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Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States

KAREN MUSALO* & STEPHEN KNIGHT**

1. Introduction

The past months have seen significant developments in gender asylum law in the United States, including the issuance of proposed asylum regulations that specifically address gender claims and the vacating of *Matter of R-A-*, the landmark negative decision.¹ The US developments should be considered in the context of recent progressive development of asylum law relating to gender in a number of other countries — including guidelines in the United Kingdom² and a decision from the Refugee Status Appeals Authority in New Zealand granting asylum to a woman from Iran whose claim was based on domestic violence and State-sanctioned discrimination.³ As will be explained below, events in the United States are positive, but when viewed in light of advances elsewhere, may be seen as continuing to reflect a high level of resistance to the progressive development of the law.

2. Background

The issue of women's human rights had long been neglected by the international human rights community. This historic exclusion of women's

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¹ *Matter of R-A-*, Interim Decision 3403, 2001 BIA LEXIS 1 (AG 2001; BIA 1999); Lara Stemple & Laura Black, Case Abstract IJRL/0274: 11 *IJRL* 386 (1999).

² Immigration Appellate Authority (United Kingdom), *Asylum Gender Guidelines* (Nov. 2000) ('UK Gender Guidelines'); http://www.courtservice.gov.uk/tribunals/tribs_home.htm

³ Refugee Appeal No. 71427/99, Refugee Status Appeals Authority (1999) (New Zealand).

human rights from the mainstream human rights movement resulted from perceptions that violations of women's rights implicated private rather than governmental action, and had to do with culture and tradition, putting the violations off-limits to criticism from the international community. The successful organizing and advocacy of women at two world conferences, the World Conference on Human Rights in Vienna in 1993 and the Fourth World Conference on Women in Beijing in 1995, led to formal recognition that 'the human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal enjoyment of all human rights and fundamental freedoms by women and girls is a priority for Governments and the United Nations and is essential for the advancement of women.'⁴

Many of the same perceptions that resulted in an historic failure to recognize violations of women's rights as violations of human rights also led to the failure of protection for women asylum seekers. The situations of persecution from which women flee often occur in the private sphere at the hands of the family or community, rather than being directly inflicted by governmental actors. In the early 1980s — in an apparent response to failures of protection — UNHCR's Executive Committee issued its conclusion on 'Refugee Women and International Protection,' stating among other things 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 1 A(2) of the 1951 United Nations Refugee Convention.⁵

UNHCR went further in 1993, recommending that States develop guidelines for gender claims.⁶ Canada then led the way in 1993 by publishing 'Women Refugee Claimants Fearing Gender-Related Persecution.'⁷ Soon thereafter, similar gender guidelines were published

⁴ Beijing Declaration and Platform for Action, para. 213, Fourth World Conference on Women (15 Sept. 1995): <http://www.un.org/womenwatch/daw/beijing/platform/index.html>. See, for example, Amnesty International Report, 'Human Rights are Women's Right!' (1995).

⁵ UNHCR Executive Committee Conclusion No. 39 (XXXVI) Refugee Women and International Protection, para. k (1985).

⁶ Karen Musalo, 'The Developing Jurisprudence of Gender-Based Claims,' in *Immigration & Nationality Law Handbook* (American Immigration Lawyers Association 1997).

⁷ Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution, Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993: 5 *IJRL* 278 (1993). The Canadian Guidelines were updated in 1996; see Chantal Bernier, 'The Immigration and Refugee Board of Canada Guidelines on Women Refugee Claimants fearing Gender-Related Persecution', (1997) *IJRL Special Issue*, Symposium on Gender-Based Persecution, 167.

by the United States⁸ and Australia;⁹ the United Kingdom published its own gender guidelines in November 2000.¹⁰

In the United States, there continued to be denials of asylum in gender-related cases that appeared contrary to both the letter and spirit of the INS guidelines. The most highly publicized of these was the 1995 denial by an immigration judge of asylum to Fauziya Kassindja,¹¹ a young woman who fled Togo to avoid being forced into a polygamous marriage to a man three times her age who demanded that she undergo the ritual practice of female genital mutilation. In the first major precedent decision on the issue of gender asylum, the US Board of Immigration Appeals (BIA or Board) reversed the immigration judge's denial and ruled that FGM constitutes persecution, and that it was imposed on account of the applicant's membership in a particular social group, which was defined, in part, by gender.¹²

During the litigation of the case, the US Immigration and Naturalization Service (INS) eventually conceded that a successful claim to asylum could be premised upon flight from FGM. But the INS argued strongly that disposition of the case required a new framework and definition of asylum, suggesting that harm could not constitute persecution unless it was inflicted with malignant or punitive intent. The INS argued that FGM 'would rarely be considered persecution [because] . . . most of its practitioners believe they are simply performing an important cultural rite that bonds the individual to society.'¹³ The INS proposed that the BIA adopt a three-part test to determine whether a particular harm 'shocks the conscience' and would thus be sufficient for asylum.¹⁴ The INS further suggested that past FGM could not serve as a basis for asylum because its victims, many

⁸ Phyllis Coven, INS Office of International Affairs, Memorandum: Considerations for Asylum Officers Adjudicating Asylum Claims from Women (26 May 1995) ('INS Gender Guidelines'); 7 *IJRL* 700 (1995); Lori Scialabba, 'The Immigration and Naturalization Service Considerations for Asylum Officers adjudicating Asylum Claims from Women', (1997) *IJRL Special Issue*, Symposium on Gender-Based Persecution, 174.

⁹ Dept. of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers (1996): (1997) *IJRL Special Issue*, Symposium on Gender-Based Persecution, 195.

¹⁰ UK Gender Guidelines, above n. 4.

¹¹ The correct spelling of Fauziya's last name is 'Kassindja.' When Ms. Kassindja arrived in the United States on 17 Dec. 1998, the INS erroneously recorded her name as 'Kasinga.' This misspelling was carried through to INS documents, briefs, and the court's decision in the case. It was not corrected until September 1996, when *New York Times* reporter Celia Dugger travelled to Togo to do an extensive story on the refugee's family and reported the correct spelling. Celia W. Dugger, 'A Refugee's Body is Intact but her Family is Torn,' *The New York Times*, 11 Sept. 1996, A1.

¹² *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996): (1997) *IJRL Special Issue*, Symposium on Gender-Based Persecution, 213. See Karen Musalo, 'In Re Kasinga: A Big Step Forward for Gender-Based Asylum Claims', 73 *Interpreter Releases* 853, 1 Jul. 1996.

