

# Lesson Plan Overview

<b>Course</b>	Asylum Officer Basic Training
<b>Lesson</b>	<i>Female Asylum Applicants and Gender-Related Claims</i>
<b>Field Performance Objective</b>	Given a request for asylum from a female asylum applicant, the asylum officer will appropriately determine eligibility for asylum.
<b>Interim (Training) Performance Objectives</b>	<ol style="list-style-type: none"> <li>1. Identify factors related to gender that should be considered in evaluating eligibility for asylum.</li> <li>2. Identify factors that may inhibit a female applicant's ability to fully present her asylum claim.</li> <li>3. Identify effective interviewing techniques to fully elicit sensitive issues related to gender.</li> <li>4. Identify factors related to gender that should be considered in evaluating credibility.</li> <li>5. Identify factors related to gender that may affect an applicant's ability to relocate within her country.</li> </ol>
<b>Background Reading</b>	<ol style="list-style-type: none"> <li>1. Coven, Phyllis. INS Office of International Affairs. <a href="#"><i>Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines)</i></a>, Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. (attached)</li> <li>2. Goldberg, Pamela. Immigration Briefings. <i>Asylum Law And Gender-Based Persecution Claims</i>. (No.94-9 September 1994 Federal Publications Inc).</li> <li>3. Immigration and Refugee Board, <a href="#"><i>Women Refugee Claimants Fearing Gender-Related Persecution</i></a>, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act ("Canadian Gender Guidelines") (Ottawa, Canada March 9, 1993).</li> <li>4. Kelly, Nancy, Women Refugees Project, Harvard Immigration and Refugee Program Cambridge and Somerville Legal Services. <i>Guidelines For Women's Asylum Claims</i>.</li> </ol>

5. Melville, Rosemary, Asylum Division, Office of International Affairs. [\*Follow Up On Gender Guidelines Training\*](#), Memorandum to Asylum Office Directors, SAOs, AOs, (Washington, DC: 7 July 1995), 2 p. plus attachments. (attached)
6. Musalo, Karen. AILA Immigration & Nationality Handbook, Vol. II, *The Developing Jurisprudence of Gender-Based Claim*. 1997-1998.
7. United Nations High Commissioner for Refugees, [\*Guidelines on the Protection of Refugee Women\*](#), paragraphs 53-76, “Legal procedures and criteria for the determination of refugee status,” July 1991. (attached)
8. Weiss, Jeffrey L., Asylum Division, Office of International Affairs. *Matter of Kasinga, Int. Dec. 3278 (BIA 1996)*, Memorandum to all Asylum Office Directors and all AOs (Washington, Dc: 1 July 1996), 1 p. plus attachment: David A. Martin, Office of the General Counsel. *Memorandum Female Genital Mutilation Matter of Kasinga, Int. Dec. 3278 (BIA 1996)* (Washington, D.C., 28 June 1996). (attached)

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**Presentation****References****I. INTRODUCTION**

This lesson provides guidance on special factors asylum officers must consider in interviewing female asylum applicants, as well as evaluating female asylum applicant's claims and asylum claims related to gender, including claims based on violation of societal norms associated with gender.

This lesson focuses on both female asylum-seekers and gender-related issues. In addressing gender-related issues, this lesson primarily focuses on female asylum-seekers, because these issues most commonly arise in the context of adjudicating women's asylum claims. However, it is recognized that gender-related issues may also be present in claims brought by men, and many of the principles addressed in this lesson may apply equally to claims raised by male or female asylum seekers.

**II. FEMALE ASYLUM SEEKERS – OVERVIEW**

The Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) called on States to “adopt an approach that is sensitive to gender-related concerns and which ensures that women whose claims to refugee status are based upon a well-founded fear of persecution for reasons enumerated in the 1951 Convention and its 1967 Protocol, including persecution through sexual violence or other gender-related persecution, are recognized as refugees.”

[UNHCR Executive Committee Conclusion No. 79\(XLVII\) – 1996](#)

The Executive Committee of UNHCR recognizes the importance of States' efforts to incorporate gender perspectives into asylum policies. It encouraged development, promotion, and implementation of “guidelines, codes of conduct and training programs on gender-related refugee issues, in order to support the mainstreaming of gender perspective and enhance accountability for the implementation of gender policies.”

[UNHCR Executive Committee Conclusion No. 87\(L\) - 1999](#)

Why are special considerations necessary in evaluating women's claims for asylum and claims relating to gender? Why did the UNHCR Executive Committee specifically address the need for special training on gender-related refugee issues?

Because women hold a significantly different position in many societies than men, experiences that give rise to their fleeing their homelands are often different than the experiences of male asylum seekers. To properly evaluate the asylum claims of women,

adjudicators must be sensitive to certain unique aspects of female asylum applicants' experiences and circumstances. They also must understand how to consider those experiences and circumstances in the context of asylum law.

An overview of some of the ways women's experiences may be different than men's in the refugee context is provided below. These issues are discussed in more detail throughout the lesson.

### A. Harm Directed at Women

### OH #3 Harm Directed at Women

1. Harm directed at women may take different forms than harm directed at men.

Women often suffer types of harm unique to women or much more commonly experienced by women than men. Women may be subject to, among other things, forced female genital mutilation, forced abortion, involuntary marriage, societal stigma that prevents marriage, "honor" killings, and forced prostitution.

Sometimes women and men are harmed for similar reasons but in different ways. For example, soldiers may harm female villagers suspected of supporting guerrillas by raping them while they might beat or kill men suspected of the same thing.

2. Women may be harmed solely because of gender.

Women may suffer harm solely because of their gender. A woman may be prevented from traveling, from obtaining an education or from pursuing a profession, or suffer other forms of institutionalized discrimination, because of her gender.

3. Women may be harmed for violating social norms or legal restrictions associated with gender.

Women who express opposition to, or violate, social norms associated with gender may be harmed as a result. A woman who refuses to comply with strict dress codes, attempts to travel without a chaperone, or engages in forbidden social contact with men may be punished because she did not comply with social norms.

Note: Men may also be punished for violating restrictions associated with gender, but generally are not subject to the same degree of restrictions as women. The punishment may be based on a violation of a norm associated with the male gender (e.g., for entering an area restricted to females) or for participating in a woman's violation of restrictions associated with

gender (e.g., for allowing his wife to violate a social restriction related to her gender).

## B. Access to State Protection

In many countries, women hold more vulnerable social and political positions than men. Women may not have access to the same types of social or legal protections available to men. Requests for protection from abuse may be ignored if the abuser is a woman's husband or father. In some countries, a woman who reports to the police that she was raped could be detained and accused of illegal sexual intercourse. In many countries, a woman's testimony in court is not accorded the same legal weight as a man's. In Saudi Arabia, a woman may not be admitted to a hospital without the permission of a male relative.

### OH #4 Limitations on Protection from Harm

See, e.g., Amnesty International. *Women in Pakistan – Disadvantaged and Denied Their Rights*, (December 1995). See also, U.S. Department of State. [“Saudi Arabia,” Country Reports on Human Rights Practices for 1999](#) (Washington, DC: U.S. Government Printing Office, February 2000).

## C. Ability to Travel or Relocate

Restrictions on travel, education, and employment could make relocation within a country unreasonable. In some countries, women are prohibited from taking public transportation without permission from a man, not allowed to work without permission from her husband, forbidden to travel without a male chaperone. It may not be economically feasible for a woman to relocate if she has been deprived of the opportunity to an education or her ability to work outside the home has been severely restricted.

See e.g., U.S. Department of State. [“Saudi Arabia,” “United Arab Emirates,” Country Reports on Human Rights Practices for 1999](#) (Washington, DC: U.S. Government Printing Office, February 2000).

## III. INTERNATIONAL AND NATIONAL GUIDELINES RELATING TO WOMEN REFUGEES

The international community has taken significant strides in addressing the need for greater protection of women's rights and women refugees. Recognizing the particular vulnerability of women, international bodies and national governments have issued several documents in an effort to enhance their protection. These documents may be helpful reference tools in evaluating asylum claims, including determining whether a type of harm experienced or feared by a female asylum-seeker has been condemned by the international community as contrary to international human rights norms.

