

Gender-Based Asylum - 7/19 - Discussion w/ Leslie
Law Professors - came up w/ a bill

CA/BIA says should VAWA
MN - made good arguments

Optimism - CHE + Women's Caucus - letter for mtg.

① ~~Revised~~ AG Certification but will then be sent to all
states and be a problem

② Regulatory Solution - not really developed yet. The
INS ~~Regulatory~~ guidelines can't be reg.

③ Legislation - Leslie mtg w/ Lee Chis + Esther
Huter + Kennedy to VAWA ~~legislation~~.

- Final mtg on Fri

- Joint press conference w/ House - try to before
Aug. recess

Demands: 101 (a)(42) number as a social group

fundamental identity

& should part practice

Gender inclusion - well-founded fear
b/c of gender - ~~is~~ - unique to women or disproportionate

Gender - abuse, FGM, forced marriage

House + by Maloney - & added - gender to
grounds of inadmissibility - do more

~~Will~~ Will Reps + WH supports - Lamar Smith.
Concern ~~to~~ control over language - could get worse

E-mail draft letter from group of attorneys
basics from

Bunch of cases in the pipeline - b/c O'Malley
sat on them.

Come up in 2 cases.

• Guatemalan women

• ~~UNIA cases - ^{undoc} ~~disputed~~ etc~~

Undocumented person being battered in the U.S.
whose spouse ~~is~~ is convicted & deported
then ~~they can~~ she can apply
asylum - makes a magistrate to bring
them here. Refugee law

Gender Guidelines - 7/21

Background

- Focused on political opinion not on "particular social group" PSG - homosexuality, gender, klan
- Evolving area of law
- Fair-minded and generous

Gender Guidelines

- Give guidance on asylum officer
- Lawyer - trial -
- ~~Asylum~~ - case by case

Specifics on Karinga

- Apply existing law to new issues
- Karinga Case - Togo - if returned to Togo would be subjected to FGM & she objected
- Is the harm by prosecutors - a bad outcome by victim - i.e. punishment but no harm or intent - ~~penal~~ Is punitive intent required
- Don't have to be intended as a bad outcome (INS argued this to BIA.) - just experienced by victim as bad ~~thing~~
- 9th Circuit case - upheld this

Test - Khyal

Is harm done

Is the ~~PSG~~ harm b/c of PSG

Is harm bad enough ~~b/c of PSG~~ b/c persecution

PSG - Is gender a PSG

- ① - Gender has been looked at political ~~claim~~ opinion claim

(2)

Sup Ct
decision

PSG looked at the ^{Supremacy} decision

② Nexus Requirement "on the account of" - what was the
prosecutor's ^{purpose} - targeting a ^{social} protected group b/c of opposition.
mixed motivation ok

Canada - "it related to the character" - recognize their claim

British - Gender perceived ~~oppression~~ case - ~~can~~ perceived
to have ~~acted~~ committed adultery.

Kaniga

PSG - young women of this tribe who would be subject
+ have not undergone this procedure

Sup Ct. - have not spoken to gender a - PSG

Academic PSG - independent as catch all

BIA - gender -

w/ reference to other ~~of~~ basis.

Guantanamo case - IT, BIA - only specific to this case.
She did not argue her opposition - Need to include
opposition. ~~that~~ Fact specific

BIA - not ruling on ~~whether~~ whether ^{women} ~~gender~~ for Guant.
could be ~~of~~

- Do they view themselves as part of group
on appeal in the Court - likely to take a case
has a stay in place ~~at~~

- Final Report - INS does not have to ~~be~~

- ^{Executive} Director - DED - extreme, no legal status

MO Case - Anikwa - case -

(3)

Minor guidelines ~~unaccompanied~~ - unaccompanied minors.

European trend - TPS but don't give them a right to apply for asylum. Subsidiary protected areas.

Klan membership - must also show harm + ^{could be} ~~harm~~ ~~harmful~~ harm (blood lines (not caste))

Nationalities = Russian Jews

~~Can~~ Canadian - 150 cases - 80 granted
Gender case

~~INS~~ ~~Guatemala~~ - INS argued that PSG - failed b/c of on the account of.

Asylum
Appeal
Process
INS, appeal decision, need some clarity. ~~INS~~
Vetted through Regional Council

1991 - backlog < asylum cases - gender mainly & vet /
but not staying staying

~~BIA~~ BIA looked at the INS guidelines
Guidelines - do not address these cases

Can ~~INS~~ INS amend the guidelines? May not
oppressed ~~it~~ + possible backlog.

Dawn - 7/12

Gender Discrim. cases - ~~inconsistent~~ - inconsistent decisions - lot of media & public pressure

- Hard to understand - why - they are really that much different
- lingering attitude - domestic disputes - Ct does not want to get involved.
- Guidelines -

BIA decisions are appealable to the AG.

Appealable of a case -

Large policy issues - Ok - gender ~~discrimination~~ cases
+ immigration

What the case is

How broad is this

What issues we

Solicitor General - James -

Asylum Won By Woman Who Feared Mutilation

By AMY WALDMAN

Adelaide Abankwah's ordeal is over.

On Friday, the Board of Immigration Appeals granted her petition for political asylum, on the ground that she feared being subjected to genital cutting if she returned to Ghana, her homeland. She is only the second woman granted asylum in the United States because of genital cutting, which millions of African women undergo each year.

Ms. Abankwah, 29, requested asylum more than two years ago when she arrived at Kennedy International Airport from Ghana.

Instead, she quickly found herself under arrest for trying to enter the country with false immigration papers.

Her appeal for asylum was denied by the Immigration and Naturalization Service. And she was detained for more than two years at the Wackenhut Detention Center in Queens, where both her health and her emotional state deteriorated.

Her release came on July 19, 10 days after the United States Court of Appeals for the Second Circuit in Manhattan issued a decision supporting her petition. It was the first time a Federal court had supported an asylum petition based on a fear of genital cutting.

But the Board of Immigration Appeals had the last word on asylum, and Ms. Abankwah's supporters said the fear that she could be returned to her country still hung over her.

With Friday's decision, that fear is gone. Mandy Sullivan, the campaign director for Equality Now, a feminist organization that campaigned for Ms. Abankwah's release, said Ms. Abankwah was speechless about the decision.

"She's relieved that it's all over," Ms. Sullivan said. "It's very hard for her to comprehend — that it's all over and no one's going to come snatch her back."

Ms. Abankwah has been living in the Bronx with Victoria Otumfuor, a Pentecostal minister who was born and raised in Ghana and who be-

friended Ms. Abankwah while she was in prison.

Since her release, Ms. Sullivan said, she has been visiting doctors and volunteering at Equality Now. And she has been waiting.

Her detention, and the denial of her asylum petition, sparked widespread protests this spring among immigrant rights groups and legislators from New York, including Senator Charles E. Schumer and Representative Carolyn B. Maloney.

The protesters said the immigration service's position on Ms. Abankwah's case demonstrated that the agency was not committed to protecting asylum seekers who flee sex-based persecution.

Female genital cutting was outlawed in the United States in 1996. That year the I.N.S. also recognized the practice as a valid form of persecution for immigrants seeking asylum.

The decision in that case, based on the petition of another African native, Fauziya Kassindja, who is from Togo, became part of a series of guidelines on sex-based persecution that were issued to immigration judges.

But immigration judges are not required to rule that persecution based on an applicant's sex constitutes a valid claim for asylum. Advocates say they rarely do so without public pressure.

The immigration service did not return a phone call requesting comment yesterday, and the board did not explain its reversal other than to refer to the Federal court's decision and a review of the record.

But for Ms. Abankwah, the most important words were there, telling her that her asylum application was being granted and that "exclusion proceedings are terminated."

Florida Accepts Districting Plan To Alter Minority Percentages

TALLAHASSEE, Fla., Aug. 17 (AP) — Florida officials have agreed to alter the shape of three Congressional districts whose boundaries were drawn to increase minority political representation.

The deal, which must be approved by a panel of three Federal judges, would change the boundaries of districts now represented by two black Democrats, Alcee L. Hastings and Carrie P. Meek, and a Hispanic Republican, Ileana Ros-Lehtinen, along with five neighboring districts.

The plan was devised to settle a lawsuit filed last year by a white candidate, Tom Fouts, who lost his bid for a State Senate seat held by a black incumbent.

Mr. Fouts's lawsuit said the creation of the three Congressional districts and two State Senate districts discriminated against whites who were not Hispanic.

Under the terms of the settlement, Mr. Fouts would drop any challenge to State Senate districts.

Mr. Hastings's district incorporates black neighborhoods in seven

counties in southern Florida. Its proportion of black voters would fall to 37 percent from 44 percent under the proposed settlement.

Mr. Hastings's lawyer, Terry Anderson, said on Monday night that he was still reviewing the deal.

"His concern is that he leave behind a district in which African-Americans have a fair opportunity to win a seat in Congress," Mr. Anderson said. "My preliminary reaction is that this doesn't do it."

"Frankly, Alcee could probably win any district they could carve up at this stage," he added.

Mr. Hastings's district was one of three designed by a panel of Federal judges in 1992 to increase Florida's minority representation in Congress.

That year, Florida elected its first black Representatives to Congress since Reconstruction: Mr. Hastings, Ms. Meek and Corrine Brown.

The Supreme Court has since ruled that race cannot be the predominant factor in drawing the boundaries of political districts

The New York Times

WEDNESDAY, AUGUST 18, 1999

No Change Seen in Louima Verdict

Experts Say Volpe's Account Won't Change Schwarz's Conviction

By RICHARD PÉREZ-PEÑA

While the former police officer who pleaded guilty to torturing Abner Louima contends that another officer was wrongly convicted of aiding in the assault, legal experts say that the second officer would have a very difficult time trying to have his conviction overturned, regardless of his guilt or innocence.

Justin A. Volpe, who admitted to shoving a stick into Mr. Louima's rectum in the bathroom of a Brooklyn police station two years ago, has told Federal authorities that the second officer who was in the bathroom was not Charles Schwarz, the man convicted of aiding him, but another officer, Thomas Wiese. Mr. Wiese was not charged in the bathroom attack, but was acquitted of related charges in the Louima case.