¹³ INS Brief on Appeal, at 16-17 (on file with authors).

¹⁴ See Musalo, above n. 12.

of whom underwent the practice as children, could be presumed to have 'consented or at least acquiesced . . .'¹⁵

The BIA rejected all of these arguments, and instead applied well-established principles of asylum law, finding that the harm of FGM was grave enough to constitute persecution, that the government would not protect the applicant from private actors who intended to inflict the FGM, and that it was imposed on the applicant because of her membership in a group defined by the immutable or fundamental characteristics of gender, ethnicity, opposition to the practice, and the fact of having 'intact genitalia.'¹⁶

The *Kasinga* decision proved to be a watershed, paving the way for women's asylum claims. While adjudication remained uneven, asylum cases began to be granted to women fleeing gender persecution such as FGM, the repressive gender policies of the governments of Iran and Afghanistan, and domestic violence.¹⁷

3. The *R-A*- decision

For its part, however, the BIA did not publish another gender asylum decision¹⁸ until June 1999, when, in *Matter of R-A*,¹⁹ it reversed a grant of asylum to a Guatemalan woman, Rodi Alvarado Peña, who fled ten years of brutal domestic violence after her government failed to protect her.²⁰ The Immigration Judge had ruled that the applicant had suffered past persecution, and established a well-founded fear of future persecution at the hands of her husband.²¹ The immigration judge had specifically relied on *Kasinga* in making her finding that Ms Alvarado's persecution

¹⁵ INS Brief on Appeal, at 18 (on file with authors).

¹⁶ The BIA cited to *Matter of Acosta*, 19 I&N Dec. 211 (1985), holding that: 'In accordance with *Acosta*, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchamba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.' *Kasinga*, above n. 14.

¹⁷ The Center for Gender & Refugee Studies (CGRS) has learned of these decisions as it seeks to track INS asylum decision-making in gender cases, building a database that currently has over 570 individual cases, some 170 of which are made available at its website, <www.uchastings.edu/cgrs/>.

¹⁸ Many decisions by the BIA are unpublished, and have no precedential value.

¹⁹ Above n. 1.

²⁰ See Karen Musalo, 'Matter of R-A: An Analysis of the Decision and its Implications', 76 *Interpreter Releases* 1177, 9 Aug. 1999.

²¹ *In re Alvarado*, INS No. A73753922 (San Francisco, Calif., Immigration Court, Sept. 20, 1996).

was inflicted on account of her social group membership²² as well as actual and imputed political opinion.

The BIA reversed the immigration judge's grant of asylum to Ms Alvarado by a ten to five vote. The Board agreed that her husband's violent abuse rose to the level of persecution, and that she was unable to obtain State protection, but ruled that the persecution was not 'on account of' Ms Alvarado's membership in a particular social group or her political opinion.

On the political opinion aspect of the claim, the BIA held that Ms Alvarado's resistance to her husband's abuse did not constitute an actual political opinion, and that her husband was not motivated to harm her for any political opinion he may have imputed to her.²³ Its ruling appeared to contradict a line of cases that had adopted a more expansive notion of political opinion,²⁴ including the recognition that opposition to male domination can be a political opinion.²⁵

The Board's analysis on the social group basis of the claim appeared even more inconsistent with existing precedent. In its seminal 1985 *Acosta* decision, the BIA held that a social group was to be defined with reference to an immutable or fundamental characteristic that 'either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.'²⁶ The BIA and the federal circuit courts, with the exception of the Ninth Circuit Court of Appeals, had applied this rule consistently in social group cases. The BIA had relied upon the immutable or fundamental criteria of *Acosta* in *Kasinga* a scant three years earlier. However, the majority in *Matter of R-A-* ruled that determining whether

²² In her decision, the immigration judge noted that: 'The Board recently held that an asylum applicant who was unwilling to undergo female genital mutilation (FGM) had a well founded fear of persecution on account of her membership in a social group of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practised by that tribe, and who oppose the practice."' *In Re Kasinga*, Int. Dec. 3278 (BIA 1996). The Board recognized FGM as a form of sexual oppression to assure male dominance and exploitation. *Id.* In similar ways, the acceptance of spousal abuse assures male dominance and exploitation by enabling men to exert control over their female companions through threats or acts of violence. Thus, as a member of the particular social group of Guatemalan women, who are subjected to the threat of violence from their former or current male companions, who believe in male domination, the Respondent qualifies for asylum simply because she is being targeted for persecution on account of her gender and past association.' *Matter of R-A-* at 11-12 (San Francisco, CA, Immigration Court, 20 Sept. 1996).

²³ The BIA held that Ms. Alvarado's resistance to her husband's abuse did not constitute a political opinion within the meaning of the statute, but simply was an expression of the 'common human desire not to be abused . . . ' *Matter of R-A-*, above n. 22, at 12.

²⁴ See, for example, *Osorio v. INS*, 18 F.3d 1017 (2nd Cir. 1994).

²⁵ See, for example, *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

²⁶ *Matter of Acosta*, above n. 14, at 233. The *Acosta* test has been widely influential, including being cited by the highest courts of Canada, (*Attorney General v. Ward*, 2 S.C.R. 689, Supreme Court of Canada, 1993), and the United Kingdom (*Islam (A.P.) v. Secretary of State*, [1999] 2 W.L.R. 1015 (House of Lords); 11 *IJRL* 496 (1999)).

members of the suggested social group shared an immutable or fundamental characteristic was only a threshold, and that an asylum applicant making a claim under the social group category must also demonstrate additional criteria — that the members of the group ‘understand their own affiliation with the grouping, as do other persons within the particular society,’ and that the harm suffered ‘is itself an important societal attribute . . .’²⁷ Demonstrating a failure to appreciate the well-documented dynamic of domestic violence,²⁸ the BIA essentially ruled that Ms Alvarado’s husband had beaten her simply because he was mean.

