

## **GENDER GUIDELINES FOR OVERSEAS REFUGEE PROCESSING**

In November 1999, the United States Congress directed the Secretary of State, in consultation with the Attorney General and other appropriate federal agencies, to develop a task force with the goal of determining eligibility guidelines for women seeking refugee status overseas. This document establishes the required guidelines and seeks to enhance the ability of U.S. Refugee Program partners to deal sensitively with the substantive and procedural aspects of gender-related refugee issues. The guidelines aim to be consistent with guidance issued by the Immigration and Naturalization Service (INS) in 1995 entitled *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*.

### **I. BACKGROUND, DEFINITIONS AND KEY ISSUES**

Human rights violations against women are certainly not a new phenomenon, but only in the past decade has the international community made significant strides in recognizing the need for greater protection and consideration of women's rights. Given the current focus on the particular vulnerability of women refugees, international bodies and national governments have issued several documents in an effort to address gender-related persecution and incorporate gender perspectives into refugee policy. In addition to the 1995 *Considerations* discussed above, the following international instruments and documents may also be useful tools in evaluating gender-based claims:

- United Nations High Commissioner for Refugees (UNHCR) – *Guidelines on the Protection of Refugee Women* (1991)
- Canadian Immigration and Refugee Board – *Women Refugee Claimants Fearing Gender-Related Persecution* (1993)
- United Nations General Assembly – *Declaration on the Elimination of Violence Against Women* (1993)
- Australian Department of Immigration and Multicultural Affairs – *Guidelines on Gender Issues for Decision Makers* (1996)
- Refugee Women's Legal Group – *Gender Guidelines for the Determination of Asylum Claims in the UK* (1998)

The recent movement of gender-related issues and policy papers to the forefront of the international refugee agenda has led to some new vocabulary that has gone largely undefined. To ensure consistent and accurate adjudication of gender-based claims, proper usage of the terms is an essential starting point. The word "gender" is often used interchangeably with the term "sex." However, in the refugee context, gender does not just refer to the sex of an individual (male or female), but rather refers to historically, geographically and culturally specific social construction, power relations, and identities.

Gender-related persecution is typically, but not exclusively, persecution directed towards women and girls. It is often manifested in severe discrimination resulting from the persecutor's perception that the victim violated prevailing social mores. Consideration of gender-related persecution requires some understanding of the status and experiences of women and girls in the applicant's society.

**II.** These guidelines address access to the U.S. Refugee Resettlement Program, effects of cultural and societal roles on a refugee applicant's testimony, interview techniques, and the legal analysis involved in adjudicating a gender-related refugee claim.

### **II. ACCESS TO THE REFUGEE PROGRAM**

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With over 12 million refugees in the world today, the United States is unable to provide refuge and assistance for all of them. Furthermore, resettlement is not necessarily the solution for every refugee. Accordingly, the President, in consultation with the Congress, sets regional ceilings for the number of refugees who may be admitted to the U.S. each year. Through the establishment of its worldwide refugee processing priority system, the United States has set guidelines for the orderly management and processing of refugee applications within these authorized ceilings. The worldwide processing priority system functions as a case management tool to ensure that those refugees who are of greatest humanitarian concern to the U.S. have access to the U.S. Refugee Resettlement Program. These processing priorities are revised periodically to reflect trends in the need for refugee resettlement worldwide. Today, the United States assigns a high priority to assisting vulnerable female refugees and this concern is reflected in greater access for refugee women to the U.S. resettlement program. Individuals who are designated as women-at-risk are referred to the INS for a refugee interview under Priority One. Generally, these women are designated “at-risk” by UNHCR because of the danger they fear or have already experienced in the country of first flight.

