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MATTER OF R-A-: AN ANALYSIS OF THE DECISION AND ITS IMPLICATIONS

by Karen Musalo*

In June 1996, the Board of Immigration Appeals (BIA) issued its landmark decision in *Matter of Kasinga*, Int. Dec. 3278 (BIA 1996),¹ which was hailed as a positive milestone in the developing jurisprudence of gender-based asylum claims. In *Kasinga*, the BIA ruled that the ritual practice of female genital mutilation (FGM) constitutes persecution, and 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.

For three years, the BIA was silent on the issue of gender-based asylum claims, but two months ago it issued another momentous decision in *Matter of R-A-*, Int. Dec. 3403 (BIA 1999). In a sharply divided 10-5 vote, the Board reversed an Immigration Judge's (IJ's) grant of asylum to Rodi Alvarado Pena, a Guatemalan woman who had been brutalized for more than 10 years by her husband. The Board accepted that the husband's violent abuses rose to the level of persecution, and that the respondent had been unable to obtain state protection, but rejected the IJ's ruling that the persecution was on account of social group membership and political opinion.

The opinion in *R-A-* has generated considerable controversy,² and raised serious concerns regarding the nature and scope of protection for the victims of gender-based persecution. The decision has also brought into question the INS's commitment to its own Gender Guidelines,³ which

¹ See Musalo, "In re *Kasinga*: A Big Step Forward for Gender-Based Asylum Claims," 73 Interpreter Releases 853 (July 1, 1996).

² See, e.g., *Washington Post*, July 5, 1999, at A3; *New York Times*, Aug. 2, 1999.

³ Memorandum from Phyllis Coven, INS Office of International Affairs, to all INS Asylum Officers and

recognize domestic violence as gender-based persecution: Recognition of *Matter of R-A-*'s broad legal and policy implications has resulted in congressional interest, including efforts to encourage the Attorney General to review the decision.⁴ Counsel for Rodi Alvarado Pena⁵ have filed a petition for review in the Court of Appeals for the Ninth Circuit, and will also file a motion to reopen for purposes of applying for relief under the Torture Convention.⁶

This article will discuss the decision in *Matter of R-A-* and its potential impact on prospective claims.

FACTS

In *Matter of R-A-*, the applicant's credibility is not at issue, and the facts are uncontested. Rodi Alvarado Pena (the applicant/respondent) was born and raised in the department of Jutiapa, Guatemala. In 1984, at the age of 16, she married Francisco Osorio, a former soldier who was five years her senior, and they moved to Guatemala City. The applicant gave birth to a daughter in 1987, and a son in 1992. Her husband's threats and violent assaults upon her began almost immediately after they were married. The BIA described the husband's abuse of her as follows:

Her husband would insist that the respondent accompany him wherever he went, except when he

was working. He escorted the respondent to her workplace, and he would often wait to direct her home. To scare her, he would tell the respondent stories of having killed babies and the elderly while he served in the army. Often, he would take the respondent to cantinas where he would become inebriated. When the respondent would complain about his drinking, her husband would yell at her. On one occasion, he grasped her hand to the point of pain and continued to drink until he passed out. When she left a cantina before him, he would strike her. As their marriage proceeded, the level and frequency of his rage increased concomitantly...He dislocated the respondent's jaw bone when her menstrual period was 15 days late. When she refused to abort her 3-4 month old fetus, he kicked her violently in the spine. He would hit or kick the respondent "whenever he felt like it, wherever he happened to be: in the house, on the street, on the bus."

The respondent's husband raped her repeatedly. He would beat her before and during the unwanted sex. When the respondent resisted, he would accuse her of seeing other men and threaten her with death. The rapes occurred "almost daily" and they caused her severe pain. He passed on a sexually transmitted disease to the respondent from his sexual relations outside of their marriage. Once, he kicked the respondent in her genitalia, apparently for no reason, causing the respondent to bleed severely for 8 days. The respondent suffered the most severe pain when he forcefully sodomized her. When she protested, he responded, as he often did, "You're my woman, you do what I say."⁷

Francisco Osorio nearly put the respondent's eye out, broke windows and mirrors with her head, and whipped her with electrical cords. Throughout the course of their marriage, he worked as a private security guard, and was in possession of weapons, which he used to threaten and assault her. Once he woke her with a harsh blow in the middle of the night, told her he hated her, and threatened to plunge his machete into her neck. On another occasion he pistol-whipped her, and in another incident he barely missed her when he threw his machete at her.

Ms. Alvarado Pena unsuccessfully sought refuge from her husband within Guatemala. She went to the homes of her brother and parents, who lived some distance away from Guatemala City, but her husband pursued her there. Shortly

⁷ *R-A-*, Int. Dec. 3403 at 3.

HQASM Coordinators, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995) (Gender Guidelines), discussed in 72 Interpreter Releases 771 (June 5, 1995).

⁴ The Attorney General may review decisions of the BIA pursuant to 8 CFR 3.1(h). Cases may be referred to the Attorney General for review: (1) upon her own request; (2) upon the request of the BIA Chairman, or a Board majority; and (3) upon a request by the INS Commissioner.

⁵ Jane Kroesche, with the law firm of Skadden, Arps, Slate, Meagher & Flom is pro bono counsel for Ms. Alvarado, and represented her before the Immigration Court and the BIA. An amicus brief co-authored by Karen Musalo, Deborah Anker, Nancy Kelly, and John Willshire-Carrera was filed with the BIA. Subsequent to the BIA's decision, Karen Musalo associated as co-counsel to Ms. Kroesche.

⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), opened for signature February 4, 1985, ratified by the U.S. Senate on October 27, 1990. See Sklar, "Implications of the New Implementing Statute and Regulations on Convention Against Torture Protections," 76 Interpreter Releases 265 (Feb. 22, 1999).

before making the decision to leave Guatemala, she attempted to escape her husband by renting a room and taking her daughter out of school. Mr. Osorio tracked her down there, and when he found her, beat her unconscious in front of their two children.

Ms. Alvarado Pena's attempts to secure the protection of the authorities were just as futile as her attempts to hide from her husband. The police told her they would not get involved and although, at her insistence, they ultimately issued three citations to Mr. Osorio to appear, they took no action when he ignored them. Ultimately, one of the respondent's complaints was referred to a judge who told her that he "would not interfere in domestic disputes."⁸

On a number of occasions, Mr. Osorio made a point of telling Ms. Alvarado Pena that she could never get away from him, because he would "cut off her arms and legs, and...leave her in a wheelchair if she ever tried to leave him."⁹ The applicant's sister, who resides in Guatemala, has told her that Mr. Osorio has his wife under a "death threat" and will "hunt her down and kill her if she comes back[.]"¹⁰

COUNTRY CONDITIONS

Evidence of relevant country conditions was presented through the testimony of an expert witness, Dr. Doris Bersing, and through the submission of documentary evidence. Dr. Bersing, an expert on matters of domestic violence and women's issues in Latin America, testified that militarism, combined with a patriarchal culture, has contributed to a particularly poor situation for women. According to her testimony, "women don't have any rights" because "men have the power"¹¹ and Guatemala is one of the worst countries in this respect. Dr. Bersing also testified that spousal abuse is common, that it occurs at all socioeconomic levels, and that the government provides no protection or support.

The Department of State advisory opinion stated that based on country conditions, Ms. Alvarado Pena's mistreatment "could have occurred" and that complaints of

spousal abuse had increased from 30 to 120 a month.¹² Documentation provided by the research branch of the Immigration and Refugee Board of Canada¹³ affirmed the pervasiveness of domestic violence,¹⁴ and discussed the deep cultural attitudes and institutionalized discrimination that perpetuate the problem¹⁵ and result in an inadequate response from the police and judicial system.¹⁶ Other documentation submitted addressed legalized discrimination against women:

The Guatemalan civil code recognizes the male as a married couple's legal representative; the female is in charge of child care and other domestic responsibilities. A husband can legally forbid his wife to engage in activities outside the home. The husband also has the primary authority in disposing of joint property.¹⁷

The existence of provisions denying women equality under law prompted the U.N. Committee on the Elimination

¹² *Matter of R-A-*, at 6.

¹³ The Research Directorate of the Documentation, Information and Research Branch of the Immigration and Refugee Board of Canada prepared a report on the issue of domestic violence in Guatemala "to respond to the information needs of those involved in the Canadian refugee-determination process." Human Rights Brief, "Domestic Violence in Guatemala," Nov. 1994, at i.

¹⁴ The report cited a 1990 survey of 1,000 women, which found that 48 percent had been battered by their partners: "Fists, feet, knives, razor blades, sledge hammers and pieces of wood" are the instruments most often used to endanger the physical and mental integrity of these women." Human Rights Brief at 3.

¹⁵ When the Guatemalan newspapers report on domestic violence, the "headlines as well as the contents [of the articles] attempt to diminish the responsibility of the abuser and present the woman as the provocator of the abuse. As such, the press...does not contribute to...the solution of the problem; rather, it reinforces in its readers and in the community in general, discrimination and ignorance regarding the human rights of women." Human Rights Brief at 5.

¹⁶ "The human resources of the institutions share the values and customs entrenched in the society regarding the discrimination and the oppression of women, and this frame of reference influences the interpretation of the problem, the attitude of the personnel towards the problem, and the type of services that are offered." Human Rights Brief at 9.

¹⁷ Tisdale, *Abuse of Women in Today's Guatemala*, 10 *Guatemala Bulletin*, No. 4 (1992).

⁸ *Id.* at 5.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ Transcript in hearing before IJ, at 97. The State Department's *Country Reports on Human Rights Practices* report that in Guatemala, "violence against women, including domestic violence, remains common among all social classes." Dep't of State, *Country Reports on Human Rights Practices for 1998*, Vol. I, 643 (1999).

of Discrimination Against Women to express "increased...concern at the discrimination institutionalized in law."¹⁸ The documentary evidence also focused on a number of poor socioeconomic conditions for women in Guatemala, including their extremely low rate of formal education and high rate of illiteracy.¹⁹

THE IMMIGRATION JUDGE'S DECISION

In a written decision issued in September 1996, IJ Mimi Schooley Yam, presiding in San Francisco, granted the applicant's request for asylum. The IJ ruled that the applicant had suffered past persecution, and established a well-founded fear of future persecution²⁰ at the hands of her husband, who the government of Guatemala was unwilling to control "because domestic abuse...is considered a family matter in which outside intervention is inappropriate."²¹ The IJ ruled that Ms. Alvarado Pena's persecution was inflicted on account of social group membership as well as actual and imputed political opinion.