"Getting a conviction overturned on the kinds of arguments available to Schwarz is extremely difficult," said Vivian Berger, a law professor at Columbia University who is a former prosecutor. "Now, this particular set of circumstances is very, very unusual, but still, it's a hard row to hoe."

Experts say that, based on Mr. Volpe's account, prosecutors could probably charge Mr. Wiese again, raising the bizarre prospect that he and Mr. Schwarz could serve time in prison, simultaneously, for an act only one of them committed. The Federal prosecutors who handled the case have not signaled whether they would try to prosecute Mr. Wiese again.

Mr. Volpe's statements, made public this week by his lawyer, Marvyn M. Kornberg, have deepened the mystery surrounding one of the most notorious crimes in recent New York history: Who was the second man in the bathroom at the 70th Precinct station house, and what did he do? The prosecutors say they have their answer, but the questions may never be answered to the satisfaction of either the public or the police.

Yesterday, Mr. Schwarz's wife, Andra, and officials of the Patrolmen's Benevolent Association held a news conference to plead for his conviction to be overturned. "We're determined to fight this until the end, until he's exonerated," Mrs. Schwarz said.

Mr. Louima, a Haitian immigrant who was arrested after a fight outside a bar, suffered a torn bladder and rectum in the bathroom attack and was hospitalized for two months. He said that an officer held him down in the bathroom while Mr. Volpe assaulted him with the stick.

Mr. Louima did not directly identify Officer Schwarz, but said that the officer who held him down during Officer Volpe's attack in the bathroom was the same officer who had driven him to the station house. Police records show that Officer Schwarz was the driver.

Prosecutors asserted that that man was Mr. Schwarz, relying in part on the testimony of other officers who said they saw Mr. Schwarz leading Mr. Louima, handcuffed, his pants around his ankles, into the bathroom. On June 8, a Federal court jury in Brooklyn convicted Mr. Schwarz of violating Mr.

Louima's civil rights — he faces a sentence of up to life in prison — and acquitted Mr. Wiese and two other officers of related charges.

But during the trial, as Mr. Volpe tried unsuccessfully to negotiate a plea deal, he told prosecutors that they had the wrong second man, a claim repeated publicly by Mr. Kornberg.

Mr. Kornberg began the case by asserting that Mr. Volpe was innocent, and suggesting that Mr. Louima's injuries could have resulted from consensual anal sex with another man — a suggestion that he never returned to with any evidence. Then, on May 25, as the trial was under way, Mr. Volpe pleaded guilty, admitting that he had done what the prosecution charged. He said that a second officer was in the bathroom but did not take part in the attack, but he did not name that officer, and his lawyer repeated the claim several times to reporters while the trial of the other officers was still under way.

This week, Mr. Kornberg said his client had told Federal prosecutors that the second officer was Mr. Wiese, not Mr. Schwarz, and reiterated that Mr. Wiese had merely watched the assault and done nothing to stop it.

A dispute over who was present during an attack by police.

But Federal prosecutors have never accepted anything that Mr. Kornberg or Mr. Volpe had to say, noting the lawyer's original theory of the case. On the day of the verdict for the other four officers, Alan Vinegrad, the assistant United States attorney who handled the trial, said, "I dare say that neither Volpe nor his attorney have any credibility with respect to any factual issue touching on this case, including the identity of the other officer or officers with him."

After the jury verdict, Mr. Schwarz petitioned the judge, Eugene H. Nickerson, for a new trial on the basis that the prosecution had not divulged Mr. Volpe's statement that Mr. Schwarz was not in the bathroom with him. But the judge rejected the motion on the basis that those statements were known during the trial to the other defendants, and that they were free to call Mr. Volpe as a witness, but chose not to. Legal scholars say that ruling was correct.

It is possible for someone who is convicted to ask for a new trial based on new evidence, but several lawyers said that Mr. Volpe's latest statements did not differ enough from what his lawyer was saying at trial to constitute new evidence.

Mr. Schwarz has fired his trial lawyer, Stephen Worth, and hired a new one, Ronald P. Fischetti. Today, Mrs. Schwarz and the P.B.A. had only good things to say about Mr. Worth, but experts say they are likely preparing for an appeal on the basis that Mr. Schwarz received "ineffective assistance of counsel" — bad lawyering — at

trial. The argument would most likely be that Mr. Schwarz's only hope was to call Mr. Volpe as a witness, and that he failed to do so.

But the Supreme Court has held that to have a conviction thrown out for poor legal representation, a defendant must make two difficult showings: first, that the lawyer's performance was not reasonably competent, and second, that a different approach could have yielded a different verdict. Experts say Mr. Schwarz might pass the second test — arguing that calling Mr. Volpe could have changed the outcome of the case — but that he would probably fail the first.

"On the face of it, what Schwarz's lawyer did wasn't crazy," Ms. Berger said. "He took a reasonable gamble. I mean, you don't want to use as the basis of your defense someone who has admitted to as disgusting a crime as you can imagine."

Another expert, however, questioned the strategy of Mr. Worth's decision. "Most lawyers I know questioned the judgment of Schwarz's lawyer in not calling Volpe," said Chester L. Mirsky, a professor of clinical law at New York University. But even if Mr. Worth made the wrong decision, he said, Mr. Schwarz probably does not have a legal claim of ineffective

counsel.

Any attempt to overturn the conviction would raise the question of Mr. Volpe's motivations in saying that Mr. Wiese, not Mr. Schwarz, was present during the bathroom assault. Mr. Schwarz's defenders say Mr. Volpe is simply coming clean; prosecutors and Mr. Wiese might argue that he only wanted to help a fellow officer in trouble, Mr. Schwarz. Trial lawyers say that there is legitimate reason to have doubts about Mr. Volpe's word, and that prosecutors have no obligation to aid Mr. Schwarz, particularly if those doubts are genuine.

The prosecution has so far dismissed Mr. Volpe's statements, but experts say those statements could conceivably be used to charge Mr. Wiese as the second man in the bathroom attack.

Mr. Wiese was charged with taking part in an assault on Mr. Louima in a squad car on the way to the station, and with being part of a conspiracy that included both the attack in the car and the stick incident. He was acquitted of both. But he and the other two officers who were acquitted still face charges that they tried to mislead Federal investigators as to Officer Schwarz's role.

The New York Times

WEDNESDAY, AUGUST 18, 1999

Busby, Scott W. (MULTI)

From: Krass, Caroline D. (LEGAL)
Sent: Thursday, July 15, 1999 7:35 PM
To: @NSA - Natl Security Advisor; @COMM - WHSR Comm Officers
Cc: @LEGAL - Legal Advisor; Busby, Scott W. (MULTI); Barks-Ruggles, Erica (AF)
Subject: Update on the Asylum Case of Adelaide Abankwah [UNCLASSIFIED]

Please pass to Sandy and Jim:

FYI

On July 9, the Second Circuit issued an opinion unanimously reversing the decision of the Board of Immigration Appeals (BIA) that Adelaide Abankwah, a woman from Ghana alleging a fear of female genital mutilation, is not eligible for asylum. The Second Circuit found that Abankwah presented sufficient evidence to support her claims and that the record compelled a finding that her fear of persecution was objectively reasonable. The President has asked about this case, which has received considerable media and NGO attention

Background: As you may recall, Abankwah attempted to enter the United States from Ghana with a false passport. She was placed in exclusion proceedings and filed for asylum. She has been detained pending her asylum claim. Abankwah claims that she has a well-founded fear of persecution because she fears, *inter alia*, that on returning to Ghana she would be punished with female genital mutilation (FGM) or death for engaging in sexual intercourse before marriage.

Next Steps: The Second Circuit remanded the case to the BIA for proceedings consistent with its opinion. Although the court found that Abankwah is *eligible* for asylum, it remains within the discretion of the Attorney General to decide whether to grant asylum (although it is very rare that the AG does not grant asylum after a decision of this sort). The court also ordered the BIA to reconsider whether, even if Abankwah is not granted asylum, she may meet the standard for withholding of deportation, which would mean that she could not be sent back to Ghana.

DOJ disagrees with the Second Circuit's assessment of the evidence. DOJ is currently considering whether to: (1) seek *en banc* review of the decision by the Second Circuit; (2) agree to the Second Circuit's remand to the BIA, which will either grant Abankwah asylum or remand to the immigration judge for a decision regarding whether to grant asylum or withholding of deportation; (3) support Abankwah's asylum application before the BIA; and/or (4) release Abankwah from detention pending the resolution of her case.

Multilateral does not share the Africa office's concerns. Although we cannot vouch for the truthfulness of Abankwah's claims, we note that it is not at all uncommon for a bona fide asylum seeker to use a fraudulent passport. Moreover, the credibility of Abankwah's basic story is not an issue in the appellate proceedings; thus, it is extremely unlikely that she would be found to be a fraud in any further legal proceedings.

We have not consulted other White House offices that would have an interest in this case as we wanted to get your views first. Nevertheless, Multilateral believes that DPC would also have a strong interest in whether we intervened with the Justice Department or not.

IRENE BUENO 65581

Busby, Scott W. (MULTI)

From: Busby, Scott W. (MULTI)
Sent: Wednesday, July 28, 1999 8:36 PM
To: Krass, Caroline D. (LEGAL); Barks-Ruggles, Erica (AF)
Cc: @LEGAL - Legal Advisor; @MULTILAT - Multilateral and Humanitarian Affairs; @AFRICA - African Affairs
Subject: Revised note on Abankwah case [UNCLASSIFIED]

Caroline, Erica -- Here's a revised split e-mail on this case. Please clear and then I guess Legal should send up. Right, Caroline?

Sandy --

You asked whether it would be appropriate for NSC to weigh in on the asylum case of Adelaide Abankwah, the woman from Ghana who fears female genital mutilation if returned. Justice has told @Legal that they see no problem with the White House expressing a view on the case. However, Justice mentioned that they think it likely that any White House input could become public knowledge.

Last Monday, the INS released Abankwah from detention pending the resolution of further proceedings in her case.

Multilateral recommends that the White House urge Justice not to seek en banc review of the Second Circuit's decision in favor of the asylum claim of Abankwah.

Although we agreed (as did State) with Justice's original evaluation of the facts in this case (i.e., that there was not sufficient evidence indicating that this woman would face FGM or other persecution), we should defer to the court's evaluation of the evidence. The court's decision turns on the facts of the case and does not establish any particularly adverse legal precedent for the USG.

