

12

*Sexual Assault Survivors and Gender-Based Asylum*¹²³

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Survivors of sexual assault who fear returning to their home country may be able to obtain lawful status in the United States by applying for gender-based asylum. If an applicant is successful in her application for asylum,

¹ For the updated version of this chapter that discusses , see Alicia (Lacy) Carra, Hema Sarangapani, & Spencer Cantrell, *Ch. 12: Sexual Assault Survivors and Gender-Based Asylum*, in *EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT* (Leslye Orloff, ed., 2014), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/asylum/training-materials/ASYLUM_12-Gender-Based-Asylum-MANUAL-ES.pdf/view (updating this manual following the precedent setting decision of *Matter of A-R-C-G*, 26 I&N Dec. 388 (B.I.A. 2014)).

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³ In this Manual, the term “victim” has been chosen over the term “survivor” because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term “victim” allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act’s (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim’s gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore we use “he” in this Manual to refer to the perpetrator and “she” is used to refer to the victim. Lastly, VAWA 2013 expanded the definition of underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – “actual or perceived gender-related characteristics.” On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child’s immigrant parent is married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse’s gender.

Sexual Assault Survivors and Gender-Based Asylum

she⁴ will be authorized to live and work in this country; subsequently apply to become a lawful permanent resident; and eventually become a U.S. citizen. This chapter is designed to help advocates and attorneys not trained in immigration law identify when a survivor might be eligible for gender-based asylum and explain how to help a survivor develop the evidentiary record necessary to succeed in bringing a gender-based asylum claim.

To qualify for asylum in the U.S., an applicant must establish that she is a refugee.⁵ To be classified as a refugee, an applicant must demonstrate that she has a well founded fear of suffering harm in the future in her home country that rises to the level of persecution. In addition, an applicant must establish that the persecution was or will be on account of **Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion**. Additionally, an applicant must establish that the persecution she suffered was committed by a foreign government, or, in the alternative, that the government of her home country is or was unwilling or unable to protect her from the harm of a non-governmental actor. As a general rule, an individual must apply for asylum within one year of her entry into the United States.

It is important to note that asylum is a legally complex process with highly specific criteria for eligibility. Denial of an asylum application can ultimately lead to deportation. U.S. law imposes many bars to asylum. For example, filing for asylum after one year of entry into the U.S. or an applicant's firm resettlement in another country may bar an applicant from receiving asylum. Likewise, certain criminal convictions, i.e. those constituting "particularly serious crime" may bar an individual from receiving asylum.⁶ Because an asylum applicant must navigate a minefield of statutory bars to relief, it is recommended that she proceed with her application only after consulting with an immigration attorney who has expertise both in immigration options for immigrant victims of violence and the intersection of immigration and crimes.

Additionally, gender-based asylum may not be the only option for relief for survivors of sexual assault. Under the Violence Against Women Act (VAWA), survivors of sexual assault or other violent crimes may benefit from relief under the U Visa, for victims of crimes, or the T Visa, for victims of trafficking.⁷ VAWA 2013 exempts self-petitioners and T/U visa petitioners from the "public charge exception" to admissibility. Immigrant crime victims are deemed inadmissible to the United States on public charge grounds are persons who are primarily dependent on the US government for subsistence.⁸ This provision no longer applies to VAWA self-petitioners, T and U visa victims, VAWA cancellation of removal, VAWA suspension of deportation and qualified immigrants subject to battering or extreme cruelty.⁹ Gender-based asylum claims often arise in connection with sexual assault and domestic violence that occurs in a survivor's home country. However, some of the violence may also occur within the United States, and some of the future threat of violence may also exist within the United States. This may happen when those committing the crimes against a survivor follow them to the United States, or are connected to others who live in the United States, and are able to continue to harm the survivor because of family or community connections. In these situations, where violence also occurs within the United States, a U visa can also be a viable option for a survivor.

U Visas are for victims of crime who have participated in the investigation or prosecution of said crime by local, state, or federal authorities. A U-visa will allow an individual to remain in the US lawfully for four years,¹⁰ and then U-visa recipients who can show humanitarian need, public interest or family unity may apply for lawful permanent residency and then later U.S. citizenship. Similarly, victims of human trafficking may benefit from either the U or T Visa, a visa specifically designed for victims of severe human trafficking. Again,

⁴ We use "she" and "her" in this chapter for ease of reading, but men can also be survivors of sexual assault who may be able to use the information in this chapter.

⁵ See INA § 101(a)(42); 8 U.S.C. § 1101(a)(42)(defining the term "refugee"); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at various sections of 8, 22 U.S.C.); United Nations Protocol Relating to the Status of Refugees, art. I § 2, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

⁶ INA § 208(b)(2)(A); 8 U.S.C. § 1158(b)(2)(A).

⁷ See INA § 101(a)(15)(T)-(U); 8 U.S.C. § 1101(a)(15)(T)-(U). A "U" visa is a visa for a victim of a crime who is or has cooperated with police to address the crime. A "T" visa is a visa for victims of trafficking. For more information on applicants who may be eligible for the U-visa see the U-visa chapter of this manual, for the T-visa see the T-visa chapter in this manual.

