

## **Gender-Based Asylum Law Training: Quick Reference to the Law<sup>1</sup>**

### **Defining Persecution:**

- Must be more than mere harassment. *Li v. Gonzales* 405 F.3d 171 (4th Cir. 2005).
- Harm “of a deliberate and severe nature and such that is condemned by civilized governments,” *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).
- Can be based on accumulation of discriminatory actions. *Matter of O-Z-* and *I-Z-*, 22 I&N Dec. 23 (BIA 1998); see also *Baharon v. Holder*, 588 F.3d 228 (4th Cir. 2010); *Korablina v INS*, 158 F. 3d 1038 (9th Cir. 1998).
- Individualized threats or “pattern or practice of persecution against persons similarly situated” See 8 C.F.R. 208.13(b)(2)(i) and 208.116(b)(3).
- Economic persecution must be “so severe that it threatens the life or freedom of the applicant.”  
*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); see also *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).
- Subjective intent to harm or punish the applicant is not required for a finding of persecution. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).
- Psychological harm may not constitute persecution in the Fourth Circuit. *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007).
- Death threats constitute persecution. See *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005); see also *Crespin-Valladares v. Holder* 632 F.3d 117, 126-127 (4th Cir. 2011); *Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009).

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<sup>1</sup> Please note that this resource was prepared by attorneys in Tahirih’s Greater DC Office in Falls Church, Virginia office and therefore focuses on 4<sup>th</sup> Circuit case law. This document was last updated in May 2015. This document is intended for reference purposes only and not as a substitute for independent legal research.

- **Rape as Persecution:**
  - Asylum Officer Basic Training Course, Lesson 26: Female Asylum Applications and Gender-Related Claims 16 (2009), available at: <http://www.uscis.gov/files/article/AOBTC%20Lesson%2026%20Female%20Asylum%20Applications%20and%20Gender-Related%20Claims.pdf> (recognizing rape as persecution).
  - *Uwais v. Att’y Gen.*, 478 F.3d 513, 518 (2d Cir. 2007) (finding that assault, beating, and rape can constitute past persecution).
  - *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (acknowledging that rape and sexual violence may constitute persecution and support a grant of asylum).
  - *Matter of Kasinga*, 21 I&N Dec. 357, 362 (BIA 1996) (noting that rape, sexual abuse and domestic violence may serve as evidence of past persecution); see also *Matter of D-V*, 21 I&N Dec 77, 79-80 (BIA 1993).

### **Past Persecution:**

- Creates a presumption of future persecution on the basis of the original claim;
- Government can rebut presumption by (preponderance of the evidence) showing:
  - Fundamental change of circumstances OR
  - Possibility of reasonable internal relocation
    - Societal, economic, cultural, psychological factors considered (see 8 C.F.R. § 1208.13(b)(1)).

### **Humanitarian Asylum – Asylum Granted on Past Persecution Alone:**

- An asylum applicant who has established past persecution is eligible for asylum on humanitarian grounds where the “applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,” or the applicant “has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” 8 C.F.R. § 1208.13(b)(1)(iii)(A)-(B).
- Severity of the Past Persecution:
  - *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989) (granting asylum based on the severity of the past persecution suffered).
  - *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. (BIA 2008) (granting asylum based on past persecution to a Somali mother and daughter who had endured FGM multiple times).
  - Rape and sexual assault are also such “atrocious forms of persecution” that they justify granting asylum even when there is little fear of future persecution. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1072 (9th Cir. 2004) (citation omitted). FGM is also recognized as “a particularly severe form of past persecution.” *Benyamin v. Holder*, 579 F.3d 970, 977 (9th Cir. 2009) (citing *Mohammed*, 400 F.3d at 801).
- Reasonable Possibility of Other Serious Harm:
  - *Matter of L-S-*, 25 I&N Dec. 705, 713 (BIA 2012)(remanding for consideration of conditions for humanitarian asylum and other serious harm faced).