However, a challenge by the Justice Department to the Second Circuit's ruling here would probably be perceived as reluctance by the U.S. government to protect women who are considered at risk of FGM. This would be unfortunate given that the Justice Department clearly recognizes that women who are credibly at risk of undergoing FGM are eligible for asylum.

For this reason, Multilateral believes that it would be worthwhile for the White House to recommend to the Justice Department that it not seek further review of the decision given that there appears to be little to gain and something to lose, namely, the credibility of our commitment to protect victims of FGM.

The Africa office believes that NSC should not express our views to Justice on this case. We do not know all the facts in this case and are not in a position to judge the truthfulness of Abankwah's claims. According to Justice, she came in on a false passport and is not actually "Adelaide Abankwah." Given the unknown possibilities, we do not believe it would be prudent for the White House to express a view, or to be seen as pressuring Justice, one way or the other on this case. Instead of weighing in on this case, we believe we should continue planning for outreach to concerned groups about what the Administration's policies and programs are to combat FGM.

Irene Bueno


 07/07/99 06:51:17 PM

Record Type: Record

To: Dawn M. Chirwa/WHO/EOP@EOP
cc: Scott Busby/NSC/EOP@EOP
Subject: Re: Gender Discrimination in Asylum Cases

Dawn -

Scott and I would like your advice on how to proceed on this issue. We would like to ask DOJ/INS about pending cases and to begin a policy discussion on making changes to current asylum policy (legislation, changes to current guidance, etc). I have attached an article to give you some background on this issue. I will give you call to follow up. Thank you.

Irene
456-6558



asylum.703.do

----- Forwarded by Irene Bueno/OPD/EOP on 07/07/99 05:33 PM -----



Scott Busby
07/07/99 08:47:59 AM

Record Type: Record

To: Irene Bueno/OPD/EOP@EOP
cc:
bcc:
Subject: Re: Gender Discrimination 

Irene --

I'm glad you're interested in this -- I have it on my own to-do list as well. (My wife asks me about it every night.)

We should do a meeting but we need to first get the views of WH Counsel on whether and how to do this. Since all of these are pending cases, discussion will have to involve if not go through our lawyers.

Do you want to call Dawn Chirwa to ask her how we should handle?

Irene Bueno

Irene Bueno



07/06/99 09:25:09 AM

Record Type: Record

To: Scott Busby/NSC/EOP@EOP

cc:

Subject: Gender Discrimination

I would like to ask INS and whoever else to brief us on these gender discrimination cases. I know that you mentioned that the President had a particular interest in one of these cases and there was a child abuse case this weekend in the papers, I think we need to figure what if anything can be done.

- Do you want to co-chair this briefing?
- Besides, INS and DOJ, who do you recommend we invite?
- When are you available?

Let me know. Thank.s

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Bill 1 of 50

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To require the Attorney General to promulgate regulations relating to gender-related persecution, including female genital mutilation, for use in determining an alien's eligibility... (Introduced in the House)

HR 1849 IH

106th CONGRESS

1st Session

H. R. 1849

To require the Attorney General to promulgate regulations relating to **gender** -related persecution, including female genital mutilation, for use in determining an alien's eligibility for asylum or withholding of deportation.

IN THE HOUSE OF REPRESENTATIVES

May 18, 1999

Mrs. MALONEY of New York (for herself, Mrs. KELLY, Mr. ABERCROMBIE, Ms. BERKLEY, Mrs. CHRISTENSEN, Mrs. CLAYTON, Mr. CONYERS, Mr. FARR of California, Mr. FILNER, Mr. FROST, Ms. JACKSON-LEE of Texas, Mr. JEFFERSON, Mr. LAFALCE, Mr. LEWIS of Georgia, Ms. LOFGREN, Mr. MCGOVERN, Ms. MCKINNEY, Mr. MEEHAN, Ms. MILLENDER-MCDONALD, Mrs. MORELLA, Ms. NORTON, Mr. OLVER, Mr. PAYNE, Ms. PELOSI, Ms. RIVERS, Mr. ROMERO-BARCELO, Mr. SANDERS, Ms. SCHAKOWSKY, Ms. SLAUGHTER, Mr. STARK, Mrs. THURMAN, Mr. UNDERWOOD, Mr. WEINER, and Ms. WOOLSEY) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To require the Attorney General to promulgate regulations relating to **gender** -related persecution, including female genital mutilation, for use in determining an alien's eligibility for asylum or withholding of deportation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. REQUIREMENT TO PROMULGATE REGULATIONS CONCERNING GENDER -RELATED PERSECUTION.

(a) REGULATIONS FOR USE IN EVALUATING ASYLUM APPLICATIONS- The Attorney General shall promulgate regulations, which shall apply to the determination of an alien's eligibility to be granted asylum under section 208 of the Immigration and Nationality Act, interpreting, in a manner consistent with international law and standards, the term 'persecution', as used in section 101(a)(42)(A) of such Act, to include **gender** -related persecution, including female genital mutilation. The regulations under this subsection may not create burdens, or increase requirements, for establishing persecution beyond those established by international law and standards and decisions of the Board of Immigration Appeals.

(b) REGULATIONS FOR USE IN WITHHOLDING DEPORTATION OR RETURN- The Attorney General shall promulgate regulations relating to **gender** -related persecution, including female genital mutilation, which shall apply to the determination under section 243(h) of the Immigration and Nationality Act. The regulations under this subsection shall be consistent, to the extent appropriate under such Act, with the regulations under subsection (a).

(c) DEADLINE- The Attorney General shall promulgate the regulations required by this Act not later than the date that is 30 days after the date of the enactment of this Act.

(d) DEFINITION- For purposes of this Act, the term '**gender** -related persecution' means a harm that--

(1) is specific to, or disproportionately affects, women on the ground of their **gender** ; and

(2) otherwise would be considered persecution for purposes of section 101(a)(42)(A) of the Immigration and Nationality Act.

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News Release

Contact: Office of Public Affairs
Phone (202) 514-2648

FOR IMMEDIATE RELEASE

May 26, 1995

INS DISTRIBUTES NEW ASYLUM GENDER-BASED GUIDELINES

The Immigration and Naturalization Service (INS) today issued new guidelines designed to assist Asylum Officers in evaluating asylum claims by women alleging persecution based on their gender. By issuing these guidelines, the United States has joined the United Nations and Canada in recognizing that women may experience discrimination unique to their gender, and that in some cases, such discrimination can meet the standards for refugee status.

In order to qualify as a refugee under section 101(a)(42) of the Immigration and Nationality Act (INA), female applicants – like any applicant – must show that they cannot return home and cannot avail themselves of the protection of the country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

"Human rights violations against women are not a new phenomenon, but the issue has recently risen to the forefront of the international agenda," said Immigration and Naturalization Service Commissioner Doris Meissner. "These new guidelines do not change the standard that must be met by women seeking refugee status. What they do is educate Asylum Officers about gender-based discrimination and provide them with procedures and methods for evaluating whether individual claims meet the refugee standard."

The new guidance is an outgrowth of guidelines issued by Canada in 1993, a set of guidelines issued by the United Nations High Commissioner for Refugees, a proposed set of guidelines submitted by the Women Refugees Project of Harvard Law School in 1994, and recent and still developing U.S. caselaw.

-MORE-

While the guidelines will help enhance the ability of Asylum Officers to more sensitively deal with the procedural and substantive aspects of gender-related claims, they are not anticipated to create an upsurge in new asylum claims.

Each Asylum Officer in the United States will receive in-Service training designed to help them to use and implement this guidance, and reinforce their awareness of and sensitivity to gender and cross-cultural issues.

The INS Resource Information Center will be also issuing papers, "alerts" and country profiles providing objective and current information on the legal and cultural situation of women in their countries of origin, on the incidence of violence—including sexual and domestic—and on the adequacy of state protection afforded to women.

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FACT SHEET

May 26, 1995

INS Asylum Gender Guidelines

Background

- Human rights violations against women are not a new phenomenon in the world. Yet, only recently have they risen to the forefront of the international agenda.
 - In 1979, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recommended the eradication of violations against women.
 - In June, 1993, the United Nations World Conference on Human Rights emphasized the need to incorporate the rights of women, and called upon the General Assembly to adopt the Declaration on the Elimination of Violence against Women. On December 20, 1993, the United Nations General Assembly adopted the Declaration.
 - There have also been Conclusions from the United Nations High Commissioner for Refugees (UNHCR). For example, in 1985 the UNHCR Executive Committee adopted Conclusion No. 39 noting that refugee women and girls constitute the majority of the world refugee population and that many of them are exposed to special problems.

All of these international initiatives underscored and contributed to the development of guidance related to women refugee claimants.

- The Canadian Immigration and Refugee Board (IRB) issued its asylum gender guidelines over two years ago, in March, 1993. The UNHCR issued a set of guidelines in 1991, and faculty members at Harvard Law School also submitted a proposed set of guidelines in 1994. Despite the increased attention given to gender-based asylum claims, they are still relatively new developments in refugee protection.

INS Implementation

- Because gender issues are novel, and adjudicators of asylum claims are guided by recent (and still developing) U.S. caselaw, INS felt that guidance to all Asylum Officers would be appropriate to ensure uniformity in adjudications, and would allow Asylum Officers to be more responsive to bona fide asylum claims.

