Sanctuary for Families

KEY GENDER-BASED ASYLUM CASES

The following is a list of key cases related to gender-based asylum claims.[1] **Please note that not all of the following are precedential decisions. Moreover, this is not an exhaustive list of decisions issued by the Board of Immigration Appeals (BIA) and the U.S. Courts of Appeals that may be relevant to your client's asylum claim.** The case law below should be supplemented with additional research.

GENERAL ASYLUM CASE LAW

PERSECUTION

- Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

Eligibility for asylum may be established by showing past persecution in lieu of evidence of a well-founded fear of persecution. Past persecution creates a rebuttable presumption that the applicant also has reason to fear persecution in the future. A favorable exercise of discretion may also be warranted for humanitarian reasons, notwithstanding the fact that there is little likelihood of future persecution.

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

The BIA previously defined persecution as "harm or suffering inflicted upon an individual in order to punish the individual for possessing a belief or characteristic the entity inflicting the harm or suffering seeks to overcome." See Matter of Acosta, 19 I&N Dec. 211 (BIA 1985) and Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). However, the BIA clarified that "punitive" or "malignant" intent on the part of the persecutor is not required for harm to constitute persecution.

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

Persecution turns not on the subjective intent of the persecutor, but rather on what a reasonable person would find to be offensive. The fact that a persecutor believes the harm they are inflicting is "good for" their victim – for example by "curing" or "treating" their victim – does not remove the conduct from the definition of persecution.

- Pavlova v. INS, 441 F.3d 82 (2d Cir. 2006).

Direct governmental action is not required to make out a claim of persecution. Private acts may be persecution if the government has proved unwilling to control such actions.

---

[1] Sanctuary for Families is grateful for the significant legal research contributed by Fried Frank, Hogan Lovells, and WilmerHale.

- Matter of T-Z-, 24 I&N Dec. 163 (BIA 2007).

Persecution may include non-physical harm or suffering such as, "the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.

- Manzur v. U.S. Dep't of Homeland Sec., 494 F.3d 281 (2d Cir. 2007).

Accumulation of harm from individual incidents may rise to the level necessary for persecution even though an individual incident may not.

BURDEN OF PROOF

- INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

To be eligible for asylum, an applicant need only demonstrate that they have a well-founded fear of persecution. In demonstrating this well-founded fear, the applicant need not prove that it is more likely than not that they will be persecuted in their country. An applicant can have a well-founded fear of an event happening when there is less than fifty-percent chance of it taking place.

- Abebe v. Ashcroft, 379 F.3d 755 (9th Cir. 2004); rehearing en banc, 2005 WL 3556910, Abebe v. Ashcroft, 432 F.3d 1037 (9th Cir. 2005).

Even a ten-percent chance of persecution may be sufficient to establish eligibility for asylum based upon a well-founded fear of persecution.

- INS v. Stevic, 467 U.S. 407 (1984).

To be granted withholding of removal under I.N.A. § 241(b)(3), an applicant must establish a "clear probability" of persecution, meaning that it is more likely than not that they would be subject to persecution. This is a higher burden of proof than that necessary to establish eligibility for asylum.

CREDIBILITY AND CORROBORATION

- Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

While an applicant should make every effort to obtain documentary or other corroborative evidence to support their claim, the lack of such evidence will not necessarily be fatal to the application. The applicant's own testimony may in some cases be the only evidence available and may suffice where it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for their fear.

- Matter of S-M-J, 21 I. & N. Dec. 722 (BIA 1997).

General background information about the country where the applicant fears persecution must be included in the record. Where the applicant's claim relies primarily on personal experiences that cannot reasonably be verified, corroborating documentary evidence of the applicant's personal experience is not required. However, where it is reasonable to expect corroborating documentary evidence for certain alleged facts in the applicant's claim (e.g., evidence of birth place, media accounts of large demonstrations, evidence of a publicly held office, or documentation of medical treatment), such evidence should be provided or an explanation should be given as to why such information was not presented.

- Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999).

A petitioner's testimony alone may be sufficient evidence to establish an objective fear of persecution if it is believable, consistent, and specific.

- Diallo v. INS, 232 F.3d 279 (2d Cir. 2000).