### **Well Founded Fear of Persecution-Based on Future Fear:**

- Fear of future harm must be both subjective and objective
- Subjective: credible testimony that the applicant genuinely fears persecution, see 8 CFR § 208.13(b)(2)
  - A “reasonable person in like circumstances would fear persecution;”
  - *Li v. Gonzales*, 405 F.3d 171, 176 (4th Cir. 2005);
  - *Matter of Mogharrabi*, 19 I&N Dec. (1987);
  - Fear has “some basis in objective reality” and is not “mere irrational apprehension. *Rusu v. INS*, 296 F.3d 316, 324 (4th Cir. 2002); *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 286 (4th Cir. 2004).
- Objective: “Reasonable possibility” of persecution -- objective factor may be satisfied if there is as little as a 10% chance of future persecution.
  - *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)

### **Nexus or “on Account of”:**

- Must present “some evidence” – direct or circumstantial – that the harm she fears is “on account of” one of the 5 statutory grounds. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).
- The statutory ground “was or will be at least one central reason for persecuting the applicant”
  - REAL ID Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2008).
- Statutory ground is “a reason,” not “the primary reason” for the persecution- *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).
- In the Fourth Circuit, an applicant need not show that nexus to a protected ground was “‘the central reason or even a dominant central reason’ for [her] persecution,” but she must “‘demonstrate that these ties are more than ‘an ‘incidental, tangential, superficial, or subordinate’ reason’ for her persecution.” See *Crespin-Valladares*, 632 F.3d at 127; see also *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164-65 (4th Cir. 2009); see also *Hernandez-Avalos v. Lynch*, 2015 U.S. App. LEXIS 7159 (4th Cir. Apr. 30, 2015).

### **Gender and Political Opinion:**

- Political opinion is often proven by actions or overt expressions of opinion, but, not necessarily – “[I]ess overtly symbolic acts may also reflect political opinion.” *Saldarriaga v. Gonzalez*, 402 F.3d 461, 466 (4th Cir. 2005).
- “Young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe and who oppose the practice” *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).
- *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (“feminism qualifies as a political opinion within the meaning of the relevant statutes”).
- Persecution must be motivated by the victim’s political opinion. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (political “motive” of the persecutor did not support claim).

- The USCIS’s Asylum Officer Basic Training Course<sup>2</sup> explains that:
  - “[f]eminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions.”
  - “[O]pposition 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.”
  - USCIS also recognizes that a persecutor may attribute a political opinion “to a woman who refuses to comply with social norms or laws governing behavior based on gender.”

### **Gender and Religion:**

- INA § 101(a)(42)(A)
- *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (granting asylum where persecution based on differing interpretation of Islam between persecutor and victim).

### **Membership in a Particular Social Group:**

- Group of persons who share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color or kinship ties, or...shared past experiences. The characteristic must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. See *Matter of Acosta*, 18 I&N Dec. 211 (BIA 1985).
- UNHCR’s Gender Guidelines – outlining protected characteristic and social perception approaches to social group: See Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).
- Particularity – “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”- *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).
  - But, doesn’t mean a group cannot be large, see *Perdomo v. Holder*, 611 F.3d 662 (9<sup>th</sup> Cir. 2010) (remanding to BIA for it to determine whether women in Guatemala constitute a PSG); see also *See Hassan v. Gonzales*, 484 F.3d 513, 518 (8<sup>th</sup> Cir. 2007) (“hold[ing] that a factfinder could reasonably conclude that all Somali females have a well-founded fear of persecution based solely on gender given the prevalence of FGM”).
- “Social Distinction” (formerly referred to as “social visibility”) – clarifies that social visibility does not demand ocular (literal) visibility, but rather that the particular social group is *perceived* as distinct by the general society in question; that the society in question “recognizes persons sharing the particular characteristic to be a group” regardless of whether the society can “easily [visibly] identify who is a

<sup>2</sup> USCIS Asylum Officer Basic Training Course: Female Asylum Applicants and Gender-Related Claims (Mar. 12, 2009), <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf>.

member of the group.” *Matter of W-G-R*, 26 I&N Dec. 208, 215-217 (BIA 2014). *Matter of M-E-V-G*, 26 I&N Dec. 227, 234-37 (BIA 2014).

- “Social visibility” or Recognizability
  - *Matter of C-A*, 23 I&N Dec. 961 (BIA 2006), *aff’d*, *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1194 (11th Cir. 2006) (explaining that social visibility requires a showing that the “attributes of a particular social group . . . [are] recognizable and discrete”).
  - *Matter of A-M-E & J-G-U*, 24 I&N Dec. 69 (BIA 2007).
  - *But see*, *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) (rejecting social visibility)
  - The Fourth Circuit has not yet spoken precisely to the issue of whether or not to accord *Chevron* deference to the Board’s use of social visibility. *See Crespin-Valladares v. Holder*, 632 F.3d 117, 124 (4th Cir. 2011) (declining to examine whether the BIA’s use of social visibility comported with INA because “family” comported with social visibility criterion).