- Women asylum applicants, like all applicants, must satisfy the refugee definition provided for by statute. Under U.S. law, the term refugee means "...any person who is outside any country of such person's nationality", and who is "unable or unwilling to return to...that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion..."
- The U.S. refugee definition is a narrow one. Individuals cannot qualify for asylum in the United States unless the persecution is on account of one of the protected grounds specified by Congress. There must also be a favorable credibility finding by an Asylum Officer. The INS Guidelines summarize recent decisions from the courts and the Board of Immigration Appeals which provide appropriate analysis for gender-related and other asylum claims. The INS Gender Guidelines do not enlarge or expand on the grounds that were specified by Congress and the understandings the courts have reached about those grounds.
- Not all women who apply for asylum under this new guidance will be granted asylum. INS asylum decisions are individualized, case-by-case determinations. For example, INS sometimes encounter women asylum applicants who come from countries where domestic or sexual abuse is tolerated. However, to qualify for asylum these women must show, for example, that:
 - ▶ The domestic violence cannot be purely "personal". It must relate to one of the grounds enumerated in the statute.
 - ▶ The harm feared must rise to the level of "persecution". The courts have uniformly held that "persecution" denotes extreme conduct and does not include every sort of treatment our society regards as offensive, unfair, unjust, or even unlawful or unconstitutional.
 - ▶ Also, both U.S. law and the UN Protocol require that the fear of persecution must normally extend to the entire country of origin; that is, in order for an applicant to meet the definition of a refugee she must do more than show a well-founded fear of persecution in a particular place or abode within a "country" - she must show that the threat of persecution exists for her country-wide. For example, some battered women may be denied asylum because they could have sought safety from the batterer simply moving to another town or province in their country of origin. National protection should take precedence over international protection.

In sum, every asylum applicant is carefully interviewed. No applicant can be approved unless all the definitional elements of the statute are satisfied.

- INS does not expect the rate of asylum applications to increase because of the Gender Guidelines. That was not the experience of the Canadians who issued their guidelines more than 2 years ago.
- Asylum Interviews/Officers: All INS Asylum Officers - men and women - will be expected to conduct interviews of women with gender-based claims. To the extent that personnel resources permit, however, Asylum Offices may allow women Asylum Officers to interview these cases. An interview will not generally be canceled because of the unavailability of a woman Asylum Officer. But INS also recognizes that, because of the very delicate and personal issues arising from sexual abuse, some women claimants may understandably have inhibitions about disclosing past experiences to male interviewers.
- Interpreters/Presence of Family Members: Testimony on sensitive issues such as sexual abuse can be diluted when received through the filter of a male interpreter. While INS encourages the use of female interpreters, interviews will not generally be canceled and rescheduled because women with gender-based asylum claims have brought male interpreters.

Interviewing Asylum Officers will provide women with the opportunity to be interviewed outside the hearing of other members of their family, especially male family members and children. There is a greater likelihood that a woman applicant may more freely communicate a claim involving sexual abuse when family members are not present.

- Generally, the new Guidelines will assist Asylum Officers in the attentive examination of cases, and the approval of legitimate asylum claimants.

Memorandum

P. Cover



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Subject Follow Up on Gender Guidelines Training

Date

JUL 7 1995

To Asylum Office Directors
Supervisory Asylum Officers
Asylum Officers

From Asylum Division

We appreciate the active participation of the designated training officers in the Gender Guidelines training and are grateful for the input of the field offices in generating excellent questions to facilitate understanding of the Guidelines.

This memorandum serves as a summary of the Gender Guidelines training and clarification of issues that were left outstanding at the close of the session. We suggest use of the attached outlines to format the trainings conducted in Asylum Offices.

In order to ensure consistency within the Asylum Offices during the initial implementation of the Guidelines, **every gender-related claim must be reviewed by the adjudicating Officer's SAO, the Gender Training Officer, and the Director prior to submission to Headquarters Quality Assurance.** We will evaluate the continued need for that level of additional oversight following a mandatory 60 day period. We do not envision that this requirement will place undue strain on the resources of the reviewing personnel, as the number of gender-related claims is proportionately small in our caseload.

HQASM/Quality Assurance (HQ/QA) will continue to review all gender-related claims as "Sensitive: Unusual Legal Issue" until further notice. We wish to monitor the implementation of the Guidelines and national consistency in adjudication, as well as the number of gender-related cases received, types of issues raised and rates of approval for gender-based claims.

The binders received at the training should be placed in the Asylum Office Library for use by all, and may be duplicated in part as needed by Officers.

The analyses for Cases 1-10, Binder Section III, will be provided under separate cover in the near future. These samples are taken from actual cases which HQ/QA has recently received and will provide realistic frameworks for the application of the Gender Guidelines. Following receipt of the analyses, the cases should be distributed to training participants who may then discuss them in

groups or teams. Each team may make a recommendation for the proper analysis. The Training Officer should then distribute the approved analysis and discuss any misunderstandings or problems, utilizing guidance from the Gender Guidelines, the training, and case law.

You will also receive the videotape from the training under separate cover. The videotape is now being edited to a length of 1-2 hours and will be made available to each Office for your use in subsequent trainings.

Do not feel compelled to conduct all elements of the training within one four hour session. The topics are intense and complex. We suggest dividing the topics into discernable issues and conducting consecutive weekly trainings on each issue, taking care not to lose continuity.

We hope that these pointers provide a helpful framework for analysis in the trainings you conduct. As you conduct your training sessions, please share helpful information with colleagues in other offices. Inform Headquarters of any difficulties and misunderstandings which may require our assistance.



Rosemary Melville
Acting Director

GENDER GUIDELINES TRAINING OUTLINES

The following points summarize the focal points of the training and may be used as an outline to convey the essential points during your In-House training on the Gender Guidelines:

- We recommend that you provide to each person in the training the following General Counsel handouts:
 - "Is the harm serious enough to be persecution?"
 - "Particular Social Group"
 - "On Account Of"
 - "State Protection"
 - "Points to Remember"

I. INTERVIEWING

- **INTERVIEWING IS THE CORNERSTONE OF THE ASYLUM PROCESS!**
- Officers are responsible for fully eliciting all material facts which have bearing on the applicant's eligibility for asylum. Officers must afford the applicant every opportunity to fully explain their case.
- The principles of **non-adversarial interviewing** are always required at affirmative asylum interviews.
- Due to the sensitive nature of many gender-related claims, the interview may possibly require more time than the usual average of one hour. **Do not allow time constraints to interfere with this process.**
- Officers must be extremely aware of their own body language, manner of speaking, and choice of words when dealing with a case in which very sensitive gender-related topics are to be discussed.

II. CREDIBILITY

- Officers must become aware of their own preconceptions and biases!
- Do not jump to the conclusion that rape is simply a private act of harm, or that the allegations have been fabricated.
- Officers must be aware of general misconceptions about rape:
 - Rape is not an act of desire, but of power and violence;
 - Rape does not happen only to certain women. All women may be vulnerable regardless of age, appearance, or religion;
 - Since rape is such a degrading and dehumanizing act, women are more inclined to under-report rape than to make false allegations about it.

- Be aware of Rape Trauma Syndrome!
- The syndrome may result in behaviors which cause the Officer to question credibility:
 - long pauses/silence
 - confusion in language
 - physical distress
 - blocking of association
- Demeanor is the least reliable indicator of credibility. Rely on the testimony.
- We recommend offices enlist expert training on the Rape Trauma Syndrome, and the syndrome of battered women from:
 - experts at your local area rape crisis center
 - police units which work with rape victims
 - battered women's shelters

III. CREDIBILITY/INTERVIEWING TECHNIQUES

- Utilize sensitive questioning to get detailed testimony surrounding painful experiences.
- Our Canadian colleagues recommend the following techniques:
 - If you suspect there may have been sexual abuse but the woman is not forthcoming, you may say, "We know that women in your country often have bad experiences in detention. We understand that it's difficult to talk about such things. Everything we talk about here is completely confidential. Is there anything else you want to tell us?"
 - If you are aware that conditions in the applicant's country are such that a woman is ostracized if she is raped, you may start by asking, "What would happen if your family and community found out what happened to you while you were detained?"
 - In cases where sexual assault is alleged and the applicant has difficulty providing details, ask about the circumstances surrounding the incident. The depth and consistency of the description may give you the detail you need for a credibility determination. "You said you were assaulted. We need to understand more about what happened. Where were you at the time? Were you alone? What happened to your sister who was with you? Did that also happen to you?"
 - If the applicant appears to experience a complete mental block, it may be advantageous to ask general questions in order to help create a more comfortable atmosphere, "In your village, do you have a lot of friends? Did you always live with your family? Are you feeling all right?"
 - As in all cases, it may be appropriate to take a recess to allow an applicant/victim to compose herself.

ANALYSIS

IV. FORMS OF PERSECUTION

- Utilize the General Counsel outline: "Is the harm serious enough to be persecution?"
- Rape, sexual violence, beatings, or the forced imposition of beliefs or activities which are abhorrent to one's most deeply held beliefs (See Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993)) can all be serious enough forms of harm to constitute persecution.

ANALYSIS

V. PARTICULAR SOCIAL GROUP (PSG)

- Various courts have concluded that gender, either alone or in combination with other factors, can define a particular social group.
- Persecution on account of membership in a "particular social group" is an independent basis for refugee eligibility. It need not, though it can, be combined with (an) other ground(s). See General Counsel "PSG" outline.
- For purposes of analysis, "gender" may be too broad a descriptor; it may be helpful to more tightly define the PSG. See General Counsel "PSG" outline: i.e. "a group comprised of women who share a social status based in part on gender."
- The number of persons who belong to the PSG is irrelevant.
- What matters is that the group is defined by characteristics that meet the standards set by the courts -- that is, a characteristic that is discernable and that either cannot be changed or is so fundamental to the applicant's individual conscience or identity that the applicant ought not be required to change it. See the General Counsel memorandum, "Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group Under the INA", December 9, 1993.
- A PSG must not be defined by the type of harm inflicted. (See Gomez v. INS, 947 F.2d 660 (2nd Cir. 1991): women who were raped are not discernable to the persecutors by that characteristic).
- Avoid circular reasoning, such as "applicant is a member of a particular social group, defined as battered women." You would then in effect be arguing that she is battered on account of being battered.
- Deciding whether an applicant is a member of a PSG is the beginning of the inquiry into whether she is a refugee.

- Determining that a group can be recognized as a PSG does not normally make its members refugees; an applicant must still meet the Mogharrabi/Acosta 4 prong test. Applicant must:
 - demonstrate that she is subject to persecution;
 - that the persecution was inflicted or threatened "on account of" one or more of the five grounds;
 - that the persecutor is aware of the belief or characteristic;
 - that the persecutor is inclined and capable of harming her;
 - that internal relocation is not an option;
 - and that the agent of persecution is a government actor, or one which the government is unwilling or unable to control.

