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Recent Developments in Domestic-Violence-Based Asylum Claims

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Rody Alvarado's thirteen-plus-year legal battle for asylum from domestic violence personifies the controversial nature of the question: Are women fleeing violations of their fundamental human rights eligible for refugee status? The past thirteen years have been marked by inconsistent decisions in, and changes in policy with regard to, claims for refugee protection based on gender-related harm, such as female genital cutting (FGC) and domestic violence. The latest policy shift renews hope for women seeking refuge from domestic violence. In a significant development, the Department of Homeland Security (DHS) recently acknowledged — in a brief it filed in the case of asylum seeker L-R- — that women fleeing domestic violence may qualify for refugee protection. This article provides an overview of the history of jurisprudence and policies in gender-based refugee claims — with a focus on domestic-violence claims based on membership in a particular social group[1] — analyzes the 2009 DHS brief, and explains its significance to domestic-violence claims.

Background on Gender-Based Claims for Refugee Protection. Congress enacted the Refugee Act of 1980[2] with the intention of bringing the United States into compliance with the United Nations Protocol Relating to the Status of Refugees (1967 Protocol),[3] which the United States had ratified in 1968. Both the 1951 Convention Relating to the Status of Refugees (1951 Convention)[4] and United States law define a refugee as a person with a well-founded fear of persecution for reasons of, or on account of, race, religion, nationality, membership in a particular social group, or political opinion.[5] The 1967 Protocol and the 1951 Convention[6] compel states not to return individuals to

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1. Although this article focuses on social-group claims, practitioners are strongly advised to argue that gender-based persecution was or would be on account of a woman's race, religion, nationality, or political opinion, when applicable.

2. Pub. L. No. 96-212, 94 Stat. 197 (1980).

3. Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

4. July 18, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

5. *See* 1951 Convention art. 1(a)(2); Immigration & Nationality Act (INA) §101(a)(42), 8 U.S.C. § 1101(a)(42).

6. The Convention and its Protocol are identical in all respects except for the fact that the Protocol removed geographic and temporal restrictions from the Convention, which was limited to refugees fleeing as a result of events occurring in Europe prior to January 1, 1951. Both are available in volume 10 of Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure, and online.

countries where they would suffer persecution on account of the enumerated grounds.[7] Among the most contentious questions in gender-based claims is whether women who are harmed because of gender are eligible for refugee status when gender is not one of the enumerated grounds in the refugee definition.

As early as 1985, the United Nations High Commissioner for Refugees (UNHCR)[8] Executive Committee expressed its concern about the failure of protection for female victims of physical and sexual violence and called upon states to issue guidelines to protect women fleeing gender-based persecution.[9] While gender is not a protected ground under the 1951 Convention or its 1967 Protocol, the Executive Committee recommended that women who are persecuted for reasons related to their gender could "be considered members of a 'particular social group'" within the meaning of the U.N. Refugee Convention.[10] In 2002, the UNHCR issued guidelines for gender-based refugee claims, which reiterated the position that, under appropriate circumstances, women could be granted protection as members of a particular social group.[11]

Early Agency Action, Supportive of Gender-Based Claims. Early decisions by the Department of Justice's Executive Office for Immigration Review (EOIR) were promising for gender-based claims. In 1985, in a landmark decision known as *Matter of Acosta*,[12] the Board of Immigration Appeals (BIA) — the appellate body within EOIR — laid out the framework for "particular social group" claims. The BIA expounded that "particular social group[s]" comprise individuals who share a common characteristic that is immutable or is so fundamental to identity that the individual should not be required to change

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7. *See* 1951 Convention art. 33; 1967 Protocol art. 1(1) — by incorporation.

8. UNHCR's primary purpose is to safeguard the rights of refugees worldwide by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application, and proposing amendments thereto." Statute of the Office of the UNHCR, U.N. Doc. A/RES/428(v), Annex, ¶ 8 (1950). The United States Supreme Court has recognized the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (also available in volume 10 of Immigration Law and Procedure) as guiding authority for interpreting asylum law. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 437-39 (1987).

9. Executive Committee Conclusions: No. 39, Refugee Women and International Protection (1985).

10. *Id.*

11. Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees ¶¶ 6, 28-31 (2002).

