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## GENDER-BASED ASYLUM: AN ANALYSIS OF RECENT TRENDS

by Karen Musalo and Stephen Knight\*

In June 1999, the Board of Immigration Appeals (BIA or Board) issued an en banc decision in *Matter of R-A-*,<sup>1</sup> reversing a grant of asylum to a Guatemalan woman, Rodi Alvarado Peña, who fled severe domestic violence after her government failed to protect her.<sup>2</sup> The Board's decision, its

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CGRS, a project of Hastings' Center for Human Rights and International Justice, provides legal expertise and resources to attorneys representing women asylum-seekers fleeing gender-related harm, and tracks decisions in these cases. CGRS also works to coordinate legal and public policy advocacy efforts through domestic and international networking, and engages in public education efforts in order to educate decision-makers and the public and contribute to the formulation of national and international policy and practice. Resources available at CGRS's web site (<http://www.uchastings.edu/cgrs>) include case summaries of gender asylum cases—organized by nationality, type of harm, asylum ground, and other categories—gender asylum case law (including hard-to-find IJ and BIA decisions), and links to relevant online resources. For more information, see CGRS's web site or contact Karen Musalo, e-mail: [musalok@uchastings.edu](mailto:musalok@uchastings.edu); phone: (415) 565-4720, or Stephen Knight, e-mail: [knight@uchastings.edu](mailto:knight@uchastings.edu); phone: (415) 565-4791.

<sup>1</sup> Int. Dec. 3403 (BIA 1999).

<sup>2</sup> See Musalo, "*Matter of R-A-*: An Analysis of the Decision and its Implications," 76 *Interpreter Releases* 1177 (Aug. 9, 1999).

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second major ruling in a gender asylum case,<sup>3</sup> added two new criteria to the longstanding test for defining a particular social group,<sup>4</sup> and has the potential to significantly impact asylum cases premised on social group, many of which are of individuals fleeing gender-related persecution. Ms. Alvarado's attorneys were joined by a wide range of asylum and domestic violence advocates in requesting that the Attorney General review and reverse the decision.<sup>5</sup> The Attorney General has yet to take action on this request, and the case remains stayed in the Ninth Circuit Court of Appeals.

Less than two months after the BIA's en banc decision in *Matter of R-A-*, a panel of the BIA granted asylum to a young woman from Morocco who based her claim on regular, extreme and escalating physical and emotional abuse at the hands of her father, who held orthodox Muslim views. In *Matter of S-A-*,<sup>6</sup> the applicant's father had burned her legs with a hot razor after she wore a skirt that he considered to be too short. He did not permit her to stay in school past the third grade, and he permanently confined her to the house

after she spoke with a man on the street who asked her directions.<sup>7</sup> The applicant had testified that her father's abuse was prompted by his "ultra-orthodox Muslim views, particularly pertaining to women," which conflicted with her "liberal Muslim views."<sup>8</sup> After finding her to be credible, the BIA panel avoided the social group category put forward by the applicant's attorney and granted asylum on the basis of religion, finding that: "The record clearly establishes that, because of his orthodox Muslim beliefs regarding women and his daughter's refusal to share or submit to such religiously-inspired restrictions and demands, the respondent's father treated the respondent differently from her brothers, her male counterparts."<sup>9</sup>

The unpublished ruling in *Matter of S-A-* was later issued as a precedent decision on June 27, 2000, at the request of the INS, which stated in a letter to the Board that the decision:

addresses important issues arising in asylum law after the precedent decision in *Matter of R-A-*....The reasoning makes it clear that harm inflicted upon a woman by a family member may be a basis for asylum if it is on account of a protected ground, and if the other generally applicable requirements of the asylum laws are met.<sup>10</sup>

The BIA's decision in *Matter of S-A-*, and the INS's request that it be published, are positive developments. As is demonstrated by the asylum denials discussed below, however, *Matter of S-A-* may have limited application for the many gender asylum cases threatened with denial as a result of the precedent established by the Board in *Matter of R-A-*.

This article examines the impact of *Matter of R-A-* on gender asylum cases, including denials of asylum to women fleeing forced prostitution, honor killing, and gang rape, and considers the significance of the recent publication of *Matter of S-A-*. This article also investigates trends and

<sup>3</sup> The first such ruling was *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996). See Musalo, "In Re Kasinga: A Big Step Forward for Gender-Based Asylum Claims," 73 Interpreter Releases 853 (July 1, 1996).

<sup>4</sup> In *Matter of Acosta*, the BIA held that a social group could be defined in reference to an immutable or fundamental characteristic that "either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed." *Matter of Acosta*, 19 I&N Dec. 211, 233 (1985). The 15-year-old *Acosta* test had been widely influential, including being cited by the highest courts of Canada, in *Attorney General v. Ward*, 2 S.C.R. 689 (Canadian Supreme Court, 1993), and the United Kingdom, in *Islam (A.P.) v. Secretary of State*, [1999] 2 W.L.R. 1015 (House of Lords). The majority in *Matter of R-A-* stated that the *Acosta* test was only a threshold, and that an asylum applicant must also demonstrate that: (1) the members of the social group "understand their own affiliation with the grouping, as do other persons within the particular society," and (2) the harm suffered "is itself an important social attribute." *Matter of R-A-*, Int. Dec. 3403, at 17.

<sup>5</sup> Under 8 CFR § 3.1(h), the Attorney General may review BIA decisions upon her own initiative, or where requested by the Chairman or a majority of the BIA, or by the INS Commissioner. Advocates for Rodi Alvarado are requesting that the Attorney General exercise her discretion to review the decision on her own authority.

<sup>6</sup> *Matter of S-A-*, Int. Dec. 3433 (BIA June 27, 2000), reported on in 77 Interpreter Releases 860 (June 30, 2000). See also 77 Interpreter Releases 336 (Mar. 20, 2000) (unpublished decision).