Accessing the U.S. Refugee Program must not be confused with the determination of whether a person is a refugee under United States law. A priority designation does not entitle the person to admission to the U.S. as a refugee; rather it allows the applicant to appear before the interviewing officer for an adjudication of the case. Therefore, assignment of an individual to a particular processing priority does not reflect any decision regarding qualification for admission to the U.S. as a refugee, but it may reflect an assessment of the appropriateness or urgency of the need for resettlement. Just as qualifying for refugee status does not confer a right to resettle in the United States, assignment to a particular processing priority does not entitle a person to U.S. admission. Each individual must establish that he or she meet the statutorily mandated definition of refugee and that they are otherwise eligible for admission to the United States.

#### **UNHCR's Guidelines for Women-at-Risk**

The UNHCR is the organization responsible for finding durable solutions for the world's refugees. UNHCR attempts to facilitate voluntary repatriation when it is deemed safe for refugees to return home. Local or regional integration opportunities are often sought as interim or permanent solutions. Among cases to be promoted for resettlement, UNHCR accords priority to those refugees with acute legal and physical protection needs and, in particular, to women-at-risk and unaccompanied children for whom resettlement has been found to be in their best interest.

Since 1997, an individual of any nationality may be referred to the U.S. program by UNHCR or an U.S. Embassy under Priority One – the highest priority. Among the categories of highly vulnerable people often referred by UNHCR for resettlement consideration are “women-at-risk.” Priority One refugee cases are first in the queue for case processing, INS interview and, for those approved, onward movement to the United States.

For purposes of resettlement, UNHCR considers women-at-risk as those women who have protection problems, and are single heads of families or are accompanied by an adult male who is unable to support and assume the role of head of the family. They may suffer from a wide range of problems including expulsion, refoulement, sexual harassment, violence, abuse, torture and different forms of exploitation, and other security threats. They also face additional problems derived from persecution such as particular hardships sustained either in their country of origin, during flight or in their country of asylum. The trauma of having been uprooted, deprived of family ties, having experienced an

abrupt change in roles and status, in addition to the absence of an adult male head of family, renders some women, under certain circumstances, more vulnerable than others.<sup>1</sup>

As a practical matter, when refugees designated as women-at-risk (or otherwise bearing similar characteristics) are referred to the U.S. resettlement program, their circumstances are evaluated to determine if special arrangements are required during the case processing period. If it is possible, the process is expedited in urgent cases. In some locations, a special facility is utilized to house the women and their family members in order to ensure protection prior to their departure for the United States. In addition, voluntary agencies charged with facilitating the integration of such cases are alerted to the possibility that special consideration should be given when determining the location as well as other aspects of resettlement for these refugees.

### **III. THE REFUGEE INTERVIEW**

Once an individual has been given access to the U.S. resettlement program, an INS Officer interviews the individual to determine whether she meets the definition of refugee in Section 101(a)(42) of the Act. The processing priority is usually not relevant to the refugee claim since the processing priority is determined by the dangers that the woman faces in the country of flight or refuge, whereas the refugee determination is concerned with the dangers that she faced in the country of her nationality or last habitual residence. Therefore, as a general rule the interviewer should not be affected by the applicant's processing priority in making the refugee determination. The exception to this rule is in the situation where a woman is at risk because the dangers that the individual faced within her country of nationality follow her to the country of flight or refuge—in this case the interviewer should evaluate this information with regard to the refugee definition.

#### **Interviewing Conditions and Considerations**

Refugee interviews can be particularly difficult to conduct. Unlike in the domestic asylum program, most refugee interviews are not conducted in an office-type setting. Often, the setting may be loud, crowded, and confusing, and the applicant's situation in the third country is often precarious. Therefore, the interviewer must try to create an environment that allows the individual to feel comfortable enough to freely discuss the elements and details of the refugee claim. In addition, the interviewer should be able to identify issues that may be related to a female applicant's gender as well as issues that could inhibit her testimony. For example, an applicant's testimony may be significantly affected by cultural and societal factors, such as a woman's expected role in her society. Strict cultural norms in many countries may cause applicants to be reluctant to disclose experiences of sexual violence because in those societies sexual assault is seen as a violation of community or family morality for which the victim herself is held responsible.