The standard for corroboration requires a twofold determination. First, the adjudicator must determine whether the applicant's testimony is credible. Second, the adjudicator must determine whether the applicant has met their burden of proof. Even if the applicant's testimony is found to be credible, the applicant may be required to provide corroborating evidence or an explanation for its absence, if such evidence would be reasonably expected, to meet their burden of proof. Therefore, the adjudicator must make a credibility finding and then assess the need for additional corroboration and the applicant's reasons for failure to provide further corroboration. Contra, e.g., Rui Yang v. Holder, 664 F.3d 580 (5th Cir. 2011) (holding, unlike the Second Circuit, that in the absence of reasonably available corroborating evidence, asylum may be denied without a credibility determination).

- Ramsameachire v. Ashcroft, 357 F.3d 169 (2d Cir. 2004).

Proving well-founded fear requires that the applicant establish both a subjective and an objective element. The former is established via the applicant's credible testimony that their fear is genuine, while the latter is largely dependent upon the context and believability they can establish for their claims through presentation of reliable, specific, and objective supporting evidence.

PROTECTED GROUNDS

- The REAL ID Act, 8 U.S.C. § 1158(b)(1)(B)(i).

An applicant for asylum must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for their persecution.

RELIGION

- Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000).

Persecution on account of religion may include persecution on account of an applicant's liberal religious beliefs—which differ from the persecutor's orthodox religious beliefs—regarding the proper role of women in society.

POLITICAL OPINION

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

The concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not necessarily physically painful or harmful but is abhorrent to that individual's deepest beliefs. Feminism qualifies as a political opinion for the purposes of asylum.

- Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994).

Asylum does not require that the applicant be a politician or belong to a political party in order to have a political opinion. Individuals and groups outside the formal institutions of government are often the ones most involved in "politics" – for example, by calling for the protection of civil liberties. The silencing of those opinions by the government is often politically motivated.

- Qi Cao Wu v. Holder, 573 F. App'x 81 (2d Cir. 2014).

Although the applicant need not show persecution was solely because of their political affiliation or opinion, there must be a showing that the persecutors knew the applicant's political affiliation or opinion.

PARTICULAR SOCIAL GROUP

"Immutability"

- Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

Persecution "on account of membership in a particular social group" refers to persecution 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." The common characteristic must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.

- Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003).

While shared past experience of suffering past persecution may support defining a particular social group for purposes of fear of future persecution, it cannot defining a particular social group for the past persecution (as that would be a circular argument). The particular social group must have existed before the past persecution began.

"Social Visibility" and "Particularity"

- Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).

A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor or in the eyes of the outside world in general. The attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself now endow individuals with membership in a particular social group.

- Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).

In addition to "immutability", the social visibility of the members of a claimed social group is an important consideration in identifying the existence of a particular social group. "Social visibility" is described as "recognizability," and the BIA explains that its past decisions have largely acknowledged social groups with characteristics that were highly visible and recognizable by society in the country in question.

- Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007).

Factors to be considered in determining whether a particular social group exists include whether the group's shared characteristic gives the members the requisite "social visibility" to make them readily identifiable in society and whether the group can be defined with sufficient "particularity" to delimit its membership.

- Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008).

Membership in a purported social group requires that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility. See also Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) (noting that, in addition to Acosta's immutability requirement, "social visibility" and "particularity" must be considered).

Unlike the Second Circuit which had generally followed the "particularity" and "social visibility" criteria, the Third and Seventh Circuits rejected deference to the BIA regarding these requirements. See Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009) (rejecting the "social visibility" requirement, noting that the BIA was inconsistent in its prior decisions); Valdiviezo-Galdamez v. U.S. Att'y Gen., 663 F.3d 582 (3d Cir. 2011) (noting prior inconsistent decisions by the BIA and the Third Circuit's inability to discern the difference between the two elements, as "'particularity' appears to be little more than a reworked definition of 'social visibility' and the former suffers from the same infirmity as the latter").

Moving from "Social Visibility" to "Social Distinction"

- Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).

An applicant must prove that his or her social group is: (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. "Social distinction" (formerly "social visibility") requires not that the group be seen by society (i.e., not "ocular" visibility), but rather that the group be perceived or recognized as such by the relevant society.

- Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014).

Although the requirements of "particularity" and "social distinction" overlap, it is necessary to address both elements to properly determine whether the group is cognizable under the Immigration and Nationality Act.

Note that the Third Circuit has not yet decided whether the BIA's explanations of the "social distinction" and "particularity" requirements in M-E-V-G- and W-G-R- are sufficient to address the concerns expressed in Valdiviezo-Galdamez. See, e.g., Edeki v. U.S. Att'y Gen., 2016 U.S. App. LEXIS 15483 (3d Cir. Aug. 23, 2016); Vaitkus v. U.S. Att'y Gen., 2016 U.S. App. LEXIS 12457 (3d Cir. July 6, 2016); Sazo-Godinez v. U.S. Att'y Gen., 629 F. App'x 271 (3d Cir. 2015).

