

CENTER FOR  
**Gender & Refugee**  
STUDIES

## **Amicus Brief Filed by CGRS in A-M-**

### **Overview of the Attached Brief**

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the Board of Immigration Appeals on March 29, 2005 in the matter of A-M-. Identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses human trafficking as a basis for asylum, and argues that the applicant, an Albanian minor who was forced into sex trafficking, was persecuted because of her membership in a particular social group and her imputed political opinion. It also argues that country conditions evidence is relevant to the nexus determination, and that acts which are criminal in nature can constitute persecution on account of a protected ground. Finally, it deals with application of the one year filing deadline to cases of unaccompanied minors and individuals with mental disabilities.

### **Organizational Overview**

The Center provides legal expertise, training, and resources to attorneys representing asylum seekers, advocates to protect refugees, advances refugee law and policy, and uses domestic, regional and international human rights mechanisms to address the root causes of persecution.

### **Technical Assistance Provided by CGRS**

As part of our core programs, CGRS engages in technical assistance and country conditions research for attorneys with gender-based, LGBTI, and child asylum claims. We provide free invaluable resources: legal consultation, country conditions information, practice advisories, unpublished immigration judge and Board of Immigration Appeals decisions, sample briefs, and expert witness affidavits developed by leading authorities in their fields in collaboration with CGRS. CGRS appears as amicus counsel or co-counsel in high impact cases. **To request assistance from CGRS, please visit our website at <http://cgrs.uchastings.edu/assistance/>.**

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CENTER FOR  
**Gender & Refugee**  
STUDIES

Karen Musalo Cal. Bar #106882  
Stephen Knight Cal. Bar #189546  
Center for Gender & Refugee Studies  
U.C. Hastings College of the Law  
200 McAllister Street  
San Francisco, CA 94102  
Telephone: (415) 565-4720  
Facsimile: (415) 565-4865

*Amicus Curiae* in Support of Respondent Ann's Appeal

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS**

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<b>In the Matter of:</b>	)
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<b>Ann</b>	)
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<b>In Removal Proceedings</b>	)
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**FILE No.: A XXXX**

**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT Ann'S APPEAL FROM  
THE JUDGMENT OF THE IMMIGRATION JUDGE**

**FACTS OF THE CASE**

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## SUMMARY OF ARGUMENT

An asylum applicant is required to file her asylum application within one year of arriving in the U.S., unless, *inter alia*, she can show that extraordinary circumstances caused the delay in filing. 8 U.S.C. § 1158(a)(2)(B) (2000). Ann arrived in the U.S. at the age of 16, unaccompanied by her parents or a legal guardian, and suffering from Major Depressive Episode and Post Traumatic Stress Disorder. She filed her asylum application on February 6, 2002, 13 months after she arrived in the U.S., when was 17 years old. Nevertheless, the Immigration Judge (IJ) held that her claim was time-barred and that no extraordinary circumstances were applicable to her. (Decision of Immigration Judge Sandy Hom (I.J.) at 12-14.) As discussed in section 1, *infra*, this ruling is clearly erroneous and must be reversed.

To establish eligibility for asylum on the merits, an applicant must show that she is unable or unwilling to avail herself to the protection of her home country “because of persecution or a well-founded fear of persecution on account of... membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A) (2000). An applicant who is not eligible for asylum may nevertheless not be removed to a country where her “life or freedom would be threatened” on account of one of the five statutorily protected grounds. 8 U.S.C. § 1253(h). To qualify for withholding of removal, an alien must demonstrate that “it is more likely than not that he would be subject to persecution on one of the specified grounds.” *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); 8 C.F.R. § 208.16 (2005). The one-year filing bar does not apply to a claim for withholding of removal. *Molathwa v. Ashcroft*, 390 F.3d 551, 553-4 (8th Cir. 2004).

After ruling that Ann's application was time-barred, the IJ went on to analyze the merits of her claim. Despite finding Ann to be credible and consistent with both her written application and the documentary country conditions evidence, he concluded that even if her filing had been timely, she would not be eligible for asylum. (I.J. at 15-22.) He rejected her claim of past persecution based on her particular social group, ruling that she was merely a victim of “personal” and “criminal” actions by L-- because of his anger at

being rejected by Ann and her family. (*Id.* at 19.) As discussed in section 2(b), *infra*, this finding is legally and factually erroneous and must be reversed. Additionally, he held that there was no nexus between the harms that Ann had suffered and either her own or her father's political opinion, since the DP is a "viable, legal and open political party;" neither she nor her father were officers or leaders of the DP; and had never been mistreated by the government. (*Id.* at 17-18.) In doing so, the IJ made a series of errors, as discussed in section 2(c), *infra*.

A showing of past persecution gives rise to a rebuttable presumption that an applicant has a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1) (2005). Ann has established that she suffered past persecution on account of her social group and political opinion and the government did not offer any evidence to rebut her claim. On the contrary, Ann has demonstrated that the pattern and practice of trafficking in Albania, and the specific targeting of political opponents like her, continues unabated. She also testified that L-- has threatened her family that he will kill her if he finds her, and that her own family has gone into hiding to protect her sisters from the harms that Ann suffered. As discussed in section 2(d), *infra*, this evidence shows that Ann has a well founded fear of persecution if she is sent back to Albania.

In addition to erroneously ruling that Ann had not suffered past persecution on account of her social group and political opinion, the IJ overlooked altogether Ann's independent well-founded fear of persecution in the form of stigmatization based on her social group of Albanian women who have been raped and undergone an abortion. As discussed in section 3, *infra*, Ann credibly testified and submitted evidence to show that if sent back, she would be severely stigmatized in Albania's patriarchal society. These fears provide Ann with a separate basis for asylum.

