

Guide to Establishing the Asylum Eligibility of Victims of Human Trafficking and Forced Marriage



2029 P Street, NW Suite 202, Washington, DC 20036 Tel: (202) 296-5702 Fax: (202) 296-5704

Website: <http://humanrightsusa.org> Email: info@humanrightsusa.org

World Organization for Human Rights USA is an independent, affiliated national member of the international World Organization Against Torture (OMCT) and SOS Torture Networks.

About the World Organization for Human Rights USA

Human Rights USA is a Washington, DC based non-profit organization that works to prevent human rights abuses through bold and innovative litigation in U.S. courts. Using impact litigation and other legal strategies, Human Rights USA seeks to obtain justice for victims of human rights violations, punish the violators, and ensure that U.S. law upholds internationally recognized human rights standards.

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DISCLAIMER

This guide is intended to provide attorneys representing refugees from trafficking and/or forced marriage with a legal framework for an asylum claim. However, the legal strategies, arguments, and authority included in this guide are not exhaustive and are not broken down for each individual federal circuit. This guide should not be used as a substitute for independent legal research or in place of an individualized strategy suited to the circumstances of each case.

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Table of Contents

Introduction.....	3
I. Writing the Brief.....	9
A. Who is a Refugee?.....	9
B. Build a Strong Evidentiary Record.....	10
C. Statement of Facts.....	13
D. Using International Materials.....	14
E. Note on Organization.....	15
II. Persecution.....	16
A. Establishing Persecution for Survivors of Trafficking and/or Forced Marriage.....	16
B. Legal Authority.....	19
III. Social Group.....	28
A. Defining the Social Group for Survivors of Trafficking and Forced Marriage.....	29
B. Common pitfalls.....	30
C. Legal Authority on Social Group Definitions.....	31
D. Social Visibility and Particularity.....	39
IV. Political Opinion & Religion.....	43
A. Political Opinion.....	43
B. Religious Belief.....	43
C. Establishing a Political Opinion or Religious Belief.....	44
V. Nexus.....	45
A. The Persecutors' Motivation.....	45
B. Establishing the Nexus.....	46
C. Mixed Motive Cases.....	49
VI. Well-Founded Fear.....	52
A. The Rebuttable Presumption.....	52
B. Establishing an Independent Well-Founded Fear.....	55
VII. Humanitarian Asylum.....	58
A. Severe Past Persecution - § 1208.13(b)(1)(iii)(A).....	58
B. Other Serious Harm - § 1208.13(b)(1)(iii)(B).....	59
VIII. Withholding of Removal.....	60
A. Threats to Life or Freedom.....	60

B. More Likely Than Not..... 60

IX. Convention Against Torture Protection..... 62

A. What Type of Harm Qualifies as Torture?..... 62

B. Motivation of the Torturer..... 64

C. Acquiescence of Public Officials..... 64

D. More Likely Than Not..... 66

Conclusion 67

Authorities Cited..... 68

Index..... 77

Introduction

Purpose of this Manual:

Every year, hundreds of thousands of people become victims of human trafficking or forced marriage.¹ Some are taken away from their home countries and moved abroad, where they are forced to engage in prostitution, other forms of labor, or marriage. Others are trafficked internally within their countries of origin. Those who escape or are rescued may want nothing more than to return home. Others may legitimately fear being punished or re-trafficked if they return. Trafficked persons who do not wish to return home must seek protection in another country.

The United States has developed some specific remedies for trafficked persons who wish to remain in this country, primarily the T visa, but broader forms of protection are needed to adequately protect the many trafficked persons who do not qualify for this form of relief. This manual focuses on asylum as an alternative form of relief by presenting a legal framework for establishing asylum eligibility on the basis of trafficking and/or forced marriage. The manual also includes brief sections on withholding of removal under INA § 241(b) and protection under the Convention Against Torture.

Human Rights USA's trafficking-related asylum cases have involved women and girls fleeing sex trafficking or forced marriage, and this manual focuses on these types of gender-based asylum cases. Many of the arguments and citations to authority contained herein, however, could be applied to other types of trafficking cases, including labor trafficking and claims made by male asylum seekers.

Note on forced marriage

Several of Human Rights USA's asylum briefs have treated forced marriage as a subset of trafficking. Many forced brides are literally purchased as commodities by their "husbands," while others are exchanged under circumstances substantially similar to a commercial transaction. Other women may not be exchanged for any value, but may be subjected to some kind of forced labor upon marriage. This manual includes arguments and authority that would be helpful in any type of forced marriage case, whether or not the situation can be characterized as trafficking.

¹ See U.S. Dep't of State, Trafficking in Persons Report, Introduction, 2001-08; Advocates for Human Rights, *Forced and Child Marriage*, http://stopvaw.org/forced_and_child_marriage.html.

Who is this manual for?

The short answer is that this manual is for any attorney litigating a trafficking or forced marriage-related asylum case.

Of course, the attorneys representing asylum seekers will fall on a spectrum from experienced immigration attorneys to attorneys handling an asylum case for the first time. While experienced attorneys may just be looking for a few tips on litigating a specific type of asylum claim, other attorneys may need broader input in asylum law generally. This manual does include some basic information to assist in understanding how the arguments and strategies fit into the framework of an asylum claim, but **this manual is not meant to serve as an overall primer on asylum litigation**. Attorneys are cautioned not to rely exclusively on this manual, and to perform independent research on legal standards and precedents for asylum cases.

What this manual does NOT do

This manual does **NOT** explain the asylum process, such as how to file a claim, where to submit claims, deadlines, timetables or other procedural issues.

This manual does **NOT** include instructions on other potential immigration remedies for trafficked persons, such as the T or U visas.²

Using this Manual

This manual focuses primarily on tips and strategies for drafting a brief in an asylum case. It contains brief explanations of each element of asylum law and suggestions for framing the arguments, including sample authority. These same arguments and much (but not all) of the sample authority is repeated in the accompanying sample briefs. Used in conjunction with the sample briefs, the manual helps to explain why certain arguments or ways of approaching issues are helpful. The manual clarifies the logic behind the sample briefs so that users may narrow in on which arguments and citations would be most helpful to their case.

The manual is broken down into sections based on the different elements of any asylum claim, with additional sections on withholding of removal and protection under the Convention Against Torture. Sample authority and suggestions for use of supporting evidence are included under each section where relevant.

² For that information, please see, e.g. http://www.asistahelp.org/en/access_the_clearinghouse; <http://iwp.legalmomentum.org/immigration/human-trafficking/tools/11%20T-visa-%20OVW%202.22.2009.pdf/view>; <http://www.legalmomentum.org/our-work/immigrant-women-program/u-visa.html>; <http://nyatn.files.wordpress.com/2010/03/u-manual-finald.pdf>; [http://aaldef.org/docs/T-visa-manual-3rd-ed\(1208\).pdf](http://aaldef.org/docs/T-visa-manual-3rd-ed(1208).pdf).

Lists of sample authorities are not necessarily exhaustive. Attorneys are encouraged to look for additional support or cases that may be more on point with their particular case. The sample authority in the manual generally falls under two categories: most will be substantive support for particular arguments, such as using marital status as an element of a social group; in other sections the authority is offered to help frame the law or legal analysis, such as clarifying the meaning of “social visibility.”

While the manual contains some suggestions for responding to certain common issues on appeal, it is geared towards the drafting of an immigration court or asylum office brief. For more targeted assistance with appeals, please contact Human Rights USA.

Why Asylum for Trafficked Persons?

The U.S. government has taken important steps to combat trafficking and assist trafficked persons. Under U.S. law, the primary tool for securing immigration relief for trafficked persons is the T visa. The T visa has been a significant benefit to many trafficked persons, allowing them to obtain at least temporary legal residence and access to refugee benefits. However, the definitions in the Trafficking Victims Protection Reauthorization Act (TVPRA), along with other requirements for T visas, have serious limitations that have allowed many trafficked persons to fall through the cracks.

Asylum can fill in the gaps left by the T visa and other forms of relief from removal. Not only does it protect people trafficked into the United States as well as people trafficked in other countries, but it also covers forced marriage or other trafficking situations that may not clearly fit within the TVPRA’s definitions. Additionally, unlike the T visa process, asylum protection does not require cooperation with law enforcement, which, as discussed below, may be an insurmountable hurdle for survivors of trafficking.

Eligibility for a T visa

As set out in 8 U.S.C. § 1101(a)(15)(T), to be eligible for a T visa, an alien must show that:

- She was a victim of a “severe form of trafficking in persons;”³
- She is in the U.S. on account of the trafficking;⁴

³ “Severe forms of trafficking” includes:

- (a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor services, through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. 22 U.S.C.A. §7102(8).

⁴ This would include individuals who were being brought into the United States by traffickers, but were detained by immigration authorities upon entry, as well as individuals who have been freed or escaped from trafficking situations within the United States.

- She has complied with any reasonable requests for law enforcement assistance OR has been found by the Secretary of Homeland Security to be too traumatized to cooperate, OR is under the age of 18; and
- Would suffer “extreme hardship involving unusual and severe harm” if removed.

Challenges to obtaining T visas

Law enforcement assistance

One obstacle for many people who may otherwise wish to apply for a T visa is the requirement of reporting to, and cooperating with law enforcement law enforcement in the investigation or prosecution of the traffickers.⁵ Many people are simply too traumatized or afraid to cooperate with law enforcement efforts. For example, trafficked persons suffering from post-traumatic stress disorder (PTSD) or other symptoms of trauma may have memory problems or other cognitive difficulties that would make providing information difficult.⁶ Going through a police interrogation or testifying in front of their traffickers could also result in further psychological trauma.

Trafficked persons also have legitimate fears of retaliation at the hands of traffickers.⁷ Traffickers often operate in organized networks, and even if the immediate abuser is arrested, that person’s colleagues can track down and punish the escaped individual or members of her family. Many individuals may fear their traffickers will be even more likely to punish them if they provide information to police or testify in criminal proceedings.

The TVPRA of 2005 amended the law to exempt some of these individuals from participating in law enforcement assistance, though meeting the exemption standard may not be easy. Neither Congress nor DHS have provided standards for this determination, or any way to ensure that prosecutorial interests do not continue to outweigh victim’s interests even when this exception is invoked.

Even if a T visa applicant is willing and able to cooperate with law enforcement, she must still prove that she has done so. The best way to establish this proof is to obtain a Law Enforcement Certification.⁸ This presents difficulties for some applicants, however, as officers or prosecutors

⁵ Minors are exempted from these requirements. 8 U.S.C. § 1101(a)(15)(T)(iii)(cc).

⁶ See, e.g., Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 395 (2005).

⁷ See Jayashri Srikantiah, *Perfect Victims and Real Survivors: the Iconic Victim in Domestic Human Trafficking Law*, 87 B. U. L. REV. 157, 181 (2007).

⁸ Form I-914 Supplement B.

have discretion to decide whether to certify people, and they may not recognize some legitimate survivors of trafficking victims as such.

TVPRA's restricted definitions

The definitions in the TVPRA also present problems for some trafficked persons. To qualify as a trafficking victim under the TVPRA, a person must be "in the United States on account of trafficking." This typically precludes people who were trafficked elsewhere and then escaped to the United States.

The definition of "severe forms of trafficking" also may not be interpreted to cover every conceivable trafficking situation. Immigration and law enforcement officials may not consider many forced marriage situations, for instance, to fit the definitions in the TVPRA absent significant forced labor – particularly where there was no kidnapping, or the financial or economic aspects of the transaction are not overt – since the statute requires a "commercial sex act" to constitute sex trafficking. Additionally, people who accepted their "jobs" willingly at first, not realizing the conditions in which they would be forced to work, may also have difficulty showing that they are survivors of trafficking. Even when these individuals are recognized as survivors of trafficking, these cases are rarely a priority for investigation or prosecution.

Removal⁹

Trafficked persons who are unable to obtain some form of immigration relief will likely be deported. Deportation poses very real dangers for trafficking victims.¹⁰ As described above, survivors of trafficking face potential retaliation from the traffickers as punishment for escaping and/or going to the police. Many survivors are re-trafficked. Finally, some survivors, particularly

⁹ "Removal" is a legal term that includes the two formerly separate processes of "deportation" and "exclusion." Deportation applied to individuals already present within the United States, while exclusion applied to individuals attempting to enter the United States, such as someone attempting to pass through customs at an airport. Both processes are now referred to as removal.

¹⁰ While some survivors may want to return home, others have legitimate fears of returning. Traffickers may plan to recapture or punish returnees, showing up at the border station or airport, or even at the person's home. Kelly Hyland, *Protecting Human Victims of Trafficking: an American Framework*, 16 BERKELEY WOMEN'S L. J. 29, 59 (2001); Office of the United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, HCR/GIP/06/07, ¶¶ 17-18 (7 Apr. 2006) (hereinafter "UNHCR Trafficking Guidelines"); UNHCR, 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, HCR/GIP/02/01, ¶ 18 (7 May 2002) (hereinafter "UNHCR Gender Guidelines"). Particularly if the trafficked person still owes a debt to the traffickers, re-trafficking is likely to occur, especially in the case of trafficked women and children. *Id.* at ¶ 19.

women forced to work as prostitutes, and those who have left their marriage, face punishment or ostracism from their own families and communities for “shaming” their family.¹¹

The fight to obtain asylum for trafficked persons

Litigating gender-based asylum claims can be an uphill battle, particularly when dealing with an issue such as trafficking, which has only recently begun to be recognized as persecution by U.S. immigration courts. Under U.S. law, trafficking clearly constitutes persecution and often occurs on account of social group membership or other protected grounds. But attorneys litigating these cases often face a struggle to make courts recognize these principles.

You *can* hold the United States accountable to its international human rights obligations, including the obligation to refugees under international and domestic law. Trafficked persons who cannot safely return to their countries of origin are a class of refugees who do not consistently receive the protection for which they qualify. This manual can assist in the fight to achieve the asylum protection survivors of trafficking deserve.

¹¹ Families and husbands of victims often disown them once they return home out of shame for their acts of prostitution. See Hyland, *supra* note 10, at 43-44; UNHCR Gender Guidelines, *supra* note 10, at ¶ 18. Some women have even been killed by family members for this reason. Hyland, *supra* note 10, at 43-44.

I. Writing the Brief

Always consider writing a brief in an asylum case!

While you are not required to write a brief for an Immigration Judge (“IJ”) hearing, it is strongly encouraged, particularly in gender-based asylum cases. You may also want to submit a brief if your client is applying to an asylum office. No matter how well your client testifies, how much documentary evidence you provide, and how persuasive your expert witness is, the judge or asylum officer will not necessarily draw the connections between the evidence and the law. Judges do not always allow opening and closing arguments, and these will rarely be enough to make clear that your client is eligible for protection anyway. Many cases fail precisely because attorneys either do not submit a brief, or do not submit a sufficiently thorough explanation of the client’s eligibility.

The process of writing your brief will also help you hone your legal arguments and identify precisely how to apply them to the facts. While eliciting facts from your client initially will help you begin to build your legal strategy, as you develop your legal arguments you will likely identify further types of information that you will want to elicit from your client, both in preparation for the case and during testimony.

Human Rights USA has achieved a nearly perfect record with trafficking-related asylum cases at the immigration court and asylum office levels by providing extensive briefs that lay out each element of asylum eligibility in detail. These briefs tie the facts and evidence to each individual element of the law. Attorneys need not shy away from submitting lengthy briefs with asylum applications!

A. Who is a Refugee?

Under the Refugee Act of 1980, 8 U.S.C. § 1101(a)(42), based on the Refugee Convention, a refugee is defined as a person:

“who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of the protection of that country because of **persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion**” (emphasis added).

Thus, to prove your client is eligible for asylum, you must establish that the harm she has fled constitutes “persecution,” and that she was, or will be, persecuted *because of* one of the protected grounds in the refugee definition. In trafficking and forced marriage cases this will

most commonly be membership in a particular social group, meaning you must establish that your client belongs to a particular social group – explained in Section III below – and that she was or will be persecuted because of that membership. You must also establish that your client’s fear of persecution is reasonable, or “well-founded.” The manual will assist in crafting arguments to establish these points, as well as to establish arguments for political opinion and religion-based claims, since survivors of trafficking or forced marriage often have an alternative political opinion or religion argument.

B. Build a Strong Evidentiary Record

The importance of a strong evidentiary record cannot be overstated, and citing your evidence repeatedly throughout your brief will strengthen your case considerably. Whether filing an affirmative application before an asylum office or a defensive application before an immigration judge, it is important to submit the following pieces of evidence:

- a detailed declaration from your client;
- substantial documentation of conditions in the client’s country of origin;
- an affidavit of an expert in country conditions in your client’s country;¹²
- evaluation by a mental health expert to document psychological impacts of past persecution and/or of feared persecution; and
- (if applicable) diagnosis/evaluation by a physician to document relevant injuries and conditions;
- copies of any identity available documents,¹³ such as passport, visas, air or other travel tickets, birth or marriage certificates, and identification cards;
- supporting affidavits, statements, or emails from, for example, friends or family members, work colleagues, or fellow members of political or religious organizations in the country of origin; and
- copies of any other documents or photographs that would help corroborate the claim.

The purpose of developing extensive evidence is not only to convince the judge to grant asylum but, also, to have a solid record for the purpose of appeal. In any asylum case it always helps to be mindful of the record you are creating for potential appeal.

In your brief, frequently explain why the facts and evidence support your client’s eligibility under each element. Refer repeatedly to the statement of facts and the evidence you submitted. Given the extremely complex and discretionary nature of asylum law, it is critical to precisely state the legal and factual bases for your client’s eligibility. This is especially true when you are

¹² If your case is in immigration court, it is ideal to also have your country and medical experts testify. The judge may either not allow an affidavit without accompanying testimony, or may give reduced weight to the affidavit.

¹³ Do not submit originals of this type of documentation unless otherwise instructed.

dealing with a novel type of claim, or one to which the Department of Homeland Security (“DHS”) is particularly resistant.

Client declaration

Try to draft the declaration with the elements of asylum eligibility in mind, particularly the “nexus” issue, explained in Section V. You will want to give particular thought to the organization of the declaration, though the exact format – by chronology or by significance of events, for instance – is a strategic decision that will need to be made on a case-by-case basis.

It is acceptable, and generally advisable, for the attorney to draft the client declaration. Write from the client’s perspective, using her word choices, and make certain the client reviews the declaration and agrees that everything is correct. Avoid characterizing any facts in a way that is likely to conflict with the client’s testimony during the interview or hearing.

Cite to the declaration throughout your brief, not just in the statement of facts. The client’s experiences and fears are evidence to use in establishing past persecution, the reasonableness of the fear of future persecution, the nexus, and potentially any of the other elements of the claim.

Country conditions evidence

Probably the most obvious sources of country conditions evidence are the State Department’s human rights reports¹⁴ and trafficking in persons reports,¹⁵ and reports from major international human rights NGOs such as Amnesty International. Judges and asylum officers definitely give a lot of weight to the State Department’s human rights reports. You need not limit your search to such sources, however, and in cases where the State Department reports do not detail the type of harm your client is fleeing, a broader search will be even more important.¹⁶ Look for additional sources such as reports from smaller NGOs; the U.N. and its agencies; reports from other countries, including the country of origin; scholarly writing; and news articles.