For further discussion on formulating particular social groups after M-E-V-G- and W-G-R-, please see the following chapter in this manual.

Family-Based Particular Social Group Claims

- Matter of L-E-A, 27 I&N Dec. 40 (BIA 2017)

Whether a particular social group based on family membership is cognizable depends on the nature and degree of the relationships involved and how those relationships are regarded by the society in question. To establish eligibility for asylum on the basis of membership in a particular social group composed of family members, an applicant must not only demonstrate that he or she is a member of the family but also that the family relationship is at least one central reason for the claimed harm.

SPECIFIC FORMS OF GENDER-BASED PERSECUTION

FEMALE GENITAL MUTILATION (FGM)

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

"Young women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not yet undergone female genital mutilation, as practiced by that tribe, and who oppose the practice," constitutes a particular social group. The characteristics of being a young woman, nationality, and membership in a particular tribe cannot be changed, and 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.

- Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999).

"FGM involves the infliction of grave harm constituting persecution."

- Mohammed v. Gonzales, 400 F.3d 785 (9th Cir. 2005).

"Genital mutilation occurs to a particular individual because she is a female. . . . the possession of the immutable trait of being female is a motivating factor—if not a but-for-cause—of the persecution."

Fear of Future FGM to Spouse or Child

The parents of an asylee cannot be granted derivative status under the INA. See INA §208(b)(3)(A), 8 USC § 1158(b)(3)(A). The following cases discuss whether parents may be granted asylum or withholding of removal as principal applicants based on fear of harm to their children.

- Ofjorji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003).

The court held that the applicant in this case could not establish a claim of withholding of removal based on fear of FGM to her U.S. citizen daughters if she were deported. U.S. citizen children have the right to remain in the country regardless of their parents' deportation.

- Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004)

The court held that the applicant in this case could establish a claim of asylum based on fear of FGM to her undocumented daughter if she were deported because the applicant would be forced to take her daughter to her country, where FGM is widespread, and to witness her daughter's pain and suffering. The court considered the applicant's own FGM, her family's attempts to subject her daughters to FGM, her inability to override her family' wishes, and the government's lack of enforcement of laws to curb FGM.

- Matter of A-K-, 24 I&N Dec. 275 (BIA 2007).

The court held that the applicant in this case was not eligible for asylum based on fear of FGM to his U.S. citizen daughters if he were deported. Compared to Oforji and distinguished from Abay, the children in this case were U.S. citizens and thus legally entitled to remain in the U.S.

The BIA also stated that parents could not establish eligibility for asylum based on incidental psychological suffering arising from harm to their children. However, it recognized in dicta that there may be cases where the applicant's loved ones would be physically harmed with the intended purpose of causing psychological suffering to the applicant, although in such cases, the applicant would be the direct target of the emotional persecution." See also Niang v. Gonzales, 492 F.3d 505 (4th Cir. 2007) (denying mother withholding of removal based on incidental psychological harm she would suffer if her U.S. citizen daughter were subjected to FGM because mother herself was not the target of persecution).

- Kane v. Holder, 581 F.3d 231 (5th Cir. 2009).

The court held that the applicant in this case was not eligible for asylum based on fear of FGM to his U.S. citizen daughters if he were deported. The applicant testified that "tribal leaders would likely enforce the practice against his daughters only because they believe that their culture compels them to do so and not as a way to persecute [applicant] for any particular belief or characteristic that he exhibits." Moreover, "[w]hen questioned whether he feared for his own safety, [applicant] replied that his family members and fellow tribesmen would likely humiliate him for opposing FGM, but that he did not believe that he would be beaten or physically tortured for his opposition, insisting that his primary concern was for his young daughters' health and well-being." But see Benyamin v. Holder, 579 F.3d 970 (9th Cir. 2009) (remanding to consider whether the applicant could be granted asylum based on past FGM performed on his older daughter without his consent and fear of future FGM to his younger undocumented daughter).

- Diombera v. Holder, 480 F. App'x 596 (2nd Cir. 2012).

The court held that the applicant in this case was not eligible for asylum based on the fact that his wife was subjected to FGM in the past, as "nothing in the record suggested that [his] wife had been subjected to FGM as a means of targeting [him] on account of a protected ground" and he was not "in the 'zone of risk' when his wife's family subjected her to FGM." Incidental emotional or psychological harm suffered by husband as a result of wife having been subjected to FGM does not constitute persecution.