Finally, the IJ denied Ann's withholding of removal claim. (*Id.* at 22.) Contrary to the IJ's ruling, Ann meets the higher standard for restriction on removal because, having established past persecution on account of her membership in a particular social group and political opinion, she is entitled to a presumption of future threats to life or freedom.

8 C.F.R. § 208.16(b)(2). The government has not carried its burden of overcoming this presumption. *Id.*

## ARGUMENT

### **The IJ Erred in Ruling That Ann’s Asylum Claim Was Time-Barred**

An applicant must file her asylum application within one year of her arrival in the U.S. 8 U.S.C. § 1158(a)(2)(B) (2000). However, the limitation period is tolled if the applicant can show that the delay in filing was caused by “extraordinary circumstances” directly related to her failure to file, and that the delay was reasonable under the circumstances. *Id.* § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(5) (2005). Those circumstances include: “Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;” or “Legal disability (e.g., the applicant was an unaccompanied minor . . . ) during the 1-year period after arrival.” *Id.* The Board of Immigration Appeals (BIA) has held that determining whether an applicant is eligible for the extraordinary circumstances exception requires an “individualized analysis of the facts of the particular case” to determine whether an extraordinary circumstance exists, whether the delay was directly related to those circumstances and whether it was reasonable. *Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002).

Ann arrived in the U.S. on January 5, 2001, unaccompanied by her parents or a guardian, and submitted her application on February 6, 2002, when she was still a minor. In January 2003, she was diagnosed with Post Traumatic Stress Disorder (PTSD)<sup>1</sup> and Major Depressive Episode (MDE),<sup>2</sup> caused by the traumatic incidents she had experienced in

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1 Dr. Schwartz defined PTSD as a “psychiatric disorder that can have pervasive effects in a variety of different areas as a consequence of some kind of overwhelming trauma in their past.” (Tr. at 95.)

2 Dr. Schwartz defined MDE as “a depressive process where the individual has a low mood, and has a variety of emotional and cognitive functions impaired by the state of their mood.” (*Id.* at 95.)

Albania. Therefore, she has shown that she was suffering from a mental and legal disability throughout the one-year period after her arrival. She has also shown that these factors directly caused the one month delay in filing, which was perfectly reasonable under those circumstances. The IJ's ruling that none of the extraordinary circumstances exceptions were applicable to her is clearly erroneous and must be reversed. 8 C.F.R. § 1003.1(d)(3) (2005) (Factual findings by the IJ are reviewed to determine if they are "clearly erroneous.").

**1. Ann's One-Month Filing Delay Should Be Excused Because She Was Suffering from a Mental Disability as Result of Her Persecution in Albania**

Ann arrived in the U.S. at the age of XXXXX on XXXXX, 2001, shortly after she had been stalked, violently kidnapped, repeatedly beaten and raped over a one-month period, nearly sold into prostitution in Italy, and forced to undergo an abortion because she became pregnant as a result of the rapes. The trauma and shame resulting from this brutal episode can hardly be overstated. REDACTED (Ann Aff. ¶ 30.) In Albania's conservative society, women who are victims of rape and trafficking victims are made to feel ashamed of themselves and are ostracized by their families and the larger community. (Fisher Aff. at 3.)

Ann continues to suffer from the psychological effects of those incidents REDACTED (Ann Aff. ¶¶ 39, 41.) In January 2003, she was evaluated by REDACTED an experienced clinical psychiatrist, who diagnosed her as having PTSD and MDE caused by the events that had befallen her in Albania. (Tr. at 95.) He found those incidents were "something that she lives with constantly," causing her shame, anxiety, guilt and feelings of worthlessness. (Tr. at 98.) Those feelings made it very difficult for her to talk about her experiences, even to people who might have been able to help her. They also affected her memory and concentration, and impeded her ability to interact with people. (*Id.* at 98.) When Ann was finally able to talk about her experiences, she chose to tell her cousin's

wife, indicating how difficult it was for her to discuss those matters with a man. Indeed, as Dr. Schwartz observed, Ann had found it extremely difficult to talk to him during their first meeting, but was better able to do so in their second meeting. (*Id.* at 101.)

The IJ's finding that Ann should have found out about the asylum process because she lived in New York City, which is "prolific with non-profit organizations," and that her feelings of shame "could easily have been rectified by going to an attorney," also shows surprising insensitivity. (I.J. at 13.) In the first place, it ignores the well-documented under-reporting of sexual assault, largely because of its stigmatizing nature and the reluctance of women to discuss these intimate matters with strangers. *See, e.g.*, H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 380 (1994), reprinted in 1994 U.S.C.A.N. 1839, 1854 ("[r]ape ... is severely underreported to law enforcement authorities because of its stigmatizing nature."); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1221 (1997) ("Some rape victims are too upset, or too embarrassed at the prospect of answering a stranger's intimate questions about the incident, or so ashamed that they do not want anyone, even their friends, to know about it."). Given how difficult it was for Ann to speak to a family member, it is clear just how anguished she would have been sharing this information with an attorney, who would have been a complete stranger. Moreover, the IJ's conclusion overlooks the fact that Ann understandably saw no further need to consult a non-profit organization or an attorney because she had already been told that she could not extend her visa, and until she discussed her experiences with her cousin's wife, she was unaware of asylum as a potential remedy for her.

2. Ann's One Month Filing Delay Should Also Be Excused Because She Was Suffering From a Legal Disability as an Unaccompanied Minor Throughout the One-Year Period After Her Arrival in the U.S.

