

Immigration Briefings
December 2003ASYLUM FOR VICTIMS OF GENDER VIOLENCE: AN OVERVIEW OF THE LAW, AND AN ANALYSIS
OF 45 UNPUBLISHED DECISIONS

by KAREN MUSALO and STEPHEN KNIGHT [FN1]

This *Briefing* examines the state of “gender asylum” claims in the United States. The term “gender asylum” is used to describe claims for the protection of asylum and restriction on removal [FN1] in which: (1) the feared harm is gender-specific or disproportionately impacts women, and/or (2) the reason (i.e. nexus) the harm is imposed is related to, or “on account of” gender. [FN2]

The treatment of gender claims in the U.S. has been in flux, with developments tending towards recognition of these claims being followed by those which seem to limit or even eliminate such recognition. This *Briefing* will trace these developments, with a focus on what has transpired since the issuance of a proposed regulation in December 2000, [FN3] and then-Attorney General Janet Reno's vacation of the BIA's decision in *Matter of R-A-* [FN4] in January 2001.

First this *Briefing* provides an introduction to the issue, including a discussion of U.S. jurisprudence, up to and including the BIA's decision in *Matter of R-A-*, as well as relevant international developments. Next, the *Briefing* examines the proposed regulation, with a close look at its treatment of gender asylum claims. Finally, the *Briefing* discusses 45 decisions by immigration judges and the BIA rendered since the issuance of the proposed regulation and the vacating of *Matter of R-A-*. Review of these decisions indicates that a number of adjudicators view the vacating of *Matter of R-A-* and the issuance of the proposed regulation as removing obstacles to granting relief in gender cases. At the same time, however, many adjudicators continue to perceive *Matter of R-A-* as an obstacle, despite having been vacated, and appear to be in need of additional guidance from the government and the courts.

BACKGROUND

The 1951 Refugee Convention and its 1967 Protocol [FN5] set forth the international refugee definition, which has been largely incorporated into U.S. law. The language is gender neutral, defining a refugee as an individual with a well-founded fear of persecution on account of [FN6] race, religion, nationality, political opinion, or membership in a particular social group (PSG). Notwithstanding that the definition is written in these broad, gender-neutral terms, over the years it has been interpreted in a way which has posed barriers to women seeking refugee recognition.

Historically, the barriers to women have been related to three separate factors. [FN7] First, and perhaps most obviously, gender is not itself one of the grounds listed in the refugee definition. Therefore, even when adjudicators find that there is persecution, they may deny protection for lack of nexus to one of the grounds. Second, the harms inflicted on women--for example female genital cutting (FGC) or repressive social norms--are often seen as cultural norms or requirements, rather than as forms of persecution. And finally, in many cases involving

gender harms, the agent of persecution is not the State or government, but a non-State actor--private individuals, such as a husband, father, or member of the applicant's community. Although many countries--including the U.S.--recognize as refugees those fleeing persecution by non-State actors where the government cannot or will not control these actors, the recognition has been slow in coming. Furthermore, the fact that the persecutor may be a family or community member leads adjudicators to characterize the persecution as "personal" in nature, rather than linked to one of the enumerated grounds.

In 1985, as a result of increasing awareness of these barriers to protection, the United Nations High Commissioner for Refugees (UNHCR) began to offer guidance on gender-related claims. [FN8] Most importantly, in its earliest guidance, UNHCR recommended that under appropriate circumstances women can constitute a PSG. UNHCR also recommended that countries develop and issue their own guidelines to address the issue of gender claims. Canada was the first to do so, issuing guidelines in 1993, which it updated in 1996. [FN9] The United States followed Canada's lead, and issued its own gender recommendations in 1995. [FN10] Many other countries have followed suit. [FN11] Most recently, in 2002 UNHCR took the important step of releasing two sets of guidelines--on gender and social group--which provide significant international guidance for asylum claims. [FN12] These guidelines will be discussed below in the context of developing U.S. and international authority on the issue of gender asylum.

DEVELOPING JURISPRUDENCE

• *Acosta and Kasinga*

U.S. case law has established that gender can be among the defining characteristics of a social group, [FN13] in combination with other relevant immutable and/or fundamental characteristics, such as nationality, [FN14] bodily integrity, [FN15] and refusal to conform or submit. [FN16] Family is also a recognized social group under U.S. law. [FN17] Gender cases may be based on any of the five grounds, and are often also argued on the basis of religion [FN18] and actual or imputed political opinion. [FN19]

The most significant landmark gender decision in the United States is *Matter of Kasinga*, [FN20] decided by the Board of Immigration Appeals (BIA) in 1996. The case involved a young woman who fled Togo to avoid being forced into a polygamous marriage to a man who demanded that she undergo the ritual practice of female genital cutting (FGC) or mutilation (FGM), which was common among members of her ethnic group, the Tchamba-Kusuntu. The BIA did not rule on the polygamy aspect of the claim, but recognized FGC as persecution, and ruled that on the facts of the case it was imposed on account of membership in a particular social group, which was defined, in part, by gender. The BIA defined the group as "[y]oung women of the Tchamba-Kusuntu Tribe, who have not had FGM, as required by the tribe, and who oppose the practice." [FN21]

Important to the decision was the Board's consideration of societal factors in establishing nexus. The societal purpose of FGC, the Board found, was to assure "male dominance and exploitation" over the women in the society, [FN22] and the practice was therefore imposed on account of the gender and other characteristics of the victims.

The BIA cited *Matter of Acosta*, [FN23] its seminal 1985 decision on social group, for the proposition that PSG membership is defined by characteristics that an individual either cannot or should not be expected to change--generally referred to as *immutable* or *fundamental* traits--and found that each of the characteristics de-

scribing Ms. Kasinga's social group met the *Acosta* criteria. Notably, the BIA also cited *Fatin v. INS*, [FN24] a case involving an Iranian woman fleeing repressive social norms, in which the Third Circuit Court of Appeals expressly accepted that a PSG could be defined by gender. Although the court in *Fatin* had recognized a gender-defined social group, it had denied relief, finding that under the circumstances the feared harm of compliance with repressive social norms did not rise to the level of persecution. *Matter of Kasinga*, therefore, was the first published gender decision in which relief was granted because the Board found that both the harm and the nexus to an enumerated ground were established.

• *International Developments*

Internationally, there have been a number of positive developments on the issue of gender asylum, some of which have influenced U.S. adjudicators. The highest courts of the United Kingdom [FN25] and Australia, [FN26] as well as an influential New Zealand [FN27] tribunal, have each issued decisions addressing social group and nexus with an interpretation that is inclusive of women's claims. And in June 2002, UNHCR published guidelines on both gender [FN28] and social group [FN29] claims which affirm in many respects the approach taken by the three State tribunals.

These three countries, and the UNHCR guidelines, have all accepted that a social group can be defined by gender. They have also adopted what is commonly referred to as a “bifurcated” approach to establishing nexus in cases involving non-State actors. Pursuant to this analysis, nexus is established when *either* the private individual persecuted, *or* the government fails to protect, is on account of one of the five enumerated grounds. [FN30]

The BIA's *Kasinga* decision is not inconsistent with the bifurcated approach, [FN31] and the commentary to the proposed regulations agrees that a similar approach may be permissible under U.S. law. In discussing nexus, the commentary refers to the relevance of patterns of violence in society against members of the applicant's group, and accepts as probative “circumstantial evidence that such patterns of violence are ...supported by the legal system or social norms in the country in question....” [FN32]

• *Matter of R-A-*

On the basis of the BIA's decision in *Kasinga*, adjudicators in the U.S. began to grant asylum in a wide range of gender cases, including those involving domestic violence. [FN33] The claim of Rodi Alvarado (*Matter of R-A-* [FN34]) was one of those cases. Ms. Alvarado, a Guatemalan woman, had been battered and brutalized for over 10 years at the hands of her ex-military spouse, and her pleas for protection to the police and courts of her country had been to no avail. In granting her asylum, the immigration judge (IJ) ruled that she had suffered past persecution and had a well-founded fear of future persecution on account of her social group membership, as well as actual and imputed political opinion. The PSG was defined as “Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination.” [FN35] The IJ found this group consistent with the immutable and fundamental criteria the BIA had set forth in *Acosta*, and had subsequently applied in a gender context in *Kasinga*, and the IJ specifically relied on *Kasinga* to establish the nexus:

The Board recently held that an asylum applicant who was unwilling to undergo female genital mutilation (FGM) had a well-founded fear of persecution on account of her membership in a social group of

“young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”The Board recognized FGM as a form of sexual oppression to assure male dominance and exploitation. *Id.* In similar ways, the acceptance of spousal abuse assures male dominance and exploitation by enabling men to exert control over their female companions, through threats or acts of violence. Thus, as a member of the particular social group of Guatemalan women, who are subjected to the threat of violence from their former or current male companions, who believe in male domination, the Respondent qualifies for asylum simply because she is being targeted for persecution on account of her gender and past association. [FN36]

The IJ also ruled that the persecution was on account of political opinion, finding that Ms. Alvarado's resistance to her husband's brutality was the expression of a political opinion against male domination (actual political opinion), or that her resistance could be interpreted as such a political opinion (imputed) by her husband.

