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To:	The Advocates for Human Rights
From:	George Ashenmacher and Christopher Svendsen
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Re:	Matters of A-B I, II, III
	Our File No. 910023.0096

Issue

The Attorney General recently overturned Matters of AB I and II. In those decisions, the prior AG's had said a Respondent must prove that the government "condones or is completely helpless" ("CCH") with respect to the Respondent's persecution. The Advocates' position is that the correct legal standard is "unable or unwilling" (UOU). The AG's new decision, Matter of AB III, reverts to the UOU standard. Unfortunately, the Eighth Circuit has published decisions using the improper CCH standard. The Advocates have requested a memo [1] highlighting those decisions, and [2] setting forth an argument as to why Matter of AB III controls and should supersede the Eighth Circuit decisions.

Executive Summary

The Eighth Circuit has utilized the CCH standard more than any other circuit. Part I of this memo describes the most significant of these cases.

Part II explains that the Eighth Circuit should follow the UOU standard because binding precedent compels the Court to do so. In *Golloso v. Barr* the court stated that UOU is the correct standard. 954 F.3d at 1192. The Eighth Circuit should also follow the UOU standard because that court has long shown deference to the AG's reasonable interpretations of immigration statutes.

Analysis

I. Eighth Circuit Case Law

The Eighth Circuit has cited the CCH standard in over a dozen cases since 2005—more than any other circuit. Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 Colum. Hum. Rights L. Rev. 441, 509 (2021). In all but one of these cases the trial court ultimately denied the petition for review, and thus the claim for asylum. This section outlines the contours of this line of jurisprudence and illustrates the language the court employs when applying this standard.

A. *Menjivar v. Gonzales,* 416 F.3d 918 (8th Cir. 2005)

The Eighth Circuit's use of the "condone or completely helpless" ("CCH") standard pre-dates the Attorney General opinion issued in *Matter of A-B* by many years. 27 I. & N. Dec. 316 (U.S.Atty.Gen. 2018) [hereinafter "*A-B I*"]. The Eighth Circuit first cited the CCH standard in *Menjivar v. Gonzales*, when it borrowed the language of the Seventh Circuit from *Galina v. INS*, the ultimate origin of the CCH wording. *Menjivar,* 416 F.3d 918, 921 (8th Cir. 2005).[1]

Describing the standard Menjivar needed to meet to show actionable persecution, the Court wrote that an asylum claim "fails where none of the incidents of abuse 'occurred with the imprimatur' of government officials." *Id.* at

[1] In *Galina*, the Seventh Circuit stated that "a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, condoned it or at least demonstrated a complete helplessness to protect the victims." 213 F.3d 955, 958 (7th Cir. 2000) (emphasis added). As commentators note, however, the Seventh Circuit seemingly pulled this standard from thin air. Ellison & Gupta, at 481. No cases cited for the standard contain that language. Moreover, the court did not offer a reason for its choice to use those words.

921 (quoting *Valioukevitch v. I.N.S.*, 251 F.3d 747 (8th Cir. 2001)). The Court further drew a distinction between a government unable or unwilling to control criminal activity and one completely helpless to do so. *Id.* ("The fact that police take no action on a particular report does not necessarily mean that the government is unwilling or unable to control criminal activity, because there may be a reasonable basis for inaction."). Finally, the court seemingly recognized that adding the CCH standard modified the unable or unwilling standard. *Id.* ("Whether a government is 'unable or unwilling to control' private actors *under these refined definitions of persecution* is a factual question that must be resolved based on the record in each case.") (emphasis added).

B. *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008)

In contrast to *Menjivar*, in *Ngengwe v. Mukasey* the Eighth Circuit overturned the administrative courts' denial of the petitioner's asylum application, granting asylum on the petition for review. 543 F.3d 1029 (8th Cir. 2008). This is the only case in which the Eighth Circuit granted a petition of asylum using the CCH standard. *See* Ellison & Gupta, at 510.

In her home country of Cameroon, petitioner Elizabeth Simeni Ngengwe faced threats to her life, ritualistic beating, and kidnapping of her children because she was a widowed woman. After escaping to Canada, Ngengwe arrived in the United States and applied for asylum. The Immigration Judge denied her application for several reasons, including that "the government was not complicit in persecuting her." *Id.* at 1032. The court directly quoted the standard from *Menjivar* as the standard for actionable persecution. Unlike in *Menjivar*, however, the Court held that Ngengwe's situation established actionable persecution. *Id.* at 1036 ("Given the evidence in the record that the Cameroonian government would not protect Ngengwe from her in-laws, this court finds no substantial evidence to uphold the IJ's and BIA's decision.").