<sup>7</sup> *Matter of S-A-*, Int. Dec. 3433 at 2.

<sup>8</sup> *Id.* The applicant did not consider turning to the police or other governmental agency for protection from her father's abuse. Twice, she attempted suicide. Eventually, she came to the U.S. with the help of her sympathetic aunt, and she applied for asylum. The applicant was found not credible and was denied asylum by an immigration judge.

<sup>9</sup> *Id.* at 8-9.

<sup>10</sup> Letter from Julia Doig, Chief Appellate Counsel, INS, to Paul Schmidt, Chairman, BIA (May 4, 2000) (<http://www.uchastings.edu/cgrs/law/biadic.html>).

developments in gender and asylum based on an analysis of information on over 440 gender-related asylum cases.<sup>11</sup>

#### THE IMPACT OF *MATTER OF R-A-*

In the wake of *Matter of R-A-*, there have been a substantial number of decisions by the BIA, Immigration Judges (IJs) and asylum officers; this article first takes a closer look at the available information pertaining to cases decided since publication of the *Matter of R-A-* decision on June 11, 1999.<sup>12</sup> As detailed below, the BIA has denied asylum in every case involving spousal domestic violence in the CGRS database. Furthermore, it has denied asylum in two cases involving honor killing; in one it explicitly relied upon *Matter of R-A-* to deny relief. IJs are more divided, having issued a handful of asylum grants as well as denials. For its part, the INS has appealed several of the grants, and the majority of cases remain pending. At the Asylum Office, there has been a single grant of asylum in a domestic violence case, and there have been three denials.

- Domestic Violence

Since the *Matter of R-A-* decision, the BIA has denied asylum to at least five women in cases raising domestic violence issues, involving applicants from the Democratic Republic of the Congo, Guatemala, Mexico (two cases), and Peru. As discussed above, the BIA also granted asylum in *Matter of S-A-*, which involved domestic abuse of a woman by her father. Sixteen domestic violence cases remain pending at the Board. The details of two of the BIA denials are as follows.

*Matter of D-K-*. On January 20, 2000, the Board affirmed a decision by an IJ denying asylum to Diebo Kuna. During her lengthy marriage to an officer in President Mobutu's military in the former Zaire, Ms. Kuna suffered what the IJ characterized as "atrocities."<sup>13</sup> Her husband became emboldened after a 1995 incident in which he shot a colleague but escaped prosecution because of his powerful connections.<sup>14</sup> He beat and raped her, often in front of their children, causing her to lose consciousness and to suffer serious injuries, including permanent facial disfigurement and infection with sexually transmitted diseases. The IJ cited a State Department document on the Democratic Republic of the Congo reporting that "[d]omestic violence, including rape and beatings, is widespread but rarely reported and that there are no provisions under the law for spousal battery,"<sup>15</sup> and Ms. Kuna knew it was futile to go to the police for help.

Ms. Kuna's attorney argued that her client was eligible for asylum on account of her political opinion, as well as her membership in the particular social group of Congolese women, or of Congolese women unwilling to remain with a battering spouse.<sup>16</sup> The IJ accepted the existence of the social groups, but denied asylum, ruling that Ms. Kuna had not been persecuted on account of her membership in either group, or for any political reason, but solely because her husband was "a despicable person."<sup>17</sup> The judge also ruled that Ms. Kuna could seek shelter elsewhere in the Congo. On January 20, 2000, a BIA panel voted 2-1 to affirm the IJ's denial.<sup>18</sup> The BIA acknowledged that Ms. Kuna's husband had "committed brutal and deplorable acts of domestic violence against her," and said: "We extend our sympathy to her."<sup>19</sup> But the BIA applied *Matter of R-A-* and ruled both that Ms. Kuna did not belong to a cognizable social group, and that she had not been targeted by her husband on account of her membership in any

<sup>11</sup> Through its efforts to track and assist with gender asylum cases, the CGRS has created a database with information on 443 cases. For each case, the database records available information such as nationality, type of harm, facts of the asylum claim, legal theory, grounds for asylum, procedural setting and disposition, and decision rationale.

The data presented may not be representative because the cases in the database are not a random sample. In most cases the information is provided by attorneys who have represented the asylum applicant, are willing to share the information, and have secured the client's permission to share such information. Nonetheless, the database represents the best information available about current cases involving gender-related claims to asylum.

<sup>12</sup> To protect the identities of the individuals discussed in this article, the authors have not included the INS "A" numbers for the cases cited below. All relevant case information, however, is available on the CGRS website discussed in the introductory footnote, and/or from the authors.

<sup>13</sup> *Matter of D-K-* (IJ, Elizabeth, NJ Dec. 8, 1998) (page number not available) (<http://www.uchastings.edu/cgrs/law/ijdec.html>). See also Amnesty International Refugee Action NSA 5/00 (May 15, 2000) (<http://www.uchastings.edu/cgrs/campaigns/alvarado.htm>).

<sup>14</sup> The facts are taken from the BIA's decision, *Matter of D-K-* at 2 (BIA Jan. 20, 2000) (<http://www.uchastings.edu/cgrs/law/biadecc.html>).

<sup>15</sup> *Matter of D-K-* (Dec. 8, 1998 IJ decision), supra note 13 (quoting U.S. State Dep't, *Democratic Republic of the Congo (DROC)—Formerly Zaire: Profile of Asylum Claims & Country Conditions* (Mar. 1998)).

<sup>16</sup> *Matter of D-K-* (Dec. 8, 1998 IJ decision), supra note 13.

<sup>17</sup> Id.

<sup>18</sup> *Matter of D-K-* (Jan. 20, 2000 BIA decision), supra note 14.