- In 1967, the United Nations General Assembly issued the *Declaration on Elimination of Discrimination Against Women*.
- In 1979, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) called for the

Nov. 7, 1967, U.N.G.A. Res. 2263 (XXII), 22 U.N. GAOR, Supp. 9No. 16) 35, U.N. Doc. A/6880 (1968) [Adopted by the U.N. General Assembly, Dec.](#)

eradication of discrimination against women.

- In 1985, the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) issued its Conclusion, *Refugee Women and International Protection*, in which the Executive Committee recognized that

“States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.”

- In 1991, the UNHCR issued *Guidelines on the Protection of Refugee Women*, which recognize the particular circumstances of women when they apply for refugee or asylum status and identify certain obstacles a female refugee may face in presenting her asylum claim. The guidelines also promote recognition of refugee status “where a government cannot or will not protect women who are subject to abuse for transgressing social standards.”

- In 1993, the Canadian Immigration and Refugee Board issued guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution*. The Canadian Gender Guidelines begin with the general proposition that “[a]lthough gender is not specifically enumerated as one of the grounds for establishing *Convention refugee* status, the definition of *Convention refugee* may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.”

- On December 20, 1993, the United Nations General Assembly adopted the *Declaration on the Elimination of Violence against Women*. States are asked to pursue appropriate means to eliminate violence against women, described 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 in private life.”

[18, 1979, U.N.G.A. Res 34/180, U.N. Doc. A/RES/34/180 \(1980\).](#)

Note: May be found on the Internet through the following site:

[www.unhchr.ch](http://www.unhchr.ch)

UNHCR Executive Committee Conclusion No. 39 (XXXVI) – [Refugee Women and International Protection, 1985](#)

Note: UNHCR Executive Committee Conclusions may be found on the Internet at

<http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=exec>

United Nations High Commissioner for Refugees, [Guidelines on the Protection of Refugee Women](#), paragraphs 53-76, “Legal procedures and criteria for the determination of refugee status,” July 1991

Immigration and Refugee Board, [Women Refugee Claimants Fearing Gender-Related Persecution](#), Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (“Canadian Gender Guidelines”) (Ottawa, Canada March 9, 1993)

G.A. Res. 48/104, U.N. GAOR, 48<sup>th</sup> Sess., Agenda Item 111, U.N. Doc. A/Res/48/104 (1994)

Article 4 provides that “States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.”

- On May 26, 1995, the INS issued Asylum Gender Guidelines, instructing asylum officers on issues to consider when interviewing female asylum-seekers and in evaluating their claims. The guidelines are not binding on adjudicators outside the INS. They have been cited to in asylum decisions by immigration judges, the Board of Immigration Appeals, and federal courts. In the legal section, the gender guidelines set out existing principles of asylum law and discuss how they may apply to gender-related claims. It is important to note that the guidelines only describe interpretive law that existed at the time of publication. They do not, and cannot, resolve questions of legal interpretation that have not yet been addressed by statute, regulations, or precedent case law.
- On July 7, 1995, the INS Asylum Division issued a follow-up memo to the guidelines to assist in training asylum officers on the guidelines.
- The Australian Department of Immigration and Multicultural Affairs issued *Guidelines on Gender Issues for Decision Makers* in July 1996, to help adjudicators assess gender-based claims for applicants for protection in Australia.
- In November 2000, the Immigration Appellate Authority of the United Kingdom issued *Asylum Gender Guidelines*. The UK had previously followed the Canadian guidelines mentioned above.
- Although not specifically addressed toward women, the UN *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (1964) has provisions that relate to women’s rights. It provides that no marriage shall be legally entered into without the full and free consent of both parties.
- On February 23, 2001, the INS issued Gender Guidelines for Overseas Refugee Processing as guidance for all overseas Immigration Officers adjudicating women's refugee claims. The Guidelines instruct overseas officers on both the substantive and procedural aspects of gender-related issues. As with the Asylum Gender Guidelines, it is important to note that the guidelines only

## OH #6 Declaration on the Elimination of Violence against Women

## OH #7 Sources for Guidance (cont.)

Coven, Phyllis, INS Office of International Affairs. [\*Considerations For Asylum Officers Adjudicating Asylum Claims From Women\*](#), Memorandum to INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995)

Melville, Rosemary, INS Office of International Affairs. [\*Follow Up On Gender Guidelines Training\*](#), Memorandum to Asylum Office Directors, SAOs, AOs, Washington, DC: 7 July 1995).

describe interpretive law that existed at the time of publication. They do not, and cannot, resolve questions of legal interpretation that have not yet been addressed by statute, regulations, or precedent case law.

#### IV. TYPES OF HARM OFTEN DIRECTED AT WOMEN

The types of harm that women suffer vary across a broad range of countries, cultures and classes. Forms of harm that are unique to, or more common to, women, include, but are not limited to:

- rape or sexual violence,
- infanticide,
- female genital mutilation (FGM),
- forced marriage,
- slavery and
- domestic violence.

The discussion below addresses certain types of harm directed at women. It does not, and is not meant to include all types of harm directed at women.

##### A. Rape

Sexual assault does not differ analytically from other beatings, torture or other forms of physical violence that are commonly considered to amount to persecution. The appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely "personal harm."

Rape is an act of violence serving non-sexual needs or aims. Rape is not based on a need for a sexual relationship; it is based on a desire to degrade, control and/or terrorize a victim or her community.

Rape of women civilians has long been an integral part of conflict, used as a tactical weapon to terrorize civilian communities, to achieve "ethnic cleansing, to seek revenge against an enemy, and to suppress political opposition."

“The rape of one woman is translated into an assault upon the community through the emphasis placed in every culture on a woman’s virtue: the shame of the rape humiliates...all those associated with the survivor.”

See, Human Rights Watch Women’s Rights Project, *The [Human Rights Watch Global Report on Women’s Human Rights](#)* (August 1996); Giller, Joan E. MA, MB, MRCOG; Swiss, Shana MD. *[Rape as a Crime of War – A Medical Perspective](#)*, *JAMA* (Vol. 270, No.5, 4 August 1993), pp 612-615. Human Rights Watch/Africa Human Rights Watch Women’s Rights Project, *Shattered Lives - Sexual Violence During the Rwandan Genocide and its Aftermath* (September 1996).

In an extensive investigation of rapes in a wide range of countries, including former Yugoslavia, India (Kashmir), Haiti, Somalia, and Peru, Human Rights Watch found that:

“Of all the abuses committed in war or by repressive regimes, rape in particular is inflicted predominantly against women. Although men also are raped, efforts to document human rights abuse reveal that women are overwhelmingly the targets. Despite how pervasive it is, rape has often been a hidden element of strife, whether political or military, a fact that is inextricably linked to its largely gender-specific character. That this abuse is committed by men against women has contributed to its being narrowly portrayed as sexual or personal in nature, a characterization that depoliticizes sexual abuse in conflict and results in its being ignored as a crime.

Yet rape in conflict or under repressive regimes is neither incidental nor private. It routinely serves a strategic function and acts as a tool for achieving specific military or political objectives. Like other human rights abuses, rape serves as a means of harming, intimidating and punishing individual women. Further, rape almost always occurs in connection with other forms of violence or abuse against women or their families.

Far from being an isolated sexual or private act, rape often occurs alongside other politically motivated acts of violence.”

Note that the historic portrayal of rape as "sexually" or "personally" motivated influences the way that many women articulate the assailant's motives for attacking her. An applicant may initially characterize the attack as motivated by sexual desire, but asylum officers should make efforts to elicit any evidence that the assault occurred on account of a protected ground. The following exchange, quoted in *Shoafera*, recognizes that rape is not primarily motivated by sexual desire, and is instructive on how to elicit relevant information about a sensitive incident:

[Q.] Now, with regard to the rape, do you have any idea—and I know this is a difficult question, but do you have any idea why Hagos Belay did this to you?  
[A.] I just--He probably was attracted to me. I don't know.