Ann's one month filing delay was also caused by the fact that she was only 16 years old when she arrived in the U.S., unaccompanied by her parents or a guardian, and



remained a minor for more than a year after her arrival. Over the course of the year,  
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In rejecting Ann's asylum application as untimely, the IJ focused on the fact that Ann participated in a competitive program to come to the U.S., spoke English well, was able to work and attend school. (I.J. at 12-13.) In doing so, however, he completely overlooked the most relevant facts: that Ann was merely 16 years old, had been forced to flee her home and family after a series of extremely traumatic and violent incidents, and, upon arriving in the U.S., had moved from home to home four times over a one-year period. It is not difficult to imagine the challenges faced by a person who, after enduring so much at such a young age, found herself in a new country amidst strangers, without the protection of her parents. The government itself has recognized the particular vulnerability of unaccompanied children, and suggests that "in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to . . . his/her special vulnerability." Jeff Weiss, U.S. Dep't of Justice, *Guidelines for Children's Asylum Claims* 18 (Dec. 10, 1998). In this case, however, the IJ paid no heed to any of the factors that resulted in her "special vulnerability."

In sum, the IJ's finding that Ann's asylum application was time barred because it was one month late and no extraordinary circumstances were applicable to her is clearly erroneous, and must be reversed.

### **3. The IJ Erred in Ruling That Ann Had Not Faced Past Persecution**

To establish eligibility for asylum based on past persecution, an applicant must show: "(1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either 'unable or unwilling' to control." *Navas v. INS*, 217 F.3d 646, 655-656 (9th Cir. 2000); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir.

2002); *Matter of S-A-*, 22 I&N Dec. 1328, 1334-35 (BIA 2000). Ann has shown that her kidnapping, repeated rapes and beatings, and narrow escape from trafficking, constitute harms that rise to the level of persecution; that she was persecuted on account of her membership in a social group of young Albanian women who are members of the DP and on account of her political opinion; and that the government is unable and unwilling to control her persecutor. The IJ's contrary rulings on these issues are erroneous and must be reversed.

#### 4. The IJ Made a Legal Error in Finding That Ann “Has Not Established Persecution”

Despite finding Ann to be completely credible and consistent in her testimony regarding her kidnapping, forced imprisonment, repeated rapes and beatings over a one-month period, the IJ held that Ann “has not established persecution.” (I.J. at 19.) In doing so, he conflated the issue of whether a harm constitutes persecution with the question of whether a nexus between that harm and a statutorily protected ground has been established. This analysis is legally erroneous, and must be reviewed *de novo*, because it is well-established that assessing whether a harm rises to the level of persecution is a separate and distinct inquiry from whether the harm is perpetrated on account of a statutorily protected ground. *See* 8 C.F.R. § 1003.1(d)(3) (the BIA reviews questions of law *de novo*); *Matter of Acosta*, 19 I&N Dec. 211, 219 (BIA 1985), *rev'd on other grounds*, by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (INA § 101(a)(42)(A) “creates four separate elements that must be satisfied before an alien qualifies as a refugee.”); *Matter of C-A-L-*, 21 I&N Dec. 754, 756 (BIA 1997) (an asylum applicant must first establish that a “reasonable person” in his circumstances would fear persecution, and in addition, prove that his well-founded fear of persecution is “on account of” one of the five statutory grounds).

By employing an improper analysis, the IJ reached the erroneous conclusion that Ann has not established persecution. In fact, courts have repeatedly found harms of the type that Ann faced to constitute persecution. *See Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1071 (9th Cir. 2004) (gang-rape and beatings by military soldiers); *Shoaf v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000) (rape); *Tarubac v. INS*, 182 F.3d 1114, 1118 (9th Cir. 1999) (kidnapping, beatings, imprisonment for a period of days, and threats of more violence); *Matter of D-V-*, 21 I&N Dec. 77, 78-79 (BIA 1993) (gang-rape and beatings by government soldiers).

Therefore, the IJ made a legal error in holding that Ann did not suffer persecution.

### **5. Ann Suffered Past Persecution on Account of Her Membership in a Particular Social Group of Young Albanian Women Who Are Members of the Democratic Party**

#### 6. Ann Belongs to a Particular Social Group of Young Albanian Women Who Are Members of the Democratic Party

In its seminal decision in *Acosta*, the BIA ruled that a social group should be defined by a “common, immutable characteristic” that the members “either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.” 19 I&N Dec. at 233. *Acosta* has been adopted by numerous federal circuits<sup>3</sup> the BIA,<sup>4</sup> and has even been favorably cited by the highest courts of the United Kingdom and Canada.<sup>5</sup> The DHS has recently restated its position that the *Acosta* test is “sound and

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<sup>3</sup> See, e.g., (in order of circuits) *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. Ashcroft*, 341 F.3d 533, 546 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000);.

<sup>4</sup> See, e.g., *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of H-*, 21 I&N Dec. 337, 349 n.7 (BIA 1996).

<sup>5</sup> See, e.g., *Islam (A.P.) v. Secretary of State for the Home Department*, *Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, 2 A11 E.R. 545 (H.L. 1999); *Canada (Att’y Gen’l)*

well supported.”<sup>6</sup> Ann’s social group of young Albanian women who are members of the DP, defined by her gender, nationality and political affiliation, meets the standards set out in *Acosta* and its progeny.<sup>7</sup>

According to *Acosta*, sex can be a basis for identifying a particular social group. 19 I&N Dec. at 214. Following that logic, some courts have found that gender alone can define a social group. *See Mohammed v. Gonzales*, 2005 WL 553229, at \*7 (9th Cir. Mar. 10, 2005) (females in general may constitute a social group); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (same). Courts have also recognized that gender can form the defining characteristic of a social group along with other factors, including nationality. *Gonzales*, 2005 WL 553229, at \*7 (social group could be defined as “Somalian females” or “young girls in the Benadiri clan”); *Fatin*, 12 F.3d at 1240-41 (“Iranian women who refuse to conform to the government’s gender-specific laws and norms”); *Matter of*

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*v. Ward*, [1993] 2 S.C.R. 689.