<sup>19</sup> Id. at 3.

such group or for her political opinion.<sup>20</sup> One of the two members in the majority stated that he in fact agreed with the dissent's analysis, but was "constrained to concur in the result" because of *Matter of R-A-*.<sup>21</sup> The BIA's ruling is pending on appeal to the U.S. Court of Appeals for the Third Circuit. On August 1, 2000, Ms. Kuna was granted relief under the Convention Against Torture (CAT)<sup>22</sup> and released after having been detained for almost two and a half years; the INS has appealed the CAT decision.

*Matter of A-C-*. In *Matter of A-C-*, a case involving a minor from Mexico, the BIA reversed a grant of asylum made by an IJ. The panel decision, on June 17, 1999, came just a week after the publication of *Matter of R-A-*. In a brief decision that closely echoed *Matter of R-A-* without citing to it, the panel found the applicant ineligible for asylum. In this case, the applicant's father was domineering and he violently abused all members of the family. Ms. C was whipped and beaten on a weekly basis, beginning when she was three years

<sup>20</sup> Id. at 5.

<sup>21</sup> Id. at 16 (Villageliu, Member, concurring).

<sup>22</sup> *Matter of D-K-* (IJ, Elizabeth, NJ Aug. 1, 2000) (copy on file with the authors). To be eligible for relief under the Convention Against Torture (CAT), the harm suffered must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity." *Matter of S-V-*, Int. Dec. 3430, at 8 (BIA 2000) (quoting 8 CFR § 208.18(a)(1)). *Matter of S-V-* is reported on in 77 Interpreter Releases 661 (May 22, 2000). The judge relied in part on the BIA's decision denying asylum to Ms. Kuna, which stated clearly that she had been persecuted by her husband. "The only issue then...is whether the respondent's husband's action came with the government's acquiescence." *Matter of D-K-* at 4 (Aug. 1, 2000 IJ decision). Under the regulations, acquiescence to torture "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 CFR § 208.18(a)(7). Relying on Ms. Kuna's testimony as well as two U.S. State Department reports discussing domestic violence in the Congo, the IJ found that "[w]illful blindness to domestic abuse appears to be the policy of the Congolese police force....This court finds that the Congolese authorities are willfully accepting the respondent's husband's torturous acts against the respondent." *Matter of D-K-* (Aug. 1, 2000 IJ decision) at 5-6.

A grant of relief under the CAT is equivalent to a grant of withholding of removal. While it prevents an individual's return to her country of origin, she can neither adjust her status to that of a legal permanent resident (and thus, eventually, citizenship), nor can she petition for any relatives to join her in the U.S.

old. Once she became older, the abuse was often prompted by her attempts to prevent her father from beating her mother. Her mother insisted that she not report the abuse to the police; in any event, Ms. C did not think the police would be of any help. On occasion she would run away to her grandfather's home, but her father always followed, beat her, and forced her to return.

The IJ, in granting relief, had found Ms. C to be a member of the particular social group of Mexican children subject to domestic violence, and ruled that the group's members share the common and immutable characteristic of being children of a family victimized by domestic violence and being unable to seek protection in Mexico. The INS appealed to the BIA, arguing that Ms. C had not shown that the social group possessed any immutable characteristics, that the Mexican government would not protect her, or that she could not find safety elsewhere in Mexico. The BIA panel applied its new social group test from *Matter of R-A-* and reversed the IJ's decision, ruling that "the respondent has not shown that Mexican children who have been subject to domestic violence is a group that is recognized and understood to be a societal faction within Mexico."<sup>23</sup> The BIA further held that there was no evidence that the father was "influenced by his perception of her political opinion."<sup>24</sup>

Broader adjudicatory trends. *Matter of D-K-* and *Matter of A-C-* are illustrative of BIA decision-making and its application of *R-A-*. In addition, from cases tracked in the CGRS database, it is possible to discern adjudicatory trends at the level of the asylum office and immigration courts. The CGRS database includes 62 cases<sup>25</sup> involving domestic violence that have been decided or remain pending since the publication of *Matter of R-A-*. There have been decisions in about a third of the cases (23 decisions in 22 of these 62 cases<sup>26</sup>); the remainder are pending.<sup>27</sup> Of the 23 decisions

<sup>23</sup> *Matter of A-C-* at 6 (BIA June 17, 1999) (<http://www.uchastings.edu/cgrs/law/biadec.html>).

<sup>24</sup> Id. at 5.

<sup>25</sup> Of these cases, 37 are in immigration court, and 26 were filed at the Asylum Office.

<sup>26</sup> One case, from Peru, accounts for two decisions, having been denied both by the IJ and the BIA.

<sup>27</sup> Almost three quarters of the cases (44) remain pending, including 20 cases at the Asylum Office and 24 in immigration court. The pending cases include some in which a decision was issued at an earlier stage of the proceedings, e.g., a denial at the affirmative stage where the claim was pursued in immigration court, or a grant or denial by an IJ that was appealed to the BIA. Many attorneys report that immigration judges appear to be awaiting the result of the Attorney General's review of

there have been a total of nine grants and 14 denials (including the BIA's one grant and five denials mentioned above). Immigration judges granted seven cases (from Bangladesh (2), Guinea, Sri Lanka, Mexico, and El Salvador (2)) and denied six (from China, El Salvador, Mexico (2), Peru, and Trinidad). The INS chose to appeal two of the seven grants, both from El Salvador.<sup>28</sup> Of the six immigration judge denials, one has since been upheld by the BIA (the applicant is from Peru); the other five remain pending. Asylum officers granted one domestic violence case (from Pakistan) and denied three (from Iran, Mexico, and Pakistan). The cases of the three applicants who were denied are all pending in immigration court.<sup>29</sup>

- Forced Prostitution, Honor Killing, and Gang Rape

The impact of *Matter of R-A-* has not been limited to claims for asylum based on domestic violence, but has extended to other cases involving such serious human rights abuses as forced prostitution, honor killing, and gang rape cases. This broad impact has not been a surprise in light of the fact that *Matter of R-A-* made it more difficult to base a claim on social group membership, and the gender-related asylum claims of women are often premised on the social group ground. Asylum advocates representing women claiming membership in a particular social group report that immigration judges and INS attorneys alike cite *Matter of R-A-* as a bar to cases that do not involve domestic violence. Several recent illustrative cases are summarized below.