You can use this evidence to support nearly every element of the asylum claim. Include footnotes or cites to the documents throughout the brief. Tie them to the facts of the case and your legal arguments, citing to the evidence every time it is relevant. Do not worry if these citations get repetitive (that is why it is helpful to use footnote format). Through repeated references to country condition evidence, you can emphasize that your client faces a serious

¹⁴ Available at <http://www.state.gov/g/drl/hr/>.

¹⁵ Available at <http://www.state.gov/g/tip/rls/tiprpt/index.htm>.

¹⁶ In this situation you may also want to have your country conditions expert review the State Department reports and address in his/her affidavit any statements from the reports that are inconsistent with his/her experience or knowledge regarding those issues.

situation. Repetition also reinforces the volume of documented abuses from a particular country, since you will hopefully be able to find many documents to cite. You can always refer back to previous cites rather than providing a detailed overview of the same documents repeatedly. Try to find documentation for any factual statement in the brief regarding country conditions, whether it is a contention you are making or a reference to your client's statements about her society or country.

Expert testimony

Even if you put together an extensive packet of country condition documents, expert testimony on country conditions is almost always necessary to winning an asylum case. Having strong expert witness testimony is crucial to proving the nexus element of the claim, and can often be equally critical to the issues of your client's government's unwillingness to protect her and the reasonableness of her fear, especially if the State Department reports are not particularly helpful or relevant to the claim.

The ideal expert witness will have performed relevant research or worked in some capacity in your client's country of origin, and will have traveled there relatively recently. The expert may be from an NGO, a government agency, or a university, among other places. Look for individuals with expertise in trafficking issues or other specifically relevant issues. If you cannot find someone with directly relevant expertise, look for someone who can discuss more general conditions, such as violence against women, or religious customs, if relevant.

As with country condition documents, include citations to the expert witness's affidavit throughout the brief, especially in the nexus section.

For assistance with finding expert witnesses or drafting questions for experts, please contact Human Rights USA.

Psychological evaluation

You should also try to submit a mental health evaluation of your client, and if your client is in removal proceedings, elicit testimony from the mental health expert.¹⁷ This evaluation is important in two ways.¹⁸ First, it can support some elements of the client's claim, such as whether the alleged events actually occurred, her subjective fear of persecution, or the severity

¹⁷ An expert may be a psychiatrist, psychologist, Masters in Social Work (MSW), or Licensed Clinical Social Worker (LCSW). Any of these professionals possess the background to conduct necessary evaluations and to be qualified as experts.

¹⁸ A psychological evaluation that finds evidence of trauma symptoms, Post Traumatic Stress Disorder or other psychological condition can also be used to support the argument that your client meets an exception to the one-year deadline for filing asylum claims. This issue is outside the scope of this manual.

of the past persecution as part of a humanitarian asylum claim,¹⁹ and can be referenced in the brief when relevant. Second, an asylum applicant who is suffering symptoms of trauma, such as Post Traumatic Stress Disorder, may have difficulty remembering facts or the chronology of events, or may exhibit an unexpected demeanor that affects the judge's credibility determination. While this generally need not be explained in an immigration court or asylum office brief, the psychological evaluation submitted for the hearing can be cited in an appellate brief if the IJ finds your client not credible.

Medical evaluation

If your client's past persecution, or some other relevant part of her story, included physical harm, such as domestic violence, female genital mutilation, or any other abuse, it is advisable to submit a medical report documenting her injuries. If possible, you can ask your client to get hospital reports from the country of origin, if your client was treated for her injuries at the time. Whether or not this is possible, if your client bears detectable signs of past injury, have her get a medical examination from a U.S. health professional documenting any scars or other signs of the injury, and submit the report with your other evidence. A medical report not only serves to corroborate the claim that your client was actually injured, but it may be able to document the extent of the injury, on-going effects, or the fact that the injury likely occurred under highly specific circumstances, which may further corroborate her account of past events.

C. Statement of Facts

As with the client's declaration, draft the statement of facts with the elements of asylum eligibility in mind. Be graphic in detailing the harm she has suffered. Do not mince words or assume the judge or asylum officer's imagination will fill in any gaps in the story. It is important to use strong, visceral language within your brief. When you are dealing with a type of harm that has not yet been widely recognized as persecution, such as trafficking and forced marriage, you have to spend some time carefully explaining why it constitutes persecution. This process begins in the statement of facts.

You can also footnote the facts with cites to country condition documents and the expert affidavit to illustrate that the types of experiences your client endured have also been documented in her country.

- Example: if your client says she was afraid to go to the police for help, cite to documents or statements from the country expert's affidavit that note law enforcement failure to help trafficked persons or victims of domestic violence, or documents finding police collusion in trafficking.

¹⁹ Humanitarian asylum is explained in Section VII.

D. Using International Materials

This manual includes many sample citations to international materials, including treaties, documents from the Office of the United Nations High Commissioner for Refugees (“UNHCR”), and case law from foreign jurisdictions. **Do not be afraid to cite international law!**

While the international authorities in this manual are not binding precedent for U.S. courts, refugee and asylum law is one area where U.S. courts do typically pay attention to international law. U.S. refugee law is based on international treaties, the U.N. Refugee Convention and its 1967 Protocol.²⁰ Congress intended U.S. asylum law to be consistent with these treaties.²¹ U.S. courts look to UNHCR materials as persuasive authority on interpreting the Convention and defining elements of the refugee definition. The UNHCR has issued numerous handbooks and guidelines on various elements of refugee law, and U.S. courts consider these to be persuasive authority.

You can also cite foreign case law. Most other countries’ domestic asylum laws are also based on the Refugee Convention. This manual includes sample authority from Australia, Canada, and the United Kingdom, where developments in gender-based asylum law have evolved in conjunction with that in the United States. This jurisprudence can be used to support a particular interpretation of the Refugee Convention, or, by extension, U.S. law, or to show that a certain concept is well accepted throughout the common law system. Given a particular issue, you may even be able to make a strong argument that a foreign interpretation is more in keeping with the Refugee Convention and Congressional intent in passing U.S. asylum laws than a recent line of decisions or your IJ’s decision.

For assistance with finding and applying international legal authority, please contact Human Rights USA.

Note regarding case law on torture

This manual also includes sample international authority under the section on Convention Against Torture protection. While European jurisdictions, including the United Kingdom, do offer both asylum and a separate form of protection based on fear of torture, the latter form of protection is rooted in Article 3 of the European Convention on Human Rights²² rather than on

²⁰ Convention Relating to the Status of Refugees, 28 July 1951, U.N. Doc. A/CONF.2/108, 189 U.N.T.S. 150 (*entered into force* 22 April 1951), *reprinted in* Westin III.G.4; Protocol Relating to the Status of Refugees, 1 Nov. 1967, 19 U.S.T. 6223 (*entered into force* 4 Oct. 1967) (U.S. acceded 1 Nov. 1968). The U.S. is bound by the Refugee Convention as a result of accession to the 1967 Protocol.

²¹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

²² Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights), 4 Nov. 1950, 213 U.N.T.S. 222 (*entered into force* 3 Sep. 1953).

the Convention Against Torture (“CAT”). The European Convention provision contains similar language to the relevant provisions of U.S. law based on the CAT,²³ and courts reviewing refugee petitions define torture under the European Convention similarly to U.S. regulations. Thus, the manual includes some United Kingdom and European Court of Human Rights (“ECHR”) citations to help support arguments that particular forms of harm can qualify as torture.

Note on format and availability

The format of the international and foreign case citations in this manual largely conform to Bluebook and Immigration Court Practice Manual citation rules. Some citations may include extraneous information, or lack abbreviations, in order to make them easier for users of this manual to find online. Thus, you may want to alter some citations slightly if using them in your brief.

Unless otherwise noted, the foreign cases cited in this manual are available at <http://www.austlii.edu.au> (Australia), <http://www.canlii.org> (Canada), and <http://www.bailii.org> (United Kingdom and ECHR).

E. Note on Organization

There is more than one way to arrange a brief. The following sections of this manual break down each of the main elements of the trafficking-related asylum brief so that they can be analyzed separately. The overall goal is to use case law to demonstrate that your client’s case is not pushing any boundaries, but rather, that trafficked persons already qualify for protection under established asylum law. Unfortunately, at this time there are very few appellate decisions regarding trafficked persons. Therefore, this manual will serve to explain how to use established gender-based asylum law to argue a still somewhat novel claim with the primary goal of securing asylum for your client, and the secondary goal of expanding precedent for survivors of trafficking and forced marriage.

²³ Protection is available under Article 3 of the European Convention on Human Rights and UK law both from torture and from “inhuman or degrading treatment,” and decisions granting Article 3 protection do not always specify on which basis protection is being granted. Since inhuman or degrading treatment that does not rise to the level of torture would not qualify a petitioner for CAT protection in the United States, the manual only cites decisions that specifically recognize a form of harm as “torture.”

II. Persecution

What qualifies as persecution?

Though not defined by statute or regulation, the boundaries of what constitutes persecution have been outlined in U.S. case law. Persecution may take various forms and may have various sources. The Board of Immigration Appeals (“BIA”) has defined persecution as “either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 429 (BIA 1987).

The attorney’s job is to demonstrate that his or her clients who have survived trafficking or forced marriage, or face threats of these harms in the future, have already suffered persecution in some form, or will suffer persecution if returned to his or her home country.

A. Establishing Persecution for Survivors of Trafficking and/or Forced Marriage

Trafficking and forced marriage can involve several actions, many of which have already been recognized as persecution. When arguing for asylum on behalf of your client, it is important to break down the over-arching harm of trafficking or forced marriage and demonstrate, in detail, each of the various forms of harm that were involved in your client’s persecution specifically.

Common forms of harm involved in trafficking and forced marriage:²⁴

- rape and other sexual abuse
- deprivation of liberty
- physical violence
- psychological violence
- forced labor (within or outside of the home)
- severe economic deprivation
- deprivation of education
- honor killings
- female genital mutilation (FGM)
- other severe human rights violations

²⁴ See, e.g., Amnesty Intl., Trafficking of Women and Girls, <http://www.amnesty.org/en/campaigns/stop-violence-against-women/issues/implementation-existing-laws/trafficking>; Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. ESCOR, 56th Sess., Agenda Item 12(a), U.N. Doc. E/CN.4/2000/68 at ¶¶ 38-39 (2000).

Specific issue in forced marriage claims

When arguing forced marriage asylum claims, it is especially important to frame the argument strongly by breaking down the over-arching harm of “forced marriage” into the specific elements involved. Judges may be uncomfortable with the suggestion that marriage can be a form of persecution, so it is crucial to go beyond the surface idea of “marriage” and explain what the day-to-day life of the involuntary bride entails.

Do not simply focus on a lack of consent to marriage

Many briefs and articles regarding the issue of forced marriage almost exclusively focus on the lack of consent or choice. While this is certainly an important starting point for framing the argument, this alone is not enough to convince a judge that forced marriage is persecution. Instead, bolster the argument with a discussion of the additional human rights violations inherent in a non-consensual marriage to explain what this concept means within the life of your client, emphasizing the physical and psychological harms that your client actually fears as a result of refusing the marriage or entering into the non-consensual marriage.

- Example:
 - If a wife has not consented to the marriage, she has not consented to marital sex. Therefore, every time her husband decides to have sex with his wife it is rape, regardless of whether, or how forcefully, she resists in the moment.
 - If a wife has not consented to marriage, she has not consented to perform any other expected spousal duties. Therefore, in the likely event she is made to perform activities such as cooking, cleaning, or other domestic labor she is experiencing involuntary servitude.²⁵

Use visceral language

As stated previously, it is important to be clear in describing the harm your client has suffered. When dealing with forced marriage in particular, you want to convince the judge to look past the surface of the marital relationship and realize that it inherently involves the potential for extreme abuse. You can use the language of your brief to make the judge look inside the highly romanticized concept of “marriage” and think about what might actually take place: rape, slavery, physical abuse and other harm.

Forced marriage versus arranged marriage

In forced marriage cases, DHS tends to try and blur the distinction between forced and arranged marriages, pointing out that the majority of the world’s marriages are arranged. However, there is a distinction between the two; one that is recognized by domestic and international law.

²⁵ See, Joyce McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207, 217-18 (1992).

Arranged marriages involve parents choosing spouses for their children, but generally the ultimate decision to accept the arrangement lies with the potential bride and groom. Parents spend time searching for a partner for their child who seems compatible enough that the marriage will be stable and the extended family network will be strengthened.²⁶

Forced marriages, as the name implies, involve some form of force. There may be an outright kidnapping or other form of physical force, or an individual may be subjected to threats or coercion. In many cases, the woman's parents are involved but the choice of a husband for their daughter is not dictated by regard for compatibility and endurance of the marriage. Instead, forced marriages are often driven by financial concerns, such as the need to pay off a debt or to acquire property. In some circumstances, parents sell their daughters to a person to whom they owe money in exchange for debt forgiveness, or to a local official to curry political favor. A forced marriage may also be used as a form of punishment, often for perceived violations of cultural norms relating to a woman's role or status in society.

Whatever the motivation and reason for the forced marriage, the State Department recognizes the distinction between forced and arranged marriages, labeling forced marriage as a human rights violation in its Foreign Affairs Manual.²⁷

Note on Matter of A-T-

In *Matter of A-T-*, a woman was denied protection in a withholding of removal claim based both on having suffered FGM and on the fear of an "arranged marriage."²⁸ 24 I&N Dec. 296 (BIA 2007). While the primary basis for the arranged marriage part of the decision was evidentiary, the case did include some analysis that could be applied to other forced marriage claims. The BIA stated that because the intended husband was of the same age and background as the applicant, "it is not likely that she would be in a disadvantaged position in relation to her

²⁶ In communities that practice arranged marriage, the practice is seen as superior to "love marriages" because partners are chosen specifically for compatibility. Yunas Samad & John Eade, *Community Perceptions of Forced Marriage*, report for the Community Liaison Unit, British Foreign and Commonwealth Office 41 (2002). Marriage is viewed as a unification of two families, not simply a unification of two individuals. By uniting families, the hope is that the extended family network will be able to help the couple survive marital problems. *Id.* at 42. When explaining why they prefer to have their marriages arranged, many young women state that they trust their parents to make good choices, unclouded by romantic feelings or passion, that will result in a more stable match. Margaret Brinig, *In Search of Prince Charming*, 4 J. GENDER RACE & JUST. 321, 334-35 (2001). Such consensual arranged marriages are in contrast to situations where a woman's parents forcibly sell her to a man, or where a woman is kidnapped outright.

²⁷ U.S. Dept. of State, Foreign Affairs Manual, Consular Affairs, *Forced and Arranged Marriage of Adults*, 7 FAM 1459.

²⁸ The case was later vacated and remanded by the Attorney General, solely based on the FGM claim. See *Matter of A-T-*, 24 I&N Dec. 617 (AG 2008). The BIA then remanded to the Immigration Judge for reconsideration. See *Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009).

husband on account of her age or economic status.” *Id.* at 302. The BIA also stated that “we do not see how the reluctant acceptance of family tradition over personal preference can form the basis for a withholding of removal claim.” *Id.* at 302-303.

This exemplifies the importance of carefully crafting the factual recitation and legal arguments in your brief. A-T-’s predicament was labeled as an “arranged marriage,” and her opposition was described as refusal to marry someone she did not love and concern over possible birth defects, since the intended husband was a first cousin. While these are certainly understandable concerns, they did not clearly establish that the marriage would constitute persecution. *Id.* at 302-303. It is crucial to vividly describe the harm involved in a forced marriage, including a lifetime of routine rape, and to explain that the denial of the right to freely enter into a marriage is not just unpleasant, it is a violation of well-established international human rights.²⁹

B. Legal Authority

Using available case law

The case law available to address the persecution element of the argument may not include cases that are directly analogous to your client’s case. Instead, take all the relevant case law and piece it together, building a narrative which tells the story of what the concept of persecution can and does include in your particular case. Cite cases which individually label as persecution, for instance, rape, deprivation of liberty, deprivation of education, or other elements of your client’s experience, and show the judge that your client’s trafficking or forced marriage experience is made up of established persecutory actions. Build on what is available and demonstrate to the judge that your client’s case is merely a logical extension of already established law.

International materials can also be useful in framing your argument. UNHCR has stated that trafficking can constitute persecution in its Trafficking Guidelines and in a set of guidelines on gender-related persecution (UNHCR Gender Guidelines),³⁰ and courts in several countries have also reached this conclusion, as outlined below.

²⁹ If you must deal with *Matter of A-T-* on appeal, distinguish your case on factual grounds to the extent possible, and highlight the numerous forms of persecution involved in a forced marriage, which the BIA did not consider in *A-T-*. Whether or not to directly attack the BIA’s determination in *A-T-* is a strategic choice for you to make, but even if you choose not to attack the decision, you can distinguish your case on a legal basis by pointing out that A-T- did not appear to base her fear on harms such as rape, physical abuse, forced labor, and denial of human rights, for instance, whereas your client’s fear was based on these harms.

³⁰ UNHCR Trafficking Guidelines, *supra* note 10, at ¶¶ 15, 17, 18, 23, 24; UNHCR Gender Guidelines, *supra* note 10, at ¶¶ 9, 18.