6 Brief of the Department of Homeland Security at 19-20, *In re R-A-*, A #: 73-753-922, (DOJ, Feb. 19, 2004) (hereinafter DHS Brief). The DHS brief criticizes the ambiguity created by *Sanchez-Trujillo*, and explains that it should not read as diluting the *Acosta* test. *Id.* at 24. *See also* U.S. Dep’t of Justice, Proposed Asylum Rule, 65 Fed. Reg. 76588, 76598 (Dec. 7, 2000) (noting that factors other than the “immutable characteristic test” may be considered but are not determinative of whether a cognizable social group exists).

7 In *Gomez v. INS*, the Second Circuit denied asylum to a young Salvadoran woman who had been repeatedly raped by the armed opposition. 947 F.2d 660, 662 (2d Cir. 1991). The court was presented with a social group defined as “women who have previously been battered and raped by Salvadoran guerillas.” *Id.* at 663. It ruled that this group was not viable because the fact that Gomez had been raped in the past did not make it more likely for her to be targeted for persecution: “Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics – other than gender and youth – such that would-be persecutors could identify them as members of the purported group.” *Id.* at 664. *Gomez* did not hold that gender cannot form the basis for a particular social group. On the contrary, it stands for the well-established proposition that a social group must be defined by characteristics that cause the individual to be targeted for persecution. In *Gomez*, the court found that being a young Salvadoran woman who had been raped in the past was insufficient to distinguish her for future persecution. The instant case is materially different. As discussed below, Ann has already been persecuted by L-- because of her social group, and has a well-founded fear of further persecution if she is sent back.

*Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996) (“young women of the Tchamba-Kunsuntu Tribe who have not had FGM [Female Genital Mutilation], as practiced by that tribe, and who oppose the practice”). Therefore, it is clear that Ann’s gender and nationality are valid characteristics by which a particular social group may be defined.

Finally, Ann’s affiliation with the DP also meets the *Acosta* test because it is an expression of her political opinion, which has been accepted as an “immutable or fundamental characteristic.” *Acosta*, 19 I&N Dec. at 233 (noting that each of the four asylum grounds in the refugee definition, race, religion, nationality, and political opinion, “describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”).

In sum, Ann’s particular social group of young Albanian women who are members of the DP is cognizable under the law.

#### 1. Ann Was Persecuted on Account of Her Membership in a Particular Social Group

In addition to establishing membership in a particular social group, an individual seeking asylum must show a causal relationship or “nexus” between the persecution and one of the statutory asylum grounds. A showing of nexus requires evidence that the persecutor is motivated at least in part by a statutory ground in inflicting the harm. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992). The IJ denied Ann asylum because he found no nexus between the persecution and either her social group membership or her political opinion. (I.J. at 21-22.) Instead, he concluded that the harm that Ann faced was a “purely personal” and “criminal” matter. (*Id.* at 20.) However, this finding is both legally and factually erroneous and must be reversed.

*(1)Ann Was Persecuted Because She Is a Young  
Albanian Woman Who Is a Member of the  
Democratic Party*

In *Kasinga*, in analyzing nexus, the Board inquired into the reasons that Ms. Kasinga was targeted for FGM, and found it had happened because of her gender, nationality and opposition to FGM. 21 I&N Dec. at 366-67. In other words, had she not been a young woman from the Tchamba-Kunsuntu Tribe, her persecutors would not have been motivated to threaten her with FGM; therefore a nexus was established between the persecution and a social group defined by these characteristics. The Ninth Circuit reaffirmed that analysis by concluding that “where the immutable trait of being female is a motivating factor – if not a but-for cause of the persecution,” the nexus requirement is met. *Mohammed*, 2005 WL 553229, at \*8.

The country conditions and expert testimony that Ann submitted leads inexorably to the conclusion that she was subjected to rapes, beatings, kidnapping and only narrowly escaped being trafficked by L-- because of her gender, nationality and political affiliation. *See, e.g., Trafficking in Human Beings in Southeastern Europe* at 125 (Over the past ten years, approximately 100,000 Albanian women and girls have been trafficked to Western Europe and other Balkan countries. Many have been kidnapped through false promises of marriage, coercion, and kidnapping. Up to 80% of the girls are under the age of eighteen); *Fisher Aff.* at 7 (Since Ann’s family is connected with the DP, she would have “little hope of receiving protection from the police.”). Therefore, she has shown that she was persecuted on account of her social group membership.

Nexus can also be established by circumstantial evidence of the persecutor’s motives, including the socio-cultural, legal, political or judicial context in which the harm takes place. *Elias-Zacarias*, 502 U.S. at 483-84; *Kasinga*, 21 I&N Dec at 366-67; U.S. Dep’t of Justice, Proposed Asylum Rule, 65 Fed. Reg. 76588, 76593 (Dec. 7, 2000) (evidence of

“patterns of violence [that] 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” are relevant to determining whether the persecution is “on account of” a protected characteristic); Brief of the Department of Homeland Security at 35-36, 36 n.11, *In re R-A-*, A #: 73-753-922, (DOJ, Feb. 19, 2004).