*Matter of O-*<sup>30</sup> An immigration judge denied relief in the case of Ms. O,<sup>31</sup> a 21-year-old woman from a former Soviet Republic who was held as a sexual slave by an organized crime figure, forced to have sex nightly with his friends—including local government officials—and then sold to a man who intended to take her to another country for purposes of forced prostitution. At her February 2000 asylum hearing, the IJ accepted Ms. O's story as true, including the

*Matter of R-A-*, which may partially explain the large number of cases that are pending.

<sup>28</sup> As noted above, to date the BIA has yet to affirm any decision granting asylum in a case of spousal domestic violence, nor has it reversed any denial of asylum in such a case.

<sup>29</sup> The Guatemalan domestic violence denial was sent to INS Headquarters as a recommended grant, where it was reversed following *Matter of R-A-*. In two other cases, there is no information on the final disposition.

<sup>30</sup> *Matter of O-* (IJ, Portland, OR Feb. 7, 2000).

<sup>31</sup> The names of a number of asylum seekers whose cases are discussed in this article are not provided in order to protect their identities.

opinion of a country expert that, if returned, "she would either be abducted again and again subject to torture and forced prostitution...or, more likely, be targeted for ritualized execution."<sup>32</sup> Ms. O's attorney argued that her client was a member of a particular social group of women targeted by the Mafia as part of an effort to control women and take away their autonomy. The IJ rejected this argument and denied asylum, stating that under *Matter of R-A-*, the persecution Ms. O endured was not "on account of" one of the five grounds for asylum.<sup>33</sup> Ms. O's appeal to the BIA is currently pending.

*Matter of M-J-* In another case involving forced prostitution, the IJ granted asylum but the INS appealed. The applicant in this case, Ms. J, is a young woman from China who faced increasingly aggressive sexual advances from her manager at work.<sup>34</sup> During one such sexual assault, she grabbed a pair of scissors and in self-defense stabbed him in the thigh. Although she was never put on trial, the police told Ms. J that she would be sentenced to three years for assault. When she explained about the manager's repeated assaults, an officer told her she was lucky to have the attention of a powerful man. The manager agreed to drop the charges in exchange for Ms. J's working off the debt in a hair salon, which in fact was a brothel run with the cooperation of the police. Ms. J managed to escape before she was forced to provide sexual services to the brothel's customers, and the police came looking for her at her parents' house. In December 1996, an IJ granted Ms. J asylum, finding her credible and ruling that even if Ms. J were found guilty of assault, being forced into prostitution was an inappropriate sentence.<sup>35</sup> The IJ ruled that Ms. J was a member of the social group of women forced into prostitution against their will.<sup>36</sup> The INS appealed, arguing that, "at most, [Ms. J's] claim is based on fear of returning to face criminal charges and associated punishment."<sup>37</sup> The case remains pending before the BIA.

<sup>32</sup> See Amnesty International Refugee Action NSA 6/00 (May 18, 2000) (<http://www.uchastings.edu/cgrs/campaigns/forcedprost.htm>).

<sup>33</sup> The immigration judge granted Ms. O relief under the CAT, which is equivalent to a grant of withholding of removal and prevents removal to her country of origin. See supra note 22.

<sup>34</sup> *Matter of M-J-* (IJ, San Pedro, CA Dec. 3, 1996) (<http://www.uchastings.edu/cgrs/law/ijdec.html>). See also Amnesty International Refugee Action NSA 6/00 (May 18, 2000) (<http://www.uchastings.edu/cgrs/campaigns/forcedprost.htm>).

<sup>35</sup> *Matter of M-J-* at 16.

<sup>36</sup> Id.

<sup>37</sup> INS Brief on Appeal (copy on file with authors).

*Matter of A-*. There have also been at least two negative decisions in cases involving feared honor killings.<sup>38</sup> *Matter of A-* involved a Jordanian applicant who was threatened with death by honor killing at the hands of her male family members because she engaged in premarital sex and married against her family's wishes. She presented corroborating evidence in the form of letters from her sister that her father has ordered all the male family members to kill her on sight. Record evidence established that the government of Jordan tolerates honor killings; the Jordanian Penal Code provides for minor penalties, averaging three to six months, for men who commit honor killings, while the penalty for other homicides is death.

Ms. A's attorney argued that the applicant belonged to the particular social group of Jordanian women who are threatened with death for having engaged in premarital sex and defying their parent's wishes by marrying without permission. The IJ found Ms. A credible, but ruled that honor killings are isolated family episodes and that the reaction of Ms. A's family remained uncertain. On August 20, 1999, the BIA affirmed the denial, ruling that an honor killing would not be persecution on account of social group membership, but rather the unfortunate consequence of a "personal family dispute."<sup>39</sup> The BIA decision did not cite *R-A-*, or reference its social group criteria; however, in future adjudication of the case, both parties will need to address the social group definition set forth in *R-A-*. The case is currently pending in the Ninth Circuit Court of Appeals, where the parties have filed joint continuances pending a decision by the Attorney General on *Matter of R-A-*.