### **Domestic Violence:**

- Depending on the facts and evidence in an individual case, “married women in Guatemala who are unable to leave the relationship” can constitute a cognizable social group that forms the basis of a claim for asylum or withholding of removal...” *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014).
- DHS 2009 Brief in *Matter of L-R*, available at [cgrs.uchastings.edu](http://cgrs.uchastings.edu):
  - Addressed social visibility & particularity
  - DHA argued that the immutability of shared characteristic/s could be established where economic, physical, social, or other constraints make it impossible for a woman to leave the relationship, or, where the abuser would not recognize divorce or separation as an end to the relationship.
  - Two groups proposed: “Mexican women in domestic relationships who are unable to leave” and “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”
- DHS 2004 Brief in *Matter of R-A*, available at [cgrs.uchastings.edu](http://cgrs.uchastings.edu):
  - Argued that “Married women in Guatemala who are unable to leave the relationship” constitutes a valid particular social group.
  - DHS also argued that gender was immutable and that marital status or relationship status may be immutable where religious or moral convictions make it so.

### **Female Genital Cutting/Mutilation:**

- Young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe (and who oppose the practice) *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).
- “FGM constitutes persecution within the meaning of the [INA].” *Haoua v. Gonzales*, 472 F.3d 227, 231 (4th Cir. 2007); *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006).
- Any type of FGM constitutes persecution and FGM in the past counts as past persecution. *Kourouma v. Holder*, 588 F.3d 234 (4th Cir. 2009).

### **Case Law on FGM Parent-Protector Cases:**

- INA allows derivative asylum only for children or spouses of a refugee, 8 U.S.C. § 158(b)(3); this means a parent cannot benefit from a daughter being granted asylum based on her fear of FGM.
- *In re A-K-*, 24 I&N 275 (BIA 2007): An alien may *not* establish asylum eligibility solely based on fear that daughter will be forced to undergo FGM upon return to home country.
- 4<sup>th</sup> has refused to extend derivative claims for asylum and withholding of removal to parents of children who may be subject to FGM. See *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007) – Court held that the parent must show that *she* or *he* will suffer harm, and not just the child.
- Other Circuits have also refused to grant derivative asylum for parents of children who are faced with a threat of FGM:
  - *Oforoji v. Ashcroft*, 354 F.3d 609 (7th Cir. 2003): Alien Nigerian parent could not establish her own claim for asylum based on fear of FGM to USC daughters. Child would not be “constructively deported” – as an alien child might. Also distinguished between situations where one or both parents are being removed. USC. Only one parent being removed in that case.
  - *Kane* (5th Cir.); *Gumaneh* (8th Cir.); *Camara* (1st Cir.).
- *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004): Ethiopian woman established asylum claim based on fear of FGM to her alien daughter – embraced a “governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of [FGM upon return.]” FGM in Ethiopia – nearly universal; *but see Dieng v. Holder*, 698 F.3d 866 (6th Cir. 2012) (finding that USC daughter could remain in the US and there was no well-founded fear of future FGM for her in Senegal given the low prevalence rates and ability to relocate internally).
- The 9<sup>th</sup> Circuit has remanded derivative claims by parents to the BIA for consideration, *Abebe v. Gonzales*, 432 F.3d (9th Cir. 2005).
- Strategies for representing parent-protectors:
  - UNHCR Guidelines state that a parent *should* be granted derivative status based on his/her child’s refugee status where claim is based on a fear of FGM to a female child. (Guidance Note on Refugee Claims Relating to FGM, 2009).
  - Look to the 6<sup>th</sup> Circuit case, *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) – rejected by the 4<sup>th</sup> Circuit.
  - Look to new 4<sup>th</sup> Circuit case, *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) to argue family as a PSG; *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004).
  - Focus on past persecution of parent and possibility of “other serious harm” in the future. See *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006).

### **Forced Marriage:**

- *Matter of A-T*, 25 I&N Dec. 4 (BIA 2009) – please ask Tahirih for IJ’s redacted 2011 decision.
- *Gao v. Gonzales*, 440 F.3d 62, 66 (2d Cir. 2006) (notes DHS conceded that FM was a form of abuse rising to the level of persecution) *vacated on other grounds by Keisler v. Gao*, 552 U.S. 801 (2007).
- *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008) – See this case for potentially opening the door for FM as future harm where FGM has already been performed.
- Fourth Circuit has avoided addressing issue of FM: *Haoua v. Gonzales*, 472 F.3d 227, 231–32 (4th Cir. 2007)(discussing only the risk of FGC upon return to home country while leaving untouched the issue of



forced marriage); *Gomis v. Holder*, 571 F.3d 353, 364 (4th Cir. 2009) (considering Senegalese FGM and FM case).