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

it.[13] Importantly, the BIA included sex as an example of an immutable characteristic that could define a social group. The *Acosta* approach was adopted by numerous federal circuit courts,[14] and has been cited favorably by several other common-law countries.[15]

Early action by the Department of Justice's (DOJ) Office of International Affairs also advanced gender claims. DOJ heeded the UNHCR Executive Committee's call, and in 1995 issued guidelines for asylum officers adjudicating refugee women's applications.[16] While the guidelines marked a positive development for refugee women, because they were not in the form of a regulation or statute they were — and continue to be — not binding on adjudicators like immigration judges or the BIA. For instance, just a few short months after the guidelines were issued, an immigration judge denied asylum to Fauziya Kassindja,[17] a Togolese woman who had fled her country to escape FGC. In 1996, the BIA remedied the failure to protect Ms. Kassindja and issued a seminal decision recognizing that women could qualify for refugee status based on violations of their fundamental rights — in her case FGC — and that gender could be a defining characteristic of a particular social group.[18]

Ms. Kassindja argued, and the BIA agreed, that she was a member of the particular social group of "young women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice," and that the persecution she feared would be on account of her group membership. The BIA deemed the group cognizable under *Matter of Acosta* because the shared characteristics of being a young woman and a tribe

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13. *Id*. at 233.

14. *See, e.g.,* Castellano-Chacon v. Ashcroft, 341 F.3d 533, 546 (6th Cir. 2003); Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 352 (5th Cir. 2002); Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000); Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998); Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993); Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993).

15. *See e.g.*, Ward v Att'y Gen. of Canada, [1993] 2 S.C.R. 689 (Canada); *In re G.J.*, Refugee Appeal No. 1312/93 (N.Z. R.S.A.A. 1995) (New Zealand); Shah & Islam v. Sec'y of State for the Home Dep't, (1992) 2 A.C. 629 (H.L.) (United Kingdom).

16. *See Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, Department of Justice, Office of International Affairs (May 26, 1995).

17. When Ms. Kassindja arrived in the United States, her name was recorded by immigration authorities as "Kasinga," and the landmark case that resulted from her claim is *Matter of Kasinga*. However, the correct spelling of her last name is "Kassindja."

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

member are immutable, and the characteristic of "having intact genitalia" is so fundamental to identity that a woman should not be required to change it.[19]

***Matter of R-A-*, Retreating from *Acosta* and *Kasinga*.** Despite this progress, a 1999 decision by the BIA, known as *Matter of R-A-*,[20] called into question the United States commitment to protect women from serious human rights violations. In *Matter of R-A-*, the BIA denied protection to Rody Alvarado,[21] a Guatemalan asylum seeker who suffered extreme violence at the hand of her husband, in a situation in which neither the police nor the courts would extend her any protection. Ms. Alvarado had been granted asylum by an immigration judge based, *inter alia*, on her membership in the group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[22] The then-Immigration and Naturalization Service (INS) appealed the decision, arguing that the group was not cognizable and that Ms. Alvarado was not harmed because of her group membership.

The BIA ruled that the criteria articulated in *Matter of Acosta* — that group members share immutable or fundamental characteristics — was only a threshold, and that asylum seekers needed to also demonstrate that the characteristic was important in society, that the group members saw themselves as a group, and that the society also considered them to be a group.[23] The Board held that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" was not a cognizable social group because it was not recognized or understood to be a societal faction, and because the evidence did not show that domestic violence was an important practice in Guatemalan society.[24] The Board also ruled that the fact that group members did not consider themselves members of a group weighed against finding that the group was cognizable.

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19. *Id*. at 366.

20. 22 I. & N. Dec. 906 (BIA 1999; Att'y Gen. 2001).

21. The spelling of Ms. Alvarado's name also has been incorrectly reported within the immigration system, as well as in the media. The correct spelling of her first name is "Rody" rather than "Rodi."

22. *Id*. at 911.

23. *Id.* at 918.

24. *Id.* at 919.

