

ASYLUM FROM TRAFFICKING: A FAILURE OF PROTECTION

by

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The issue of women fleeing gender-based persecution in their home countries has been a significant one in refugee law, particularly over the past decade in the United States. A leading case involves Rodi Alvarado, a Guatemalan woman fleeing severe domestic violence.¹ Perhaps because of the focus on Ms. Alvarado's case, much of the attention has been centered on the question of granting asylum to women fleeing domestic violence. Yet it has always been clear that a broad range of gender-based harms are caught up in the same legal and policy debate, and that many women with very compelling cases for asylum are being denied and returned to face their persecutors.²

Of particular note are a troubling series of decisions denying asylum in cases involving women

fleeing trafficking. The Center for Gender & Refugee Studies (CGRS) is a national resource center on the issue which has advised attorneys in, and/or tracked, almost 100 cases in which trafficking was at least a significant part of an applicant's claim to asylum, in cases ranging from the Asylum Office to the federal circuit courts. The harms include being targeted for prostitution, threatened with kidnap, being successfully kidnapped, suffering rapes and beatings, sale into brothels, and forcible prostitution.³ While some of these women have been granted asylum, the available record of written decisions by the immigration agency is heavily weighted toward denials, and a review of those decisions demonstrates a fundamental resistance to acknowledging that even the most severe levels of harm linked to trafficking might provide the basis for a claim to asylum.

After briefly reviewing the legal and political background surrounding the issue of trafficking, this *Briefing* will give an overview and discussion of a number of mostly unpublished decisions. Taken as a whole, these decisions raise troubling questions about the availability of U.S. protection to women fleeing the serious harm of trafficking in persons.

PROTECTION OF VICTIMS OF TRAFFICKING: TRAFFICKING, INTERNATIONAL LAW & ASYLUM

- ◆ **International Concern and Action to Protect Victims of Trafficking**

The U.S. Department of Justice, the agency with authority over the nation's immigration judges and

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This Issue in Brief

PROTECTION OF VICTIMS OF TRAFFICKING: TRAFFICKING, INTERNATIONAL LAW & ASYLUM

- ◆ International Concern and Action to Protect Victims of Trafficking
- ◆ Asylum Law and Trafficking Victims
- ◆ Claims Based on Future Fear Distinguished from Past Persecution

THE TREATMENT OF TRAFFICKING VICTIMS: A STATISTICAL SNAPSHOT

DISCUSSION OF WRITTEN AGENCY DECISIONS IN TRAFFICKING CASES

- ◆ Negative Decisions
- ◆ Positive Decisions

CONCLUSION



Board of Immigration Appeals (BIA), states the case very clearly: "Trafficking in persons—also known as 'human trafficking'—is a form of modern-day slavery. Traffickers often prey on individuals who are poor, frequently unemployed or underemployed, and who may lack access to social safety nets, predominantly women and children in certain countries. Victims are often lured with false promises of good jobs and better lives, and then forced to work under brutal and inhuman conditions."⁴

As UNHCR has noted:

[i]nherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution.⁵

The international community has expressed serious concern over the issue, as reflected in the considerable work and high-level attention paid to the matter by the United Nations. Former U.N. Secretary General Kofi Annan declared that the "trafficking of persons, particularly women and children, for forced and exploitative labor, including sexual exploitation, is one of the most egregious violations of human rights which the United Nations now confronts."⁶ In 2001, the international community acted on this high-level concern, approving the United Nations Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children. Trafficking is defined under the U.N. Protocol as follows:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of pay-

ments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁷

Trafficking in persons has repeatedly been singled out for specific and harsh condemnation by top members of the Bush Administration. In January 2006, President George W. Bush declared his determination "to fight and end this modern form of slavery[,]"⁸ and, standing before the world at the United Nations in 2004, the President had this to say:

Because we believe in human dignity, America and many nations have joined together to confront the evil of trafficking in human beings. We're supporting organizations that rescue the victims, passing stronger anti-trafficking laws, and warning travelers that they will be held to account for supporting this modern form of slavery. Women and children should never be exploited for pleasure or greed, anywhere on Earth.⁹