On appeal, the BIA reversed the IJ's grant of asylum by a ten to five vote. The Board accepted that the harm rose to the level of persecution, and that Ms. Alvarado was unable to obtain State protection, but ruled that the persecution was not on account of her membership in a PSG or political opinion. The BIA's ruling encompassed four separate findings--failure to establish a social group; failure to establish nexus between a social group and the persecution; failure to establish an actual or imputed political opinion, and failure to establish a nexus between the harm and the actual or imputed opinion. [FN37]

In rejecting the establishment of a social group, the BIA held for the first time that the 1985 *Acosta* decision's widely-adopted immutable or fundamental criteria were only threshold requirements. The BIA ruled that a cognizable PSG required a showing that (1) group members understand their own affiliation within the group; (2) are recognized as a societal faction; and (3) that the form of persecution--in this case, spousal abuse--be “an important societal attribute...” [FN38] According to the BIA majority, even if a social group were established, the claim would fail because the husband's motivation was unrelated to the applicant's membership in the group, as demonstrated by the fact that he did not beat other members of the described group. [FN39] Furthermore, the Board majority found that Ms. Alvarado's resistance did not constitute an actual political opinion, referring to it dismissively as the “common human desire not to be harmed or abused...” [FN40] The BIA ruled that her husband was not motivated to harm her for any opinion she held or that he thought she may have held.

• ***The Issuance of Proposed Regulation and the Vacating of R-A-***

The decision in *Matter of R-A-* was widely controversial. Five Board members authored an extensive dissent in which they criticized the majority for departing from established precedent and ignoring relevant international norms. The criticism was shared by scholars and advocates who failed to see a principled distinction between the facts of *Kasinga* and those of *R-A-* to justify the different results. Attorney General Janet Reno credited these concerns when her Department of Justice issued a proposed regulation applicable to gender claims, [FN41] and in January 2001 she certified [FN42] *Matter of R-A-* to herself, and then vacated the decision, [FN43] remanding to the Board with instructions to re-decide it pursuant to the proposed regulation once issued as final.

Almost three years have passed, and the Bush Administration has not yet released the regulation in final form. In February 2003, Attorney General Ashcroft took the prospective re-decision in *Matter of R-A-* away from the BIA, certifying it to himself. [FN44]

The ultimate form which the regulation takes, in tandem with the decision in *R-A-*, will significantly shape the law on this issue. In the interim, however, asylum officers, IJs, and the BIA, have rendered unpublished de-

cisions in gender asylum claims. The decisions in many of these cases provide useful guidance as to how existing precedent, informed by the proposed regulation, may be applied to gender claims. The following two sections will analyze the proposed regulation, and provide a survey of unpublished gender asylum decisions made in the time period from the vacating of *R-A-* to the present.

THE PROPOSED REGULATION

The actual text of the proposed regulation takes up less than two pages in the Federal Register. [FN45] Although it has been dubbed a “gender regulation” it lays out broad principles of asylum law in three sections. [FN46] The text of the regulation is preceded by a commentary which covers almost 10 pages, and provides extensive interpretive guidance, including input from the Violence Against Women Office (VAWO) of the Department of Justice (DOJ). Without the commentary, it is unclear whether the regulation as written would actually result in greater recognition of gender-based claims. [FN47]

The commentary explicitly states that the proposed regulation “removes certain barriers that the *Matter of R-A-* decision seems to pose to claims that domestic violence ... rises to the level of persecution...on account of membership in a particular social group.” [FN48] It also “restates that gender can form the basis of a particular social group” [FN49] and specifically discusses the dynamic of domestic violence in the context of past persecution being an indicator of future harm. [FN50] The government is on record as stating that the regulation represents its best interpretation of the refugee definition. [FN51] The following provides an overview and analysis of the proposed rule, along with the commentary’s interpretive guidance.

• *Proposed section 208.13--Establishing Asylum Eligibility*

This section restates the past persecution presumption and provides that in cases where a finding of no past persecution is reversed on appeal, on remand the government is permitted to submit rebuttal evidence (i.e. changed circumstances, internal relocation). This aspect of the regulation was written prior to, but now essentially restates, the holding in the Supreme Court’s decision in *Ventura v. INS*. [FN52] Although the regulation’s text contains nothing specific to gender, the commentary does, as the VAWO was invited to comment on past domestic violence as an indicator of future harm. Citing from the extensive literature on domestic violence, the VAWO observed that “in relationships involving domestic violence, past behavior is a strong predictor of future behavior by the abuser[,]” and that because domestic violence “centers on power and control over the victim” an attempt to flee or “otherwise assert ... independence” often results in an escalation of violence. [FN53] The VAWO commentary expressly distinguished intimate violence cases from other cases of persecution, noting that “in contrast to other persecution cases where the persecutor’s desire to harm the victim may wane if the victim leaves, the [domestic violence] victim’s attempt to leave typically increases the abuser’s motivation to locate and harm her[,]” and that the persecutor is “likely to possess important information about where the victim could go or to whom she would turn for assistance.” [FN54]

• *Proposed Section 208.15--Definitions*

Persecution. Subsection (a) defines persecution as “objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause the harm” (i.e. the persecutor need not have a malignant or punitive intent). [FN55] Up to a point, this is a re-

statement of settled law--the “well-founded fear” standard has both an objective and subjective component. [FN56] But the phrase “serious harm” has not previously been set forth as an element of the definition of persecution. [FN57] The latter provision, dismissing the need for punitive intent, directly arises out of *Kasinga*, where the fact that the practitioners considered FGC as a social good did not preclude it from constituting persecution. [FN58]

Directly relevant to gender claims is this subsection's discussion of the requirement that persecution be carried out by the government or by “a person or group that government is unwilling or unable to control.” [FN59] The rule sets out a number of considerations for evaluating whether the government is unable or unwilling to control a non-State persecutor, including whether the government takes “reasonable steps” to control the persecutor, and whether the victim has “reasonable access” to the state protection that exists. The rule states that other “pertinent” evidence which may be considered includes:

Government complicity with respect to the infliction of harm or suffering at issue; attempts by the applicant, if any, to obtain protection from government officials and the government's response to these attempts; official action that is perfunctory; a pattern of government unresponsiveness; general country conditions and the government's denial of services; the nature of the government's policies with respect to the harm or suffering at issue; and any steps the government has taken to prevent infliction of such harm or suffering. [FN60]

In its comments on the proposal, UNHCR raised concerns about this provision. While stating its agreement with the application of a “reasonable steps” standard for measuring whether a government is *unwilling* to provide protection, UNCHR expressed reservations about the use of that evidence in determining the *inability* of a State to provide protection:

Inability is a result-driven determination, i.e., does the protection exist or not. The efforts of the State to provide protection are largely irrelevant. A government may take numerous “reasonable steps,” indeed it may take “extraordinary steps,” to protect its nationals from, for example, a rebel movement. Yet, if despite these best efforts, its nationals continue to have a well-founded fear of persecution on account of a protected ground, the refugee definition will be satisfied and protection should be afforded. [FN61]

The commentary provides additional guidance applicable to the context of gender claims. Making the general observation that “protection may vary within a given society depending on the individual applicant's circumstances[,]” [FN62] the commentary notes that in some countries a woman who has suffered domestic violence may only be able to access protection if her family supports her. The commentary also notes that access may be limited if the persecutor “is influential with government officials.” [FN63] Although this is universally applicable in asylum cases, it frequently arises in gender claims where the abusive spouse or family member has governmental or political connections.

“On account of.” Subsection (b) discusses the nexus requirement. Here, the difference between the content of the rule and the commentary is particularly remarkable. Rather than restating existing law, as the proposed regulation does elsewhere, this subsection clearly increases the applicant's burden of proof. It does this by requiring that in mixed motive cases the applicant establish that the “protected characteristic is *central* to the persecutor's motivation to act against the applicant.” [FN64] It is settled law that where a persecutor has mixed motives, a protected characteristic need only be one of the motivations. [FN65] Although the commentary is consistent with the rule in imposing a centrality requirement, the commentary points out the errors in the BIA's nexus analysis in *R-A-*, and identifies a number of significant factors which can assist decision-makers in adjudicating the nexus issue.