The BIA’s decision was greeted with concern by advocates and scholars alike who correctly perceived it as having the potential to significantly impact a wide range of asylum cases premised on social group. The decision was especially troubling to those who had been watching and nurturing the slow and steady development of a gender jurisprudence in the United States. In the wake of *Matter of R-A-*, immigration judges around the country began to deny not only domestic violence claims, but a broad scope of gender asylum cases — sometimes refusing even to take testimony on the claim. Included among those cases that were denied on the basis of the Board’s decision in *Matter of R-A-* was that of a woman from a former Soviet republic who was abducted, gang-raped, prostituted to local government officials and traded to international sex traffickers,²⁹ and a Jordanian woman whose male relatives had vowed to kill her (‘honour killing’) because she had shamed the family by engaging in premarital sex with a man she loved and whom her father had forbidden her to marry.³⁰ In addition to such denials, the INS appeared consistently to appeal any grants of asylum that were entered by immigration judges.³¹

One exception to this generally negative trend was a BIA panel decision in *Matter of S-A-*,³² which involved a young Moroccan woman who suffered many years of extreme and escalating physical and emotional abuse at

²⁷ *Matter of R-A-*, above n. 1, at 17. The latter of the criteria appeared to be an explicit effort to distinguish and limit the *Kasinga* decision, in which the harm of FGM could be seen to involve an ‘important societal attribute.’

²⁸ See Deborah Anker, Pamela Goldberg, Nancy Kelly, et al., Brief of Amici Curiae in Support of Request for Certification and Reversal of the Decision of the Board of Immigration Appeals in *In Re R-A-* (21 Jan. 2000): <<http://www.uchastings.edu/cgrs/law/briefs.html>>.

²⁹ See Amnesty International Refugee Action 6/00 (18 May 2000): <http://www.uchastings.edu/cgrs/documents/advocacy/ai_fp5-00.pdf>; see also <<http://www.uchastings.edu/cgrs/campaigns/traffic-pros.htm>>.

³⁰ See Amnesty International Refugee Action 6/00 (18 May 2000), available on CGRS’s web site at <http://www.uchastings.edu/cgrs/documents/advocacy/ai_honor.pdf>; see also <<http://www.uchastings.edu/cgrs/campaigns/honor.htm>>.

³¹ This information is based on CGRS’s database of cases, which records appeals in a large percentage of grants during this period. See also Karen Musalo & Stephen Knight, ‘Gender-Based Asylum: An Analysis of Recent Trends,’ 77 *Interpreter Releases* 1533, 30 Oct. 2000: <<http://www.uchastings.edu/cgrs/law/articles.html>>.

³² *Matter of S-A-*, Interim Decision 3433 (BIA 2000).

the hands of her father. The asylum applicant had testified that her father's harsh physical abuse was prompted by his 'ultra-orthodox Muslim views, particularly pertaining to women,' which conflicted with her 'liberal Muslim views.'³³ After finding her to be credible, the BIA panel avoided the social group category put forward by the applicant's attorney and ruled that the young woman merited asylum because she had been persecuted on account of religion. The decision was originally unpublished, but was subsequently issued as a precedent decision at the request of the INS.³⁴ While this decision was a positive development, it has limited application for many gender asylum cases, which do not involve a difference in religious beliefs between the persecutor and the applicant.³⁵

The opinion in *Matter of R-A-* generated tremendous controversy,³⁶ brought into question the INS's commitment to its own gender guidelines and raised serious concerns regarding the nature and scope of protection for the victims of gender-based persecution. Recognition of the broad legal and policy implications of *Matter of R-A-* resulted in congressional interest, including efforts to encourage the Attorney General to review the decision.³⁷ The decision was also appealed to the federal Court of Appeals for the Ninth Circuit, where it remained stayed at the agreement of both parties.

Finally, responding to an effective 18-month national campaign involving congressional lobbying, grassroots mobilization, and a highly

³³ Ibid., 2.

³⁴ The ruling, released as an unpublished decision on 6 Aug. 1999, was issued as a precedent decision on 27 June 2000, at the request of the INS itself, which stated in a letter to the Board that the decision, 'addresses important issues arising in asylum law after the precedent decision in *Matter of R-A-* . . . The reasoning makes it clear that harm inflicted upon a woman by a family member may be a basis for asylum if it is on account of a protected ground, and if the other generally applicable requirements of the asylum laws are met.' Letter from Julia Doig, Chief Appellate Counsel, INS, to Paul Schmidt, Chairman, BIA (4 May 2000), available at <www.uchastings.edu/cgrs/law/biadecc.html>.

³⁵ As this article was being written, the Ninth Circuit Court of Appeals granted asylum to a young woman from Mexico who fled after she was unable to gain protection from her father's violent abuse. *Aguirre-Cervantes v. INS*, — F.3d —, 2001 U.S. App. LEXIS 4166 (9th Cir. 21 Mar. 2001): <<http://www.uchastings.edu/cgrs/law/feddec.html>>. For a discussion of this case, see below, Part 5.

³⁶ For a partial list of news articles, opinion pieces, Amnesty International Refugee Actions, and other materials, see this CGRS web site page: <<http://www.uchastings.edu/cgrs/campaigns/alvarado.htm>>.

³⁷ The request to the Attorney General is not an appeal as of right; instead, pursuant to regulation the Attorney General has the discretion to review decisions of the BIA referred to her (1) upon her own request, (2) upon the request of the BIA Chairman, or a Board majority, and (3) upon a request by the INS Commissioner. 8 C.F.R. § 3.1(h). Direct intervention by the Attorney General was sought in order to obtain nationwide reversal of the negative decision, which would not have been achieved through a successful outcome in the Ninth Circuit Court of Appeals alone, which covers a limited geographical area.

successful media strategy,³⁸ Attorney General Janet Reno issued an order (on her last day in office before the commencement of the new Bush Administration) vacating the BIA's decision in *Matter of R-A*.³⁹ Rather than use her authority to issue a decision on the merits that, like *Kasinga*, applied established asylum law principles to grant asylum to Ms Alvarado, however, the Attorney General remanded the case to the BIA. Her order directs the BIA to reconsider the case under a set of proposed amendments to the asylum regulations that had been drafted by the INS and published on 7 December 2000 in the US Federal Register.⁴⁰

4. The proposed gender/social group regulations

It is widely acknowledged that the INS's proposed regulations were developed in response to the national advocacy effort to reverse the *Matter of R-A* decision. The preamble⁴¹ to the proposed regulations state that they remove 'certain barriers' that the decision in *Matter of R-A* posed to claims involving domestic violence, and summarizes the purpose of the regulations as follows:

This rule provides guidance on the definitions of 'persecution' and 'membership in a particular social group,' as well as what it means for persecution to be 'on account of' a protected characteristic in the definition of a refugee and to make clear that gender can form the basis of a particular social group. It restates that gender can form the basis of a particular social group. It also establishes principles for the interpretation and application of the various components of the statutory definition of 'refugee' . . . and, in particular, will aid in the assessment of claims made by applicants who have suffered or fear domestic violence.⁴²

The summary adds that 'these issues require further examination after the . . . decision *Matter of R-A*.'⁴³

Under US law, proposed regulations have a 'comment period' during which interested parties may write and express their views on the proposal; the responsible governmental agency is to review and take into consideration the comments prior to issuing the regulations in final form.⁴⁴

³⁸ The campaign, coordinated in part by the Center for Gender and Refugee Studies, included repeated mail and email campaigns by interested citizen activists, numerous congressional letters to the Attorney General, at least one congressional meeting between the Attorney General and interested members of the House of Representatives, and high-level contacts within the administration.