ANALYSIS

VI. "ON ACCOUNT OF"

- We are guided in our adjudications by all precedent decisions. The absence of specific case law does not mean we make no decision on an individual case.
- The principle in INS v. Elias Zacarias, 112 S.Ct. 812 (1992), is that the persecutor must be motivated by a quality possessed, or at least perceived to be possessed, by the victim. Elias Zacarias is a precedent decision and therefore it must be addressed in all cases.
- "On account of" refers to harm inflicted because of the victim's beliefs or characteristic, not the persecutor's.
- There must be "some evidence, either direct or circumstantial" that the persecutor's motive for action is on account of the victim's protected trait.
- Persecutors may have mixed motives. Applicant does not have to show that the protected ground was the sole motivation to the exclusion of all others.
- You must examine the totality of evidence presented.
 - Whom does the persecutor seek to harm?
 - What evidence is there about the persecutor's motivation?
 - In cases of battering and domestic abuse, does the husband beat the applicant and others? Children? Brothers?
 - Is he violent towards other people?
- The fact that a persecutor seeks to harm only the applicant or those who share her characteristics may help determine the persecutor's motives.
- Country conditions information could supply "circumstantial evidence." See General Counsel, "On Account Of" outline.

ANALYSIS

VII. AGENT OF PERSECUTION

- Determine whether the agent of persecution is a governmental actor or one whom the government is unable or unwilling to control.
 - A spouse may be an agent of persecution.
 - What are the penalties if he beats his neighbor's wife?
 - Are they the same for beating his own wife?
 - What are the penalties for beating a man?
 - Do the laws, customs, traditions, of the country actively condone the ability of the persecutor to inflict the harm?
 - In cases where laws exist to prohibit the persecution, do the authorities enforce the laws or does custom take over? (ie. female genital mutilation (FGM) in Nigeria - illegal but unenforced).
- Determine if it is reasonable that a woman in applicant's circumstances could seek the protection of the government of her country.
 - Are there laws, customs, rites, etc. directed at or experienced predominantly by women?
 - Did she try to seek protection and was denied it, or told it was merely a private matter?
 - Did she believe it would be futile to seek the authorities' protection? What evidence is there that this belief is reasonable?
 - Is she aware of what happened to other women in her circumstances who sought the protection of the state?
 - Do the country conditions indicate that women in applicant's circumstances receive protection?
- It is unreasonable to expect a woman to have sought the protection of authorities when the record and circumstantial evidence (including county conditions) indicate that she may face further threat by seeking that protection.
 - (ie. a woman raped in Pakistan may decide not to seek the protection of authorities because the Hadood laws require that she must provide four male witnesses to the act of penetration to prove her case, and if she cannot she may be then be jailed or punished as an adulterer.)

ANALYSIS

VIII. INTERNAL RELOCATION

- Determine if internal relocation is a **reasonable** option. See Guidelines, p.18
- Options for relocation may be more restricted for women than for men.
- "Some societies require that women live under the protection of male family members." Guidelines, p.4.
- If women proactively, or inadvertently (through death of male family members), do not meet that expectation, it may be unreasonable for them to relocate and live elsewhere on their own.

Memorandum



Subject Considerations For Asylum Officers
Adjudicating Asylum Claims From Women

Date May 26, 1995

To All INS Asylum Office/rs
HQASM Coordinators

From Phyllis Coven, Office
of International Affairs

This memorandum is written to provide the INS Asylum Officer Corps (AOC) with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender.

Recent international initiatives have increased awareness and suggested approaches to gender-related asylum claims. Enhancing understanding of and sensitivity to gender-related issues will improve U.S. asylum adjudications while keeping pace with these international concerns. This guidance will serve as a useful tool for new Asylum Officers, and will help to ensure uniformity and consistency in procedures and decisions. In-Service training at all Asylum Offices will be critical to using this guidance effectively.

Despite the increased attention given to this type of claim during the past decade, gender-based asylum adjudications are still relatively new developments in refugee protection. This "Considerations" memorandum is a natural and multi-faceted outgrowth of a set of gender guidelines issued by the UNHCR in 1991, the 1993 Canadian gender guidelines, a proposed set of guidelines submitted by the Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, in 1994, and recent (and still developing) U.S. caselaw. It is similar in approach to the Haiti "Considerations" memorandum of March 9, 1993 and other memoranda issued to maintain consistency among Offices and Officers. Additionally, this memorandum seeks to enhance the ability of U.S. Asylum Officers to more sensitively deal with substantive and procedural aspects of gender-related claims, irrespective of country of origin.

I Background and International Guidance

This section reviews the historical and human rights context in which guidance on gender-sensitive and gender-based adjudications have evolved internationally.

Human rights violations against women are not a new phenomenon. Yet, only recently have they risen to the forefront of the international agenda. Spurred by the United Nations and

a handful of commentators, notably in Canada and the United States¹, understanding of gender-related violence in general is increasing.

The evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations.² The following international instruments and documents contain gender-related provisions that recognize and promote the principle that women's rights are human rights, and that women's rights are universal:

- **CEDAW:** The 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) is the most comprehensive international human rights instrument for women. CEDAW prohibits actions by States which are discriminatory and requires States to take affirmative steps to eradicate discriminatory treatment of women.
- **UN Declaration:** In June 1993, the United Nations World Conference on Human Rights emphasized the need to incorporate the rights of women as part of universal human rights,³ and called upon the General Assembly to adopt the Declaration on the Elimination of Violence against Women.⁴ On December 20, 1993, the United Nations General Assembly adopted the Declaration. The 1993 Declaration recognizes violence against women as both a per se violation of human rights and as an impediment to the enjoyment by women of other human rights.⁵
- **UNHCR Conclusions/Guidelines:** In 1985, the UNHCR Executive Committee adopted Conclusion No. 39 noting that refugee women and girls constitute the majority of the world

¹ J. Greathatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989), 1(4) *Intl. J. Refugee L.* 518; A. Johnson, "The International Protection of Women Refugees: A Summary of Principal Problems and Issues" (1989), 1(2) *Intl. J. Refugee L.* 221; D. Neal, "Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum" (1988), 20 *Col. Human Rights L.R.* 203. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 *Cornell Int'l. L.J.* 625 (1993).

² These instruments need not be ratified by the United States to provide guidance as a source of human rights norms. See, Basic Law Manual, Second Edition (BLM2), at pgs. 11-12.

³ Adoption of the Final Documents and Report of the Conference: Report of the Drafting Committee, Addendum, Final Outcome of the World Conference on Human Rights, 24 June 1993, A/Conf.157/DC/1/Add.1, p. 8-9, para.9.

⁴ United Nations General Assembly, *Adoption of the Final Documents and Report of the Conference, Report of the Drafting Committee, Addendum, Final Outcome of the World Conference on Human Rights*, 24 June 1993, "A/CONF.157/DC/1/Add.1," p. 23, para. 3.

⁵ United Nations General Assembly, *Declaration on the Elimination of Violence Against Women* (Geneva: U.N. General Assembly, "A/RES/48/104," 23 February 1994), p. 2. United Nations General Assembly, *Vienna Declaration and Programme of Action, Note by the Secretariat*, 12 July 1993, "A/CONF. 157/23," p. 18-20.

refugee population and that many of them are exposed to special problems. The Conclusion also recognized that States are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a "particular social group".⁶ In October, 1993, the UNHCR Executive Committee adopted Conclusion No. 73 on Refugee Protection and Sexual Violence.⁷ The 1993 Conclusion recognizes that asylum seekers who have suffered sexual violence should be treated with particular sensitivity, and recommends the establishment of training programs designed to ensure that those involved in the refugee status determination process are adequately sensitized to issues of gender and culture. In 1991, the Office of the High Commissioner issued its *Guidelines on the Protection of Refugee Women* (document EC/SCP/67).⁸ The 1991 UNHCR guidelines primarily address issues pertaining to women in refugee camps. However, the guidelines also address gender-related persecution and recommend procedures to make the refugee adjudication process more accessible to women.

- **Canadian Guidelines:** On March 9, 1993, the Canadian Immigration and Refugee Board (IRB) issued the ground-breaking "Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution".⁹ The Canadian guidelines attracted considerable interest both in the United States and other countries because they are the first national guidelines to formally recognize that women fleeing persecution because of their gender can be found to be refugees. In developing the guidelines, the IRB carried out extensive consultations with interested governmental and non-governmental groups and individuals. More than two years after their release, the Canadian guidelines remain a model for gender-based asylum adjudications.

This is not intended to be a full compendium of international sources of gender-related instruments and documents, only illustrative of the types of initiatives which have taken place during recent years. All of these initiatives underscored and contributed to the development of international human rights and humanitarian law relating to women refugee claimants; and

⁶ Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 39(k) (36th Session 1985); see also, Section III Legal Analysis of Claims, *infra*.

⁷ United Nations High Commissioner for Refugees, "Executive Committee Conclusion No. 73 Refugee Protection and Sexual Violence," *Report of the 44th Session* (Geneva: Office of the United Nations High Commissioner for Refugees, U.N. Doc. "A/AC.96/821 (1993)").

⁸ United Nations High Commissioner for Refugees, *Guidelines on the Protection of Refugee Women* (Geneva: Office of the United Nations High Commissioner for Refugees, July 1991).

⁹ Immigration and Refugee Board, *Guidelines Issued By the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, Canada: Immigration and Refugee Board, 9 March 1993).

contributed directly to the formulation of the U.S. guidelines.

Like the Canadian guidelines, this guidance is a collaborative effort developed after consultations with interested governmental and non-governmental organizations (NGOs) and individuals. The Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, initially highlighted these concerns to INS and was instrumental in the development of this guidance. Representatives from the INS Office of the General Counsel, the INS Resource Information Center, and the Executive Office for Immigration Review also participated in discussions held in Washington D.C. in April, 1994. The views of various womens' and law groups, the UNHCR and the Canadian IRB added to a productive and informative dialogue.

II Procedural Considerations for U.S. Asylum Officers

(a) Purpose and Overview

The purpose of this section is to emphasize the importance of creating a "customer-friendly" asylum interview environment that allows women claimants to discuss freely the elements and details of their claims.