As noted in the discussion of *R-A-* (above), the BIA ruled that even if the applicant had established a PSG (“Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination”), she had failed to demonstrate a nexus between those characteristics and her husband's motivation to abuse her. One of the factors relied upon by the BIA was the fact that her husband persecuted her alone, and did not seek out other Guatemalan women in abusive relationships with other men. The commentary rejects this reasoning with the analogy of a slave owner who abuses only his own slave (for reasons of race) and not those belonging to other slave owners. [FN66] Similarly, a husband might be motivated to harm his wife because of her gender and status in the relationship, but not be motivated to harm other women in other abusive relationships.

The commentary underscores the importance of contextualizing the claim of persecution in evaluating the husband's motivation. Given the ongoing controversy regarding nexus, the commentary's directive on this point is especially significant:

[E]vidence about patterns of violence in the society against individuals similarly situated to the applicant may also be relevant to the “on account of” determination. For example, in the domestic violence context, an adjudicator would consider any evidence 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 would include any direct evidence about the abuser's own actions, as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society, that cannot be deduced simply by evidence of random acts within that society. Such circumstantial evidence, in addition to direct evidence regarding the abuser's statements or actions, would be relevant in determining whether the abuser believes he has the authority to abuse and control the victim “on account of” her status in the relationship. [FN67]

Membership in a particular social group. Subsection (c) addresses the criteria for establishing social group membership. This provision begins by defining a social group by reference to the *Acosta* criteria, notes that the group must “exist independently of the fact of persecution” (i.e. precluding groups such as “battered spouses” or “raped women”), and points to the relevance of the applicant's own circumstances, as well as country conditions. This approach has been seen as generally positive. However, the third paragraph of the rule lists six additional factors, in addition to the *Acosta* criteria, that “may be considered” but are “not necessarily determinative...” [FN68] The first of these six factors are drawn from the Ninth Circuit's decision in *Sanchez-Trujillo v. INS*, [FN69] and include (1) close affiliation between members; (2) common motive or interest; and (3) voluntary associational relationship; the last three are from the BIA's *R-A-* decision, and include (4) recognition as a societal faction; (5) members view themselves as members of a group; and (6) the group is distinguished for different treatment or status within the society.

It is the listing of these six factors that has drawn the most criticism and concern from commentators. [FN70] This criticism has focused on two separate and distinct issues. First, there is consternation about the very use of factors drawn from *Sanchez-Trujillo* and *R-A-*. The Ninth Circuit had stood alone in not adopting the *Acosta* criteria, and instead requiring affiliation, common motive, and voluntary associational relationship (often referred to as the “cohesion” requirement). Recently, in *Hernandez-Montiel v. INS*, [FN71] the Ninth Circuit revised its own approach so as to no longer require “cohesion.” In that context, the inclusion of these factors in the proposed rule can be seen as problematic. Likewise, the factors in *Matter of R-A-* were central to the denial of relief in that case, and led to the Attorney General's vacating of the decision--raising the question why these factors have been resurrected in the regulation.

Here again, the commentary provides the interpretive guidance necessary to avoid a potentially restrictive application of the text. The social group in *R-A-*, which was rejected by the BIA, was one based principally on gender and marital status. The commentary explicitly states that both of these characteristics could meet the *Acosta* immutable/fundamental test:

Gender is clearly such an immutable trait... and is incorporated in this rule. Further, there may be circumstances in which an applicant's marital status could be considered immutable. This would be the case, for example, if a woman could not be reasonably expected to divorce because of religious, cultural or legal constraints. Any intimate relationship... could also be immutable if the evidence indicates that the relationship is one that the victim could not reasonably be expected to leave. [FN72]

In addition, the commentary cites to specific country condition facts present in *R-A-* which it identifies as relevant in establishing the existence of a PSG. The applicant in *R-A-* had testified that the police and the courts would not intervene to provide protection, and the Board itself had found that within Guatemala, domestic violence is seen as a private matter. The commentary notes that this type of evidence could establish the kind of differential treatment required by the last of the six factors in the regulation's text, by demonstrating that society tolerates the harm inflicted on the applicant's group, while it would not tolerate this same treatment of "members of the society at large." [FN73]

• *Status of the Proposed Regulation*

There have been various reports regarding the status of the proposed regulation. Earlier this year credible sources reported that Attorney General John Ashcroft intended to issue the proposed regulation in final form prior to March 1, 2003, the date the Attorney General would lose his exclusive jurisdiction over immigration regulations due to the reorganization of the former INS into the Department of Homeland Security. [FN74] An email message that was leaked by government sources indicated that the Attorney General intended to "delete large sections of the proposed rule's supplemental language [commentary]..." [FN75] As detailed above, the text of the regulation is not particularly gender-protective, without the interpretive guidance of the commentary.

The Attorney General did not act on the regulation and it has been now reported that a final regulation may be issued by the end of 2003. [FN76] The prospect remains that large sections of the commentary may be removed, as was originally planned by the Attorney General. The issuance of the regulation without the commentary may result in the re-imposition of significant barriers to gender asylum claims and is a matter of some concern to those watching these developments.

THE UNPUBLISHED U.S. DECISIONS

The vacating of *Matter of R-A-* removed an obstacle to the granting of gender claims. Prior relevant positive precedent--such as *Acosta* and *Kasinga*-- could be applied once more without the limitations imposed by *R-A-*. The issuance of the proposed regulation, when informed by the guidance of the commentary, created an additional basis for favorable decisions in cases involving gender.

In order to get a sense of the actual impact of these two developments, the authors reviewed a sample of 45 written decisions rendered since *R-A-* was vacated and the new regulation was proposed. Of the 45 decisions, two-thirds (30) were grants, and one-third (15) were denials. [FN77] These unpublished decisions were provided to the authors by the attorneys in the cases and provide a unique body of written opinions in gender asylum

cases. Because this is a self-selected group, the decisions do not represent a random sample, and they may not be representative of decisions nationwide. Furthermore, although they are illustrative of decision-making trends, they should not be seen as comprising the basis for any statistically-based conclusions regarding types of claims and probable outcomes.

• *An Overview of the Decisions*

The 30 cases in which relief was granted included claims based on domestic violence, female genital cutting, restrictive social norms, forced marriage, forced servitude and/or prostitution, and beatings, rape or sexual assault. A number of the claims involved overlapping harms, i.e., domestic violence together with FGC, or forced marriage together with domestic violence. As detailed below, the majority of the cases were decided on the social group ground, but grants were also made on the basis of political opinion, religion and nationality. Although none of the cases was decided on the basis of race alone, race or ethnicity was often found to be a characteristic of the particular social group.

The 15 cases in which relief was denied included a similar mix of cases-- domestic violence, female genital cutting, forced marriage, rape, and trafficking for sexual exploitation. As discussed in greater length below, in many cases the denials were based on an adverse credibility finding. In others they were based on continued reliance on *R-A*- even after it had been vacated. In a number of cases the denials were based on the finding that the applicant had not shown that the government was unable or unwilling to protect, or that relocation was not a reasonable alternative.

• *Grants in Domestic Violence Cases*

The broad acceptance of a social group theory in cases involving domestic violence demonstrates the positive impact of the vacating of *R-A*- and the issuance of the proposed regulation. Eleven of the 15 decisions granting relief in domestic violence claims included a social group rationale; in seven of these 11 cases, the decision was based *solely* on PSG, while in the remaining four, the decisions were based on both social group and political opinion. Other grants in these domestic violence cases were based solely on political opinion, while a few rested on religion, alone or in combination with political opinion.

Particular Social Group--Definition. Gender was a defining characteristic in every one of the approved domestic violence cases based on a PSG rationale. One decision accepted that under the circumstances of the claim, the social group could be defined by gender alone, [FN78] although the PSG in most decisions was defined by gender in combination with other characteristics (the authors refer to these as “gender plus” social groups). In many cases, the nationality of the applicant was one of the defining characteristics. The other characteristics were often related to the beliefs of the applicant (i.e. her belief in marital equality, [FN79] opposition or resistance to marital abuse, [FN80] or her attempt to escape the abuse), [FN81] and/or to some aspect of the marital or intimate relationship (i.e., the fact that the applicant was, or had been, in a relationship with the abuser, [FN82] the fact that the husband believed in his right to use violence to control his wife [FN83]). In one case, where the applicant had divorced her abusive husband, the decision-maker defined the social group to include the characteristic of being perceived as having disgraced the family. In several cases where the abusive spouse targeted not only his wife, but also his children, the court accepted family as the relevant social group. [FN84]

Acosta, *Kasinga* and the proposed regulation were oft-cited and relied upon in finding that a social group could be defined by reference to these types of characteristics. Notably, a number of the decisions cited to the commentary of the proposed regulation to support the ruling that a persecutor need not target other members of the PSG in order for social group persecution to be established. [FN85] *R-A-* was occasionally discussed and distinguished, including noting that it had been overturned by the Attorney General.