⁸ See 8 U.S.C. § 1182(a)(4)(E) INA § 212(a)(4) and Section 804 of VAWA

⁹ See Moira Fisher Preda, Cecilia Olavarria, Janice Kaguyutan, and Alicia (Lacy) Carra, *Preparing the VAWA Self-petition and Applying for Residence* (Ch. 3.3 at 29-30 for a full discussion).

¹⁰ See the U-visa chapter in this manual for more information.

Sexual Assault Survivors and Gender-Based Asylum

such a visa is contingent on the victim's assistance in the investigation or prosecution of the crime that is the basis for the visa. Like with asylum, both the U and T visas will provide the recipient with authorization to work, permanent residence, and an eventual path to citizenship. Based on these additional forms of relief, and dependent upon the facts underlying a particular case, a trained legal advocate may want to explore the availability of U and T visa relief in addition to pursuing an application for gender based asylum.

When is a survivor of sexual assault eligible for asylum?

Survivors of gang rape, stranger rape, acquaintance rape, attempted rape, domestic violence¹¹, or spousal rape may be eligible to file for asylum when their experiences cause them to fear returning to their home country.

AN APPLICANT FOR ASYLUM MUST SHOW:¹²

1. Persecution

- a. Has either already occurred¹³ -or-
- b. Applicant has a well-founded future fear of persecution
 - i. Rape or well-founded fear of rape may rise to the level of persecution¹⁴
 - ii. It is helpful to explain to a judge how rape is often a part of a larger picture of domestic violence.

2. Motive/ "On Account of"/Nexus

- a. An applicant must show that the persecution (in this case, rape, threat of rape, or sexual assault) was motivated, at least in part, by the applicants actual or perceived:
 - i. Race
 - ii. Religion
 - iii. Nationality
 - iv. Membership in a Particular Social Group¹⁵
 - v. Political Opinion

3. State Action/Inaction

- a. Either the country the survivor fled perpetrated or supported the sexual assault¹⁶ or
- b. The country was willfully blind, refused to act, or was unable to act to prevent or address the sexual assault/persecution.¹⁷

4. No safe option within home country

- a. The immigration officer or judge may raise the issue of whether the victim had a safe option to relocate within the victim's home country in a victim's asylum case. Under federal asylum

¹¹ The case law is not clear on this point as of August 2008. See *Matter of R-A-*, 22 I&N Dec. 906 (AG 2001), remanded by AG, 23 I. & N. Dec 694 (A.G. 2005) (remanding earlier decisions to the Board of Immigration Appeals for reconsideration under final rule, yet to be issued, still only proposed rule). Still pending August 2008.

¹² INA §101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

¹³ Past persecution generally only creates a presumption of a well founded fear of persecution that may be rebutted by the government. Past persecution only qualifies an applicant for relief when there is extraordinary persecution such that the victim should not be required to return to the country for humanitarian reasons regardless of whether or not there is a fear of future persecution. See *Matter of Chen*, 20 I. & N. Dec. 16 (B.I.A. 1989). Rape has met this standard. *Ali v. Ashcroft*, 394 F.3d 780, 787 (9th Cir. 2005).

¹⁴ *Ali*, 394 F.3d at 787 (gang rape based on family identity past persecution rising to the level that well founding fear of future persecution presumed by the court).

¹⁵ The definition of "membership in a particular social group" is currently under debate. See *In the Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985); *In re H-*, 21 I. & N. Dec. 337 (B.I.A. 1996); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000). Most recently DHS has explained that: An individual may be able to show that she is a member of a particular social group when that group is defined by an immutable characteristic, namely a characteristic that someone cannot or should not be required to change. Family, for example, has been repeatedly held to constitute a particular social group. While gender *per se* has not yet been found to constitute a particular social group, successful claims by applicants for gender-based asylum often rest on the notion of "Gender+" as a category. DHS has suggested "Gender +," with the plus defined as susceptibility to abuse/assault defined as an immutable characteristic: "married women who are unable to leave the relationship." Brief of Dep't of Homeland Sec.'s Position on Respondent's Eligibility for Relief at 31-38, *In re Alvarado-Pena* (INS No. A 73 753 922) (Feb. 9, 2004), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (hereinafter "DHS Brief *In re R-A-*").

¹⁶ *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998); *Surita v. INS*, 95 F.3d 814, 819-820 (9th Cir. 1996), as cited in the DHS Brief *In Re R-A-*.

¹⁷ *Mgoian v. INS*, 184 F.3d 1029, 1036-37 (9th Cir. 1999), as cited in the DHS Brief *In Re R-A-*.

Sexual Assault Survivors and Gender-Based Asylum

law the immigration officer or judge raising the issue of safe relocation bears the burden for showing that the survivor could safely relocate within her country of origin.¹⁸

- b. To counter this issue, look for country condition documentation that establishes the nature of domestic violence and sexual assault in the applicant's original country, as well as evidence of that government's unwillingness or inability to protect victims of sexual assault/domestic violence. This can be from the victim's own community as well as other communities in her home country where she has family members or some other support network.