The BIA held that regardless of the group's cognizability, Ms. Alvarado had failed to establish that she was persecuted "on account of" her group membership. The nexus, or on-account-of element, required applicants for refugee status at the time to prove that persecution was or would be motivated at least in part by the applicant's race, religion, nationality, political opinion, or social-group membership.[25] Because Ms. Alvarado's husband targeted only her and not other group members, and because he would have targeted her regardless of her nationality, the BIA found that she was not persecuted on account of her group membership.[26] The BIA also rejected the argument that societal acceptance of domestic violence and the state's failure to protect women from it motivated Ms. Alvarado's husband to abuse her.[27]

DOJ Response to Advocates' Call for Action. Women's rights, refugee rights, and immigrants' rights groups were deeply troubled by the decision and launched a broad-based advocacy campaign calling for its reversal.[28] In 2001, then-Attorney General Janet Reno responded as advocates had hoped. She intervened by certifying the case to herself and vacating the BIA's decision. A month prior to the certification, her Justice Department had issued proposed regulations[29] to provide guidance on the elements of the refugee definition. Although the regulations themselves do not mention gender, their preamble expressly states that they are intended to address gender claims and to remove the obstacles to these claims posed by the BIA's decision in *Matter of R-A-*.[30] Attorney General Reno remanded *Matter of R-A-* to the BIA, and ordered it to stay the decision until the proposed regulations were finalized.[31]

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25. *See* Matter of S- P-, 21 I. & N. Dec. 486, 495 (BIA 1996) (applicant must produce evidence from which it is reasonable to believe that persecution was or would be motivated in part by an actual or imputed protected ground).

26. 22 I. & N. Dec. at 920.

27. Ms. Alvarado had also argued persecution on account of political opinion, an argument that the BIA also rejected. This article does not address this theory in detail, because its focus is on the social-group ground and recent developments pertaining to it.

28. *See* Frederic Tulsky, *Abused Woman is Denied Asylum; Immigration Ruling Reflects Split Over Gender Persecution*, Washington Post, June 20, 1999, at A1.

29. 65 Fed. Reg. 76588-98 (Dec. 7, 2000).

30. 65 Fed. Reg. at 76589 (supplementary information).

31. 22 I. & N. Dec. 906 (Att'y Gen. 2001) (as Order No. 2379-2001, *available at* http://cgrs.uchastings.edu/documents/legal/ag_ra_order.pdf).

Regulations to Remove Barriers in Domestic-Violence Cases. DOJ's proposed regulations were generally considered positive for gender-based refugee claims. The preamble to the regulations clarified that the immutable-or-fundamental-characteristics approach articulated by the BIA in *Acosta* is the correct approach to social-group claims.[32] It recognized that gender is "clearly" an immutable characteristic, and that marital status may be considered immutable in appropriate circumstances.[33] The preamble also recognized that "all relevant evidence" of the applicant's individual circumstances and country conditions information should be considered in determining whether the shared characteristic is unchangeable or the applicant should not be required to change it.[34]

In addition, the preamble explained that other factors may be considered, but are not required, in social-group determinations. While the factors "may be relevant *in some cases*," they are "*not determinative* of the question of whether a particular social group exists."[35] These factors include whether group members: 1) are closely affiliated, 2) are driven by a common motive or interest, 3) have a voluntary associational relationship, 4) are recognized as a societal faction or a recognized segment in society, 5) view themselves as members of the group, and 6) are assigned distinct status or treated differently in society.[36] The first three factors come from federal circuit court decisions on the meaning of the term "particular social group,"[37] while factors 4, 5, and 6 are consistent with the BIA's social-group ruling in *Matter of R-A-*, which concerned advocates.

The preamble affirmed Supreme Court precedent that nexus to a statutorily protected ground can be established through direct or circumstantial evidence.[38] The preamble also recognized that circumstantial evidence that patterns of violence against members of the defined group are "supported by the legal system or social norms in the country in

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32. 65 Fed. Reg. at 76593 (supplementary information).

33. The preamble lists "religious, cultural, or legal constraints" against divorce as examples of circumstances that could make marital status unchangeable. *Id*.

34. *Id*.

35. *Id*. at 76594 (supplementary information) (emphasis added).