Particular Social Group--Nexus. The decision-makers found that the domestic violence was on account of social group membership by analyzing the relationship and motivations between the abuser and his victim, as well as the societal context in which the abuse was taking place. Following the nexus analysis employed in *Kasinga*, IJs found that a “gender plus” social group nexus was established because the abusing spouse was motivated by a desire to dominate or control his female partner, [FN86] and that such domination was acceptable within the applicant's country of origin.

Two separate decisions, [FN87] rendered by one immigration judge, are notable for their conclusion that nexus can be established where the State fails to protect the asylum seeker because of her membership in a PSG. The judge relied on *Kasinga* for the proposition that “the nexus can be established by either showing the persecutor's own motives or the broader societal reasons for the persecution.” [FN88] These decisions also rely upon and integrate into their analysis the recommendations in the commentary to the proposed regulation, the UNHCR guidelines, and international case law.

Political Opinion. As discussed above, the Board majority in *Matter of R-A-* rejected the claim that the abusive spouse was motivated by an actual or imputed political opinion. The majority characterized *R-A-*'s opinion as “the common human desire not to be harmed or abused[,]” [FN89] which in its judgment was not a political opinion. Although the existence of a political opinion on the part of any particular applicant is a question of fact based on the individual circumstances, the decision-makers in a number of cases appeared more inclined to find that the opinions possessed by the abused spouses could be characterized as “political.”

An applicant's belief that she should not be abused by her husband was characterized as “feminism” and as the expression of a qualifying political opinion by one IJ. [FN90] In another case, the opinion was described as a belief in the right to live independently and free of male dominance. [FN91] In yet another case, the political opinion consisted in the applicant's refusal to conform to the societal norm of being subservient. [FN92] That decision is important for its re-affirmation of the principle that what is political must be assessed in the context of the society in which it is expressed. [FN93] In all of these cases, after identifying the existence of a political opinion, the decision-makers found sufficient facts to conclude that the abusive spouse was motivated by the fact of that opinion.

Religion. Two of the domestic violence cases were based on religion, or religion in combination with particular social group. One case involved a woman from Indonesia whose partner kept her a virtual captive while abusing her. [FN94] The other case involved a Muslim woman from Uganda who was sold into a polygamous abusive marriage and was unable to divorce her husband under the law; [FN95] she was not supported by her family because they would have had to repay her spouse if she left him. In both cases the husbands justified their behavior on the basis of their religious beliefs. In ruling that the persecution was on account of religion, the IJs cited *Matter of S-A-*, [FN96] a 2000 decision granting asylum to a young Moroccan woman who had suffered persecution at the hands of her father who dictated her behavior--and then meted out punishment--on the basis of his strict religious beliefs.

• *Denials in Domestic Violence Cases*

There were seven denials of claims based on domestic violence. The denials were based on legal conclusions as well as factual findings, including on the issues of the government's ability and willingness to protect [FN97] and the reasonableness of the asylum seeker's relocation within the country to avoid persecution. Without reviewing the entire records in these cases, it is not possible to evaluate whether the factual findings were supported by the evidence. However, it is striking that judges who granted and judges who denied could reach such diametrically opposed conclusions regarding conditions in countries such as Guatemala, [FN98] Honduras, [FN99] or Bangladesh. [FN100]

For instance, in a case granting relief to a Honduran woman, the adjudicator recounted a wealth of documentation and evidence demonstrating the unwillingness of the authorities to control persecutors in situations involving domestic violence, in effect denying protection given to other groups, including proof that:

- the authorities were unwilling to help the applicant;
- discrimination and domestic violence against women in Honduras received societal and official support or tolerance, and that as many as eight out of every 10 women suffered from domestic violence;
- a 1997 law intended to strengthen the rights of women and to increase penalties for crimes of domestic violence in fact only sanctioned community service as punishment or 24-hour preventative detention if the aggressor was caught in the act;
- the 1997 legislation was largely unsuccessful due to the lack of financial and political support from the government;
- police did not respond to domestic violence calls until after the victim was murdered;
- a 2001 UN Committee on Economic, Social and Cultural Rights report expressed “concern about the extent of domestic violence and the apparent inability of Honduras to implement legislation against this phenomenon....” [FN101]

This discussion of conditions in Honduras, in a case granting relief, stands in stark contrast to the discussion in a decision by a different judge, rendered within six months of the preceding decision. In denying relief, the IJ ruled in part that the Honduran asylum seeker had failed to show that the government was unwilling or unable to protect her, notwithstanding the failure of the police to respond to requests for protection made on two occasions:

Although the respondent testified that she went to the police and did not receive protection, it was not because the police deliberately chose to exclude [women of this social group]. The Honduran law now provides punishment for abuses, as well as aid and protection for the victims. The fact that they are not completely successful does not mean that the government is unwilling or unable to protect them. Even in this country women have been killed after bringing their spouses to Court [sic]. [FN102]

Of course, a judge's conclusions in any case must be based on the record. It is apparent that the judge in the first case had extensive country conditions evidence before her. In the second case it is less clear--from the decision itself--what evidence was in the record beyond the applicant's own testimony. Arguably her testimony regarding the officials' failure to respond could suffice, although the submission of documentary country condi-

tions evidence is always critical in establishing contested facts.

Particular Social Group--Definition and Nexus. In virtually all of the cases in which relief was denied, the decision-makers ruled that there was no nexus between the persecution and an enumerated ground. In most cases, this was not the only basis for denial; in a number of cases, for example, credibility or the well-foundedness of the fear was also at issue. However, because the most disputed legal issues in gender cases--as seen in *Kasinga, R-A-*, the proposed regulation and the UNHCR guidelines--are the existence of an enumerated ground and the proof of nexus to this ground, this discussion will focus on the treatment of those issues by the decision-makers who denied protection.

The most common grounds asserted in the domestic violence cases that were denied were PSG and political opinion (imputed or actual). The social groups proposed--and rejected--in this pool of cases did not differ in a meaningful way from those found to be cognizable in the cases that were granted. The same could be said for the political opinion theories and the facts which were used to support them. In addition, a number of the same countries were involved in both sets of cases, including Guatemala and Honduras. The most significant differences in the decisions--besides the adjudicator--were the choices of precedent, the application of that precedent to the facts, and the adjudicator's analysis of the dynamic of domestic violence. [FN103]

Generally, the decision-makers in the PSG cases were aware that *Matter of R-A* had been vacated, and they properly identified *Acosta, Kasinga* and the proposed regulation as controlling precedent. However, IJs in two cases [FN104] cited to a 1975 Board decision, *Matter of Pierre*, [FN105] which had held that an abusive husband's death threats were not on account of an enumerated ground, but were of a personal nature. The citation to *Pierre* is troubling, given that the decision pre-dates not only the 1980 Refugee Act but every single relevant development in the area of gender claims--from the DOJ's own 1995 Gender Guidelines [FN106] to *Acosta* and *Kasinga*, not to mention the proposed regulation. In a case denying asylum to a young woman raped and abducted into a life of prostitution, [FN107] the IJ not only believed that *Matter of R-A* is still valid precedent, but he mistakenly attributed the original decision to the Attorney General rather than to the Board.

The most common basis for denial, in the cases where the proper legal authorities and standards were applied, was a finding that the proposed group was not cognizable because it did not meet the three *R-A* criteria. (As discussed above, these criteria were imported into the proposed regulation. [FN108]) In one case, the IJ misunderstood the principle set forth in the proposed regulation that the social group cannot be defined by the harm, precluding narrowly-defined PSGs such as "battered spouses" or "acid-burned women." [FN109] But, as should be clear from the social group in the *Kasinga* decision itself, this principle does not rule out all social groups that reference the harm, such as "women with intact genitalia in a tribe where FGC is required" or "women in marriages with abusive men."