The record establishes that trafficking is prevalent in Albania because of the failure of the government to protect young girls and women from such harms. *See, e.g., 2002 Albania Country Reports* (The police are often involved in or assist the trafficking. Lawyers and judges can also be manipulated and bribed, allowing traffickers to buy their way out of being punished.). Moreover, as a member of the DP she was even more vulnerable because the Socialist controlled police would be unwilling to protect her.<sup>8</sup> As Dr. Fisher testified, “if you are not a member of the Socialist Party, it is very unlikely that you will be able to avail yourself of . . . governmental protection.” (Tr. at 77.) This evidence further establishes that L-- acted as he did because of Ann’s social group membership. In the context of this lack of protection, L-- knew that he would succeed in selling Ann into prostitution with impunity. His actions were supported by the legal, political and judicial system in Albania that fails to protect women. Proposed Asylum Rule, 65 Fed. Reg. at 76593.

*(2)The IJ Erred in Dismissing Ann as the Victim of a Personal and Criminal Action by L-- Directed Towards Her “Solely Due to His Personal Reasons”*

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<sup>8</sup> The IJ conceded that trafficking remains a problem in Albania but noted that it was also prevalent when the DP was in power from 1992-1997. While trafficking may be an ongoing problem however, the record establishes that at present, the legal and judicial systems in Albania are largely controlled by the SP, which provides no protection to members of the opposition party.

The IJ's conclusion that Ann was merely the victim of a personal and criminal action by L-- "directed toward respondent solely due to his personal reasons," is clearly erroneous and must be reversed. (I.J. at 19.) In the first place, it overlooks the growing recognition that women and girls who face serious harms, even when perpetrated by community members, family members or other private actors, rather than directly by the government or its agents, are refugees within 8 U.S.C. § 1101(a)(42)(A) (2000). *See, e.g., Mohammed*, 2005 WL 553229 (imposition of female genital cutting (FGC) by applicant's clan); *Shoaferra v. INS*, 228 F.3d 1070 (rape by high-ranking person within applicant's local neighborhood authority); *Matter of S-A-*, 22 I&N Dec. 1328 (frequent physical assaults, imposed isolation and deprivation of education by applicant's father); *Kasinga*, 21 I&N Dec. 357 (imposition of FGC by applicant's tribe). This understanding is also reflected in the Proposed Asylum Rule, which recognizes that patterns of gender-based violence, even when perpetrated by non-state actors, can constitute persecution when they are supported by a legal system or social norms that condone or perpetuate such harms. 65 Fed. Reg. at 76593.<sup>9</sup> The record in this case clearly shows that L-- acted as he did because he knew that the legal, political and judicial system within Albania offers no protection or recourse for young women like Ann, particularly those who are affiliated with the DP.

Second, despite noting that Ann's testimony was consistent with the country conditions evidence she had provided, the IJ dismissed Ann's kidnapping, rapes and beatings as the result of the vengefulness of a rejected and wounded suitor, and found no nexus between those harms and the trafficking. (I.J. at 20.) In doing so, he overlooked overwhelming

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<sup>9</sup> These developments in refugee law reflect the acceptance within the international human rights movement that gender-based violence, irrespective of whether it is perpetrated by state or private actors, is a violation of women's fundamental rights. *See, e.g., Beijing Declaration and Platform for Action*, Fourth World Conference on Women, Sept. 15, 1995, para. 113, U.N. Doc. A/CONF.177/20/Add.1 (1995) (defining "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."); UNHCR, *Elimination of Violence Against Women*, Commission on Human Rights Resolution 2001/49, para. 3 (2001).



evidence establishing that L--'s actions towards Ann, including his offer of marriage, kidnapping, repeated rapes and beatings, are completely consistent with the manner in which girls are forced into trafficking. *See Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075 (9th Cir. 2004) (admonishing the IJ for considering the repeated rapes of a woman by the Guatemalan military “as if they had occurred in a vacuum” without considering the societal context in which they had occurred, and rejecting the conclusion that they were merely a random criminal act).

As Mr. Keith Sherper stated in his affidavit, Ann's experience was consistent with the “traffickers' plan of breaking down their victim and preparing her for prostitution.” (Sherper Aff. at 5.) He explained that marriage was often a common enticement to lure young girls into trafficking. (*Id.* at 4.) Sometimes, girls are kidnapped by gangs, often during the day. (*Id.* at 5.) Girls are usually “held in houses, repeatedly raped, and beaten into submission to ‘prepare’ them for prostitution. (*Id.*; *see also* Fisher Aff. at 9 (“[Kidnapping] is one of the principal methods by which many of these women end up in the slave sex trade.”)) This evidence, which exactly mirrors Ann's experiences, compels the conclusion that Ann was the subject of an elaborate scheme to sell her into forced prostitution and not the victim of a rejected suitor's wrath.<sup>10</sup>

Further, the IJ's finding that since L--'s actions “were personal and criminal toward the respondent” there was no nexus, is both legally and factually erroneous and must be reversed. (I.J. at 20.)<sup>11</sup> In the first place, it is well established that many acts of

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<sup>10</sup> In finding that mutual acts of persecution to which Ann was subjected were merely personal and criminal, the IJ relied on a series of erroneous findings, each of which compels a contrary conclusion. REDACTED.