*Matter of M-O-*. In another honor killing case, the BIA relied on *Matter of R-A-* to reverse a grant of withholding of removal<sup>40</sup> to Mr. O, a young man from Jordan. The asylum applicant testified that he would be tortured and killed in accordance with tribal law for having sexual relations with his girlfriend, who was engaged to another man. The applicant

was wounded and narrowly escaped being killed in an armed attack by a member of his girlfriend's family in Jordan. Stating that he was "convinced that imminent death awaits the respondent under Islamic law should he be forcibly removed to Jordan,"<sup>41</sup> the IJ ruled that Mr. O was a member of the particular social group of "Jordanians subject to death by Islamic law and who cannot adequately avail themselves of government protection."<sup>42</sup> The BIA panel accepted the facts as laid out by the IJ, but reversed the grant, finding that the described social group did not meet the additional requirements established in *Matter of R-A-*:

Although the respondent fits within the proposed group, he has not shown that this group is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Jordan. Furthermore, the respondent has not shown that the characteristic of being a Jordanian male that has had sexual relations with a virgin who is engaged to another man is one that is important within Jordanian society.<sup>43</sup>

In addition to finding that the described group was not cognizable as a particular social group, the Board ruled that the harm the applicant feared would not be imposed on account of membership in the alleged social group, but rather, because of his illicit relationship with his girlfriend. The Board found that this was the case even if the Jordanian government failed to protect him, citing *Matter of R-A-* on this point: "[C]onstruing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the 'on account of' requirement in the statute."<sup>44</sup>

#### GENDER AND ASYLUM: AN ANALYSIS

The CGRS database currently includes information on 443 gender asylum cases filed at the Asylum Office and immigration court over the past five years.<sup>45</sup> Although the database may not represent a random sample, it constitutes an unprecedented resource about gender cases, including

<sup>38</sup> The term "honor killing" refers to the practice in Jordan and other Middle Eastern and South Asian countries in which male members of a family consider themselves duty-bound to kill a female family member who they think has brought them dishonor and shame. The only form of protection offered by the Jordanian government for women who fear becoming victims of honor crimes is their own imprisonment. In 1998, there were up to 50 women involuntarily detained in this form of "protective custody."

<sup>39</sup> *Matter of A-* at 1 (BIA Aug. 20, 1999). See also Amnesty International Refugee Action NSA 4/00 (Feb. 14, 2000) (<http://www.uchastings.edu/cgrs/campaigns/honor.htm>).

<sup>40</sup> The applicant is ineligible for asylum due to an aggravated felony conviction.

<sup>41</sup> *Matter of M-O-* at 6 (IJ, York, PA Oct. 8, 1999) (<http://www.uchastings.edu/cgrs/law/ijdec.html>).

<sup>42</sup> Id. at 4.

<sup>43</sup> *Matter of M-O-* at 4 (BIA Apr. 7, 2000) (<http://www.uchastings.edu/cgrs/law/biadec.html>).

<sup>44</sup> Id. at 5. Because the IJ had not ruled on the applicant's claim to relief under the CAT, the BIA remanded the case for a decision on that basis. Id. at 6.

<sup>45</sup> Currently, the great majority of cases are from the U.S., but the database also includes gender cases from Canada and the United Kingdom.

information such as the nationalities of claimants, facts of claims, legal theories presented, and the dispositions and decision-making rationales. On the basis of this information, the impact of *Matter of R-A-* was closely examined above. Below, this article engages in a preliminary analysis of overall trends and developments based on the entire database.

In this section, numerical information regarding gender cases is presented, broken down by type of harm, asylum ground, decision, etc. In properly interpreting this information, it is important to recognize that any given case may be included more than once within these categories. For example, a case may raise more than one type of harm (i.e., female genital mutilation (FGM) and domestic violence), be based on more than one ground for asylum (i.e., political opinion and social group), and have resulted in more than one decision (i.e., a denial at the asylum office, and a subsequent grant at the immigration court). The full range of information is not available for all cases, which also affects the numbers reported.

As presented in more detail below, the cases in the CGRS database include the following gender-related types of harm: domestic violence (139 cases); rape (109); FGM (67); repressive social mores (72);<sup>46</sup> honor killing (22); forced marriage/polygamy (14); forced prostitution (9); family planning (13); incest (9); and sexual slavery (6). In 39 cases, information on the type of harm was not available. Of the 244 cases in which there is information on a final decision (including cases pending on appeal), there are a total of 162 grants of asylum, and 82 denials. It should be kept in mind that a number of the grants were in the post-*Kasinga*, pre-*R-A-* time period.

- Domestic Violence

Domestic violence cases represent the single largest group of cases, which is due at least in part to the fact that, because of concern and advocacy around *Matter of R-A-*, many attorneys representing women with asylum claims involving domestic violence have contacted CGRS. The domestic violence cases in which there has either been a decision since the publication of *Matter of R-A-* in June 1999, or which remain pending, have been discussed above. Looking at all of the domestic violence cases in the database, including those

<sup>46</sup> The category of "Repressive Social Mores" is used to characterize cumulative social harms faced by women arising from restrictions on their ability to work and attend school, as well as on their behavior, dress, etc. See, e.g., UNHCR, Division of International Protection, "Gender-Based Persecution: An Analysis of Recent Trends," Int'l J. of Ref. L. 80, 84 (Special Issue: Autumn 1997).

decided prior to *Matter of R-A-*, there are 139 cases in which domestic violence is raised at least in part as a basis for the asylum claim, including 38 grants and 31 denials; 66 cases are pending; and there is insufficient information on the disposition of four cases.

BIA: The Board has granted asylum in one domestic violence case (*Matter of S-A-*, discussed above), and denied asylum in seven cases (including reversal of two immigration judge grants).<sup>47</sup>

Immigration Court: Asylum was granted in 19 of 73 cases in immigration court in which domestic violence was raised as a basis for asylum,<sup>48</sup> and was denied in 16; 31 cases remain pending; and in seven cases there is no information on the disposition.

-19 applicants were granted asylum, from: Bangladesh (3), El Salvador (4), Ghana, Guatemala (2), Guinea, Fiji, Jordan, Mexico (3), Nigeria (2), and Sri Lanka. Seven of the 19 cases were appealed by the INS, involving applicants from El Salvador (2), Guatemala, Mexico (2), and Nigeria (2). To date, two of those grants have been reversed by the BIA (including *Matter of R-A-*); the five other appeals remain pending.