In the cases where the PSG was not found to be cognizable, the immigration judges generally went on to find that the husband was not motivated to target the wife because of her membership in the group. In at least one case, the IJ found that there was no nexus between the persecution and group membership because the spouse did not target other members of the group -- a factor relied upon in *R-A* which was explicitly rejected as a requirement in the commentary to the proposed regulation. [FN110]

The existence of a political opinion, and the question whether persecution in any given case is motivated by actual or imputed political opinion, may sometimes be a more fact-based inquiry than that implicated in PSG determinations. However, it is clear from a comparison of the grants and denials that some decision-makers find a

woman's resistance to abuse as inherently constituting a political opinion, [FN111] while others disparage its political nature, sometimes--as did one IJ--adopting almost verbatim the dismissive language from *R-A-* that the opinion is merely that “humans should not be harmed or abused, which lacks any political character of note.” [FN112] In terms of nexus, decision-makers who granted asylum were more likely to accept that domestic violence is exacerbated by resistance, as articulated by VAWO in the commentary to the regulation, [FN113] and to find a causal connection between the persecution and any expression of resistance or independence on the part of the abused spouse.

• *Grants in Other Gender Asylum*

Thirteen of the 30 claims granted could be characterized as cases not principally based on domestic violence, although several of them involved marital abuse. The 13 grants included one case of rape for reasons of nationality, one based on sexual orientation, five cases in which FGC was a factor, three involving repressive social norms, two based on forced servitude and forced prostitution, and one arising from persecution for advocacy of women's rights.

The two cases most distinct from the remainder of the cases were the ones involving rape for reasons of nationality and sexual orientation persecution. The applicant in the rape case was a Russian Jewish woman. [FN114] She and her fiancé had been targeted by an ultra-nationalist, anti-semitic group, her fiancé had been murdered and she had been raped. The BIA reversed the IJ's ruling that the persecution was not on account of one of the five grounds, and found that it was linked to her and her fiancé's Jewish nationality. This claim provides an example of a case in which the form of the harm is gender specific (i.e., rape) but the reason for the harm is unrelated to gender or gender roles.

The applicant in the sexual orientation claim was a lesbian from Peru [FN115] who had not acted on her orientation while in Peru, but became involved in an intimate relationship with a woman on coming to the United States. She feared that she and her lover would not be able to hide the relationship, and that she would be persecuted in Peru for her sexual orientation. In this case, as in sexual orientation cases generally, the IJ avoided the controversy over gender-defined PSGs by relying upon earlier precedent of *Toboso Alfonso* [FN116] and *Hernandez-Montiel* [FN117] in accepting that a PSG could be defined by sexual orientation. Notable in this case was the IJ's finding that the respondent's “coming out” as a lesbian in the United States was a change in circumstances, such that she was not barred by failure to apply within a year of arriving in the United States.

FGC Cases. In FGC cases, adjudicators have generally accepted the “gender plus” PSG formulation articulated by the BIA in the *Kasinga* decision. Although the definition of the social group did not add anything new to the existing analysis on the issue in the cases that were granted, these grants raised other interesting issues. Most significant is an unpublished BIA decision [FN118] addressing past FGC as a basis for relief. The BIA reversed an IJ decision which had held that past FGC was a one-time harm and that the applicant did not have a well-founded fear of persecution because “nothing further could be done to her....” [FN119] The BIA reversed and granted relief, analyzing FGC as a permanent and ongoing form of harm:

Forced female genital mutilation is better viewed as a permanent and continuing act of persecution that has permanently removed from a woman a physical part of her body, deprived her of the chance for sexual enjoyment as a result of such removal, and has forced her to [sic] potential medical problems relating to this removal. [FN120]

Although it did not cite to it, the analysis in the BIA's decision was very similar to that employed in a pub-

lished BIA decision, *Matter of Y-T-L-*, [FN121] which had been released the day before. *Y-T-L-* had dealt with past reproductive sterilization, not FGC, but the rationale of both was based on a characterization of the harm as irreversible and on-going. Immigration judges have held otherwise in cases involving FGC. [FN122] Although this decision is unpublished, the fact that its rationale derives from a precedent decision makes it useful in arguing similar cases. It should also be noted that IJs have granted relief in other cases involving past FGC. [FN123]

A number of the FGC cases involved multiple harms. For instance, one case involved FGC and forced marriage, with domestic violence. [FN124] In that case the IJ relied upon a gender-defined social group to grant asylum to a woman who had been subject to FGC at the age of 14, and was subsequently forced into an abusive polygamous marriage. The IJ did not find the past FGC to be a basis of the claim, but did find forced and abusive marriage to be persecutory. Another case involved prospective FGC and polygamy. [FN125] The IJ found two PSGs, the first almost identical to the *Kasinga* PSG (gender, ethnicity, bodily integrity, opposition), while the second was defined by opposition and resistance to an arranged polygamous marriage. The IJ pointed out that this opposition was based on religious convictions that were fundamental to her identity and conscience, and which she should not have to change.

Another of the positive cases involved a Guinean woman [FN126] who had not undergone FGC as required in her culture, and whose politically powerful husband brutally abused her both physically and verbally. The abuse was accompanied by comments demonstrating the husband's belief that she was repugnant and defective because she had not undergone FGC. The IJ relied upon the *Kasinga* PSG and quoted extensively from the commentary of the proposed rule in finding that the fact that the husband did not abuse other uncircumcised Guinean women did not diminish the viability of her social group. Of note is the fact that the IJ cited to *Gomez v. INS*, [FN127] a case which has often been seen as a barrier to gender claims in the Second Circuit. The IJ noted that *Gomez* had not foreclosed the possibility that gender could form the basis for a social group claim, [FN128] and distinguished it from the case at hand.

Repressive Social Norms. Three positive cases involved repressive social norms; the applicants in these cases came from Pakistan, [FN129] Jordan [FN130] and Senegal. [FN131] The woman from Pakistan had been brutally beaten and threatened with honor killing by the male members of her family when she became pregnant out of wedlock and refused to abort the child. The IJ ruled that the applicant's persecution was on account of her political opinion that she had the right to enter into a relationship, and to refuse an abortion. The Jordanian woman, whose family was Catholic, was threatened with honor killing because she married and bore a child with a Muslim man against her family's wishes. The IJ relied on a number of the Iranian gender cases, such as *Fatin*, in ruling that the persecution she feared was on the basis of a social group defined by her gender and her transgression of societal norms ("Jordanian women under threat of honor killing by their families because they are perceived to have transgressed family or community norms of sexual morality." [FN132]). The Senegalese applicant feared persecution at the hands of her conservative Muslim family because she had given birth to a child out of wedlock with a Christian man. The persecution would take the form of "100 lashes in a purification process" [FN133] and there would be no possibility of government protection. In a 2-1 decision, the BIA ruled that the harm described rose to the level of persecution, and remanded the case to the IJ to "address the question whether such persecution would be on account of a statutorily protected ground, in light of current case law." [FN134]

Involuntary Servitude/Forced Prostitution. In two cases, relief was granted to young women who had been subjected to involuntary servitude or forced prostitution and other forms of sexual assault. Neither of the cases was decided on a PSG based on gender. The asylum seeker in the first case [FN135] was from an ethnic group in

the northern hills of Thailand, but did not hold Thai citizenship and was considered to be stateless. Since the age of three she had been raised by a man who was not her father. This man, who beat and raped her from an early age, handed her off to another woman who forced her to work in a beauty shop, where she was sexually violated. Ultimately she was smuggled to the United States. She feared retribution by the smugglers if returned to Thailand and because she had assisted in their prosecution. Citing to the Seventh Circuit's adoption of *Acosta*, the IJ ruled that she was a member of a PSG defined by her status as a non-Thai ethnic from the northern hills of Thailand, and that she had been persecuted on that basis.

The asylum seeker in the second case was a young Honduran woman [FN136] who had been abandoned by her biological parents, abused by her adoptive parents, and later kidnapped and forced into prostitution. The BIA granted asylum, reversing an IJ denial which had been based on an adverse credibility finding as well as a failure to establish persecution and lack of state protection. The BIA identified the relevant PSG as “children who have been abandoned by their parents and who have not received a surrogate form of protection” [FN137] and ruled that the kidnapping and forced prostitution had been on account of her status in this group which put her in an “extreme state of vulnerability [.]” which permitted “dangerous actors” to persecute her because they could do so without any “negative repercussions.” [FN138]

Advocacy of Women's Rights. One grant by an IJ to a Haitian woman [FN139] was based on the grounds of political opinion and PSG. The applicant's mother was an advocate for women's rights. Unknown men came to the home and attacked the mother, the applicant, and other family members who were in the home. The mother subsequently died of her injuries. The IJ ruled that persecution was on account of the political opinion of feminism. In addition, the IJ recognized a gender-defined social group, and also found for the applicant on that basis.

