship exists—including cases in which persecutors had a close relationship with the victim," and "there cannot be a general rule when it comes to determining whether a group is distinct because 'it is possible that under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society.'") (citing *Matter of M-E-V-G-*, 26 I. & N. Dec. at 242).

[68] American Immigration Lawyers Association, Matter of A-B-*: Case Updates, Current Trends, and Suggested Strategies*, AILA Doc. 19020731 (Feb. 2, 2019), *available at* https://www.aila.org/infonet/matter-of-a-b-case-updates-current-trends, https://perma.cc/K2TK-F5RP.

to being used at all levels of asylum proceedings more generally. Between its strong reliance on international standards and its reiteration that no blanket rule can be established to prevent applications involving privately sponsored violence from being granted, *Grace* will be a powerful instrument for advocates to advance their clients' cases and for adjudicators to address them fairly. Of equal importance is the decision's signal to the current administration that the government may not deviate from long-standing precedents and the existing law without facing the courts' exacting scrutiny. No matter how badly the administration wants to curtail protections for noncitizens on all fronts, there are laws in place and a judicial system that will not tolerate arbitrary and unsupported applications of unfair policies against vulnerable groups.

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Elisa Vari received her J.D. in 2019 from the University of California, Hastings College of the Law. She has a B.A. cum laude in international affairs from John Cabot University (2015). She was Operations Editor of the *Hastings International and Comparative Law Review*. Ms. Vari developed her interest in refugee issues during college, when she taught Italian and English to political refugees and later interned at Rights in Exile, connecting asylum seekers to legal aid providers in Oxford, UK. During law school, she focused her studies on immigration and refugee law and interned for the Immigrant Legal Resource Center, the National Immigration Forum, and the UN High Commissioner for Refugees. She also was an immigration law clerk at Van der Hout LLP and Squire Patton Boggs and a Research Assistant at the UC Hastings' Center for Gender and Refugee Studies.

Richard A. Boswell is a Professor of Law & Director of the Immigrant Rights Clinic, UC Hastings College of the Law and the author of *Essentials of Immigration Law*, *Immigration & Nationality Law: Cases & Materials* (5th Ed. 2018) and co-author with Karen Musalo, Jennifer Moore & Annie Daher of *Refugee Law & Policy: A Comparative & International Approach* (5th Ed. 2018).