- Other resources:
  - U.S. Dep't. St. Foreign Affairs Manual Vol. 7, 7 FAM 1450, at 10 (2005), available at <http://www.state.gov/documents/organization/86802.pdf> (stating that the Department considers forced marriage to be a violation of basic human rights).
  - Asylum Officer Basic Training Course, Lesson 26: Female Asylum Applications and Gender-Related Claims 16 (2009).
  - US Gender Guidelines recognized that Forced Marriage might be a basis for asylum. See U.S. Bureau of Citizenship & Immigration Services, Considerations for Asylum Officers Adjudicating Asylum Claims from Women 9 (May 26, 1995), available at <http://www.unhcr.org/refworld/docid/3ae6b31e7.html> (stating that marrying outside of an arranged marriage may result in harm, abuse, or harsh treatment, thus diminishing the civil, political, social, and economic rights of women).

### **Government Unwillingness/Inability to Protect:**

- *Matter of Acosta*, 19 I&N Dec. at 222 (“harm or suffering had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control”).
- *In Re S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (respondent need not attempt to seek assistance from the police if the record shows that attempts to seek help would be futile).

### **Firm Resettlement:**

- *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011) (setting up a four part framework for adjudicators to assess whether there is an offer of firm resettlement).
- *Matter of D-X- and Y-Z-*, 25 I&N Dec. 664 (BIA 2012) (finding a couple firmly resettled even where permanent residence equivalent may have been obtained in part by fraud).

### **Internal Relocation:**

- 8 C.F.R. § 1208.13(b)(3) (2012)
- *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (2012) (adjudicators must analyze the reasonableness of internal relocation using the factors set forth by regulation). See also *De Castro-Gutierrez v. Holder*, 713 F.3d 375 (8th Cir. 2013); *Alavez-Hernandez v. Holder*, 714 F.3d 1063 (8th Cir. 2013); *Rana v. Holder*, 534 Fed.Appx. 734 (10th Cir. 2013).
- *Essohou v. Gonzalez*, 471 F.3d 518 (4th Cir. 2006) (finding it unreasonable for asylum applicant to have to hide from persecutor(s) within the country of feared persecution).

### **Other Gender-Based Asylum Case Law and Resources:**

- US Dept. of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, Phyllis Coven memo, Office of International Affairs, 26 May 1995. 72 Interpreter Releases 771 (June 1995).
- Proposed Regulations on Gender Asylum: 65 Fed. Reg. No. 236 (Dec. 7, 2000).

- American Immigration Lawyers Association 2012 amicus brief to the Board of Immigration Appeals addressing particularity and social visibility and addressing domestic violence as persecution, available at: <http://www.aila.org/content/default.aspx?docid=42288>
- Other gender-based social group cases:
  - Women of the Nkumssa tribe who did not remain virgins until marriage (*Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999)).
  - Unmarried women over age 25 in Ghana (*Fiadjoe v. AG*, 411 F.3d 135 (3d Cir. 2005)).
  - *Ngengwe v. Mukasey*, 543 F. 3d 1029 (8th Cir. 2008) (remanding to BIA to consider whether “Cameroonian widows” could constitute a social group).

### **Practice Pointers and Articles on Gender-Based Asylum:**

- Kim Thuy Seelinger, *Forced Marriage and Asylum: Perceiving the Invisible Harm*, Columbia Human Rights Law Review, Vol. 42, No. 1, Fall 2010.
- Lisa Frydman and Kim Thuy Seelinger, *Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence*. 13 Bender's Immigration Bulletin 1073. September 1, 2008
- Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, Refugee Survey Quarterly, Vol. 29, No.2, November 2010.
- Natalie Nanasi, *Lessons from Matter of A-T-: Guidance for Practitioners Litigating Asylum Cases Involving a Spectrum of Gender-Based Harms, From Female Genital Mutilation to Forced Marriage and Beyond*, Immigration Briefings, February 2012.
- Lindsay M. Harris, *Expert Evidence in Gender-Based Asylum Proceedings: Cultural Translation for the Court*, Benders Immigration Bulletin, November 2012.
- Lisa Frydman and Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylums Based on Persecution by Organized Gangs*, Immigration Briefings, October 2012.
- Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, Hasting's Women's Law Journal 24(1) 2013.