• *Denials in Other Gender Asylum*

The five denials in cases not principally based on domestic violence included one case of forced marriage, three cases in which rape was alleged, and one case of trafficking. Two of the denials were on the basis of adverse credibility; in those cases, however, the IJs indicated that even if they had found the applicants to be credible, they would have denied on other grounds. The remaining three cases were based primarily on failure to establish a nexus to an enumerated ground.

The forced marriage case involved a young woman from China [FN140] who claimed that she was smuggled out of China to the U.S. to escape an arranged marriage to the son of a man who had lent her father a large sum of money which he could not repay. The applicant had testified that she and/or her grandmother had gone to village officials to see if there were laws to protect her from being compelled to marry, but were told this was a “private family dispute” and that the officials would not intervene. [FN141] The applicant's uncle also testified on her behalf. The IJ denied asylum on the basis of credibility, but stated that even if the claim were true, he would have denied because no efforts were made to relocate internally, and he considered the use of smugglers to come to the U.S. to be a basis for a denial in the exercise of discretion.

Two of the three rape cases were of women seeking asylum from Guatemala. In the first of these cases [FN142] the applicant was beaten and raped five years after her husband, who had refused to support the guerrillas, had been murdered. On these facts, the IJ found there was no political motive or other recognized statutory ground for the rape. In the second Guatemalan case, [FN143] the applicant was from a town perceived as being sympathetic to the guerrillas and her own brother had been forcibly recruited by the guerrillas. She fled the country after three soldiers came to her family home, beat her father, and brutally gang-raped her. The IJ denied,

characterizing the rape as a “criminal act,” as opposed to persecution on account of one of the five grounds.

The applicant in the third case, who was from Sierra Leone, [FN144] claimed that the rebels had killed her father as an informer, and had taken her captive for an extended period of time. She recounted that she was repeatedly raped by the rebels and forced to participate in raids on neighboring towns and villages. Ultimately she escaped, went first to Guinea and then to the U.K. before arriving in the United States. Although her story was consistent with country conditions for Sierra Leone, the IJ found her not credible in the absence of corroboration, and denied the claim on that basis.

The trafficking case involved a young woman from China [FN145] who arranged to work in Hong Kong, but upon arrival discovered that she had been sold to a brothel as a prostitute. An older woman helped her escape. The IJ had found that she was not credible; on appeal the BIA reversed the adverse credibility finding, but denied the claim on several grounds. The Board majority ruled that she had failed to establish a nexus to any enumerated ground, that she had failed to show that those who trafficked her had the “power, ability or inclination ... to harm her,” and she had failed “to explain why Chinese authorities would not otherwise protect her....” [FN146] One Board member dissented, stating that the case should be remanded to the IJ for a full analysis of whether the applicant could establish persecution on account of membership in a PSG of young women in China who flee because of forced prostitution.

CONCLUSION

From a review of these decisions, it is clear that a significant number of adjudicators understand that existing case law provides a firm framework for grants of asylum in cases based on gender persecution. These adjudicators rely on long-standing landmark cases, such as *Acosta* and *Kasinga*, and they understand that the vacating of *R-A-* is just as significant a development as was the issuance of the original decision itself. These adjudicators who grant relief in gender cases are often likely to inform their analysis by reference to the proposed rule with its helpful commentary, or even to international developments, including UNHCR's gender and social group guidelines.

Yet some adjudicators, having followed the complicated and ongoing legal and political maneuvering over the *Matter of R-A-* case, may have arrived at the mistaken conclusion that existing precedent does not support the recognition of gender-defined social groups, and that nexus can rarely--if ever--be established in these types of cases. Notwithstanding the vacating of *R-A-*, these adjudicators appear to have been motivated by the tone and spirit of the original decision, which sent a clear message that the U.S. was retreating from the gender-protective high-water mark of *Kasinga*.

In light of these divergent understandings of the relevant legal standards, additional guidance could be helpful, whether in the form of final regulations, a new decision in the *R-A-* case or decisions by the federal courts. That guidance, when it comes, will hopefully further the progress made by the *Kasinga* decision, and the vacating of *R-A-*, and clarify that women fleeing gender harms meet the refugee definition.

[FN1]. INA §§ 208(a)(1), 241(b)(3), 8 U.S.C.A. § 1158(a)(1), 1231(b)(3).

[FN2]. Examples of harms which are gender-specific, or which more commonly befall women, include female genital cutting (FGC), sexual slavery, honor killing, forced marriage, domestic violence, and repressive social

norms - which in some cases (such as under the Taliban in Afghanistan where girls and women were prohibited from going to school or working, and were not permitted to leave their homes unless in the company of a male relative) deprive women of virtually all of their societal rights. As will be discussed throughout this article, many of these harms are not only “gender-specific” in terms of the form they take, but the reason they are imposed is also on account of gender.

[FN3]. Asylum and Withholding Definitions, Department of Justice, Immigration and Naturalization Service, 65 Fed. Reg. 76588-98 (Dec. 7, 2000) [hereinafter “Proposed Regulation”].

[FN4]. *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999), *vacated* (AG 2001).

[FN5]. United Nations Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter “Refugee Convention”]; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577.

[FN6]. U.S. law uses the phrase “on account of;” the Convention employs “for reasons of,” in linking the harm to the reasons for the harm.

[FN7]. See, e.g., Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: a Unifying Rationale for Evolving Jurisprudence*, 52 DePaul L. Rev. 777, 781-82 (2003).

[FN8]. See, e.g., *Conclusion on Refugee Women and International Protection*, UNHCR Executive Committee, 36th Sess., No. 39 ¶ k (1985). *Conclusion on Refugee Women*, UNHCR Executive Committee, 39th Sess., No. 54 (1988). *Conclusion on Refugee Women and International Protection*, UNHCR Executive Committee, 41st Sess., No. 64 (1990). *Conclusion on Refugee Protection and Sexual Violence*, 44th Sess., No. 73 (1993).

[FN9]. Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (March 1993); Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 25, 1996).

[FN10]. Office of International Affairs, U.S. Immigration and Naturalization Service, *Considerations for Asylum Officers Adjudicating Asylum Claims for Women* (May 26, 1995). The *Considerations* were in the form of non-binding guidance, directed to Asylum Officers only.

[FN11]. Governmental gender guidelines from 10 countries are available on the CGRS web site: <<http://www.uchastings.edu/cgrs/law/guidelines.html>>.

[FN12]. UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01, 7 May 2002) (hereinafter “UNHCR 2002 Gender Guidelines”); UNHCR, *Guidelines on International Protection: Membership in a Particular Social Group*, ¶ 19 (HCR/GIP/02/02, 7 May 2002) (hereinafter “UNHCR 2002 Social Group Guidelines”).

[FN13]. See, e.g., *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

[FN14]. See, e.g., *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

[FN15]. See, e.g., *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996), at 366 (“The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”).

[FN16]. See, e.g., *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994).

[FN17]. See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993). The 9th Circuit's decision in *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001), vacated, 273 F.3d 1220 (9th Cir. 2001), recognizing family as a PSG where the persecutor was also a member of the family, has been vacated and remanded back to the immigration judge.

[FN18]. *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000).

[FN19]. *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

[FN20]. *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996).

[FN21]. *Matter of Kasinga*, 21 I. & N. Dec. 357, at 365.

[FN22]. *Matter of Kasinga*, 21 I. & N. Dec. 357, at 366.

[FN23]. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

[FN24]. *Fatin v. INS*, 12 F. 3d 1233 (3d Cir. 1993).

[FN25]. *Islam v. Secretary of State for the Home Department*, [1999] 2 All E.R 546, available at <<http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm>>.

[FN26]. *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14 (hereinafter “*Khawar*”), available at <<http://scaleplus.law.gov.au/html/highcourt/0/2002/0/2002041114.htm>>.

[FN27]. Refugee Appeal No. 71427/99 [1999] (New Zealand), available at <<http://www.nzrefugeeappeals.govt.nz/default.asp>>.

[FN28]. UNHCR 2002 Gender Guidelines, *supra* note 12.

[FN29]. UNHCR 2002 Social Group Guidelines, *supra* note 12.

[FN30]. For a discussion of the bifurcated analysis, see Karen Musalo, *supra* note 7.

[FN31]. See *id.* at 798-99.

[FN32]. Proposed regulation, *supra* note 3, at 76593.

[FN33]. See Karen Musalo & Stephen Knight, *Gender-Based Asylum: An Analysis of Recent Trends*, 77 Interpreter Releases 1533 (October 30, 2000); Stephen Knight, *Seeking Asylum from Gender Persecution: Progress amid Uncertainty*, 79 Interpreter Releases 689 (May 13, 2002).

[FN34]. *Matter of R-A-* (A# redacted) (San Francisco, CA, Immigration Court, 20 Sept. 1996).