In addition, the fear that the father may be harmed while trying to protect from FGM a daughter who has not yet been born, but that he may have with his wife in the future, is too speculative to constitute persecution.

Rebuttable Presumption of Future Persecution Based on Past FGM

- Matter of A-T-, 24 I&N Dec. 296 (BIA 2007), vacated, 24 I&N Dec. 617 (AG 2008), remanded by 25 I&N Dec. 4 (BIA 2009).

In a 2007 decision, the BIA rejected the "continuing persecution" theory in the case of an applicant who was already subjected to FGM in the past. The BIA based its decision on the belief that any presumption of future FGM persecution is rebutted by the "fundamental change" in the applicant's situation arising from the "one-time infliction" of FGM upon her.

The Attorney General held that the BIA erred in rejecting the applicant's claim on the grounds that FGM cannot occur more than once, since FGM is capable of repetition. Moreover, an applicant who establishes past persecution on account of membership in a particular social group is entitled to a regulatory presumption of well-founded fear of future harm on account of the same protected ground, even if future harm does not take the identical form of the past harm (in this case, FGM).

In its 2009 decision, the BIA also specified that past FGM constitutes persecution even if the applicant does not remember being subjected to it. Once an applicant has established past persecution, the burden is placed on DHS to rebut the presumption of future persecution.

- Bah v. Mukasey, Diallo v. U.S. Dep't of Homeland Sec., Diallo v. U.S. Dep't of Homeland Sec., 529 F.3d 99 (2d Cir. 2008).

The court held that the BIA erred by assuming that FGM was a one-time occurrence, since the record revealed that FGM was often repeated in the home country of the applicants in this case. The BIA also erred in failing to require DHS to show that the applicants would not endure further threats to their lives or freedom. DHS cannot meet its burden just by showing that the particular act of persecution suffered by the applicant in the past (in this case, FGM) will not recur in the future.

Humanitarian Asylum Based on Past FGM

- Matter of S-A-K- and H-A-H, 24 I&N Dec. 464 (BIA 2008).

An applicant who suffers past persecution in the form of FGM that still causes her continuing physical pain and discomfort should not be expected to return to her home country, regardless of whether or not she has established a fear of future harm.

- Kone v. Holder, 596 F.3d 141 (2d Cir. 2010).

The court remanded the case to the BIA to consider granting the mother of U.S. citizen daughters humanitarian asylum based on "mental anguish of a mother who was herself a victim of genital mutilation who faces the choice of seeing her daughter suffer the same fate, or avoiding that outcome by separation from her child."

DOMESTIC VIOLENCE

- Department of Homeland Security's Position on Respondent's Eligibility for Relief, Feb. 19, 2004, in Matter of R-A-, 22 I&N Dec. 906 (BIA 1999), vacated by 22 I&N Dec. 906 (AG 2001), remanded by 23 I&N Dec. 694 (AG 2005), remanded by 24 I&N Dec. 629 (AG 2008), summary order issued by Immigration Judge, Dec. 10, 2009.

In a 1999 decision, the BIA held that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is not a particular social group and that the applicant in this case could not establish that her membership in the articulated group motivated her abuser's actions. After the Attorney General directed the BIA to reconsider the case, DHS submitted a brief to the BIA stating that, "[a]lthough it would be inaccurate to characterize [the applicant]'s persecution as motivated by her husband's political opinions on male dominance, [her] social group may be defined as 'married women in Guatemala who are unable to leave their relationship.'"

Eventually, the immigration court granted the applicant asylum in 2009 based on a stipulation between the applicant and DHS. The immigration judge's ruling granted the stipulation but did not address the substantive issues raised by the 2004 DHS brief. The case has no binding precedential value.

- Department of Homeland Security's Supplemental Brief, Apr. 13, 2009, in Matter of L-R-, summary order issued by Immigration Judge, Aug. 4, 2010.

In 2007, an immigration judge found that "Mexican women in an abusive domestic relationship who are unable to leave" is not a particular social group. In 2009, DHS submitted a brief to the BIA stating that the applicant's proposed group was "impermissibly circular" because a particular social group cannot be "centrally defined by the existence of the abuse" feared by the applicant. However, DHS proposed two particular social group formulations "which outline a framework under which victims of domestic violence might be able to advance cognizable asylum claims": (1) "Mexican women in domestic relationships who are unable to leave" and (2) "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."