Ambassador John R. Miller, Director of the State Department's Office to Monitor and Combat Trafficking in Persons, testified before the Senate in 2004 that

[t]he United States, under the leadership of Congress and President Bush, is taking strong action, in cooperation with other nations, to end human trafficking. We have 11 U.S. government agencies executing strategic anti-trafficking in persons plans through the President's Interagency Task Force on Trafficking in Persons. The U.S. devoted more than \$70 million in the last fiscal year to anti-trafficking programs abroad to prevent trafficking, protect victims, and prosecute traf-

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fickers. We issue the most comprehensive report on trafficking in persons in an effort to stimulate greater government action around the world, and we are aggressively stepping up prosecution and public education efforts here at home.¹⁰

Attorney General Alberto Gonzales, speaking to an anti-trafficking conference in October 2006 proclaimed that, “[We] share a passion for protecting victims and eradicating the practice of enslaving human beings. ... [A]mong those engaged in this cause, there can be only two teams, two sides—us, and the traffickers.”¹¹ Secretary of State Condoleezza Rice has pledged the State Department to “work with international partners to secure the freedom of those who are exploited and call on governments to be effective and accountable in prosecuting those who exploit.”¹² Then-Secretary of State Colin Powell, releasing the 2004 Trafficking in Persons Report, noted the “growing concern of the President, Members of Congress, and the public over the serious human rights, health, and security implications of human trafficking around the world.”¹³

◆ Asylum Law and Trafficking Victims

The Trafficking Protocol flatly states that, “Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including... in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.”¹⁴ *Non-refoulement* enshrines a core principal of refugee and human rights law: no party shall return a person to a country where they will be persecuted.

Former Secretary of State Colin Powell once stated that “America will continue to be a champion of refugee women. We will promote programs to protect them from sexual and gender-based violence.”¹⁵ Under U.S. law, which tracks and is intended to be consistent with international refugee law,¹⁶ a refugee is a person outside of the country of his or her nationality,

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...a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁷

Refugee status may be established by showing past persecution or a well-founded fear of future persecution.¹⁸ An applicant seeking to qualify for asylum based on past persecution must show: “(1) an incident, or incidents, that rise to the level of persecution; (2) that is ‘on account of’ one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either ‘unable or unwilling’ to control.”¹⁹

Central to the dispute over the applicability of refugee law to trafficking victims is the question of the link, or “nexus.” The statutory phrase “on account of” requires an asylum applicant to demonstrate a nexus between the persecution and one of the protected grounds.²⁰ In trafficking cases that link generally revolves around either political opinion or social group. While the protected ground need not be the sole reason for the persecution, it must be “at least one central reason for persecuting the applicant.”²¹ Nexus can be established by direct or circumstantial evidence of the persecutor’s motives, including the socio-cultural, political, and/or legal context in which the harm takes place.²² “Evidence about patterns of violence in the society against individuals similarly situated to the applicant may be relevant to the ‘nexus to a protected ground’ determination.”²³

With respect to the definition of particular social group, the seminal decision is *Matter of Acosta*, in which the BIA held that groups are defined by a “common, immutable characteristic” that the members “either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.”²⁴ *Acosta* and other courts have repeatedly made clear that sex or gender can be the principal defining characteristic of a social group, alone or in combination with other factors.²⁵

As for political opinion, that term has a broad meaning and is not restricted simply to traditional concepts of political parties or partisan politics.²⁶ Virtually all of the Albanian trafficking cases discussed below present a recurring theme of politically-charged targeting, with supporters of the Democratic Party frequently asserting that it was on that basis that they became prey of the traffickers.