-There were 16 denials of asylum by IJs, from: China, Colombia, Democratic Republic of Congo, El Salvador (2), Guatemala, Haiti, India, Jamaica, Mexico (3), Morocco, Peru and Trinidad; in one case the nationality was not available.<sup>49</sup> All of the 16 asylum denials by IJs were appealed to the BIA, which has affirmed four denials, and reversed one (*Matter of S-A-*, discussed above); 11 remain pending.

Asylum Office: Asylum officers have granted 13 of the 50 domestic violence asylum cases; 16 have been denied, and 19 are pending; for two cases information on the disposition is not available.

<sup>47</sup> Three domestic violence cases are pending in federal court.

<sup>48</sup> Note that this number includes cases denied affirmatively, and referred to immigration court.

<sup>49</sup> Chronologically, three of the 19 IJ domestic violence asylum grants came in 2000; six date from 1999, two each from 1998 and 1997, four from 1996, and three from 1995 or earlier. Of the denials, two date from 2000, seven date from 1999, three each from 1998 and 1997, and one from 1995 or earlier.

-13 applicants were granted asylum, from: Guatemala, Eritrea, India (2), Iran, Ivory Coast, Jamaica, Nepal, Pakistan (3), Syria and Turkey.

-16 individuals were denied asylum, from: Afghanistan, Bangladesh, El Salvador (2), Guatemala, India, Iran (2), Italy, Mexico (2), Pakistan (2), Sri Lanka, and Trinidad; nationality is not available in one case.<sup>50</sup> Only one of the 16 affirmative asylum denials was granted asylum by an IJ.

*Asylum grounds.* Grounds for asylum raised in the 87 cases involving domestic violence for which this information is available include: race (3), religion (13), nationality (1), particular social group (83), and political opinion (45); five cases also involved claims under the CAT.<sup>51</sup>

*Geographic region.* The largest number of domestic violence cases (56) come from Central America, Mexico, and the Caribbean, followed by West Asia/Middle East (18), sub-Saharan Africa (16), South Asia (16), South America (7), Southeast Asia and the Pacific (7), Europe (5), North Africa (3), and Central/East Asia (1). In nine cases, the nationality is unknown.

- Female Genital Mutilation (FGM)

There are a total of 67 cases involving female genital mutilation as a ground for asylum. Thirty were granted asylum, and 12 cases have been denied; 24 remain pending, and in one case the disposition is unknown.

BIA: There are 11 cases, including one grant and one denial (later reversed); seven cases are pending. In two cases the disposition is unavailable.

Immigration Court: There were 19 grants out of 43 cases, from: Ethiopia, Ghana, Guinea, Ivory Coast, Mali (2), Nigeria (5), Sierra Leone (2), Somalia (2), Sudan (2), Uganda, and an unidentified West African country. The INS appealed in just two cases (one of which involved an asylum claim by a father of two young U.S. citizen girls).

-11 cases were denied (Eritrea, Ethiopia, Ghana (2), Mali, Nigeria (5), and Sierra Leone<sup>52</sup>); 12 remain pending; information is not available in one case. The BIA has reversed one denial; another was affirmed (a decision later overturned by a court of appeals<sup>53</sup>).

Asylum Office: Seven of 17 were granted (Eritrea, Ivory Coast, Kenya (2), Nigeria, Sierra Leone, and an unidentified West African country).

-Three cases were denied (Ghana, Mali and Nigeria); five are pending; the disposition in two is unknown. One of the three denials has since also been denied asylum by an IJ.

*Asylum grounds:* Grounds included: race (1), religion (6), particular social group (41), and political opinion (15); six cases involving FGM also involved claims under the CAT.

*Geographic region:* Regions included: sub-Saharan Africa (61); North Africa (3), South America (1), and South Asia (1); n/a (1).

- Rape/Sexual Violence

Of 107 cases in which applicants raised rape or other sexual violence as a type of harm, 45 were granted and 20 denied; 33 remain pending. In nine cases, the disposition is unknown.

BIA: One grant (Nigeria) out of 16 cases, overturning the IJ's decision.

-There were two denials (both from Russia). Eleven cases are pending; the disposition in one is unknown.

Immigration Court: 18 were granted out of 53 cases (Bangladesh (2), China, the Democratic Republic of Congo, El Salvador (3), Fiji, Guatemala, Ethiopia (2), India, Iran, Somalia (2), Suriname, Yugoslavia, and one unidentified country).

<sup>50</sup> There were two affirmative grants in 2000, six in 1999, two in 1998, and one each in 1995 and 1997; date information is unavailable in five cases. There is insufficient date information for affirmative denials.

<sup>51</sup> On August 1, 2000, one domestic violence case that has been denied asylum by the BIA was granted relief under the CAT by an IJ. See *supra* notes 13-22 and accompanying text.

<sup>52</sup> Five of the grants came in 2000; three date from 1999, four from 1998, one from 1997, and one from 1995 or earlier. Two denials date from 1998 and one from 1997; the other four for which date information is available are from 1995 and earlier.

<sup>53</sup> See *Abankwah v. INS*, 185 F.3d 18 (2<sup>d</sup> Cir. 1999). For a summary of *Abankwah*, see 76 Interpreter Releases 1328 (Sept. 3, 1999).

-16 were denied (from Bulgaria, China, El Salvador (4), Ethiopia (2), Honduras, Nigeria (2), Russia (2), a former Soviet republic, Uganda, and Yugoslavia). One IJ denial has been affirmed by the BIA.

-19 remain pending, and the disposition in one is unknown.

Asylum Office: 25 cases were granted out of 44 (from El Salvador (11), Ethiopia, Guatemala (6), Kenya (2), Peru (3), Sierra Leone, and Somalia).

-11 were denied (Bangladesh (2), El Salvador (3), Ethiopia, Guatemala, Pakistan, Somalia, and Uganda).

-Four of the individuals denied were later granted asylum by IJs; two have been denied by an IJ also.