36. Proposed 8 C.F.R. §208.15(c)(3), *id*. at 76598.

37. *See* Gomez v. United States, 947 F.2d 660, 664 (2d Cir. 1991); Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

38. *See* INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

question, and [] reflect a prevalent belief within society or within relevant segments of society" is relevant to determining whether persecution is on account of social-group membership.[39]

Rody Alvarado's Ongoing Legal Battle. Despite the issuance of the proposed regulations in 2000 and Attorney General Reno's 2001 decision in *Matter of R-A-*, the regulations were never finalized. During his tenure as Attorney General, John Ashcroft certified the case to himself in 2003, and insiders leaked the information that his intention was to issue a negative decision. Advocates once again rallied in support of Ms. Alvarado and women like her, and by this point the immigration authorities had changed their position, with the DHS filing a brief, discussed below, urging Attorney General Ashcroft to grant Ms. Alvarado asylum.[40] Attorney General Ashcroft did not decide the case, but instead remanded it to the BIA in 2005, with the same order Attorney General Reno had initially issued — to stay the case until final regulations issue.[41] In 2008, Attorney General Michael Mukasey certified the case a third time and ruled that recent jurisprudence on social group and nexus, discussed below, provided sufficient guidance for the BIA to issue a decision without waiting for the issuance of regulations. He lifted the stay and ordered the BIA to decide *Matter of R-A-* and other domestic-violence cases that the BIA had been holding pending the issuance of final regulations.[42] The BIA, in turn, has remanded *Matter of R-A-* and other domestic-violence cases to the immigration courts for submission of additional evidence and argument in light of these recent decisions.

DHS Argument that Rody Alvarado is Eligible for Asylum. DHS's 2004 brief argued that Ms. Alvarado had established all the elements of asylum and urged Attorney General Ashcroft to grant her case. Of particular note are the brief's arguments regarding social group and nexus. The brief affirmed the *Matter of Acosta* test as the appropriate standard for social-group cases, argued that gender is an immutable characteristic, and rejected the BIA's imposition of additional requirements. DHS argued that Ms. Alvarado was a

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39. 65 Fed. Reg. at 76593 (supplementary information).

40. *See* Department of Homeland Security's Position on Respondent's Eligibility for Relief, Matter of Alvarado-Pena, A73 753 922 (Att'y Gen. Feb. 19, 2004), *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf [hereinafter DHS 2004 brief].

41. Matter of R-A-, 23 I. & N. Dec. 694 (Att'y Gen. 2005); *see also* Bob Egelko, *Ashcroft Will Pass Asylum Case to Successor; Abused Woman from Guatemala in Limbo for Years*, San Francisco Chronicle, Jan. 22, 2005, at B3.

42. Matter of R-A-, 24 I. & N. Dec. 629 (Att'y Gen. 2008).

member of the cognizable social group of "married women in Guatemala who are unable to leave the relationship," and explained that a woman may be unable to leave a relationship for a number of reasons — such as religious, cultural, or moral constraints, or because the abuser would not recognize divorce or separation as ending the relationship.[43] DHS further took the position that the size of the group should not be determinative and that groups need not be small to be cognizable. However, the group is overbroad if it is defined by traits that are not the characteristics targeted by the persecutor.[44]

Consistently with the preamble to the proposed regulations, the 2004 brief contended that nexus can be established through direct evidence, such as evidence of the persecutor's beliefs, or circumstantial evidence. Circumstantial evidence, it explained, includes evidence of legal and social norms that permit abuse of group members and embolden persecutors to act. Evidence that the abuser "uses violence to enforce power and control over the applicant because of the social status that the applicant has within the family relationship is highly relevant to determining the persecutor's motive."[45] The brief also rejected as fundamentally flawed the BIA's ruling that Ms. Alvarado had failed to establish nexus because there was no evidence that her husband sought to abuse other group members.[46]

Decisions in Gender-Based Claims, Rife With Inconsistency and Paralysis. The absence of guidance — in the form of regulations or binding precedent — in domestic-violence cases, and gender cases more broadly, has resulted in inconsistent decision-making by asylum officers and immigration judges.[47] Some adjudicators have found a basis in law to grant asylum or withholding of removal to women fleeing domestic violence; others have denied protection, ruling that the women were not members of particular social groups and/or that persecution was not inflicted on account of social-group membership or any other statutorily protected ground.[48] Many women have been left in

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43. DHS 2004 brief, at 20.

44. *Id*. at 22.

45. *Id*. at 35.

46. *Id*.

47. Federal circuit court decisions have not issued in domestic-violence cases because the BIA has been holding appeals of such cases, waiting for final regulations.

48. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 Va. J. Soc. Pol'y & L. 119, 128 n.27 (2007).

legal limbo, while asylum offices sent their cases to headquarters, while immigration judges administratively closed their cases or continued them indefinitely, or while appeals sat at the BIA for years, all waiting for direction from above.