5. Credibility

- a. The success of an asylum application often turns on the adjudicator's determination of the credibility of the applicant. While corroborating evidence in support of an applicant's claim is generally required, an applicant is not always required to corroborate her testimony to win her claim.¹⁹ There is guidance that suggests that an adjudicator should not make a negative credibility finding based on an applicant's reticence or failure to immediately disclose incidents of rape or sexual assault. Just as in the criminal context, however, the credibility of a survivor of sexual assault may be called into question by an adjudicator's personal bias.²⁰ It should be noted, however, that recent legislation has imposed more stringent requirements by imposing an obligation on the applicant to provide corroborating evidence where it is reasonably available.²¹

TIMING OF APPLICATION

As a general rule, an applicant for asylum has one year from her entry into the United States to file for asylum²². If an applicant has missed this deadline, she must either establish that her application was delayed due to circumstances beyond her control, or that circumstances have recently changed in her home country such that she now needs asylum.²³ Since there is such a short timeframe in which to apply for asylum, it is important that advocates or attorneys know how to identify potential gender based asylum cases and make referrals to immigration attorneys with experience in gender based asylum as quickly as possible.

The first exception to the one-year filing deadline requires a showing of "extraordinary circumstances related to the delay in filing" the application. These extraordinary circumstances must be factors beyond the applicant's control.²⁴ In addition, the application must have been filed within a reasonable time period given the nature of the circumstances. Examples of extraordinary circumstances include:²⁵

- Serious illness or disabling medical condition. Such conditions may include the effects of past persecution or abuse;
- Legal disability, for example if the applicant was an unaccompanied minor or suffered from a mental impairment;
- The applicant maintained Temporary Protected Status or some other status until a reasonable period before the filing of the asylum application;
- The applicant submitted an asylum application prior to the expiration of the one-year deadline, but that application was rejected by the Department of Homeland Security (DHS) as not properly filed, was returned to the applicant for corrections, and was re-filed within a reasonable period; or
- Ineffective assistance of counsel.

¹⁸ 8 C.F.R. § 208.13(b)(3)(i); *INS v. Ventura*, 537 U.S. 12, 123 S.Ct. 353 (2002).

¹⁹ Testimonial evidence is sufficient regarding sexual assault and asylum claims. *Shoaf v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000).

²⁰ *Id.*; see also, *Hassan v. Ashcroft*, 94 Fed.Appx. 461, 463 (9th Cir. 2004) (noting that judges should not speculate as to untrustworthiness and must have substantiated reason to disbelieve testimony, and that immediate disclosure of a sexual assault is not required for trustworthiness); see Lawyers Committee for Human Rights, *Refugee Woman at Risk; Unfair U.S. Laws Hurt Asylum Seekers* (2002)(finding INS officials often fail to recognize cross-cultural differences in evaluating asylum seekers credibility), available at http://www.humanrightsfirst.org/refugees/reports/refugee_women.pdf.

²¹ INA § 208(b)(1)(B)(ii)-(iii); 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii).

²² INA § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B).

²³ INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

²⁴ *Id.*

²⁵ See 8 C.F.R. § 208.4(a)(5).

Sexual Assault Survivors and Gender-Based Asylum

The second exception to the deadline requires a showing of “changed circumstances” that materially affect the applicant’s eligibility for asylum.²⁶ For example, after an applicant has entered the U.S. and resided for a period of time, her home country’s political, religious, or social structure may significantly change so as to expose her to a well founded fear of persecution if she were to return. Additionally, the applicant may have become a member of a group subject to persecution after entering the U.S. In these instances, the applicant is required to file for asylum within a reasonable time period following the change in circumstances.²⁷

Options after the deadline has passed

If the applicant is not deemed to have met an exception to the one-year filing deadline, an applicant may still be eligible for the related forms of relief of

- Withholding of Removal or
- Relief under the Convention Against Torture Claim (CAT) for “non-refoulement.”
“Non-refoulement” is an international technical term of law referring to a principle that says you cannot send someone back into a situation where they will be tortured.

Both forms of relief require a higher standard of proof than asylum and, as a result, can be difficult to establish. Evaluating the risks and benefits of each path must be done with the assistance of an immigration attorney to best serve the survivor’s interests. These options are explained further at the end of this chapter.

PROCESSING OF THE APPLICATION

Applications for asylum are filed either affirmatively, when the applicant has not already been placed in removal proceedings, or defensively, as a request²⁸ for relief once removal proceedings have commenced.

It is highly recommended that asylum applications include:

- a form I-589 application for asylum, withholding, and/or relief under the Convention Against Torture;
- the applicant’s detailed affidavit documenting her eligibility for asylum;
- extensive country condition documentation supporting the applicant’s claims of harm and fear,
- psychological evaluation of the applicant to support credibility and corroborate applicant’s claim of harm, and
- expert affidavits.

Applications for asylum are submitted to the asylum office, if filed affirmatively, or with the immigration court, if filed defensively. Advocates can help gather supporting evidence throughout their interactions with their client.

After an application for asylum is filed, an applicant may be able to obtain work authorization if the asylum application has not been adjudicated within 150 days of filing.²⁹ An applicant for asylum must appear for a detailed interview before a government asylum officer and must bring her own interpreter.³⁰ Family members who are in the United States, including a spouse and unmarried children under 21, may be included in the application and must also attend the interview.

