PennState Law Center for Immigrants' Rights Clinic

Case Summary: *Grace v. Whitaker*

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What is the judicial and policy background for this decision?

On June 11, 2018, then–Attorney General Jeff Sessions overruled *Matter of A-R-C-G-*, a landmark case in asylum law for survivors of domestic violence, in a decision called *Matter of A-B-*. In his decision, Sessions stated, "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." 27 I. & N. Dec. 316, 320 (A.G. 2018). Later, on July 11, 2018, United States Citizenship and Immigration Services ("USCIS") issued a policy memorandum of guidance in light of *Matter of A-B-*. USCIS, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* ("policy memorandum"). In that policy memorandum, the USCIS reiterated that "[i]n general . . . claims based on membership in a putative 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, refugee status, or a credible or reasonable fear of persecution." *Id.*

What is the procedural background for this new decision?

On December 19, 2018, in *Grace v. Whitaker*, Judge Emmet G. Sullivan of the United States District Court for the District of Columbia granted relief in the form of a permanent injunction to twelve (12) plaintiffs, non-citizen adults and children who were given negative credible fear determinations during the expedited removal process due to *Matter of A-B-* and the ensuing policy memorandum. The plaintiffs sought review of these negative findings, but the immigration judges affirmed the asylum officers' determinations.

What did the Court decide?

The District Court for the District of Columbia is unique in that under INA § 242(e)(3)(A) it is the only U.S. court with the jurisdiction to review "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*, No. 18-cv-01853 at 11 (D.D.C. Dec. 19, 2018). Judge Sullivan's decision was largely devoted to two issues: (1) the plaintiffs' motion to consider evidence outside the existing record and (2) the motion for summary judgment. Regarding the record, the Court decided that it "will consider extra-record evidence only to the extent it is relevant to plaintiff's contentions that the government deviated from prior policies without explanation or to their request for injunctive relief." *Id.* at 27.

Next, Judge Sullivan analyzed whether the Court could consider the case at all. INA § 242(e)(3) grants the District Court for the District of Columbia exclusive jurisdiction to hear "systemic challenges" to expedited removal. *Id.* at 28–29. Despite the government's arguments to the contrary, Judge Sullivan concluded that INA § 242(a)(2)(A) does not shield judicial review and that INA § 242(e)(3) "affirmatively grants jurisdiction." The court based this conclusion on an analysis of the Attorney General's role in the credible fear process and general principles that favor judicial review and the interpretation of statutory ambiguities in favor of the noncitizen, among other factors. *Id.* At 32-35.

The court found that both *Matter of A-B-* and the policy memorandum fall within INA § 242(e)(3)'s grant of jurisdiction. *Id.* at 37.

Judge Sullivan held that the "plaintiffs have standing to challenge the [p]olicy [m]emorandum" because "they have demonstrated that they have: (1) suffered an injury; (2) the injury is fairly traceable to the credible fear policies; and (3) action by the Court can redress their injuries[.]" *Id.* at 41.

Judge Sullivan then turned to the plaintiffs' statutory and APA claims. According to 5 U.S.C. § 706(2)(a), an agency must not act in a way that is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Id.* at 42. Additionally, the Court needed to determine the extent to which it would defer to the government's interpretation of the statutes referenced in *Matter of A-B-*. Under *Chevron,* the Court must ask (1) whether Congress has clearly expressed its intent regarding the question at hand and, if not, (2) whether the agency's interpretation of the statute in question violates the agency's "'statutory authority.'" *Id.* at 43–45. While the Court noted that the policy memorandum was "not subject to *Chevron* deference[,]" *Id.* at 48, n.11, the Court held that *Matter of A-B-* is subject to *Chevron* because it is an agency's interpretation of the INA.

The court held "that Congress has not 'spoken directly' on the question of whether victims of domestic or gang-related persecution fall into the particular social group category." *Id.* at 52. The court held that *Matter of A-B-* "create[d] a general rule against [domestic and/or gang violence] claims at the credible fear stage" and that the rule was "not a permissible interpretation of the statute." *Id.* at 56. Additionally, the general rule "impermissibly heighten[ed] the standard at the credible fear stage[,]" rendering the rule arbitrary and capricious.