Commentators note that, despite citing the CCH standard, the facts may actually have supported only the UOU standard. Ellison & Gupta, at 510. This conclusion is further supported by a citation to *Ngengwe* in *Galloso v. Barr*. 954 F.3d at 1192–93 ("[Petitioner] must provide some evidence to show the Mexican government would be *unable or unwilling* to help her") (citing *Ngengwe*) (emphasis added).

C. *Galloso v. Barr*, 954 F.3d 1189 (8th Cir. 2020)

In *Galloso v. Barr* the Eighth Circuit directly addressed the conflict between the UOU and CCH standards. 954 F.3d 1189 (8th Cir. 2020). This case was decided after *A-B I* but before *A-B II* or *III*. In *Galloso* the court announced that the standard which should be applied to asylum cases is the UOU standard. *Id*. at 1192 ("To the extent that the condone-or-completely-helpless standard conflicts with the unable-or-unwilling standard, the latter standard controls."). The court based this reasoning on the rule in the circuit that between two conflicting panel opinions, the earlier opinion is controlling. *Id*. ("[W]hen faced with conflicting panel opinions, the earliest opinion must be followed as it should have controlled the subsequent panels that created the conflict.") *(*citing *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc)).

As discussed above, the CCH standard was introduced in 2005. The UOU standard, however, has been employed by the Eighth Circuit since at least 1998. *Miranda v. United States INS*, 139 F.3d 624, 627 (8th Cir. 1998). Therefore, the UOU standard is the earliest and controlling standard.

In *Galloso* the court went on to apply the UOU standard, ultimately denying the petition because petitioner could not establish that the Mexican government was unwilling or unable to protect her. The court cited the lack of evidence beyond country reports, which were too general in nature. *Id*. at 1193. Furthermore, the court pointed to petitioner's failure to alert the police to past

persecution she experienced in Mexico as a reason she could not now show the government was unable or unwilling to protect her. *Id*. The court did not mention the CCH standard again after it dismissed it as inferior to the UOU standard.

D. *Ahmed v. Garland*, 993 F.3d 1029 (8th Cir. 2021)

Ahmed is the first published, post-*Galloso* opinion applying either standard. 993 F.3d 1029 (8th Cir. 2021). *Ahmed* was announced before *Matter of A-B- III*. Yet, while in *Galloso* the court seemed to sweep away the CCH standard, in *Ahmed* the CCH standard made an encore appearance. *Id*. at 1034 ("Al-Shabaab is a private actor, so asylum under these circumstances is available only when the government condones the group's conduct or is otherwise completely helpless to stop it.") (citing *Saldana v. Lynch*, 820 F.3d 970, 977 (8th Cir. 2016)).

That said, *Ahmed* can be distinguished. First, in the preceding paragraph, the court explicitly references UOU as the standard to meet, undercutting any argument that the Eighth Circuit meant to do away with that standard. *Id*. at 1034 (noting that in "the Board's view, [the petitioner] failed to prove, among other things, that the Somali government was 'unable or unwilling to protect him from' al-Shabaab"). In a similar vein, the court again referenced the UOU standard in discussing the petitioner's failure to qualify for the imputed political opinion and religion standard—further suggesting that, notwithstanding the stray reference to the CCH standard, the UOU standard governs. *Id*. at 1034 n.2 ("We need not address this point given our conclusion that the Board did nothing wrong in deciding that Ahmed had failed to prove that the Somali government was *unable or unwilling* to protect him") (emphasis added). Last, the statutory hook at issue when the court uses the CCH language is with respect to whether the petitioner experienced persecution due to an imputed political opinion or religion, not as a member of a particular social group as in *Galloso*. *Id*. Thus, even

if *Ahmed* could be read as adopting the CCH standard (it should not be), the holding would not extend to the "social group" category of persecution.

E. Cases citing the CCH standard

Ahmed v. Garland, 993 F.3d 1029 (8th Cir. 2021) (discussed *supra*)
Fuentes-Erazo v. Sessions, 848 F.3d 847 (8th Cir. 2017)
Saldana v. Lynch, 820 F.3d 970 (8th Cir. 2016)
Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014)
Constanza-Martinez v. Holder, 739 F.3d 1100 (8th Cir. 2014)
De Castro-Gutierrez v. Holder, 713 F.3d 375 (8th Cir. 2013)
Gutierrez-Vidal v. Holder, 709 F.3d 728 (8th Cir. 2013)
Salman v. Holder, 687 F.3d 991 (8th Cir. 2012)
Guillen-Hernandez v. Holder, 592 F.3d 883 (8th Cir. 2010)
Khilan v. Holder, 557 F.3d 583 (8th Cir. 2009)
Ngengwe, v. Mukasey, 543 F.3d 1029 (8th Cir. 2008) (discussed *supra*)
Setiadi v. Gonzales, 437 F.3d 710 (8th Cir. 2006)
Menjivar v. Gonzales, 416 F.3d 918 (8th Cir. 2005) (discussed *supra*)

F. Eighth Circuit Discussions of *Matter of A-B*

We found two Eighth Circuit opinions citing *A-B I*. In both, the court seems to grant the Attorney General's opinion marginal significance.