At the interview, the asylum officer will review the application and evidence and ask the asylum applicant questions about the claim. It is important that the facts stated in the written application be correct and

²⁶ INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

²⁷ *Id.*

²⁸ Sometimes this request is also called a “prayer for relief”

²⁹ 8 C.F.R. § 208.7(a).

³⁰ 8 C.F.R. § 208.9(g); see U.S. Citizenship and Immigration Services Frequently Asked Questions About Asylum, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vqnextoid=da55809c4410f010VgnVCM1000000ecd190aRCRD&vqnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD>

Sexual Assault Survivors and Gender-Based Asylum

consistent with the applicant's oral testimony at the asylum interview. If there are inconsistencies, the applicant may be found not to be credible.³¹ If the asylum office feels that it cannot approve the application based on the evidence presented and the interview, the case will be "referred" to the immigration court for a hearing, and will become a defensive application for asylum in immigration court. In immigration court the applicant will have a second chance to present testimony, this time before an immigration judge, regarding the substance of her asylum claim.³²

If the judge denies the gender based asylum claim, the applicant will be ordered removed (deported) to her home country. An applicant should reserve her right to appeal the decision of the immigration judge and immediately seek legal representation if she does not already have counsel. The victim may appeal to the Board of Immigration Appeals (BIA) within thirty days of the final order of the Immigration Judge. If an applicant encounters new evidence that supports her claim that was unavailable at the time of her initial hearing, she should consult with an immigration attorney as to whether her application for asylum may be reopened in light of the new evidence.

If a victim's application is granted, the individual and dependent family members are conferred the status of "asylee." Asylees are authorized to live and work in the United States. They also qualify for certain public benefits. If the asylee has a spouse or children outside the United States, she may file a petition to classify them as asylees and allow them to enter the U.S. After one year, an asylee is eligible to apply for lawful permanent resident status (a green card).³³

Due to the high risk of immediate removal if an asylum case is denied by the immigration judge, it is strongly recommended that no immigrant victim attempt to make a gender-based asylum claim with out representation of an immigration lawyer with expertise on gender-based asylum and/or violence against women cases. If a victim is represented by an immigration attorney without this experience, those attorneys are strongly encouraged to consult with experts listed at the end of this chapter. If you are an advocate or non immigration attorney trying to help with a gender-based asylum claim you can call these resources as well in order to find help.

FACTORS TO CONSIDER IN PREPARING AN ASYLUM APPLICATION

The parameters of gender-based asylum remain somewhat unsettled due to the non-resolution of *In re R-A-*, a gender-based asylum claim brought by a Guatemalan survivor of domestic violence that is currently pending before the Board of Immigration Appeals (BIA).³⁴ Attorneys should consult with local asylum experts to gauge how best to construct a gender-based asylum application before the local asylum office or immigration court. While *In re R-A-* remains pending, advocates and attorneys should know that many individuals across the country have successfully prevailed on gender-based asylum claims. The following framework provides some guidance as to what an immigration lawyer will consider when preparing an application for gender-based asylum for a survivor of rape/sexual assault.

Persecution

Asylum case law supports a finding of persecution for asylum applicants who have been the victims of stranger/gang rape³⁵ or sexual assault by a government official.³⁶ Applicants who have been the victims of

³¹ See *INS Supplemental Refugee/Asylum Adjudication Guidelines*, reprinted in 67 Interpreter Releases 101-03 (Jan. 22, 1990); *In re A-S-*, 21 I. & N. Dec. 1106 (B.I.A. 1998); INA § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D).

³² If the applicant is already in removal proceedings before the immigration court prior to filing an asylum application, she can file her application directly with the immigration judge without first filing the application with the asylum office. The applicant, however, is still subject to the one year filing deadlines described above.

³³ INA § 209(b); 8 U.S.C. § 1159(b).

³⁴ *Matter of R-A-*, 22 I. & N. Dec. 906 (AG 2001), *remanded by AG*, 23 I&N Dec. 694 (AG 2005) (*remanded by Ashcroft* in 2005 to be reconsidered by BIA in light of new regulations, still not issued as of August 2008).

³⁵ *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005); *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); *Aguirre-Cervantes v. INS*, 242 F.3d 1169, *vacated in* 273 F.3d 1220 (9th Cir. 2001); *Hassan v. Ashcroft*, 94 Fed. Appx. 461 (9th Cir. 2004); *Paramasamy v. Ashcroft*, 295 F. 3d 1047 (9th Cir. 2002)

³⁶ *Shoafara v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000); *Lazo-Majano*, 813 F.2d 1432 (9th Cir. 1987).

Sexual Assault Survivors and Gender-Based Asylum

spousal rape³⁷ or domestic violence must largely rely on the discussion related to *In re R-A-* for guidance in preparing their application.³⁸ *In re R-A-* focused on domestic violence, the severity of torture, and the various forms of domestic violence, including rape, which the victim experienced. As of the date of this publication³⁹ there were no cases regarding spousal rape outside of the context of a long pattern of domestic violence/torture. However, amicus briefs and commentary have focused on the broad spectrum of persecution R-A- faced, including rape.