- Persecution on Account of Social Group Membership

Citing the BIA's decision in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)²² which defines social group by

¹⁸ The Committee "expressed alarm' that Guatemala's Constitutional Court had ruled that none of the country's Civil Code provisions required change, despite Guatemala's ratification of the Convention on the Elimination of Discrimination Against Women, which was automatically incorporated into domestic law and requires that states not discriminate on the basis of gender." Lawyers Comm. For Human Rights, Critique: Review of the U.S. Department of State's Country Reports on Human Rights Practices for 1994 (July 1995), at 87.

¹⁹ "Out of the three million illiterate persons in Guatemala today, 2.5 million are female....Guatemala has the highest rate of illiteracy in the western hemisphere and the highest rate of females without formal education in all of Latin America." Ceri-Gua, Weekly Briefs, Dec. 1991.

²⁰ The IJ ruled that Ms. Alvarado Pena was entitled to the presumption of future persecution because there was nothing in the evidence to suggest "that conditions in Guatemala have changed to such an extent since this harm occurred as to obviate the Respondent's need for protection." *In re Alvarado*, No. A73753922 (IJ (San Francisco) Sept. 20, 1996) at 8.

²¹ *Id.*

²² The Board in *Acosta* ruled that persecution on account of membership in a particular social group is persecution "that is directed toward an individual who is a member of a

reference to immutable or fundamental characteristics, the IJ defined the social group as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." The IJ ruled that the applicant's gender and prior association with her husband were characteristics that she could not or should not be expected to change,²³ and that "she, and others like her, are targeted for persecution specifically because they are women who have been involved intimately with their male companions, who believe in male domination"²⁴ (emphasis in original). In analyzing the social group nexus, the IJ referred to the Board's decision in *Matter of Kasinga* as follows:

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 opposed 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.²⁵

- Persecution on Account of Actual and Imputed Political Opinion

On the facts of the case, the IJ found that Ms. Alvarado Pena had resisted her husband's brutal "acts of domination."²⁶ The IJ ruled that her resistance constituted the expression of a political opinion against male domination, or could be interpreted as such by her husband. Mr. Osorio's increasingly violent behavior toward his wife was meant to punish her for the actual or imputed political opinion that men have no right to treat women in the manner in which he treated her:

group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed."

²³ The IJ ruled that the respondent's gender was a fundamental characteristic that she should not be expected to change, and that her prior relationship with her husband was a historical reality that she could not change. *In re Alvarado*, at 10.

²⁴ *Id.* at 10.

²⁵ *Id.* at 12.

²⁶ *Id.*

Alvarado's resistance to Osorio's acts of domination, constituted a challenge to his opinion that women are to be subordinate to men. The resistance can be characterized as Alvarado's expression of a political opinion against this notion of male domination. And even if it were not characterized as an expression, it can be inferred from his increased violent behavior that he imputed this opinion to her.²⁷

APPEAL OF THE INS

The INS appealed the IJ's grant of asylum on the basis that the respondent had "not demonstrated that she suffered harm or persecution, nor that she fears harm or persecution, based upon race, religion, nationality, political opinion or membership in a particular social group."²⁸ At the time that the INS filed its appeal, there had been several other highly publicized IJ grants of asylum in domestic violence cases, in which the INS had not pursued appeals.²⁹ In light of this fact, and in light of the existence of the INS Gender Guidelines, which appear to contemplate domestic violence as a basis for asylum,³⁰ Ms. Alvarado Pena's counsel wrote a letter to the INS General Counsel asking if the Service might "reevaluate its position in [the] case and withdraw its appeal."³¹ Neither

the written request nor subsequent verbal communications resulted in a change of course regarding the INS's decision to appeal the IJ's grant of asylum.

THE BOARD'S DECISION

The majority's³² analysis begins by identifying those elements of the IJ's decision with which it is in accord. The majority agrees that the harm suffered by the respondent is "more than sufficient" to constitute persecution. It also does not dispute that the respondent established a failure of state protection. At the heart of the case, however, is the issue of nexus, and the majority rejects the IJ's ruling that the respondent was harmed on account of either actual or imputed political opinion or membership in a particular social group.³³ The Board's decision on this point is based upon a number of individual rulings, namely: (1) the social group identified by the IJ—Guatemalan woman intimately involved with male companions who practice domination through violence—does not constitute a particular social group; (2) the persecutor was not motivated to harm the respondent because of her membership in the described social group; (3) the respondent did not possess a political opinion; and (4) the persecutor was not motivated to harm the respondent because of any opinion she held, or he thought she held. The dissent,³⁴ which is almost as lengthy as the majority decision, disputes each of these four individual findings to conclude that, on the facts of the case, Ms. Alvarado Pena established persecution on account of social group membership, and political opinion. Interestingly, both the majority and the dissent assert that the Board's analysis and decision in *Kasinga* supports their respective positions.

• Majority's Opinion

Social group. The majority acknowledges that the social group identified by the IJ "may satisfy the basic requirement

"indifference to or ignorance of the [Gender Guidelines], which were published by the INS in 1995[.]" Amnesty International U.S.A., *Refugee Action*, May 25, 1999.

³² The majority decision, written by Board Member Lauri Filppu, was joined by BIA Vice Chairman Mary Maguire Dunne and Members Fred Vacca, Michael Heilman, David Holmes, Gerald Hurwitz, Patricia Cole, Lauren Mathon, Philemina Jones, and Edward Grant. Board Member Lori Scialabba did not participate in the decision in *R-A-*.

³³ *Matter of R-A-*, Int. Dec. 3403 at 3.