<sup>11</sup> The IJ's decision is confusing as to whether he really believed that L-- was a criminal. On the one hand, he concluded that L--'s actions were “personal and criminal toward the defendant,” and made that the basis for his ruling that there was no nexus between the harms she suffered and her social group membership. (I.J. at 20.) Yet, a few sentences later, he stated that “[t]here was no objective evidence shown by the respondent that Mr. L-- was a trafficker, or a criminal.” (*Id.*) Either of those findings, however, is irrelevant to the ultimate conclusion compelled by these

persecution are also criminal. Acts of persecution have been held to include torture, destruction of personal property, death threats, physical violence, rape and sexual assault, to name just a few, all of which are also criminal in nature. *See, e.g., Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (death threats); *Shoaf v. INS*, 228 F.3d at 1074 (rape, sexual assault); *Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997) (threats to life, confinement and torture); *Montoya-Ulloa v. INS*, 79 F.3d 930 (9th Cir. 1996) (beatings); *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996) (multiple robberies, home invasions, threats of rape and murder). Moreover, the IJ's finding is also factually erroneous because it flies in the face of the "clearly demonstrated tight relationship [in trafficking] between . . . criminal organizations and people at the highest levels of the government." (Fisher Aff. at 80.)

*(3) The IJ Erred in Ruling That There Was  
Insufficient Evidence to Establish That L-- Was a  
Trafficker*

Despite finding Ann to be credible, the IJ concluded that there was insufficient evidence to establish that L-- was a trafficker: "Respondent simply testified as to what she had heard from others, but she had no information or knowledge that Mr. L-- was a trafficker . . . other than what had been informed to the respondent by her father." (I.J. at 21.) He also found that there was no "objective" evidence to establish that L-- was a trafficker. (*Id.* at 20.) This finding is both factually and legally erroneous, and must be reversed.

The IJ's finding that Ann had no information or knowledge that L-- was a trafficker other than what she had heard from her father is factually erroneous because Ann credibly testified that she personally overheard him talk about selling and transporting her as well as other girls to Italy for sexual slavery. (Tr. at 35-35.)

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facts; that L-- targeted Ann for trafficking because he was confident that the government would be unwilling to protect her.

Having overlooked Ann's credible testimony, the IJ further made a legal error by rejecting her claim because she had failed to produce any "objective" evidence that L-- was a trafficker. (Tr. at 20.) It is well established that an applicant's credible testimony is sufficient in situations where other corroborating evidence cannot reasonably be produced. In *Diallo v. INS*, the court held that where the applicant had produced sufficient country conditions evidence which closely paralleled his own personal experiences, it was not reasonable to require additional corroboration. 232 F.3d 279, 288 (2d Cir. 2000). As discussed above, Ann has provided ample supporting evidence, including expert affidavits and country conditions evidence, all of which demonstrate that her personal experiences were entirely consistent with the pattern of trafficking in Albania. In *Diallo*, the court further held that additional corroborating evidence of the applicant's personal experiences may be required only if it "is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers." *Id.* at 288-289. Given that L-- is a member of the ruling SP and REDACTED, it is unlikely that there are any police records against him, and even if there were, it is clear that Ann and her family would not have access to them. Therefore, the IJ erred in placing on Ms Ann the unreasonable burden of providing any additional evidence to show that L-- was a trafficker.

## **7. Ann Faced Past Persecution on Account of Her Political Opinion**

### 1. Ann and Her Family's Membership and Involvement in the Democratic Party Was the Expression of a Political Opinion

There can be no clearer expression of political opinion than manifested by membership or participation in an organization with political purposes or goals. *See, e.g., Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (membership in political group opposing the Sandinistas); *Mendoza Perez v. INS*, 902 F.2d 760 (9th Cir. 1990) (involvement with Salvadoran land reform organization); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985) (active member of anti-government political organization in El Salvador).

REDACTED. (Ann Aff. ¶ 13.) Therefore, it is clear that Ann and her family had expressed a strong political opinion.

## 2. Ann Suffered Past Persecution on Account of Her Political Opinion

The facts in Ann's case provide strong direct evidence that L--, a SP member, targeted Ann at least in part because she and her family are active supporters of the DP.<sup>12</sup>

REDACTED

Moreover, Ann's claim is also supported by ample evidence of the political situation in Albania. As Dr. Fisher explained, trafficking in Albania is not just a commercial enterprise, but there is also a "fairly strong political connection," with some of the money from trafficking actually being returned to "Socialist Party coffers." (Tr. at 84-85.) Moreover, Dr. Fisher also described the growing tension between the Democratic and Socialist Parties in the aftermath of the October 2000 election, and increase in violence against DP supporters. (Fisher Aff. at 7.) This evidence clearly establishes that L-- was at least partly motivated to persecute Ann because of her and her family's political affiliation. *See Jahed v. INS*, 356 F.3d 991, 999 (9th Cir. 2004) (former member of a banned opposition organization was targeted by a soldier of the Iranian Revolutionary Guard, who threatened to turn him in to the government if he refused to pay the soldier; the court held that while the soldier may have intended to extort money his own gain, his motive in doing so was "inextricably intertwined with the Petitioner's past political affiliation."); *De Brenner v. Ashcroft*, 388 F.3d 629 (8th Cir. 2004) (where the applicant and her family was targeted by the Shining Path for money and material support, and on

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<sup>12</sup> As the evidence strongly suggests, L-- was a trafficker, and therefore, in addition to persecuting Ann for her political opinion, he also wanted to sell Ann into prostitution for his commercial gain. However, mixed motives do not defeat Ann's claim. *Matter of S-P-*, 21 I&N Dec. 486, 492-93 (BIA 1996).

their refusal to pay, received politically loaded threats, such as “death to the traitors,” the applicant had established persecution on account of political opinion).