The international community has taken concrete steps to ensure that the concern with trafficking of women is reflected in the refugee arena.²⁷ As noted above, the application of refugee protection to victims of trafficking is adverted to in the text of the Trafficking Convention.²⁸ Furthermore, UNHCR has over the past five years provided specific

guidance on refugee issues relevant to trafficking. Following up on its clear and helpful guidelines on both gender-related persecution²⁹ as well as on membership of a particular social group,³⁰ UNHCR released guidelines pertaining “to victims of trafficking and persons at risk of being trafficked” in April 2006.³¹

UNHCR describes its involvement with the issue of trafficking in persons as to ensure that refugees do not become victims of trafficking, and

to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked, whose claim to international protection falls within the refugee definition...are recognized as refugees and afforded the corresponding international protection.³²

UNHCR lays out a range of factual circumstances in which a victim or potential victim of trafficking may make a claim to asylum:

The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the State where she or he now is. The victim may have been trafficked within national territory, may have escaped from her or his traffickers and have fled abroad in search of international protection. The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection.³³

CGRS has seen examples of specific claims to protection from individuals in each of these circumstances as discussed below. UNHCR advises that claims should be “examined in detail to establish whether the harm feared as a result of the trafficking experience, or as a result of its anticipation, amounts to persecution in the individual case.”³⁴

Regarding social group, UNHCR discusses the view that vulnerable groups and/or certain subsets of vulnerable groups in society may make up a social group for purposes of refugee law.³⁵ With respect to women, UNHCR points out that:

factors which may distinguish women as targets for traffickers are generally connected to their vulnerability in certain social settings; therefore 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.

◆ **Claims Based on Future Fear Distinguished from Past Persecution**

A key difficulty which advocates and adjudicators have struggled with is determining the characteristics of a particular social group which are sufficiently narrow to describe the basis on which the applicant was targeted in the first place.

The Trafficking Guidelines note that women who escape from traffickers face the possibility of future reprisals for having escaped, as well as possible re-trafficking.³⁶ This is an important point all too frequently ignored or overlooked by adjudicators, and some advocates. “In some countries a woman may experience severe discrimination and social ostracization because she was raped,” DHS has noted. “The ostracism is further harm after the rape, and may itself be sufficiently serious to constitute persecution.”³⁷ UNHCR agrees, stating that victims:

...may also fear ostracism, discrimination or punishment by the family and/or the local community or, in some instances, by the authorities upon return...³⁸

In the individual case, severe ostracism, discrimination or punishment may rise to the level of persecution, in particular if aggravated by the trauma suffered during, and as a result of, the trafficking process. Where the individual fears such treatment, her or his fear of persecution is distinct from, but no less valid than, the fear of persecution resulting from the continued exposure to the violence involved in trafficking scenarios.... [R]ejection by, and isolation from, social support networks may in fact heighten the risk of being re-trafficked or of being exposed to retaliation, which could then give rise to a well-founded fear of persecution.³⁹

In such a circumstance, UNCHR recommends that “[f]ormer victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked.” Such a group is not defined by the harm because “it is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared in the form of ostracism, punishment, reprisals or re-trafficking.”⁴⁰

Furthermore, as for whether some cases may be seen as involving “a one-off past experience,” UNHCR advises that:

it may still be appropriate to recognize the individual concerned as a refugee if there are compelling reasons arising out of previous persecution....This would include situations where the persecution suffered during the trafficking experience, even if past, was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable.⁴¹

The future stigmatization and ostracism faced by victims of past trafficking—particularly, e.g., in conservative societies such as Albania—may well constitute persecution under established U.S. law. Social ostracism has been found to constitute persecution.⁴² Women who have been raped or otherwise sexually abused “may be seriously stigmatized and ostracized in their societies. They may also be subject to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonor on themselves, their families, and their communities.”⁴³ The law also provides for asylum being granted to individuals who demonstrate that they face “other serious harm” and have shown “compelling reasons for being unwilling or unable to return.”⁴⁴

THE TREATMENT OF TRAFFICKING VICTIMS: A STATISTICAL SNAPSHOT

CGRS has information on 93 trafficking cases. Each represents a case in which trafficking, forcible prostitution, and/or the threat of trafficking or forcible prostitution was a significant or central aspect of a woman or girl’s claim to asylum in the U.S. This data is derived not from official governmental statistics but instead from documentation provided to CGRS by attorneys and/or from what attorneys tell CGRS about their cases. It appears to represent by far the largest and best available body of data on how victims of trafficking are being treated within the U.S. refugee system.