³⁹ See *Matter of R-A*, above n. 1.

⁴⁰ See 65 Fed. Reg. 76588-76598 (7 Dec. 2000).

⁴¹ The preamble to the proposed regulations is much more lengthy and detailed than the proposed rules themselves; the preamble runs for nine full pages, while the proposed rules themselves are about one page long. The following discussion of the regulations will refer not only to the actual proposed regulation, but to the preamble. Although the preamble does not have the force of law, it can be referenced as indicating INS policy on the issue.

⁴² 65 Fed. Reg. at 76588.

⁴³ *Ibid.*, 76588.

⁴⁴ See 5 U.S.C. § 553 (2000).

UNHCR and a number of NGOs, such as the Women's Commission for Refugee Women and Children, the Lawyers Committee for Human Rights, the Refugee Law Center, and the Center for Gender and Refugee Studies, submitted comments endorsing certain aspects of the proposed regulations, and critiquing others.⁴⁵ Under normal circumstances, after receiving public comments, the agency would proceed to prepare the regulations for publication in final form. However, these were not normal circumstances, in that the deadline for submission of comments was 22 January 2001 — the first working day of the new administration under US President George W. Bush. This timing adds an element of uncertainty to the fate of the regulations, because it is possible that the Bush administration could decide it is not in agreement with their content, and put a halt to them.⁴⁶

There is a general consensus that the proposed regulations represent a position more consistent with international norms and US jurisprudence than the BIA's now-vacated *R-A-* decision. The recognition in the preamble that applicants fleeing gender persecution can be granted asylum, including on the basis of a particular social group defined in part by gender, is a positive step.⁴⁷ The regulations also remove any requirement, imposed by *Matter of R-A-*, that an applicant must prove her persecutor had targeted other members of the proposed social group.⁴⁸ The regulations codify several helpful developments of recent asylum law, including the rule that persecution is not dependent on 'whether the persecutor intends to cause the harm.'⁴⁹ There is no mention of any need to demonstrate that the harm suffered involved an 'important societal attribute.'⁵⁰ Finally, the rule formalizes the applicability of the 'imputed political opinion' doctrine to the other four grounds, i.e., an asylum claim may be based on persecution inflicted on account of imputed race, religion, etc.⁵¹

⁴⁵ See 'Proposed Rule Addresses Asylum for Victims of Gender-based Persecution,' 22 Refugee Reports 1 (Jan. 2001).

⁴⁶ The Bush administration has criticized a number of the many regulations published in the later months of the administration of former President Bill Clinton, and White House Chief of Staff Andrew Card in January ordered a 60-day hold on all final regulations. Cindy Skrzycki, 'Opposition Braces for Rule Rollback,' *Washington Post*, 20 Feb. 2001. The asylum regulations, however, were not yet published in final form, and will require affirmative action by the new administration in order to come into effect.

⁴⁷ 65 Fed. Reg. 76588–89.

⁴⁸ *Ibid.*, 76592–93 (preamble). Note that the regulations do not do away with this element, but rather make it optional rather than mandatory. See *ibid.*, 76598, Proposed 8 C.F.R. § 208.15(b): 'Evidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered but shall not be required.'

⁴⁹ *Ibid.*, 76597 (Proposed 8 C.F.R. §208.15(a)).

⁵⁰ See above text accompanying n. 27.

⁵¹ 65 Fed. Reg. at 76597–98, Proposed 8 C.F.R. §208.15(b): 'An asylum applicant must establish that the persecutor acted . . . on account of what the persecutor perceives to be the applicant's race, religion, nationality, membership in an particular social group and political opinion.'

However, there are problematic aspects of the proposed rules that are inconsistent with settled US case law. The following is a summary and critique of key gender-related aspects of the regulations.⁵²

4.1 The preamble

In the preamble to the proposed regulations, the INS explicitly sought comments on three broad, overarching issues: (1) '[h]ow persecution claims based on domestic violence might be conceptualized and evaluated within the framework of asylum law;' (2) how asylum adjudicators 'should determine whether a particular victim of domestic violence (or other acts of persecution by an individual non-state actor) has suffered this treatment 'on account of' membership in a particular social group . . .'; and (3) whether claims involving persecution by non-state actors raise 'distinct issues concerning statutory eligibility or the exercise of discretion.'⁵³

The drafting of these regulations was reported to be highly contentious within the INS, and the phrasing of these questions is indicative of the nature of the debate within the INS about gender asylum claims and non-state actor claims generally. Advocates have consistently argued that women fleeing persecution related to their gender should be granted protection under existing case law, and that no new or different analysis need be developed to address their cases. Although claims involving domestic violence may appear different from more traditional claims involving, for instance, persecution for racial reasons, they come squarely within the protection of well-established principles of asylum law, as do gender claims generally.⁵⁴ As stated in the UK gender guidelines, '[g]ender-specific harm does not differ analytically from other forms of ill-treatment

⁵² The proposed regulations address a range of asylum issues, not only those related to gender, however, for the purposes of this article, we will focus on those matters most relevant to the gender issues.

⁵³ 65 Fed. Reg. 76589.