-Five affirmative cases remain pending and the disposition in three is not known.

*Asylum grounds*. Grounds included: race (4), religion (5), nationality (2), particular social group (31), and political opinion (50); two cases involving rape and sexual violence also involved claims under the CAT.

*Geographic region*. Regions included: Mexico, Central America and the Caribbean (37); sub-Saharan Africa (34); Europe (9); South America (8), Southeast Asia and the Pacific (5), South Asia (3), West Asia/Middle East (3), Central and East Asia (2), and North Africa (1); n/a (5).

- Repressive Social Mores (RSM)

A total of 72 cases involve RSM; 47 were granted asylum, and seven were denied; 11 remain pending and the disposition in eight is unknown.

BIA: There was one grant; two cases are pending.

Immigration Court. 11 grants out of 20 cases (from Afghanistan (5), Iran (2), Somalia (2), Sudan, and Uganda). The INS did not appeal any of the asylum grants.

-There were three denials (from Afghanistan (2) and Pakistan). One of the denials was reversed by the Board; the disposition of the other two is unknown.

-Six remain pending; the disposition in one is unknown.

Asylum Office. 34 of 46 cases were granted asylum (from Afghanistan (9), Algeria (3), Iran (16), Iraq, Nepal, Pakistan, Saudi Arabia, and Sudan (2)).

-Eight cases were denied (Afghanistan (2), Algeria, Bangladesh, Iran (2), the Philippines, and Somalia).<sup>54</sup>

-Four cases remain pending, the disposition in two is not known.

*Asylum grounds*: Grounds included: race (4), religion (23), nationality (1), particular social group (41), and political opinion (46).

*Geographic region*: Regions included: West Asia/Middle East (48), followed by North Africa (9), South Asia (4), Southeast Asia and the Pacific (2), sub-Saharan Africa (1), and Central/East Asia (1).

- Other Types of Harm

The CGRS database includes 22 cases that involve fear of threatened honor killing; of this number, seven were granted asylum, five have been denied, and eight are pending. In the remaining three cases information about the disposition is unavailable.

As discussed in more detail above, the BIA denied the two honor killing cases that it considered, both of which were from Jordan. IJs granted asylum in two of nine honor killing cases, both from Jordan, and denied two cases, from Jordan and Syria. Five cases are pending in immigration court. Thirteen honor killing cases have been filed affirmatively, and asylum officers granted six cases, from Egypt, Pakistan, Sudan, Syria, and Turkey (2). One case was denied, from Pakistan. Grounds for asylum raised in the 22 honor killing cases include: religion (2), particular social group (13), and political opinion (7).

There are 14 cases involving forced marriage or polygamy—six have been granted and five denied; three are pending. IJs granted four of 10 such asylum cases brought before them, including cases involving individuals from Guinea, Mali, and the Ivory Coast (one case was not identified by country). One woman seeking asylum in a forced marriage

<sup>54</sup> Three of the grants date from 1999, seven from 1998, three each from 1997 and 1996, and nine from 1995 and earlier; there is insufficient date information on the denials.

case, from China, was denied by an IJ. Five cases are pending in immigration court. Asylum officers granted one forced marriage/polygamy case (from Sudan) and denied four (from Afghanistan, China, El Salvador and Nepal); one affirmative case remains pending.

There are 13 family planning cases, including harms such as forced abortion or sterilization and cases involving "over-birth" children. All are from the People's Republic of China. Five have been granted, and four denied; the remainder (four) are pending. One case was denied by the BIA, and two remain pending there. IJs granted asylum in six family planning cases (one was reversed by the BIA) and denied two cases (both remain pending on appeal); two cases are pending before IJs. One family planning case was denied by an asylum officer; it remains pending in immigration court.

Five of the nine cases involving forced prostitution were denied asylum, and one has been granted. Both affirmative cases have been denied, from India and Burma. Five forced prostitution cases have been denied by IJs, from Albania, Honduras, India (the same case denied at the affirmative level), and an unidentified former Soviet republic (the case of Ms. O, discussed above). One such case, from China, was granted by an IJ; the INS has appealed the decision (the case of Ms. J, discussed above). Three cases are pending in immigration court.

In the nine cases involving incest, there has been one decision, an IJ grant from Mexico. The remainder are either pending or there is insufficient information regarding the disposition.

Finally, of the six cases in which the applicant sought asylum for being held as a sexual slave, three were granted asylum at the affirmative level (from Haiti, Kenya, and Mauritania). One case is pending; for two there is insufficient information regarding the disposition.

- Types of Harm, by Geographic Region

Information in the database allows a correlation of type of harm with country of nationality/geographic region. Of the 104 cases from sub-Saharan Africa, claims raising FGM (60 cases) and rape (35) predominate; 17 involved domestic violence. The countries in sub-Saharan Africa with the largest numbers of claims are Nigeria (23), Somalia (12) and Ghana (11). From North Africa, almost half of the cases—10 of 22—involved repressive social mores (RSM); three involved domestic violence and three raised FGM claims. The countries with the largest number of cases in North Africa are Sudan (9) and Algeria (7).

Rape and other sexual violence was the basis of 41 of 109 gender cases from Central America, Mexico, and the Caribbean, and 56 of the 109 cases raised domestic violence. The largest number of cases came from El Salvador (43), followed by Guatemala (25).

By contrast, of the 77 cases from West Asia and the Middle East, only three involved rape; instead, almost two-thirds of the cases (48) involved RSM. Domestic violence was raised in 18 cases, and 16 involved honor killing. The two countries with the largest numbers of claims in this region are Iran and Afghanistan, with 26 cases each; Jordan follows with 13 cases.

Differences by country as to the nature of the claims are also interesting. For example, the majority of the cases from Jordan involve honor killing (13), with a lesser number involving domestic violence (4) and forced marriage/polygamy (1). In contrast, the majority of the cases from Iran were based primarily on RSM (22 of 26), with a smaller number involving domestic violence or rape.