The Immigration Court granted the applicant asylum in 2010 based on a stipulation between the applicant and DHS. The immigration judge's ruling granted the stipulation but did not address the substantive issues raised by the 2009 DHS brief. The case has no binding precedential value.

- Matter of A-R-C-G, 26 I&N Dec. 388 (BIA 2014).

"Married women in Guatemala who are unable to leave their relationship" can constitute a particular social group. The case was remanded for further fact finding, particularly surrounding the issue of nexus and the role of the government.

The BIA also noted that the immigration judge may consider, if appropriate, whether the applicant is eligible for humanitarian asylum. See also, e.g., I-M-E-G-, AXXX XXX 997 (BIA Aug. 23, 2016) (unpublished decision) (holding that the applicant – who suffered repeated rapes and threats at the hands of her partner over a ten-year period in Honduras – should have an opportunity to present a claim for humanitarian asylum, even if presumption of fear of future persecution is rebutted based on applicant living apart from her former abuser for many years without problems).

- Unpublished BIA Decision of November 1, 2016

Whether or not a respondent "physically left" an abuser's home is not dispositive. Instead, the BIA found that where the respondent's inability to have a "normal social life" in El Salvador, including a relationship with another partner, shows that she was unable to leave the relationship. The BIA confirmed that "Salvadoran women unable to leave a domestic relationship is a cognizable particular social group."

- Ordonez-Tevalan v. U.S. Att'y Gen., 826 F.3d 670 (3d Cir. 2016), vacated by, rehearing at 2016 U.S. App. LEXIS 17222 (3d Cir. Sept. 21, 2016), petition denied by,

substituted opinion at 2016 U.S. App. LEXIS 17224 (3d Cir. Sept. 21, 2016).

In its original opinion, the court based its denial of the applicant's petition for review on an adverse credibility determination, while adding briefly that her failure to establish nexus to a particular social group was further reason for denying her petition. The court stated that, although "married women in Guatemala who are unable to leave a relationship" can constitute a particular social group, the applicant in this case was never married to her alleged abuser and therefore was not a member of this group. Thus, the court stated that the applicant's failure to establish nexus to a particular social group was further reason for denying her petition.

Given this cursory statement, it was unclear whether the court was suggesting that a victim of domestic violence cannot claim persecution on account of a particular social group if she is not married to her abuser (note that DHS previously proposed two particular social group formulations in Matter of L-R- where the applicant was not married to her abusive partner). After a rehearing, the court vacated its original opinion and removed the aforementioned statements in its substituted opinion.

FORCED MARRIAGE

- Gao v. Gonzales, 440 F.3d 62 (2d Cir. 2006), vacated on procedural grounds by Keisler v. Gao, 552 U.S. 801 (2007).

"Lifelong, involuntary marriage" rises to the level of persecution. Also, "women who have been sold into marriage, whether or not that marriage had taken place yet, and who live in a part of China where forced marriages are considered valid and enforceable" can constitute a particular social group in accordance with Acosta.

The impact of Gao being vacated on procedural grounds is unclear. In Yan v. Holder, 489 F. App'x 733 (4th Cir. 2012), the court upheld the refusal of an immigration judge to reconsider certain findings based on Gao as "the fact remains that Gao has been vacated."

- Ngengwe v. Mukasey, 543 F.3d 1029 (8th Cir. 2008).

The court held that the BIA erred in not considering whether the "choice of forced marriage, death, or paying an unaffordable bride's price" constitutes persecution. In this case, the BIA also erred in rejecting the applicant's proposed social group of "Cameroonian widows," where the applicant claimed she would be forced to marry her late husband's brother in accordance with "wife inheritance" customs.

- Qu v. Holder, 618 F.3d 602 (6th Cir. 2010).

The court recognized the particular social group of "women in China who have been subjected to forced marriage and involuntary servitude" and criticized the BIA for viewing "the entire matter as simply a debt collection dispute" when the applicant was targeted by her persecutor both to secure repayment of a loan he made to her father and "because she was a woman whom he could force into marriage in a place where forced marriages are accepted."

The court held that "[u]nlike cases in which women fear being forced into marriage . . . because they have been threatened by potential perpetrators and it is a common practice in their country," the applicant in this case "was kidnapped for two weeks until she escaped, her perpetrator attempted to rape her, and he threatened to send her to prison if she did not marry him" which constituted a "severe form of the practice of forced marriage."