##### **A. Effect of Interpreters, Interviewers and the Presence of Family Members**

Male interpreters, male interviewers, or the presence of certain family members can also alter an applicant's testimony. Furthermore, a female applicant might be reluctant to provide full and detailed testimony about sexual violence through an interpreter or interviewer of the opposite sex. There may be cases when a female officer would be able to elicit more information from the applicant than a male officer. It is possible that testimony on sensitive issues such as sexual abuse may be diluted when filtered through a male interpreter. Also, the interviewer may ask other family members to leave if it appears that communication is being inhibited by their presence. Family members may be reluctant to fully discuss

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<sup>1</sup> UNHCR Resettlement Handbook (1997).

their experiences in front of family members, particularly spouses and children. It is essential that interviewers consider these factors when interviewing female applicants.

#### B. Credibility: Lack of Detail and Demeanor

Cultural norms may limit an applicant's knowledge of the activities of some male family members, causing her testimony regarding their participation in certain political, military or social groups to be vague or confused. In evaluating the amount of detail an applicant should be expected to provide, the interviewer should take into account the applicant's social background, education, and role in society. When an applicant is not able to provide detail about certain aspects of her claim, the interviewer must inquire into the reason. Trauma may also have a significant impact on the applicant's demeanor or ability to present testimony. The demeanor of traumatized applicants can vary considerably; some may appear numb or show emotional passivity when recounting past events of mistreatment, while others may cry or even laugh when describing difficult experiences. In some cultures, keeping the head down and avoiding eye contact are signs of respect, while in others it is a sign of evasiveness. Therefore, interviewers should be aware that seemingly inconsistent behavior of an applicant, which might raise suspicions in other circumstances, could be the product of trauma or culture.

#### C. Interview Techniques

There are several interview techniques the Immigration Officer may use to ensure that the interview is conducted in a non-adversarial and open atmosphere that allows women to be more comfortable when discussing past experiences and fears of future harm. First, the interviewer must build a rapport with the applicant. As noted above, female applicants may have difficulty speaking about past experiences that are personally degrading, humiliating or culturally unacceptable. Officers should begin interviews with questions that deal with less sensitive matters and then move on to more difficult topics only when well into the interview. It is not necessary, and is often counterproductive, to require precise details of sexual abuse; the important factors are to establish whether the abuse occurred and the motive of the perpetrator. Interviewers should verbally acknowledge how difficult it may be for the applicant to answer certain questions, but remind the individual of the confidential nature of the interview and the importance of describing events with consistent, detailed testimony. Finally, if the applicant's ability to testify becomes impaired due to her loss of composure, the interviewer should pause and allow the applicant to regain her composure. A calm and composed individual will be able to provide more accurate and clear information. Although these techniques can be employed in all refugee interviews regardless of gender, it is important for the interviewer to be aware of factors that are unique to female applicants.

### **IV. LEGAL ANALYSIS OF THE REFUGEE CLAIM**

This guidance cites numerous federal court and BIA decisions rendered in the asylum context. Except as they may be modified or overruled by the Attorney General, BIA decisions are binding on INS officers pursuant to 8 CFR 3.1(g). As the supreme law of the land, U.S. Supreme Court decisions also control INS application of the refugee definition. Although portions of these decisions may concern issues that are solely related to asylum, such as interpretations that arise from INA Section 208 and 8 C.F.R. Section 208, those portions that are concerned with the refugee definition, INA Section 101(a)(42), are binding on overseas refugee adjudication. In addition to these cases, decisions of other federal district and circuit courts, as well as the UNHCR Handbook, while not binding on overseas adjudicators, may also provide useful guidance. Although a particular decision may not be binding on a refugee case because it reflects the interpretation of a particular circuit, or applies specifically to an asylum

interpretation, the decision reflects the wisdom of the BIA or the federal courts and should be given significant weight in determining the best course of decision-making in the refugee context.

