CENTER FOR
Gender & Refugee
STUDIES

Brief Filed by CGRS in *A-O-*

Overview of the Attached Brief

The attached brief was filed by the Center for Gender & Refugee Studies (CGRS) to the United States Court of Appeals for the Ninth Circuit on January 31, 2000 in the matter of *A-O-*. All identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses honor killing as persecution and argues that "Jordanian women who have lost their virginity while unwed and married against their will" is a particular social group.

Organizational Overview

The Center is one of the leading organizations in the United States protecting the fundamental human rights of refugee women, children and LGBT individuals fleeing gender-based persecution. We seek to advance sound asylum laws and policies, helping advocates successfully represent refugees who need protection, while at the same time mitigating the conditions that force individuals to flee their home countries.

Technical Assistance Provided by CGRS

As part of our core programs, CGRS engages in technical assistance and country conditions research for attorneys with gender-based, LGBTI, and child asylum claims. We provide free invaluable resources: legal consultation, country conditions information, practice advisories, unpublished immigration judge and Board of Immigration Appeals decisions, sample briefs, and expert witness affidavits developed by leading authorities in their fields in collaboration with CGRS. CGRS appears as amicus counsel or co-counsel in high impact cases. **To request assistance from CGRS, please visit our website at http://cgrs.uchastings.edu/assistance/.**

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CGRS continuously updates and adds to our database of more than 7,000 case records involving gender-based, LGBT, and child asylum claims in the United States. In addition to tracking developments in individual cases, the database helps us monitor trends in refugee adjudication across the country, enabling us to hold decision makers accountable to their obligations under domestic and international law and to provide greater transparency in the asylum system. Our ability to track cases and monitor patterns informs CGRS appellate and policy advocacy, and this in turn further informs our technical assistance. **To report the outcome in gender-based, LGBT and child asylum claims, please email the Center at cgrs@uchastings.edu.**

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No. XXXXX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

XXXXXXXXX,

Petitioner,

v.

JANET RENO, Attorney General
of the United States,

Respondent.

On Petition for Review of a Final Order
of the Board of Immigration Appeals

BRIEF OF PETITIONER
XXXXXXXX

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STATEMENT OF JURISDICTION

A. The Board of Immigration Appeals ("BIA") had jurisdiction pursuant to 8 USC section 1158 and 8 CFR section 3.1(b).

B. The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the decision of the BIA as a final order of deportation pursuant to 8 USC section 1105a and 8 CFR section 3.1(d)(2).

C. Pursuant to 8 USC section 1252(b)(1), on September 17, 1999, petitioner timely filed for review of the decision of the BIA, which was entered on August 20, 1999.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

This case raises the legal issue of whether "honor killings" constitute persecution within the meaning of the Refugee Act. The question presented is whether the Board of Immigration Appeals committed legal error when it ruled that such harm is not persecution. This case also raises the legal issue of whether Jordanian women who are the prospective victims of honor killings for losing their virginity out of wedlock, and marrying against their family's wishes constitute a particular social group. The question presented is whether the Board of Immigration Appeals committed legal error when it ruled that honor killings are a matter of personal family dispute, rather than persecution on account of social group membership defined by gender and transgression of required social norms. The case raises the factual issue whether the petitioner's fear of persecution was well-founded. The question presented is whether the Board of Immigration Appeals ignored the weight of the evidence when it ruled that the petitioner's fear of

persecution was speculative, even though she presented credible evidence of direct threats upon her life.

The Ninth Circuit reviews de novo the BIA's determinations of purely legal questions. See, Fisher v. INS, 79 F.3d 955,961 (9th Cir. 1996) (en banc). Specifically, the questions of whether the feared harm constitutes persecution, and whether the petitioner has established a link between the harm and her social group membership, is reviewed de novo. Singh v. Ilchert, 63 F.3d 1501, 1506-08 (9th Cir. 1995).

The BIA's factual findings are reviewed under the "substantial evidence" standard and a denial of asylum will be upheld if it is supported by reasonable, substantial and probative evidence in the record. INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992); Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992). See also, 8 USC 1252(b)(4).

STATEMENT OF THE CASE

This case involves a petition for review of an order of the Board of Immigration Appeals, which affirmed a decision by the Immigration Judge denying petitioner's request for asylum. After the Immigration and Naturalization Service ("INS") commenced deportation proceedings, petitioner applied for asylum and withholding of deportation, because she had been persecuted on account of her membership in a particular social group, defined as a Jordanian woman who is the prospective victim of an honor killing for losing her virginity out of wedlock, and marrying against her family's wishes. The Immigration Judge concluded that petitioner did not have a reasonable well-founded fear of future persecution. (A.R. 54). Moreover, the Immigration

Judge also concluded that any persecution feared by petitioner did not fall under one of the enumerated grounds for asylum. (A.R.55). Petitioner appealed the Immigration Judge's decision to the BIA, where the BIA adopted the Immigration Judge's decision. (A.R. 2-3). Petitioner now appeals this decision.