⁵⁴ These well-established principles require that the harm — which is at the hands of the government, or a group the government cannot or will not control — be sufficiently serious to constitute persecution, and that it be imposed 'on account of' the victim's race, religion, nationality, political opinion, or membership in a particular social group. See, for example, *Aguirre*, above n. 35. For more on this decision, see below, Part 5. Asylum law has always recognized that persecution may be committed not only by governments, but by other actors who the State is unable or unwilling to control: United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status*, (Geneva, 1979), para. 65: 'Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.' Since the passage of the 1980 Refugee Act, numerous BIA and federal court decisions have granted asylum in cases of persecution by non-state actors. *Sotelo-Aquije v. INS*, 17 F.3d 33, 37 (2d Cir. 1994): 'the statute protects against persecution not only by government forces but also by nongovernmental groups that the government cannot control.' *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984) (persecution by FMLN guerrillas); *Kasinga*, above n. 12; *Matter of S-A-*, Interim Decision 343 (BIA 2000). Case law in Canada, New Zealand and the United Kingdom is in agreement. See, for example, *Islam v. Secretary of State for the Home Department*, [1999] 2 AC 629 (H.L. 1999); *Re G7*, Refugee Appeal No. 1312/93, Refugee Status Appeals Authority (1999) (New Zealand).

and violence that are commonly held to amount to persecution and may constitute torture or cruel inhuman or degrading treatment or punishment.⁵⁵ From the questions raised in the preamble, it may be inferred that the INS does not fully accept this premise.

4.2 The definition of persecution

The proposed regulations seek for the first time under US law to set out a definition of persecution, describing it as ‘the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant regardless of whether the persecutor intends to cause the harm.’⁵⁶

‘There is no universally accepted definition of “persecution” and various attempts to formulate such a definition have met with little success.’⁵⁷ The meaning of persecution has been given considerable definition through developing case law and, as stated by UNHCR in its comments on the proposal, ‘[d]efining persecution by regulation could be problematic and confusing for adjudicators. Instead, UNHCR proposes that the rule allow and encourage adjudicators to consider the standards provided for in international human rights instruments to determine what is persecution.’⁵⁸ Striking in their absence is any mention to these standards in the proposed regulations.⁵⁹ The 1951 Convention makes reference to human rights norms in its preamble, and commentators agree that such norms are relevant in fleshing out the concept of persecution. Courts in Canada, the United Kingdom and Australia have all sought to define persecution by reference to international human rights standards,⁶⁰ as have the various gender guidelines.⁶¹

The final clause of the rule (‘regardless of whether the persecutor intends to cause the harm’) is intended to address situations in which the

⁵⁵ Immigration Appellate Authority (United Kingdom), *Asylum Gender Guidelines*, para. 2A.16 (Nov. 2000) (‘UK Gender Guidelines’), <http://www.courtservice.gov.uk/tribunals/tribs_home.htm>.

⁵⁶ 65 Fed. Reg. at 76597, Proposed 8 C.F.R. §208.15(a).

⁵⁷ UNHCR *Handbook*, above n. 54, para. 51.

⁵⁸ Guenet Guebre-Christos, Regional Representative, UNHCR Regional Office for the United States of America & the Caribbean, ‘Comments on Proposed Rule Regarding Asylum and Withholding Definitions’ at 4 (22 Jan. 2001) (hereafter ‘UNHCR comments’; copy on file with authors).

⁵⁹ The only reference to human rights at all comes in the preamble’s parenthetical quotation from para. 51 of the UNHCR *Handbook*, noting that ‘serious violations of human rights . . . would also constitute persecution.’ 65 Fed. Reg. at 76590.

⁶⁰ See, for example, *Ward*, above n. 26; Refugee Appeal No. 71427/99, above n. 3, para. 50; *Horvath* (IAT) [1999] INLR 7, [1999] Imm AR 121.

⁶¹ Relevant international authority cited by the Australian gender guidelines, for example, includes UDHR48, ICCPR66, ICESCR66, CAT84, CERD65, CEDW79, CRC89, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Convention on the Nationality of Married Women; 1949 Geneva Conventions on the Laws of War and the two Additional Protocols of 1977; Declaration on the Protection of Women and Children in Emergency and Armed Conflict; and Declaration on the Elimination of Violence Against Women. Department of Immigration and Multicultural Affairs, Australia, ‘Refugee and humanitarian visa applicants: Guidelines on gender issues for decision makers,’ (July 1996), above n. 9, para. 2.2.

persecutors believe they are carrying out an act beneficial to the victim, which in reality constitutes a harm rising to the level of persecution. The Board announced this rule in *Kasinga* in light of the societal attitude that FGM is a social good, and the Ninth Circuit Court of Appeals applied it in *Pitcherskaia v. INS*,⁶² a case involving forced psychiatric treatment and threatened institutionalization in an effort to ‘cure’ the applicant of her homosexuality. The preamble to the regulations provide that the ‘Department [of Justice] believes that it is appropriate to codify an interpretation that is drawn from the conclusion reached by both the Board in *Kasinga* and the Ninth Circuit in *Pitcherskaia*: that the existence of persecution does not require a ‘malignant’ or ‘punitive’ intent on the part of the persecutor.’⁶³ This rule’s clarification of this point can be particularly helpful in gender cases, where the type of harm is frequently considered to be a cultural or societal norm or benefit.

In its definition of persecution, the proposed regulations also address the issue of state action, and codify existing case law that the harm or suffering ‘must be inflicted by the government or by a person or group the government is unable or unwilling to control.’⁶⁴ The rule states:

[I]n evaluating whether a government is *unwilling or unable* to control the infliction of harm or suffering, the immigration judge or 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 state protection that exists.⁶⁵

This issue is particularly relevant in gender cases because the persecution is often at the hands of private actors, rather than the government. The regulation goes on to list a number of ‘pertinent’ factors that may be considered, including: government complicity; attempts to obtain protection; perfunctory official action; a pattern of government unresponsiveness; general country conditions and the government’s denial of services; government policies relating to the harm or suffering; and ‘any steps the government has taken to prevent infliction of such harm or suffering.’⁶⁶

UNHCR expressed concern about this section of the regulation. While noting that the listed factors can be useful on the issue of whether a government is *unwilling* to provide protection, UNHCR stated that

[s]uch evidence is less useful, if not misleading, in determining the ‘inability’ of a state to provide protection. Inability is a result-driven determination, i.e., does the protection exist or not. The efforts of the State to provide protection are

⁶² *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

⁶³ 65 Fed. Reg. at 76590.