Examples

Domestic Law

- Persecution does not have to be life threatening harm
 - *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (persecution may include conduct that is not painful or physically harmful)
 - *Borca v. INS*, 77 F.3d 210, 215 (7th Cir. 1996) (Congress did not intend that persecution required bodily harm)
 - *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (persecution includes "non-life threatening violence and physical abuse"), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir.2005)
- Violations of basic human rights
 - *Daneshvar v. Ashcroft*, 355 F.3d 615, 625 (6th Cir. 2004) (persecution includes violations of basic human rights)
 - *Lal v. INS*, 255 F.3d 998, 1010-11 (9th Cir. 2001) (petitioner may face likelihood of human rights abuse, and thus persecution, regardless of whether evidence indicates a "sustained pattern" of human rights abuse in country of origin)
- Forced marriage
 - *Gao v. Gonzales*, 440 F.3d 62, 66 (2d Cir. 2006) (noting DHS' concession that "forced marriage is a form of abuse that rises to the level of persecution"), *vacated on other grounds by Keisler v. Gao*, 552 U.S. 801 (2007)
- Sexual violence and abuse
 - *Matter of Kasinga*, 21 I&N Dec. 357, 362 (BIA 1996) (noting that rape, sexual abuse and domestic violence may serve as evidence of past persecution)
 - *Canaj v. Gonzales*, 219 Fed. Appx. 104, 107 (2d Cir. 2007) (rape and attempted kidnapping amount to persecution)
 - *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (rape can constitute persecution)
 - *Sankoh v. Mukasey*, 539 F.3d 456, 471 (7th Cir. 2008) (rape can constitute persecution)
 - *Angoucheva v. INS*, 106 F.3d 781, 789-90 (7th Cir. 1997) (attempted rape may constitute persecution)
 - *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097-98 (9th Cir. 2000) (rape can constitute persecution), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir.2005)
 - *Lopez-Galarza v. INS*, 99 F.3d 954, 962-63 (9th Cir. 1996) (detailing the long-term psychological effects of rape)
 - *Lazo-Majano v. INS*, 813 F.2d 1432, 1434 (9th Cir. 1987) (rape can constitute persecution), *overruled on other grounds by Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (en banc)

- Physical/psychological violence and deprivation of liberty
 - *Matter of B-*, 21 I&N Dec. 66, 72 (BIA 1995) (psychological abuse coupled with physical abuse and deprivation of liberty may constitute persecution)
 - *Tian-Yong Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004) (violence and physical abuse can constitute persecution)
 - *Tesfamichael v. Gonzales*, 469 F.3d 109, 114 (5th Cir. 2006) (citing deprivation of liberty as a form of persecution)
 - *Mikhael v. INS*, 115 F.3d 299, 303 n.2 (5th Cir. 1997) (“deprivation of liberty, food, housing, employment or other essentials of life” can constitute persecution)
 - *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004) (“mental or emotional injury may in part constitute persecution”)
 - *Javhlan v. Holder*, 626 F.3d 1119, 1123 (9th Cir. 2010) (psychological trauma may constitute persecution in aggregate with other harm)
- Forced labor
 - *Lhanzom v. Gonzales*, 430 F.3d 833, 847-49 (7th Cir. 2005)
 - *Lopez-Galarza v. INS*, 99 F.3d 954, 960 (9th Cir. 1996)
- Severe economic deprivation
 - *Li v. Att’y Gen.*, 400 F.3d 157, 159 (3d Cir. 2005) (“deliberate imposition of severe economic disadvantage” can constitute persecution)
 - *Yong Hao Chen v. INS*, 195 F.3d 198, 204 (4th Cir. 1999)
 - *Borca v. INS*, 77 F.3d 210, 215-17 (7th Cir. 1996) (applicant does not need to show total deprivation of livelihood to establish “substantial economic disadvantage” sufficient to constitute persecution)
 - *Ahmed v. Ashcroft*, 396 F.3d 1011, 1014 (8th Cir. 2005) (economic discrimination constitutes persecution if “sufficiently harsh to constitute a threat to life or freedom”)
 - *Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004)
- Deprivation of education
 - *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (assault, imposed isolation, and deprivation of education constitute persecution)
 - *Bucar v. INS*, 109 F.3d 399, 403-04 (7th Cir. 1997)
 - *Zhang v. Gonzalez*, 408 F.3d 1239, 1249 (9th Cir. 2005) (immigration judges should evaluate the effects of familial trauma, economic deprivation, and denial of access to education in the aggregate to determine whether past persecution exists)
- Family members as persecutors
 - *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (father’s abuse of daughter on account of her refusal to conform to his conservative religious beliefs regarding women’s behavior and attire constituted persecution)
 - DHS’ Supplemental Brief in *Matter of L-R-* (Apr. 13, 2009) (spouse as persecutor)
 - DHS’ Position on Respondent’s Eligibility for Relief in *Matter of Rodi Alvarado-Pena*, A 73 753 922, at 17 (Feb. 19, 2004) (spousal abuse can constitute persecution)

- Honor Killings³¹
 - *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (punishment, including murder, for violation of gender-based religious norms can constitute persecution)
- FGM³²
 - *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008) (FGM is an “atrocious form of persecution)
 - *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)
 - *Toure v. Ashcroft*, 400 F.3d 44, 49 n.4 (1st Cir. 2005)
 - *Bah v. Mukasey*, 529 F.3d 99, 112 (2d Cir. 2008)
 - *Abay v. Ashcroft*, 368 F.3d 634, 638 (6th Cir. 2004)
 - *Agbor v. Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007)
 - *Mohammed v. Gonzales*, 400 F.3d 785, 796 (9th Cir. 2005)
 - *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005)
- Cumulative effect
 - *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998) (distinct acts of harm may constitute persecution in the aggregate)
 - *Poradisova v. Gonzales*, 420 F.3d 70, 74, 79-80 (2d Cir. 2005) (adjudicators must consider the cumulative effect of the harms suffered by applicants)
 - *Ngengwe v. Mukasey*, 543 F.3d 1029, 1037 (8th Cir. 2008) (adjudicator must consider whether the “combination of all the actions” suffered constitutes persecution)
 - *Zhang v. Gonzalez*, 408 F.3d 1239, 1249 (9th Cir. 2005)

Other sources

- INS Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims for Women* (1995)
- U.S. Dept. of State, Foreign Affairs Manual, Consular Affairs, *Forced and Arranged Marriage of Adults*, 7 FAM 1459 (forced marriage differs from arranged marriage and constitutes a human rights violation)

³¹ While murder or threats to life constitute persecution by definition, U.S. asylum jurisprudence does not say much about honor killings specifically. The decision in *Matter of S-A-* does not include the term “honor killing,” but accepts a woman’s fear of being murdered by her father for violating religious norms as a fear of persecution. Additionally, there are further cases considering honor killing claims, denied on nexus or evidentiary grounds, that seem to assume that honor killings would constitute persecution. See, e.g., *Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010); *Vellani v. Att’y Gen.*, 296 Fed.Appx. 870, 877 (11th Cir. 2008). Other cases involving fear of honor killings have been successful at the asylum office and immigration court levels. See Stephen M. Knight, *Seeking Asylum from Gender Persecution: Progress Amid Uncertainty*, 79 INTERPRETER RELEASES 689, 689, 690 (2002).

³² Forced marriage cases often involve the act, or threat, of FGM. FGM has also been the basis of asylum claims not involving forced marriage, and an extensive body of case law and other materials exists on FGM claims. The examples listed here are a very small percentage of the available authority.

International Materials

- UNHCR
 - Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1, at ¶¶ 51, 201 (1992)
 - Trafficking Guidelines, at ¶¶ 15, 17, 18, 23, 24³³
 - Gender Guidelines, at ¶¶ 9, 18³⁴
 - Handbook for the Protection of Women and Girls at 141, 192 (January 2008)
- Other United Nations Materials
 - Universal Declaration of Human Rights, arts. 3, 4, 16(2), 23, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 Dec. 1948)
 - U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm'n on the Promotion and Protection of Human Rights, *Working Paper: Contemporary Forms of Slavery*, U.N. Doc. E/CN.4/Sub.2/2003/31, at 6 (27 Jun. 2003)
 - Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, U.N. HRC, 4th Sess., Agenda Item 2, U.N. Doc. A/HRC/4/23 (2007)
 - Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. ESCOR, 56th Sess., Agenda Item 12(a), U.N. Doc. E/CN.4/2000/68 (2000)
- International Agreements
 - Slavery Convention, 25 Sep. 1926, arts. 1, 5, 212 U.N.T.S. 17, 18 (*entered into force* 9 Mar. 1927) and the Protocol Amending the Slavery Convention, 7 Dec. 1953 (*entered into force* 7 Jul. 1955) (transferring League of Nations duties under Slavery Convention to United Nations) (U.S. signed 7 Mar. 1956)
 - Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sep. 1956, arts. 1(a), 1(c), 226 U.N.T.S. 3 (*entered into force* 30 Apr. 1957) (U.S. acceded 6 Dec. 1967)
 - Abolition of Forced Labour Convention, 25 Jun. 1957, ILO no. 105, 320 U.N.T.S. 291 (*entered into force* 17 Jan. 1959) (U.S. ratified 25 Sep. 1991)
 - Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 7 Nov. 1962, 521 U.N.T.S. 231 (*entered into force* 6 Dec. 1964) (U.S. signed 10 Dec. 1962)
 - International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, arts. 8, 23(2), 999 U.N.T.S. 171, 6 I.L.M. 368 (*entered into force* 23 Mar. 1976) (U.S. ratified 8 Sep. 1992)
 - Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 Dec. 1979, art. 16, 1249 U.N.T.S. 13, 19 I.L.M. 33 (*entered into force* 3 Sep. 1981) (U.S. signed 17 Jul. 1980)

³³ See footnote 10 for full citation.

³⁴ See footnote 10 for full citation.

- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 25 May 2000, 2171 U.N.T.S. 227 (*entered into force* 18 Jan. 2002) (U.S. ratified 23 Dec. 2002)
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), 15 Nov. 2000, 2237 U.N.T.S. 319 (*entered into force* 25 Dec. 2003) (U.S. ratified 3 Nov. 2005)
- Organization of American States
 - American Declaration of the Rights and Duties of Man, 2 May 1948, art. 14, 43 AJIL Supp. 133 (1949), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)³⁵
 - American Convention on Human Rights, 22 Nov. 1969, arts. 6, 17(3), 1144 U.N.T.S. 123 (*entered into force* 18 Jul. 1978) (U.S. signed 1 Jun. 1977)
 - Inter-American Convention on International Traffic in Minors, 18 Mar. 1994, art. 1, 79 O.A.S. T.S., 33 I.L.M. 721 (*entered into force* 15 Aug. 1997) (not signed by U.S.)
- Other Regional Materials
 - Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 Nov. 1950, art. 4, 213 U.N.T.S. 222, (*entered into force* 9 Mar. 1953)
 - Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, Preamble, C.E.T.S No. 197 (*entered into force* 1 Feb. 2008)³⁶
 - European Union, Council Framework Decision on Combating Trafficking in Human Beings, Preamble, Official Journal of the European Communities, No. L 203/1, at 1, 19 Jul. 2002³⁷
 - African [Banjul] Charter on Human and Peoples' Rights, 27 Jun. 1981, art. 15, 21 I.L.M. 58 (1982) (*entered into force* 21 Oct. 1986)
 - Southern African Development Community, Protocol on Gender and Development, 17 Aug. 2008, Preamble³⁸
- International Case Law
 - *Aydin v. Turkey*, [1997] ECHR 75 (European Court of Human Rights, 25 Sep. 1997) (rape can constitute persecution)

³⁵ The United States is bound by the American Declaration through its membership in the Organization of American States (OAS) and its ratification of the Charter of the OAS on April 23, 1968. See Inter-American Commission on Human Rights, case 10.675, Rep. No. 28/93 (13 Oct. 1993).

³⁶ Available at http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf.

³⁷ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:203:0001:0004:EN:PDF>.

³⁸ Available at <http://www.sadc.int/index/browse/page/465>.

Foreign case law

- Australia
 - Trafficking
 - *SZBFQ v. Minister of Immigration*, [2005] FMCA 197 (Fed. Magistrates Court of Australia, 10 Jun. 2005)
 - N03/47757 [2004] RRTA 355 (Refugee Review Tribunal of Australia, 11 May 2005)
 - Forced Marriage
 - 071426303 [2007] RRTA 132 (Refugee Review Tribunal of Australia, 29 Jun. 2007)
 - N98/25465 [2001] RRTA 27 (Refugee Review Tribunal of Australia, 12 Jan. 2001)
 - V96/04445 [1996] RRTA 2166 (Refugee Review Tribunal of Australia, 23 Jul. 1996)
 - Rape
 - *Abebe v. Commonwealth of Australia*, [1999] HCA 14 (High Court of Australia, 14 Apr. 1999)
 - V98/09366 [1999] RRTA 295 (Refugee Review Tribunal of Australia, 5 Feb. 1999)
 - V96/05479 [1997] RRTA 250 (Refugee Review Tribunal of Australia, 29 Jan. 1997)
 - V96/04076 [1996] RRTA 2371 (Refugee Review Tribunal of Australia, 15 Aug. 1996)
 - V93/00110 [1994] RRTA 1379 (Refugee Review Tribunal of Australia, 30 Jun. 1994)
 - Forced Labor
 - N98/23772 [2000] RRTA 675 (Refugee Review Tribunal of Australia, 23 Jun. 2000)
 - V94/02275 [1996] RRTA 2170 (Refugee Review Tribunal of Australia, 24 Jul. 1996)
 - Honor Killings
 - 0907686 [2009] RRTA 1161 (Refugee Review Tribunal of Australia, 23 Dec. 2009)
 - FGM
 - N97/19046 [1997] RRTA 4090 (Refugee Review Tribunal of Australia, 16 Oct. 1997)

- Deprivation of Liberty and Other
 - *W68/01A v. Minister for Immigration & Multicultural Affairs*, [2002] FCA 148 (Fed. Court of Australia, 25 Feb. 2002)
 - *Ibnu Prahastono v. Minister for Immigration & Multicultural Affairs*, [1997] FCA 586 (Fed. Court of Australia, 8 Jul. 1997) (deprivation of liberty, education, and access to employment can each constitute persecution)
 - V96/04042 [1996] RRTA 2067 (Refugee Review Tribunal of Australia, 10 Jul. 1996)
 - V93/00669 [1994] RRTA 969 (Refugee Review Tribunal of Australia, 23 May 1994)
- Canada
 - Trafficking
 - *Bian v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16669 (Fed. Court of Canada, 11 Dec. 2000)
 - CRDD V95-02904, Neuenfeldt (Immigration and Refugee Board of Canada, 26 Nov. 1997)³⁹
 - Forced Marriage
 - *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 60 (Fed. Court of Canada, 8 Jun. 1995)
 - RPD TA2-00417, Kitchener, 2002 CanLII 52707 (Immigration and Refugee Board of Canada, 13 Nov. 2002)
 - RPD MA1-08227, Delisle, 2002 CanLII 52645 (Immigration and Refugee Board of Canada, 19 Aug. 2002)
 - CRDD T99-14088, Milliner (Immigration and Refugee Board of Canada, 2 June 2000, reasons signed 17 Jul. 2000)⁴⁰
 - CRDD T99-09887, Smith (Immigration and Refugee Board of Canada, 17 May 2000, reasons signed 5 Jun. 2000)⁴¹
 - Honor Killings
 - MA6-08455, Langelier, 2010 CanLII 62685 (Immigration and Refugee Board of Canada, 19 Jul. 2010)
 - FGM
 - MA2-04725, Berger, 2003 CanLII 55228 (Immigration and Refugee Board of Canada, 3 Jan. 2003)
 - Rape and Other
 - CRDD M98-09104, di Pietro, Lavoie (concurring), 1999 CanLII 14682 (Immigration and Refugee Board of Canada, 1 Dec. 1999) (rape, beatings, and mental abuse constitute persecution)

³⁹ Summary available at <http://www.irb-cisr.gc.ca:8080/ReFlex/Issue.aspx?id=83>.

⁴⁰ Available at http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=1235&l=e.

⁴¹ Available at http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=1209&l=e.

- United Kingdom
 - Trafficking
 - AZ (Trafficked women) Thailand CG, [2010] UKUT 118 (UK Immigration & Asylum Chamber, 23 Apr. 2010)
 - AM and BM (Trafficked women) Albania CG, [2010] UKUT 80 (UK Immigration & Asylum Chamber, 18 Feb. 2010)
 - HC and RC (Trafficked women) China CG, [2009] UKAIT 00027 (UK Asylum & Immigration Tribunal,⁴² 18 Jul. 2009)
 - SK (prostitution) Albania, [2003] UKIAT 00023 (UK Immigration Appeal Tribunal, 7 Jul. 2003)
 - Dzhygun (Ukraine), [2000] UKIAT 00TH00728 (UK Immigration Appeal Tribunal, 17 May 2000)
 - Forced Marriage
 - MD (Women) Ivory Coast CG, [2010] UKUT 215 (UK Immigration & Asylum Chamber, 7 Jul. 2010)
 - AM and BM (Trafficked women) Albania CG, [2010] UKUT 80 (UK Immigration & Asylum Chamber, 18 Feb. 2010)
 - NS (Social Group - Women - Forced marriage) Afghanistan CG, [2004] UKIAT 00328 (UK Immigration Appeal Tribunal, 30 Dec. 2004)
 - Rape
 - *R v. Immigration Appeal Tribunal, ex parte Subramaniam* [1999] EWHC Admin 92 (England & Wales High Court, 2 Feb. 1999)
 - SS (Adan, sexual violence, UNHCR letter) Burundi CG, [2004] UKIAT 00290 (UK Immigration Appeal Tribunal, 29 Oct. 2004)
 - FGM
 - *Sec'y of State for the Home Dep't (SSHD) v. K and Fornah v. SSHD*, [2006] UKHL 46 (UK House of Lords, 18 Oct. 2006)
 - FM (FGM) Sudan CG [2007] UKAIT 00060 (UK Asylum & Immigration Tribunal, 27 Jun. 2007)

⁴² The Asylum and Immigration Tribunal replaced the Immigration Appeal Tribunal in 2005. In 2010, the former was replaced by the Immigration and Asylum Chamber.

III. Social Group

Many trafficking and forced marriage cases will fall under the “membership in a particular social group” prong of the refugee definition, though if your client also has a cognizable claim on other grounds, such as political opinion or religious belief – described in Section IV – you can add these as alternate arguments.

The BIA has defined social group as a group sharing a

“common, immutable characteristic...such as sex, color...kinship ties...or a shared past experience...that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”

Matter of Acosta, 19 I&N Dec. at 233.

To prove that your client’s persecution was or will be motivated by her membership in a particular social group, you must first establish that she is a member of such a group, explaining the characteristics that make up the group as well as how this group is a legally cognizable social group under the law. A social group claim can be a difficult type of claim to prove because it is a far more vague category than any of the other protected grounds under the Refugee Convention.

Include more than one social group

While coming up with one strong social group classification may be difficult enough, it is generally a good idea to present the judge or asylum officer with multiple social groups to consider. Judges and asylum officers tend to review proposed social groups closely in relation to the facts of the case; if the adjudicator does not agree that the proposed group fits the facts of the case, they will not likely choose to interpret the social group more broadly in order to make it fit the applicant’s case. Offering multiple social groups increases the chance of success.

One easy way to do this is to craft one social group classification based on the persecution your client has already suffered, and create a second classification based on future persecution she fears upon return. This will be discussed further in the Nexus section.

- Example: The fact that your client has fled her husband or traffickers may now make her vulnerable to additional harm in the form of punishment or reprisals, or based on a societal notion that she has been shamed. Thus, since the motivation for future harm may be slightly different, you can tweak the original social group, or create an entirely different one, specifically geared towards the potential new persecution.

A. Defining the Social Group for Survivors of Trafficking and Forced Marriage

The following categories of social group characteristics are illustrated by examples in Section C below.

Gender-based social groups

A substantial body of case law has developed that addresses gender-based social groups. Gender has been repeatedly recognized as an immutable characteristic that satisfies the *Acosta* definition. Some authority suggests that gender alone can make up a social group, but courts are wary of such a broad categorization. More commonly, gender has been recognized along with nationality, tribe/ethnicity, region, age, marital status,⁴³ and/or other characteristics as forming the basis for a cognizable social group.

Opposition to gender-based oppression

The refusal to conform to gender-specific laws or customary women's roles can also form a social group characterization, as can opposition to cultural norms more generally. While not necessarily immutable, this would be considered a fundamental characteristic the applicant should not be required to change. The relevant opposition could take the form of action or conduct, such as actually violating social norms,⁴⁴ or it could be a deeply held belief that certain cultural norms are wrong. Your client's opposition may even be accurately described as both. Whether or not your client is a political or social activist, if she believes that gender-specific laws, or laws and practices that oppress women, are wrong, this belief could be part of a social group definition.⁴⁵ While this characteristic could form the basis for a social group geared towards your client's past persecution, it is also a good one to use for social groups geared towards additional future persecution, since such acts as refusing a marriage and/or fleeing the country could themselves be viewed as social opposition.

⁴³ Case law is beginning to develop, largely at the immigration court and asylum office levels, on the issue of domestic violence-based asylum, such as the case of *Rodi Alvarado-Pena*. Arguments and strategies from these cases may also be applicable to many forced marriage cases. References are made throughout this manual to DHS' brief in support of granting asylum to Ms. Alvarado-Pena. See DHS' Position on Respondent's Eligibility for Relief in *Matter of Rodi Alvarado-Pena*, A 73 753 922 (Feb. 19, 2004).

⁴⁴ Such actions could also potentially be characterized as a "shared past experience," another type of social group characteristic described in this section.

