IADC COMMITTEE NEWSLETTER

SOCIAL JUSTICE PRO BONO

October 2018

IN THIS ISSUE

"Matter of A-B" is an Attorney General opinion that purports to make sweeping changes to the definitions of statutory provisions in the Immigration and Naturalization Act ("INA"). However, much, if not most of the opinion is dicta with no precedential value. Additionally, because the United States Supreme Court has eliminated "Chevron deference" in Immigration Law, the Courts of Appeal, not the Attorney General, are the final arbiters on the interpretation of the INA.

Matter of A-B: Tectonic Shift in Immigration Law or Mere Dicta?

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Matter of A-B 27 I &N 316 (A.G. 2018) (hereinafter "A-B") is an opinion issued by the United States Attorney General, Jefferson B. Sessions on June 11, 2018. The opinion is the result of Attorney General Sessions' self-referral of the Board of Immigration Appeals' ("BIA") December 6, 2016 opinion reversing the Immigration Judge's determination that the Respondent – A-B – was not entitled to asylum. The Attorney General's opinion reversed the BIA opinion and ordered that the case be remanded to the Immigration Judge for further proceedings.[1]

A-B is replete with sweeping and prospective statements about immigration law. For example:

- "**Generally**, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors **will not qualify for asylum**." A-B at p. 320(emphasis added).
- "**Few such claims would satisfy** the legal standard to determine if an alien has a credible fear of such persecution." Id. at fn. 1(emphasis added);
- "While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice, **such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address**." Id. at p. 320(emphasis added).
- Social groups defined by their vulnerability to private criminal activity **likely lack** the particularity required under M-E-V-G [M-E-V-G 26 I& N Dec. 227 (BIA 2014)] given that broad swaths of society may be susceptible to victimization". Id. at 335 (emphasis added)

But, as discussed below, these sweeping statements are mostly pure dicta because A-B did not involve gang violence or "broad swaths of society[that] may be susceptible to victimization". Instead, A-B was a domestic violence case where the Respondent – consistent with well-established precedent– sought asylum because she was trapped in a hyper-violent relationship with her ex-husband, the father of her three children.

Additionally, A-B invokes "Chevron deference[2]" throughout the opinion and takes the position "The Supreme Court has also made clear that administrative agencies are not bound by prior judicial interpretations of ambiguous statutory interpretations, because there is a presumption that Congress, when it left ambiguity in a statute, meant for implementation by an agency, understood that the ambiguity would be resolved, first

[1] Notably, the Attorney General's Opinion expressly limits itself to Respondent's asylum claims under 8 U.S.C. §§1101(a)(42)(A), 1158(b)(1)(a) and (b)(i). See A-B at fn. 4.

[2] Chevron U.S.A. Inc. v. Natural Res. Def. Council 467 U.S. 837 (1984).

and foremost by the agency." Id. at 327, citing Chevron U.S.A. Inc. v. Natural Res. Def. Council 467 U.S. 837 (1984). However, A-B ignores the specific holding of Pereira v. Sessions, 138 S. Ct. 2105 (2018) which explicitly stated that "Chevron deference" does not apply to interpretation of the Immigration and Naturalization Act.

In sum, as further discussed below, A-B is not a tectonic shift in immigration law as some claim. The opinion is limited to the narrow issue it addressed. Further, the opinion is entitled to no deference from courts –either Immigration Courts or Courts of Appeal.

A. Facts of A-B Do Not Apply To Most Cases

A-B was a domestic violence case involving a woman who sought asylum because her ex-husband, with whom she shares three children, repeatedly abused her physically, emotionally and sexually during and after their marriage". Id. at 321. The Attorney General referred A-B to himself for purposes of re-examining the particular social group identified in that case – "Salvadoran women unable to leave [their] relationship". Id. That particular social group derived from Matter of A.R.C.G. 26 I&N Dec. 338. Matter of A.R.C.G. identified a particular social group of married women in Guatemala who are unable to leave their relationship. A-B. 27 I&N at 321.

The Attorney General overruled Matter of A.R.C.G. and concluded that the BIA had improperly recognized the particular social group in A-B. The Attorney General remanded the case to the Immigration Judge for further proceedings. Id. at 346.

The case does not involve any issue of gang violence, the primary basis for asylum applications made by Central Americans. Those cases typically involve family members threatened with death and the death of their children by criminal gangs – (typically Barrio 18 or MS 13) -- who operate as quasi-governmental entities. Consequently, the holding in A-B is not germane to most Central American asylum cases.

B. The Discussion of Topics, Other Than Domestic Violence, in A-B are Pure Dicta

Throughout history, the United States Supreme Court has consistently held that dicta does not govern:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. **If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.** The reason of this maxim is obvious. **The question actually before the Court is investigated with care,** and considered in its full extent. Other principles which may serve to illustrate it, are in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (emphasis added)

Dicta in an opinion is a form of advisory opinion and advisory opinions are not constitutional.

> "**advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court** with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests, **we have consistently refused to give**."