STATEMENT OF FACTS

Petitioner A is a 35- year- old, married female, a native and citizen of Jordan. Ms. A was admitted into the United States (while an unmarried woman) as a visitor for pleasure on or about -----, 1991 with authorization to remain in the United States until -----, 1992. (Ex. 1, A.R. 233). Petitioner overstayed such visa. (Ex. 1, A.R. 233).

On -----, 1992, Ms. A married Mr. B in Los Angeles, California. (Ex. 5, A.R. 143).

On or about -----, 1996, Ms. A was served with an Order to Show Cause ("OSC") to appear at a deportation hearing on -----, 1996. This OSC was marked as Exhibit 1 during the proceeding. At her hearing, Ms. A conceded deportability and asked for relief in the form of asylum, withholding, and alternatively voluntary departure. (A.R. 64, line 17-24). The hearing ultimately was continued to -----, 1997 to determine Ms. A's eligibility for the requested relief, (A.R. 69).

On -----, 1997, Ms. A presented testimony and documentary evidence in support of her claim for asylum. Ms. A testified that she does not want to return to Jordan because she is afraid that her extensive family in Jordan would kill her (T. 84, Line 21-24) in what is referred to as a "crime of honor." (Ex. 4, A.R. 151; Ex. 3, A.R. 155). Ms. A's family would murder her because

she chose to disobey Arabic and Islamic cultural norms and lost her virginity outside the marital relationship. She further violated these norms because she left Jordan for the United States and married Mr. B without her family's permission. (A.R.. 86, line 2-6). The importance of virginity to the family "honor" in her culture was laid out in Petitioner's supporting documents, (Ex. 3, A.R. 155), and also confirmed in the Country Reports on Human Rights Practices for 1996. (Ex. 4, A.R. 144-154).

Ms. A further testified that it was the culture and custom of her people to kill a woman who goes to bed with a man before marriage. (T. 86, line 17-21). Jordanian law has little effect either to punish these crimes or discourage them from happening. Petitioner submitted numerous documents to support this fact. (Ex. 3, A.R. 155).

While they both still were living in Jordan, Mr. B asked permission to marry Ms. A from her father and family, pursuant to custom. (A.R. 86, line 23-24). This occurred after the couple had engaged in premarital sex. (A.R. 86, line 23). The family refused. ((A.R.. 86, line 22-24). The family refused for two reasons: they believed Mr. B was unable to support Ms. A, and also because Mr. B was a Palestinian and not a member of any Jordanian tribe, as Ms. A was. ((A.R.. 88, line 3-14; 130, lines 12-22).

Ms. A testified that she could not marry Mr. B without her family's approval because, pursuant to the customs of her people, it is forbidden for a woman to marry against the will of her family. Such an act could subject the woman to death. ((A.R. 88, line 24 - (A.R.. 89, line 4).

After Ms. A's family refused to allow Mr. B to marry her, the couple decided to run away togther. They felt that this was necessary because her family might order her to marry another man, and he would quickly realize that Ms. A was not a virgin. (A.R.. 92, line 23 - A.R. 93, line

6).

Ms. A fears injury and death from the male members of her family: her brothers, uncles and cousins. (A.R.. 91, line 16-22). The total family members whom she fears is 15. (A.R. 87, line 21 - T.25, line 1).

Her fear of injury and death are supported by letters from her sister explaining that Ms. A's life is in jeopardy from her family because her father is very upset that she ran away to America without his permission. (A.R.. 90, line 6-25; Ex. 3, A.R.. 171-177). These letters came to Ms. A in ----- (A.R..90, line 10-11), ----- (A.R. 91, line 2-5), and ----- (A.R..100, line 1). The last correspondence revealed that Ms. A's father insisted that her brothers kill her, and that he wanted to die knowing that she had been killed. Further, if the father died, he wanted his sons to continue pursuing Ms. A and kill her. Finally, there was a warning not to return to Jordan. Ms. A wrote to her sister periodically, but addressed letters to her sister's post office box in Jordan. (A.R.. 92, lines 5-10). She wrote to a post office box because she does not want her family to know where she lives, even in the United States. (A.R.104, lines 14-15).

Ms. A's family would still be interested in killing her because of the existing customs and traditions of the male-dominated culture. Ms. A's refusal to conform with imposed cultural restrictions has damaged the "honor" of her family. Consequently, family members would not care about any punishment they may receive for killing Ms. A; the punishment is only two years in jail for crimes of this kind. (A.R.. 96, line 20 - A.R.. 97, line 14). These type of crimes commonly are referred to as "crimes of honor." (Ex. 3, A.R. 155).

Ms. A cannot return to any part of Jordan. It is a small country and people can be found easily. (A.R.. 97, line 15-19).

Throughout the balance of her testimony, Ms. A testified about a country deeply ingrained with customs and traditions that establish women as third-class citizens, subordinate to men. Ms. A could never speak directly to her father or any male member of her family about her desire to marry Mr. B. (A.R.. 102, line 21 - A.R. 103, line 3). Ms. A knew that if she had tried to speak with her father directly about her desire, he would have responded "How could you? How dare you to talk about this? You should not interfere. Those men will talk about it...." Thereafter, her father would have come to the conclusion that she had engaged in premarital sex. (A.R. 103, line 10-16).