In 52 cases involving trafficking issues there is information about a decision. There have been seven grants and four denials at the Asylum Office; 13 grants and 26 denials in immigration court;⁴⁵ and the BIA has issued three grants and nine denials.⁴⁶ (In the federal circuits, there have been no positive decisions and three denials.⁴⁷)

There is a clear declining pattern in these statistics, from 64% granted at the lowest, affirmative level; to a lower 35% at the immigration court level; down to a grant rate of 25% at the BIA. Without positive developments at the precedent-making levels—the BIA and circuit courts—the strong negative trend may eventually foreclose many of the current positive decisions at the Asylum Office and in immigration court.

Fully 33 of the 93 cases (35%) are from Albania,⁴⁸ a country with a well-documented and troubled reputation as a source of many victims of trafficking.⁴⁹ Focusing just on the 22 Albanian cases for which we have decision information, the negative trend is accentuated. At the Asylum Office, there were three grants and two denials; in immigration court, four grants and 13 denials.⁵⁰ There were no grants and five denials at the BIA.⁵¹ In the federal circuits, there are no positive decisions, and two denials.⁵² Again, the strong negative trend is clear.

The grant rate thus cannot be seen to represent simply a winnowing out of strong cases from the weak, the credible from the incredible. As detailed below, in many of these case adjudicators are denying asylum to victims of trafficking in persons based on pure legal rulings that foreclose even the possibility of a positive decision for the strongest and most credible applicants.

DISCUSSION OF WRITTEN AGENCY DECISIONS IN TRAFFICKING CASES

◆ Negative Decisions

In many of the 93 cases discussed above, there either is as yet no agency decision (e.g. the case is pending) or there is no written decision to review. CGRS has copies of about a dozen unpublished negative agency decisions in trafficking cases.⁵³ In a number of these cases, CGRS has advised the attorneys and on several occasions become closely involved and reviewed some if not all of the documents submitted in the cases. In two cases⁵⁴ CGRS has submitted amicus briefs on behalf of the trafficking victims; in others, CGRS has been involved with the case in other ways, such as in implementing non-legal strategies to help win protection for the applicant.⁵⁵

With the exception of those cases, however, the discussion below is based solely on the written decisions of the immigration agency, unless otherwise noted. Such a review is inherently limited. Without the benefit of having interviewed the

applicant or reviewed the record, one cannot, of course, independently determine the applicant's credibility or what evidence may have gone unmentioned. The discussion and analysis below is presented in the hope that it has overall value in shedding light on the handling of trafficking cases by the agency, rather than to assert that any individualized decision is mistaken.

The opinions, many of them involving women from Albania, are quite similar in their analysis. The principal reason for denying asylum is not credibility; virtually all of these women's stories of feared or actual abduction, rape and trafficking are found credible by the adjudicators, and the others are analyzed on the merits as well, as if the applicant were considered credible.

The overwhelming basis for the rejection of these claims is that these women are not members of any particular social group that can be defined under the law, and/or that there is no "nexus"—that they are not being persecuted *on account of* any social group membership or political opinion. Instead, what these women face at the hands of traffickers is dismissed as a personal, criminal problem, and not something which could make them eligible for asylum under U.S. law.

Other decisions are based on narrower legal or factual grounds, such as that a particular applicant could safely relocate within her country of origin, that there is no reasonable possibility of any further persecution sufficient to support a finding of a well founded fear of future harm, or that state protection was available.

Nexus, Always Nexus: The Missing Link. Immigration judges (IJs) and the BIA most frequently treat the claims of women refugees fleeing trafficking as victims of personal, criminal problems, and thus as ineligible for asylum for failure to demonstrate any link to any of the five statutory grounds. One of the strongest examples involves "Ann,"⁵⁶ a young Albanian woman who, at age 15, became the target of a local trafficker named "Artan."⁵⁷ A member of a Democratic Party family, Ann was repeatedly approached by Artan on the street as she walked to school. Artan asked Ann if she would marry him. After being rebuffed by her family, he approached her and her mother on the street and shouted at her mother: "Listen, you Democratic bitch, you and your husband have offended me and you will pay."