United States v. Fruehauf, 365 U.S. 146, 157, 81 S. Ct. 547, 554 (1961)(emphasis added) citing Parker. Los Angeles County, 338 U.S. 327 (1949); Rescue Army v. Municipal Court, 331 U.S. 549 (1947); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945); Arizona v. California, 283 U.S. 423 (1931).

The Fourth Circuit, for example, rejects dicta as a source of any authority:

> Therefore, to reject the so-called "*McKinney* rule," [related to federal removal] we must conclude that either (1) *McKinney* is non-binding precedent, or (2) subsequent holdings of the Supreme Court counsel a different result. **We find that, because it was dictum, the "rule" expressed in *McKinney* is not binding on this panel.**

Barbour v. Int'l Union, 594 F.3d 315, 321 (4th Cir. 2010) (emphasis added) citing United States v. Pasquantino, 336 F.3d 321, 329 (4th Cir. 2003)(*en banc*) ("The first significant problem is that the statements [the defendants] rely upon . . . are pure and simple dicta, and, therefore, cannot serve as a source of binding authority in American jurisprudence."); *see, e.g.,* Alexander v. Sandoval, 532 U.S. 275, 282, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) ("[T]his Court is bound by holdings, not language."); Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."); Estate of Love v. Comm'r, 923 F.2d 335, 337 (4th Cir. 1991) (ruling on issue despite dicta in prior case)

Dictum includes "any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion." Black's Law Dictionary 454 (6th ed. 1990). Courts are empowered to resolve cases and controversies. To the extent they depart from that mandate and offer opinions in the form of dicta, courts exceed their authority; thereby weakening the Rule of Law.

In A-B the Attorney General pays lip service to the limits of the opinion, (See e.g. footnote 8). Nevertheless, whole sections of the opinion

suggest ways to resolve future cases involving other fact patterns, (like the more typical asylum application based on persecution by quasi-governmental gangs). Those sections of A-B are pure dicta.

To summarize, the courts of this nation have long recognized that dicta is unnecessary ornament in a judicially resolved dispute. To give dicta the power of *stare decisis* is to depart from the Case or Controversy doctrine[3] and undermines the Rule of Law.

C. The Attorney General's Interpretation of Immigration Law Is Not Entitled to Deference

The Attorney General's interpretation of immigration law, --under 8 U.S.C. §§1101(a)(42)(A), 1158(b)(1)(a) and (b)(i) or other statutory provisions --, to the extent it conflicts with opinions issued by the federal Courts of Appeal, is entitled to no deference because "Chevron deference"[4] no longer applies to immigration law.

The **proper rules for interpreting statutes** and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and t**he function and province of the Judiciary.**

Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J. concurring) (quotations omitted)(emphasis added)

Pereira involved the interpretation of the immigration statutes as they related to Notices to Appear. The BIA upended a consensus that had developed in the Circuit Courts concerning the application of the stop-time rule. Id. at 2120.

The United States Supreme Court was critical of the BIA's illogical interpretation of the statute and equally critical of the slavish adoption of the BIA's interpretation by Circuit Courts:

> In according Chevron deference to the BIA's interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned, and whether the BIA's interpretation was reasonable.. In , Urbina v. Holder, [745 F.3d 736 (4th Cir. 2014)] for example, the court stated, without any further elaboration, that "we agree with the BIA that the relevant statutory provision is ambiguous." It then deemed reasonable the BIA's interpretation of the statute, "for the reasons the BIA gave in that case." . . .

[3] U.S. Const. Art. III. § 2, clause 1.

[4] "Chevron deference" is a doctrine that originated in Chevron U.S.A. Inc. v. Natural Res. Def. Council 467 U.S. 837 (1984) and holds that the administering executive branch agency of federal statute is entitled to deference in interpreting ambiguous provisions of that statute. See A-B, p. 326- 327. A-B extensively cited "Chevron deference" for its interpretation of the critical elements of asylum law, including the phrases " membership in a particular social group"; "particularity"; and "[persecution] on account of" See A-B pp 327 – 330.

> **This analysis suggests an abdication of the Judiciary's proper role in interpreting federal statutes. . . .**
>
> **The type of reflexive deference exhibited in some of these cases is troubling.** And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. . . . **The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary**.

Pereira v. Sessions, 138 S. Ct. 2105, 2120-21 (2018)(emphasis added)(internal citations omitted)

Pereira established that the interpretation of immigration law is determined by the judiciary, not the executive branch. To the extent those two branches conflict, the judicial interpretation wins out.

In sum, to the extent that A-B attempts to reach beyond its narrow holding related to domestic violence against Salvadoran woman unable to leave their former partners, the case is pure dicta. To the extent the holding or the dicta conflict with Article III precedent, the Article III precedent prevails.

Conclusion

A-B offers thoughts on general topics including persecution by quasi-governmental gangs. Such thoughts are pure dicta. Those thoughts are not only non-binding. To the extent the thoughts encompassed by the opinion's (voluminous) dicta are adopted as precedent, such adoption would be unconstitutional and a violation of the basic tenets of the Rule of Law. Finally, to the extent that A-B offers the current administration's views on immigration law, it is entitled to no deference because the United States Supreme Court has abolished Chevron deference as it relates to immigration law.

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