The only published Eighth Circuit opinion discussing *A-B I* is *Godinez v. Barr*, 929 F.3d 598 (8th Cir. 2019). The court acknowledged the petitioner's argument that *Matter of A-B* significantly reversed prior precedent (established by *Matter of A-R-C-G*). *Id*. at 602. After that acknowledgement, however, the court retreats from the weeds of the "difficult questions" those two cases present in relation to one another. *Id*. ("We need not address the difficult questions

raised by *Matter of A-R-C-G-* and *Matter of A-B-* in the present case because Petitioners simply misconstrue the BIA's findings.").

The only other citation we found to *A-B- I* was the unpublished opinion of *Najera v. Whitaker*. 745 Fed. Appx. 670. In this case the court shows some deference to the Attorney General's opinion. *Id.* at 671 ("Recent guidance from the Attorney General overruled *Matter of A-R-C-G*. . . . Therefore, under *Matter of A-B-*, [petitioner's] proposed particular social group of Salvadorean females unable to leave a domestic relationship may not be cognizable."). The court went on, however, to analyze the issues notwithstanding whether petitioner's claimed particular social group was cognizable. *Id.* ("Even assuming that Najera's proposed particular social group is cognizable, Najera failed to establish her membership in it").

II. Eighth Circuit Argument

A. Under *Galloso*, the correct standard is UOU.

The best argument as to why the Eighth Circuit should follow the UOU standard is that *Galloso* compels as much. In *Galloso* the court resolved the conflict between the CCH and UOU two standards in favor of the UOU standard. 954 F.3d at 1192. *Galloso* is the *only* time the court has directly confronted the conflict between the two standards; there is no contradicting statement in subsequent case law reversing course.

Moreover, the Court's pronouncement in *Galloso* is based on an independent, apolitical precedent, not a weighing of the merits between the two standards. That is, it is based on an objective factor: that between two conflicting opinions the earlier one must control. *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011). This grounds the UOU standard in the circuit's jurisprudence.

Finally, although *Ahmed* referenced the CCH standard, the court did not apply that standard and the case is distinguishable. *Supra* at 5-6. Because the UOU standard is the earlier standard, it should govern in any new asylum cases.

B. BIA Deference Argument

The Eighth Circuit should also follow the UOU standard because it owes deference to the AG's interpretation of the law, which now follows that standard.

Chevron deference should apply in all immigration cases. *Negusie v. Holder*, 555 U.S. 511, 516 (2009) ("[T]he BIA is entitled to deference in interpreting ambiguous provisions of the INA"). Therefore, under this framework, the Eighth Circuit must first ask whether the asylum statute clearly defines a standard as to the amount of control exercised by a government over third party persecutors. The Eighth Circuit has already stated that the statutory language is ambiguous. In *Saldana*, the court noted that "inability to control private actors is an imprecise concept that leaves room for discretion by the agency." 820 F.3d at 977.

While the statement in *Saldana* most directly addresses the standards at issue, the Eighth Circuit has more generally made clear that it defers to the BIA's reasonable interpretations of the immigration statutes. *See Cinto–Velasquez v. Lynch*, 817 F.3d 602, 606 (8th Cir. 2016) ("[W]e give Chevron deference to the BIA's reasonable interpretation of [an] ambiguous statutory phrase."). Therefore, Eighth Circuit opinions endorsing Matter of A-B I and II should be disregarded, because Matter of A-B III has superseded them, and in doing so, reasonably interpreted an ambiguous statute.

Were a future Attorney General to revert yet again *back* to the CCH standard, then the Advocates should consider the argument advanced by Ellison & Gupta in Part V of their article—that "the canons of statutory construction demonstrate that the condone-or-completely-helpless language impermissibly

conflicts with the statute's language," such that "there is no occasion for *Chevron* deference." Ellison & Gupta, at 518. As the authors note, at least two courts have adopted this argument, with the D.C. Circuit's opinion in *Grace v. Whitaker* leading the way and more thoroughly reasoned. *Id*. (citing Grace v. Whitaker, 344 F. Supp. 3d 96, 130 (D.D.C. 2018); *Juan Antonio v. Barr*, 959 F.3d 778, 795 (6th Cir. 2020). The D.C. Circuit's carefully reasoned opinion provides a road map for the Advocates' consideration, were the Attorney General to revert to the CCH standard or were the Eighth Circuit to overrule *Galloso*.