Human Rights Watch  
Women's Rights Project,  
[\*The Human Rights Watch Global Report on Women's Human Rights\*](#) (August 1996)

#### **Instructor Note #1**

*Shoafera v. INS*, 228 F.3d 1070 (9<sup>th</sup> Cir. 2000), the immigration judge ruled that her comment that the rape was on account of her ethnicity was “speculative” despite supporting testimony by her sister and supporting country conditions information. The 9<sup>th</sup> Circuit ruled in favor of *Shoafera*.

Q. Aside from the fact that he may have been attracted to you, can you think of any other circumstances or factors that might have made you an easier target for him, or someone who he felt he could do this to?

A. 'Cause I'm an Amhara. If I was a Tigrean he wouldn't do it.

## B. Female Genital Mutilation (FGM)

Female genital mutilation (FGM) is a custom involving the cutting or removal of all or part of the female genitalia. The origins of FGM are unknown. It predates Christianity and Islam and is not required by the Bible or the Koran. FGM crosses religious, ethnic and cultural boundaries.

FGM can expose women to serious and potentially life threatening physical complications. Factors that allow for the continued practice of FGM include traditional beliefs, superstition, the role of women in the society and the belief that FGM will suppress and control sexual behavior. In some instances, it is performed on infants, children, adolescents, single, married, pregnant, post-partum women, and corpses.

FGM is most prevalent in Africa. It is practiced in at least twenty-eight African countries as well as in several Middle East countries, including, Egypt, Oman, Saudi Arabia, Yemen and the United Arab Emirates. It is found in India, Pakistan, Indonesia and Malaysia, as well as within small indigenous groups in Peru, Mexico and Brazil.

### 1. Types of FGM

Some people refer to the practice of FGM as “circumcision.” Circumcision is only one type of FGM, and it is the least traumatic and dangerous. Only a small percentage of women subjected to FGM are circumcised. The vast majority of women suffer more drastic and dangerous forms of FGM.

#### a. circumcision

The clitoral prepuce or tip of the clitoris is cut away. About five percent of the women who undergo FGM undergo circumcision. In circumcision, also called “sunna,” part of the clitoris is removed.

United States Department of State, Bureau of Democracy, Human Rights and Labor, Office of Asylum Affairs, *Female Genital Mutilation (FGM)* (Washington, DC: 15 September 1997)

Note: The system of classification outlined here is taken from the Department of State report referred to above. Alternative systems of classification exist and actual procedures vary greatly depending on where the operation is performed and who is performing the operation.

*See also*, Nahid Toubia, M.D. The New England Journal of Medicine, *Special Article - Female Circumcision as a Public Health Issue*, (September 15, 1994)

## b. excision

The clitoris and/or prepuce is partially or totally cut away. All, or part of, the labia minora are cut away. This is the most commonly practiced type of FGM.

## c. infibulation

The clitoris, the prepuce, the labia minora and a part of the labia majora are cut away. The edges of the labia majora are then sewn, pinned, or brought together with an adhesive in order for scar tissue to form.

## 2. Short and long term consequences of FGM

FGM can have devastating and harmful consequences for a woman throughout her life.

Those performing FGM have varying degrees of expertise. FGM is often performed without anesthesia, under unsanitary conditions, by non-medical personnel. The type of procedure, the degree of sterility and the expertise of the individual performing the procedure affect the degree of harm experienced. However, long term, serious harm may result even when the least damaging procedure (circumcision) is performed by qualified surgeons in sterile operating rooms.

Short-term consequences include: bleeding, post-operative shock, infection, tetanus, damage to other organs and death.

Long term consequences include retention of blood in the abdomen and swelling of the stomach, chronic infections of the bladder and vagina, extremely painful menstruation, child- birth obstruction, risk of HIV infection, psychological problems and sexual dysfunction.

United States Department of State, Bureau of Democracy, Human Rights and Labor, Office of Asylum Affairs, *Female Genital Mutilation (FGM)* (Washington, DC: 15 September 1997)

**C. Domestic Violence**

Violence against mothers, sisters and daughters, like other forms of violence against women, is related to the historically more powerful position of men in the family and in society, the perceived inferiority of women and unequal status granted by laws and societal norms. In many societies, the police, the court system, and even the laws may condone the practice, allow for it, and at best may simply do nothing to prevent it or to punish the perpetrator. For example, in some countries, there is no legal

United Nations Commission on Human Rights, [\*Violence Against Women, its Causes and Consequences\*](#), Preliminary Report by the Special Rapporteur Ms Radhika Coomaraswamy, 22 November 1994; United Nations Commission on

recognition that sexual assault is a crime, if committed by a husband against his wife.

Human Rights, [Violence Against Women, Report by the Special Rapporteur, 24 February 2000.](#)

*Id.* p.22

Regarding the extent of domestic violence, a Special Rapporteur on violence against women reported to the UN Commission on Human rights:

There are many different types of domestic violence. Young girls...are often the victims of sexual assault within the family. Elderly family members and the infirm may also be subject to ill treatment. In extended families, mothers-in-law are often violent towards their daughters-in-law. Though there are many incidents of assault directed against the husband, studies show that they are not so frequent and rarely result in serious injury.

Violence by the husband against the wife is the most prevalent form of domestic abuse.

Although most battered women engage in various forms of resistance to abuse, there are many factors that make it difficult for a battered woman to leave her abuser. Fear of losing children; socio-economic factors that make it impossible for a woman to support herself without the support of her husband; and the stigma caused by cultural, religious, and social norms regarding the role of a wife and mother all make it difficult or impossible to leave. Leaving the batterer also could pose an even greater threat to a woman's safety than staying, unless she can escape to a place where the batterer has no access to her.

At the point that separation (or the decision to separate) occurs, the risk of violence to the battered woman increases, a phenomenon referred to as "separation abuse." When battered women are killed, they are more likely to be killed after having left the relationship.

Mary Ann Dutton, *The Dynamics of Domestic Violence: Understanding the Response from Battered Women*, 68 Fla.B.J., Oct 1994

Therefore, for some women, staying with the batterer may actually be a strategy to protect herself or her children.

## V. INTERVIEWING CONSIDERATIONS

The purpose of this section is to emphasize the importance of creating an interview environment that allows applicants to discuss freely the elements and detail of their claims and to identify issues that may be related to a female applicant's gender. This section is a supplement to

the guidance in the Asylum Officer Basic Training lessons on interviewing and should be considered along with the guidance contained in those lessons, which also address issues related to gender.

### A. Pre-Interview File Review

Prior to the interview, the asylum officer should review the information in the A-file to identify any gender-related issues involved in the claim. All asylum officers are expected to conduct interviews of applicants with gender-related claims. Due to the very delicate and personal issues arising from sexual abuse, some applicants may have inhibitions about disclosing past experiences to an interviewer of the opposite sex.

To the extent that personnel resources permit, asylum offices should honor an applicant's request for an interviewer of a particular sex. If a pre-interview review of the A-file indicates that the case may involve sensitive gender-related issues, the asylum officer may consult with his or her supervisor prior to the interview to evaluate whether it would be more appropriate for an officer of a different sex to conduct the interview.

[\*INS Gender Guidelines\*](#), p. 5

### B. Considerations Related to Gender and Culture

Cultural factors, such as the expected role of a woman in her society, may significantly affect an applicant's testimony. In order to properly elicit and evaluate testimony, the asylum officer must be aware of such factors when eliciting testimony at the interview.

See also, lesson, [\*Interviewing Part IV: Cross-Cultural Communication and Other Factors Which May Impeded Communication at Asylum Interviews.\*](#)

**OH #9 Interviewing Considerations**

1. Cultural norms may exacerbate reluctance to relate sensitive information

Due to strict cultural norms in many countries, asylum applicants may be reluctant to disclose experiences of sexual violence. This may be especially true for women from societies that place extreme importance on preserving a woman's virginity. In many societies, sexual assault is seen as a violation of community or family morality, for which the victim herself is held responsible. The combination of shame, feelings of responsibility and blame for having been victimized in this way can seriously limit a woman's ability to discuss or even to mention such experiences.