Ms. A believes that her father suspects that she engaged in premarital sex. She believes that fleeing the country under the circumstances and secrecy that she did convinced her father that she had slept with Mr. B out of wedlock. (A.R.. 105, line 13-21).

If Ms. A returned to Jordan, the police could not protect her. The police would ask family members to sign a document saying they would not injure Ms. A. However, Ms. A believes that her family would ignore the police and the signed document, and kill her anyway. The reason is that the punishment for crimes of this type, crimes to restore the family's honor, is light. (A.R.. 110, line 23 - A.R.. 111, line 14). This contention was well-documented by the numerous newspaper articles in Ex. 3 that repeatedly described these crimes occurring in the recent months before her hearing.

Mr. B testified after his wife. He confirmed that Ms. A would be killed by the male members of her family if she were to return to Jordan. He testified that by running away to America, Ms. A had committed a crime against her family. Women in Jordanian society were required to never go against the adult males of the family. Women may not leave the home, go

on dates or participate in the choosing of a husband. The adult males make the choices and decisions. By leaving her home, Ms. A has created doubts about the reasons for leaving. No further evidence is needed and she would be killed if she returned. (A.R. 122, line 19 - A.R.. 123, line 21). Mr. B confirmed they keep their address a secret from their families and friends in Jordan, because they are afraid to be found. (A.R. 124, line 14-25; 125 lines 1-8).

Among the documents submitted in support of Ms. A's case were excerpts from the book, The Hidden Face of Eve, by the renowned Egyptian author Nawal El Saadawi. (Ex. 3, A.R. 158-169; 208-215). This book is an in-depth discussion of the condition of women in the Arab cultures, and addresses many of the issues raised by Ms. A. Additionally, several recent Jordanian newspaper articles relating stories of "honor crimes" also were submitted. (Ex. 3, A.R. 180-206).

The IJ issued a written decision dated January 8, 1998 denying Ms. A's claim for asylum and withholding of deportation. (A.R. 46-59). It is from this decision that Ms. A appeals.

LEGAL ARGUMENT

Summary of the Argument

The Board of Immigration Appeals (BIA) affirmed the Immigration Judge's denial of political asylum and withholding of deportation to the petitioner, Ms. A. In so holding, the Board ruled, in three separate findings, that the harm feared by Ms. A: 1) does not constitute persecution within the meaning of the Refugee Act; 2) is speculative, and not well-founded; and 3) is not on account of one of the five statutory grounds, but is instead the result of a "personal family dispute." (A.R.. 1-3). The Board's findings that the feared harm does not constitute persecution, and was not on account of one of the enumerated grounds constitute clear errors of law because they contradict long-established Board and Ninth Circuit precedent. The feared harm of being the victim of an honor killing clearly constitutes persecution, and where such harm is imposed because of gender in combination with other immutable characteristics, a social group nexus has been established. The Board's finding that Ms. A's fear is not well-founded is against the weight of the evidence where she suffered specific and direct threats by persons willing and able to carry out their threats.

Argument

1 Ms. A met the requisite burden for political asylum because she has established a well-founded fear of persecution on account of social group membership

Political asylum is a discretionary remedy which may be granted to an individual who

meets the statutory definition of refugee. A refugee is defined as a person who has suffered past persecution or who has a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42)(A). Through her credible testimony, and documentary evidence, Ms. Al Omari has established that she has a well-founded fear of being the victim of an "honor killing" in her home country of Jordan. Furthermore, she has established that the persecution she fears will be inflicted on account of her membership in the social group of women who lose their virginity prior to marriage and subsequently disobey family's wishes regarding marriage.

A. The harm that Ms. A fears is persecution

Ms. A fears that she will be the victim of an honor killing because she had sexual relations with Mr. B, her then-boyfriend, and then fled to the United States, where she married Mr. B against her family's wishes. Mr. B asked permission from Ms. A's family to marry her. (A.R. 24-25). When they refused to allow her to marry, she and Mr. B decided that they had no option but to flee Jordan, because they feared that the family would discover she was no longer a virgin and would kill her as punishment and to "reclaim" the family's "honor." (A.R. 92-93).

Ms. A testified that although Jordan does proscribe the crime of honor killing, the sentencing is very lenient, and does not act as a deterrence. (A.R. 97-98). As explained by the U.S. Department of State's Country Reports on Human Rights Practices for 1996:

> The Criminal Code allows for leniency for persons found guilty of committing a "crime of honor", the term commonly used for a violent assault against — or murder of — a female by a male relative for alleged sexual misconduct. Law enforcement treatment of men accused of "honor" crimes mirrors widespread social approval for such acts...[C]onvicted offenders rarely spend more than 2 years in prison....In contrast to

> "honor" crimes, the maximum penalty for first-degree murder is death; the maximum penalty for second degree murder is 15 years. (A.R. 151).