In every state within the United States spousal rape is defined as rape.⁴⁰ Explaining the context of domestic violence, power and control, and societal factors trapping a woman in a situation where sexual assault occurs will help asylum officers and immigration judges understand that spousal/family/partner rape is also persecution, which explains how the applicant may qualify for gender-based asylum because of spousal rape.⁴¹

Female Genital Mutilation as Sexual Assault

Female Genital Mutilation (FGM) is a form of sexual assault against women and girls, and is a form of persecution that may qualify an applicant for asylum. FGM is a crime in the United States⁴². Both the Ninth and Seventh circuits have written that FGM is unequivocally persecution qualifying for asylum.⁴³ However, as of publication there is some confusion over this determination because of a few new cases.⁴⁴ This type of confusion is why contacting an immigration expert on gender based asylum is crucial in preparing an asylum application. FGM is also a violation of human rights and should qualify for Convention Against Torture (CAT) relief. Fear of FGM can constitute a well-founded fear of persecution.⁴⁵

Motive, also called the "On Account of" or "Nexus" requirement

Asylum law requires proof that the assailant was motivated because of the survivor's race, religion, nationality, membership in a particular social group, or political opinion. These categories **do not** have to be the only motive for the assault, but merely need to be part of the assailant's motivation in persecuting the survivor.⁴⁶ Difficulties arise for gender based asylum applicants in meeting this requirement because there is not yet authority that suggests that gender, in and of itself, constitutes a particular social group. The Department of Homeland Security (DHS) issued a brief in support of a grant of asylum in *In re R-A-*. In its brief, it suggested

³⁷ Also commonly referred to as 'marital rape'.

³⁸ *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A.1999) (remanded by Ashcroft in 2005 to be reconsidered by BIA in light of new regulations, still not issued as of December 2007).

³⁹ December 2007.

⁴⁰ National Center for Victims of Crime, "Spousal Rape Laws: 20 years later"
<http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32701>

⁴¹ *Morrison v. INS*, 166 Fed. Appx. 583 (2d Cir. 2006).

⁴² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-209, §645 (1996):

SEC. 645. CRIMINALIZATION OF FEMALE GENITAL MUTILATION.

(a) Findings.--The Congress finds that— (1) the practice of female genital mutilation is carried out by members of certain cultural and religious groups within the United States; (2) the practice of female genital mutilation often results in the occurrence of physical and psychological health effects that harm the women involved; (3) such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional; (4) the unique circumstances surrounding the practice of female genital mutilation place it beyond the ability of any single State or local jurisdiction to control; (5) the practice of female genital mutilation can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law; and (6) Congress has the affirmative power under section 8 of article I, the necessary and proper clause, section 5 of the fourteenth amendment, as well as under the treaty clause, to the Constitution to enact such legislation.

(b) Crime.-- (1) In general.--Chapter 7 of title 18, United States Code, is amended by adding at the end the following: "**Sec. 116. Female genital mutilation** "(a) **Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.**" (b) A surgical operation is not a violation of this section if the operation is-- "(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or "(2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife. "(c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual." (2) Conforming amendment.--The table of sections at the beginning of chapter 7 of title 18, United States Code, is amended by adding at the end the following new item: "116. Female genital mutilation."

⁴³ See *Mohammed v. Gonzalez*, 400 F.3d 785, 795 (9th Cir. 2005); *Agor v. Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007).

⁴⁴ See *In re A-T-*, 24 I. & N. Dec. 296 (B.I.A. 2007), but also see the 2nd Circuit: *Bah v. Mukasey*, *Diallo v. DHS*, *Diallo V. DHS* (June 11, 2008).

⁴⁵ See *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)(involving a Togolese woman who fled female genital mutilation)

⁴⁶ *Shoafra v. INS*, 228 F.3d 1070 (9th Cir. 2000).

Sexual Assault Survivors and Gender-Based Asylum

that “Gender Plus(+)” may be a way to meet the nexus requirements of an asylum claim.⁴⁷ Under this framework, an applicant who believes she was persecuted on account of her gender could meet the nexus requirement by tying gender to another recognized social group such as family, nationality, religion, or political opinion.⁴⁸ Under such a framework, a survivor of gender based violence may have more likelihood of success if she was persecuted not solely on account of her gender, but on account of her gender within the context of her religion, nationality, or even political opinion. Thus, defining a particular social group more narrowly, such as “married women in X country who cannot leave their husbands or families” or “women in a particular country who refuse to conform to the gender-specific norms of their country,” may be successful theories for a gender-based asylum claim.⁴⁹ To prevail in an asylum claim, a survivor must demonstrate that their persecution was on account of one of the protected grounds.