Of the 17 cases from South America, eight involved rape and seven involved domestic violence. Nine cases are from Peru; no other country has more than two. Finally, 17 of 25 cases from South Asia involved a claim of domestic violence, three raised rape as a basis for asylum, and four involved RSM. All but two of 18 cases from Central/East Asia were from China, and 10 of these based their claim to asylum on that country's family planning policies.

## CONCLUSION

U.S. jurisprudence regarding the protection of women fleeing gender-related persecution has followed a somewhat bewildering and often contradictory path. In March 1995, the INS proudly issued its Gender Considerations,<sup>55</sup> becoming only the second country (after Canada) to recognize the unique circumstances of women asylum seekers. The Considerations were seen as an attempt to bring the U.S. more in line with the recommendations of the United Nations High Commissioner for Refugees, and to provide substantive and procedural guidance for decision-makers. The Considerations encouraged the recognition of gender-unique harms as being persecution within the meaning of the Refugee Act, and

<sup>55</sup> "Considerations for Asylum Officers Adjudicating Asylum Claims from Women," INS Memorandum from the Office of International Affairs (May 26, 1995), reported on in 72 Interpreter Releases 771 (June 5, 1995). See also Kelly, "Guidelines for Women's Asylum Claims," 71 Interpreter Releases 813 (June 27, 1994).

provided guidance on the nexus determination, including the use of social group.

In June 1996, gender jurisprudence moved forward in an even more unambiguous fashion with the nearly unanimous BIA decision in *Matter of Kasinga*, which recognized a gender-specific cultural practice such as FGM to be persecution, and held that a social group could be defined by gender in combination with other characteristics. Three years later, however, rather than building on the foundation established by *Matter of Kasinga*, the Board in *Matter of R-A-* appeared intent on undoing its own precedent. The Board added two formerly unheard-of criteria to the respected *Acosta* test for social group definition.<sup>56</sup> In addition, the BIA's decision grossly misrepresented the current understanding of the dynamic of domestic violence and its societal context.<sup>57</sup>

Just this year, the Board has published its third gender decision, *Matter of S-A-*. This can be viewed as a positive development, but it is one that avoids the problematic aspects of *R-A-*, and therefore does not undo the harm done by that decision. As discussed above, *Matter of S-A-* has limited applicability to gender claims, being helpful only in those situations where the persecutor was motivated to punish the applicant for religious beliefs, and not in those which rely upon social group analysis.

As any review of human rights reports makes abundantly clear, women asylum seekers continue to suffer violations of their fundamental human rights. And as the overview of gender cases in this article demonstrates, a small number of these women seek protection from these violations in the U.S. Over the years, the record of the U.S. in providing protection has been a mixed one. That record is now worsening with the BIA's decision in *Matter of R-A-*, which has had an identifiable adverse impact on cases ranging from domestic violence to honor killings and forced prostitution. The Attorney General—and possibly the U.S. Court of Appeals for the Ninth Circuit—has the opportunity to review the BIA's holding in *Matter of R-A-*. The decision will be a significant one for the ongoing development of gender jurisprudence. ■

<sup>56</sup> See supra note 4.

<sup>57</sup> See Musalo, supra note 2; Anker, Goldberg, Kelly et al., "Brief of Amici Curiae in Support of Request for Certification and Reversal of the Decision of the Board of Immigration Appeals *In Re R-A-* (Interim Decision No. 3403)" at 26-32 (<http://www.uchastings.edu/cgrs/law/briefs.html>).

### 1. Still Deadlocked Over an End-of-Session Immigration Package, Congress Clears Several Noncontroversial Bills

As Congressional Republicans and President Clinton continue to face off over an end-of-session immigration benefits package, lawmakers this week cleared two more noncontroversial measures for White House approval, and completed Senate action on a third.

As we reported in 77 Interpreter Releases 1437 (Oct. 9, 2000), President Clinton is demanding that the provisions of the "Latino Immigrant and Fairness Act" (LIFA) be included in an end-of-session vehicle, such as the Commerce, Justice, State (CJS) appropriations bill.<sup>58</sup> Among other things, the LIFA provisions would restore the adjustment of status provisions of former INA § 245(i), equalize the treatment of certain immigrants from Central America and the Caribbean, and update the registry date to provide permanent residence to undocumented aliens present in the U.S. since 1986.

The White House reportedly rejected a Republican-sponsored compromise that would have provided for judicial review for certain aliens who are members of the plaintiff class in any of several lawsuits challenging the implementation of the 1986 amnesty program. The measure also would have allowed certain aliens awaiting permanent residence to reside in the U.S. with their families during the pendency of their case processing.<sup>59</sup>

A summary of the legislative action follows.

Refugee status for individuals facilitating the return of POWs or MIAs. On October 24, the House approved a measure by unanimous consent<sup>60</sup> that would grant refugee status to foreign nationals who facilitate the live return of any Americans still missing or held prisoner from the Vietnam or Korean Wars. The Senate previously approved the "Bring Them Home Alive Act" (S. 484) on May 26.<sup>61</sup> The measure is thus cleared for the President's signature.

S. 484 directs the Attorney General to grant refugee status in the U.S. to any alien (including his or her parent, spouse, or child) who: (1) is a national of Vietnam, Cambodia, Laos, China, or any of the independent states of the former Soviet Union; and (2) personally delivers into U.S. custody a living

<sup>58</sup> The CJS bill has been folded into H.R. 4942, the combined fiscal year 2001 District of Columbia and CJS appropriations bills.

<sup>59</sup> See Reuters newswire, Oct. 23, 2000; Associated Press newswire, Oct. 26, 2000.

<sup>60</sup> 146 Cong. Rec. H10704 (daily ed. Oct. 24, 2000).

<sup>61</sup> See 77 Interpreter Releases 691 (May 26, 2000).