ImmigrationProf Blog: Guest Post: The "Complete Helplessness" of Matter of A-B- And One More Last Ditch Effort to Torpedo Asylum by Geoffrey A. Hoffman *

By Immigration Prof

The "Complete Helplessness" of *Matter of A-B-* And One More Last Ditch Effort to Torpedo Asylum by Geoffrey A. Hoffman *

The latest decision from Acting Attorney General Rosen in **Matter of A-B-, 28 I&N Dec. 199 (A.G. 2021)** evidences, in many ways, what has been wrong about asylum adjudication under the current outgoing administration. I want to focus here on one specific strand of that wrongness: the "complete helplessness" standard as an interpretation of the "unable or unwilling to return" component of the definition of refugee as defined under the Immigration and Nationality Act, specifically INA section 101(a)(42); 8 USC s. 1101 (a)(42). The requirement that an applicant for asylum prove that they are "completely helpless" in the face of governmental inaction in their home country has never been the rule. It is derived from *dicta* in one Seventh Circuit decision, as the AG concedes, and ignores the plain language of the statute itself, as well as the attendant regulations. *See Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000). That the Attorney General felt the need to trot out another *Matter A-B-* decision to bolster an already bad interpretation should give us pause. In fact, the mere existence of this decision demands our further thought and consideration.

What is the AG actually *doing* in this new 2021 version of *Matter of A-B-*? Taking a step back, after a close reading of the decision one possible conclusion is that AG, far from adjudicating any new issues or resolving any new dispute, is merely providing an advisory opinion attempting to justify its own strained interpretation of the INA with a list of circuit court decisions. The AG is not persuaded by the multiple decisions where *A-B-* was actually struck down, criticized, or limited. Interestingly, there is no mention for example of *Grace v. Whitaker,* where the U.S. District Court for the District of Columbia enjoined the application of *A-B-* as to credible fear interviews and held that *Matter of A-B-* may not be applied by USCIS, for example. This raises serious questions about its continued efficacy and legitimacy before the immigration courts, although they were not parties in *Grace v. Whitaker* and therefore *EOIR* was not bound. The appellate decision, Grace v. Barr, at the D.C. Circuit is mentioned, but not Grace v. Whitaker. The decision from

the Sixth Circuit in *Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020) is listed as a "cf." but there is no mention that Sixth Circuit held that A-B- was *abrogated*. Nor does the AG consider that the Ninth Circuit in *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1078–87 (9th Cir. 2020) granted the petition for review andheld that despite *A-B-* there still is required a case-by-case consideration of all aspects of social group claims, including domestic violence, among other related gender-related claims.

Consider for a moment the reality of a "complete helplessness" standard and what kind of unfair burden that would impose on litigants. I am reminded of what they tell you when studying for a bar exam (or any multiple choice test for that matter). They say, be very skeptical of answers that have "ALL" or "NONE" responses. Those, as we know in the law, are usually not the right answer. That someone has to prove that in order to meet the "unable or unwilling to return" to their country of origin that they are "completely" helpless smacks of that same kind of totalizing nonsense you see on multiple choice exams and against which competent attorneys are taught to be cautious. The AG apparently would be very happy to see a rule which requires all litigants to prove they are completely and utterly helpless, the police are totally inept, and the country is without police protection at all. One has to wonder if the AG desires such a rule because such a situation can rarely if ever be proven. What country, even the most lawless, would characterize itself in such terms? What country report, even the most critical, would not concede that there is at least the appearance of a police function, governmental accountability, the semblance of police protection? Is not the very point of domestic violence claims that the police do investigate but their investigation is cursory, illusory and dismissive of the violated and protective of the violator? By making the bar so high and unreasonable, the latest decision in *A-B-* clearly is just more political theatre, a justification designed to insulate the poorly reasoned (past) *A-B's* from censure and reversal. The decision is designed to torpedo and obfuscate -- not adjudicate and elucidate.

A final further troubling aspect of the AG's new *A-B-* decision should be noted. The AG gratuitously includes at the end of the new *A-B* decision a discussion of *Matter of L-E-A-*, including further justifications for *L-E-A-'s* validity related to nuclear family particular social groups and nexus. The AG, completely, unilaterally and without relation to the case at hand, argues *against* the Fourth Circuit's interpretation of nexus in "mixed motive" cases. The AG goes out of his way to ensure we are reminded that the two-pronged test articulated in *Matter of L-E-A-*, 27 I&N Dec. 40, 43–44 (BIA 2017), is the "proper approach" for determining whether a protected ground is "at least one central reason" for an asylum applicant's persecution.

On the last page, in an attempted rebuke of the circuit courts, the AG says, "[a]s explained above, I understand that existing case law in certain circuits may conflict with my conclusions that (1) *Matter of A-B-* reiterated and did not change the legal standard for determining when "persecution" by third parties may be attributed to the government; and (2) more than but-for causation is required to show that the alien's protected characteristic is "at least one central reason" for the persecution. In my view, however, *those decisions were made without the benefit of clear and controlling interpretations of the statutory "unable or unwilling," "persecution," and "one central reason" requirements*." *See Matter of A-B-* (AG 2021) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)). As we have discussed in a recent law review article,[1] the AG in expressing apparent disagreement with circuit court precedent is attempting to stake a claim

against what he sees as recalcitrant and disagreeable circuit court decisions. Such an encroaching practice from the AG as the leader of an executive branch agency is dangerous and may violate separation of powers.

* **Geoffrey A. Hoffman** is a clinical professor and director of the University of Houston Law Center Immigration Clinic. Institution for identification only.

KJ

https://lawprofessors.typepad.com/immigration/2021/01/guest-post-the-complete-helplessness-of-matter-of-a-b-and-one-more-last-ditch-effort-to-torpedo-asyl.html