Examples of demonstrating this nexus include:

- Assailant(s) used derogatory slurs before, during, or after the assault.⁵⁰
- Assailant(s) targeted the victim because of her membership in a racial, religious, nationality, social group, or her political beliefs.⁵¹
 - This could mean that her family, village, neighborhood, religious group, etc. was targeted in any way by the assailant(s).⁵²
- Military/guerilla groups assaulted her during civil war/rebellion/military action.⁵³
- An official used her, or her family’s, race, religion, nationality, social group, or political beliefs to force her to interact with that official and that official assaulted her, for example
 - during an official interrogation⁵⁴ or while blackmailing her to force her into domestic labor⁵⁵
- Her assailant(s) knew she would not be able to get any protection or help from the government because of her race, religion, nationality, social group, or political beliefs.⁵⁶
- She was targeted because of her family membership or to punish, hurt, or demean one of her family members.⁵⁷
- Her sexual identity is at odds with socially accepted sexual identities, and she has been persecuted or fears persecution on account of her sexual identity.⁵⁸

⁴⁷ DHS Brief *In re R-A-* at 20-21; *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207 (1987); *INS v. Sanchez-Trujillo*, 801 F.2d 1571 (9th Cir. 1986).

⁴⁸ DHS Brief *In re R-A-* at 20-22.

⁴⁹ See *Fatin v. INS*, 12 F.3d 1233 (3d Cir.1993) (recognizing feminism as a political opinion); *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)(involving a Togolese woman who fled female genital mutilation), and *In re S-A-*, 22 I. & N. Dec. 1328 (B.I.A. 2000)(involving a Moroccan woman whose father abused her for violating strict Islamic rules governing women’s behavior and dress).

⁵⁰ *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996); *Nedkova v. Ashcroft*, 83 Fed. Appx. 909 (9th Cir. 2003); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004); *Hassan v. Ashcroft*, 94 Fed. Appx. 461 (9th Cir. 2004).

⁵¹ *Shoafara v. INS*, 228 F.3d 1070, 1075-76 (9th Cir. 2000); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004).

⁵² *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004).

⁵³ *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066 (9th Cir. 2004). However, the Ninth Circuit has determined that politically motivated rape by a guerilla group was not persecution because many other women in same village were also targeted. *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001). Further, the Eighth Circuit held that guerilla gang rape was expected crime in area and no fear of future persecution by guerilla group meant denial of asylum status. *Menendez-Donis v. Ashcroft*, 360 F.3d 915 (8th Cir. 2004).

⁵⁴ *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997); *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996).

⁵⁵ *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

⁵⁶ *Angoucheva v. INS*, 106 F.3d 781 (7th Cir. 1997); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987); *Shoafara v. INS*, 228 F.3d 1070 (9th Cir. 2000).

⁵⁷ *Gonzales v. Thomas*, 547 U.S. 183, 126 S.Ct. 1613 (2006).

⁵⁸ See *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005)(granting asylum based only on a finding of a well-founded fear of future persecution for a gay man with AIDS from Lebanon); *Amanfi v. Ashcroft*, 328 F.3d 719 (3d Cir. 2003)(finding imputed membership in the particular social group of homosexuals to constitute a particular social group); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000)(gay men with a female sexual identity in Mexico constitute a protected social group for asylum law, sexual identity is here immutable); *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005).

Sexual Assault Survivors and Gender-Based Asylum

When the assailant was a spouse, a family member, or a partner

The nexus requirement is sometimes harder to demonstrate where the persecution occurred within a family, marriage, or intimate context. While the law is unsettled here, a DHS 2004 brief provides guidance on evidence that could be useful in meeting the nexus requirement in gender-based asylum cases.⁵⁹ The DHS brief guides applicants toward the following factors as supporting the nexus requirement:

- Direct evidence about the abuser's motives supporting the determination he believes he has the authority to abuse on account of victim's status in the relationship, such as:
 - Slurs or commentary by assailant about the survivor's race, nationality, religion, social group or political opinion
 - A long pattern of sexual assault and/or domestic violence
- Circumstantial evidence that patterns of violence are supported by the legal system/social norms of the country and reflect a prevalent belief within the country, such as:
 - Pattern of lack of response from public safety or government officials
 - Condoning of abuse or assault by community leaders
 - An inability to leave the relationship or living situation given current social or cultural conditions

State Action

In determining whether there was state action for the purposes of an asylum claim, the immigration judge or asylum officer will examine whether the applicant's government, including its agents and officials⁶⁰, was the persecutor or, alternatively, whether the government was unwilling or unable to control non-state persecutors.⁶¹

Ways to Find State Action:

- Was the assault committed by a public/government official acting in an official capacity?
- Did military or rebel/guerilla forces commit the abuse/assault?
- Was there a lack of response from public safety or community officials?
- Was the survivor denied or unable to ask for government/public official aid regarding the abuse/assault?
- Because of the assailant's official capacity was the survivor unable to get redress?
- Did a public official condone the sexual assault?⁶²
- Is there a cultural understanding that sexual assaults similar to the survivor's are commonplace or culturally accepted?

⁵⁹ See Brief for Respondent, *In Re: R-A-* (2004) (No. A-73-753-922). See also Memorandum from Phyllis Coven, Immigration and Naturalization Services, Department of Justice (May 26, 1995) (detailing former proposed regulations from 1995, copy attached in Appendix); Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (current proposed regulation, which should only be used as guidance since it is not yet promulgated, copy attached in Appendix).