Additionally, the evidence suggests that many honor killings are not prosecuted. The Country Report cites violence against women as an ongoing problem (A.R.. at 145), and identifies honor crimes as being substantially under-reported:

> As of September, the press reported 11 such cases in 1996. However these figures likely understate the actual number of cases, as most crimes of honor are not reported by the press, and the actual number of such crimes is believed by a local expert to be four times as high. (A.R.. 151).

A recent effort to amend Penal Code Article 340, which provides for leniency in the case of honor killings, was defeated in the lower House of Jordan's Parliament. Jordan Times, Editorial: "Appealing to the Senate," Nov. 23, 1999 <http://www.access2arabia.com/jordantimes/Tue/opinion/opinion1.htm>. The high-profile support by many elected officials for the continued viability of this penal code section is additional strong evidence that the government is both unable and unwilling to protect women from honor killings.

Excerpts from the Jordanian newspaper *Al Sayyad* detailed the circumstances of recent honor killings in Jordan and described the shootings and stabbings of women by their male relatives — brothers, nephews, uncles — for alleged sexual transgressions. (A.R.. 192-206). Women were killed by family members for transgressions such as marrying a man of another religion (A.R.. 199), meeting with and embracing a lover (A.R.. 195), and going on a day trip to a resort with a man. (A.R.. 194). Many of these articles report that the murderers were easily apprehended, audacious and unabashed, proud to have restored the family honor. In her book, The Hidden Face of Eve, Nawal El Saadawi addresses the relationship between women's

virginity and the concept of family honor, observing that there is a "distorted concept of honour in our Arab society. A man's honour is safe as long as the female members of his family keep their hymens intact." (A.R.. 164).

The harm which Ms. A fears is being murdered by her male family members for losing her virginity prior to marriage, and for marrying against her family's will. The Board asserts that this "treatment" merits no protection under the 1980 Refugee Act:

> As the Immigration Judge pointed out, our asylum laws do not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. Citing Fisher v. INS, 79 F.3d 995, 962 (9th Cir. 1996) Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993). We agree that, despite evidence showing that women in Jordan do face some discrimination, and even that they are sometimes subject to violence for failure to conform to cultural and moral norms of their society, the evidence also shows that the Jordanian government attempts to provide some degree of protection to its female subjects and to punish those who harm women for violating social norms. (A.R. 2-3).

While there is no universally agreed-upon definition of persecution, courts have long held that threats to life or freedom, inflicted by the government, or by persons the government is unable or unwilling to control, constitute persecution. See, Montoya-Ulloa v. INS, 79 F.3d 930, 931 (9th Cir. 1996); Singh v. INS, 94 F.3d 1353, 1360 (9th Cir. 1996); Matter of Acosta, 19 I. & N. Dec. 222 (BIA 1985).

The Board's ruling that the harm feared by Ms. A is not persecution is flawed in two respects. First, it mischaracterizes the nature of the harm feared by Ms. A. Unlike the petitioners in Fisher and Fatin, Ms. A is not seeking asylum on the basis of discriminatory treatment, such as an enforced dress code, including the wearing of the chador. Ms. A seeks asylum based on her fear of being put to death for bringing shame on her family. The reliance upon Fisher and Fatin is simply inapposite. Second, to the degree that the Board acknowledges that women in Jordan

are subject to discriminatory treatment, and violence, the Board erroneously concludes that because the government "attempts to provide some degree of protection[,]" the feared harm cannot constitute persecution. To the contrary, as clearly indicated by the evidence, the lenient sentences given to those convicted of honor killings indicate a level of formal acquiescence in these crimes; it is certainly a matter of dispute the extent to which the government attempts to protect prospective victims. In any event, the issue of the government's efforts is not dispositive because the Refugee Act provides protection when the government is either unwilling or *unable* to control the persecutor. See, e.g., Surita v. I.N.S. , 95 F.3d 814, 819 (9th Cir. 1996). Ms. A testified that the government is unsuccessful in providing protection in light of the strong societal approval of honor killings, and this fact is corroborated by the documentation in the record. The Board's ruling that the harm feared by Ms. A does not constitute persecution is a clear error of law.[1]

B. Ms. A has established a well-founded fear of persecution

An applicant's fear of persecution is well-founded if it is subjectively genuine, and objectively reasonable. INS v. Cardoza -Fonseca, 480 U.S. 421, 430-431 (1987). Where there is a one in ten possibility of the feared harm occurring, a fear of persecution may be considered to be well-founded. Id. at 431. The Board has ruled that a fear is well-founded if a "reasonable person" in the circumstances of the applicant would fear persecution. Matter of Mogharrabi, 19 I&N Dec. 439, 444 (BIA 1987).

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[1] The severity of the harm feared by Ms. A would also qualify her for withholding of deportation.