Imposing the Problematic Requirements of Social Visibility and Particularity. In the meantime, the BIA imposed additional requirements for asylum and withholding-of-removal cases based on the particular-social-group category. These burdensome requirements are known as "social visibility" and "particularity." Social visibility was first mentioned in a BIA decision known as *Matter of C-A-*.[49] The applicant in the case sought protection based on membership in the group of "former noncriminal drug informants working against the Cali drug cartel." The BIA rejected the social group. While it acknowledged *Acosta*'s immutable/fundamental characteristic approach as the "starting point" for analyzing particular social groups, it explained that the social visibility of the group is a "relevant factor" in determining its existence.[50] This new "relevant factor," though not a *requirement*, justified the BIA's holding that the social group was not cognizable under the Immigration and Nationality Act (INA).[51] The BIA also found that the group was "too loosely defined to meet the requirement of particularity," but offered no explanation of the term or its relevance to social-group determinations.[52] The BIA cited to UNHCR's 2002 guidelines on social group claims[53] as the source on the importance of social visibility. As explained below, the BIA misconstrued UNHCR's guidelines.

One year after its decision in *C-A-*, the BIA reaffirmed "the importance of social visibility" and "particularity" as "factor[s]" in making a particular social group determination in *Matter of A-M-E- & J-G-U-*.[54] The group advanced in that case was "affluent Guatemalans." Just as in *C-A-*, these "factors," while not listed or discussed as *requirements*, were de-

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49. 23 I. & N. Dec. 951 (BIA 2006*), aff'd sub nom.* Castillo-Arias v. U.S. Att'y Gen.*,* 446 F.3d 1190 (11th Cir. 2006).

50. *Id*. at 957.

51. *Id*. at 960.

52. *Id*. at 957.

53. UNHCR Guidelines on International Protection: "Membership in a particular social group," within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR social group guidelines].

54. *See* 24 I. & N. Dec. 69, 74 (BIA 2007).

terminative. The BIA held that the group of "affluent Guatemalans" lacked social visibility and was not sufficiently particular to constitute a particular social group.[55]

In a 2008 decision known as *Matter of S-E-G-*,[56] the BIA converted the "factors" of social visibility and particularity into "requirements" for proving the existence of a particular social group. *S-E-G-* was a gang-based asylum claim, in which the applicants fled persecution that resulted from their (or their immediate family members') refusal — based on their religion and fundamental beliefs — to join a gang. The social groups advanced in *S-E-G-* were: "Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own moral and religious opposition to the gang's values and activities" and "family members of such Salvadoran youth." For the first time, the BIA elaborated on the term "particularity," explaining that the key question is whether the group is "sufficiently 'particular,' or is 'too amorphous … to create a benchmark for determining group membership.'"[57] It then ruled that the social groups advanced in the case lacked sufficient particularity because "'people's ideas of what those terms mean can vary.'"[58] It also held that the groups lacked social visibility, based on insufficient evidence establishing that members of either group would be "perceived as a group" by society.[59]

BIA Misconstruction of UNHCR's Guidelines. The BIA stated that its imposition of social visibility was consistent with UNHCR guidelines on the issue. This is clear error. UNHCR's 2002 guidelines on social-group claims provide *alternative* approaches to social-group determinations. The primary approach is the protected-characteristics approach, which, very similarly to the standard in *Acosta*, examines whether group members share immutable characteristics or characteristics that are so fundamental to identity that the individual should not be required to change them. Immutable characteristics

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55. *Id.* at 74-76.

56. *See* Matter of S- E- G-, 24 I. & N. Dec. 579 (BIA 2008); *see also* Matter of E- A- G- , 24 I. & N. Dec. 591 (BIA 2008) (requiring social visibility and particularity in addition to a shared immutable or fundamental characteristic).

57. 24 I. & N. Dec. at 584 (citing Davila-Mejia v. Mukasey, 531 F.3d 624, 628-29 (8th Cir. 2008)). While the BIA explained that the focus of the particularity requirement is whether groups are clearly demarcated, its decisions conflate the question of particularity of the social group with other elements of the refugee definition, and overlap with the social-visibility requirement. *See, e.g.,* 24 I. & N. Dec. at 585 (conflating particularity with nexus by finding particularity not established because there was no evidence that gangs target group members "in order to punish them for [their shared] characteristics").

58. *Id.* at 585-86 (citing Davila-Mejia v. Mukasey, 531 F.3d 624, 628-29 (8th Cir. 2008)).