Asylum Officers should bear in mind the context of these human rights and cross-cultural considerations when dealing with women claimants:

- The laws and customs of some countries contain gender-discriminatory provisions. Breaching social mores (e.g., marrying outside of an arranged marriage, wearing lipstick or failing to comply with other cultural or religious norms) may result in harm, abuse or harsh treatment that is distinguishable from the treatment given the general population, frequently without meaningful recourse to state protection. As a result, the civil, political, social and economic rights of women are often diminished in these countries.
- Although women applicants frequently present asylum claims for reasons similar to male applicants, they may also have had experiences that are particular to their gender. A woman may present a claim that may be analyzed and approved under one or more grounds. For example, rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds.
- Some societies require that women live under the protection of male family members. The death or absence of a spouse or other male family members may make a woman even more vulnerable to abuse.

- Women who have been raped or otherwise sexually abused may be seriously stigmatized and ostracized in their societies. They may also be subject to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonor on themselves, their families, and their communities.

(b) Asylum Interviews/Officers

All INS Asylum Officers - men and women - will be expected to conduct interviews of women with gender-based claims. To the extent that personnel resources permit, however, Asylum Offices may allow women Asylum Officers to interview these cases. An interview should not generally be canceled because of the unavailability of a woman Asylum Officer. But we must also recognize that, because of the very delicate and personal issues arising from sexual abuse, some women claimants may understandably have inhibitions about disclosing past experiences to male interviewers.

Women asylum applicants who have suffered sexual violence may have inhibitions about disclosing past experiences to male interviewers

Cases of this kind can often (but not always) be identified by a pre-interview reading of the Form I-589 application for asylum. Sometimes, only during the course of the asylum interview is it revealed that an applicant has suffered sexual violence. In such cases, Asylum Officers (men and women) must use their utmost care to assure that the interview continues in an atmosphere that allows for the discussion of past experiences.

(c) Interpreters/Presence of Family Members

Asylum Offices do not ordinarily have control over the interpreters chosen by asylum applicants. Testimony on sensitive issues such as sexual abuse can be diluted when received through the filter of a male interpreter. It is also not difficult to imagine the reluctance of a woman applicant to testify about sexual violence through a male interpreter, particularly if the interpreter is a family member or friend. We are hopeful that NGOs will convey our openness to female interpreters. However, interviews should not generally be canceled and rescheduled because women with gender-based asylum claims have brought male interpreters.

Testimony on sensitive issues such as sexual abuse can be diluted when received through the filter of a male interpreter

Interviewing Asylum Officers should provide women with the opportunity to be interviewed outside the hearing of other members of their family, especially male family members and children. The testimonial process can be a highly stressful experience for anyone, and there is a greater likelihood that a woman applicant may more freely communicate a claim involving sexual abuse when family members are not present. Sexual violence is seen in some cultures as a failure on the

part of the woman to preserve her virginity or marital dignity. Discussing her experience in front of family members may become a further source of alienation.

(d) Interview Considerations

The atmosphere created during the non-adversarial asylum interview should allow for the full discussion of past experiences. Asylum Officers may have to build a rapport with an applicant to elicit claims and to enable the applicant to recount her fears and/or past experiences. Women applicants may have difficulty speaking about past experiences that are personally degrading, humiliating, or culturally unacceptable. Officers should begin interviews with questions that do not deal with sensitive matters, and should move on to issues such as sexual abuse and violence only when well into the interview. It should not be necessary to ask for precise details of the sexual abuse; the important thing is establishing whether it has occurred and the apparent motive of the perpetrator.

It should not be necessary to ask for precise details of the sexual abuse; the important thing is establishing whether it has occurred and the apparent motive of the perpetrator.

Keep in mind that, from the point of view of most applicants, Asylum Officers are authority figures and foreign government officials. Officers must also be culturally sensitive to the fact that every asylum applicant is testifying in a foreign environment and may have had experiences which give her (or him) good reason to distrust persons in authority, and a fear of encounters with government officials in countries of origin may carry over to countries of reception. This fear may cause some asylum applicants to be initially timid.¹⁰ Asylum Officers can overcome much of this nervousness by giving a brief "Opening Statement" (see, Asylum Officer Corps Training, Interviewing Summary Of Techniques, HQ 7/14/94).

Gender-Based Claim:

- *Opening Statement*
- *Outside Hearing of Family*

(e) Demeanor/Credibility Issues

Inasmuch as Asylum Officers deal with people from a diverse array of countries, cultures and backgrounds, cross-cultural sensitivity is required of all Officers irrespective of the gender of the applicant. Nowhere is this sensitivity more needed than in assessing credibility and "demeanor". By "demeanor" is meant how a person handles himself/herself physically; for example, maintaining eye contact, shifts in posture, and hesitations in speech.

¹⁰ "A person who, because of his experiences, was in fear of the authorities in his [or her] own country may still feel apprehensive vis-a-vis any authority. He [or she] may therefore be afraid to speak freely and give a full and accurate account of his [or her] case." UNHCR Handbook at ¶ 198.

Women who have been subject to domestic or sexual abuse may be psychologically traumatized. Trauma can be suffered by any applicant, regardless of gender, and may have a significant impact on the ability to present testimony.

The demeanor of traumatized applicants can vary. They may appear numb or show emotional passivity when recounting past events of mistreatment. Some applicants may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause other applicants to block certain experiences from their minds in order not to relive their horror by the retelling.

From the applicant's point of view, Asylum Officers are authority figures and foreign government officials - Applicants may have had experiences which give them good reason to distrust persons in authority

In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect. This is a product of culture, not necessarily of credibility.

Questionable demeanor can be the product of trauma rather than a lack of credibility

It bears reiteration that the foregoing considerations of demeanor can be the products of trauma or culture, not credibility.¹¹ Poor interview techniques/cross-cultural skills may cause faulty negative credibility findings.

(f) Derivative Status or Independent Claim

Women in many cultures are viewed as completely subordinate to their husbands; that is, not having or deriving anything independently of their spouses. Asylum Officers of course do not make this assumption regarding the asylum eligibility of spouses. When a husband does not appear to have an approvable claim, an Asylum Officer should routinely review the merits of the wife's case even though she may be listed merely as a derivative on her husband's application and may not have filed a separate Form I-589 asylum application.

¹¹ The BLM2 points at pg. 104 that an applicant's demeanor while testifying may aid the assessment of credibility. Demeanor may be used to determine credibility, but it is most effectively used in conjunction with other factors. HQASM cautions against reliance on demeanor as an exclusive method to assess credibility for a gender-based or any other kind of asylum claim. "Credibility involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationality or internal consistency and the manner in which it hangs together with other evidence." In Re Lugo-Guadiana, 12 I&N Dec. 726, 729 (BIA 1968).

(g) INS Resource Information Center

Asylum Officers must be able to rely on objective and current information on the legal and cultural situation of women in their countries of origin, on the incidence of violence, including both sexual and domestic, and on the adequacy of state protection afforded to them. To this end, the Resource Information Center (RIC) will be issuing papers ("alerts" and country profiles) dealing with these issues.

RIC will be working on a number of projects in an attempt to assure that information concerning violations of the rights of women are distributed regularly and systematically to all Asylum Offices.

III Legal Analysis Of Claims

Women make up a large percentage of the world's refugees. In order to qualify as a refugee under our laws, female applicants must -- like any applicant -- show that they cannot return home and cannot avail themselves of the protection of their country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA section 101(a)(42). Often, of course, the asylum claim of a female applicant will have nothing to do with her gender. In other cases, though, the applicant's gender may bear on the claim in significant ways to which the adjudicator should be attentive. For example, the applicant may assert a particular kind of harm, like rape, that either is unique to women or befalls women more commonly than men. Or an applicant may assert that she has suffered persecution on account of her gender or because of her membership in a social group constituted by women. She might also assert that her alleged persecutors seek to harm her on account of a political or religious belief concerning gender. Such claims must be analyzed within the terms of United States law, but gender-related claims can raise issues of particular complexity, and it is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-related claims.

This section will describe how such claims should be analyzed within the framework of U.S. law. As with asylum cases in general, which can be among the most complicated adjudications in U.S. administrative law, there are no special "bright line" tests for evaluating claims that are based on the applicant's gender. This is a developing area, and adjudicators should freely seek legal counsel regarding these issues as the decisional law evolves.

Persecution: How Serious is the Harm?

As in all asylum cases, the asylum officer must assess whether the harm that the applicant fears or has suffered is serious enough to be regarded as "persecution" as that term is understood under the relevant international and domestic law. See Basic Law Manual: Asylum, pp. 23-27. The Board of Immigration Appeals has interpreted persecution to include threats to life, confinement,

torture, and economic restrictions so severe that they constitute a threat to life or freedom. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985), overruled on other grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). "Generally harsh conditions shared by many other persons" do not amount to persecution. Id. See also Kovac v. INS, 407 F.2d 107 (9th Cir. 1969) (persecution involves "the infliction of suffering or harm upon those who differ... in a manner regarded as offensive"); Hernandez-Ortiz v. INS, 77 F.2d 509, 516 (9th Cir. 1985) (persecution can occur where "there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted because of a difference the persecutor will not tolerate"). In addition, though discriminatory practices and experiences are not generally regarded by themselves as persecution, they "can accumulate over time or increase in intensity so that they may rise to the level of persecution." Basic Law Manual at 22.

The forms of harm that women suffer around the world, and that therefore will arise in asylum claims, are varied. Forms of harm that have arisen in asylum claims and that are unique to or more commonly befall women have included sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion. The form of harm or punishment may be selected because of the gender of the victim, but the analysis of the claim should not vary based on the gender of the victim. Asylum adjudicators should assess whether an instance of harm amounts to persecution on the basis of the general principles set out above.

A. Rape and Other Forms of Sexual Violence as Persecution

Serious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall within this rule. See Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987) (Salvadoran woman raped and brutalized by army sergeant who denounced her as subversive had been "persecuted" within the terms of the Act). In Matter of --, Krome (BIA May 25, 1993, which the Board recently voted to designate as a precedent), it was determined that the gang rape and beating of a Haitian woman in retaliation for her political activities was "grievous harm" amounting to persecution. Severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution. The appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm. As in all cases, the determination that sexual abuse may be serious enough to amount to persecution does not by itself make out a claim to asylum. The applicant must still demonstrate that the fear of persecution is well-founded and that the persecution was threatened or inflicted on account of a protected ground.