2. Cultural norms may limit an applicant's knowledge of other family members' activities

In some cultures, men normally do not share the details of their political, military or even social activities with spouses, sisters, daughters or mothers. Women from such cultures may be able to present only vague testimony about experiences of male relatives, even husbands. Some women may not be able to explain which male relatives were politically active or, if they are aware of the relative's political activity, may be unable to provide any details about it.

3. Presence of relatives may inhibit testimony

**Instructor Note #2**

For a variety of reasons, the presence of relatives, particularly a husband or father, may impede an asylum applicant's willingness to discuss gender-related persecutory acts or fears. For example:

- a. The applicant's relatives may not be aware of the harm experienced by the applicant. She may wish that the relative remain unaware of her experiences, or she may be ashamed to say what she has experienced or fears in front of a relative.
- b. The applicant's claim may be based, in part, on fear of the male relative who is present.
- c. In some cases, a woman may be accustomed to having a male relative speak for her and may try to defer to that male relative in the interview, or the male relative may insist on speaking for the applicant.

**Instructor Note #3**

While the presence of a male relative may inhibit testimony, as described above, in other cases a woman may be more comfortable testifying with the presence of a relative, male or female. Therefore, to the extent possible, the choice of whether to be interviewed alone or with a relative present should be left to the applicant. She should be asked her preference, when possible, prior to the interview.

If the applicant elects for the relative to be present at the interview, the asylum officer should exercise sound judgment during the interview; determining whether the presence of the relative is impeding communication. If, it

appears that relative's presence is interfering with open communication, the relative should be asked to wait in the waiting room.

4. Interpreters may inhibit testimony

Testimony on sensitive issues such as sexual abuse may be diluted when received through the filter of an interpreter. The applicant may not feel comfortable discussing gender issues with an interpreter of the opposite sex. The same holds true for the interpreter; even if the applicant feels comfortable using a particular interpreter, the interpreter may be inhibited about discussing gender-related issues or using certain terms. For example, the interpreter may substitute the word "harm" for "rape," because the interpreter is not comfortable discussing rape or because of cultural taboos.

See lesson, [Interviewing Part VI: Working with an Interpreter](#)

### C. Suggested Interview Techniques

In all cases, the asylum officer must use his or her utmost care to assure that the interview is conducted in a non-adversarial and open atmosphere that allows for the discussion of past experiences and fears of future harm and its ramifications.

See also, lesson, [Interviewing Part V: Interviewing Survivors](#)

Some techniques that may be employed (discussed in greater detail in the lessons on interviewing) include the following:

#### Instructor Note #4

1. Begin with easy topics to establish rapport and give the applicant time to become accustomed to the interview
2. If the applicant becomes upset, pause to allow the applicant to regain her composure.
3. Acknowledge how difficult it may be for the applicant to answer certain questions by assuring the applicant that it is all right to let the asylum officer know when something is difficult to discuss in detail.

#### OH #10 Interviewing Techniques

Note: An asylum officer should require a certain level of detail in order to establish credibility. The applicant may be able to provide sufficient detail about certain parts of the claim to establish credibility, without providing minute detail on particularly sensitive topics. Example: Applicant provides detail about circumstances of arrest and conditions of detention, but finds it extremely painful to provide detailed description of certain torture she endured during detention. The asylum officer does not need to press for

detail about the torture if the applicant's testimony about the arrest and the general conditions of detention is credible.

4. Temporarily switch from the sensitive topic to something less sensitive, remembering to return to the sensitive topic later if more information is required.
5. Approach the issue from a different angle. For example, ask about events that led up to the traumatic experience and how the applicant felt after the experience, instead of asking about the specifics of the traumatic incident.
6. Switch the focus to another victim the applicant has testified about and then return to the applicant's experience.
7. Emphasize the confidential nature of the interview.
8. Remind the applicant that, for the asylum officer to evaluate eligibility for asylum, the asylum officer needs to understand the applicant's history, including the harm she may have experienced.

#### **OH #11 Interviewing Techniques (cont.)**

#### **D. Examples of Questions to Elicit Sensitive Information**

1. If the asylum officer suspects the applicant may have been sexually abused but is not forthcoming, the asylum officer may try to help her relax by reassuring her of the confidentiality of the process and by acknowledging that the interview process may be difficult for her.

#### **OH #12 Questions to Elicit Sensitive Information: Example 1**

"I understand that it is difficult to talk about such things. I know that women in your country often have bad experiences. Everything we talk about here is completely confidential. No one in your country (family) will know what you tell me today, unless you tell them yourself. Is there anything else you want to tell me?"

2. If the asylum officer is aware a woman in the applicant's country may be ostracized if she is raped, the asylum officer may ask about how she would be treated by her family and community.

"What would happen if your family and community found out what happened to you while you were detained?"

3. In cases where sexual assault is alleged and the applicant has difficulty providing details, the asylum officer may

focus on the circumstances surrounding the incident.

“You said you were assaulted. I need to understand more about what happened.

- Where were you at the time?
- Were you alone?
- What happened to your sister who was with you?
- Did that also happen to you?
- Did you tell anyone about the incident?
- What did the attacker say to you?
- Do you remember what you did immediately after the assault?”

The asylum officer should always ask questions one at a time and give the applicant sufficient time to fully answer.

## VI. LEGAL ANALYSIS – PERSECUTION AND AGENT OF PERSECUTION

Neither the INS Gender Guidelines nor this lesson expand the statutory definition of a refugee. The legal criteria used to evaluate a female asylum applicant’s eligibility for asylum, whether the claim is gender-based or not, is the same criteria used in all other asylum adjudications. However, because female asylum applicants’ experiences are often different than those of men, it is useful to discuss how those experiences fit into the legal framework of established asylum law.

### A. Persecution

As explained in greater detail in the lesson, *Eligibility for Asylum, Part I, Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution*, the term “persecution” is not defined by treaty, statute, or regulation, and adjudicators must rely on guidance from various sources, including international human rights norms, to evaluate whether harm constitutes persecution. To be eligible for asylum, the applicant must also establish that the persecution is “on account of” a protected characteristic in the refugee definition. This section focuses on the type of harm that may constitute persecution. The requirement that the persecution be on account of a protected characteristic (“Nexus”) will be discussed in the next section.

#### 1. General considerations

In evaluating whether harm constitutes persecution in a

**OH #15 Persecution:  
General Considerations**

gender-related case, the asylum officer should consider the same factors as in an asylum case that is not related to gender. The relevant considerations are:

- Whether the harm the applicant experienced and/or fears is serious enough to constitute persecution, and
- Whether the persecutor is the government (or agent of the government) or an entity that the government cannot control.

The fact that a practice is widespread, (e.g.: domestic violence, FGM, rape as part of an occupation during war) is not relevant to determining whether the alleged acts constitute persecution.

## 2. Rape and other sexual violence

Rape constitutes harm serious enough to amount to persecution. Other sexual violence may constitute persecution, depending on the degree of harm experienced by the applicant. In some countries a woman may experience severe discrimination and social ostracization because she was raped. The ostracism is further harm after the rape, and may itself be sufficiently serious to constitute persecution.

*See, Shoafra v. INS*, 228 F.3d 1070 (9<sup>th</sup> Cir. 2000) Rape by gov't official constitutes persecution. *See*, lesson, [Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution](#); and [INS Gender Guidelines](#), p.9

## 3. Torture, beatings, and inhuman treatment

Female asylum applicants may have experienced or fear the same types of “traditional” persecution experienced by male applicants, such as torture, beatings, and other inhuman treatment. Note that rape in detention is a form of torture that occurs to both men and women.