⁴⁵ Such beliefs can also be characterized as political opinion or religious belief, even if your client is not politically or religiously active. Political opinion and religious belief arguments are discussed in Section IV.

Family as a social group.

Family relationships can also provide the basis for a social group. For example, if something about a client's family makes her particularly vulnerable to trafficking, such as lack of a male protector, or traffickers have targeted her and her family specifically for some reason, this may be a foundation for a social group.

- Example: your client's family may be known in their community for being active with a particular political party, and your client could be targeted by traffickers with ties to an opposing party. While this could be persecution on account of imputed political opinion, a judge may also determine that the traffickers did not care what her political beliefs were. So it would be a good idea to include an alternate argument that your client was targeted due to her membership in a social group, i.e., her family.

Shared past experience as a social group.

Your client may share a past experience with similarly situated individuals that was relevant to her persecutors' motivation for targeting her, or that may motivate future persecution. For instance, the shared experience of having been trafficked and having escaped could form the basis of a social group definition. While a social group cannot be defined by the persecution itself, a social group may be based on the experience of being harmed by the same people from whom your client fears future persecution, as long as the past harm and the future harm are different. Past experience is thus a good characteristic on which to base a social group geared towards future persecution.

- Example: in a trafficking case, the shared experience of being a victim of trafficking can form the basis of a social group, *if* the feared future persecution is framed as something other than trafficking, such as retaliation by traffickers or ostracism by the victim's family and/or community.

B. Common pitfalls

There are certain types of social group definitions that judges commonly reject. When crafting your social group definitions be mindful of avoiding these pitfalls, or, if you feel you have a good argument to support a potentially problematic social group and wish to use it, offer an alternative social group definition that avoids these common problems.

Large social groups

One social group pitfall is broadly defined social groups, or social groups that would include an extremely large number of individuals. For instance, many unsuccessful trafficking-related asylum cases have involved broad social groups such as "young [nationality] women."

Although, under the law, the size of a social group should not matter,⁴⁶ judges often shy away from broad social groups, citing failure to meet the “particularity” requirement, described in Section D below. Thus, the more specifically you define your client’s social group, the more likely your chance of success. Social groups defined solely by gender and nationality have been successful, however, and some examples can be found in the Legal Authority section below. Additionally, should you have to refute a conclusion that your proposed social group is too large on appeal, you can find relevant authority in the Particularity section under Section C below.

Circular social groups

Another potential pitfall is a circularly defined social group. U.S. and international authority make clear that social groups cannot be defined by the persecution the applicant fears. While past persecution may become an element of a new social group with regard to future persecution, as explained above, you should not *define* your client’s social group by her vulnerability to persecution. For instance, a social group defined as “young women who are vulnerable to trafficking” is likely to be rejected as circular. Examples of past persecution can serve as evidence of social visibility, as explained in Section D below, or as evidence of nexus, but should not be used as an actual element of the social group definition. There probably was something about your client that made her particularly vulnerable to trafficking, but the key in defining the social group is to draw out the specific characteristics that made her vulnerable, rather than including her vulnerability to persecution as an element in itself.

- Example: in addition to “young [nationality/ethnicity/etc.] women” you can add specific characteristics such as impoverishment, lack of formal education, lack of family (commonly cited as characteristics that make certain women especially vulnerable to trafficking), or whatever *specific characteristics* you believe made your client particularly vulnerable, or would make her vulnerable in the future.

C. Legal Authority on Social Group Definitions

A substantial body of case law has developed on social groups and the types of characteristics that may qualify as immutable. While courts have issued no binding precedent on trafficking-related asylum cases specifically, and very little precedent on forced marriage cases, much of the precedent on social groups, particularly gender-based groups, will be applicable to these cases.

As with the persecution argument, international materials can provide added authority to establish the cognizability of a social group. The UNHCR has produced guidelines on social group generally (“Social Group Guidelines”),⁴⁷ and their Trafficking Guidelines include analysis

⁴⁶ See, e.g., *Perdomo v. Holder*, 611 F.3d 662, 668-69 (9th Cir. 2010).

⁴⁷ UNHCR, Guidelines on International Protection: “Membership of 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, HCR/GIP/02/02 (May 7, 2002) (hereinafter “UNHCR Social Group Guidelines”).

on potential social groups. Additionally, you can find extensive foreign precedent analyzing gender-based social groups under the Refugee Convention.

General Examples

Gender is an immutable characteristic

- Domestic authority
 - *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996)
 - *Matter of Acosta*, 19 I.& N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 429 (BIA 1987)
 - *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005)
 - *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993)
 - *Mohammed v. Gonzales*, 400 F. 3d 785, 797-98 (9th Cir. 2005)
 - *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir.2005)
 - *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005)
 - INS Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims for Women* 13-14 (1995)
- UNHCR
 - Social Group Guidelines, at ¶ 15 (“women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.”)
 - Trafficking Guidelines,⁴⁸ at ¶ 38 (“Women are an example of a social subset of individuals who are defined by innate and immutable characteristics and are frequently treated differently to men. As such, they may constitute a particular social group.”)
 - Gender Guidelines,⁴⁹ at ¶ 30 (“women [are] a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men”)
- Foreign case law
 - 071426303 [2007] RRTA 132 (Refugee Review Tribunal of Australia, 29 Jun. 2007)
 - *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (Supreme Court of Canada, 30 Jun. 1993)
 - CRDD T98-06186 Bousfield, Milliner (dissenting), 1999 CanLII 14662 (Immigration and Refugee Board of Canada, 2 Nov. 1999)
 - *Islam v. Sec’y of State for the Home Dep’t*, and *R v. Immigration Appeal Tribunal, ex parte Shah*, [1999] UKHL 20 (UK House of Lords, 25 Mar. 1999)

⁴⁸ See footnote 10 for full citation.

⁴⁹ See footnote 10 for full citation.

Gender + nationality/tribe/region/age/marital status/etc.

- Domestic authority
 - *Matter of Kasinga*, 21 I&N Dec. 357, 358 (BIA 1996) (“**young women** of the **Tchamba-Kunsuntu Tribe** who have not had FGM...”)⁵⁰
 - *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (“**women** who have been **sold into marriage**... in a **part of China where** forced marriages are considered valid...”) *vacated on other grounds by Keisler v. Gao*, 552 U.S. 801 (2007)
 - *Abankwah v. INS*, 185 F.3d 18, 21 (2d Cir. 1999) (“**women** of the **Nkumssa tribe** who did not remain **virgins until marriage**”)
 - *Fiadjoe v. Attorney General*, 411 F.3d 135, 137 (3d Cir. 2005) (“**unmarried women** over **age 25** in **Ghana**”).
 - *Abay v. Ashcroft*, 368 F.3d 634, 639-40 (6th Cir. 2004) (**Ethiopian females**)
 - *Mohammed v. Gonzales*, 400 F. 3d 785, 797 (9th Cir. 2005) (“**Somalian females**” or (“**young girls** in the **Benadiri clan**”)
 - *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“**gay men** with female sexual identities **in Mexico**”), *overruled in part on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir.2005)
- UNHCR
 - Trafficking Guidelines,⁵¹ at ¶ 38 (“certain **social subsets of women** may also constitute particular social groups. Examples of social subsets of women or children could, depending on the context, be **single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans or street children.**”)
- Foreign case law
 - Australia
 - *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (High Court of Australia, 11 Apr. 2002) (“**women in Pakistan**”)
 - *Minister for Immigration and Multicultural Affairs v. Ndege*, [1999] FCA 783 (Fed. Court of Australia, 11 Jun. 1999) (“**married women in Tanzania**”)
 - V96/04445 [1996] RRTA 2166 (Refugee Review Tribunal of Australia, 23 Jul. 1996) (“**unmarried women** from **traditional Sinhalese families in Sri Lanka**”)
 - N95/06944 [1996] RRTA 3480 (Refugee Review Tribunal of Australia, 4 Dec. 1996) (“**Bangladeshi Muslim women without male protection**, who have transgressed social mores”)

⁵⁰ Note that this social group also includes the refusal to conform to gender-based customary practices.

⁵¹ See footnote 10 for full citation.

- Canada
 - *Incirciyan v. Minister of Employment and Immigration*, M87-1541X (Immigration Appeal Board of Canada, 10 Aug. 1987)⁵² (“**single women** living in a **Moslem country without the protection** of a male relative”)
 - RPD MA3-08450 et al., *Berger*, 2004 CanLII 56774 (Immigration and Refugee Board of Canada, 8 Apr. 2004) (“**young women without male protection**”)
- United Kingdom
 - *Sec’y of State for the Home Dep’t (SSHD) v. K and Fornah v. SSHD*, [2006] UKHL 46 (UK House of Lords, 18 Oct. 2006) (**Sierra Leonean women, or young, single Sierra Leonean women** who have **not undergone FGM**)
 - *Islam v. Sec’y of State for the Home Dep’t*, and *R v. Immigration Appeal Tribunal, ex parte Shah*, [1999] UKHL 20 (UK House of Lords, 25 Mar. 1999) (“**women in Pakistan**”)
 - *P and M v. Sec’y of State for the Home Dep’t*, [2004] EWCA Civ 1640 (England & Wales Court of Appeal, 8 Dec. 2004) (**women in Kenya** under the **age of 65**)
 - NS (Social Group - Women - Forced marriage) Afghanistan CG, [2004] UKIAT 00328 (UK Immigration Appeal Tribunal, 30 December 2004) (“**women in Afghanistan,**” or **unprotected women**)

Refusal to conform to gender specific laws or customary women’s roles

- Domestic Authority
 - *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (“Iranian women who *refuse to conform* to the government's gender-specific laws and social norms”)
 - *Al-Ghorbani v. Holder*, 585 F.3d 980, 996 (6th Cir. 2009) (individuals who oppose “the repressive and discriminatory Yemeni cultural and religious customs that prohibit mixed-class marriages and require paternal consent for marriage”)
 - *Yadegar-Sargis v. INS*, 297 F.3d 596, 603-04 (7th Cir. 2002) (“Christian women in Iran who do not wish to adhere to the Islamic female dress code”)
 - *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (Iranian women who oppose oppressive and abusive gender-based laws and choose to suffer the “consequences of noncompliance”).
- UNHCR
 - Guidelines on the Protection of Refugee Women 19 (July 1991) (“women who are subject to abuse for transgressing social standards” may be eligible for asylum)

⁵² In JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 162 (1991).

- Foreign Authority
 - N95/06944 [1996] RRTA 3480 (Refugee Review Tribunal of Australia, 4 Dec. 1996) (“Bangladeshi Muslim women without male protection, who have transgressed social mores”)
 - N95/09580 [1996] RRTA 461 (Refugee Review Tribunal of Australia, 7 Mar. 1996) (“Iranian women who have transgressed the social mores of Iranian society”)
 - FB (Lone women - PSG – internal relocation – AA (Uganda) considered) Sierra Leone, [2008] UKAIT 00090 (UK Asylum & Immigration Tribunal, 27 Nov. 2008) (women who are “opposed to traditional values in [their] rural environment”)

Family membership

- Domestic Authority
 - *Matter of C-A-*, 23 I&N Dec. 951, 956 (BIA 2006)
 - *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (there is “no plainer example of a social group based on common, identifiable characteristics than that of the nuclear family”)
 - *Ravindran v. INS*, 976 F.2d 754, 761 n.5 (1st Cir. 1992)
 - *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007) (“the Board has held unambiguously that membership in a nuclear family may substantiate a social-group basis of persecution”)
 - *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004)
 - *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997)
 - *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)
 - INS Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims for Women* 15-16 (1995)
- UNHCR
 - Gender Guidelines,⁵³ at ¶ 33
- Foreign case law
 - *Minister for Immigration and Multicultural Affairs v. Sarrazola*, [2001] FCA 263 (Fed. Court of Australia, 21 Mar. 2001)
 - N97/16904 [1998] RRTA 1354 (Refugee Review Tribunal of Australia, 13 Mar. 1998)
 - *Casetellanos v. Canada (Solicitor General)*, [1995] 2 F.C. 190 (Fed. Court of Canada, 15 Dec. 1994)
 - *Sec’y of State for the Home Dep’t (SSHD) v. K and Fornah v. SSHD*, [2006] UKHL 46 (UK House of Lords, 18 Oct. 2006)
 - *Skenderaj v Sec’y of State for the Home Dep’t*, [2002] EWCA Civ 567 (England & Wales Court of Appeal, 26 Apr. 2002)

⁵³ See footnote 10 for full citation.

Past experience

- Domestic Authority
 - *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988)
 - *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 429 (BIA 1987)
 - *Lukwago v. Ashcroft*, 329 F.3d 157, 178 (3d Cir. 2003) (the “shared characteristic” uniting a social group may be a “shared past experience” that includes harm already imposed by the potential persecutor)
- UNHCR
 - Trafficking Guidelines,⁵⁴ at ¶ 39 (“Former victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked.”)
 - Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶ 37 (Mar. 2010)
- Foreign case law
 - N94/04563 [1995] RRTA 682 (Refugee Review Tribunal of Australia, 31 Mar. 1995)
 - RPD TA2-17942, Smith-Gordon, 2007 CanLII 69395 (Immigration and Refugee Board of Canada, 19 Mar. 2007)
 - RPD TA3-04657, Smith-Gordon, 2007 CanLII 69396 (Immigration and Refugee Board of Canada, 1 Mar. 2007)
 - *R v. Special Adjudicator, ex parte Hoxha*, [2005] UKHL 19 (UK House of Lords, 10 Mar. 2005)
 - SB (PSG - Protection Regulations – Reg 6) Moldova CG, [2008] UKAIT 00002 (UK Asylum & Immigration Tribunal, 26 Nov. 2007)

Examples from Trafficking and Forced Marriage Claims⁵⁵

Domestic

- *Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (“women who have been sold into marriage...and who live in a part of China where forced marriages are considered valid and enforceable”) *vacated on other grounds by Keisler v. Gao*, 552 U.S. 801 (2007)
- *Bi Xia Qu v. Holder*, 618 F.3d 602, 607 (6th Cir. 2010) (“women in China who have been subjected to forced marriage and involuntary servitude”)
- *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (“Cameroonian widows”)

⁵⁴ See footnote 10 for full citation.

⁵⁵ Note that many of these social groups include the fact of having been trafficked or forcibly married. In these cases, the potential future persecution the courts identified was something other than trafficking or forced marriage. As explained above, the social group is not circular where the feared harm is something that will occur *because* the client was trafficked or married, as opposed to trafficking or forced marriage themselves.

Some of Human Rights USA's Successful Social Groups⁵⁶

- "young Albanian women without the protection of male relatives"
- member of a "family of Democratic Party activists in Albania"
- " teenage, Guatemalan women from rural communities whose family and "suitor" comport with social norms of female subservience"
- " rural-born Guatemalan women who were forced into a marriage and resisted both the marriage and social norms of female subservience"
- " unmarried girls of Bamiléké ethnicity whose families practice polygamy and the exchange of bride prices"
- " Cameroonian women sold into polygamous marriage who resisted that marriage and treatment as property"
- " Cameroonian women who were sold into a polygamous marriage and have resisted men's 'right' to buy and sell them by leaving or attempting to leave that marriage"
- " Chinese women who have been forced into marriage by physical and/or sexual abuse, and live in a part of China where forced marriage is considered valid and enforceable"

Foreign

- Australia
 - *SZBFQ v. Minister of Immigration* [2005] FMCA 197 (Fed. Magistrate Court of Australia, 10 Jun. 2005) (women)
 - 071426303 [2007] RRTA 132 (Refugee Review Tribunal of Australia, 29 Jun. 2007) (women)
 - V06/18399 [2006] RRTA 95 (Refugee Review Tribunal of Australia, 22 Jun. 2006) ("women in northern Albania who have failed to honour an arranged marriage")
 - N03/47757 [2004] RRTA 355 (Refugee Review Tribunal of Australia, 11 May 2005) ("sex workers in Thailand")
 - N03/45573 [2003] RRTA 160 (Refugee Review Tribunal of Australia, 24 Feb. 2003) ("trafficked Shan women" or "women who have been working in prostitution in countries neighbouring Burma,")
 - V01/13868 [2002] RRTA 799 (Refugee Review Tribunal of Australia, 6 Sep. 2002) ("young women in Albania")

⁵⁶ These cases were oral Immigration Judge decisions or Asylum Office decisions.

- Canada
 - *Chen v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1059 (Fed. Court of Canada, 12 Sep. 2003) (“young Fujianese citizens (especially girls) who travel unaccompanied, following exploitative agreements between their parents or other family members and criminal smugglers of Chinese migrants”)
 - CRDD T99-14088, Milliner (Immigration and Refugee Board of Canada, Jun. 2, 2000) (reasons signed July 17, 2000)⁵⁷ (“women in forced marriages”)
 - CRDD T98-06186 Bousfield, Milliner (dissenting), 1999 CanLII 14662 (Immigration and Refugee Board of Canada, 2 Nov. 1999) (“women and/or former sex trade workers”)
 - CRDD V95-02904, Neuenfeldt (Immigration and Refugee Board of Canada, 26 Nov. 1997)⁵⁸ (“impoverished women from the former Soviet Union recruited for exploitation in the international sex trade”)
- United Kingdom
 - AZ (Trafficked women) Thailand CG, [2010] UKUT 118 (Immigration & Asylum Chamber, 23 Apr. 2010) (“young females who have been victims of trafficking for sexual exploitation”)
 - AM and BM (Trafficked women) Albania CG, [2010] UKUT 80 (UK Immigration & Asylum Chamber, 18 Feb. 2010) (“victims of trafficking in Albania”)
 - SB (PSG - Protection Regulations – Reg 6) Moldova CG, [2008] UKAIT 00002 (UK Asylum & Immigration Tribunal, 26 Nov. 2007) (“former victims of trafficking” or “former victims of trafficking for sexual exploitation”)
 - TB (PSG – women) Iran, [2005] UKIAT 00065 (UK Immigration Appeal Tribunal, 9 Mar. 2005) (“young Iranian women who refuse to enter into arranged marriages”)
 - SK (prostitution) Albania, [2003] UKIAT 00023 (UK Immigration Appeal Tribunal, 7 Jul. 2003) (young women from Northeastern Albania)
 - Dzhygun (Ukraine), [2000] UKIAT 00TH00728 (UK Immigration Appeal Tribunal, 17 May 2000) (“women in the Ukraine who are forced into prostitution against their will”)

⁵⁷ Available at http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=1235&l=e.

⁵⁸ Summary available at <http://www.irb-cisr.gc.ca:8080/ReFlex/Issue.aspx?id=83>.

D. Social Visibility and Particularity

For the last few years, the BIA has required applicants to meet additional requirements to establish the cognizability of their social group. In *Matter of C-A-*, the Board stated that a group's visibility – meaning the degree to which members of a society perceive the targeted characteristics as defining members of a social group – is a key factor in the analysis. 23 I&N Dec. 951, 956-60 (BIA 2006). The BIA subsequently specified that a social group must be both “recognizable by others in the community” and be “defined with the requisite particularity” to delimit its membership. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74, 76 (BIA 2007), *aff'd*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). See also *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008). These decisions followed a revision by UNHCR of its Social Group Guidelines, but the Guidelines indicated that “immutability” and “social perception” were alternative – rather than simultaneous – requirements for establishing a social group.⁵⁹

Gender-based asylum cases often fail on these very factors, but the visibility and particularity of social groups in trafficking or forced marriage-related cases can be established using both legal authority and a well-reasoned explanation of why your client's proposed social group meets the BIA's standards.