### 3. The IJ Erred in Finding No Nexus Between L--'s Actions and Ann's Political Opinion

In finding no nexus between L--'s actions and Ann's political opinion, the IJ made a series of legal and factual errors. First, the IJ concluded that L--'s actions were not of a “political nature.” (I.J. at 21.) However, there is no such legal requirement to establish persecution based on political opinion. On the contrary, it is a long-standing principal that an applicant is merely required to show that she was persecuted on account of *her own* political opinion, and not her persecutor's. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (U.S. 1992) (“The ordinary meaning of the phrase ‘persecution on account of ... political opinion’ in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's.”) (emphasis in original).

Next, despite acknowledging that Ann and her father were supporters and members of the DP, the IJ concluded that she was not persecuted on account of her political opinion because neither she nor her father were officers or leaders of the DP. (I.J. at 17.) This finding is legally erroneous because a person does not have to be a leader or an officer in order to suffer persecution on account of political opinion; mere membership can suffice, as long as the persecutor was aware of that person's political opinion and persecuted her because of that opinion. *Garcia-Ramos*, 775 F.2d 1370 (membership in leftist political group that opposed the government); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (membership in a student union that opposed the military government). The record makes clear that L-- persecuted Ann at least in part so that he could force her father to stop his involvement in the DP, thereby establishing a strong link between his actions and the Ann's political opinion.

Additionally, in denying Ann's claim based on her political opinion, he noted that the DP is a "visible, legal and open" political party and has had electoral success in several districts. (I.J. at 17.) However, the status of the DP was never disputed, and is in fact irrelevant to Ann's claim, because the fact that a political party has legal status does not lead to the conclusion that its members are not persecuted. In fact, as Ann explained, the SP margin prior to the October 2000 elections was quite narrow, and one of the ways it protected that margin was by persecuting DP members, especially those who, like Ann's father, were involved in the elections. (Ann Aff. ¶¶ 6-7; Fisher Aff. at 9.) This evidence establishes that DP members faced persecution from SP supporters.

Finally, the IJ erred in ruling that Ann had not been persecuted on account of her political opinion because she had never been arrested, detained or otherwise mistreated by the government. (I.J. at 17.) As discussed in section 2(e), *infra*, this finding is legally erroneous because an applicant may be eligible for asylum even where the persecutor is a non-state actor, as long as it is shown that the government was unable or unwilling to control the persecutor.

### **8.The Government Has Failed to Demonstrate that Ann Does Not Have a Well-Founded Fear of Persecution**

Having established past persecution on account of her membership in a particular social group and political opinion, Ann is entitled to a presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1). The government bears the burden of overcoming the presumption of well-founded fear by proving by a preponderance of the evidence that the circumstances in an applicant's country have changed so substantially that the applicant no longer has such fear, or that the applicant could avoid future persecution by relocating, and that it would be reasonable to require her to do so. 8 C.F.R. §§ 208.13(b)(1)(i)(A)-(B).

Here, the government cannot overcome the presumption of well founded fear. First, there is simply no evidence in the record of changed circumstances. To the contrary, Ann stated that the situation in Albania has become worse, with SP supporters killing members of the DP. (Ann Aff. ¶ 28.) Second, it is clear that Ann could not avoid persecution by relocating. As Dr. Fisher explained, Albanians “don’t simply pick up and move somewhere,” and when they do, they tend to congregate with their clan members and are suspicious and inquisitive of outsiders. Therefore, “it is very difficult . . . for anyone to remain anonymous.” (Tr. at 81.)

Even if the BIA were to find that the presumption of future persecution was rebutted, Ann still merits a grant of asylum because the past persecution she suffered was so severe and atrocious. 8 C.F.R. § 208.13(b)(1)(iii)(A) (2005); *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996); *Matter of Chen*, 20 I&N Dec. 16, 19 (BIA 1989). Having been repeatedly stalked and threatened by L--, then kidnapped and held in an abandoned house for a whole month, where she was mostly kept tied to a bed and was repeatedly beaten and raped, and having only narrowly escaped being trafficked for prostitution into Italy, Ann clearly has suffered extreme, severe and atrocious persecution. Moreover, given that L-- has threatened to kill her if he finds her, and country conditions in Albania enable him to carry out his threat, Ann is also entitled to asylum because she faces “other serious harm” if she is sent back to Albania. 8 C.F.R. § 208.13(b)(1)(iii)(B); *Mohammed*, 2005 WL 553229, at \*10 (serious human rights abuses and killings of civilians in factional fighting in home country constitutes “other serious harm” that may entitle applicant to asylum in the absence of a well-founded fear).

### **9. The Government Was Unable or Unwilling to Control Ann’s Persecutor**

In order to be eligible for asylum, an applicant needs to show some level of state action. Even when the persecutor is a non-state actor, however, the state action requirement can

be met if it is shown that the government is unable or unwilling to control the persecutor. *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 37 (2d Cir. 1994) (“the [asylum] statute protects against persecution not only by government forces but also by nongovernmental groups that the government cannot control”). Ann submitted ample evidence to show that the government was unable or unwilling to control traffickers like L--. According to Dr. Fisher, the Socialist “police have a well-deserved reputation for brutality,” and Ann would have “little hope of receiving protection from the police.” (Fisher Aff. at 7.<sup>13</sup>) In the instant case, Ann’s hopes of getting police protection were further dimmed by the fact that L-- is a SP supporter, many of his family members held government posts, and REDACTED. (Tr. at 39.) Therefore, it is clear that seeking police protection would have been futile and, in all likelihood even dangerous, for Ann.