⁶⁴ *Ibid.*, 76597, Proposed 8 C.F.R. §208.15(a).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

largely irrelevant. A government may take numerous 'reasonable steps,' indeed it may take 'extraordinary steps,' to protect its nationals. . . . Yet, if despite these best efforts, its nationals continue to have a well-founded fear of persecution . . . protection should be afforded.⁶⁷

UNHCR expressed concern that the 'proposed 'reasonable steps' standard . . . could result in the denial of refugee status where no effective State protection exists[,] and suggested several changes to the language, including that adjudicators consider 'other evidence that an attempt to seek government protection would be futile.'⁶⁸

4.3 'On account of'

The proposed regulations address the nexus or 'on account of' element of the refugee definition, and provide that an 'asylum applicant must establish that the persecutor acted, or that there is a reasonable possibility that the persecutor would act, against the applicant on account of the applicant's race, religion, nationality, membership in a particular social group, or political opinion, or 'what the persecutor perceives to be the applicant's race, religion, nationality, membership in a particular social group or political opinion.'⁶⁹ As mentioned above, this aspect of the regulation applies the concept of an *imputed* enumerated ground — which has generally been limited to political opinion — to all five of the grounds, and is therefore essentially protection-oriented.

The proposed 'on account of' regulation also directs itself to the issue of mixed motives. The majority position in US jurisprudence is that in a case where a persecutor has mixed motives, a protected characteristic need only be one of the motivations.⁷⁰ The rule proposes to depart from this principle and would require the applicant to establish that the 'protected characteristic is *central* to the persecutor's motivation to act against the applicant.'⁷¹ This aspect of the rule has been criticized for departing from settled law and substantially increasing the asylum seeker's

⁶⁷ UNHCR comments, above n. 58, 4–5.

⁶⁸ *Ibid.*, 5, 6.

⁶⁹ 65 Fed. Reg. 76597–98.

⁷⁰ See, for example, *Tagaga v. INS*, 228 F. 3d 1030, 1035 (9th Cir. 2000): 'We have held that a petitioner for asylum need not prove that his well-founded fear of persecution is based exclusively on a ground for refugee status . . . Rather, so long as one of the motives for the feared persecutory conduct relates to a protected ground, the petitioner is entitled to that status'; *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994); *Matter of T-M-B-*, 21 I. & N. Dec. 775, (BIA 1997): 'An applicant for asylum need not show conclusively why persecution occurred in the past or is likely to occur in the future. However, the applicant must produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or implied protected ground' (overruled on other grounds sub nom. *Borja v. INS*).

⁷¹ 65 Fed. Reg. 76598, Proposed 8 C.F.R. §208.15(b), emphasis added. In making this showing, an applicant can use direct or circumstantial evidence. *Ibid.*

evidentiary burden.⁷² As UNHCR states in its comments, '[t]here is no requirement in the Convention, Protocol, *Handbook* or Executive Committee documents that one of the protected grounds be central to the persecutor's motivation.'⁷³

The proposed rule also reiterates the rule set forth by the US Supreme Court in *INS v. Elias Zacarias*⁷⁴ that proof of the persecutor's motivation may be established by direct or circumstantial evidence. It also goes on to state that '[e]vidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered, but shall not be required.'⁷⁵ In *Matter of R-A-*, the BIA had relied partly upon the fact that the applicant's husband did not persecute other women who shared the applicant's characteristics to reach its conclusion that the applicant was not persecuted because she was a member of a particular social group. The proposed regulations expressly reject that element of the BIA's decision. The rejection of this requirement is especially relevant in gender cases, where the persecutor

⁷² In its comments on the proposed regulations, UNHCR wrote that: 'US asylum policy and case law as reflected in U.S. Board of Immigration Appeals decisions is that '[t]he persecutor may have mixed motivations in harming the applicant [and] so long as the persecutor is motivated in part on account of a protected characteristic, the applicant may establish the requisite nexus.' Currently, under US law, there is no requirement that a protected characteristic be central to a persecutor's motivation when the persecutor has mixed motivations.' UNHCR Comments, above n. 58, at 7 (citations omitted). For its part, CGRS commented: 'It is difficult enough to establish the motivation or motivations of persecutors, who are unlikely to verbally articulate the reasons for their persecutory acts. The requirement to show that a protected basis was 'central' to the motivation of the persecutor will substantially increase the asylum seeker's evidentiary burden. An increase of their already high evidentiary burden could result in the denial of asylum to individuals who face severe threats to their life or freedom, but who cannot adequately read the mind of their persecutors to establish centrality of motivation. This is precisely the situation that the mixed motives case law is designed to remedy. "In adjudicating mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum law." *Matter of S-P-*, 21 I. & N. Dec. 486, 1996 BIA LEXIS 25 at *15-16 (BIA 1996).' Karen Musalo and Stephen Knight, CGRS Comments on Proposed INS Social Group Regulations, at 7 (18 Jan. 2001) (on file with authors).

⁷³ UNHCR Comments, above n. 58, at 7. See also para. 66, UNHCR *Handbook*: 'it is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not however, his duty to analyze his case to such an extent as to identify the reasons in detail.'

⁷⁴ *INS v. Elias Zacarias*, 502 U.S. 478 (U.S. 1992).

⁷⁵ 65 Fed. Reg. 76598 (Proposed 8 C.F.R. § 208.15(b)).

may act only against a woman within his control, which may be limited to his spouse or child.⁷⁶

In reaching its conclusion that the applicant's husband tormented her because he was a vicious person, and not for reasons related to her gender or marital relationship, the BIA in *Matter of R-A-* ignored the dynamic of domestic violence, as well as the societal context in which it occurs. The preamble to the regulations directly addresses this point, and suggests an analytical approach that takes these broader factors into consideration:

[I]n the domestic violence context, an adjudicator would consider any 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 enters into 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.⁷⁷

An improved understanding of these issues could be of assistance in gender cases generally.

4.4 Particular social group

The heart of the proposed new regulations is its provision relating to particular social group. The rule first restates the law as laid out in the respected *Acosta* decision, defining a particular social group as one

composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.⁷⁸

This language is consistent both with US and international case law regarding the meaning of the particular social group category.⁷⁹

⁷⁶ The preamble to the regulations provide a useful discussion on this point, explaining: 'As an evidentiary matter, it often would be reasonable to expect that a person who is motivated to harm a victim because of a characteristic the victim shares with others would be prone to harm or threaten others who share the targeted characteristic. Such a showing should not necessarily be required as a matter of law, however, in order for an applicant to satisfy the "on account of" requirement. In some cases, a persecutor may in fact target an individual victim because of a shared characteristic, even though the persecutor does not act against others who possess the same characteristic. For example, in a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim's race.' 65 Fed. Reg. at 76592-93.