Social Visibility

To establish that your client's proposed social group meets the social visibility standard, you will need to do two things in this section of your brief. Naturally you will need to explain why the social group meets the standard. But you can also begin this section with a legal framework that makes clear what social visibility is, and is not. Two problematic aspects of this standard are its inconsistent application by immigration judges and even the BIA itself, as well as an increasing tendency to interpret the social visibility element to require that social group characteristics literally be visible to the eye. You can use BIA and circuit court case law, however, as well as DHS and UNHCR statements, to outline a more reasonable social visibility standard.

To the extent that certain of your client's social group characteristics are literally visible or obvious to an observer – such as gender, or ethnicity in some instances – you will certainly want to emphasize those. But you can also help shape the analysis by highlighting the following points:

- “Visibility” should not be understood in the literal sense, but rather as concrete traits recognized by a given society. *Benitez-Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).
- Social visibility must be considered in the context of the country concerned and the persecution feared. *Matter of S-E-G-*, 24 I&N Dec. 579, 586-87 (BIA 2008).
- Failures of government protection may reflect a social distinction between members of society who will receive societal protection, and members (such as your client's social group) who will not. DHS' Supplemental Brief in *Matter of L-R-*, at 18 (Apr. 13, 2009).

⁵⁹ UNHCR Social Group Guidelines, *supra* note 47, at ¶ 11.

- The fact that members of a social group have been targeted with harm previously may serve to establish the group's visibility in society. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007), *aff'd*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007).⁶⁰
- The UNHCR has stressed in briefs of *amicus curiae* submitted to the Third, Fifth and Seventh Circuits that its Guidelines should be read as promoting alternative tests for defining a particular social group – either immutability or social visibility/perception – rather than introducing additional requirements, and that the Guidelines do not require literal visibility. *Valdiviezo-Galdamez v. Holder*, 3d Cir., No. 08-4564, Docket at 4/14/2009; *Orellana-Monson v. Holder*, 5th Cir., No. 08-60394, Docket at 06/15/2009; *Doe v. Holder*, 7th Cir., No. 09-2852, Docket at 11/13/2009.

Thus, in explaining the social visibility of your client's social group, you may want to highlight prior instances of persecution or harm that have befallen her or others in the social group, or examples and trends of police or government failure to protect the client or others in her social group. Use country condition evidence to document harms against other similarly situated people. As explained above, you would not want to argue that these prior harms are part of the social group definition, but instead use them as evidence that the group is visible. You can also highlight discrimination against the social group, or any type of disparate treatment – even if it does not rise to the level of persecution, it evidences society's identification of the social group as a distinct subset of society.

If you are struggling to establish the visibility of the social group as a whole, try to focus on the individual characteristics. For instance, gender is (generally) an obvious trait, and ethnicity may be literally visible, or it may be inferred from behaviors, language or residence within a particular neighborhood or region.

Law in Flux

Circuit courts have begun to question the use of the social visibility standard altogether. In 2009, the Seventh Circuit determined that social visibility "makes no sense" and conflicts with prior decisions regarding social groups in female genital mutilation cases and sexuality-based asylum cases. *See Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009). Subsequently in *Benitez-Ramos v. Holder*, the court affirmed and elaborated on its reservations about the social visibility standard. 589 F.3d 426, 430 (7th Cir. 2009).

At the time of publication of this manual, the Third Circuit is currently considering two cases raising questions about the social visibility standard. *See Valdiviezo-Galdamez v. Holder*, No. 08-4564, and *Mejia Fuentes v. Holder*, No. 08-2783.

⁶⁰ Note that this is different from using instances of past persecution to define the social group in the first place. While including the threat of persecution in the social group definition will likely be seen as circular, instances of persecution can be used as evidence of social visibility.

The First Circuit recently upheld the BIA's use of the social visibility standard, and the decision affirms its use as an additional criterion in the social group analysis, rather than part of an either/or test. See *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010).

Particularity

You must also establish that your client's social group is defined with sufficient particularity, which, according to the BIA, means that the society has a uniform understanding of the social group's characteristics. See *A-M-E- & J-G-U-*, 24 I&N Dec. at 76. The concept of particularity serves to delimit the potential membership of a social group by ensuring that its defining characteristics are not vague or amorphous. *Id.*

In *S-E-G-*, the BIA rejected as too "amorphous" a social group described as "male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment," because "people's ideas of what those terms mean can vary." 24 I&N Dec. at 585 (internal citations omitted). The BIA had previously rejected "wealthy Guatemalans" as a social group under similar reasoning. *A-M-E- & J-G-U-*, 24 I&N Dec. at 73-74. Many judges use these rejected social groups as measuring sticks for analyzing new ones, often merely comparing the proposed social group to *S-E-G-* rather than analyzing it on its own merit.

To satisfy the particularity element, you need to establish that your client's social group characteristics have specific, socially understood meanings that delimit who is, and is not, a member of the group. Some social group characteristics may be quite straightforward, and establishing particularity will be a matter of highlighting the concrete, non-amorphous nature of each characteristic – pointing out, for example, that "orphans" is a far more discrete characteristic than *S-E-G-*'s "children who lack stable families."

On the other hand, establishing the particularity of social group characteristics is often a highly fact specific inquiry, as DHS has acknowledged. See DHS' Supplemental Brief in *Matter of L-R-*, at 18-20 (Apr. 13, 2009). Country condition evidence can be crucial in some cases to establishing particularity, just as with social visibility.

- Example: While in some countries, a woman living alone is not remarkable, in others it may be extremely rare, highly socially unacceptable, and/or give rise to inferences about the woman or her lifestyle. So a social group that included "independent women," "single women," "women without family protection," etcetera, could have a particular, discrete meaning in a given society, and country condition evidence or expert testimony could help establish that fact.

Large Social Groups

Judges have rejected, often on particularity grounds, social groups that could potentially include large numbers of people. If you are dealing with such an issue on appeal, there is authority to combat that reasoning. The BIA itself, in *S-E-G-*, stated that the size of a social group is not determinative of its particularity, 24 I. & N. Dec at 586, though the case contains conflicting language on social group size. UNHCR has expressly stated, in both the Social Group and Trafficking Guidelines, that a proposed social group's size is irrelevant to the analysis of whether it qualifies as a social group under the Refugee Convention.⁶¹

The following federal court decisions can also be used to refute the conclusion that a social group may be too large to qualify:

- *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 n.2 (2d Cir. 2007) (“a group's size can[not] itself be a sound reason for finding a lack of particularity”)
- *Gao v. Gonzales*, 440 F.3d 62, 69-70 (2d Cir. 2006), *vacated on other grounds by Keisler v. Gao*, 552 U.S. 801 (2007)
- *Malonga v. Mukasey*, 546 F.3d 546, 554 (8th Cir. 2008)
- *Perdomo v. Holder*, 611 F.3d 662, 668-69 (9th Cir. 2010).
- *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005) (Reluctance to permit “half of a nation's residents to obtain asylum on the ground that women are persecuted there” should not distract from the question of whether either gender constitutes a social group, and both “certainly do”)

⁶¹ UNHCR Social Group Guidelines, *supra* note 47, at ¶ 18; UNHCR Trafficking Guidelines, *supra* note 10, at ¶ 37. This principal is also echoed by the UNHCR Gender Guidelines, *supra* note 10, at ¶ 31.

IV. Political Opinion & Religion

In addition to “particular social group,” victims of trafficking, or more often, forced marriage, may be able to demonstrate that they have been persecuted on account of their political opinion or religious belief, though this will not necessarily be true for every case.

A. Political Opinion

What constitutes a political opinion?

A “political opinion” for asylum purposes can encompass more than just statements regarding political parties or systems. Courts have interpreted political opinion quite broadly to include a range of actions that oppose some status quo. *See, e.g. Sagaydak v. Gonzales*, 405 F.3d 1035, 1041-45 (9th Cir. 2005); *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 546-548 (2d Cir. 2005). In a patriarchal society, opposition to the status quo could include any expression of female independence or refusal to conform with customary women’s roles. *See, e.g., Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994). A woman who resists a marriage, or resists her husband’s dominance of her within the marriage, could be characterized as expressing a political opinion about women’s rights or women’s role in society. This type of political opinion may overlap with a social group characterization based on refusal to conform to gender-based laws, but this overlap does not weaken either argument. *See Matter of Kasinga*, 21 I&N Dec. 357, 376 (BIA 1996).

Imputed Political Opinion

Your client may have also suffered or face persecution on account of an *imputed* political opinion. If your client’s persecutor is motivated to harm her because of what he thinks is her political opinion, this would still qualify your client for asylum, even if she does not actually hold that political opinion. *See, e.g., Sangha v. INS*, 103 F.3d 1482, 1489 (9th Cir. 1997).

B. Religious Belief

What constitutes a religious belief?

The term “religion” lacks a strict definition in asylum law, the UNHCR’s guidelines on religion-based claims state that religion can “encompass freedom of thought, conscience or belief.”⁶²

⁶² UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, at ¶ 4 (28 Apr. 2004).

The guidelines further explain that religion-based claims may involve “a) religion as belief (including non-belief); b) religion as identity; c) religion as a way of life.”⁶³

You can look to U.S. case law to further tease out what constitutes a religious belief for asylum purposes. It can also provide support for the idea that religious freedom includes the freedom to hold beliefs that differ from other members of one’s own community. While cases based on religious persecution may typically involve individuals being persecuted by members of religious groups that are different from their own, in a forced marriage case a woman may find herself being persecuted by members of her own religious group.

- Example: your client may face a forced marriage as punishment for not behaving in a way considered appropriate under her family’s religious customs, such as having a boyfriend.

The BIA has recognized the occurrence of persecution between orthodox and liberal members of the same religious group. See *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000). *Matter of S-A-* involved a young Muslim woman persecuted by her father due to her refusal to conform to his conservative ideas about women’s behavior. The BIA determined that the father’s abuse was persecution because it was motivated by his daughter’s non-traditional religious beliefs. *Id.* at 1336. See also *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) (holding that applicant qualified for asylum where “others in his group persecuted him because they found him *insufficiently loyal or authentic* to the religious . . . ideal they espouse” (emphasis added).

C. Establishing a Political Opinion or Religious Belief.

Typically, an asylum applicant proves that she has expressed a political opinion with demonstrative or expressive evidence, such as evidence of having participated in rallies or protests. However, “[l]ess overtly symbolic acts may also reflect political opinion,” *Perafan Saldarriaga v. Gonzalez*, 402 F.3d 461, 466 (4th Cir. 2005), and with many forced marriage cases, the client may not have engaged in any public political activism. The same holds true for religious beliefs. You will need to list the incidents from your client’s story where she resisted or attempted to resist male authority, traditional marriage practices, or other manifestations of her society’s status quo or customary religious practice.

- Example: Behaviors or statements that would be innocuous in a more egalitarian society may constitute expressions of political opinion or non-traditional religious belief in a highly patriarchal society. Such expressions could include asking her parents’ permission to marry someone of her choice, dating, resisting sex with her husband, expressing a desire to pursue education or employment, attempting to live independently of family, dressing a certain way, or even seeking protection from the government or law enforcement.

⁶³ *Id.* at ¶ 5.

V. Nexus

To receive asylum, your client must show a link, or nexus, between the persecution and the social group, political opinion, or other protected ground. In other words, she must demonstrate that she has been, or likely will be, persecuted *on account of* the protected ground.

A. The Persecutors' Motivation.

Traffickers do not target people completely at random. Rather, they target specific genders,⁶⁴ particular age groups, nationalities, or ethnicities. Furthermore, individuals who purchase trafficked persons or their services also seek out particular genders, nationalities, ethnicities etcetera.⁶⁵ Likewise, the husbands involved in forced marriage target potential brides based on these and other types of characteristics.⁶⁶ Women who are sold into trafficking or marriage by their families – and have thereby been persecuted by their families as well as the traffickers or husbands – may have been subjected to this persecution because of characteristics possessed by their families, such as socio-economic status or religious, political or cultural beliefs. Your client may also fear future persecution on account of the fact that she escaped from the traffickers or her husband. The “nexus” element of the asylum claim is, thus, the explanation of how the characteristics defining your client’s social group, or her political beliefs, may have motivated her abusers to target her for trafficking, forced marriage, or other forms of abuse.

You do **NOT** have to prove that the persecutors have or had a subjective intent to harm your client. The persecutors may see the action your client fears as benign or even beneficial; but as long as they are motivated by a protected ground, you can establish a nexus. *See Kasinga*, 21 I&N Dec. at 365; *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997).

⁶⁴ The Immigration and Refugee Board of Canada and the UNHCR have both stressed that many women are vulnerable to trafficking simply *because* they are women. Immigration and Refugee Board of Canada, CRDD T98-06186 at 5, Bousfield, Milliner (dissenting), November 2, 1999 (t)he fact that [the] claimant is a woman *is* a major cause of her predicament; not the only cause, but a major one.”). *See also*, UNHCR Trafficking Guidelines, *supra* note 10, at ¶ 32.

⁶⁵ Studies have shown that the individuals who use the services of trafficked persons are aware of such things as the nationality, race, ethnicity or status of those individuals. For instance some men prefer sex workers of their own nationality, while others may purposefully seek out women of another nationality. When looking for domestic servants, people may also target particular ethnic groups or classes, because a particular minority group is seen as having a better work ethic, because it is more comfortable to employ someone of a lower status in a position like housekeeper, or because the employer enjoys the power they can wield over an employee from a minority group. *See Dina Haynes, (Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L. J. 337, 357-58 (2007).

⁶⁶ *Id.*

- Example: Your client may face a threat of FGM as part of a forced marriage, and her family or in-laws may believe this procedure is a necessary and beneficial procedure for all women. Even though they do not intend to harm her, they are still motivated to perform the procedure by characteristics such as gender, nationality or ethnicity, age, and marital status.

Additionally, your client may have been targeted based on multiple social group memberships, or based on social group in conjunction with political opinion or another protected ground.

You can strengthen your chances of success by making arguments for as many protected grounds as reasonably possible. As stated previously, alternate social groups are especially useful when your client has a fear of future persecution on a different basis than that which motivated the past persecution. Therefore, you may want to argue that she already suffered persecution on account of one social group, and has a fear of future persecution on account of another.

- Examples:
 - Your client may have been targeted for a forced marriage because she was an unmarried young woman of a certain nationality and/or tribe, and she may still face further persecution on that basis. But she may also face future persecution on account of being a woman who has left her husband or fiancé, or resisted social norms of male domination.⁶⁷
 - Your client may have been originally targeted for trafficking because of her age, gender and ethnicity, but she may now fear punishment or murder by her family for having worked as a prostitute.

B. Establishing the Nexus.

Nexus can be established using both direct and circumstantial evidence. Highlight instances in your client's story where she was abused or punished for expressing her opinions, beliefs or for aspects of her social group characteristics. If your client's persecutor(s) gave her any direct indication of their motivation for punishing her, or targeting her in the first place, this should be emphasized in your brief and in the client's testimony. However, direct evidence of motive – such as statements by the persecutors explaining their motivation – is rare in this type of asylum case. Circumstantial evidence, therefore, can be crucial to securing asylum for your client.

⁶⁷ Actual social group examples from some of Human Rights USA's cases can be found in Section III, for instance, "unmarried girls of Bamiléké ethnicity whose families practice polygamy and the exchange of bride prices" vs. "Cameroonian women who were sold into a polygamous marriage and have resisted men's 'right' to buy and sell them by leaving or attempting to leave that marriage."

Using Circumstantial Evidence

Circumstantial evidence of a persecutor's motive can include country condition evidence documenting the political or cultural context underlying the persecution, as the authority below makes clear. Look for State Department reports, NGO reports, scholarly articles, or other sources documenting, for instance, the patriarchal nature of the society; the prevalence of trafficking, forced marriage, domestic violence or violence against women; and the failure of law enforcement and the government to protect similarly situated people from these forms of harm or to punish the perpetrators. As discussed in Section I, **expert witness testimony is also crucial to establishing nexus**. The expert can put these issues into perspective, such as by explaining what the patriarchal social norms or high levels of violence against women mean for people in your client's social group. Also, explore with your expert whether laws exist specifically prohibiting forced marriage or human trafficking, whether these laws are enforced by law enforcement and the courts, and whether, societally, such actions are condemned.

- Examples:
 - If you want to argue that your client was trafficked in part because of ethnicity, look for evidence that traffickers target certain groups *as well as* evidence that your client's ethnic group is marginalized or considered inferior by her society generally. That supports the idea that it is easy to traffic members of the group with impunity or that users of trafficked labor would willingly exploit her.
 - If you want to argue that your client faces persecution on account of the past experience of resisting a forced marriage, look for evidence indicating that the society, tribal customs, and/or religion dictates complete obeisance of daughters to fathers, that independent women are considered shameful, apostatic, and/or that domestic abuse is not criminalized. These factors support the likelihood that your client will be punished because of her resistance to the marriage.

As another example from *Matter of A-T-*, the BIA noted in that case that A-T- failed to establish a nexus between her social group and the feared persecution because she "expressed only a generalized fear of disobeying her authoritarian father." 24 I&N Dec. at 303. Once again, this highlights the importance of crafting explicit legal arguments, supported with numerous references to country condition documents and expert witness statements. In the client's declaration and the statement of facts, be cognizant of how the client's fear is expressed, describing it not merely as a fear of angering or disappointing her family, but as a fear of, for instance, being punished for transgressing social norms. Then explain this explicitly in your legal analysis, citing to country condition evidence that supports the claim that your client's social group has or will motivate her family, community members, or others to harm her.

Relevant Authority

Most of your arguments in this section will be supported with citations to evidence, not legal authority. The authority below, however, may be useful depending on the facts of your case. If your case relies heavily on circumstantial country condition evidence, you can cite the authority in the first category below to highlight the acceptability and importance of such evidence. The examples in the second category may assist in framing the nexus in trafficking cases specifically.

Importance of Circumstantial Country Condition Evidence

- Case Law
 - *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992) (an applicant may fulfill the nexus requirement by providing direct or circumstantial evidence, which may include evidence of political or cultural contexts behind the harm)
 - *Matter of S-V-*, 22 I&N Dec. 1306, 1309 (BIA 2000)
 - *Matter of S-P-*, 21 I&N Dec. 486, 490-96 (BIA 1996)
 - *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075 (9th Cir. 2004) (the harms suffered or feared by an asylum applicant must be considered within the societal context and not dismissed as random acts of criminal violence)
- Other Federal Materials
 - Asylum & Withholding Definitions, 65 Fed. Reg. 76588, 76593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 1208) (adjudicators should consider evidence of “patterns of violence [that] are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society”)
 - DHS’s Supplemental Brief in *Matter of L-R-*, at 15 (Apr. 13, 2009) (a persecutor’s motivation, sufficient to establish nexus, may arise from a combination of his own beliefs or personal experiences and his society’s view that individuals in the applicant’s social group deserve to be harmed or punished)
 - DHS’ Position on Respondent’s Eligibility for Relief in *Matter of Rodi Alvarado-Pena*, A 73 753 922 (Feb. 19, 2004) at 28 (“All asylum claims must be considered within the context of the social, political, and historical conditions of the country. In determining whether an applicant cannot change, or should not be expected to change the shared characteristic, all relevant evidence should be considered including the applicant’s individual circumstances and country conditions information about the applicant’s society.”)