## 4. Forced Female Genital Mutilation (FGM)

Harm resulting from FGM is sufficiently serious to constitute persecution. FGM has been internationally recognized as a violation of women's and female children's rights and is criminalized under federal law. The U.S Court of Appeals, Second Circuit stated that FGM involves the infliction of “grave harm constituting persecution.”

*Abankwah v. INS*, 185 F.3d 18, (2<sup>nd</sup> Cir. 1999) citing to [Report of the Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 14](#), U.N. GAOR, 45th Sess., Supp. No. 38, at 80, ¶ 438, U.N. Doc. A/45/38; and [The Beijing Declaration and The Platform for Action](#), Fourth World

Conference on Women,  
Beijing, China, 4-15  
September 1995, U.N. Doc.  
DPI/1776/Wom (1996) ¶¶  
112-113

5. Forced abortion and forced sterilization

[INA section 101\(a\)\(42\)](#)

Statute provides that forced abortion and forced sterilization constitute harm amounting to persecution.

6. Discrimination and harassment

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulates to the level of persecution, or is so serious that that it leads to consequences of a substantially prejudicial nature. An applicant's deprivation of educational opportunities, the right to work to support herself, the right not to be forced into marriage, and other deprivations of internationally recognized rights may constitute persecution, depending on how such deprivations affect the applicant's well-being.

See lesson, [Eligibility for Asylum, Part I, Definition of Persecution](#)

7. Violation of fundamental beliefs

The US Court of Appeals, Third Circuit indicated that “the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs.”

[Fatin v. INS](#), 12 F.3d 1233 (3d Cir. 1993); see also [Sharif v INS](#), 87 F.3d 932 (3rd Cir. 1996) (finding that applicant failed to meet this standard because she did not offer evidence that conforming to Iranian law caused her serious harm).

In *Fatin v. INS*, the court considered whether the applicant's opposition to strict Iranian dress codes would constitute persecution. In that case, the court found that the record before it failed to establish that obeying the strict dress codes would be “so profoundly abhorrent” as to amount to persecution, but left open the possibility that other applicants could make such a case.

## B. Agent of Persecution

As in any other asylum claim, in order to establish persecution, the applicant must demonstrate that the persecutor is the government (including agents of the government) or an entity that the government is unable or unwilling to control. The persecutor may be a rebel group, a clan, a tribe, or someone closely associated with the applicant, such as a father or husband.

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

**OH #16 Non-Governmental Persecutor**

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection. "Reasonable steps" constitute measures that reduce the risk of claimed harm below the well-founded fear threshold.

Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable.

See e.g., *Matter of S-A-*, Int. Dec. #3433 (BIA 2000), finding applicant had established a state action where country conditions evidence showed that applying to the police would have been futile and dangerous and that legal remedies were generally unavailable to women.

In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection. For example, the evidence may indicate that the applicant would not have received assistance if she had sought it. Country conditions information may reveal that government officials in the applicant's country view violence perpetrated by a family member, clan member, or tribal member as a "private" dispute for which governmental intervention is inappropriate.

Or, evidence may establish that seeking protection would have placed an applicant at even greater risk of persecution. For example, country conditions information shows that women from Pakistan who report rape to the authorities are often themselves arrested and jailed under laws prohibiting sexual relations outside of marriage. Once jailed, their jailers often rape them. Therefore, a woman from Pakistan may reasonably fear reporting a rape and seeking state protection from the person who raped her.

See, Amnesty International. *Women in Pakistan – Disadvantaged and Denied Their Rights* (December 1995); *Matter of S-A-*, Int. Dec. #3433 (BIA 2000)

Asylum officers often must consult country conditions information to evaluate whether state protection is available to an applicant who fears persecution from a non-governmental entity.

## VII. LEGAL ANALYSIS – NEXUS

The "nexus" requirement discussed in the Asylum Officer Basic Training lesson *Eligibility Part III: Nexus and the Five Protected*

*Characteristics*, applies equally to female and male applicants and to all claims, including those related to gender. Because “nexus” is discussed in detail in another lesson, this section focuses on common nexus issues raised in gender-related claims, explaining how the analysis may be formulated, taking into account the social circumstances of female applicants.

## A. Overview

To be eligible for asylum, the applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or more of the protected characteristics in the refugee definition.

[\*INS v. Elias-Zacarias\*](#), 502 U.S. 478, 112 S.Ct. 812 (1992); lesson, [Asylum Eligibility Part III: Nexus and the Five Protected Characteristics](#)

Evidence about patterns of violence in the society against individuals similarly situated to the applicant may be relevant to the "nexus to a protected ground" determination.

For example, in a domestic violence claim, an adjudicator would consider evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she is in a domestic relationship. This would include any direct evidence about the abuser's own actions; as well as any circumstantial evidence that such patterns of violence are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society.

See, [Matter of S-A-](#), Int. Dec. 3433 (BIA 2000) (noting that in Morocco, a father's power over his daughter is unfettered)

Such circumstantial evidence (in addition to the direct evidence regarding the abuser's statements or actions) would be relevant to determining whether the abuser believes he has the authority to abuse and control the victim "on account of" her status in the relationship.

There are two factors to consider when evaluating “nexus.” The first is whether the harm is “on account of” a protected characteristic. The second is whether the applicant possesses or is believed to possess a protected characteristic.

### 1. “On account of”

The “on account of” requirement focuses on the motivation of the persecutor. The persecutor must be motivated to harm the applicant on account of a protected characteristic. However, the persecutor may have mixed motivations in harming the applicant. So long as the persecutor is motivated in part because the applicant possesses or is

[Matter of Fuentes](#), 19 I&N Dec. 658, 662 (BIA 1988); [Matter of S-P-](#), 21 I&N Dec. 486 (BIA 1996)

believed to possess a protected characteristic, the applicant may establish the harm is “on account of” a protected characteristic.

## 2. Protected characteristics (“Five Grounds”)

As the Court of Appeals for the Ninth Circuit has noted, “gender” is not specifically listed as one of the five enumerated characteristics in the refugee definition. However, an asylum applicant may present a claim that is based on one of the five protected characteristics and that is at the same time related to the woman’s gender. Additionally, gender may be one of the characteristics included in the formulation of a particular social group.

[\*Fisher v. INS\*, 79 F.3d 955, 963 \(9th Cir. 1996\)](#); [\*Fatin v. INS\*, 12 F.3d 1233 \(3rd Cir. 1993\)](#); [\*INS Gender Guidelines\*](#).

## B. Political Opinion

### 1. Actual political opinion

There are a few important points the asylum officer should bear in mind when evaluating women asylum applicant’s claims. First, women often express political opinions in the traditional sense of actively participating in political institutions within a country, such as political parties, and organizing or participating in political demonstrations. Even in countries with extremely restrictive norms and laws governing women’s behavior, some women may risk severe harm by taking such actions.

### OH #18 Expressions of Political Opinion

Second, women may also engage in more non-traditional political expression than men, because of their situation in society. For example, a woman may cook and provide food for an opposition group or rebel forces, rather than campaign for the group or fight with the rebel forces. Or women may organize to try to obtain release of male relatives detained for political reasons.

### Instructor Note #5

Third, opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion. Feminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions.

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

## 2. Imputed political opinion

**OH #19 Imputed Political Opinion**

## a. activities of family members

In evaluating why a persecutor may have harmed or seek to harm an applicant, it may be important to inquire into any political activities of the applicant's family members and whether the government has attributed a family member's political views to the applicant. For example, if the applicant's husband is involved in opposition political activities, the authorities might assume that the applicant has assisted her husband and shares his political views.

## b. violation of social norms

In some cases, a political opinion may be attributed to a woman who refuses to comply with social norms or laws governing behavior based on gender. For example, authorities might attribute a feminist political opinion to a woman who refuses to participate in an arranged marriage or who otherwise attempts to live outside the constraints governing the role of women in her society. It is important for the asylum officer to elicit information regarding how the feared persecutor views the woman for such behavior.