In cases where the applicant was not harmed or threatened with physical harm, U.S. Courts of Appeals have been more reluctant to grant asylum or withholding of removal. See, e.g., Zhang v. U.S. Att'y Gen., 494 F. App'x 255 (3d Cir. 2012) (holding that threats of jailing applicant did not constitute persecution as she was never arrested); Yan v. Holder, 489 F. App'x 733 (4th Cir. 2012) (holding that vandalization of applicant's home and assault of brother did not constitute persecution); Taghzout v. Gonzales, 219 F. App'x 464 (6th Cir. 2007) (denying case in which applicant married without family's permission and feared she would be forced to marry someone else, due to lack of threats of physical harm or evidence of harm to women for opposing customs); Huang v. U.S. Att'y Gen., 286 F. App'x 604 (11th Cir. 2008) (holding that detention of applicant's father, destruction of family's crops and beating of boyfriend due to applicant's rejection of marriage proposal constitutes harassment but not persecution).

HONOR VIOLENCE

Female Victims

- Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000).

A woman's fear of being murdered by her family for her liberal religious beliefs regarding the proper role of women in society, and for violating the edicts of her family's orthodox religious beliefs, constitutes fear of persecution on account of religion. In this case, the court held that, although the applicant suffered repeated physical assaults, imposed isolation, and deprivation of education at the hands of her father and not the government, she could not rely on Moroccan authorities to protect her.

- Zaza v. Ashcroft, 106 F. App'x 640 (9th Cir. 2004).

According to the majority, generalized threats made to the applicant that she "should pay a price" and "should be taught a lesson" for refusing to wear the veil could refer to any treatment from mere verbal harassment to physical mutilation. While these threats may have supported an asylum claim, if it had been timely filed, the applicant cannot show a fifty percent probability of actual physical harm to meet the burden for withholding.

The dissent noted, however, that the threats should have been understood in the larger context in which they were made, as the threats came from a fundamentalist group that assaults women for refusing to wear the veil and the Jordanian government has remained unable or unwilling to stop such attacks.

- Dianie v. U.S. Att'y Gen., 293 F. App'x 170 (3d Cir. 2008).

While recognizing that family abuse over differences in religious practice can constitute persecution, the court distinguished this case from S-A-. The court noted that, although the police apparently did not believe the applicant the one time she reported her in-laws' abuse, this was insufficient to find that Indonesian authorities were generally unwilling or unable to protect her.

Male Victims

- Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009).

The court held that the applicants in this case would be subjected to persecution based on their membership in (1) "the Al-Ghorbani family" (which includes immutable characteristics of kinship, regional background, and class), and (2) a social group "that opposes the repressive and discriminatory Yemeni cultural and religious customs that prohibit mixed-class marriages and require paternal consent for marriage." In this case, two brothers feared persecution as one of them had married a woman from a higher class family without her father's permission, with the other brother's help. The court explained that while "'young' or 'westernized' peoples in Yemen" would be an impermissibly broad group, the groom and his brother were identifiable by their community by their opposition to marriage traditions. Given the fundamental nature of the right to marry, this is a characteristic the applicants should not be required to change.

- Al Bustami v. Holder, 385 F. App'x 719 (9th Cir. 2010).

The court held that the immigration judge failed to reasonably explain why he denied withholding to the applicant but granted withholding to his wife, as the adjudicator must treat similarly situated applicants similarly. The couple in this case claimed that they would suffer violence at the hands of the wife's family for having premarital sex and for marrying against her family's wishes. The court noted that, while derivative status is unavailable through withholding of removal, "harms to family members should be assessed cumulatively and . . . physical violence towards close family members can substantiate [an applicant's] fear of persecution."

According to a footnote in the opinion, DHS claimed that honor killings are directed at women and not at men; however, the immigration judge did not base his decision on these grounds, assuming that "Jordanian men who have premarital sex with virgin women" could constitute a particular social group. The court did not address this issue but referenced the Sixth Circuit's finding of a particular social group in Al-Ghorbani under similar circumstances involving men threatened with honor violence.

Relocation

- Vellani v. U.S. Att'y Gen., 296 F. App'x 870 (11th Cir. 2008).

The court found it irrelevant that honor killings occur throughout the applicant's home country as she testified that only her brother had threatened to kill her and had not argued

that people throughout Pakistan wish to kill her to avenge her family's dishonor. The applicant had argued before the Immigration Court and BIA that, although she could avoid her brother's threat by relocating to another part of Pakistan, it would not be reasonable to expect her to relocate because of the stigma and hardship of living alone as a woman. However, because the applicant did not raise this argument on appeal, the court considered it abandoned and did not address the reasonableness of expecting the applicant to relocate.

- Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011).