On the "unable and unwilling" standard, Judge Sullivan also held that requiring a government to condone or to be completely helpless to prevent persecution by non-government actors violated the INA and the APA because the "unwilling or unable" standard for persecution "was settled at the time the Refugee Act was codified[.]" as *Id.* at 59, 66.

On nexus, the court found the government's interpretation of nexus to be reasonable, noting "although the nexus standard forecloses cases in which *purely* personal disputes are the impetus for 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." *Id.* at 68–69.

Judge Sullivan held that the policy memorandum's articulation of the circularity standard—that is, the requirement that a particular social group not be defined exclusively by the harm its members suffer—was "arbitrary, capricious, and contrary to immigration law" because it (1) categorically barred women unable to leave their relationship from asylum and (2) exceeded the circularity standard recognized by *Matter of A-B-*. *Id.* at 69–75.

The court also held that *Matter of A-B-* and the policy memorandum did not impose a new requirement on asylum officers to exercise discretion at the credible fear stage, but the court found that the policy memorandum arbitrarily and capriciously required asylum-seekers to present evidence delineating their proposed particular social groups at the credible fear stage, in clear contradiction of the INA. *Id.* at 75-79.

Further, Judge Sullivan found that the policy memorandum's instruction to asylum officers to ignore circuit law contrary to *Matter of A-B-* violated *Brand X,* a case in which the Supreme Court held that

an agency's interpretation may contravene "a prior court's interpretation" of a given provision so long as (1) "the agency is entitled to *Chevron* deference" and (2) "the agency's interpretation is reasonable." *Id.* at 82. If *Chevron* does not apply, "or if the agency's interpretation is unreasonable," then the court's interpretation "controls." *Id.* at 82–83. Said Judge Sullivan, "a directive to ignore circuit precedent when doing so would violate the principles of *Brand X* itself is clearly unlawful." Ultimately, the court held that because the policy memorandum asks asylum officers to ignore contrary circuit law and look only at the circuit law where the credible fear interview take place, the requirement was arbitrary and capricious and contrary to law. *Id.* at 89–92.

Finally, the Court addressed the appropriate methods of relief for the plaintiffs. The Court concluded that the action brought by the plaintiffs is not subject to the limits of INA § 242(e)(1)(a) because it is an authorized systemic challenge under INA § 242(e)(3). The Court also held that INA § 242(f), which bars injunctive relief, does not apply because the plaintiffs are not challenging the INA, but rather the government's violations of the INA. Thus, the Court may grant injunctive relief and may, by finding the credible fear policies unlawful, prevent the U.S. Department of Homeland Security ("DHS") from following these policies in other cases.

Furthermore, the Court held that it has the authority to order that the non-citizen plaintiffs who have already been removed be returned to the United States, stating that "[a] Court Order solely enjoining these policies is meaningless for the removed plaintiffs who are unable to attend the subsequent interviews to which they are entitled." *Id.* at 101–04. The Court finally held that the plaintiffs satisfy the four-factor test from *eBay Inc. v. MercExchange, L.L.C.* on whether permanent injunctive relief is appropriate: (1) the plaintiffs have suffered "irreparable harm"; (2) injunction alone is the "adequate remedy"; (3) "the balance of hardships weighs in favor of plaintiffs"; and (4) the government's compliance with existing laws is in the public interest. *Id.* at 104–06. Thus, a permanent injunction is the appropriate form of relief in this case.

What happens next?

As discussed above, the Court has granted the plaintiffs' motion for a permanent injunction and may order that the non-citizen plaintiffs who have already been removed reenter the United States to continue their asylum claims.

The Center for Gender & Refugee Studies and the American Civil Liberties Union, which are serving as co-counsel for the plaintiffs along with ACLU of Texas and ACLU of D.C., have issued a joint statement celebrating the plaintiffs' success. However, according to Fox News, a spokesperson for the Department of Justice claims that the Justice Department is "'reviewing [its] options with regard to this ruling[.]'"

The goal of this document is to provide general information and is not meant to act as a substitute to legal advice from an attorney.