Ms. A provided credible testimony regarding the customs and norms in her home country of Jordan that mandate the killing of female family members deemed to have brought shame on the family. (A.R. 87-89; 92-92; 97; 109). The documentation submitted on country conditions in Jordan fully corroborates her testimony regarding the practice of honor killing, the circumstances under which it may be imposed, and the government's unwillingness and inability to prevent such killings from occurring. (A.R. 151; 192-206).

But this is not all the evidence that Ms. A has proffered to establish the fact that a reasonable person in her circumstances would fear persecution. Ms. A also submitted three letters from her sister, C, which detail her father's rage and his commitment and that of the male family members to kill her. The authenticity and credibility of these letters has not been challenged in any respect by the Immigration Judge or the BIA.

In the first letter, which is dated -----, 1992, C tells her sister A that the border police at the airport informed their father that she had traveled to the United States. Their father, "infuriated and enraged," swore that the shame she brought on the family could only be removed "through blood" and he made her brothers swear that they would "kill her without mercy at any place and at any time [,]" because the only punishment for this shame is death. (A.R.. 171). The second letter from C to A recounts an event at which their father gathered the family together and "demanded all members that they should kill you wherever they meet you and defend the killer against danger, even against the law." (A.R.. 174). There were a total of 15 male relatives. (A.R. 106). The third and most recent letter, postmarked ----, 1997, refers to the fact that A has fallen "victim to beliefs, customs and traditions" and informs her that their father told their brothers that "he would not find comfort" as long as she was alive, and that if he died before he

could kill her, he "would not have comfort in his grave" until the brothers killed her. (A.R. 177).

The letters from Ms. A's sister recount direct and specific death threats made against Ms. A. As the Ninth Circuit has long held, direct threats made by individuals with the will and ability to carry out the threats are sufficient to establish a *clear probability* of persecution, the standard applicable to withholding of deportation. Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285-86 (9th Cir. 1984). Therefore, such direct threats are more than adequate to establish a well-founded fear of persecution, which is a lesser standard than clear probability.

The Board does not discuss the letters — or any of the evidence which goes to the reasonableness of Ms. A's fear. In fact, the Board's analysis of the well-foundedness of Ms. A's fear is dealt with in one terse sentence: "[W]e agree with the Immigration Judge's conclusion that the respondent's fear of harm is speculative." (A.R. 2).[2] The Board's

[2] The Immigration Judge's conclusion that Ms. A's fear was speculative was based on a number of factors which were irrelevant, untrue, or not supported by the record. For example, she relied upon the fact that Ms. A's father had not been "abusive to her in the past." (A.R. 53). This fact is totally irrelevant since Ms. A had not committed any act in the past which would have caused him to abuse her. The IJ also opines that Ms. A's father might not be so angry if he knew he had grandchildren. (A.R. 53). The IJ's speculation on this point is totally contradicted by the record, which recounts instances of the killing of pregnant women, or of women who had already given birth in the prohibited marriage. (A.R. 192-205). The IJ also states that the family probably does not have the resources to "search, find and kill the respondent[.]" (A.R. 55). As stated in the letter from Ms. A's sisters, the airport police notified her father of her departure. There is no reason to believe that these same officials won't inform her father upon her return to the country. Furthermore, Ms. A credibly testified that her country is small and family members looking for her would be able to find her. Her circumstances are quite similar to those in In re Kasinga, Int. Dec. 3278 (BIA 1996), where the BIA found countrywide risk given the relatively small size of the country. Finally, the IJ relies upon the fact that Ms. A's father did not harm Mr. B after Ms. A's departure. (A.R.. 57). Again, this factor is irrelevant since *all* of the documentation demonstrates that it is women only who suffer for actual or supposed sexual transgressions. This is true even in cases where the woman was the victim of rape or incest — the woman will be killed and her violator often will pay no consequences. (A.R. 210-211).

(continued...)

decision is simply against the weight of the evidence. In light of country conditions and the specific circumstances of her father's vow to vindicate his honor through her blood, no reasonable factfinder could conclude that Ms. A's fear is not well-founded.

C. The persecution which Ms. A will suffer is on account of her membership in a particular social group of Jordanian women who have lost their virginity while unwed and married against their family's wishes

Petitioner argued before the Immigration Judge, and in her brief to the Board of Immigration Appeals, that the persecution she feared would be inflicted because of her membership in a particular social group defined by gender, in combination with the additional characteristics of her loss of virginity and defiance of her family's command that she not marry the man of her choice. The petitioner relied upon the landmark decision Matter of Kasinga, Int. Dec. #3278 (BIA 1996), as well as other federal decisions which have accepted that social groups can be defined in whole or part by gender. See, e.g., Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993); Safaie v. INS, 25 F.3d 636 (8th Cir. 1994).

