

Remarks of Professor Karen Musalo – Safe Third Country Agreement Briefing
September 1, 2020

Good afternoon Congressman Castro, and my co-panelists. I am grateful for the opportunity to participate in this briefing. I will be speaking about U.S. asylum policies towards women and girls fleeing gender-based violence, and how the Trump administration has all but eliminated the promise of protection.

The extreme position taken by this administration is best understood when put in a broader context and I will attempt to do that.

As you know, a refugee is defined as an individual with a well-founded fear of persecution on account of race, religion, nationality, political opinion or membership in a particular social group. Gender is not one of those five grounds.

But as early as the 1980s, the UNHCR, which is a source of guidance on the interpretation of our domestic refugee obligations, began issuing guidance that women persecuted because of gender could meet the refugee definition, and it encouraged countries to issue guidelines for their decisionmakers.

Canada was the first to do so in 1993, and the U.S., during the administration of Bill Clinton, was the second issuing “Gender Considerations” in 1995. This was a step in the right direction but was limited in that these Considerations were not binding.

In 1996 the U.S. took a big step forward when the Board of Immigration Appeals, the highest immigration tribunal, issued a precedent decision in *Matter of Kasinga*, granting protection to a woman from Togo who was fleeing female genital cutting and forced marriage.

In 1996, relying on the precedent of *Matter of Kasinga*, an immigration judge granted asylum to Rody Alvarado, a Guatemala woman, who – over the course of a ten year marriage – had been battered into unconsciousness, threatened with machetes, raped, kicked in the stomach while pregnant – never to have the authorities respond.

The BIA, which three years earlier had issued a decision granting protection in the *Kasinga* case, reversed the grant of asylum to Rody Alvarado.

Rody Alvarado’s case got caught up in a complicated procedural path, and in 2003, during the administration of George W. Bush, then Attorney General Ashcroft took jurisdiction over it and requested briefing. Attorneys at the highest level of the Department of Homeland Security – and remember this is during the Bush administration – filed a brief for Ashcroft’s consideration which unequivocally stated that Rody Alvarado met the refugee definition and should be granted asylum.

Ms. Alvarado was ultimately granted protection – but it was in an unpublished decision – so although her case represented the recognition that cases of gender persecution – such as domestic violence – should be granted – we did not yet have a published binding decision establishing precedent.

That finally came in 2014 – in the case known as *Matter of A-R-C-G-*. The Guatemalan asylum seeker in *A-R-C-G-* had suffered egregious abuse over a ten-year period at the hands of her spouse. Her husband beat and kicked her, including an incident where he punched her in the stomach when she was eight months pregnant with such force that the baby was born premature and with bruises. She called the police on numerous occasions and they failed to respond. The BIA – to its credit – ruled that claims involving domestic violence in situations where the government fails to protect are valid under U.S. law.

What I have described – from the 1996 grant of asylum in the FGC case of *Kasinga*, to the 2014 published decision in *A-R-C-G-* – is the steady progression in U.S. law to the recognition that women who suffer gender persecution meet the refugee definition.

It is this fundamental principle that the Trump administration has attempted to wipe out, using the case of a Salvadoran woman, Ms. A.B. who was brutally abused by her husband. Ms. A.B. appeared before Stuart Couch, an immigration judge in Charlotte who has an asylum denial rate over 90%. He denied asylum to Ms. A.B. I should note that he has now been appointed to the BIA where he will have even more power.

However, he wasn't on the BIA when it considered his denial, and the BIA reversed Couch, citing its 2014 precedent in *A-R-C-G-*. The BIA sent the case back to Couch with clear instructions to grant asylum. He refused to do so, and there are indications that he may have improperly reached out to bring this case to the attention of then A.G. Sessions, who certified the case to himself and in June of 2018 issued a decision not only reversing the grant of protection to Ms. A.B. but reaching back to 2014 to vacate *Matter of A-R-C-G-*.

The decision issued by Sessions is full of broad sweeping statements intended to convey to decision-makers that women fleeing gender violence do not qualify for asylum, and should not even pass credible fear screenings and be permitted to apply for protection.

Although legal challenges in the federal courts have limited to some degree the reach of the *A-B-* decision, in June 2020 the Trump administration proposed regulations that – if finalized – would unequivocally foreclose protection for women fleeing gender persecution. These proposed regs touch upon every aspect of asylum law, and attempt to rewrite the Refugee Act and 40 years of case law interpreting it – with the objective of making it impossible not only for women – but for anyone fleeing persecution and torture – from obtaining protection.

The future of asylum in the United States rests entirely on resistance to these policies. I am grateful to our colleagues in Canada for holding their own government to account, and I thank you, Representative Castro, for your leadership in co-sponsoring the Refugee Protection Act

and in speaking out for the rights of asylum seekers. I hope we can all work together to restore protection and ensure that our refugee system is consistent with our ideals and international obligations.