³⁴ The dissent was written by Board Member John Guendelsberger. He was joined by BIA Chairman Paul Schmidt, and Members Gustavo Villageliu, Lory Rosenberg, and Anthony Moscato.

²⁷ *Id.*

²⁸ Notice of Appeal by INS, Sept. 18, 1996.

²⁹ *In re A and Z*, A72 190 893, A72 793 219 (IJ (Arlington) Dec. 20, 1994) (granting asylum to a Jordanian woman who had been physically and verbally abused throughout a 30-year marriage by her husband, who was a wealthy and successful businessperson; found to be a member of the social group of women who "are challenging the traditions of Jordanian society and government"); and *In re M and K*, A72 374 558 (IJ (Arlington) Aug. 9, 1995) (granting asylum on social group and political opinion grounds to a woman from Sierra Leone who was subjected to FGM against her will, and verbally and physically abused by her husband; the IJ defined the social group as "women who have been punished with physical spousal abuse for attempting to assert their individual autonomy").

³⁰ The INS Gender Guidelines recognize that: "The forms of harm that women suffer around the world, and that therefore will arise in asylum claims, are varied. Forms of harm arising in asylum claims that are unique to or more commonly befall women have included sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion." Gender Guidelines, at 9.

³¹ Letter from Jane B. Kroesche to David Martin, General Counsel, July 21, 1997. Amnesty International registered its concern that the INS's appeal in the case demonstrated

of containing an immutable or fundamental individual characteristic."³⁵ These criteria, however, according to the majority, are only threshold requirements.³⁶ In order to establish a cognizable social group, an individual must meet the additional requirements of demonstrating that: (1) the members of the proposed group "understand their own affiliation with the grouping, as do other persons in the particular society,"³⁷ and (2) the harm suffered (spouse abuse) "is itself an important societal attribute, or, in other words, that the characteristic of being abused is one that is important within Guatemalan society."³⁸ After engrafting these additional provisions onto the *Acosta* test, the majority makes the factual finding that the social group identified by the IJ fails to meet the requirements because its members are not "recognized and understood to be a societal faction"³⁹ and there is no evidence that "women are expected by society to be abused."⁴⁰

According to the majority, the IJ's ruling of social group persecution suffered from a second fatal defect: the failure to establish the persecutor's motivation to harm the respondent because of her membership in the particular social group as defined:

The respondent's statements regarding her husband's motivation also undercut the nexus claims. He harmed her, when he was drunk and when he was sober, for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving a cantina before him, for leaving him, for reasons related to his mistreatment in the army, and "for no reason at all." Of all these apparent reasons for abuse, none was "on account of" a protected ground, and the arbitrary nature of the attacks further suggests it was not the respondent's claimed social group characteristics that he sought to overcome.⁴¹

³⁵ *Matter of R-A-*, Int. Dec. 3403 at 16.

³⁶ The Board also notes that the case arises in the Ninth Circuit, which has articulated a "voluntary associational relationship" requirement for social group definition, but states that: "regardless of Ninth Circuit law, we find that the respondent's claimed social group fails under our own independent assessment of what constitutes a qualifying social group." *Matter of R-A-*, Int. Dec. 3403 at 9.

³⁷ *Id.* at 17.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 21.

The majority concludes that Mr. Osorio tormented Ms. Alvarado Pena because she was his wife, and not because she was a member of a "broader collection of women."⁴² The majority notes that its ruling on failure of nexus would be the same, even if the proposed social group was modified to be "Guatemalan women" or "battered spouses."⁴³

The majority also addresses the issue of societal attitudes and failure of state protection. The IJ had ruled that the failure of state protection resulted from institutional biases against women, and that the issue of nexus had to be considered in the context of these societal attitudes. Although it does not deny the existence of discrimination against women, the majority makes the factual finding that husbands in Guatemala are "supposed to honor, respect and take care of their wives"⁴⁴ and that the government of Guatemala recognizes spouse abuse as a problem. This finding runs counter to the IJ's holding that the government's failure to protect was motivated by societal and governmental bias against women. Notwithstanding the majority's disclaimer of societal and governmental discrimination against women, it goes on to rule that the motivation of the government may not substitute for the motivation of the actual persecutor. In other words, even if the Guatemalan government's failure to protect was on account of animus toward women, it would not affect the analysis regarding Mr. Osorio's motivation, or change the majority's conclusion that the persecution was not on account of social group membership. In the context of this analysis, the majority references the recent House of Lords decision in the United Kingdom, *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)*⁴⁵ where the failure of state protection was a factor in determining nexus. The majority explicitly states that it "part[s] company" with this approach or rationale in determining nexus.

The majority concludes its social group analysis with a discussion of *Kasinga*. According to the majority, its ruling in *R-A-* is not inconsistent with the precedent established in

⁴² *Id.*

⁴³ *Id.* at 18, n. 2.

⁴⁴ *Id.* at 6. The majority picks this quote out of Dr. Bersing's testimony. Read in context, the expert's point was that the cruel irony in some cultures is that the Christian faith teaches men that they need to honor their wives, take care of them, respect, and love them, but the reality is that women are sometimes oppressed and abused.

⁴⁵ 2 All ER 545 (House of Lords); see Anker, Kelly, and Willshire, "Defining 'Particular Social Group' in Terms of Gender: The *Shah* Decision and U.S. Law," 76 Interpreter Releases 1005 (July 2, 1999).