Without any discussion whatsoever, the Board dismisses out of hand the petitioner's

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[2](...continued)

argument of persecution on account of social group membership. Citing only one case — Matter of Y-G-, 20 I & N Dec. 794 (BIA 1994) — the Board rules that Ms. A's fear is "essentially based on a personal family dispute" and is not on account of social group membership. (A.R. 2). The facts in Matter of Y-G- are so different from those in the present case, however, that the Board's reliance upon it is totally misplaced. Matter of Y-G- involved a Haitian asylum seeker who feared returning to his home country because "he and a soldier had several altercations which stemmed from their relationship with a girl." Matter of Y-G-, supra. Unlike Ms. A, the respondent in Matter of Y-G- did not allege membership in a group; he did not allege that the members of his social group were subject to discrimination and murder; he did not allege the existence of pervasive cultural norms which approved of such treatment; and finally, he did not allege that the feared persecutors could act with virtual impunity because the laws provided leniency for such acts of violence against members of his group. Simply stated, Matter of Y-G- does not provide any authority whatsoever for the Board's ruling that Ms. A's fear is not on account of her social group membership. In fact, when analyzed pursuant to the controlling jurisprudence, it is clear that Ms. A is a member of a cognizable social group, and that her well-founded fear of persecution is on account of her membership in that group.

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(1) Ms. A is member of a cognizable social group

In Matter of Acosta, 19 I & N Dec. 211 (1985), the Board of Immigration Appeals set

forth its definition of membership in a particular social group:

> [W]e interpret the phrase 'persecution on acount 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....However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is so fundamental to their individual identities or consciences. (Id. at 233.)

In its landmark Kasinga decision, the Board affirmed the applicability of the Acosta social group definition to cases involving gender, citing Acosta in holding that a young Togolese woman who fled female genital mutilation (FGM) belonged to a social group defined by the characteristics of gender, ethnicity and the fact of having intact genitalia. The Board ruled that the applicant's gender and ethnicity were immutable, and that the fact of having intact genitalia (i.e., not subjected to FGM) was fundamental, in that she should not be required to change that by submitting to FGM.

In Matter of R-A-, Int. Dec. #3403 (BIA 1999), the Board's most recent published decision addressing social groups premised on gender, the Board ruled that proof of the immutable or fundamental nature of the characteristics used to define a social group is only a threshold requirement — and that there are two additional requirements for establishing the existence of a cognizable social group. The two additional requirements are that: (1) the members of the proposed group "understand their own affiliation with the grouping, as do other persons in the particular society," and (2) the harm suffered "is itself an important societal attribute, or in other words, that the characteristic of being abused is one that is important within Guatemalan society." Id. at 16. The respondent in Matter of R-A- has appealed the decision to

the Ninth Circuit Court of Appeals, and has also requested that the Attorney General review the decision, pursuant to 8 C.F.R. 3.1(h) and these matters are currently pending before the respective tribunals. However, as will be discussed below, on the record evidence, Ms. A meets the additional requirements set forth in Matter of R-A-.

The Acosta social group formulation, which looks to the immutable or fundamental nature of the defining characteristics, has not been fully adopted in the Ninth Circuit Court of Appeals. However, the different interpretive approach to social group taken in the Ninth Circuit does not compel — nor does it even support — the Board's decision in the instant case. Furthermore, the Board did not rely upon Ninth Circuit jurisprudence in denying relief to Ms.A, but cited to its decision in Matter of Y-G-.

Courts and commentators refer to the Ninth Circuit social group formulation as one requiring "voluntariness" in the association of the group members. See, e.g., Lwin v. INS, 144 F.3d 505, 511 (1998) ("the Ninth Circuit has charted a different course, construing 'social group' to represent a 'voluntary associational relationship' among its members."). The following language in the seminal Ninth Circuit social group decision, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986), is quoted to demonstrate that the Ninth Circuit has such a voluntariness requirement:

> The phrase 'particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.

801 F.2d at 1576. Notwithstanding this language, voluntariness of association is not a prerequisite to establishing a social group in the Ninth Circuit. This fact is made clear both by

the Sanchez-Trujillo court's own discussion of viable social groups, as well as by subsequent Ninth Circuit decisions.

For example, in Sanchez-Trujillo, the court provides two examples of prototypical social groups, neither of which are premised upon voluntary associational relationships. First, in discussing whether, in some cases, mere membership in a "persecuted group" could be sufficient to establish eligibility for asylum, the court notes that "[f]ew could doubt, for example, that any Jew fleeing Nazi Germany in the 1930's or 40's would by virtue of his or her religious status alone have established a clear probability of persecution." 801 F.2d at 1574 (quoting Hernandez-Ortiz v. INS, 777 F.2d 509, 515-16 n.6 (9th Cir.1985)). Although the particular social group of "Jews fleeing Nazi Germany" were unified by their nationality and religious status and beliefs, it is beyond dispute that the members of such a group were not in a voluntary associational relationship with each other. The second example the Ninth Circuit gives of a "prototypical" social group in its Sanchez-Trujillo opinion is "the immediate members of a certain family[.]" Id. at 1576. Once again, it is clear on its face that such a group is not based on voluntary associational relationship — one does not choose one's family, but is born into it.