In order to qualify as a refugee under U.S. law all applicants must show that they meet the refugee definition as outlined in the INA Section 101(a)(42). The legal criteria used to evaluate a female refugee applicant's eligibility, whether the claim is gender-based or not, is the same criteria used in all refugee adjudications. Because the experiences of refugee women are often different than those of men, it is useful to discuss how those experiences fit into the legal framework already established.

#### Persecution or Well-Founded Fear

In each refugee case, the Immigration Officer must evaluate whether the harm that the applicant fears or has suffered is serious enough to be regarded as persecution. The types of harm that women suffer vary across a broad range of countries, cultures and classes. Forms of harm that are unique to, or more common to, women include, but are not limited to:

- rape or sexual violence,
- infanticide,
- female genital mutilation (FGM),
- coercive family planning,
- forced marriages,
- slavery, and
- domestic violence.

**In evaluating whether the harm or feared harm constitutes persecution, the same factors and guidance that an Immigration Officer uses to assess the level of harm in any refugee case should be used in gender-related persecution cases as well. For instance, the fact that a practice is widespread or a cultural norm does not detract from a claim that the alleged acts are serious enough to be persecution. The determination of whether an act (or acts) rise(s) to the level of persecution must be made on a case-by-case basis.**

#### A. Rape and Other Sexual Violence as Persecution

Serious physical harm consistently has been held to constitute persecution, and rape, as well as other forms of severe sexual violence, clearly falls within this rule. Severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly considered to amount to persecution, and 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. However, a determination that sexual abuse is serious enough to amount to persecution does not by itself establish that the applicant is a refugee. The applicant must still demonstrate that the fear of persecution is well-founded and that the persecution is on account of one of the five protected grounds.

#### B. Other Forms of Persecution

Harm need not only be physical in nature to constitute persecution. For example, the BIA has interpreted persecution to include threats to life, confinement, and economic restrictions so severe that they constitute a threat to life or freedom.<sup>2</sup> The concept of persecution may even include governmental measures that compel an individual to engage in conduct that is not physically harmful, but is abhorrent to

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<sup>2</sup> 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).

that individual's deepest beliefs. Furthermore, although discriminatory practices are not generally regarded as persecution, discrimination or harassment could rise to the level of persecution if the adverse practices, treatments, or experiences accumulate over time or increase in intensity.

### C. Agent of Persecution

In addition to the level or type of harm, Immigration Officers must determine if the persecutor is the government or a group or individual that the government is unable or unwilling to control. The persecutor may be a rebel group, clan, tribe or someone closely associated with the applicant, such as a family member. In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the adjudicator should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection. For example, the government may view violence perpetrated by a family or clan member as a private dispute for which government intervention is inappropriate. Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable. In Surita v. INS, the Ninth Circuit found persecution where the police refused to respond to the applicant's request for assistance or to provide a reasonable explanation for their failure to respond.<sup>3</sup>

In some cases, an applicant may establish that state protection is unavailable even when she did not seek protection, or evidence may establish that actually seeking protection would have placed the applicant at an even greater risk. For example, there have been published reports that women in a particular country who reported rape to the authorities were themselves arrested and jailed under laws prohibiting sexual relations outside marriage.<sup>4</sup> Immigration Officers must be aware of country conditions information to evaluate whether state protection is available to an applicant who fears persecution from a non-government entity.

### The "On Account Of" Requirement (Nexus)

One of the most difficult issues in gender-related adjudications is whether the persecution is "on account of" one or more of the five protected characteristics: race, religion, nationality, political opinion and membership in a particular social group. To be eligible for refugee status, the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or more of the protected characteristics in the refugee definition. This required relationship between the harm and the five grounds is often referred to as the "nexus." Gender can form the basis for membership in a particular social group, or combined with other factors, can be the basis for one of the other protected characteristics of the refugee definition. In evaluating the refugee claims of women, there are several factors adjudicators must consider when examining the basis of the claim.