Kasinga. The form of persecution in *Kasinga*—ritual FGM—and its place within the Tchamba-Kunsuntu tribal society, compared with domestic violence and its place within Guatemalan society, explain the different results in the two cases. The majority characterizes FGM as a pervasive⁴⁶ and important practice among the Tchamba-Kunsuntu tribe, one that women are expected to undergo and to suffer ostracization for resisting. According to the majority, domestic violence is not as pervasive in Guatemala as FGM is in Togo, and women in Guatemala “are not expected to undergo abuse from their husbands.”⁴⁷

Actual and imputed political opinion. The majority rejects the IJ’s finding that Mr. Osorio’s persecution of his wife was motivated in any way to punish her for an actual or imputed opinion in opposition to his domination and abuse. The majority undertakes a two-step analysis to reach this conclusion: first, it examines whether Ms. Alvarado Pena possessed a political opinion; then, it discusses the issue of nexus. According to the majority, Ms. Alvarado Pena’s only opinion was “the common human desire not to be harmed or abused,” which in the opinion of the majority does not qualify as a political opinion.⁴⁸ The majority likewise dismisses the possibility that Mr. Osorio could have been motivated to harm his wife because he believed that she “disagreed with his views of women.”⁴⁹ According to the majority, Mr. Osorio did not care about his wife’s beliefs: he “harmed the respondent regardless of what she actually believed, or what he thought she believed.”⁵⁰

The majority discusses *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987), upon which the IJ had partially relied. *Lazo-Majano* involved the claim of a Salvadoran woman who suffered sexual violence and beatings in a non-marital relationship at the hands of an army sergeant. In *Lazo-Majano*, the Ninth Circuit had identified several different analytical constructs by which the persecution of the victim could be characterized as “on account of” political opinion. These constructs included a finding of cynical imputation of political opinion by the persecutor, as well as a finding that the persecutor was “asserting the political opinion that a man has the right to dominate and he has persecuted (the alien) to force her to accept this opinion without rebellion.”⁵¹ The

majority rejects the second of these two rationales for the Ninth Circuit’s decision, interpreting it as establishing nexus on the basis of the persecutor’s—rather than the victim’s—political opinion. The majority observes that after the U.S. Supreme Court’s decision in *INS v. Elias Zacarias*, 502 U.S. 478 (1992), the fact that the persecutor was motivated by his own opinion will not be sufficient; a showing must be made that he was motivated to harm the victim for her political opinion.⁵²

- The Dissent

At the outset, the dissent articulates its vigorous disagreement with the majority opinion, which it finds to be “at odds with our own precedent, federal court authority, and Department of Justice policy pronouncements, which effectuate our obligation to provide surrogate protection for persons who fear harm inflicted because of some fundamental aspect of their identity.”⁵³ The “laundry list of hurdles” that the majority has imposed before the respondent:

disregards decisions of tribunals, both domestic and foreign, which extend asylum protection to women who flee human rights abuses within their own homes. It also ignores international human rights developments and the guiding principle of the Charter of the United Nations, the Universal Declaration of Human Rights, and the 1951 Convention Relating to the Status of Refugees, ‘that human beings shall enjoy fundamental rights and freedoms without discrimination.’⁵⁴

Social group. The dissent begins its analysis by returning to *Acosta*, which established the fundamental rule that social group membership is to be defined by reference to common, immutable characteristics, which may be innate (sex, color, kinship ties) or may arise from shared past experience (such as former military leadership or land ownership). The dissent observes that the analytical approach established in *Acosta* has been applied without question in numerous cases⁵⁵ over the years. The Board’s decision in *Kasinga* was not only consistent with the principle articulated in *Acosta*, but also made it clear that “social group could be established by reference to gender in combination with one or more

⁴⁶ The majority cites a Department of State Report estimating that as many as 50 percent of Togolese females may have been mutilated. *Matter of R-A-*, Int. Dec. 3403 at 25.

⁴⁷ Id. at 25.

⁴⁸ Id. at 12.

⁴⁹ Id. at 14.

⁵⁰ Id. at 12.

⁵¹ Id. at 13 (quoting *Lazo-Majano*).

⁵² See 69 Interpreter Releases 166 (Feb. 3, 1992).

⁵³ *Matter of R-A-*, Int. Dec. 3403 at 34.

⁵⁴ Id.

⁵⁵ The dissent cites to *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988), *Matter of Toboso-Alfonso*, 20 I&N 819 (BIA 1990), *Matter of H-* Int. Dec. 3276 (BIA 1996) and *Matter of V-T-S-*, Int. Dec. 3308 (BIA 1997).

additional factors."⁵⁶ In *Kasinga* those additional factors were ethnic affiliation and the characteristic of not having been subject to FGM. In *R-A-* the additional factors are relationship to an abusive partner, and opposition to domestic violence.