In subsequent cases the Ninth Circuit has selectively invoked the "voluntariness" rule of Sanchez-Trujillo. For example, it invoked its voluntariness rule in DeValle v INS, 901 F.2d 787 (9th Cir. 1990) to reject as a social group family members of deserters in El Salvador and in Li v. INS, 92 F.3d 985 (9th Cir. 1996) to reject as a social group Chinese citizens with low economic status. However, in Velarde v. INS, 140 F.3d 1305 (9th Cir. 1998), without any discussion of the voluntariness requirement, the Ninth Circuit recognized a social group defined as "former bodyguards to the Presidential family" in Peru, citing the Board's decision in Matter of Fuentes,

19 I & N 658 (BIA 1988), for its "immutable characteristics" language. 140 F.3d at 1313. Again, without reference to the requirement of voluntary association, the Ninth Circuit in Aruta v. INS, 80 F.3d 1385, 1389 (9th Cir. 1996), accepted that family members of former military police officers could constitute a particular social group.

It has been observed that in the Ninth Circuit, the voluntariness requirement has generally been invoked where the "basis for the asylum claim is 'mere membership' in a sweeping demographic wedge of the general population" and where there has been "neither past harm nor an individual targeting" of the applicant. Matter of R-A-, Int. Dec. 3403 at 33 (Guendelsberger, Board Member, dissenting). For example, in Sanchez- Trujillo, where the rule originated, the claimed social group was "young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador." 801 F.2d at 1571. Although the petitioners in Sanchez-Trujillo had experienced some difficulties with the authorities, their problems did not have the hallmarks of individual targeting.[3] In De Valle, where the voluntariness rule was relied upon, the social group was the broad category of family members of deserters under circumstances where the applicant herself had not experienced any threats or acts of persecution. In contrast, in Velarde, where the Ninth Circuit made no reference to a required voluntary association among social group members, the applicant had been threatened repeatedly with death, had been the recipient of a package bomb, and narrowly escaped an abduction attempt. 140 F.3d at 1307.

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[3] Luis Alonzo Sanchez-Trujillo, one of the two petitioners, had been briefly detained on four occasions by security forces; he was not harmed during these encounters. The other petitioner, Luis Armando Escobar-Nieto, had been attacked one evening by men in civilian clothes, who robbed him and threatened him with death before releasing him. 801 F.2d at 1573.

The Ninth Circuit has spoken to the issue of the relationship between gender and social group membership in dicta only in Fisher v. INS, 79 F.3d 995 (9th Cir. 1996). The female applicant in Fisher feared persecution in Iran on the basis of religion and political opinion. A claim of persecution on account of social group defined by gender had not been raised, and was not before the court. Notwithstanding this fact, Judge Wallace, writing for the court, stated that "the mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States." Id. at 962. He went on to say that "[p]ersecution on account of sex is not included as a category allowing relief" under the Refugee Act. Id. at 963. In a concurrence Judge Canby chided Judge Wallace, stating as follows:

> Judge Wallace's opinion convincingly demonstrates that substantial evidence supports the Board's finding that Fisher was not persecuted, and did not have a well-founded fear of persecution, on account of her two asserted grounds of religion or political belief. I do not join the opinion, however, because it may too easily be misinterpreted as deciding, without briefing or argument, the important claim that it concedes Fisher did not raise: whether persecution of women because they are women is a ground for asylum under the Act....
>
> Whether persecution directed at women constitutes persecution "on account of...membership in a particular social group" within the meaning of section 1101(a)(42)(A) is an arguable point [citing to Matter of Acosta, supra and Fatin v. INS, supra] but it has not been argued or briefed in this case. The issue is not before us. Presumably these gratuitous statements on the merits of the question are dicta, but they should be left unsaid. Id. at 966.

In deciding this issue, the Ninth Circuit may look to the Second, Third, and Eight Circuit Courts of Appeal, which have all accepted that a cognizable social group may be premised upon gender alone, or in combination with other factors. Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999), (women of Ghana's Nkumssa tribe who did not remain virgins until marriage constitute a

particular social group); Fatin v. INS, supra (Iranian women who oppose fundamentalist Islamic norms consitute a particular social group)(Third Circuit); Safaie v.INS, supra (Iranian women who advocate women's rights could constitute a particular social group)(Eighth Circuit).

These circuit court decisions are consistent with domestic and international trends. For example, the INS' own Gender Guidelines recognize "sex" as the "sort of shared characteristic that could define a particular social group." Phyllis Coven, Considerations for Asylum Officers Adjudicating Claims from Women at 14 (May 26, 1995) (visited January 12, 2000) <http://www.uchastings.edu/cgrs/documents/documents.html#guidelines>. The United Nations High Commissioner for Refugees has recommended 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 a 'a particular social group'" within the meaning of the 1951 Refugee Convention. UNHCR Ex. Comm. Conclusion No. 39 (XXXVI) on Refugee Women and International Protection (36th Sess. 1985) (visited January 12, 2000) <http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom39.htm>. The Immigration and Refugee Board of Canada has made similar recommendations.[4] The United Kingdom's House of Lords also held that gender can define a particular social group for purposes of refugee status.[5]

The petitioner asserts that she is a member of the particular social group of Jordanian women who have lost their virginity prior to marriage and defied their families by marrying the

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[4] Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution: Update (Immigration and Refugee Board; Ottawa, Canada), November 13, 1996 (visited January 12, 2000) <http://www.cisr.gc.ca/legal/guidline/women/index_e.stm>.