[FN35]. *Id.* at 9.

[FN36]. *Matter of R-A-* at 11-12.

[FN37]. For a detailed discussion of the BIA's ruling, see Karen Musalo, *Matter of R-A-: An Analysis of the Decision and its Implications*, 76 Interpreter Releases 1177 (August 9, 1999).

[FN38]. *Matter of R-A-*, 22 I. & N. Dec. 906, at 919.

[FN39]. *Matter of R-A-*, 22 I. & N. Dec. 906, at 920.

[FN40]. *Matter of R-A-*, 22 I. & N. Dec. 906, at 915.

[FN41]. Proposed regulation, *supra* note 3.

[FN42]. 8 C.F.R. § 3.1(h) (2002). Note that following the reorganization of INS into DHS on March 1, 2003, these regulations were renumbered. The new “referral” provisions can be found at 8 C.F.R. § 1003.1(h).

[FN43]. *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999), *vacated* (AG 2001).

[FN44]. Attorney General Order No. 2661-2003 (Feb. 21, 2003) (on file with authors).

[FN45]. Proposed regulation, *supra* note 3, at 76597-98.

[FN46]. *Id.* (proposed regulations at 8 C.F.R. §§208.13, 208.15 and 208.16).

[FN47]. Prefatory comments to a regulatory proposal are often of assistance to courts engaged in interpretation. *See, e.g., National Min. Ass'n v. Babbitt*, 172 F.3d 906, 914 (DC Cir. 1999).

[FN48]. Supplementary Information to Proposed Regulation, *supra* note 3, at 76589 [hereinafter “Commentary”].

[FN49]. Proposed regulation, *supra* note 3, at 76588.

[FN50]. *Id.* at 76595.

[FN51]. Among the fora in which this position has been stated for the record include during the June 21, 2001, en banc argument of the case, *INS v. Vallabhaneni*, before the BIA (copy of transcript on file with authors).

[FN52]. *Ventura v. INS*, 537 U.S. 12 (2003).

[FN53]. Proposed regulation, *supra* note 3, at 76595.

[FN54]. *Id.*

[FN55]. *Id.* at 76597.

[FN56]. *See, e.g., Francois v. INS*, 283 F.3d 926, 929 (8th Cir. 2002); *Aguilera-Cota v. U.S.I.N.S.*, 914 F.2d 1375, 1378 (9th Cir. 1990).

[FN57]. While persecution of course does not encompass harms that are adjudged to be trivial, more helpful guidance for adjudicators might have referred to the international treaties and human rights standards, serious violation of which would amount to persecution. *See, e.g.*, Immigration Appellate Authority (United Kingdom), *Asylum Gender Guidelines* ¶ 2A.15 (Nov. 2000) (“Whether particular treatment amounts to ‘serious harm’ should be decided on the basis of international human rights standards.”) (citation omitted), available at <http://www.courtservice.gov.uk/tribunals/tribs_home.htm>; UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, ¶ 51 (“serious violations of human rights ... would constitute persecution.”).

[FN58]. *See also Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

[FN59]. Proposed regulation, *supra* note 3, at 76597.

[FN60]. *Id.*

[FN61]. UNHCR, Comments on Proposed Rule Regarding Asylum and Withholding Definitions INS No. 2092-00; [hereinafter “UNHCR Comments”]. AG Order No. 2339-2000 (January 21, 2001) (on file with authors).

[FN62]. Proposed regulation, *supra* note 3, at 76591.

[FN63]. *Id.*

[FN64]. *Id.* at 76598 (emphasis added).

[FN65]. *See, e.g., Lukwago v. Ashcroft*, 329 F.3d 157 (3rd Cir. 2003); *Osario v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994); *Matter of Fuentes*, 19 I & N Dec. 658, 662 (BIA 1988).

[FN66]. Proposed regulation, *supra* note 3, at 76592-93.

[FN67]. *Id.* at 76593.

[FN68]. *Id.* at 76598.

[FN69]. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

[FN70]. UNHCR Comments, *supra* note 61; U.S. Committee for Refugees, Proposed Rule Addresses Asylum for Victims of Gender-Based Persecution, 22 Refugee Reports 1, 5 (2001).

[FN71]. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

[FN72]. Proposed regulation, *supra* note 3, at 76593.

[FN73]. *Id.* at 76595

[FN74]. The Department of Justice and Department of Homeland Security appear to hold concurrent jurisdiction over immigration regulations. INA secs. 103(a)(3) & (g)(2); 8 U.S.C.A. 1103(a)(3) & (g)(2).

[FN75]. This email message is on file with the authors.

[FN76]. [80 Interpreter Releases 1244 \(2003\)](#).

[FN77]. Note that for the purposes of this *Briefing*, the authors have included as “grants” three BIA decisions sustaining appeals by asylum seekers and remanding for further proceedings (CGRS Case nos. 963, 1118, 1166), and included as a “denial” one BIA decision sustaining a government appeal of a grant of asylum and remanding for further proceedings (CGRS Case no. 138). Those cases are identified as remands when discussed in the text.

[FN78]. *Matter of M-T-* (A# redacted) (San Francisco, CA, Immigration Court, Dec. 19, 2002) (CGRS case no. 1194).

[FN79]. *Matter of Anon.* (A# redacted) (San Francisco, CA, Immigration Court, May 19, 2003) (CGRS case no. 1204).

[FN80]. *Matter of Anon.* (A# redacted) (New York, NY, Immigration Court, Mar. 10, 2003) (CGRS case no. 813). In this case, the IJ approved a PSG of “women in Guatemalan society who resist male domination by living independently and self-sufficiently.” *Id.* at 19-20.

[FN81]. *Matter of M-T-* (CGRS case no. 1194), *supra* note 78. The IJ granted asylum based on the applicant's membership in a PSG of “women in Mexico. She is also part of the narrower group of women who try to escape domestic violence, but are unable to receive official protection in Mexico.” *Id.* at 4 (footnote omitted).

[FN82]. *Matter of Anon.* (A# redacted) (San Diego, CA, Immigration Court, June 25, 2002) (CGRS case no. 604). This case, involving a woman from Mexico, was granted on a PSG defined “by her gender, her relationship with her ex-husband, and her opposition to domestic violence.” *Id.* at 7.

[FN83]. *Matter of Anon.* (CGRS case no. 1204), *supra* note 79.

[FN84]. *Matter of U-R-* (A# redacted) (San Francisco, CA, Immigration Court, Aug. 9, 2002) (CGRS case no. 881); *Matter of D-G-* (A# redacted) (San Francisco, CA, Immigration Court, Jan. 29, 2002) (CGRS case no. 1193).

[FN85]. *Matter of Anon.* (CGRS case no. 813), *supra* note 80.

[FN86]. *Matter of Anon.* (CGRS case no. 604), *supra* note 82; *Matter of U-R-* (CGRS case no. 881), *supra* note 84.

[FN87]. *Matter of M-T-* (CGRS case no. 1194), *supra* note 78; *Matter of Anon.* (CGRS case no. 1204), *supra* note 79.

[FN88]. *Matter of M-T-* (CGRS case no. 1194), *supra* note 78, at 9.

[FN89]. *Matter of R-A-*, 22 I. & N. Dec. 906, at 915.

[FN90]. *Matter of Anon.* (A# redacted) (San Antonio, TX, Immigration Court, Mar. 8, 2002) (CGRS case no. 195). “‘Political opinion’ includes a political opinion imputed to a woman because she is perceived by the established political/social structure as expressing politically antagonistic views through her actions or failure to act....” *Id.* at 12.

[FN91]. *Matter of Anon.* (A# redacted) (BIA 2002) (CGRS case no. 503). In this case, the BIA upheld an IJ's

grant of asylum. The IJ had concluded that the record “amply supports the conclusion that the abuse suffered by Respondent was on account of her abuser's belief that, as her boyfriend, he could dominate her, physically and emotionally.... Her opposition was known to him by her attempts to leave him, and his responses to such acts indicate that he punished her more severely when she displayed her political views in this way.” *Matter of Anon.* (A# redacted) at 8 (San Diego, CA, Immigration Court, Sept. 29, 1999) (CGRS case no. 503).

[FN92]. *Matter of Anon.* (A# redacted) (San Antonio, TX, Immigration Court, Sept. 13, 2001) (CGRS case no. 1043). This analysis shows the overlap that often exists between PSG and political opinion. The fundamental characteristic of “refusal to conform,” which can define a social group, on its face equates closely to a political opinion, and/or a persecutor may be motivated by his or her imputing a political opinion from such a refusal.