"Jordanian women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals" can constitute a particular social group. The court found it unconvincing that the Jordanian authorities prosecuted all honor crimes reported during a given year because prosecution is an "empty gesture" resulting in "little more than a slap on the wrist." Contra Khalili v. Holder, 557 F.3d 429 (6th Cir. 2009) (in denying the applicant relief, the court cited evidence that the Jordanian authorities prosecuted all honor crimes reported in one given year and that there was a "societal trend" toward condemning honor crimes).

The court further rejected DHS's argument that the applicant could relocate within Jordan to avoid her brother and held that if the applicant would have to live in hiding, as she would in a small country like Jordan, the applicant could not reasonably be expected to internally relocate.

HUMAN TRAFFICKING

- Rreshpja v. Gonzales, 420 F.3d 551 (6th Cir. 2005).

The court rejected the social group "young (or those who appear to be young), attractive Albanian women who are forced into prostitution," noting that a particular social group may not include "generalized, sweeping classification[s]" or be circularly defined by the fact that the group suffers from persecution.

- Burbiene v. Holder, 568 F.3d 251 (1st Cir. 2009).

Criminal activity amounts to persecution if the applicant can demonstrate either "1) it is by people aligned with the government, or 2) the government is unwilling or unable to control it." However, "[s]cattered incidences of violence or harassment are not enough to establish that a government is unwilling or unable to control violence; '[b]y definition, persecution has a systematic aspect.'" A country's inability to eradicate human trafficking despite its attempts to combat the criminal activity does not subject trafficking victims to persecution.

- Cece v. Holder, 733 F.3d 662 (7th Cir. 2013).

The court disagreed with the Sixth Circuit's decision in Rreshpja and rejected the BIA's conclusion in this case that "young women who are targeted for prostitution by traffickers in Albania" is not a particular social group on the basis that it is "defined in large part by the harm inflicted on the

group, and does not exist independently of the traffickers." The court noted that "although it is true that these women are linked by the persecution they suffer—being targeted for prostitution—they are also united by the common and immutable characteristic of being (1) young, (2) Albanian, (3) women, [and] (4) living alone." In doing so, the court considered "what underlying characteristics account for the fear and vulnerability" rather than focusing on the language of the group. Even if the proposed group is defined in part by the fact of persecution, this does not invalidate it as a particular social group for asylum purposes if there are other characteristics linking the group. The court also noted that Albania was unable or unwilling to protect the applicant from third party traffickers because the applicant called the police, who failed to take any action. "[T]he standard is not just whether the government of Albania was involved in the incident or interested in harming Cece, but also whether it was unable or unwilling to take steps to prevent the harm."

- Paloka v. Holder, 762 F.3d 191 (2d Cir 2014).

The court remanded to determine whether "young Albanian women" or "young Albanian women between the ages of 15 and 25" qualify as particular social groups in light of M-E-V-G- and W-G-R-.

The court also noted that "being a victim of a crime or even being a likely target for criminal opportunistic behavior does not necessarily preclude the existence of a valid asylum claim if the claimant would likely be targeted because of her membership in a sufficiently defined social group. Indeed, those facing persecution may often be the most vulnerable to crimes, especially if the government condones or aids the perpetrators."

LGBT PERSECUTION

Sexual Orientation or Gender Identity as the Basis of a Particular Social Group

- Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990).

The court held that sexual orientation can constitute the basis for establishing a particular social group. This decision has precedential value in all proceedings pursuant to Attorney General, Order number 1895 (June 19, 1994).

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

The court recognized that the applicant had suffered persecution on account of her membership in the particular social group of "Russian lesbians." The BIA had held that because Russian authorities subjected the applicant to involuntary psychiatric treatments with the intent of "curing" her of her sexual orientation and not to punish her, she had not suffered persecution. The court reversed, stating that "[t]he definition of 'persecution' . . . does not include a subjective intent to punish or harm." The relevant factor is not the persecutor's characteristic, religious belief, or political opinion, but the victim's.

- Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000), overruled on other grounds by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005).

The BIA had stated that "homosexual males who dress as females" is not a particular social group because "the decision to dress as a female [is] a volitional act, not an immutable trait." The court concluded that the BIA erred in defining the applicant's group and held that "gay men with female sexual identities in Mexico" is a particular social group. "Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them. . . . Sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance."

- Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

An applicant's imputed sexual orientation may be the basis for protection as a member of a particular social group where the applicant faces persecution in his country of origin due to perception of him as a gay man, even if he is not actually gay.