⁷⁷ *Ibid.*, 76593.

⁷⁸ *Ibid.*, 76598, Proposed 8 C.F.R. §208.15(c)(1).

⁷⁹ See, for example, *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993), *Matter of Kasinga*, Interim Decision 3278 (BIA 1996), *Ward*, above n. 26; *Islam v. Secretary of State for the Home Department*, [1999] 2 AC 629 (H.L. 1999) (United Kingdom); *Re GJ*, Refugee Appeal No. 1312/93, Refugee Status Appeals Authority (1999) (New Zealand).

In line with well-accepted principles, the proposed regulation states that the group ‘must exist independently of the fact of persecution’ and provides that in determining ‘whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant’s individual circumstances and . . . country conditions information about the applicant’s society.’⁸⁰ As part of its overarching focus on domestic violence claims, the preamble identifies gender as an immutable trait, and notes that an applicant’s marital status could be immutable. The preamble gives examples of situations where ‘a woman could not reasonably be expected to divorce because of religious, cultural or legal restraints’ or could not otherwise be expected to leave her relationship.⁸¹

Consistent with *Acosta* and *Ward*,⁸² the proposed regulations accept that past experience could define a particular social group. However, instead of accepting that a social group can always be based on past experience since historical reality is by definition immutable, it limits it to circumstances where the past experience is one that ‘at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.’⁸³ The intent of this limiting language is made clear in the preamble, where the example of past gang membership is given as a past experience that could have been avoided, and thus would not be recognized as the basis for a particular social group.⁸⁴

A controversial aspect of the proposed regulation on the definition of a particular group is its addition of six additional factors that adjudicators may — but are not required to — consider in determining the existence of a particular social group:

- (1) the members of the group are closely affiliated with each other;
- (2) the members are driven by a common motive or interest;
- (3) a voluntary associational relationship exists among them;
- (4) the group is a societal faction or recognized segment of the population in the country;

⁸⁰ 65 Fed. Reg. 76598, Proposed 8 C.F.R. §208.15(c)(1).

⁸¹ *Ibid.*, 76594.

⁸² As the BIA explained in *Acosta*: ‘we interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.’ *Acosta*, above n. 16, at 233; see also *Ward*, above n. 26.

⁸³ 65 Fed. Reg. 76598, Proposed 8 C.F.R. §208.15(c)(2).

⁸⁴ This limitation has been criticized by CGRS and others on the basis that such concerns ‘are fully addressed in other asylum principles, such as the distinction between prosecution and persecution and the ability to deny asylum to an applicant who has engaged in non-political criminal activity.’ CGRS Comments, above n. 72, at 11.

- (5) members view themselves as members of the group;
- (6) society distinguishes members of the group for different treatment or status than others in the society.⁸⁵

The first three of these criteria are drawn from a 1986 Ninth Circuit Court of Appeals decision, *Sanchez-Trujillo v. INS*,⁸⁶ and the last three from the Board's decision in *Matter of R-A*.

There is some concern that the effect of including a list will be that some adjudicators may use the factors as a checklist, and will deny those cases in which all of the factors are not established. In response to this concern, UNHCR and other commentators suggested that the proposal be slightly modified to make clear that the list is neither exclusive nor determinative of the formation of a particular social group.⁸⁷

The preamble reiterates a number of times that the list of six criteria are 'non-exclusive' and not determinative of whether a particular social group exists. If the regulations are finalized and become law, it will be an important inquiry to survey to what degree adjudicators appear to rely upon these factors as determinative criteria, rather than as criteria that 'may be relevant in some cases, but not as requirements for a particular social group.'⁸⁸

4.5 Political opinion

The preamble to the regulations states that '[t]he Board's analysis of the political opinion claim is consistent with longstanding principles of asylum law and is not altered by this rule.'⁸⁹ The BIA made a legal and factual finding that Ms Alvarado's husband had not persecuted her on account of any political opinion she may have held.⁹⁰ The legal finding was that her opposition to his domination did not constitute a political opinion, but was simply an expression of the 'common human desire not to be harmed or abused'⁹¹ while the factual finding was that her husband was not motivated to harm her because of this opinion. As a number of US cases have recognized, however, opposition to male domination can be a political opinion.⁹² The Board's application of those principles displayed a fundamental misunderstanding of non-traditional political opinions,

⁸⁵ 65 Fed. Reg. 76598, Proposed 8 C.F.R. §208.15(c)(3).

⁸⁶ *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

⁸⁷ UNHCR Comments, above n. 58, at 12; CGRS Comments, above n. 72, at 10–11. To date, the Ninth Circuit Court of Appeals is the only court that has applied the proposed factors; in its recent decision granting asylum to a Mexican teenager fleeing domestic violence, it took note of the proposed six-factor test and found that the applicant met all the requirements. *Aguirre*, above n. 35, 2001 U.S. App. LEXIS 4166 at *17–19.

⁸⁸ 65 Fed. Reg. 76594.

⁸⁹ *Ibid.*, 76592.

⁹⁰ *Matter of R-A*, above n. 1, at 12.

⁹¹ *Ibid.*

⁹² See above nn. 24–25.

and of the dynamic of domestic violence, where the abuse often escalates precisely to punish the woman for her perceived resistance. The Board's ruling on this issue runs counter to the observations on domestic violence from the Violence Against Women Office of the Department of Justice, contained in the preamble to the proposed regulations.⁹³

The new UK Gender Guidelines provide a commendable example of how to approach the analysis of whether the particular persecution cited is on account of political opinion:

Political activities often undertaken by women (as well as by men) may include (but are not limited to): providing community services, food, clothing, medical care, hiding people and passing messages from one person to another. The context in which these activities are performed makes them political, regardless of whether they are inherently political. For example, posting posters is not inherently political, but will be if, for example, they support a particular party or cause; cooking food is not inherently political, but will be if, for example, it is part of or supportive of Trade Union activities. Such political activities may put women at risk of persecution on the basis of an actual or imputed political opinion.⁹⁴

In comments on the regulations, advocates suggested that INS supplement the proposed regulation with a statement to the effect that 'opinions concerning treatment or rights based on gender, such as feminism, will be considered a political opinion.'⁹⁵

5. The *Aguirre-Cervantes* decision

As noted above, the federal Ninth Circuit Court of Appeals issued an important and relevant decision on 21 March 2001, as this article was being written. The case, *Aguirre-Cervantes v. INS*,⁹⁶ involved a claim for asylum from a Mexican teenager based on her father's brutal abuse. The applicant testified that her father began beating her when she was three years old, that he beat her with a horse whip, tree branches, a hose and his fists, and that he beat every member of her family. When she fled to her grandfather's home, her father tracked her down; she did not know of any shelters and did not believe the police would intervene between her and her father. Considerable evidence was presented that 'in Mexico domestic violence is pervasive, officially tolerated, and in some areas legally approved.'⁹⁷ In granting asylum, the Ninth Circuit ruled that 'the

⁹³ See 65 Fed. Reg. 76595.