Nexus in Trafficking Cases

- UNHCR Trafficking Guidelines
 - ¶ 32 (“Members of a certain race or ethnic group in a given country may be especially vulnerable to trafficking and/or less effectively protected by the authorities of the country of origin. Victims may be targeted on the basis of their ethnicity, nationality, religious or political views in a context where individuals with specific profiles are already more vulnerable to exploitation and abuse of varying forms. Individuals may also be targeted by reason of their belonging to a particular social group”)
 - ¶¶ 17, 18, 19, 28, 48 (former trafficking victims face a threat of persecution on account of their status as trafficking victims or prostitutes)
- Immigration and Refugee Board of Canada, CRDD T98-06186 at 5, Bousfield, Milliner (dissenting), November 2, 1999 (“[t]he fact that [the] claimant is a woman is a major cause of her predicament; not the only cause, but a major one”)

C. Mixed Motive Cases.

In addition to facing persecution on account of multiple protected grounds, your client may have faced persecution on account of *non-protected* grounds as well. For instance, traffickers are likely motivated by economic interests, as well as the specific characteristics that guide their choice of victims. The existence of economic motivations, however, does not undermine your client’s eligibility for asylum, as long as she can show that a protected ground “was or will be at least one central reason for” the persecution. 8 U.S.C. § 1158(b)(1)(B)(i).

Relevant Authority

The authority below can be useful in framing your nexus argument, particularly if you are dealing with the issue on appeal, after a judge has determined no nexus existed because the persecutors were motivated by personal impulses.

General Authority on Mixed Motives

- *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000)
- *Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996) (requiring conclusive proof of persecutor’s motivation “would be inconsistent with the ‘well-founded fear’ standard embodied in the ‘refugee’ definition”)
- *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992)
- *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075 (9th Cir. 2004) (the fact that a rape may be motivated in part by a sexual urge does not preclude it from also arising from a motive to overcome the victim’s political opinion)

Mixed Motives in the Trafficking Context

- UNHCR Trafficking Guidelines⁶⁸
 - at ¶ 29 (“It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause”)
 - at ¶ 31 (“Trafficking in persons is a commercial enterprise....This overriding economic motive does not, however, exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking”)

Criminal Activity and Personal Animus

One specific hurdle to establishing nexus in some cases is the characterization of the harm as mere criminal activity or personal animus. A judge may determine that the harm your client suffered was random criminal violence, or an act of vengeance that should not be characterized as persecution on account of a protected ground.⁶⁹ The criminal activity issue often arises when the persecutors are part of a gang or large crime ring, which is sometimes the case in human trafficking situations, but it can also arise in cases involving small scale trafficking operations. Many judges have been reluctant to find that any organized criminal activity might occur on account of protected grounds.

You do not necessarily need to highlight the criminal activity or personal animus issue at the immigration court or asylum office level. If you are dealing with this issue on appeal – or know that your judge has denied cases on this basis before – the authority below can be used to establish the principal that criminal activity or acts partially motivated by a desire for personal vengeance can still constitute persecution on account of a protected ground.

- *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 25-26 (BIA 1998)
- *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009) (criminal activity may constitute persecution if the criminals are aligned with the government, or the government is “unable or unwilling to control it”)
- *Ly v. Mukasey*, 524 F.3d 126, 132 (1st Cir. 2008)
- *Ahmed v. Ashcroft*, 348 F.3d 611, 619 (7th Cir. 2003)
- *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075 (9th Cir. 2004) (applicant’s fear of harm must be considered in societal context, not summarily dismissed as random crime)

⁶⁸ See footnote 10 for full citation.

⁶⁹ A judge may analyze this as a question of whether the harm constitutes persecution in the first place, rather than questioning whether it occurs on account of a protected ground. Such analyses, though, tend to conflate the definition of persecution with the nexus issue. The manual includes the criminal activity information in this section for logical consistency, but an appellate brief may be organized differently depending on how the judge analyzed the case. Recognizing it as a question of nexus, however, may help you frame the argument more clearly, regardless of how the judge’s opinion characterized it.

- *Jahed v. INS*, 356 F.3d 991, 999-1000 (9th Cir. 2004) (extortion motivated in part by petitioner's former political affiliation constituted persecution on account of political opinion)
- *Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000)
- *Grava v. INS*, 205 F.3d 1177, 1181 n. 3 (9th Cir. 2000) ("personal retaliation against a vocal political opponent does not render the opposition any less political")
- *Bolshakov v. INS*, 133 F.3d 1279, 1281 (9th Cir. 1998)
- *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996) (a dispute with personal origins may still be characterized as persecution on account of a protected ground)
- *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981)

Regarding trafficking specifically, the United Nations Office on Drugs and Crime has stated that while trafficking may seem to be a result of general crime, "more often a particular type of victim is targeted and then recruited in a predetermined manner."⁷⁰ Additionally, the UNHCR Trafficking Guidelines explain that

[s]cenarios in which trafficking can flourish frequently coincide with situations where potential victims may be vulnerable to trafficking precisely as a result of characteristics contained in the [Refugee Convention.... Opportunities arise for organized crime to exploit the inability, or lack of will, of law enforcement agencies to maintain law and order, in particular the failure to ensure adequate security for specific or vulnerable groups.⁷¹

⁷⁰ UNODC, *Trafficking in Persons: Global Patterns* 59 (2006).

⁷¹ UNHCR Trafficking Guidelines, *supra* note 10, at ¶ 31.

VI. Well-Founded Fear

Typically, asylum is granted to protect the applicant from prospective harm. Thus, to succeed on an asylum claim, the applicant must establish that she has a “well-founded” fear of suffering persecution in the future if she is removed. The fear is well-founded if “there is a reasonable possibility of suffering such persecution if he or she were to return,” and the applicant cannot obtain protection from her own government. 8 C.F.R. § 1208.13(b)(2)(i).

Establishing past persecution on account of a protected ground generally does not, by itself, qualify an applicant for asylum, with the exception of humanitarian grants of asylum described in Section VII. Proving past persecution can greatly bolster a claim, however, because it creates a rebuttable presumption of a well-founded fear. 8 C.F.R. § 1208.13(b)(1).

If your client cannot establish past persecution (or in case DHS can rebut the presumption), you will need to show that your client has an independent well-founded fear of persecution.

A. The Rebuttable Presumption

Once you have established that your client suffered past persecution on account of a protected ground, the burden shifts to DHS to rebut the presumption that your client still has a well-founded fear of persecution. To do this, DHS must show by a “preponderance of the evidence” that “[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution” based on the protected grounds, or that “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality . . . and under all the circumstances, it would be reasonable to expect the applicant to do so.” 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

While DHS bears the burden of rebutting this presumption, it would be wise to include a short section in your brief arguing that DHS cannot rebut the presumption.

Changed Circumstances

To find a “fundamental change in circumstances,” an adjudicator must “provide an individualized analysis of how changed conditions will affect the specific petitioner’s situation.” *Lopez v. Ashcroft*, 366 F.3d 799, 805 (9th Cir. 2004) (internal citations omitted). Thus, you can argue that to rebut the presumption, DHS would have to rely on more than just general changes in the country. Rather, the changes must alter the conditions specific to your client or others similarly situated. So, for instance, DHS has not rebutted the presumption if you demonstrate that the type of persecution suffered by your client is still occurring to members of her social group or those who share her political or religious beliefs. *See, e.g., Ali v. Ashcroft*, 394 F.3d 780, 789 (9th Cir. 2005).

You will have already gathered country condition documentation to support your client's claim, and you can refer back to the relevant evidence here. Refer to any documentation that indicates that trafficking and/or forced marriage is still occurring in the country or relevant region within the country, and that the government is still failing to protect people in your client's social group. Additionally, refer to any evidence that the specific persecutors who have targeted your client are still looking for her. The testimony of your expert in country conditions will be crucial to establishing the existing danger to your client.

If you do not have any direct evidence of the persecutors' continuing intent to harm your client, you can cite general sources or expert testimony that indicates it is unlikely the persecutors would just forget about your client.

- Example: look for articles or reports stating that traffickers frequently hunt down escaped victims. In a forced marriage case, look for evidence indicating that, in your client's country or community, it is considered shameful for a man to be abandoned by his wife, and argue that your client's husband is unlikely to bear that shame without seeking to reclaim or punish his wife.

Relocation

To establish that an applicant could safely relocate,⁷² DHS must do more than show that there are parts of the applicant's country where she is unlikely to face the same persecution she fled. Adjudicators should consider "whether the applicant would face *other serious harm*⁷³ in the place of suggested relocation" as well as taking into account "ongoing civil strife within the country." 8 C.F.R. § 1208.13(b)(3) (emphasis added). Serious harm is not limited to the specific form of persecution the applicant has fled, nor must it occur on account of a protected ground.

The analysis of the reasonableness of relocation should also include the "administrative, economic, or judicial infrastructure" of the country of removal, and "social and cultural constraints such as age, gender, health, and social and familial ties" of the applicant. 8 C.F.R. § 1208.13(b)(3). Additionally, DHS should demonstrate how the applicant would be relocated to a "protected area" as part of the removal process. *Matter of H-*, 21 I&N Dec. 337, 349 FN7 (BIA 1996).

As with changed circumstances, consider addressing the issue of relocation in your brief, citing the rules above to clarify what DHS would have to prove. Refer back to any evidence or testimony that your client's persecutors would be willing and/or able to track her down

⁷² If the client is a minor, it is presumed that she cannot relocate internally.

⁷³ Note that "other serious harm" is also potentially grounds for humanitarian asylum, as explained in the next section. You may want to make a more extensive argument regarding other serious harm in a humanitarian asylum section, and simply refer to this more detailed argument in your relocation section, since it is merely one of many considerations to the relocation issue.

anywhere in the country. This evidence might include testimony regarding actual threats, or circumstantial evidence regarding the persecutors' ability to find your client.

- Example: Direct evidence could include previous instances where she escaped and was discovered, threats made to her before she fled or threats made to her family or others since she fled. Additionally, if the persecutors have connections that they could use to search for someone, such as ties to the police or military, this would further support the argument by indicating the persecutors would be able to track her down.

After arguing that relocation would not protect your client from her original persecutors, you can also argue that she would not be safe from persecution or other serious harm at the hands of others. Refer back to your country condition evidence or expert testimony to show that women in your client's situation would be in danger anywhere in the country. The danger might be similar to the persecution and occur on account of the same grounds that underlie the asylum claim, or it may harm that would arise simply from relocating.

For instance, in many non-Western countries, single and separated women have very little freedom to live a reasonable and safe life independently and apart from the protection of family or a husband. Rape, forced prostitution, and other harms, combined with the lack of police protection or effective law enforcement, are not uncommon. Having to care for children usually exacerbates these problems. Supporting oneself is impossible in countries where a husband or male relative must approve the employment of a woman.

Do not hesitate to remind the adjudicator that the standard is "reasonable" relocation, not relocation at any cost; inability to support oneself financially, for instance, can help show that relocation is not reasonable. Any danger that could be characterized as "serious harm" should also undermine the reasonableness of relocation, though judges often analyze the relocation issue as if it is simply a question of whether the applicant could avoid the specific persecution on which she has based her claim. For this reason, it is a good idea to include some evidence that your client would face danger related to the grounds for her persecution.

- Example: A related danger may be a threat of sexual violence faced by women the society views as shamed or tainted in some way, perhaps for being divorced or having been raped.

However, even if your strongest argument against relocation comes down to harm *unrelated* to the asylum claim, the judge must consider this evidence instead of focusing strictly on whether your client could avoid her persecutors. If this does not occur, you have grounds for appeal if the judge denies the claim on this basis.

In some countries, relocation might not just be dangerous, it may be virtually impossible. Some countries or regions are strictly segregated by ethnicity or tribe, and/or by religion, thus rendering most of the country strictly off-limits to internal migration, particularly for women. Many government also heavily restrict the internal movements and resettlement of its citizens. If

this is the case in your client's country of origin, country condition documentation and expert testimony can help establish that relocation is truly not an option for her.

B. Establishing an Independent Well-Founded Fear

An independent well-founded fear of persecution refers to additional persecution your client fears upon return to her country, in addition to the type of harm she already suffered, or even the same type of harm, but on account of another ground. This may include punishment for having fled. Since the presumption of a well-founded fear would not apply to the independent fear of persecution, particularly if the past persecution claim fails, you must affirmatively establish that the fear is well-founded. While the facts and evidence may largely overlap with your past persecution claim, it is a good idea to write a separate section following the standards for proving a "well-founded" fear.

What is a reasonable possibility?

An applicant must show that there is a "reasonable possibility" that she will suffer persecution upon return to her country. 8 C.F.R. § 1208.13(b)(2)(i). The persecution does not have to be more likely than not. The Supreme Court has suggested that a 10 percent chance can constitute a reasonable possibility of persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987). A few circuit courts have relied on this percentage analysis in asylum decisions.⁷⁴ Regardless of whether the possibility is quantifiable, an asylum applicant need only prove that the chance of persecution is reasonable, not certain.

To satisfy the reasonable possibility standard you will need to present both subjective and objective evidence. *Id.* at 421, 430-31, 440. The subjective standard is met through credible testimony that the client actually fears the persecution, *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256 (9th Cir. 1992), and you can show this by highlighting relevant statements from your client's declaration as well as the psychological evaluation. The objective standard requires showing that a reasonable person in similar circumstances would fear persecution. *Yong Hao Chen v. INS*, 195 F.3d 198, 201-202 (4th Cir. 1999).

To establish that your client's fear of persecution is reasonable you must also show either that she "would be singled out individually for persecution" upon return, or that "that there is a pattern or practice in [her] country of nationality . . . of persecution of a group of persons similarly situated to [her]" and that your client is a part of that group. 8 C.F.R. § 1208.13(b)(2)(iii).

Finally, since your client is not likely being targeted by government officials in an official capacity, you must show that her country's government is unable or unwilling to protect her.

⁷⁴ See, e.g., *Lumataw v. Holder*, 582 F.3d 78, 92 (1st Cir. 2009); *Abebe v. Gonzales*, 432 F.3d 1037, 1042 (9th Cir. 2005); *Kllokoqi v. Gonzales*, 439 F.3d 336, 345 (7th Cir. 2005).

Objectively Reasonable Fear – BIA Test

In *Matter of Mogharrabi*, the BIA laid out a four part test to determine whether an asylum applicant has an objectively well-founded fear of persecution on account of one of the five protected grounds. According to this test, the applicant must show that:

- she possesses a **belief** or **characteristic** a persecutor seeks to overcome by means of punishment;
- the **persecutor is aware**, or could easily become aware, that she possesses this belief or characteristic;
- the persecutor is **capable of punishing** her; and
- the persecutor has the **inclination to punish** her

19 I&N Dec. 439, 445 (BIA 1987).

In addition to referring to relevant facts from your client's declaration to address each element, you may also want to refer to some of your country condition evidence in regard to the last two elements. The capability and inclination of the persecutor to harm your client may be shaped or bolstered by societal or cultural conditions.

- Example: If you have country evidence indicating that social norms encourage or justify a man's "right" to physically punish his wife, this would support the idea that your client's husband is capable and inclined to punish her. In a trafficking case, you could use evidence indicating that law enforcement does not investigate or prosecute traffickers, for instance, to show that the traffickers would be capable of punishing your client.

Singled Out for Persecution

Although you do not have to prove your client will be singled out for persecution if you satisfy the "pattern or practice" element, "singled out" arguments are generally more successful. In a forced marriage case, it seems obvious that the husband, or your client's family, would target her specifically to punish for fleeing the marriage. You can make that point, and reference any threats that were made regarding what would happen if she refused or left the marriage. Particularly if country condition evidence indicates the husband will be viewed shamefully by the society for being left by his wife, you can use that evidence to argue he will want to find and punish her, or force her back into the marriage, rather than just taking a new wife.

In a trafficking case, you can also reference any direct threats, as well as any evidence that traffickers in the country typically recapture and punish escaped victims. This evidence may be client testimony, if she saw this happen to other victims, or general documentary evidence. If she is likely to face social ostracism or other harm for having been a trafficking victim, this might also help establish that she will specifically be singled out for persecution, and you can reference supporting country condition evidence. This argument may begin to overlap with the "pattern or practice" argument, but trying to meet both standards only increases the chance of success.

Pattern or Practice of Persecution

This element is met with country condition and expert evidence, and you may be able to refer back to much of the country condition evidence cited throughout the brief, while specifically highlighting the strongest examples. Because you have to show the pattern of persecution is against a group of similarly situated individuals, broad evidence about conditions for women generally might not be as helpful here as evidence regarding trafficking and the treatment of former trafficking victims, or evidence regarding marriage practices and spousal abuse.

Government Protection

You can satisfy two elements of asylum eligibility in this section. Not only do you need to show the government will not protect your client to prove her fear is reasonable, but you must show some kind of state culpability, such as a failure of state protection, to establish asylum eligibility anyway. While the classic image of persecution may involve government officials targeting dissidents or minorities, an asylum applicant can establish eligibility by showing a fear of persecution at the hands of private actors her government is “unable or unwilling to control.” *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988). See also *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *Valioukevitch v. INS*, 251 F.3d 747, 749 (8th Cir. 2001); *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006)

Thus, there are two sides to the issue: does the government control the persecutors, and does the government protect the victims. Of course, failure to control the persecutors is simultaneously failure to protect the victims, and you do not need to make two separate arguments regarding government protection unless it makes sense given the facts of the case.

This element is primarily met with country condition evidence, though your client may also have relevant testimony. If she ever attempted to get help from the police and was refused, for instance, cite this fact from her declaration as evidence of the government’s unwillingness to control the persecutors. Similarly, if she never contacted the police because she feared retaliation or she knew other women similarly situated that the police did not help, this should be fully documented in the declaration and referenced in the brief.

You can refer back to previously cited country condition evidence, while highlighting some strong examples. You can also use general as well as specific evidence, establishing a failure to control violence against women generally as well as trafficking or forced marriage specifically.

- Example: Use evidence regarding the prevalence of forced marriage or trafficking, along with evidence of low rates of prosecution of traffickers or abusive husbands, to show the government is not controlling the persecutors. Use evidence that police rarely investigate crimes reported by women, for instance, to show that the government does not sufficiently protect women generally.

VII. Humanitarian Asylum

An applicant who fails to establish a well-founded fear of future persecution may still be eligible for asylum if she can show “compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution,” 8 C.F.R. § 1208.13(b)(1)(iii)(A) or if she can establish “a reasonable possibility that he or she may suffer other serious harm upon removal.” 8 C.F.R. § 1208.13(b)(1)(iii)(B).

Thus, an applicant who can establish past persecution may be eligible for asylum even if DHS can rebut the well-founded fear. For example, a humanitarian asylum argument could be viable where there was extreme persecution, but the persecutor has died, the regime has changed, or new, effective laws have been put in place.

A. Severe Past Persecution - § 1208.13(b)(1)(iii)(A)

Not everyone who establishes past persecution will be able to show that it was sufficiently severe to warrant a grant of asylum under 8 C.F.R. § 1208.13(b)(1)(iii)(A). Many survivors of trafficking and forced marriage, however, have likely suffered a level of abuse that adjudicators would find severe. Rape and physical violence have been found to be sufficiently severe, *see, e.g., Menendez-Donis v. Ashcroft*, 360 F.3d 915, 920-21 (8th Cir. 2004), and you can find cases highlighting the traumatic effect of rape in the context of both persecution and torture analyses. Even opinions that do not address the humanitarian asylum issue can still be useful to establish the severity of the persecution your client has suffered.