Shortly thereafter, Artan kidnapped Ann off the street and held her in captivity for over a

month. Ann was repeatedly beaten and raped, and threatened with trafficking and death. She overheard Artan making plans to traffic her over the telephone. Ann managed to escape from captivity, and her parents sent her to a high school in the U.S. as part of a student exchange program. She was 16 years old when she arrived in the U.S. Due to shame, her father was not told about the rapes, which led to an abortion after she became pregnant. Thirteen months after arriving in the U.S., at the age of 17, she filed for asylum.

Ann argued that she had become a target for trafficking because of her political opinion—her link to an opposition Democratic Party family—as well as because of her membership in a gender-defined social group. Her case was referred by the Asylum Office on the one-year deadline, an apparent violation of DHS policy given that Ann was a minor.⁵⁸ In immigration court, Ann was found a credible witness, but the IJ ruled that there was no connection between Ann's kidnap, rape, and threatened trafficking and any of the asylum grounds. The IJ referred to Artan as a "spurned suitor."⁵⁹ Since Artan's actions "were personal and criminal toward the respondent, the Court finds that the respondent did not demonstrate that it was persecution."⁶⁰

The judge's ruling that her trafficker was merely a "spurned suitor" motivated by a "personal and criminal" intent is difficult to reconcile with well-established facts known to the U.S. and international anti-trafficking community. In the words of the U.S. government's leading official on trafficking issues, "[t]raffickers are documented to have used offers of marriage to recruit women for the sex trade and for forced labor."⁶¹ The Department of Justice's "Introduction to Human Trafficking" repeatedly makes reference to the use of "sham" and "false" marriages.⁶² The IJ stated there was an absence of sufficient objective evidence "that [Artan] was a trafficker, or criminal, or had engaged in this type of activity in the past."⁶³ The IJ's ruling ignored the overwhelming evidence—which was in the record in this case—that such treatment is completely consistent with the manner in which young women are forced into trafficking.

The IJ further concluded that Ann's fear of future persecution upon return to Albania was not objectively reasonable, citing "the fact that the parents and the respondent sisters are still in Albania, and have been able to reside there without any difficulties."⁶⁴ Ann's effort to point out that she was not similarly situated to her parents and sisters was met with the response that this only

“supports the Court’s conclusion that the actions of [Artan] is one of a personal nature relating to the rejection that he’d received from respondent and her family.”⁶⁵

Apart from denying Ann’s asylum claim on the merits, the IJ also found her barred from asylum based on the one-year filing deadline. Ann was an unaccompanied minor (16 years old) on her arrival in the U.S., suffering from post-traumatic stress disorder (PTSD), and yet she filed for asylum when she was still a minor. The IJ ruled that Ann could have “easily...rectified” her feelings of shame and humiliation as a unaccompanied minor sex assault victim “by going to an attorney....”⁶⁶

The BIA affirmed the IJ’s denial in a few sentence decision:

we note that neither her age or [sic] her psychiatric diagnoses were shown to be such as to inhibit the timely filing of her application. We further...agree that the respondent has failed to carry her burden of proof with respect to establishing that it would be more likely than not that she would be persecuted on account of a protected ground to include [sic] her political affiliation or membership in particular social group or torture upon return to Albania.”⁶⁷

A very different case involves a Thai woman smuggled into the U.S. and forced into prostitution in a number of U.S. cities over a number of months. When she was briefly entrusted to return a few hundred dollars to her captors, she fled, bought a plane ticket instead, and escaped. She continues to owe her traffickers substantial funds, and she fears them all the more after having taken their money in order to escape.⁶⁸ Her mother has since been repeatedly threatened in Thailand about her daughter’s outstanding debt.