**10. Ann Has an Independent Well-Founded Fear of Persecution on Account of Her Membership in a Particular Social Group of Albanian Women Who Have Been Raped and Undergone an Abortion**

In addition to Ann’s asylum claim based on past persecution, she also has an independent well-founded fear of being persecuted on account of her membership in a social group of Albanian women who have been raped and undergone an abortion.

The severe ostracism and stigmatization that she faces in Albania’s conservative society as a result of the rapes and abortion constitutes persecution. *See INS v. Stevic*, 467 U.S.

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<sup>13</sup> Dr. Fisher also explained that the State Department reports concerning Albania contained “serious problems” that downplayed the treatment of political opponents by the SP. (Fisher Aff. at 11.) He explained that the 2000 State Department report ignored the arrests of nearly 1000 DP supporters, some of whom were tortured in police custody. (*Id.*) He also noted that a statement in the 2001 Profile of Asylum Claims and Country Conditions report about there being “virtually no evidence that individuals are targeted for mistreatment on political grounds,” was completely inaccurate and contradictory. (*Id.* at 10-11.) *See Tian-Young Chen v. U.S. INS*, 359 F.3d 121, 130 (2d Cir. 2004) (“We note the widely held view that the State Department’s reports are sometimes skewed toward the governing administration’s foreign-policy goals and concerns.”)



407, 428 n.22 (1984) (persecution is a broader concept than “threats to life and freedom”); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (social ostracism for resistance to FGC constitutes persecution).

Further, under *Acosta* and its progeny, her social group, defined by her gender, nationality, and the characteristic of having been raped and undergoing an abortion, is cognizable. As discussed in section 2(b)(i), *supra*, gender and nationality are well-accepted as defining characteristics of a particular social group. Also, Ann cannot change the fact that she was raped and underwent an abortion. *See Acosta*, 19 I&N Dec. at 233 (past experiences can define a social group).<sup>14</sup>

Ann has also shown that she faces ostracism on account of her membership in a social group of Albanian women who have been raped and undergone an abortion. As Dr. Fisher explained, women who have been raped or undergone abortions are “considered to be . . . immoral and are ostracized by society.” (Tr. at 82). *See also* Phyllis Coven, U.S. Dep’t of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* 5 (1995) (women who have been raped or otherwise sexually abused “may be seriously stigmatized and ostracized in their societies. They may also be subject to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonor on themselves, their families, and their communities.”). There is no doubt that the harm that Ann faces is inextricably linked to her social group characteristics; were she not an Albanian woman who had been raped and had an abortion, she would not be rejected by Albania’s conservative society. *See Mohammed*, 2005 WL 553229, at \*8.

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14 The instant case can be distinguished from *Gomez*, where the Second Circuit denied asylum to a young Salvadoran woman who had been repeatedly raped by the armed opposition. 947 F.2d at 662. The court ruled that a group defined as “women who have previously been battered and raped by Salvadoran guerillas” was not viable because the fact that Gomez had been raped in the past did not make it more likely for her to be targeted for persecution. *Id.* at 663-664. The instant case is materially different. Ann has submitted ample evidence to show she will be unable to conceal the fact that she was raped and had an abortion, and that these events will cause her to be ostracized and stigmatized by Albanian society.

Finally, Ann's fear of persecution is well-founded. A fear of persecution is well-founded if it is subjectively genuine and objectively reasonable, *Guan Shan Liao v. United States DOJ*, 293 F.3d 61,68 (2d Cir. 2002), or if "persecution is a reasonable possibility." *Cardoza Fonseca v. INS*, 480 U.S. 421, 440 (1987). Through her own credible testimony, Ann has established that everyone in her community will find out about her rapes and abortion and will ostracize her as "someone who did something bad." (Ann Aff. ¶ 30.) Moreover, as Dr. Fisher explained, "Albania is a country with few secrets," and people would certainly find out about her experiences and stigmatize her for them. (Fisher Aff. at 11.) Therefore, it is clear that Ann has an independent well-founded fear of persecution on account of having been raped and undergone an abortion.

#### 11.1. **Ann Is Eligible for Withholding of Removal**

To qualify for withholding of removal, an applicant must demonstrate that it is more likely than not that her life or freedom would be threatened on account of one of the statutory grounds, a higher standard than that required to establish a well-founded fear. 8 C.F.R. § 208.16(b)(2). Having established past persecution on account of her membership in a particular social group and political opinion, Ann is entitled to a presumption of eligibility for withholding of removal. *Id.* The government has not carried its burden of overcoming that presumption by demonstrating by a preponderance of the evidence that Ann could relocate within Albania or that circumstances there have changed to such an extent that it is no longer more likely than not that Ann would face a threat to her life or freedom. *Id.*; *Secaida-Rosales v. INS*, 331 F.3d 297, 306 (2d Cir. 2003), ("If the applicant shows that he or she has suffered past persecution such that the applicant's life or freedom was threatened, a rebuttable presumption arises that there is a clear probability of a future threat should the applicant be returned.").

### **CONCLUSION**

For the foregoing reasons, Ann has met the statutory requirements for asylum because she suffered past persecution and has a well-founded fear of persecution on account of her membership in a particular social group and political opinion. Furthermore, there are no negative discretionary factors that would result in a denial of relief.

In addition, Ann has met the standard for Withholding of Removal, and since no statutory bars are applicable to her, she must be granted this form of relief.

Dated: March 29, 2005

San Francisco, CA

Respectfully submitted,

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KAREN MUSALO  
Cal. Bar #106882

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STEPHEN KNIGHT  
Cal. Bar #189546

Center for Gender & Refugee Studies  
200 McAllister Street

San Francisco, CA 94102  
Telephone: (415) 565-4791  
Fax: (415) 565-4865