[5] Islam (A.P.) V. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.), (1999) 2 All ER 545 (House of Lords).

man of their choice. Under controlling precedent the social group asserted by Ms. A is clearly cognizable.[6] Each of the characteristics which describe this social group are immutable. Ms. A cannot change her gender, nor can she change the fact that she was born in Jordan, and is therefore subject to its cultural norms. Furthermore, she cannot change the past experience of having engaged in pre-martial sexual relations and married against her parents' wishes. These are past experiences which have occurred and cannot be denied or erased from reality. In addition, as noted above, the UNHCR has specifically recommended the recognition of a gender-based social group where women asylum seekers face severe harm for "transgressing" social norms, which is clearly the situation of Ms. A and other women who disobey the rules of their society.

(2) Ms. A's feared persecution is on account of her membership in the particular social group of women who have lost their virginity prior to marriage and defied their families by marrying the men of their choice

The statutory language "on account of" requires proof of a nexus or causal connection between the persecution and one of the five enumerated grounds. In INS v. Elias Zacarias, supra, the Supreme Court ruled that nexus requires a showing that the persecutor is motivated by a cognizable ground in inflicting the harm. Other cases refer to the motivation to "punish" or "overcome" the victim's status or belief, e.g., "the alien possesses a belief or characteristic a

[6] Ms. A can establish the additional requirements for showing her membership in a cognizable social group set forth in Matter of R-A-, and discussed supra. The record evidence demonstrates that women who transgress the cultural and moral norms are seen by the larger society to be members of a group who deserve to be punished. Furthermore, the punishment itself — i.e., honor killing — is considered to be important in sustaining and protecting societal values and norms ("Law enforcement treatment of men accused of 'honor crimes' mirrors widespread social approval for such acts." (A.R. 151).

persecutor seeks to overcome in others by means of punishment of some sort[.]" Matter of Mogharrabi, supra.

Recognizing the difficulties inherent in proving motive, recent Supreme Court, Court of Appeal and BIA decisions have made it clear that direct evidence of motivation need not be provided, that subjective intent need not be proved, that motives can be mixed, and that motives may be deduced from the socio-cultural or political purpose of the harm. See, e.g., INS v. Elias Zacarias, supra, at 483 (proof of motive could be direct or circumstantial); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (finding that proof of subjective and malevolent intent to punish not required); Matter of S-P-, Int. Dec. 3287 at 6 (BIA 1996) ("[a]n asylum applicant is not obliged to show conclusively why persecution has occurred or may occur" and observing that requiring proof of actual, exact reason "would largely render nugatory the [Supreme Court's] decision in INS v. Cardoza Fonseca and would be inconsistent with the 'well-founded fear' standard embodied in the 'refugee' definition"); Kasinga, supra, at 10 (finding the relevant inquiry of motive to be the fundamental socio-cultural purpose and consequence of the practice of female genital mutilation).

Ms. A has asserted, and the record evidence has established, that the persecution she fears is imposed because she is a woman and because she has violated the social norms required by her society of women. It is for these reasons that her father has commanded her death. The norms which Ms. A violated — loss of virginity prior to marriage, and marriage to a man of her choosing — apply only to women; they do not apply to men. See, e.g., A.R. at 162 ("Virginity is a strict moral rule which applies to girls alone."); id. at 168 ("most fathers are still prepared to sell their daughters into wedlock for a good price ... the authority over daughters is

absolute."). The evidence overwhelmingly establishes that Ms. A's father is motivated to punish her for her gender and her failure to conform with the rules which apply to women in Jordanian society.

Although proof of her father's motivation would be sufficient to meet her burden, the Board made clear in Kasinga that Ms. A can also rely upon the overarching societal objectives served by these norms:

> Record materials state that FGM "has been used to control woman's sexuality," FGM Alert, supra, at 4. It is also characterized as a form of "sexual oppression" that is "based on the manipulation of women's sexuality in order to assure male dominance and exploitation." [citations omitted]....
>
> We agree with the parties that, as described and documented in this record, FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM. We therefore, find that the persecution the applicant fears in Togo is "on account of" her status as a member of the defined social group.

1996 BIA LEXIS 15 at *23. Here, the social norms at issue demand purity and obedience from women. These norms, taken together with the severe sanction of death inflicted for deviance from them, clearly work to perpetuate male dominance and exploitation of women. In such circumstances, as the Board held in Kasinga, the requisite nexus can be established between the persecution and a social group defined in part by gender.

CONCLUSION

For the foregoing reasons, the order of the Board of Immigration Appeals should be reversed and the petition of A should be granted.

Dated: _____

Respectfully Submitted,

_____
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_____
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