Violation of social norms may also indicate persecution on account of religion. The Board of Immigration Appeals considered the case of a young Moroccan woman whose father repeatedly abused her. He burned her thighs to discourage her from wearing short skirts, brutally beat her for giving directions to a man on the street, and forbade her from leaving the house, all because of his religious viewpoint about the proper role of women in society. The Board found that the applicant, in wearing western style clothing and interacting with men the applicant was demonstrating that her religious beliefs were different than those of her father. Although both were Islamic, the Board determined that the father persecuted the daughter on account of her religion.

## c. applicants living in theocracies

In some cases, a political opinion may be imputed to an asylum applicant who resides in a theocracy, if she

Punishment for refusal to

displays behavior that is considered contrary to societal norms. Where tenets of the governing religion in such a country require certain kinds of behavior, contrary behavior may be perceived by the government as evidence of an unacceptable political opinion, because it is perceived as being in opposition to the national law.

Cases involving female applicants who flee theocracies may be complex. The asylum officer must determine whether the applicant is subject to legitimate prosecution for violating the laws of the country, or whether there is evidence that the applicant is perceived as holding an adverse political (or religious) opinion and punished as a result.

- d. imputing a political opinion as a means of control

In one case, the court found an applicant eligible for asylum based on persecution on account of imputed political opinion because an army sergeant who had in effect enslaved the applicant threatened to tell the authorities that she supported the guerrillas. Although the sergeant knew that the applicant did not support the guerrillas, he used the threat to terrorize the applicant into submission and keep control over her. Because of his position in society, it was found that the sergeant would be believed by the authorities and therefore the applicant's fear of future persecution on account of imputed political opinion was reasonable.

comply with laws established in a theocracy may also constitute persecution on account of religion. See section on religion. See also, lesson, [Asylum Eligibility Part III: Nexus and the Five Protected Characteristics](#), section on prosecution vs. Persecution. See e.g., [Fisher v. INS](#), 79 F.3d 955 (9th Cir. 1995) (Finding that evidence in the record failed to establish applicant would be subject to persecution as opposed to prosecution for violating Iranian laws governing conduct and dress of women.); [Fatin v. INS](#), 12 F.3d 1233(3rd Cir. 1993).

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

## C. Religion

The notion of freedom of religion encompasses the freedom to hold and express a belief system of one's choice and the right not to be subjected to coercion that impairs the freedom to have or adopt a religion or belief of one's choice.

Just as in claims involving political opinion or imputed political opinion, the relevant inquiry in evaluating whether an applicant has established a connection between the harm she suffered and/or fears and religion, is how the persecutor views the woman. The fact that the persecutor may target a woman because of the persecutor's religious beliefs about how a woman

[Universal Declaration of Human Rights](#) (Art. 18); [The International Covenant on Civil and Political Rights](#) (Art. 18); See also, lesson, [Asylum Eligibility Part III: Nexus and the Five Protected Characteristics](#), section on Religion

should behave does not, in itself, establish that the persecutor is targeting the woman because of the woman's religious beliefs or religious beliefs imputed to her. However, a woman may, through her behavior, demonstrate that her beliefs are at odds with those of the persecutor.

See, *Matter of S-A-*, Int. Dec. #3433 (BIA 2000)

Certain religions assign particular roles to women; if a woman does not fulfill her assigned role she may be viewed as having "incorrect" religious views and punished. Such punishment would be considered to be "on account of" religion.

As explained in the section above on persecution, the U.S. Court of Appeals for the Third Circuit has indicated that forced compliance with laws that fundamentally are abhorrent to a person's deeply-held religious convictions may constitute persecution.

*Fatin v. INS*, 12 F. 3d 1233 (3rd Cir. 1993).

#### D. Particular Social Group

The factors to consider in evaluating whether an applicant is a member of a particular social group and whether harm is on account of that group membership are discussed in detail in another lesson. The purpose of this section is to focus on gender-specific issues related to particular social group.

See lesson, [Asylum Eligibility Part III: Nexus and the Five Protected Characteristics](#)

The BIA has held that members of a particular social group must share a "common, immutable characteristic" that the members "cannot change, or should not be required to change because such characteristic is fundamental to their individual identities."

**OH #20 Particular Social Group**  
*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)

Gender is an immutable trait and has been recognized as such by the BIA. Further, there may be circumstances in which an applicant's marital status or status within a family could be considered immutable. A father-daughter relationship, or a marriage in which a woman could not reasonably be expected to divorce because of religious, cultural or legal constraints are examples of such immutable traits. Any intimate relationship could also be immutable if the evidence indicates that the relationship is one that the victim could not reasonably be expected to leave.

See, e.g., *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)

##### 1. *Matter of Kasinga*

In *Matter of Kasinga*, the BIA held that gender, in conjunction with other characteristics, may be a defining characteristic in a particular social group. In that case, the BIA found the applicant eligible for asylum based on her

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

fear of persecution on account of membership in the particular social group defined as “young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice.” The separate concurring opinions in *Kasinga* emphasized that opposition to the practice was not a necessary component to the particular social group.

2. *Fatin v. INS*

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

In *Fatin v. INS*, the Court of Appeals for the Third Circuit recognized three gender-based particular social groups.

First, the Court concluded, based on language in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), that “gender” could form the basis for a particular social group. However, the Court found that the applicant in that case failed to establish that she had a well-founded fear of suffering persecution based solely on her gender, because she failed to establish that, as applied to her, the harsh restrictions placed on all women in Iran would cause her harm that was serious enough to amount to persecution.

Second, the Court recognized the particular social group formed of “Iranian women who refuse to conform to the government’s gender-specific laws and social norms,” but found that the record failed to establish that the applicant belonged to such a social group, because the evidence did not establish that the applicant would refuse to comply with the laws.

The Court found this “sub-group” could constitute a particular social group, because if a woman’s opposition to the Iranian laws “is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as ‘so fundamental to [her] identity or conscience that [they] ought not be required to be changed.’” (citing *Matter of Acosta*).

**Instructor Note #6**

Third, the Court recognized the particular social group of “Iranian women who find their country’s gender-specific laws offensive and do not wish to comply with them.” The Court found that the applicant fell within that particular social group, but that she failed to establish that being forced to comply with the gender-specific laws would be so abhorrent to her that compliance in itself would constitute harm serious enough to amount to persecution.

3. *Gomez v. INS*

*Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991)

In *Gomez*, the Court rejected the applicant’s claim based on the particular social group defined as “women who have been previously battered and raped by Salvadoran guerrillas.” The court explained that “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group” and that the applicant “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.”

Thus, in contrast to the Third Circuit, the Second Circuit appears to have rejected the premise that gender alone may form the basis of a particular social group.

4. *Safaie v. INS*

*Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994)

In *Safie v. INS*, the Court of Appeals for the Eighth Circuit found that the category of “Iranian women,” based on the innate characteristic of sex and the harsh restrictions placed upon women in Iran, was overbroad, because “no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”

As noted in the lesson, [Eligibility Part III](#), the court appears to confuse the analysis of what elements may form a particular social group with the analysis of risk of persecution.

However, the Court agreed with the Third Circuit conclusion that “Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior” could form a particular social group. The Court nonetheless upheld the denial of the applicant’s asylum claim because it found that the applicant failed to establish that her compliance with the gender-specific laws would be “so profoundly abhorrent” to her that it would amount to persecution.

5. *Abankwah v. INS*

*Abankwah v. INS*, 185 F.3d 18 (2<sup>nd</sup> Cir. 1999); Note that the adverse information that has appeared in the press since *Abankwah* was decided does not affect the precedential value of the decision or the importance of the legal reasoning

In *Abankwah*, the Court of Appeals for the Second Circuit found an applicant eligible for asylum based on a well-founded fear of persecution on account of membership in a particular social group defined as “women of the Nkumssa tribe who did not remain virgins until marriage.” The applicant was a member of the Nkumssa tribe, which forbids premarital sex and punishes women who engage in

premarital sex by subjecting them to female genital mutilation (FGM).

contained therein.

The issue in that case was whether there was sufficient evidence to objectively establish that the applicant's fear was well-founded. The Second Circuit accepted the Board's finding that the feared harm was on account of membership in the described particular social group without discussion.