⁶⁰ For example: police officers, bureaucrats, attorneys, investigators, civil servants, etc.

⁶¹ DHS Brief *In re R-A-* at 38.

⁶² See *Morrison v. INS*, 166 Fed. Appx. 583 (2d Cir. 2006).

Sexual Assault Survivors and Gender-Based Asylum

- Are there any laws or a lack of laws protecting people similar to the survivor from sexual assaults?
- Does divorcing or separating lead to further abuse, violence, or discrimination?
- Is there is a social stigma attached to a woman taking action or speaking about her husband, partner, family member assailant by seeking outside help?
- Are there laws that punish a woman for seeking outside help in a family, spousal, or domestic violence matter?
- Will the violence continue if she is returned to her home country?⁶³

Trustworthiness/Credibility

While guidance on adjudicating gender-based asylum claims stresses the importance of understanding the impact of gender-specific trauma, cultural, and language differences for a survivor appearing for her first asylum interview or hearing,⁶⁴ some immigration officers or judges may equate hesitance on the part of survivor to share her story with a lack of credibility. In cases of spousal, family, and partner sexual assault putting the assault in context of other abuse and power dynamics can help officials understand the reactions of a survivor and a community. Courts have acknowledged that a survivor's inability or failure to initially relate details of a sexual assault should not automatically result in a negative credibility finding.⁶⁵ In *In re RA*, the court explained that there was not a question of veracity because the abuse and its after effects were so severe and prolonged.⁶⁶

Advocates and attorneys working with immigrant victims of domestic violence and sexual assault should be aware that some potential gender-based asylum applicants will have been abused, assaulted, raped, or otherwise persecuted in the United States by someone who comes from their home country.⁶⁷ In such cases, the abuser or perpetrator could be deported back to the home country as a result of a criminal prosecution for crimes he committed against the applicant. If the victim is removed from the United States and returned to her home country, she may be in danger of persecution there, either by her abuser or by family members residing in that country. A survivor who has experienced domestic violence/sexual assault in the U.S. faces returning to her home country where her abuser now lives, and fears he may violently retaliate against her may have a basis for gender-based violence.

The lack of consistent interpretation from the courts on gender-related asylum claims, the complexity of this area of the law, and the grave risk associated with denial of an asylum claim makes it critical that advocates promptly refer clients with potential gender-based asylum claims to an experienced immigration attorney. Immigration attorneys who do not have experience working with battered immigrants or with gender-based asylum claims are encouraged to contact the asylum experts listed at the end of this chapter for advice and assistance in formulating case strategies in gender-based asylum cases.

⁶³ See Leslye E. Orloff & Nancy Kelly, *A Look at the Violence Against Women Act and Gender-Related Political Asylum*, 1 *Violence Against Women* 380, 393, 398 (1995).

⁶⁴ Memorandum from Phyllis Coven, Office of Int'l Affairs, INS to All INS Asylum Officers re: Guidelines, Office of International Affairs, Immigration and Naturalization Service, Regarding Adjudicating Asylum Cases on the Basis of Gender (May 26, 1996), available at <http://www.state.gov/s/l/65633.htm>. For children in general see Memorandum from Jeff Weiss, U.S. Dep't of Justice re: Guidelines for Children's Asylum Claims (Dec. 10, 1998).

⁶⁵ *Paramasamy v. Ashcroft*, 295 F.3d 1047, 1053 (9th Cir. 2002); *Kaur v. Ashcroft*, 112 Fed. Appx. 652 (9th Cir. 2004); *Fiadjoe v. Att'y Gen. of the United States*, 411 F.3d 135 (3d Cir. 2005).

⁶⁶ DHS Brief *In re R-A-* at 12.

⁶⁷ See the U visa chapter within this manual for other options if this is the case.

⁶⁷ DHS Brief *In re R-A-* at 12.

OTHER FORMS OF IMMIGRATION RELIEF RELATED TO ASYLUM

What is Withholding of Removal?

A survivor who applies for withholding of removal⁶⁸ must prove that it is more likely than not that they will face persecution on account of an enumerated ground if forced to return to their country of origin. Applicants for asylum typically file for asylum and withholding of removal concurrently. However, in cases where an applicant is barred from applying for asylum (such as missing the one-year filing deadline), an applicant will typically rely on a withholding of removal claim once they have applied for and been denied asylum. Applying for withholding of removal is the next step after asylum has been applied for and denied, or if an applicant has missed the filing deadline for asylum and cannot get a waiver, or asylum was denied on discretionary grounds.

When Does the Convention Against Torture (CAT)⁶⁹ Apply?