59. *Id.* at 587.

are those that are innate — such as gender or ethnicity — or that have become unchangeable, such as a past experience.[60] Sometimes, however, individuals may share a characteristic that is not immutable or fundamental, but that makes the group cognizable or sets group members apart from society at large. In such cases, the guidelines explain, a particular social group can be established under the alternative social-perception approach.[61] The BIA's error in *Matter of C-A-* and its progeny was that it interpreted UNHCR's guidelines as requiring *both* protected characteristics *and* social perception, rather than offering alternative approaches. Even under the social-perception approach, UNHCR does not require that group members be visible to society at large. UNHCR has expressly communicated to the BIA its misapplication of the guidelines, but the BIA has continued to incorrectly apply them.[62]

Unfortunately, a number of federal circuit courts have affirmed the social-visibility and particularity requirements.[63] These requirements are particularly burdensome, have consistently been used to deny refugee status, and have posed further obstacles in gender-based cases.[64]

Raising the Bar on Nexus. The nexus element has also become increasingly difficult to establish. Under the REAL ID Act of 2005, the statutorily protected ground must be "one central reason" for persecution.[65] The BIA has not interpreted this standard as being "substantially different" from the mixed motives, or "at least in part," standard.[66]

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60. *See* UNHCR social group guidelines, *supra* note 53, ¶6.

61. *Id*. ¶13.

62. The UNHCR recently filed an amicus brief before the Third Circuit's court of appeals, clarifying that "the Board [has] inaccurately cite[d] the *UNHCR Social Group Guidelines* in support of the 'social visibility' requirement. This interpretation of the UNHCR Guidelines is incorrect." Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner 3-4, 8-10, Validivezo-Galdamez v. Holder, No. 08-4564 (A97-447-286), (3d Cir. Apr. 14, 2009), *available at* http://www.unhcr.org/refworld/category,LEGAL,UNHCR,AMICUS,,49ef25102,0.html.

63. *See, e.g.,* Scatambuli v. Holder, 558 F.3d 53, 60 (1st Cir. 2009) (adopting social-visibility requirement); Santos-Lemus v. Mukasey, 542 F.3d 738, 744, 746 (9th Cir. 2008) (rejecting social group for lack of visibility and particularity); Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008); Ucelo-Gomez v. Mukasey, 509 F.3d 70 at 73-74 (2d Cir 2007) (affirming social visibility and particularity as proper factors); *Castillo-Arias,* 446 F.3d at 1197-98 (applying visibility and particularity as requirements).

64. For example, the immigration judge in Ms. L-R-'s case rejected the proposed social group for lack of visibility and particularity. Following the submission of DHS's April 2009 brief, the BIA remanded the case to the immigration court, where it is currently pending.

65. Section 101(a)(3) of REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302, 303 (codified at 8 U.S.C. §1158(b)(1)(B)(i), INA § 208(b)(1)(B)(i)).

However, a few federal circuit courts have interpreted the REAL ID Act's "one central reason" language as requiring a higher showing than the previous "at least in part" standard.[67] Even under this higher standard, the statutory ground does not have to be the only motivation, and mixed motives for persecution are still acceptable, as long as the protected ground is not tangential to persecution.[68]

DHS Change of Policy in Domestic-Violence Cases. Lawyers for DHS have used the social-visibility and particularity requirements, as well as the "one central reason" standard, to argue against asylum or withholding of removal in domestic-violence cases, and to appeal grants of such cases. For example, before the immigration judge, a DHS trial attorney argued against refugee protection for domestic violence victim L-R-, a position he later defended in a 2008 brief he submitted to the BIA. Ms. L-R- had fled Mexico after suffering years of sexual assault and domestic abuse. She was denied asylum and withholding of removal by a San Francisco immigration judge and appealed the decision to the BIA. In its initial brief to the BIA, filed during the Bush administration in April 2008, DHS argued, *inter alia*, that the decision below should be sustained because Ms. L-R- had failed to establish that she was a member of a cognizable social group or that her persecution was on account of any such membership.