6. *Matter of R-A- (Vacated by Attorney General)*

In *Matter of R-A-*, the BIA found that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" did not form a cognizable social group and that, even if the BIA were to recognize the existence of such a social group, the applicant also failed to establish that she was persecuted on account of her membership in that group.

*Matter of R-A-*, Int. Dec. #3402 (BIA 1999), vacated by the Attorney General, January 19, 2001

The Attorney General vacated the Board's decision *R-A-* and remanded the case to the Board, for "reconsideration following final publication of the proposed rule published at 65 Fed. Reg. 76588 (proposed Dec. 7, 2000)." The Attorney General's act of vacating *R-A-* means that the decision is not binding and may not be relied upon or cited to as the basis of an asylum decision.

A proposed rule is not binding. However, the proposed rule referred to by the Attorney General does represent the agency's interpretation of the refugee definition and the analytical framework that should be used to analyze gender-related asylum claims.

See, lesson, [Eligibility III: Nexus and the Five Protected Characteristics, section VI.A.5](#), for a discussion of the proposed rule.

7. *Hernandez-Montiel*

Although not precisely gender based, the U.S. Court of Appeals, Ninth Circuit recently overturned the BIA in a decision that could have ramifications for gender-based particular social group decisions. The Ninth Circuit found that sexual orientation and sexual identity may be the basis for establishing a particular social group.

*Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9<sup>th</sup> Cir. 2000); although *Hernandez-Montiel* overruled a negative BIA decision, it is consistent with the holding in [Matter of Toboso-Alfonso](#), 20 I & N Dec. 819 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994)

The Ninth Circuit found that the applicant had been persecuted on account of his membership in the particular

social group of gay men with female sexual identities in Mexico. The Ninth Circuit took note of the extensive supporting documentation submitted as clearly indicating that the applicant's female identity was immutable.

### **E. Race and Nationality**

A female applicant's claim may be based on persecution or feared persecution on account of her race or nationality, or a combination of race or nationality and other characteristics in the refugee definition.

The US Court of Appeals, 9<sup>th</sup> Circuit, found an applicant who was raped by a policeman to be eligible for asylum because she had been persecuted on account of her ethnicity. The applicant testified that the Tigrean policeman had raped her because she was Amharic, her sister's testimony supported her claim, and documents submitted on her behalf also supported that conclusion."

*Shoafera v. INS*, 228 F.3d 1070 (9<sup>th</sup> Cir. 2000)

## **VIII. LEGAL ANALYSIS – INTERNAL RELOCATION**

As established by regulation, in cases where an applicant has established past persecution, asylum officers must refer or deny asylum if the Service establishes that the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

[8 C.F.R. 208.13\(b\)\(1\)\(i\)\(B\)](#)

An applicant does not have a well-founded fear of persecution if he or she could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

[8 C.F.R. 208.13\(b\)\(2\)\(ii\)](#)

The crucial aspect of analyzing the internal flight alternative is an inquiry as to whether relocation would be reasonable under all the circumstances. Reasonable relocation possibilities for a woman may vary substantially from the relocation possibilities for a man from the same country.

Legal restrictions and cultural or social norms governing women's behavior must be considered in evaluating whether it would be reasonable for a female applicant to relocate within her country.

## A. Ability to Travel

In evaluating whether it would be reasonable for a woman to relocate within her country, the asylum officer must consider whether there are significant restraints on a woman's right to travel. For example:

- A Saudi women must obtain written permission from her closest male relative in order to board public transportation between different parts of the country.
- If there is civil strife or war ongoing in the woman's country, she may be particularly vulnerable if she travels outside the area in which she is protected by family or clan.

U.S. Department of State.  
["Saudi Arabia," Country Reports on Human Rights Practices for 1999](#)  
 (Washington, DC: U.S. Government Printing Office, February 2000)

The asylum officer should inquire into whether there are any legal or social constraints on the applicant's ability to travel. This information should be elicited during the asylum interview and also may be found in country conditions information.

## B. Economic Circumstances

The asylum officer should consider whether it would be reasonable to expect a woman to survive economically, if she could relocate within her country to avoid future persecution. In many parts of the world, women are still economically dependent on men and availability of employment opportunities is quite restricted for women.

## C. Social Circumstances

In some countries, a woman living outside the protection of her father, spouse, or clan may be vulnerable to attack and/or damaging social stigma. For example, in some countries it is assumed that a woman living on her own or with other unrelated women is a prostitute. In other countries, women are not allowed to rent an apartment, open a bank account or own property. Therefore, the asylum officer must be aware of conditions for women living on their own in the applicant's country to evaluate whether internal relocation to avoid future persecution is reasonable.

## IX. CREDIBILITY

See lesson, [Credibility](#)

Cultural differences and norms governing women's behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum applicants. As explained in the Asylum

**OH #22 Credibility Considerations**

Officer Basic Training lesson *Credibility*, the most important factors to consider in evaluating credibility are detail, consistency and plausibility. Demeanor may also be considered, in conjunction with the other factors, but is often an unreliable and misleading factor. All of these factors may be affected by circumstances related to an asylum applicant's gender.

## A. Detail

## Instructor Note #8

An applicant's gender may affect her ability to provide detailed testimony a number of ways. In evaluating the amount of detail an applicant should be expected to provide regarding any element of a claim, the asylum officer should take into account the applicant's social background and role in society. When an applicant is not able to provide detail about certain aspects of her claim, the officer should inquire into the reason why she is unable.

Some factors that may limit a female applicant's ability to provide detail include the following.

### 1. Social constraints may limit access to information.

Social constraints governing gender roles may restrict a woman's role in an opposition organization and she therefore may be unable to provide many details about the organization, even if she is a member of the organization. Although a woman may take great risks to further the goals of the organization, male members of the organization may limit the female members' knowledge of the detailed workings and structure of the organization.

A woman who may be at risk of persecution because of her relationship to a male family member may be unable to provide detail about the activities of the male family member that placed the family at risk. In many societies, it is normal for a male family member not to discuss his "public" activities (such as political activities, or activities in a union or religious organization) with female members of the family, even with his wife.

### 2. Effects of trauma

As discussed in other lessons and earlier in this lesson, effects of trauma may have a significant impact on an applicant's ability to present details about her claim. The effect of trauma on an applicant's ability to present a credible claim is not unique to gender. However, because

See lessons, [Credibility](#) and [Interviewing Part V: Interviewing Survivors](#)

## Instructor Note #9

persecution directed against women may involve sexual harm, asylum officers need to be sensitive to the possibility that a woman is reluctant to provide detail about certain experiences because those experiences may be difficult to discuss, particularly with a male asylum officer or through a male interpreter.

### 3. Gender roles

**Instructor Note #10**

A woman's cultural and social background may also affect her ability or the ease with which she discusses her history with a stranger. In some cultures, women live secluded lives and may only rarely have contact with strangers, particularly strangers of the opposite sex. When women in such societies do encounter strangers, they may be accustomed to having male relatives speak for them. This may result in an applicant providing only short, limited answers to questions posed by an asylum officer.

## B. Consistency

In many refugee-producing countries, the literacy rate for women is quite low. Because of this, along with the fact that women in such societies may be accustomed to having male relatives conduct all "public" activities for them, female asylum applicants may sign or mark applications that have been completed by a male relative who did not allow them to review for accuracy. As in any asylum case, the asylum officer should always inquire into who prepared the application for the applicant and whether the applicant had an opportunity to review it for accuracy before signing.

## C. Plausibility

**OH #23 Credibility Considerations (cont.)**

Asylum officers should exercise care in evaluating the plausibility of the claims by someone from a different culture when behavior or life choices are being evaluated. What may seem implausible behavior to an asylum officer in the United States could be plausible in the applicant's culture, or given conditions in the applicant's country.