Applications for relief under Article III of the Convention Against Torture (CAT) are a last resort, and should only be attempted by an attorney after asylum and withholding claims have failed. A CAT claim arises from the international law principle of “non-refoulement,⁷⁰” and only applies where the survivor could show that being sent back to their home country would result in continuing of the torture and/or other cruel, inhuman, or degrading treatment or punishment, and that the government supports and/or refuses to act to prevent or correct the persecution.⁷¹ Under the International Convention Against Torture, rape could be considered torture.⁷²

Revictimization and Evolving Immigration Official Awareness

Survivors interacting with immigration officials can expect a range of understanding of and/or sensitivity to issues concerning gender-related violence, such as sexual assault or domestic violence. The Department of Homeland Security has issued guidance to all field officers on evaluating asylum claims that includes gender-specific persecution.⁷³ However, even with these recommendations, including cultural sensitivity to differences in eye contact, comfort with interviewers of a different gender, or manner of describing sexual assaults,⁷⁴ in 2002, the Lawyers Committee for Human Rights found that there was still a great need for increasing sensitivity of government officers handling asylum claims. The report found that many women felt revictimized, or were victimized, by the interview process.⁷⁵ Appeals courts have highlighted such failures on the part of asylum adjudicators as well.⁷⁶ Advocates and attorneys should work with survivors to prepare them for the retraumatization that may occur during the asylum interview process and work towards increasing immigration officials’ understanding of the dynamics of sexual assault and domestic violence.

Conclusion

Gender based asylum for survivors of sexual assault is an evolving field. With the aid of an immigration attorney who has experience in gender-based asylum claims or who works closely in developing the case with technical assistance experts (listed at the end of this chapter) a survivor can appropriately map out her asylum, withholding of removal, or CAT claims. No one should apply for asylum without the assistance of an

⁶⁸ INA § 241(b)(3); 8 U.S.C. § 1231(b)(3).

⁶⁹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, adopted Dec. 10, 1984, 108 Stat. 382, 85 U.N.T.S. 1465 (hereinafter “CAT”).

⁷⁰ This legal term of art means that someone should not be sent back into a situation where they will be tortured again.

⁷¹ Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has A Foreign Government Acquiesced in the Torture of Its Citizens*, 19 Geo. Immigr. L.J. 585, 590-591 (Summer 2005).

⁷² CAT

⁷³ Memorandum from Phyllis Coven, International and Naturalization Service (INS) Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995), available at http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf.

⁷⁴ *Id.* at 4-7.

⁷⁵ Lawyers Committee for Human Rights, *Refugee Woman at Risk; Unfair U.S. Laws Hurt Asylum Seekers* (2002).

⁷⁶ See *Angoucheva v. INS*, 106 F.3d 781, 793 (7th Cir. 1997).

immigration advocate or attorney who has experience with this type of case.⁷⁷ This chapter serves only as a basic introduction and should not be relied upon to apply for asylum without first consulting an attorney. Because asylum law is constantly evolving, these standards may have changed after publication of this manual.

Resources Available to Advocates and Attorneys

- **NIWAP's** Technical Assistance Hotline 202-274-4457 for referrals and technical assistance to attorneys and advocates. For more information also e-mail NIWAP at info@niwap.org, or visit <http://www.wcl.american.edu/niwap/>
- ASISTA's Technical Assistance Hotline 515-244-2469
- Mentoring and materials on domestic violence claims are available from **ASISTA**, <http://www.asistaonline.org/>.
- **AILA**, the American Immigration Lawyers Association, <http://www.aila.org/>
- **The Refugee Case Law Site** at the University of Michigan, providing cases, summaries, links, and information on refugee law around the world <http://www.refugeecaselaw.org/>
- **The Center for Gender and Refugee Studies** at the University of California, Hastings College of Law, monitors domestic violence asylum cases; summarizes current domestic and international case law, regulations, and standards particular to gender asylum; lists contact information for gender asylum experts; and provides individual case support. Phone 415-656-4791 <http://www.uchastings.edu/cgrs>
- **The Refugee Law Center**, in conjunction with the Harvard Immigration and Refugee Clinic Program, provides document support, attorney referrals and general advice on gender-based asylum claims. Phone 617-524-8400 <http://www.refugeelawcenter.org/>
- <http://www.asylumlaw.org/> - provides contact information for pro bono and low fee attorneys
- Request a free **UNHCR Handbook on Procedures and Criteria for Determining Refugee Status** from UNHCR, 1775 K Street, N.W. Suite 300, Washington, DC 20006, email usawa@unhcr.ch or access the *Handbook* on the Internet at <http://www.unhcr.ch>
- Contact a **university law clinic** where law students supervised by licensed attorneys represent asylum clients pro bono. Typically students have more time to prepare for cases and take on cutting-edge issues. Following is contact information for some law school clinics around the country:
 - American University International Human Rights Law Clinic
Washington College of Law
Washington, DC
Phone: 202-274-4147
 - Harvard Immigration and Refugee Law Clinic at
Greater Boston Legal Services
Boston, MA
Phone: 800-323-3205, 617-603-1808

⁷⁷ The following organizations can provide information and technical assistance:
National Immigrant Women's Advocacy Project – Phone: 202-274-4457, Fax: 202-274-4226, E-mail: niwap@wcl.american.edu; Address: 4910 Massachusetts Ave NW – Suite 16, Lower Level – Washington, DC 20016.
National Immigration Project, National Lawyers Guild – Phone: 617-227-9727, Fax: (617) 227-5495, E-mail: gail@nationalimmigrationproject.org; Address: 14 Beacon Street, Suite 602, Boston, MA 02108.

Sexual Assault Survivors and Gender-Based Asylum

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