Judges will consider “the degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma resulting from the harm.” *Abrha v. Gonzales*, 433 F.3d 1072, 1076 (8th Cir. 2006). *See also Matter of N-M-A-*, 22 I&N Dec. 312, 326 (BIA 1998). Courts generally reserve this first type of humanitarian asylum for those who have suffered the most egregious forms of persecution. *See, e.g., Kone v. Holder*, 596 F.3d 141, 152 (2d Cir. 2010) (citing *Matter of Chen*, 20 I&N Dec. 16, 19 (BIA 1989)).⁷⁵

Start by discussing relevant case law and then reiterate any statements in your client’s declaration discussing her on-going suffering. Reference the psychological evaluation to detail any trauma symptoms, and note any statements regarding the danger of re-traumatization.

⁷⁵ *Matter of Chen* predated the regulations on humanitarian asylum and was the basis for the first prong of the regulatory framework, justifying a grant of asylum based on the severity of past persecution. The BIA in *Chen* referred to a provision of the UNHCR Handbook, which recognized a “general humanitarian principle” of protecting individuals who had suffered “atrocious forms of persecution” even in the absence of a well-founded fear of future persecution. *See Chen*, 20 I&N Dec. at 19; UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1, at § 136 (1992).

Sample Authority

- Domestic
 - *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (rape can constitute torture)
 - *Menendez-Donis v. Ashcroft*, 360 F.3d 915, 920-21 (8th Cir. 2004) (gang rape and beatings were “sufficiently severe and atrocious” to establish eligibility under 8 C.F.R. § 1208.13(b)(1)(iii)(A))
 - *Lopez-Galarza v. INS*, 99 F.3d 954, 962-63 (9th Cir. 1996) (rapes and beatings are sufficiently atrocious to establish eligibility under 8 C.F.R. § 1208.13(b)(1)(iii)(A))
- International
 - *Aydin v. Turkey*, [1997] ECHR 75 (European Court of Human Rights, 25 Sep. 1997) (rape can constitute torture)

B. Other Serious Harm - § 1208.13(b)(1)(iii)(B)

The phrase “other serious harm” is defined as “harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution.” 65 Fed.Reg. 76121, 76127 (2000). Though it must be a type of harm that would generally be considered persecution, it does not have to meet the heightened standard of atrocious persecution usually applied to 8 C.F.R. § 1208.13(b)(1)(iii)(A). *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008).

In this section, refer back to the types of harm your client has stated she fears suffering if removed, as well as any danger she is likely to face according to the expert witness’ affidavit and country condition reports, whether or not it is an extension of the past persecution. Even if this evidence proves insufficient to establish a well-founded fear of future persecution, the judge or asylum officer may agree that it constitutes other serious harm.

Just as in the context of the relocation issue, “other serious harm” does not have to occur on account of protected grounds. There is not much case law on what does or does not qualify as serious harm under 8 C.F.R. § 1208.13(b)(1)(iii)(B). The Seventh Circuit has suggested that homelessness may qualify, *Kholyavskiy*, 540 F.3d at 577, and the Second Circuit has suggested that mental anguish may qualify in the context of an FGM case. *Kone*, 596 F.3d at 153.⁷⁶

Courts will sometimes overlook the “other serious harm” element, even when considering a humanitarian asylum claim specifically. See, e.g., *Hernandez v. Holder*, 579 F.3d 864, 875 (8th Cir. 2009). If your immigration judge denies humanitarian asylum solely because he determines your client’s past persecution was not sufficiently severe, without considering evidence of other serious harm, you have grounds for appeal.

⁷⁶ The court suggested that the mental anguish of a mother seeing her daughter forcibly circumcised may qualify as other serious harm.

VIII. Withholding of Removal

Withholding of removal⁷⁷ is a mandatory form of relief available to applicants in removal proceedings who can show that their life or freedom would more likely than not be threatened in the removal country. See INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(b).

Don't Overlook the Withholding Claim!

This claim is most important for individuals who are not eligible to apply for asylum, including those who have missed the one-year application deadline. If there is any possibility your client could face one-year deadline issues, you should certainly include a withholding claim. But even eligible asylum seekers can benefit from including this claim, since asylum may be denied in the judge's discretion, while withholding is mandatory if the applicant meets the standard.

A. Threats to Life or Freedom

Courts generally consider all threats to life or freedom to constitute persecution, but not all forms of persecution are necessarily threats to life or freedom. Thus, when writing this section, be conscious of how you describe the harm your client fears so that it would clearly fall within this characterization. Focus on life-threatening harm, deprivation of liberty, restrictions on movement or life choices, etcetera.

As with asylum, the harm must be likely to occur on account of a protected ground. The nexus argument from the asylum claim would fully apply to the withholding claim, and you can reference the earlier argument in this section.

B. More Likely Than Not

Similarly to the asylum claim, an applicant who establishes she suffered past persecution is entitled to a presumption that she will face a threat to life or freedom upon removal.

To establish entitlement to withholding of removal in the absence of past persecution, you must show that the threat to life or freedom is "more likely than not" to occur. 8 C.F.R. §§ 1208.16(b)(1)(iii), 1208.16(b)(2).⁷⁸

⁷⁷ Withholding of removal, both under INA § 241(b) and the Convention Against Torture, allows the applicant to remain in the United States, work legally, and receive most refugee benefits. However, unlike asylees, individuals granted withholding will not be eligible to apply for permanent resident status.

⁷⁸ The standard has also been cited as a "clear probability" standard, originating in the Supreme Court's decision in *INS v. Stevic*, based on an earlier version of the withholding of removal provisions. See 467 U.S. 407

Once again, country condition documents and expert testimony are the primary sources of evidence to establish the likelihood of harm. Cite all relevant evidence indicating that the harm your client fears is widespread and inescapable. Also reference facts from your client's declaration such as threats or previous instances of punishment or failed escape attempts. This evidence is likely identical to that cited in your asylum claim, you must merely frame it in terms of a higher likelihood of harm.

As with asylum, DHS may rebut the likelihood of harm with the same type of evidence used to rebut a presumption of well-founded fear: change in circumstances or reasonable relocation. 8 C.F.R. § 1208.16(b)(1)(i). It should be sufficient to just address these arguments once, in the "well-founded" section of the asylum claim, and reference the earlier arguments in this section.

(1984). Today courts use the terms "clear probability" and "more likely than not" interchangeably in withholding of removal cases.

IX. CAT Protection

Article 3 of the Convention Against Torture states, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”⁷⁹ when that torture will “occur with the consent or acquiescence of a public official.”⁸⁰

Under U.S. law, an individual who fears for her safety upon repatriation will be entitled to mandatory withholding of removal⁸¹ under the CAT if she can show it is more likely than not she will be tortured in the removal country by, or with the acquiescence of, a public official. See 8 C.F.R. § 1208.16(c)(2); 8 C.F.R. § 1208.18(a)(1).

Don’t Overlook the CAT Claim!

While CAT protection is also often sought by individuals who are ineligible to apply for asylum, it is available to asylum seekers. And although an asylum seeker who fails to prove eligibility for asylum will generally not be able to prove entitlement to withholding under the CAT, failure to receive asylum should not always automatically exclude the applicant from CAT protection. See *Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d Cir. 2003). Particularly if the asylum claim fails on the nexus element, the applicant may still have a good chance of succeeding on the CAT claim.

A. What Type of Harm Qualifies as Torture?

Under 8 C.F.R. § 1208.18(a)(1), torture is defined as any act that:

“causes severe physical or mental pain or suffering; is intentionally inflicted for such purposes as obtaining from the victim or a third person information or a confession, punishing her for an act she or a third person has committed or is suspected of having committed, or intimidating or coercing her or a third person, or for any reason based on discrimination of any kind; is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity; and which does not arise from a lawful sanction.”

⁷⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), 10 Dec. 1984, art. 3, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (*entered into force* 26 Jun. 1987) (U.S. signed 18 Apr. 1988).

⁸⁰ *Id.* at Art. 1.

⁸¹ Withholding of removal is not available to anyone deemed to be a persecutor or terrorist, or to certain criminals, though they can still receive the more limited deferral of removal. See 8 C.F.R. § 1208.17.

Severe Physical or Mental Pain or Suffering

Victims of trafficking and forced marriage will likely have suffered, or fear suffering, harm that qualifies as torture. Rape, physical abuse, abduction, and death threats have been held to constitute severe pain and/or suffering. Even without specific case law support, you can describe any harm your client has suffered that might reasonably be considered torture.

Examples

- Domestic
 - *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (rape can constitute torture under both domestic and international law)
 - *Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001) (“severe domestic violence” can constitute torture)
 - *Tchemkou v. Gonzales*, 495 F.3d 785, 795 (7th Cir. 2007) (abduction and physical abuse can constitute torture)
 - *Nwaokolo v. INS*, 314 F.3d 303, 308-09 (7th Cir. 2002) (FGM constitutes torture)
 - *Edu v. Holder*, 624 F.3d 1137, 1147 (9th Cir. 2010) (FGM constitutes torture)
 - *Lopez-Galarza v. INS*, 99 F.3d 954, 963 (9th Cir. 1996) (rape can constitute torture)
 - *Doe v. Qi*, 349 F.Supp.2d 1258, 1317 (N.D. Cal. 2004) (“sustained systematic beatings” can constitute torture)
- UNHCR
 - Trafficking Guidelines,⁸² at ¶ 47 (trafficking includes harm that can constitute torture)
 - Gender Guidelines,⁸³ at ¶ 18 (forced prostitution can constitute torture)
- International
 - *Aydin v. Turkey*, [1997] ECHR 75 (European Court of Human Rights, 25 Sep. 1997) (rape can constitute torture)
 - *Mejia v. Peru*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R. 157, OEA/Ser.L/V/II.91 Doc. 7 rev. (Inter-American Commission on Human Rights, 1 Mar. 1996)⁸⁴ (rape can constitute torture)
- Foreign
 - V96/04076 [1996] RRTA 2371 (Refugee Review Tribunal of Australia, 15 Aug. 1996) (rape can constitute torture)
 - *Sec’y of State for the Home Dep’t (SSHD) v. K and Fornah v. SSHD*, [2006] UKHL 46 (UK House of Lords, 18 Oct. 2006) (FGM can constitute torture)
 - *R v. Immigration Appeal Tribunal, ex parte Subramaniam* [1999] EWHC Admin 92 (England & Wales High Court, 2 Feb. 1999) (rape can constitute torture)

⁸² See footnote 10 for full citation.

⁸³ See footnote 10 for full citation.

⁸⁴ Available at <http://www1.umn.edu/humanrts/cases/1996/peru5-96.htm>.

B. Motivation of the Torturer

Unlike persecution in the asylum context, torture does not have to be inflicted on account of a protected ground. You must still explain the motivation of the torturer, however.

Article 1 of the CAT, echoed by DHS regulations, requires that the torture must be inflicted intentionally and for particular purposes, among them “punishing [someone] for an act he or she or a third person has committed or is suspected of committing...intimidating or coercing him or a third person”, and “for any reason based on discrimination of any kind.”⁸⁵

Within the human trafficking and forced marriage context, traffickers or husbands may likely harm their victims in order to punish, intimidate or coerce, or for discriminatory reasons that could be likened to persecution on account of protected grounds. Your client may have been targeted for discriminatory reasons, she may have been intimidated or coerced into the situation, and/or she may have been punished for resisting or attempting to escape. Now, she likely faces a threat of punishment for having fled, her traffickers may try to intimidate or coerce her into returning to them, and any discriminatory bases for torture likely still exist.

You can use the UNHCR Trafficking Guidelines to support the argument that traffickers often punish escaped victims.⁸⁶ Look for country condition materials that also support this idea. You may also have direct evidence, such as previous punishment, intimidation, coercion, or discrimination, as well as threats of any of these. All of this evidence can also be used to meet the “more likely than not” standard, explained in more detail below.

C. Acquiescence of Public Officials

In order to qualify for relief under CAT when no public official has actively committed the torture, the torturous act must occur with the “acquiescence of a public official.” 8 C.F.R. § 1208.18(a)(1). This standard requires that a public official, prior to the torturous activity, had “awareness of such activity” and subsequently breached his “legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 1208.18(a)(7).

This element of eligibility, along with the more likely than not standard, is one of the most common points of failure of CAT claims.

In most human trafficking and forced marriage cases, public officials are not actively committing the torture, nor do they always have *direct* knowledge of torture or of specific victims.

However, specific awareness of the individual claimant’s torture at the hands of her abuser is NOT a requirement to proving entitlement to CAT protection.

⁸⁵ CAT, *supra* note 79, Art. 1; 8 C.F.R. § 1208.18(a)(1).

⁸⁶ UNHCR Trafficking Guidelines, *supra* note 10, at ¶¶ 17, 18, 28, 39, 47.

You may have direct evidence of acquiescence, such as prior failures of police to assist your client after being made aware of the torture. Most likely, however, you will need to rely on country condition evidence indicating that public officials are aware that the type of torture your client fears occurs regularly, and that they do nothing to address it. This can include failures of police protection, failures in the judicial system, failures of lawmakers to outlaw the relevant forms of harm, or failures of enforcement, as well as any evidence of specific officials having knowledge of the torture and failing to address it.

Willful Blindness

In ratifying the CAT, the Senate stated that acquiescence of public officials meant that public officials have awareness of the torture.⁸⁷ Explaining this requirement subsequently, the Senate Foreign Relations Committee made clear that “awareness” did not require actual knowledge of the torture; instead “willful blindness” would suffice. S. Exec. Rep. No. 101-30, at 9 (1990).

If you are appealing a denial of CAT protection on the acquiescence issue, you will likely be responding to the judge’s misunderstanding or misapplication of the acquiescence standard. You do NOT need to show that any public officials had or will have actual knowledge of your client’s torture if you can show that the type of torture your client fears occurs regularly in her country and the government ignores, or fails to respond reasonably to the problem. If a judge seems to require otherwise, this is grounds for appeal.

Examples

The following case law may be helpful in framing the original argument in a trial brief or in responding to a misapplication of the acquiescence element on appeal.

- *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (“acquiescence” does not require “official ‘consent or approval’”)
- *Silva-Rengifo v. Att’y Gen.*, 473 F.3d 58, 69-70 (3d Cir. 2007) (the government need not be “actually aware of the conduct that constitutes torture”)
- *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-355 (5th Cir. 2002) (willful blindness suffices to prove acquiescence)
- *Ali v. Reno*, 237 F.3d 591, 598 (6th Cir. 2001) (when evidence indicates that “the authorities ignore...severe domestic violence...the Convention [Against Torture] appears to compel protection for a victim”)
- *Tunis v. Gonzales*, 447 F.3d 547, 551 (7th Cir. 2006) (the fact that torture is committed by private groups does not mean there can be no government acquiescence)
- *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007) (willful non-intervention in the torture of citizens by third parties constitutes acquiescence)

⁸⁷ 136 Cong. Rec. S17486-01, *S17491-92 (1990).

- *Ochoa v. Gonzales*, 406 F.3d 1166, 1172 (9th Cir. 2005) (“a petitioner need only prove the government is aware of a third party’s torturous activity and does nothing to intervene to prevent it”)
- *Zheng v. Ashcroft*, 332 F.3d 1186, 1194-95 (9th Cir. 2003)⁸⁸ (government officials can acquiesce to torture without officially condoning or accepting the torture)

D. More Likely Than Not

An applicant for CAT relief must also establish that based on the facts and circumstances of her case it is “more likely than not” that she “would be tortured if removed to the proposed country of removal.” 8 C.F.R. § 1208.16(c)(2). To make this determination, adjudicators will consider (1) evidence of past torture inflicted upon the applicant, and (2) “evidence of gross, flagrant or mass violations of human rights within the country of removal.” 8 C.F.R. § 1208.16(c)(3).

Refer back to all of the harm your client has already suffered, as well as any with which she was specifically threatened. As with asylum and withholding of removal under INA § 241(b), country condition evidence will also be highly important. Start by referring back to your evidence regarding the prevalence of trafficking and/or forced marriage in the country of origin, the tendency of traffickers to recapture or punish victims, etcetera. But as the regulations indicate, an adjudicator should broadly consider any evidence of flagrant or mass human rights violations, and you can include evidence of violations that are unrelated to the specific type of harm your client fears, including any reports documenting the government’s failure to comply with the CAT.

⁸⁸ In this decision, the Ninth Circuit overruled the BIA decision in *Matter of S-V-*, 21 I&N Dec. 1306 (BIA 2000). The BIA had held that Congress’s implementing legislation created a more limited definition of acquiescence than that found in the CAT. The Ninth Circuit disagreed, citing legislative history, and stated that the BIA could not apply a more restrictive standard than Congress intended. *Zheng*, 332 F.3d at 1196. See also *Ochoa*, 406 F.3d at 1172 (recognizing overruling of BIA standard in *S-V-*).

Conclusion

Asylum cases are rarely easy, and cases involving gender-based persecution or other persecution at the hands of private actors are among the most challenging. Often the case law is not directly on point and does not include fact patterns similar to your client's case. But with carefully crafted arguments and a thorough examination of asylum jurisprudence, trafficking and forced marriage-related asylum cases can be successful. By weaving together legal principals from different types of asylum cases, you can show judges and asylum officers that your client's situation falls squarely within the framework of U.S. asylum law. Supplementing domestic law with international law can further clarify legal principles that were grounded in international law at their inception.

The suggestions and examples in this manual provide you with a firm foundation for drafting briefs and shaping legal arguments to successfully establish the asylum eligibility of survivors of trafficking and forced marriage. However, given the challenges inherent to these cases, you may find that you need more specific assistance. The attorneys at Human Rights USA are available to answer questions regarding this manual, or any questions you may have regarding your trafficking or forced marriage-related asylum cases. Please do not hesitate to contact Human Rights USA for answers to questions, help strategizing, assistance with expert witness issues, feedback on briefs, or consultations regarding amicus filings.