B. Violation of Fundamental Beliefs as Persecution

The Third Circuit has considered whether an Iranian woman faced with having to wear the traditional Islamic veil and to comply with other harsh rules imposed on women in Iran risked "persecution" as the Board has defined it. Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993). The record included evidence about the possibility of physical harm. The applicant had asserted in her brief

that the routine penalty for women who break the moral code in Iran is "74 lashes, a year's imprisonment, and in many cases brutal rapes and death." *Id.* at 1241. These, the court stated, would constitute persecution. The court went on to assume that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." *Id.* at 1242. Having to renounce religious beliefs or to desecrate an object of religious importance might, for example, be persecution if the victim held strong religious beliefs. Noting that the administrative record was "sparse, the court found that the applicant before it did not risk persecution, because she had not shown either that she would disobey the rules and risk the consequences or that obeying the rules would be "so profoundly abhorrent" as to amount to persecution. *Id.*

The court did not specify how "profoundly abhorrent" to one's beliefs forced behavior must be to constitute persecution. It did note that "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." *Id.* at 1240. The degree of abhorrence an applicant claims to feel at such forced behavior must be objectively reasonable — that is, it would have to be a degree of abhorrence that a reasonable person in the circumstances of the applicant could share. *Id.* at 1242 n.11.

Fisher v. INS, 37 F.3d 1371 (9th Cir. 1994) rehearing *en banc* pending, also concerned an Iranian woman whose claim was based on failure to conform to fundamentalist religious and cultural norms. The Fisher court emphasized that persecution should not be evaluated "solely on the basis of the physical sanction" 37 F.3d at 1379. Citing Fatin, the court stated that "when a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with laws that fundamentally are abhorrent to that person's deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in 'extreme conduct' that is 'tantamount to persecution.'" 37 F.3d at 1381.

Nexus: the "On Account of" Requirement

Some of the most difficult issues in asylum law arise over whether a gender-based asylum claim involves persecution "on account of" one of the five statutory grounds. This is a critical part of the analysis under U.S. law. INS v. Elias-Zacarias, ___ U.S. ___, 112 S.Ct. 812 (1991). Discussing this requirement in the context of a political opinion claim based on forced recruitment, the Supreme Court emphasized that persecution must be threatened or inflicted "on account of the victim's political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion." *Id.* at 816. Thus harm must be inflicted in order to punish the victim for having one or more of the characteristics protected under the statute. See Acosta, 19 I&N Dec. at 226.

A. Actual or Imputed Political Opinion

Asylum claims may often raise assertions of fear on account of a political opinion having to do with gender-related issues. The Third Circuit in Fatin had "little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes." 12 F.3d at 1242. The political opinion of the applicant in that case did not, however, provide a basis for refugee status. Though she had shown that she generally possessed political beliefs about the role of women in society that collided with those prevailing in Iran, she had not shown that she would risk severe enough punishment simply for holding such views. Nor had she shown that she actually possessed the narrower political opinion that Iran's gender-specific laws and repressive social norms must be disobeyed on grounds of conscience, although the court had indicated that the penalties for disobedience were harsh enough to amount to persecution. *Id.* at 1242-43. However, the case does make clear that an applicant who could demonstrate a well-founded fear of persecution on account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion.

Some tribunals have held or suggested that an applicant can establish eligibility for refugee status by demonstrating that he or she is at risk on account of a political opinion that the persecutor believes the applicant to have, whether or not the applicant actually possesses that political opinion. This is the doctrine of "imputed political opinion." See, e.g., Ravindran v. INS, 976 F.2d 754 (1st Cir. 1992); Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992); Matter of R-, Interim Decision #3195 (BIA 1992); Opinion of the General Counsel, "Continuing Viability of the Doctrine of Imputed Political Opinion" part I, pp. 1-6 (INS, January 19, 1993). Thus, in addition to the question whether views on issues that relate to gender can constitute a "political opinion" under the INA, asylum claims sometimes raise the question whether a woman has been persecuted because of a political opinion (regardless of its substance) that has been imputed to her.

In Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir. 1987), for example, the Fifth Circuit considered the claim of a woman whose family members had been politically active in El Salvador. Armed attackers came to her home, bound the applicant and other female family members and forced them to watch while the attackers murdered male family members. The attackers then raped the applicant and the other female family members while one attacker chanted political slogans. In what might appear to be an extreme assessment of the evidence, the court affirmed the Board's determination that the applicant had not established that the attackers were motivated by a political opinion they imputed to the victim. Reasonable minds could differ over this record. The court might reasonably have concluded that the chanting of political slogans during the rape indicated not merely that the attackers were politically motivated, but more specifically that they believed the petitioner to have contrary political views and that they punished her because of it. In any case, Campos-Guardado illustrates the need for an adjudicator to carefully ascertain all the facts surrounding an allegation of persecution in order to assess whether there are indicia that the act was committed or threatened on account of a protected characteristic.

B. Membership in a Particular Social Group

(1) General

"Membership in a particular social group" is perhaps the least clearly defined ground for eligibility as a refugee. See, e.g., Fatin, 12 F.3d at 1238 & nn. 4, 5, citing courts and commentators who have "struggled" with the concept. An applicant may, of course, have a claim based on more than one ground; "this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality." UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook") para. 77. Nevertheless, the Convention and the INA clearly set forth membership in a particular social group as an independent basis of refugee status.

The Board of Immigration Appeals has stated that :

"persecution on account of membership in a particular social group" encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Acosta, 19 I&N Dec. at 233. ¹²

According to the Ninth Circuit, an adjudicator considering a claim of persecution on account

¹² According to the UNHCR Handbook,

A "particular social group" normally comprises persons of similar backgrounds, habits or social status Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

Handbook, ¶¶ 77-78. These paragraphs are best understood as a possible explanation for harm directed at the members of a particular social group rather than as a requirement that the persecutor must inflict or threaten harm because it regards the group as a political opponent. The latter interpretation would render the "particular social group" category redundant. Evidence that the persecutor is motivated to act by its view of the group as subversive would likely satisfy a U.S. adjudicator that the persecutor is causing or threatening harm on account of actual or imputed political opinion.

of membership in a particular social group must determine:

- 1) whether the class of people identified by the asylum applicant is cognizable as a particular social group under the applicable laws;
- 2) whether the applicant qualifies as a member of the group;
- 3) whether the group has in fact been targeted for persecution on account of the characteristics of the group members; and
- 4) whether "special circumstances" are present that would justify regarding mere membership in the group in itself as sufficient to recognize the applicant as a refugee.

Sanchez-Trujillo v. INS, 801 F.2d 1572, 1574-75 (9th Cir. 1986). The requirement of "special circumstances" apparently applies only when the applicant's claim is based on mere membership in the social group.

(2) Social Group Defined by Gender

An increasing number of asylum applicants claim that gender, alone or along with other characteristics, can define a "particular social group." The Second Circuit has stated that gender alone cannot. "Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." Gomez v. INS, 947 F.2d 660, 664 (2nd Cir 1991). The Third Circuit has taken a different view. In Fatin, the court emphasized that an Iranian applicant who feared persecution because she is a woman would be a member of a particular social group under the INA. Ms. Fatin was not eligible for asylum, however, because she had not shown that persecutors would seek to harm her "based solely on her gender." 12 F.3d at 1240 (emphasis added).¹³

Thus, while some courts have concluded as a legal matter that gender can define a particular social group, no court has concluded as a factual matter that an applicant has demonstrated that the government (or a persecutor the government could not or would not control) would seek to harm her solely on account of her gender. The courts have then considered whether gender might be one characteristic that combines with others to define the particular social group.

¹³ The Eighth Circuit has adopted a similar approach. "Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear based solely on their gender." Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994). Although this language on its face would suggest that gender could never define a particular social group, the court does not make so broad a statement. Though its language is imprecise, the Safaie court cites the portion of Fatin in which the Third Circuit concluded that, while gender can define a social group under the INA, the record before it contained no evidence from which a reasonable factfinder could conclude that persecutors in Iran seek to harm people simply because they are women.

In Fatin, for example, the applicant's primary argument was not that she risked harm simply for being female. Rather, she argued that she risked harm as a member of a "very visible and specific subgroup: Iranian women who refuse to conform to the government's gender-specific laws and social norms." 12 F.3d at 1241, quoting petitioner's brief (emphasis supplied by the court). This group, the court noted, is not made up of all Iranian women who hold feminist views, nor even of all those who object to the rules that govern women in that country. It is limited to the smaller group of women who so strongly object that they refuse to conform, despite the risk of severe punishment. If a person would choose to suffer severe consequences rather than to comply with rules contrary to her beliefs, the court reasoned, then those beliefs might well be so fundamental to her identity or conscience that she ought not have to change them. The subgroup that the applicant asserted therefore could be seen as a particular social group. Moreover, the record indicated that the punishment facing the members of that group is severe enough to constitute persecution. The applicant was not a refugee, though, because she had not shown that she was a member of such a group. She had testified only that she would try to avoid as much as she could the strictures that she objected to. Id.

Thus the Fatin court found that women in Iran could constitute a "particular social group" and recognized the applicant's membership, but found that the members were not at risk of persecution. The court also seemed to recognize the narrower subgroup of Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them, but similarly found no evidence that people in this narrower group faced harm serious enough to constitute persecution. Last, the court recognized the narrowest subgroup of Iranian women whose opposition to Iran's gender-specific laws is so profound that they would disobey at serious peril; it held that the possible consequences of disobedience were extreme enough to be persecution but found that petitioner was not in the particular social group. In each scenario the court regarded gender, either alone or as part of a combination, as a characteristic that could define a particular social group within the meaning of the INA. Accord, Safaie, 25 F.3d at 640, citing Fatin (although "a group of women, who refuse to conform [with moral code in Iran] and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance, may well satisfy the definition," the applicant had failed to show that she fell within that group).

This is consistent with the statement of the Board in Acosta that "sex" might be the sort of shared characteristic that could define a particular social group. It is also consistent with the view taken by the UNHCR Executive Committee, of which the United States is a member. In 1985 the Executive Committee

recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.