But top officials in DHS changed course in April 2009, shortly after the Obama administration took power, and filed a brief arguing that in some cases women who have suffered domestic violence may be eligible for refugee protection. While the brief was filed in April 2009, it did not become public until July 16, 2009, when asylum seeker L-R- provided her permission for the release of a redacted copy.[69] The brief marks a significant change in policy toward domestic-violence cases, and has implications for gender claims more broadly.[70]

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66. *See* Matter of J-B-N- & S-M-, 24 I. & N. Dec. 208, 214 & n.9 (BIA 2007), *aff'd sub nom.* Ndayshimiye v. Att'y Gen., 557 F.3d 124 (3d Cir. 2009).

67. *See Ndayshimiye,* 557 F.3d 124, 131 (3d Cir. 2009) ("[T]he plain meaning of [this provision] contradicts Petitioner's suggestion that § 208 simply adopts the pre-2005 requirement that persecution have been motivated 'at least in part' by a protected ground."); Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2008) ("the plain meaning of the phrase 'one central reason' indicates that the Real ID Act places a more onerous burden on the asylum applicant than the 'at least in part' standard we previously applied.").

68. *See J-B-N-,* 24 I. & N. Dec. at 213-14; *see also Parussimova,* 555 F.3d at 741.

69. *See* Julia Preston, *New Policy Permits Asylum for Battered Women*, N.Y. Times, July 16, 2009, at A1.

70. While the brief's focus is domestic-violence claims, DHS's formulation of social groups based on gender and women's status — which it argues fulfill the visibility and particularity requirements — and its recognition that gender-based harm may be motivated by legal or social norms accepting such harm are relevant to gender claims.

DHS's 2009 brief[71] affirms the position articulated in its 2004 brief that women who have suffered domestic violence may establish eligibility for asylum/withholding of removal based on social-group membership, even with the additional requirements of social visibility and particularity. The brief advances two alternate social groups that it argues could meet the immutability, visibility, and particularity requirements, depending on the facts in the record: 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." It also clearly states that a woman's status in a domestic relationship or her inability to leave a domestic relationship may be one central reason for persecution. The brief explains that social, political, and historical conditions in the country where persecution occurred or is feared are relevant to social-group and nexus determinations, and sets forth factors to consider in making such determinations.

As all practitioners should do when formulating the particular social group in their cases, DHS advises that the characteristics the persecutor targets in his victim must be identified in order to assess the existence of a particular social group. At the same time, practitioners should always avoid formulating particular social groups defined by the harm suffered; such groups are considered "circular" and are not recognized.[72] DHS suggests that the characteristic L-R-'s abuser targeted was her status in the domestic relationship, which he viewed as subordinate and permanent — refusing to recognize her physical separation as ending the relationship.

Social Groups in Domestic-Violence Cases Satisfying Requirements of *Acosta*, Visibility, and Particularity. According to DHS, immutability of the shared characteristic(s) can be established in cases where economic, social, physical, or other constraints made it impossible for a woman to leave the abusive relationship, or where the abuser would not recognize separation or divorce as ending the relationship, were the woman to be deported. Evidence of the woman's individual circumstances as well as information regarding societal attitudes about women's status in domestic relationships and domestic violence in general are relevant to immutability of the shared characteristic(s).

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71. The brief is available at http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf.

72. For example, the argument that a woman was targeted for domestic violence "on account of" her membership in the group of "abused women" is a circular argument. *See, e.g.*, Lukwago v. Aschcroft, 329 F.3d 157, 171-72 (3d Cir. 2003) (rejecting social group of "children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude").

Visibility of the group can be established by showing that society and the state or government officials perceive group members in a particular way, e.g., the status of women in domestic relationships as subordinate, or treat them distinctly, e.g., by failing to protect women in domestic relationships from physical harm. DHS also explains that the alternative social groups proposed could satisfy the particularity requirement because the terms delineating both groups can be defined clearly enough for adjudicators to determine who is a member of the groups. DHS points to the "detailed framework" for conceptualizing domestic relationships under section 237(a)(2)(E)(1) of the INA,[73] which defines the crime of domestic violence, to show that the term "domestic violence" can be clearly defined.

Proving Nexus. Nexus, according to the brief, may be established through evidence regarding societal acceptance of domestic violence, impunity for domestic violence, and lack of protection for victims of domestic violence. These factors may embolden an abuser and reinforce his belief that abuse of women within a domestic relationship is acceptable.