The dissent discounts the distinctions between *Kasinga* and *R-A-* upon which the majority relied in its analysis. The pervasiveness of FGM, its societal importance, or possible ostracization for resistance were not factors in the formulation of social group in *Kasinga*; in fact, the record in *Kasinga* "did not suggest that [Ms.] *Kasinga* would face severe social ostracization for her refusal to submit to FGM[.]"⁵⁷ According to the dissent, whereas the purported distinctions between *Kasinga* and *R-A-* were contrived by the majority, the similarities between the two cases are "striking."⁵⁸

Both cases involve a form of persecution inflicted by private parties upon family members. In both cases, the victims opposed and resisted a practice that was ingrained in the culture, broadly sanctioned by the community, and not prevented or punished by the state. In both cases, the overarching societal objective underlying the cultural norm was the assurance of male domination.⁵⁹

The dissent also addresses Ninth Circuit social group jurisprudence. Citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), the majority had stated that social group formulation in the Ninth Circuit requires a showing of "voluntary associational relationship." Although this was not the basis for the majority's decision, the dissent references a number of subsequent Ninth Circuit decisions in which the court analyzed "social group claims without reference to 'voluntariness.'"⁶⁰ The dissent also notes that the voluntary association relationship factor has been rejected by most courts outside the Ninth Circuit, and most recently, was rejected by the House of Lords in its decision in *Shah*.

Finally, the dissent draws upon developments in international and domestic law that "provide a sound basis for providing protection"⁶¹ to the respondent. International instruments, such as the Declaration on the Elimination of Violence Against Women,⁶² have recognized that domestic

violence is not simply a private matter, but constitutes a violation of fundamental human rights. The INS Gender Guidelines advise that "the evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of those instruments by international organizations."⁶³ The courts in Canada,⁶⁴ and the House of Lords in Britain in the *Shah* decision, have recognized that women seeking protection from domestic violence may constitute a particular social group within the meaning of the Refugee Convention.

After its analysis of social group definition, the dissent turns to the issue of nexus. Where the majority ruled that the harm was not related to social group membership, the dissent concludes that the "factual record reflects quite clearly that the severe beatings were directed at the respondent by her husband to dominate and subdue her, precisely because of her gender[.]"⁶⁵

The dissent takes note of the fact that there are no comprehensible, legitimate motives for the harm inflicted, and that courts have recognized that the absence of legitimate motives can give rise to "an inference that the harm occurred on account of a statutorily protected characteristic[.]"⁶⁶ In making the argument of a nexus between the persecution suffered by Ms. Alvarado Pena and her membership in a group partially defined by gender, the dissent turns to the issue of the fundamental purpose of domestic violence. The purpose or underlying motivation of domestic violence—like that of FGM—is to control and subordinate women.

In *Kasinga*, we determined that FGM exists as a means of controlling women's sexuality. So too does domestic violence exist as a means by which men may systematically destroy the power of women, a form of violence rooted in the economic, social, and cultural subordination of women.⁶⁷

The dissent quotes from the Report of the Committee on the Elimination of Discrimination Against Women, which affirms the power dynamic underlying domestic violence:

At its most complex, domestic violence exists as a power tool of oppression. Violence against women in general, and domestic violence in particular, serve

⁵⁶ *Matter of R-A-*, Int. Dec. 3403 at 36.

⁵⁷ *Id.* at 37.

⁵⁸ *Id.* at 36.

⁵⁹ *Id.*

⁶⁰ *Id.* at 38.

⁶¹ *Id.* at 35.

⁶² G.A.Res 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/104 (1994), reprinted in 33 I.L.M. 1049 (1994).

⁶³ *Matter of R-A-*, Int. Dec. 3403 at 43.

⁶⁴ *Id.* at 44, citing *Mayers v. Canada*, 97 D.L.R. 4th 725 (C.A. 1992).

⁶⁵ *Id.* at 45.

⁶⁶ *Id.* at 46.

⁶⁷ *Id.*

as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home.⁶⁸

Finally, the dissent states that the societal norms and level of impunity for the persecutor are relevant to a determination of nexus. Mr. Osorio knew he could act with total impunity because "of the respondent's gender and their relationship." The dissent concludes that "[i]t is reasonable to believe, on the basis of the record before us, that the husband was motivated, at least in part, 'on account of' respondent's membership in a particular social group that is defined by her gender, her relationship to him, and her opposition to domestic violence."⁶⁹

Actual and imputed political opinion. Citing *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), as well as a plethora of Ninth Circuit cases, the dissent asserts that "[o]pposition to male domination and violence against women, and support for gender equity, constitutes a political opinion."⁷⁰ The dissent finds that Ms. Alvarado Pena's statements and actions (resisting her husband's violence, attempting to flee, and seeking police and court intervention) demonstrated her political opinion of opposition. Furthermore, the dissent notes that even after *Zacarias*, the concept of imputed political opinion remains viable, and that Mr. Osorio imputed such an opinion to her.

The majority had ruled that Mr. Osorio's actions were not in any way motivated by his wife's actual or imputed political opinion. In part it had relied upon the fact that the abuse began at the beginning of the marriage, before Ms. Alvarado Pena manifested opposition and resistance. The dissent disagrees with the majority's analysis, and finds that the husband's escalating abuse demonstrates his increasing attempts to "stifle and overcome" Ms. Alvarado Pena's opposition. Even if Mr. Osorio's initial motivation was not to punish Ms. Alvarado Pena for her resistance, that became his motivation over time:

[T]he respondent has faced an exponentially increasing imposition of severe abuse, which has

⁶⁸ U.N. Comm. On the Elimination of Discrimination Against Women, 47th Sess., Supp. No. 38, para. 26, at 8, U.N. Doc. A/47/38 (1992). *Matter of R-A-*, Int. Dec. 3403 at 46.

⁶⁹ Id. at 47.