## D. Demeanor

**Instructor Note #11**

As explained in the lesson on credibility, demeanor is the least reliable indicator of credibility. This may be particularly true in cases involving torture. Some individuals who have been tortured become emotionally overcome when recalling their ordeals, others may exhibit no emotion at all. Because there is

such a wide variety of emotional reactions to recounting experiences of torture, asylum officers should not expect the asylum applicant to manifest any particular emotion when recounting traumatic experiences.

In some cultures, keeping the head down and avoiding eye contact are signs of respect. For many women, making eye contact and speaking clearly and directly are considered highly inappropriate conduct and should not be viewed as indicators of lack of credibility.

## X. EVIDENTIARY CONSIDERATIONS

The same evidentiary rules apply to female applicants, whether or not the claim is gender-related, as apply to male applicants. Testimony alone may be sufficient to establish eligibility if it is credible in light of general conditions in the applicant's country of origin. However, corroboration of material facts may be required. "[W]here it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided or an explanation should be given as to why such information was not presented as to why such corroboration cannot be provided."

In *Diallo*, the Second Circuit found that the BIA did not fairly apply the reasonability standard in *M-D-* and it vacated that decision. However, it did find that the reasonability standard itself was valid.

Note that in the Ninth Circuit, corroboration may not be required if the applicant's testimony is credible: "To the extent that decisions such as *Matter of S-M-J* and *Matter of M-D-* establish a corroboration requirement for credible testimony, they are disapproved." Asylum officers from the Los Angeles and San Francisco asylum offices should be aware of this distinction.

In evaluating whether an applicant should be expected to provide documentation, the asylum officer must take into account the applicant's situation in the country she fled and the circumstances under which she fled. For a number of reasons, a female asylum applicant might not have access to identity documents or other documentary proof of her claim. For example, women in the applicant's country may not be afforded full rights of citizenship, or an applicant's means of support may have been dependent upon a male relative who had control over any documents pertaining to the female applicant.

It may be unreasonable to expect a woman from a refugee-producing country to have documentation of sexual abuse she suffered. Because

### OH #24: Evidentiary Considerations

[8 CFR § 208.13\(a\)](#); *Diallo v. INS*; 232 F.3d 279 (2d Cir. 2000); *Matter of S-M-J-*, 21 I&N Dec 722 (BIA 1997). *See also*, lesson, [Asylum Eligibility Part IV: Burden of Proof and Evidence](#)

*Ladha v. INS*; 215 F.3d 889 (9<sup>th</sup> Cir. 2000)

### Instructor Note #12

Human Rights Watch  
Women's Rights Project,

of strong cultural stigma attached to rape, “women survivors of sexual violence often are reluctant to seek medical assistance or to file police reports, because they do not want it known that they were raped.”

[\*The Human Rights Watch Global Report on Women’s Human Rights\*](#) (August 1996)

## XI. DERIVATIVE STATUS AND INDEPENDENT CLAIMS

[INS Gender Guidelines](#), p. 7.

If a male asylum applicant includes his spouse as a derivative applicant, the asylum officer should also inquire into whether the spouse has an independent claim, if it appears that the principal applicant is not eligible for asylum.

## XII. SUMMARY

### A. Female Asylum Seekers – Overview

Women often suffer types of harm unique to women or much more commonly experiences by women than men, and at times women may suffer harm solely because of their gender. In many societies, women are subject to much greater social restrictions and harsher penalties for social violations than men are.

Furthermore, social constraints placed on women in many countries pose great obstacles to accessing the protection of the state or fleeing harm.

### B. International and National Guidelines Relating to Women Refugees

Recognizing the particular vulnerability of women, international bodies and national governments have issued several documents in an effort to enhance their protection. These documents may be helpful reference tools for the officer in evaluating asylum claims, including determining whether a type of harm experienced or feared by a female asylum-seeker has been condemned by the international community as contrary to international human rights norms.

Some of those instruments and documents are:

- *Declaration on Elimination of Discrimination Against Women* (1967)
- *Convention on the Elimination of All Forms of Discrimination Against Women* (1979)
- *UNHCR Guidelines on the Protection of Refugee Women* (1991)

- *Declaration on the Elimination of Violence Against Women* (1993)
- *INS Asylum Gender Guidelines* (1995)

### **C. Types of Harm Directed at Women**

The types of harm that women suffer vary across a broad range of countries, cultures, and classes. There are particular types of harm that will confront the asylum officer in the claims of women interviewed.

#### **1. Rape**

Rape and other forms of sexual assault are acts of violence serving non-sexual needs or aims. Rape is based on a desire to degrade, control, and/or terrorize a victim or her community. Rape of women civilians has long been an integral part of conflict, used as a tactical weapon to terrorize civilian communities.

#### **2. Female Genital Mutilation (FGM)**

Female genital mutilation (FGM) is a custom of unknown origins involving the cutting or removal of all or part of the female genitalia. This practice can have devastating and harmful consequences for a woman throughout her life.

#### **3. Domestic Violence**

Violence against women by relatives is related to the historically more powerful position of men in the family and society. In many societies, the police, the court system, and laws may condone the practice, allow for it, or at best may simply do nothing to prevent it or punish perpetrators. Although most battered women engage in various forms of resistance to abuse, there are many factors that make it difficult for a battered woman to leave her abuser.

### **D. Interview Considerations**

Cultural factors, such as the expected role of a woman in her society, may significantly affect an applicant's testimony. Cultural norms may exacerbate a reluctance to discuss an issue or limit an applicant's knowledge on a particular subject, and the presence of certain people, such as family members or interpreters, may inhibit an applicant's testimony.

The asylum officer must use his or her utmost care to assure that the interview is conducted in a non-adversarial manner and to employ questioning techniques that both encourage testimony and put the applicant at ease.

### **E. Legal Analysis – Persecution and Agent of Persecution**

The INS Gender Guidelines do not expand the statutory definition of a refugee and the legal criteria used to evaluate a female asylum applicant's eligibility for asylum is the same criteria used in all other asylum adjudications.

#### **1. Persecution**

When considering whether the harm that an applicant has suffered or fears rises to the level of persecution, keep in mind that rape and FGM are serious enough harms to amount to persecution. According to statute, forced abortion and forced sterilization constitute harm amounting to persecution.

Discrimination and harassment may amount to persecution if the adverse practices or treatment accumulates to the level of persecution, or is so serious that it leads to consequences of a substantially prejudicial nature. Caselaw has also indicated that being compelled to engage in conduct that is abhorrent to an individual's deeply-held beliefs may constitute persecution.

#### **2. Agent of persecution**

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the asylum officer should consider whether the government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the existing state protection.

Evidence that the government does not respond to requests for protection is a strong indication that state protection is unavailable. In some cases, an applicant may establish that state protection is unavailable even when she did not actually seek protection.

### **F. Legal Analysis – Nexus**

The "nexus" requirement applies equally to female and male applicants and to all claims, including those relating to gender.

When examining claims based on female applicants' political opinion, asylum officers must remember that in addition to expressing political opinions in the traditional sense of actively participating in political institutions within a country, women also express their political opinion in more non-traditional ways, such as cooking or providing food to rebel forces. Women also express political opinions when they oppose or challenge institutionalized discrimination or restrictive social norms.

Though gender has been recognized by the BIA as an immutable trait, most courts agree that gender alone is too broad a category to be considered a particular social group. However, there are cases in which the applicant's gender can form a part of construction of a particular social group.

### **G. Legal Analysis – Internal Relocation**

Determinations regarding whether a female applicant could avoid future harm through internal relocation must take into consideration the legal restrictions and cultural or social norms governing women's behavior. This includes a woman's ability to travel, her economic circumstances, and her social circumstances.

### **H. Credibility**

Cultural differences and norms governing women's behavior, as well as the effects of trauma, may present special difficulties in evaluating credibility of female asylum applicants. For example, social constraints controlling access to information, the effects of trauma, or customs of social interaction may limit a woman's ability to provide detailed testimony about certain aspects of her claim. Also, as women from certain countries are less likely to be literate than their male compatriots, they may not have the ability to review the asylum application for accuracy.