DHS's brief should help attorneys formulate particular-social-group and nexus arguments in domestic-violence cases. Attorneys are advised to define social groups based on the two groups advanced in the DHS brief[74] (assuming the facts and socio-political context support one or both of the groups), and to prove nexus by submitting evidence of societal beliefs about domestic violence and impunity for such violence. Practitioners should submit country-conditions evidence, including expert testimony when possible, to establish that women in domestic relationships take on a subordinate status in society, that there is widespread tolerance for domestic violence in the country where persecution occurred or is feared, and that the state fails to protect women from domestic violence. Attorneys should present similar evidence specific to the client's circumstances — e.g., that the abuser assigned her a subordinate status upon entering the domestic relationship, that he believed he could abuse her because of her status, and, where relevant, that he would not recognize a formal end to the relationship.

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73. 8 U.S.C. §1227(a)(2)(E)(1).

74. The DHS 2009 brief recognizes that in some cases a victim of domestic violence may be able to establish that she is a member of a social group based on family membership, and that such membership may be the reason for her persecution. Dep't of Homeland Security's Supplemental Brief, [case name and file number redacted,] at 16 n.11, *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf.

Evidence Regarding Relocation and State Failure to Protect — Essential. The brief also stresses the importance of careful determinations regarding the reasonableness of relocation and whether the government is unable or unwilling to protect against domestic violence, indicating that these will be central issues in domestic-violence cases. Attorneys should be sure to submit sufficient evidence to prove that a client cannot safely or reasonably relocate, and that the government is unable or unwilling to protect the client from harm. As with social group and nexus, country-conditions evidence, including expert testimony, is central to proving lack of state protection and lack of safe and reasonable relocation alternatives. Attorneys should look to the existence of laws against domestic violence and spousal rape, as well as information regarding the enforcement of such laws, including prosecution rates for crimes of domestic violence and spousal rape, to show the failure of state protection. In many countries where violence against women has culminated in the practice of "femicides" or gender-motivated killings, evidence of such a pattern should be presented.[75] Practitioners should also seek information regarding other governmental efforts to curb domestic violence — such as governmental services to victims of domestic violence, or campaigns to educate the public about domestic violence. Evidence that the applicant sought, but did not receive, protection from the police or courts would be highly relevant, as would evidence that women she knows have sought such protection to no avail.

Evidence specific to the abuser's ability to track the applicant, e.g., through familial connections or connections to government officials, would be highly pertinent to an applicant's ability to safely relocate. In addition, country-conditions information — through an expert and documentation — showing that government officials can be bribed for information, or that localities post address information on the Internet, for example, would undercut arguments that the applicant can safely relocate. Even if relocation is possible, it must be reasonable, considering the totality of the circumstances.[76] Attorneys should submit evidence of any individual circumstances, such a psychiatric condition from which the applicant may be suffering as result of the violence she experienced, to show that relocation would be unreasonable. Practitioners should also present information about societal factors that would make relocation unreasonable — such as information about widespread societal discrimination against women and lack of employment opportunities for women.

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75. Femicides are on the rise in Mexico and Guatemala, and have been documented in other Central American countries. *See generally* Adriana Beltrán & Laurie Freeman, Washington Office on Latin America, Special Report: Hidden in Plain Sight: Violence Against Women in Mexico and Guatemala (2007), *available at* www.wola.org/media/violenceAWomen.pdf; Musalo, *supra* note 48, at 136-37. For further country-conditions information regarding violence against women, contact the Center for Gender and Refugee Studies at http://cgrs.uchastings.edu/.

76. *See* 8 C.F.R. §§1208.13(b)(1)(i)(B), (2)(ii); 1208.16(b)(1)(i)(B), (2).

Conclusion. The DHS brief in L-R- takes the position that women who are abused because of their status in a domestic relationship or their inability to leave a domestic relationship may be eligible for refugee protection as members of a particular social group. In the face of Rody Alvarado's enduring legal battle for asylum, the still-lacking regulatory guidance, and the fact that adjudicators have often found that gender-defined social groups could not meet the social-visibility and particularity requirements, the DHS brief — acknowledging that they can and charting the path — should support domestic-violence claims, and gender-based claims more broadly.

Additional information generally, *see* Karen Musalo, Jennifer Moore & Richard A. Boswell, Refugee Law & Policy: A Comparative and International Approach, http://www.carolinapress.com/books/1606.

For more on asylum *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure §§33.01, 33.04, 33.05, 33.06, 34.02, 34.03.

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