- Karouni v. Gonzalez, 399 F.3d 1163 (9th Cir. 2005).

The court held, "to the extent that our case-law has been unclear, we affirm that all alien homosexuals are members of a 'particular social group.'"

The court also noted that the applicant's AIDS illness would make it extremely difficult for him to avoid his persecutors. The applicant in this case had noted that treatment for AIDS is unavailable in Lebanon and, furthermore, that seeking treatment would require him to reveal his illness, confirming suspicions that he is gay in a society that associates HIV/AIDS with sexual orientation. See also Boer-Sedano v. Gonzales, 418 F.3d 1082 (9th Cir. 2005) (noting that the applicant's advanced AIDS illness would make relocation unreasonable because he would not have access to the required treatment in Mexico and because it would be impossible for him as a gay man with AIDS to find work to pay for importing the required medication); Aguilar-Mejia v. Holder, 616 F.3d 699 (7th Cir. 2010) (encouraging consideration of humanitarian asylum or other discretionary relief for the applicant, as losing access to treatment in Mexico for his advanced AIDS illness could be "a literal death sentence").

Role of Government

- Joaquin-Porras v. Gonzales, 435 F.3d 172 (2d Cir. 2006).

In denying the applicant withholding, the court held that the applicant had not suffered past persecution but rather isolated acts of violence by corrupt police officers. The applicant in this case was a gay man from Costa Rica who cited two incidents: the first in the 1980s when he was raped by a police officer after he was asked about his sexual orientation, and the second in 2000 when he was briefly detained and subjected to anti-gay slurs by a police officer after leaving a gay bar. While recognizing that the cumulative effect of an applicant's experience must be considered, the court noted in particular that the applicant had remained in Costa Rica for many years after the first incident without suffering further attacks.

- Maldonado v. U.S. Att'y Gen., 188 F. App'x 101 (3d Cir. 2006).

The court rejected DHS's argument that the applicant had suffered mistreatment at the hands of police officers on account of him engaging in an activity that he could change (i.e. leaving gay discos late at night) rather than his sexual orientation. The court noted that the fact that the applicant was targeted by police only while engaged in a voluntary activity does not preclude persecution based on his membership in a particular social group. In this case, the Argentinian police officers were clearly motivated by the applicant's sexual orientation as they made disparaging remarks about his sexual orientation while arresting him. See also Ayala v. U.S. Att'y Gen., 605 F.3d 941 (11th Cir. 2010) (holding that the physical and sexual assaults the applicant suffered at the hands of Venezuelan police officers were not merely "acts of rogue policemen" but rather persecution based on sexual orientation since the police assaulted him outside a gay nightclub and threatened him with anti-gay slurs).

The court also noted that, although the applicant did not claim that his physical assaults resulted in severe injuries or that he was ever detained for more than twelve hours at a time, the mistreatment he suffered at the hands of police officers occurred at least twenty times over a period of several years and thus rose to the level of persecution.

- Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008).

The court rejected the immigration judge's finding that gay men in Jamaica are victims of harassment and random acts of violence, noting that "[w]hether particular conduct constitutes persecution or 'random' violence turns on the perpetrator's motive." Although the applicant had not faced past persecution, the court concluded that he had a well-founded fear of future persecution based on a pattern or practice of persecution of gay men in Jamaica, as evidenced by widespread, targeted violence against gay men and active enforcement of an anti-LGBT law in Jamaica.

- Doe v. Holder, 736 F.3d 872 (9th Cir. 2013).

The court held that the applicant, who was persecuted by nongovernmental actors in Russia, did not need to show that the Russian government sponsored or condoned the persecution of gay men or was unwilling for that reason to control the applicant's persecutors. The only nexus requirement is that the actual persecutors, which may be nongovernmental, act on account of a protected ground. There is no nexus requirement between the government's inability/unwillingness to control nongovernmental persecutors and the protected ground; it does not matter if reasons for the government's inability to control nongovernmental persecutors are financial.

Stereotyping by Immigration Judges

- Ali v. Mukasey, 529 F.3d 478 (2d Cir. 2008).

An immigration judge may not rely on "stereotypes about homosexuality and how it is made identifiable to others" in considering the applicant's credibility or fear of being identified as gay and persecuted. Such presumptions result in an appearance of bias or hostility that precludes meaningful review and requires remand of the case. See also Shahinaj v. Gonzales,

481 F.3d 1027 (8th Cir. 2007); Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009); Todorovic v. U.S. Attorney Gen., 621 F.3d 1318 (11th Cir. 2010) (2010).