⁷⁰ Id. at 48.

escalated in tandem with her efforts to resist, oppose, or seek protection from such harm. As the IJ noted, the beatings worsened 'when the respondent protested or tried to leave her husband to get help,' and 'violent behavior increased in response to respondent's resistance to domination.'⁷¹

In concluding, the dissent observes that if Ms. Alvarado Pena had been "subjected to such heinous abuse due to political opposition to communism, imputed as a result of her family's economic class or political activities," the majority would have no difficulty recognizing that she had suffered persecution on account of political opinion, and that she is no less entitled to protection "on account of her political opinion opposing male domination expressed through the abuse of women by their husbands[.]"⁷²

CONCLUSION

Matter of R-A- represents a substantial setback in gender-based asylum jurisprudence. As the dissent eloquently states, the majority's analysis represents a "differentiation between the supposedly more private forms of persecution, typically suffered by women, and the more public forms of persecution, typically suffered by men, [which] is exactly the type of outdated and improper distinction that the [] Guidelines were intended to overcome."⁷³ The Board has retreated from its decision in *Kasinga*, where it was willing to recognize that harms unique to women may nonetheless constitute persecution, that social group membership may be defined by gender in combination with other relevant factors, and that nexus determinations may take societal norms and failure of state protection into consideration.

The decision in *R-A-* has the potential to seriously undermine protection—not only for women, but for other categories of asylum seekers whose claims do not neatly fit within the other four enumerated grounds and who must rely upon nexus to a defined social group.⁷⁴ Indeed, the Board's

⁷¹ Id. at 54.

⁷² Id. at 55.

⁷³ Id. at 50.

⁷⁴ Since *R-A-* was decided, there has been at least one adverse decision in a case involving a child claimant who had suffered brutal abuse from her father. *Matter of A-C-*, A76 627 200 (BIA June 17, 1999). The claims of children often rely upon social group membership as a basis for protection, and involve issues of failure of state protection. See generally Bhabha and Young, "Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers," 75 Interpreter Releases 757 (June 1, 1998).

decision not only makes social group claims more difficult, but it also threatens to adversely impact political opinion claims that do not conform to the Board's rigid notion of what is—and is not—a protected political opinion. If Ms. Alvarado Pena's belief that she has the right not to be battered by her husband is not a political opinion, then it is conceivable that the belief by a member of a racial minority that he has the right not to be mistreated due to racial identity is also not a political opinion—nor is the belief by an Afghani woman that she has the right not to be whipped for venturing out in public without male accompaniment.

The Board's decision was based on its interpretation of the law, and its evaluation of the facts. Unless and until it is reversed, Asylum Officers and IJs are bound by the Board's interpretation of the law. They are not, however, bound to take a similar approach to an evaluation of the facts in the cases that come before them. This is one way in which the negative impact of *R-A-* may possibly be lessened.

For example, on a well-made record, an adjudicator examining a domestic violence claim from Guatemala (or any country with similar societal norms) could find that an applicant met the Board's additional social group requirements. An adjudicator who is not hostile to these claims could reach the conclusion that abused women in a country such as Guatemala see themselves as members of a disfavored group (i.e., they understand their "affiliation within the grouping"). This could be based on the fact, present in *R-A-*, that women are aware of their subservient status. Furthermore, on the basis of a record showing pervasive abuse with near-total impunity, as demonstrated in *R-A-*, an adjudicator could also find that "women are expected by society to be abused."⁷⁵

An adjudicator could take a similar approach in evaluating the facts that are relevant to nexus. The Supreme Court in *Zacarias* ruled that the evidence required to establish the persecutor's motivation could be either direct or circumstantial. On the basis of a record such as that developed in *R-A-*, an adjudicator could find that a persecutor was motivated to abuse his wife by an animus toward women (i.e., social group nexus), or that he intended to punish her for her opinion of resistance. The Second Circuit's recent decision in *Abankwah v. INS*, 99 WL 474436 (2d Cir. July 9, 1999)⁷⁶ chastising the Board for being "too exacting both in

the quantity and quality of evidence that it required," should give courage to sympathetic adjudicators to give a greater benefit of the doubt⁷⁷ to the applicant in establishing factual issues, such as motivation, that go toward proof of nexus.

These possible strategies for mitigating the adverse effects of *Matter of R-A-* are not satisfactory solutions in the long run. The BIA has reversed course in what had been an encouraging evolution of the law in gender cases. It has radically departed from its own longstanding and well-respected *Acosta* social group formulation. One can only speculate as to the BIA's motivation for reversing course. There are some who believe that underlying the Board's decision is a fear of floodgates, a concern that seems to be raised disproportionately in the context of women's claims for asylum. Prior to the decision in *Kasinga*, the fear of floodgates was an oft-repeated argument against granting asylum to those who flee FGM. However, there is no evidence that, in the aftermath of the *Kasinga* decision, there was an great upsurge in arrivals to the U.S. of women fleeing FGM, and there is no rational basis for thinking that it would be otherwise in the case of domestic violence.⁷⁸

The decision in *Matter of R-A-* also goes against a number of significant developments and trends. It is counter to the principles expressed in the INS Gender Guidelines, inconsistent with the Board's own decision in *Kasinga*, contrary to the jurisprudence of countries such as Canada and the United Kingdom, and a repudiation of fundamental

credibility, the point made regarding "quantity and quality" of evidence is just as applicable to factual determinations related to proof of motivation and nexus.

⁷⁷ The decisions of Asylum Officers and IJs that give the benefit of the doubt to the applicant may be subject to challenge at a number of levels. INS Headquarters may question recommended grants based on such fact assessments, and INS trial attorneys may choose to appeal IJ decisions that give a benefit of the doubt on nexus issues.