⁹⁴ Immigration Appellate Authority (United Kingdom), *Asylum Gender Guidelines*, para. 3.23 (Nov. 2000) ('UK Gender Guidelines'), available at <http://www.courtservice.gov.uk/tribunals/tribs_home.htm>.

⁹⁵ CGRS Comments, above n. 72, at 9.

⁹⁶ *Aguirre*, above n. 35.

⁹⁷ *Ibid.*, 2001 U.S. App. LEXIS 4166 at *5.

petitioner's immediate family, all of whose members lived together and were subjected to abuse by the petitioner's father, constitutes a protected particular social group under the asylum statute . . .⁹⁸

The *Aguirre-Cervantes* decision is an important one for a number of reasons. First, as discussed throughout this article, the social group ground is a significant one for gender claims. Until recently, the Ninth Circuit Court of Appeals was out of step with the rest of the US, and with international precedent by rejecting *Acosta*, and applying its own 'voluntary associational' criteria to the social group ground, and by denying that a social group could be premised on family membership.⁹⁹ *Aguirre-Cervantes* is the second of two recent landmark Ninth Circuit cases¹⁰⁰ that have brought the Ninth Circuit into line with the weight of precedent on social group jurisprudence. This is a very positive development that — in and of itself — will be helpful to the claims of women fleeing gender-related persecution.

Second, and perhaps even more significantly, is the fact that the decision in *Aguirre* — although not expressed in gender-specific terms¹⁰¹ — contributes greatly to the developing jurisprudence of gender-based claims by correctly analyzing the phenomenon of domestic violence. The court noted that:

The petitioner presented extensive documentary evidence that domestic violence is practised to control and dominate members of the abuser's family:

Domestic violence is purposeful and instrumental behavior. The pattern of abuse is directed at achieving compliance from or control over the abused party. It is directed at circumscribing the life of the abused person so that independent thought and action are eliminated and so the abused person will become exclusively devoted to fulfilling the needs and requirements of the batterer. The pattern is not impulsive or out of control behavior. Tactics that work to control the abused party are selectively chosen by the perpetrator.¹⁰²

Based on this understanding of domestic violence, the Ninth Circuit had no difficulty in finding that the applicant's father persecuted her on

⁹⁸ Ibid at *2. Interestingly, the INS had sought to have the federal court stay its decision in this case until after the regulations it has proposed become final, a position it is currently taking in other courts of appeals cases. Ms. Aguirre-Cervantes opposed any such indeterminate stay. The Ninth Circuit panel declined to delay its decision; rather, it laid out the six-part social group test and stated: 'we have considered the factors specified in the proposed Rule and those factors support our conclusion that the petitioner is entitled to asylum protection as a member of a particular social group.' Ibid at *17–19.

⁹⁹ *Estrada Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991): 'If Congress had intended to grant refugee status on account of "family membership" it would have said so.'

¹⁰⁰ The first was *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), which held that social group membership could be established by showing either a voluntary associational relationship, or fundamental/immutable characteristics.

¹⁰¹ The social group in *Aguirre* was not defined by reference to gender, but to family relationship.

¹⁰² *Aguirre*, above n. 35, 2001 U.S. App. LEXIS 4166 at *20–21 (quoting Family Violence Prevention Fund, Domestic Violence in Civil Court Cases 23 (1992)).

account of her membership in the family. This analysis stands in stark contrast to the BIA's holding in *R-A-* that Ms Alvarado's husband did not batter her because she was his wife, but simply because he was 'warped', had a 'psychological disorder' or acted out of 'pure meanness.'¹⁰³

In June 2001, as this article went to press, the US Department of Justice moved for an en banc rehearing by the Ninth Circuit of its decision in *Aguirre-Cervantes*. The decision may be difficult to challenge, however, in that it is based upon well-established social group precedent, and because — although it was not required to do so — the court took the additional step of applying the proposed regulations' six-part social group test.¹⁰⁴

6. Conclusion

As noted above, the deadline for submission of comments on the proposed regulations was just days after President Bush took office. Left unclear by this unusual timing is whether the regulations will ever be issued as a final rule. President Bush has issued an order placing in abeyance all such pending regulations, and could simply decide to let them die a quiet death. If the administration does proceed, it is unclear whether it will modify the proposed regulations in a substantial or significant manner — and if so, whether such revisions will meet the concerns expressed in comments by UNHCR, and others.

All of this brings us back to the fact that Janet Reno's order directs the BIA to reconsider its decision in *R-A-* after the issuance of the proposed regulations as a final rule. If the regulations are never issued in that form, it certainly appears that the BIA would simply reconsider the case based on existing precedent. Ninth Circuit jurisprudence has developed in significant respects since the Board originally issued its *R-A-* decision. As discussed above, the Ninth Circuit has fully adopted *Acosta*, and has recognized that domestic violence is a purposeful form of persecution, inflicted on account of the relationship between the batterer and the victim. The application of these principles will certainly make it difficult for the BIA to rule that Rodi Alvarado Peña was not persecuted on account of one of the enumerated grounds.¹⁰⁵

¹⁰³ *Matter of R-A-*, above n. 1, 2001 BIA LEXIS 1 at *53.

¹⁰⁴ The *Aguirre* court stated that 'we have considered the factors specified in the proposed Rule and those factors support our conclusion that the petitioner is entitled to asylum protection as a member of a particular social group.' *Aguirre*, above n. 35, 2001 U.S. App. LEXIS 4166 at *19.

¹⁰⁵ In addition, as CGRS continues to track cases, we have identified three domestic violence grants since the vacating of *R-A-* — two at the affirmative level, and one by an immigration judge (the INS will appeal). Many immigration judges appear to be continuing to await further developments.