#### A. Political Opinion or Imputed Political Opinion

When investigating the presence of a political opinion or imputed political opinion, adjudicators should explore many different types of activities. Women may express political opinions in the traditional sense of direct participation within political organizations, institutions or demonstrations, but women may also engage in more indirect political expression than men because of their status in society. For example, a woman may cook and provide food for an opposition group or try to organize the release of a male relative detained for political reasons. Furthermore, the political opinion of male family members

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<sup>3</sup> Surita v. INS, 95 F.3d 814, 819-20 (9<sup>th</sup> Cir. 1996).

<sup>4</sup> Amnesty International, *Women in Pakistan – Disadvantaged and Denied Their Rights* (December 1995).

may be attributed to their female relatives, putting them at risk. Finally, women who live in a country with strict social norms who oppose or refuse to comply with traditional expectations of behavior associated with gender (such as dress codes or roles in family and society) may be expressing a political opinion.

#### B. Religion, Race and Nationality

Just as in claims involving political opinion or imputed political opinion, claims based on religion, race and nationality may also be related to an applicant's gender. Religion is a particularly significant ground because certain religions often assign different roles and expectations to women and men. Often, if a woman does not fulfill her assigned role she may be viewed as having incorrect societal or religious views and therefore deserving of punishment. This such punishment may be on account of religion, and may be a gender-related form of persecution. Adjudicators should also recognize that there may be an overlap between religious and political persecution. For example, refusal to comply with laws established in a theocracy could be perceived as holding an adverse political *or* religious opinion.

Although racial identity is certainly not solely a female or male attribute, persecution on account of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity or prosperity of a racial group by killing, maiming or incarcerating the men while the women may be viewed as propagating the ethnic identity and persecuted in a different way, through sexual violence or population control policies.<sup>5</sup>

#### C. Gender and Membership in a Particular Social Group (PSG)

Membership in a particular social group often serves as the protection ground in gender-related persecution cases, and it is perhaps the most complex and difficult ground to understand. The key BIA's decision on the meaning of particular social group requires that members of the group share a common, immutable trait. In Matter of Acosta, the BIA stated that "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...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."<sup>6</sup>

The Department of Justice has recently articulated a non-exhaustive list of additional factors that may be taken into consideration in determining whether a particular social group exists. Factors that may be considered in addition to the factors stated in Matter of Acosta, include:

- The members of the group are closely affiliated with each other.
- The members are driven by a common motive or interest.
- A voluntary associational relationship exists among the members.
- The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question.
- Members view themselves as members of the group.
- The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

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<sup>5</sup> Canadian Immigration and Refugee Board, *Guidelines on Gender Issues for Decision-Makers* (July 1996).

<sup>6</sup> *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

These factors may be highly relevant in some cases, but less relevant in others. They represent non-determinative considerations rather than requirements. The Department has also recently re-stated the principle that gender alone may form the basis for membership in a particular social group.

(1) The Role of Gender in a PSG

Although Acosta clearly states that gender alone can define a particular social group in certain circumstances, to date, no court has concluded as a legal matter that an applicant has demonstrated persecution based solely on account of gender. However, where the courts have recognized a gender-related claim, gender has been combined with other characteristics to form the basis of a particular social group. For instance, in Matter of Kasinga, the BIA recognized as a social group, young women of a particular tribe who opposed female genital mutilation and feared being subjected to it by their tribe.<sup>7</sup> In this case, the social group is not defined solely by gender, but gender is a central element of the definition. Similarly, in Fatin v. INS, the court explained that Iranian women whose opposition to Iran's gender-specific laws is so profound that they would disobey the law at serious peril, could be recognized as members of a particular social group.<sup>8</sup> In Fatin, gender is central to membership in the social group, but it is not the only requirement. Nevertheless, adjudicators should note that although the courts have not yet decided a case in which an applicant demonstrated harm solely on account of gender, such a case could occur.