Conclusions on the International Protection of Refugees adopted by the Executive Committee of the

When considering whether gender might combine with other characteristics to define a particular social group, asylum adjudicators should consider whether such additional characteristics are likely to be ascertainable by persecutors. In Gomez, the applicant argued — in line with the suggestion in Acosta that a shared past experience might define a particular social group — that she was a refugee based on her membership in the class of women who had been previously battered and raped by Salvadoran guerrillas. The court denied her claim, finding that she had failed to produce evidence that persons in this group could be identified as members by would-be persecutors and would be targeted for further harm on the basis of their common characteristic — that is, having been harmed by the guerrillas in the past. For this reason, the group could not be recognized as a "particular social group" within the meaning of the INA. Gomez, 947 F.2d at 664.

(3) Social Group Defined by Family Membership

Asylum seekers often claim to have suffered harm or to face the risk of harm because of a family relationship. In Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993), the court concluded: "There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family." This appears to follow the pronouncement of the BIA in Matter of Acosta that "kinship ties" could be the shared characteristic defining a particular social group. Gebremichael concerned an Ethiopian applicant who had been imprisoned and tortured by Dergue government officials seeking information about the applicant's brother. The court found that

the link between family membership and persecution is manifest: as the record makes clear and the INS itself concedes, the Ethiopian security forces applied to petitioner the "time-honored theory of cherchez la famille ('look for the family')," the terrorization of one family member to extract information about the location of another family member or to force the family member to come forward. As a result, we are compelled to conclude that no reasonable factfinder could fail to find that petitioner was singled out for mistreatment because of his relationship to his brother. Thus, this is a clear case of "[past] persecution on account of . . . membership in a particular social group."

10 F.3d at 36. See also Ravindran v. INS, 976 F.2d 754, 761 n.5 (1st Cir. 1992), quoting Sanchez-Trujillo, 801 F.2d at 1576 ("a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being the focus of fundamental affiliational concerns and common interests for most people"). Without mentioning Sanchez-Trujillo, however, or exploring the question in depth, the Ninth Circuit later held that the concept of persecution on account of membership in a particular social group does not extend to the persecution of a family. Estrada-Posadas v. INS, 924 F.2d 916, 919 (9th Cir. 1991).

While the state of the law is therefore uncertain in the Ninth Circuit, there is nevertheless

Board and federal court support for the principle that family membership could define a "particular social group" under the asylum laws. Obviously all other elements of the definition must be satisfied for this to be the basis of eligibility as a refugee. There must be past persecution or a well-founded fear of future persecution, and the harm must be threatened or inflicted on account of the applicant's membership in the group. Adjudicators should also note that the applicant's gender need not play any role in whether family membership can define a particular social group in the context of a particular case; Gebremichael, for example, was male. But claims based on family membership are frequently asserted by female applicants, particularly in countries where men tend to be more active politically than women. Thus, adjudicators should be aware of the caselaw on this point.¹⁴

Public versus Private Acts

(1) Is the Persecutor the Government or Someone the Government is Unable or Unwilling to Control?

After the adjudicator has examined the degree of harm and whether it has been threatened or inflicted on account of one or more of the five grounds, it is still necessary to inquire about the availability of protection within the country of claimed persecution. This is based on the notion that international protection becomes appropriate where national protection is unavailable.

A person is a refugee if he or she has a well-founded fear of persecution (as a result of one of the five factors in the definition) because he or she is not adequately protected by his or her government.

Basic Law Manual at 28. Caselaw establishes that this means, in part, that the persecutor can be either the government or a non-government entity that the government is unable or unwilling to control. See Matter of Villalta, Int. Dec. No 3126 (BIA 1990).

In the usual case, the government will be the alleged persecutor. The question may arise, however, whether an act committed or threatened by a government official was nevertheless a purely private one. The Ninth Circuit considered whether a woman who was "singled out to be bullied, beaten, injured, raped, and enslaved" was persecuted by an agent of the government for political or for personal reasons in Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir 1987). There the persecutor, a member of the Salvadoran military, threatened to accuse the applicant of subversion. He then did so, to a friend in the police force. Based on evidence of severe treatment of subversives by Salvadoran authorities, the court determined that the applicant was a refugee on account of the political opinion that could be imputed to her because of the public accusation, even without evidence that she actually held subversive political views. In Lazo-Majano, therefore, an

¹⁴In addition, adjudicators analyzing the degree of harm and the reasonableness of an applicant's fear should note that "the Board and the courts of appeals have consistently recognized evidence about treatment of one's family as probative of such a threat." Ananeh-Firempong v. INS, 766 F.2d 621, 627 (1st Cir. 1985) (Citations omitted.)

act that might have been regarded as personal violence not covered by the INA was held to have become persecution on account of a protected characteristic because of the conduct of the persecutor. Cf. Matter of Pierre, 15 I&N Dec. 461 (BIA 1975) (husband's status as a legislator in Haiti did not by itself make abuse of his wife persecution on account of political opinion even though the Haitian government would not restrain the husband).

The Sixth Circuit considered the distinction between public and private acts in a claim based on sexual harassment in Klawitter v. INS, 970 F.2d 149 (6th Cir. 1992). There the applicant claimed that she feared the unwanted sexual advances of a colonel in the Polish secret police. The court agreed with the position of the Board that "[h]owever distasteful his apparent treatment of the respondent may have been, such harm or threats arising from a personal dispute of this nature, even one taking place with an individual in a high governmental position, is not a ground for asylum." . . . Although petitioner's testimony recounts an unfortunate situation, harm or threats of harm based solely on sexual attraction do not constitute 'persecution' under the Act." 970 F.2d at 152.¹⁵

These cases involve public officials who commit what is commonly seen as a private act. In such situations adjudicators must determine whether a reasonable basis exists for regarding the act as a "public" one that can be attributed to the government or an agent the government is unable or unwilling to control. Compare Klawitter (sexual abuse by officer of Polish secret police was a purely private act) with Lazo-Majano (otherwise private acts of brutality by military officer treated as having become "public" when officer falsely accused victim in public of political opposition, putting her at risk of harm from other military officers). Adjudicators must also determine, as always, whether the applicant faces harm "on account of" a protected characteristic. Elias-Zacarias.

As mentioned above, the persecutor might also be a person or group outside the government that the government is unable or unwilling to control. If the applicant asserts a threat of harm from a non-government source, the applicant must show that the government is unwilling or unable to protect its citizens. See Matter of Villalta, Int. Dec. 3126 (BIA 1990); Rodriguez-Rivera v. INS, 848 F.2d 998, 1005 (9th Cir. 1988). It will be important in this regard, though not conclusive, to determine whether the applicant has actually sought help from government authorities. Id. Evidence that such an effort would be futile would also be relevant.

¹⁵ This does not mean that sexual harassment could never amount to persecution no matter the seriousness; nor does it mean that a government official could never engage in sexually abusive conduct as a means of punishing someone on account of a protected ground. Klawitter instead reiterates the requirement that an asylum seeker must show that harm is threatened or inflicted on account of a protected characteristic within the meaning of Elias-Zacarias, and that the agent of harm must be the government or someone the government is unable or unwilling to control. As in all asylum cases, the adjudicator must explore thoroughly the apparent motives of the persecutor and the level of harm inflicted or threatened in deciding cases involving sexual harassment or sexual assault. Likewise, the adjudicator must examine the identity of the alleged persecutor and the role of the government in offering protection.

2) Is State Protection Possible Elsewhere in the Country?

The principle that international protection becomes appropriate where national protection is unavailable also means that, to be eligible for international protection, an applicant must generally demonstrate that the danger of persecution exists nationwide. See Acosta, 19 I&N Dec. 211; Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988); Matter of R-, Int. Dec. 3195 at 7-9 (BIA 1992); Quintanilla-Ticas v. INS, 783 F.2d 955, 957 (9th Cir. 1986). If there is evidence that the applicant can avoid the threat by relocating to a different part of the country or that a government would offer protection from otherwise private acts of harm elsewhere in the country than the locality where those acts take place, then normally the applicant will not qualify for asylum. See Beltran-Zavala v. INS, 912 F.2d 1027, 1030 (9th Cir. 1990).

This principle becomes crucial where the applicant alleges private actions – such as domestic violence – that the state will not protect against. In such situations the officer must explore the extent to which the government can or does offer protection or redress, and the extent to which the risk of harm extends nationwide. According to the UNHCR Handbook, "a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so." UNHCR Handbook, ¶ 91. Whether is it "reasonable under all the circumstances" to expect an applicant to have sought refuge from acts of domestic violence or other seemingly "private" acts will of course depend on the facts of the case. Asylum adjudicators should carefully explore the circumstances giving rise to the harm or risk of harm, as well as the extent to which government protection would have been available in other parts of the country. The adjudicator must consider whether protection was available as a factual matter as well as in the law of the country and whether, under all the circumstances, it would be reasonable to expect a woman to seek residency elsewhere in her country. This underscores the general need to develop the record fully, with respect to both the applicant's particular circumstances and the conditions prevailing in the country of origin.

IV Conclusions: Training & Monitoring/Follow-up

(a) Training

This guidance is required reading for all interviewing and supervising Asylum Officers. Photocopies should be made for the fullest possible distribution within the Corps. Upon receipt of this guidance, each Asylum Office must initiate four hours of in-Service training designed to help Officers to use this guidance, and reinforce their awareness of and sensitivity to gender and cross-cultural issues. Training materials will be provided by Headquarters and, in certain instances, trainers may be drawn from the ranks of concerned NGOs.

This guidance will be included in all future training sessions as a separate module. These training activities, and the information being gathered by the RIC, will enhance the ability of

Asylum Officers to make informed, consistent and fair decisions.

Headquarters will continue to keep Office/rs abreast of the latest information on issues of gender and culture. Further training on these and related topics will take place as required. Training is critical to using this guidance effectively.

(b) Monitoring

Asylum Officer interviewing and decisionmaking should be monitored systematically by Asylum Office Directors and Supervisory Asylum Officers. The latter will be held accountable for assuring that Asylum Officers fully implement this guidance.

As caselaw on gender-related persecution evolves, this guidance will be revised from time to time. Headquarters will keep track of all developments in the law of gender-related persecution, both in the United States and internationally. At the same time, procedures will be established to ensure collection of statistics on various aspects of gender-related claims adjudicated by the AOC.

This memorandum is a public document and may be distributed outside INS.