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<i>Abay v. Ashcroft</i> , 368 F.3d 634, 639-40 (6th Cir. 2004).....	22, 33
<i>Abebe v. Gonzales</i> , 432 F.3d 1037 (9th Cir. 2005)	55
<i>Abrha v. Gonzales</i> , 433 F.3d 1072 (8th Cir. 2006).....	58
<i>Agbor v. Gonzales</i> , 487 F.3d 499 (7th Cir. 2007)	22
<i>Ahmed (Djillali) v. Ashcroft</i> , 348 F.3d 611 (7th Cir. 2003)	50
<i>Ahmed (Mushtaquddin) v. Ashcroft</i> , 396 F.3d 1011 (8th Cir. 2005).....	21
<i>Ahmed v. Holder</i> , 611 F.3d 90 (1st Cir. 2010)	22
<i>Al-Ghorbani v. Holder</i> , 585 F.3d 980 (6th Cir. 2009).....	34
<i>Ali v. Ashcroft</i> , 394 F.3d 780 (9th Cir. 2005).....	52
<i>Ali v. Reno</i> , 237 F.3d 591 (6th Cir. 2001).....	63, 65
<i>Angoucheva v. INS</i> , 106 F.3d 781 (7th Cir. 1997).....	20
<i>Arteaga v. INS</i> , 836 F.2d 1227 (9th Cir. 1988)	57
<i>Bah v. Mukasey</i> , 529 F.3d 99 (2d Cir. 2008)	22
<i>Bartesaghi-Lay v. INS</i> , 9 F.3d 819 (10th Cir. 1993)	57
<i>Benitez-Ramos v. Holder</i> , 589 F.3d 426 (7th Cir. 2009)	39, 40
<i>Berroteran-Melendez v. INS</i> , 955 F.2d 1251 (9th Cir. 1992),	55
<i>Bi Xia Qu v. Holder</i> , 618 F.3d 602 (6th Cir. 2010)	36
<i>Bolshakov v. INS</i> , 133 F.3d 1279 (9th Cir. 1998).....	51
<i>Borca v. INS</i> , 77 F.3d 210 (7th Cir. 1996).....	20, 21
<i>Bucar v. INS</i> , 109 F.3d 399 (7th Cir. 1997).....	21
<i>Burbiene v. Holder</i> , 568 F.3d 251 (1st Cir. 2009)	50
<i>Canaj v. Gonzales</i> , 219 Fed. Appx. 104 (2d Cir. 2007).....	20
<i>Chand v. INS</i> , 222 F.3d 1066 (9th Cir. 2000).....	51
<i>Chen (Tian-Yong) v. INS</i> , 359 F.3d 121 (2d Cir. 2004).....	21
<i>Chen (Yong Hao) v. INS</i> , 195 F.3d 198 (4th Cir. 1999).....	21, 55
<i>Daneshvar v. Ashcroft</i> , 355 F.3d 615 (6th Cir. 2004).....	20
<i>Doe v. Qi</i> , 349 F.Supp.2d 1258, 1317 (N.D. Cal. 2004).....	63
<i>Edu v. Holder</i> , 624 F.3d 1137 (9th Cir. 2010)	63
<i>Escobar v. Gonzales</i> , 417 F.3d 363 (3d Cir. 2005).....	32
<i>Fatin v. INS</i> , 12 F.3d 1233 (3d Cir. 1993).....	20, 32, 34, 43
<i>Fiadjoe v. Attorney General</i> , 411 F.3d 135 (3d Cir. 2005).....	33
<i>Gao v. Gonzales</i> , 440 F.3d 62 (2d Cir. 2006)	20, 33, 36, 42
<i>Garcia-Martinez v. Ashcroft</i> , 371 F.3d 1066 (9th Cir. 2004)	48, 49, 50
<i>Gatimi v. Holder</i> , 578 F.3d 611 (7th Cir. 2009).....	40
<i>Gebremichael v. INS</i> , 10 F.3d 28 (1st Cir. 1993).....	35
<i>Gomez-Saballos v. INS</i> , 79 F.3d 912 (9th Cir. 1996).....	51
<i>Gormley v. Ashcroft</i> , 364 F.3d 1172 (9th Cir. 2004).....	21
<i>Grava v. INS</i> , 205 F.3d 1177 (9th Cir. 2000).....	51

<i>Hernandez v. Holder</i> , 579 F.3d 864 (8th Cir. 2009).....	59
<i>Hernandez-Montiel v. INS</i> , 225 F.3d 1084 (9th Cir. 2000).....	20, 32, 33
<i>Iliev v. INS</i> , 127 F.3d 638 (7th Cir. 1997)	35
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987).....	14, 55
<i>INS v. Elias-Zacarias</i> , 502 U.S. 478 (1992)	48, 49
<i>INS v. Stevic</i> , 467 U.S. 407 (1984)	60
<i>Jahed v. INS</i> , 356 F.3d 991 (9th Cir. 2004).....	50
<i>Javhlan v. Holder</i> , 626 F.3d 1119 (9th Cir. 2010).....	21
<i>Kholyavskiy v. Mukasey</i> , 540 F.3d 555 (7th Cir. 2008).....	59
<i>Khouzam v. Ashcroft</i> , 361 F.3d 161 (2d Cir. 2004).....	65
<i>Kllokoqi v. Gonzales</i> , 439 F.3d 336 (7th Cir. 2005)	55
<i>Kone v. Holder</i> , 596 F.3d 141 (2d Cir. 2010)	58, 59
<i>Lal v. INS</i> , 255 F.3d 998 (9th Cir. 2001).....	20
<i>Lazo-Majano v. INS</i> , 813 F.2d 1432 (9th Cir. 1987).....	20
<i>Lhansom v. Gonzales</i> , 430 F.3d 833 (7th Cir. 2005).....	21
<i>Li v. Att’y Gen.</i> , 400 F.3d 157 (3d Cir. 2005).....	21
<i>Lopez v. Ashcroft</i> , 366 F.3d 799 (9th Cir. 2004).....	52
<i>Lopez-Galarza v. INS</i> , 99 F.3d 954 (9th Cir. 1996).....	20, 21, 59, 63
<i>Lopez-Soto v. Ashcroft</i> , 383 F.3d 228 (4th Cir. 2004)	35
<i>Lukwago v. Ashcroft</i> , 329 F.3d 157 (3d Cir. 2003).....	36
<i>Lumataw v. Holder</i> , 582 F.3d 78 (1st Cir. 2009).....	55
<i>Ly v. Mukasey</i> , 524 F.3d 126 (1st Cir. 2008)	50
<i>Maini v. INS</i> , 212 F.3d 1167 (9th Cir. 2000).....	44
<i>Malonga v. Mukasey</i> , 546 F.3d 546 (8th Cir. 2008).....	42
<i>Matter of Acosta</i> , 19 I&N Dec. 211 (BIA 1985).....	16, 28, 32, 36
<i>Matter of A-M-E- & J-G-U-</i> , 24 I&N Dec. 69 (BIA 2007)	39, 40, 41
<i>Matter of A-T-</i> , 24 I&N Dec. 296 (BIA 2007).....	18, 19, 47
<i>Matter of B-</i> , 21 I&N Dec. 66 (BIA 1995).....	21
<i>Matter of C-A-</i> , 23 I&N Dec. 951 (BIA 2006)	35, 39
<i>Matter of Chen</i> , 20 I&N Dec. 16 (BIA 1989).....	58
<i>Matter of Fuentes</i> , 19 I&N Dec. 658 (BIA 1988).....	36
<i>Matter of H-</i> , 21 I&N Dec. 337 (BIA 1996).....	53
<i>Matter of Kasinga</i> , 21 I&N Dec. 357 (BIA 1996).....	20, 22, 32, 33, 43, 45
<i>Matter of Mogharrabi</i> , 19 I&N Dec. 439 (BIA 1987).....	56
<i>Matter of N-M-A-</i> , 22 I&N Dec. 312 (BIA 1998)	58
<i>Matter of O-Z- & I-Z-</i> , 22 I&N Dec. 23 (BIA 1998).....	22, 50
<i>Matter of S-A-</i> , 22 I&N Dec. 1328 (BIA 2000)	21, 22, 44, 49
<i>Matter of S-A-K- & H-A-H-</i> , 24 I&N Dec. (BIA 2008)	22
<i>Matter of S-E-G-</i> , 24 I&N Dec. 579 (BIA 2008).....	39, 41, 42
<i>Matter of S-P-</i> , 21 I&N Dec. 486 (BIA 1996)	48, 49
<i>Matter of S-V-</i> , 22 I&N Dec. 1306 (BIA 2000)	48, 66
<i>McMullen v. INS</i> , 658 F.2d 1312 (9th Cir. 1981).....	51
<i>Mendez-Barrera v. Holder</i> , 602 F.3d 21 (1st Cir. 2010)	41
<i>Menendez-Donis v. Ashcroft</i> , 360 F.3d 915 (8th Cir. 2004).....	58, 59

<i>Mikhael v. INS</i> , 115 F.3d 299 (5th Cir. 1997).....	21
<i>Mohammed v. Gonzales</i> , 400 F. 3d 785 (9th Cir. 2005)	22, 32, 33
<i>Mouawad v. Gonzales</i> , 485 F.3d 405 (8th Cir. 2007).....	65
<i>Ngengwe v. Mukasey</i> , 543 F.3d 1029 (8th Cir. 2008).....	22, 36
<i>Niang v. Gonzales</i> , 422 F.3d 1187 (10th Cir. 2005)	22, 32, 42
<i>Nwaokolo v. INS</i> , 314 F.3d 303 (7th Cir. 2002)	63
<i>Ochoa v. Gonzales</i> , 406 F.3d 1166 (9th Cir. 2005).....	66
<i>Ontunez-Tursios v. Ashcroft</i> , 303 F.3d 341 (5th Cir. 2002).....	65
<i>Perafan Saldarriaga v. Gonzalez</i> , 402 F.3d 461 (4th Cir. 2005).....	44
<i>Perdomo v. Holder</i> , 611 F.3d 662 (9th Cir. 2010)	31, 42
<i>Pitcherskaia v. INS</i> , 118 F.3d 641 (9th Cir. 1997)	45
<i>Poradisova v. Gonzales</i> , 420 F.3d 70 (2d Cir. 2005)	22
<i>Ravindran v. INS</i> , 976 F.2d 754 (1st Cir. 1992).....	35
<i>Rizal v. Gonzales</i> , 442 F.3d 84 (2d Cir. 2006).....	57
<i>Safaie v. INS</i> , 25 F.3d 636 (8th Cir. 1994).....	34, 43
<i>Sagaydak v. Gonzales</i> , 405 F.3d 1035 (9th Cir. 2005).....	43
<i>Sanchez-Trujillo v. INS</i> , 801 F.2d 1571 (9th Cir. 1986).....	35
<i>Sangha v. INS</i> , 103 F.3d 1482 (9th Cir. 1997).....	43
<i>Sankoh v. Mukasey</i> , 539 F.3d 456 (7th Cir. 2008)	20
<i>Shoaira v. Ashcroft</i> , 377 F.3d 837 (8th Cir. 2004).....	21
<i>Tchemkou v. Gonzales</i> , 495 F.3d 785 (7th Cir. 2007).....	63
<i>Tesfamichael v. Gonzales</i> , 469 F.3d 109 (5th Cir. 2006)	21
<i>Toure v. Ashcroft</i> , 400 F.3d 44 (1st Cir. 2005).....	22
<i>Tunis v. Gonzales</i> , 447 F.3d 547 (7th Cir. 2006).....	65
<i>Ucelo-Gomez v. Mukasey</i> , 509 F.3d 70 (2d Cir. 2007)	42
<i>Valioukevitch v. INS</i> , 251 F.3d 747 (8th Cir. 2001).....	57
<i>Vellani v. Att’y Gen.</i> , 296 Fed.Appx. 870 (11th Cir. 2008)	22
<i>Vumi v. Gonzales</i> , 502 F.3d 150 (2d Cir. 2007)	35
<i>Yadegar-Sargis v. INS</i> , 297 F.3d 596 (7th Cir. 2002)	34
<i>Zhang (Xue Yun) v. Gonzalez</i> , 408 F.3d 1239 (9th Cir. 2005)	21, 22
<i>Zhang (Yueqing) v. Gonzales</i> , 426 F.3d 540 (2d Cir. 2005)	43
<i>Zheng v. Ashcroft</i> , 332 F.3d 1186 (9th Cir. 2003)	66
<i>Zubeda v. Ashcroft</i> , 333 F.3d 463 (3d Cir. 2003).....	20, 59, 62, 63

STATUTES

22. U.S.C.A. §7102(8).....	5
8 U.S.C. § 1101(a)(15)(T)	5, 6
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8 U.S.C. § 1231(b)(3)(A).....	60
Immigration & Nationality Act § 241(b)(3)(A)	3, 60, 66

REGULATIONS

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8 C.F.R. § 1208.13(b)(1).....	52, 58, 59
8 C.F.R. § 1208.13(b)(2).....	52, 55
8 C.F.R. § 1208.13(b)(3).....	53
8 C.F.R. § 1208.16(b).....	60, 61
8 C.F.R. § 1208.16(c)(2).....	62, 66
8 C.F.R. § 1208.16(c)(3).....	66
8 C.F.R. § 1208.17.....	62
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8 C.F.R. § 1208.18(a)(7).....	64
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<i>Minister for Immigration and Multicultural Affairs v. Ndege</i> , [1999] FCA 783 (Fed. Court of Australia, 11 Jun. 1999).....	33
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N03/45573 [2003] RRTA 160 (Refugee Review Tribunal of Australia, 24 Feb. 2003).....	37
N03/47757 [2004] RRTA 355 (Refugee Review Tribunal of Australia, 11 May 2005).....	25, 37
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N95/06944 [1996] RRTA 3480 (Refugee Review Tribunal of Australia, 4 Dec. 1996).....	33, 35
N95/09580 [1996] RRTA 461 (Refugee Review Tribunal of Australia, 7 Mar. 1996)	35
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Canada

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<i>Casetellanos v. Canada (Solicitor General)</i> , [1995] 2 F.C. 190 (Fed. Court of Canada, 15 Dec. 1994).....	35
<i>Chen v. Canada (Minister of Citizenship and Immigration)</i> , 2003 FC 1059 (Fed. Court of Canada, 12 Sep. 2003).....	38
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Dzhygun (Ukraine), [2000] UKIAT 00TH00728 (UK Immigration Appeal Tribunal, 17 May 2000).....	27, 38
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Index

- Acquiescence. *See* Convention Against Torture Protection
- Affidavits. *See* Evidence
- Arranged Marriage, 17
 - difference from forced marriage, 17–18
- Burden Shifting
 - with asylum, 52
 - with withholding of removal, 61
- Changed Circumstances
 - asylum and. *See* Well-Founded Fear
 - withholding of removal and. *See* Withholding of Removal
- Convention Against Torture Protection, 66
 - acquiescence of a public official, 66
 - deferral of removal, 62
 - definition of torture, 62
 - eligibility for, 62
 - purpose of the torture, 64
 - qualifying types of harm, 63
 - standard of evidence. *See* Standard of Evidence
 - treaty language, 62, 64
 - willful blindness, 65
- Country Conditions Evidence. *See* Evidence
 - citing to in brief. *See* Evidence
 - Trafficking in Persons Reports. *See* State Department Reports
- Declarations. *See* Evidence
- Deferral of Removal. *See* Convention Against Torture Protection
- European Court of Human Rights, 15, 24, 63
- Evidence, 10
 - citing to in brief, 10, 11, 12, 13, 40, 41, 47, 53, 55, 56, 57, 58, 59, 61, 64, 65, 66
 - client declaration, 10, 11, 47, 55, 56, 57, 58, 61
 - country conditions evidence, 11, 40, 41, 47, 48, 53, 56, 57, 59, 61, 64, 65, 66
 - expert witness, 10, 12, 13, 41, 47, 53, 54, 55, 57, 59, 61, 67
 - psychological evaluation, 12-13, 55, 58
- Expert Witness. *See* Evidence
- Foreign Case Law
 - examples, 24–27, 32, 33, 35, 36–38, 49, 63
 - use of, 14, 15, 19
- Humanitarian Asylum, 13, 58–59
 - definition of, 58
 - grounds for, 58
 - other serious harm, 59
 - severe past persecution, 58–59

International Law

- examples, 22–24, 32, 33, 34, 35, 36, 40, 59, 63
- foreign case law. *See* Foreign Case Law
- international case law, 15, 24, 59, 63
- treaties and international agreements, 23–24
- UNHCR materials. *See* Office of the United Nations High Commissioner for Refugees
- use of, 14, 15, 19

Matter of A-T-, 18, 19, 47

More Likely Than Not. *See* Standard of Evidence

Nexus, 45–51

- alternate social groups, 28, 45–46
- and withholding of removal, 60
- circumstantial evidence, 47–48
- criminal activity, 50
- definition of, 45
- economic motives, 49
- establishing, 46–49
- evidence of, 11, 12, 31, 47
- mixed motives cases, 49–51
- not required for Convention Against Torture claim, 62, 64
- to multiple protected grounds, 45–46

Office of the United Nations High Commissioner for Refugees, 14, 23, 32, 33, 34, 35, 36, 39, 42, 45, 63

amicus briefs, 40

Guidelines on International Protection - Gender Guidelines, 7, 8, 19, 23, 32, 35, 42, 63

Guidelines on International Protection - Religion-Based Claims, 43

Guidelines on International Protection - Social Group Guidelines, 31, 32, 39, 42

Guidelines on International Protection - Trafficking Guidelines, 7, 19, 23, 31, 32, 33, 36, 42, 45, 49, 50, 51, 63, 64

Handbooks, 23, 58

Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, 23

Special Rapporteur on Violence Against Women, Its Causes and Consequences, 23

On Account of. *See* Nexus

Organization of American States, 24

Persecution, 9, 16–27

establishing, 16–27

forced marriage issues, 17–19

forms of, 16, 20–27

Political Opinion, 9, 43–44

definition of, 43

establishing, 44

Imputed, 43

overlap with social group, 29, 43

Psychological Evaluation. *See* Evidence

Refugee Definition, 9

Religious Belief, 9, 43–44

- definition of, 43
- establishing, 44
- persecution by members of own religious group, 44

Relocation

- asylum and. *See* Well-Founded Fear
- withholding of removal and. *See* Withholding of Removal

Social Group, 9, 28–42

- alternate social groups. *See* Nexus
- circularity, 31
- common problems, 30
- developments in the law, 40
- literal visibility, 39
- particularity, 31, 39, 41–42
- size, 30, 42
- social visibility, 31, 39–41
- suggested characteristics, 29–30, 32–38

Special Rapporteurs. *See* Office of the United Nations High Commissioner for Refugees

Standard of Evidence

- for asylum, 52, 55–56
- for Convention Against Torture protection, 66
- for withholding of removal, 60

State Action

- and asylum, 57
- and Convention Against Torture. *See* Convention Against Torture

State Department Reports

- Country Reports on Human Rights Practices, 11
- Trafficking in Persons Report, 3, 11
- using as evidence. *See* Evidence

Statement of Facts, 13

T visa, 3, 5, 6

- challenges to obtaining, 6
- definition of trafficking. *See* Trafficking Victims Protection Reauthorization Act
- eligibility for, 5
- law enforcement assistance, 6
- Law Enforcement Certification, 6

Torture. *See* Convention Against Torture Protection

Trafficking in Persons Reports. *See* State Department Reports

Trafficking Victims Protection Act. *See* Trafficking Victims Protection Reauthorization Act

Trafficking Victims Protection Reauthorization Act, 5, 6

- definition of trafficking, 7
- severe forms of trafficking, 5, 7

TVPA. *See* Trafficking Victims Protection Reauthorization Act

TVPPRA. *See* Trafficking Victims Protection Reauthorization Act

Unable and Unwilling to Control. *See* State Action

United Nations Office on Drugs and Crime, 51

UNHCR. *See* Office of the United Nations High Commissioner for Refugees

Well-Founded Fear, 9, 52–57

- Board of Immigration Appeals test, 55–56
- changed circumstances, 52–53
- definition of, 52
- establishing, 55–57
- government protection, 57
- objective evidence of, 55–56
- other serious harm, 53, 54
- pattern or practice of persecution, 55, 57
- presumption of, 52–55
- reasonable possibility of persecution, 52, 55–56
- relocation, 53–55
- singled out, 55, 56
- subjective evidence of, 55

Withholding of Removal

- standard of evidence. *See* Standard of Evidence
- under INA 241(b), 60–61
- under the Convention Against Torture. *See* Convention Against Torture Protection



2029 P Street, NW Suite 202, Washington, DC 20036 Tel: (202) 296-5702 Fax: (202) 296-5704

Website: <http://humanrightsusa.org> Email: info@humanrightsusa.org

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