(2) Immutable Characteristics and Past Experience

Another crucial aspect of the Acosta definition is that, to be considered immutable, the common trait must be unchangeable or truly fundamental to an applicant's identity. As noted above, past experience can be a basis for membership in a particular social group; however, any harm described in the past experience cannot be defined as the harm which the applicant claims as persecution. For example, in Gomez v. INS<sup>9</sup>, the court rejected an applicant's claim to membership in a particular social group of women who had been previously battered and raped by Salvadoran guerrillas because it is circular reasoning to suggest that the woman was persecuted because she was a battered and raped woman. This principle, however, does not foreclose the possibility that the shared past experience could be related to past harm. One example of a conceivable social group that involves past harm as the basis for membership would be women who are severely ostracized by their society because they were raped in the past; although their social group, women who are rape victims, is based upon past harm, these women now fear a separate persecution of severe ostracism. As with any refugee claim, to determine whether a trait is an immutable characteristic in a gender-related persecution case, all related evidence should be considered, including the applicant's individual circumstances as well as information on country conditions and the applicant's culture.

D. Domestic Violence

Following the BIA's decision in Matter of R-A-, Int. Dec. 3403 (BIA 1999), the Department of Justice has articulated an analytical framework within which domestic violence and other gender-related asylum claims should be considered. The Department of Justice has stated that certain forms of domestic violence may constitute persecution, despite the fact that they occur within familial or intimate relationships. Victims report patterns of abuse - rather than single, isolated incidents - that tend to include the repeated use of physical, sexual and emotional abuse, threats, intimidation, isolation and economic

<sup>7</sup> Matter of Kasinga, Int. Dec. 3407 (BIA 1996).

<sup>8</sup> Note that in Fatin v. INS, 12 f.3d 1233 (3<sup>rd</sup> Cir. 1993), the court concluded that the applicant did not belong to the particular social group because, although she opposed the gender-specific law, she did not refuse to obey.

<sup>9</sup> Gomez v. INS, 947 F.2d 660, 664 (2<sup>nd</sup> Cir. 1991).

coercion. Domestic violence centers on power and control over the victim. Consequently, when victims attempt to flee the abusive relationship, or otherwise assert their independence, abusers often pursue them and escalate the violence to regain or reassert control. The risk of lethality to the victim is often greatest when the victim attempts to escape the abuse and, in contrast to other persecution cases where the persecutor's desire to harm the victim may wane if the victim leaves, the victim's attempt to leave typically increases the abuser's motivation to locate and harm her. Because of the abuser's intimate or familial relationship with the victim, the abuser is likely to possess important information about where the victim could go or to whom the victim would turn for assistance.

In every application for refugee status, the burden is on the applicant to establish that the persecutor seeks to harm the individual on the basis of one of the five protected grounds. In the domestic violence context, an adjudicator should consider any evidence showing that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she enters into a domestic relationship. This includes direct evidence about the abuser's own actions, as well as any circumstantial evidence that such patterns of violence are supported by the legal system or the social norms in the country in question.

Interviewers should also note that a persecutor may target an individual victim because of a shared characteristic, even though the persecutor does not act against the others who also possess that characteristic. For example, in some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship. This may be a characteristic that the applicant shares with other women in society, although the abuser only seeks to harm the individual with whom a relationship exists. The adjudicator should not conclude that the individual fails to articulate her membership in a particular social group, but should analyze the case consistent with prevailing law and policy and make a determination on a case-by-case basis. Similar analysis may also be applicable, depending on the circumstances of each individual case, to a claim involving sexual slavery, female genital mutilation or forced marriages.

The UNHCR has not ordinarily referred cases to the U.S. Refugee Program on the basis of domestic violence or other similarly described situations. Therefore, it is not likely that refugee adjudicators will encounter these types of claims unless an applicant articulates this as the basis for her claim. Nevertheless, the legal analysis involved in adjudicating this type of claim is discussed above in an effort to inform interviewers of relevant factors to consider if a domestic violence case is presented overseas as well as providing a more in-depth understanding of the analytical framework in all refugee cases.

## **V. CONCLUSION**

This area of refugee law is undergoing continual change through litigation and regulatory review. As case law and new information on gender-related persecution evolves, these guidelines will be further revised to reflect the changes.