[FN93]. *Id.*

[FN94]. *Matter of Y-A-* (A# redacted) (San Francisco, CA, Immigration Court, Apr. 24, 2002) (CGRS case no. 789). He “told her that she was being persecuted because of her rejection of her status under his view of the Koran and for protesting his abuse, which was justified by his fundamentalist views.” *Id.* at 9.

[FN95]. *Matter of H-M-* (A# redacted) (York, PA, Immigration Court, Nov. 19, 2001) (CGRS case no. 792).

[FN96]. *Matter of S-A-*, 22 I. & N. Dec. 1328 (BIA 2000).

[FN97]. *Matter of M-F-* (A# redacted) (Oakdale, LA, Immigration Court, July 26, 2001) (CGRS case no. 723) (Guatemala); *Matter of R-P-* (A# redacted) (Miami, FL, Immigration Court, Jan. 31, 2002) (CGRS case no. 818) (Honduras), *Matter of X-B-* (A# redacted) (New York, NY, Immigration Court, Mar. 6, 2001) (CGRS case no. 1114) (Albania); *Matter of Anon.* (A# redacted) (Bloomington, MN, Immigration Court, Jan. 28, 2003) (CGRS case no. 1216) (Panama); *Matter of S-S-* (A# redacted) (Seattle, WA, Immigration Court, Sept. 19, 2003) (CGRS case no. 2538) (Bangladesh); and *Matter of M-S-* (A # redacted) (Atlanta, GA, Immigration Court, Apr. 16, 2003) (CGRS case no. 1195) (Guatemala).

[FN98]. *Matter of D-G-* (CGRS case no. 1193), *supra* note 84 (grant), and *Matter of M-S-* (CGRS case no. 1195) (denial), *supra* note 97.

[FN99]. *Matter of Anon.* (CGRS case no. 1204) (grant), *supra* note 79, and *Matter of R-P-* (CGRS case no. 818) (denial), *supra* note 97.

[FN100]. *Matter of S-S-*, *supra* note 97 (denial); *Matter of Sharmin*, (A73556833) (New York, NY, Immigration Court, Sept. 27, 1996) (grant).

[FN101]. *Matter of Anon.* (CGRS case no. 1204), *supra* note 79, at 10-11.

[FN102]. *Matter of R-P-* (CGRS case no. 818), *supra* note 97, at 8.

[FN103]. For an excellent illustration, in the immigration context, of the importance of an understanding of the DV dynamic, see *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003) (VAWA case).

[FN104]. *Matter of M-S-* (CGRS case no. 1195), *supra* note 97; *Matter of M-D-* (A# redacted) (Miami, FL, Immigration Court, Apr. 14, 2003) (CGRS case no. 1223).

[FN105]. *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975) (BIA ruled that the fact that the applicant's abuser was a legislator did not make abuse of his wife persecution on account of political opinion, despite the fact that the government was unable or unwilling to control the abuser).

[FN106]. Phyllis Coven, Department of Justice, Immigration & Naturalization Service, Office of International Affairs, "Considerations for Asylum Officers Adjudicating Asylum Claims From Women" (1995).

[FN107]. *Matter of Anon* (A# redacted) (Chicago, IL, Immigration Court, May 29, 2003) (CGRS case no. 2506).

[FN108]. *See, e.g., Matter of M-S-* (CGRS case no. 1195), *supra* note 97.

[FN109]. Proposed regulation, *supra* note 3, at 76594; *see also* 76592 n3. This rule is sometimes referred to as the "circularity" principle, because the cited PSGs essentially make a circular argument that an applicant is persecuted because of her membership in a group that is defined by nothing more than the fact of the persecution itself. UNHCR has stated that "while the social group must exist independently of the persecution ..., the fact that a group is targeted for harsh or inhuman treatment may be evidence that the group exists." UNHCR, *supra* note 61, at 10.

[FN110]. *Matter of Anon*. (CGRS case no. 1195), *supra* note 97.

[FN111]. *Matter of Anon*. (CGRS case no. 195), *supra* note 90.

[FN112]. *Matter of M-S-* (CGRS case no. 1195), *supra* note 97; compare *Matter of R-A-*, 22 I. & N. Dec. at 915 (applicant mere expressed the "common human desire not to be harmed or abused...").

[FN113]. Proposed regulation, *supra* note 3, at 76595.

[FN114]. *Matter of R-K-* (A# redacted) (BIA 2002) (CGRS case no. 968).

[FN115]. *Matter of Anon*. (A# redacted) (San Francisco, CA, Immigration Court, Oct. 10, 2001) (CGRS case no. 1180).

[FN116]. *Matter of Toboso Alfonso*, 20 I. & N. Dec. 819 (BIA 1990).

[FN117]. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

[FN118]. *Matter of Anon*. (A# redacted) (BIA 2003) (CGRS case no. 201).

[FN119]. *Id.* at 2.

[FN120]. *Id.*

[FN121]. *Matter of Y-T-L-*, 23 I. & N. Dec. 601 (BIA 2003). The BIA held that forced sterilization did not constitute a "fundamental change" in circumstances sufficient for a discretionary denial of asylum under 8 C.F.R. § 1208.13(b)(1)(i)(A):

The act of forced sterilization should not be viewed as a discrete, onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.

Id at 607.

[FN122]. *Matter of A-D-* (A# redacted) (Boston, MA, Immigration Court, Feb. 21, 2001) (CGRS case no. 283).

[FN123]. *Matter of A-M-* (A# redacted) (Boston, MA, Immigration Court, Sept. 20, 2001) (CGRS case no. 608).

[FN124]. *Matter of A-D-* (CGRS case no. 283), *supra* note 122.

[FN125]. *Matter of O-O-* (A# redacted) (Atlanta, GA, Immigration Court, July 3, 2002) (CGRS case no. 998).

[FN126]. *Matter of M-T-* (A# redacted) (New York, NY, Immigration Court, Feb. 28, 2002) (CGRS case no. 713).

[FN127]. 947 F. 2d 660 (2d Cir. 1991).

[FN128]. *Matter of M-T-* (CGRS case no. 713), *supra* note 126, at 10. As acknowledged by the commentary itself, *see* 65 Fed. Reg. at 76594, the main barrier to relief posed by the holding in *Gomez* was not the fact that gender was proposed as a characteristic of the social group, but that the PSG was largely defined by the harm.

[FN129]. *Matter of Anon.* (A# redacted) (Los Angeles, CA, Immigration Court, Sept. 25, 2002) (CGRS case no. 143).

[FN130]. *Matter of J-H- & S-H-* (A#s redacted) (Detroit, MI, Immigration Court, Oct. 30, 2002) (CGRS case no. 292).

[FN131]. *Matter of Anon.* (A# redacted) (BIA 2002) (CGRS case no. 1166) (remand).

[FN132]. *Matter of J-H- & S-H-* (CGRS case no. 292), *supra* note 130, at 20.

[FN133]. *Matter of Anon.* (CGRS case no. 1166), *supra* note 131, at 2 (remand).

[FN134]. *Id.* at 3.

[FN135]. *Matter of S-* (A# redacted) (Chicago, IL, Immigration Court, June 18, 2001) (CGRS case no. 560).

[FN136]. *Matter of F-L-* (A# redacted) (BIA 2003) (CGRS case no. 216).

[FN137]. *Id.* at 5.

[FN138]. *Id.*

[FN139]. *Matter of S-P-* (A# redacted) (Miami, FL, Immigration Court, Apr. 3, 2002) (CGRS case no. 1082).

[FN140]. *Matter of S-X-* (A# redacted) (York, PA, Immigration Court, Nov. 7, 2002) (CGRS case no. 1104).

[FN141]. *Id.* at 2.

[FN142]. *Matter of V-M-* (A# redacted) (Bloomington, MN, Immigration Court, Mar. 3, 2000) (CGRS case no. 1109).

[FN143]. *Matter of G-M-* (A# redacted) (San Francisco, CA, Immigration Court, May 10, 2001) (CGRS case no. 97).

[FN144]. *Matter of Anon.* (A# redacted) (Atlanta, GA, Immigration Court, June 16, 2003) (CGRS case no. 1163).

[FN145]. *Matter of Anon.* (A# redacted) (BIA 2003) (CGRS case no. 1416).

[FN146]. *Id.* at 2.

[FN147]. Karen Musalo is Resident Scholar at University of California Hastings College of the Law, and Director of the Center for Gender & Refugee Studies (CGRS) <www.uchastings.edu/cgrs>. Stephen Knight is CGRS Coordinating Attorney and Research Fellow at UC Hastings.

03-12 Immigr. Briefings 1

END OF DOCUMENT