⁷⁸ Canada's Gender Guidelines have been in place since 1993, and domestic violence has been accepted as a basis for a successful claim. The Canadian numbers do not indicate a "flood" of gender claims. One scholar has reported that: "The numbers of positive claims decided in accordance with the Canadian Guidelines since they were promulgated in March 1993 are: 78 in 1883, 204 in 1994, 212 in 1995, 150 in 1996, 104 in 1997, 95 in 1998 (through September). Annual acceptance rates ranged from 59% to 69%." Macklin, Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims, 13 Georgetown Immigration Law Journal 34 (1998).

⁷⁵ This approach is suggested as an interim measure, with the hope that the obstacles erected in *Matter of R-A-* will be removed by appropriate judicial, executive, or congressional action.

⁷⁶ Although the Second Circuit was criticizing the amount of evidence required by the Board of an applicant to establish

understandings regarding the nature of women's human rights, and the relationship between these rights and principles of asylum. The U.S. prides itself on its commitment to human rights—and its leadership role with respect to the protection of women's human rights. The decision in *Matter of R-A-*, and how it is addressed in the months to come, will put that commitment to the test. ■

1. House Immigration Subcommittee Hears Testimony Concerning the Need for Additional H-1B Numbers

On August 5, 1999, the House Subcommittee on Immigration and Claims held an oversight hearing on the H-1B program, revisiting the issue of whether the current, increased annual allotment of H-1B visas is sufficient to meet the demands of U.S. industry for highly skilled labor. Among those testifying at the hearing were several representatives from the high-tech sector, who stressed the shortage of qualified available U.S. workers in the high-tech fields, and the continued need for the H-1B program to fill this gap; representatives of labor unions, who argued that another expansion of the H-1B program would further hurt U.S. workers; and an unemployed biophysicist, who claimed that there exists a shortage of available employment for U.S. high-tech workers, not a shortage of qualified workers.

As background, the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) temporarily raised the number of H-1B visas available annually from 65,000, where it had been since the Immigration Act of 1990, to 115,000 for fiscal years (FYs) 1999 and 2000, and to 107,500 for FY 2001.⁷⁹ Despite the additional visas, however, the INS published a notice in the June 15, 1999 Federal Register announcing that the 1999 cap of 115,000 H-1B visas "likely" had been reached, with several months still remaining before FY 1999 ends on September 30, 1999. In fact, according to subcommittee chairman Lamar Smith (R-Tex.), the FY 1999 cap of 115,000 H-1B visas was reached earlier than the previous year's cap of 65,000.⁸⁰

Among the questions raised at the hearing was why, contrary to expectations, so many H-1B petitions have been submitted since passage of the ACWIA. A related question was whether established users of the H-1B program have increased the number of aliens for whom they petition, or whether there is a new universe of users. In his opening

⁷⁹ See 75 Interpreter Releases 1547 (Nov. 9, 1998).

⁸⁰ In FY 1998, the INS issued a notice on May 11 announcing that the 65,000 H-1B cap had been reached. See 75 Interpreter Releases 662 (May 11, 1998).

statement, Chairman Smith cited several possible reasons for the continued increased demand for H-1B visas.

Some argue, he said, that the increased demand is caused by an ongoing and worsening shortage of information technology (IT) workers, and that the high H-1B demand is proof in and of itself of such a shortage. Others respond that there is no such shortage and that the high demand is merely reflective of a preference for foreign workers and their perceived advantages over U.S. workers.

Another possible reason for the H-1B cap having been reached so early is a phenomenon Chairman Smith referred to as the "bubble." After the FY 1998 cap of 65,000 was reached on May 11, 1998, the INS continued to receive and approve petitions with the stipulation that the petitioned-for aliens could not start work until the beginning of the next fiscal year on October 1, 1998. In all, said Rep. Smith, the INS approved 19,431 petitions before October 1. These aliens were counted against the 1999 H-1B quota, not the 1998 quota. Hence, he continued, an argument can be made that even before FY 1999 started, the heightened quota of 115,000 H-1B numbers had in effect been reduced to 95,569. Without this reduction, said Rep. Smith, we may have reached the end of FY 1999 without hitting the cap.

A final possible reason that Rep. Smith posited to explain the early hitting of the cap is visa fraud. As an example, he cited a joint INS and State Department review of more than 3,000 pending petitions at the U.S. Consulate at Chennai, India, the city that apparently provides the most foreign IT workers. According to Rep. Smith, Chennai's anti-fraud unit was able to verify the authenticity of only 45 percent of the petitions, with 21 percent found to be outright fraudulent.

In a May 26, 1999 letter to INS Commissioner Doris Meissner, Rep. Smith urged the agency to place a greater emphasis on the detection and elimination of fraud, including investigating all questionable applications before a petition is approved, moving expeditiously to revoke fraudulent petitions so that the H-1B number may be recaptured for another employer, taking stronger action against companies and individuals filing fraudulent petitions, and initiating removal proceedings against aliens who have entered the U.S. on the basis of a fraudulent H-1B petition.

Rep. Sheila Jackson Lee (D-Tex.), while supporting the H-1B program in general, noted that she continues to have concerns about its use. She urged that any further increase in the H-1B cap be accompanied by a mandate to educate and retrain our domestic workforce, including displaced U.S. workers, women and minorities. In addition, she said, "[w]e must search the nation" to be sure that we have not