An IJ granted her withholding of removal⁶⁹ based on a social group of “sex slaves from foreign countries who are brought to the U.S. under false pretenses and forced at the threat of death and destruction to participate in sexual activities.”⁷⁰ The immigration service appealed this grant of protection, and the BIA reversed. In an unpublished decision, the Board said that “while the respondent’s circumstances are unfortunate, she has failed to establish a nexus in this case.... Instead, the respondent’s fear is based on the outstanding debt she continues to have stemming from the illegal smuggling into United States, and as a result of international criminal conduct.”⁷¹ Elaborating on

this theme, the BIA further denied on the basis that the applicant had failed to establish that it was more likely than not that the people she fears would find and harm her, asserting that the people who were in contact with her family after her escape “seemed more interested in having the debt repaid than in finding the respondent herself.”⁷²

Another case example also involves a young Albanian woman.⁷³ In 1999, “Ariana” and her cousin were kidnapped by two masked men as they were walking down the street. The men dragged them into a van and raped them both at gunpoint. They were bound and gagged and driven to a vacant building where they were held with five other women. For a week, Ariana and her cousin were repeatedly raped, hit, and deprived of adequate food and water. They were then tied and blindfolded and put on a boat to be taken to Italy for prostitution. The boat was apprehended by Albanian authorities and the women freed. Ariana filed a police report, but she was never contacted by the police; she and her parents then began to receive regular telephoned threats by men who used her name. After her cousin was again kidnapped, and masked men forced their way into her home, Ariana went into hiding before escaping to the U.S. in 2001.

The IJ found Ariana’s story to be credible. But he denied her asylum in part on the reasoning that the kidnapers “did not target [her] for any purpose other than for their own criminal enrichment.”⁷⁴ The IJ stated that she had been “randomly targeted” by men she had never seen before “for no other reason than her location at that particular moment, her gender, and her age, not because the kidnapers bore any personal animus against her on account of one of the Act’s enumerated grounds.”⁷⁵

This holding appears to conflict with the factual record described by the IJ, which included the ongoing targeting of both Ariana and her cousin, and the eventual successful kidnap of her cousin. And the IJ erred in requiring proof of “personal animus.”⁷⁶ The relevant inquiry for asylum purposes is not whether the persecutor was personally angry toward Ariana, but whether she was or would be targeted for persecution on account of her membership in an identifiable social group.

A different case involved a young Albanian woman who was repeatedly approached by young men in criminal gangs and told she could make money “the easy way,” and who with her mother was heckled, chased, and surrounded by four cars

filled with men from the same group; they managed to run away and escape.⁷⁷ The applicant's mother testified regarding another young woman she knew who had been kidnapped into prostitution in Italy. The IJ noted that the record evidence "strongly demonstrates that Albania currently has an overwhelming problem with the trafficking of women," referencing reports by the U.S. State Department and the International Helsinki Federation for Human Rights which mentioned the kidnapping of women and reported that 30,000 Albanian women were employed in prostitution abroad.⁷⁸ Nevertheless, the IJ dismissed the applicant's claim of past persecution on the basis that general criminal violence was at high levels in Albania: "More than likely, these organized criminal gangs harass many people similarly."⁷⁹

The repeated references by adjudicators denying trafficking claims to the fact that the conduct is criminal in nature are puzzling. Many acts of persecution also amount to criminal conduct; that reason alone hardly renders them unable to support a claim to asylum. Physical violence, rape and sexual assault, torture, destruction of personal property, death threats, and other crimes have all been found to support grants of asylum.⁸⁰ Proving nexus requires direct or circumstantial evidence that the persecutor inflicts harm on account of one or more statutory grounds.⁸¹ The requirement that "at least one central reason" for the harm need be linked to one of the five grounds⁸² does not mean that the existence of other potential reasons—such as monetary gain—is a barrier to a grant of protection.

UNHCR's Trafficking Guidelines do not disagree that trafficking victims "are likely to be targeted above all because of their perceived or potential commercial value to the traffickers."⁸³ They note that this "overriding economic motive does not, however, exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking."⁸⁴ UNHCR's guidance on nexus in trafficking cases is worth quoting at some length:

Scenarios 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 1951 Convention refugee definition. For instance, States where there has been significant social upheaval and/or economic transition or which have been involved in armed conflict resulting in a breakdown in law and order are prone to increased poverty, deprivation and dislocation of the

civilian population. 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.⁸⁵

This straightforward explanation is consistent with long-standing U.S. law which looks to circumstantial evidence to show nexus,⁸⁶ and it also echoes the approach to nexus found in the proposed asylum regulations from 2000 and in DHS's brief in the Rodi Alvarado case. This includes 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, that cannot be deduced simply by evidence of random acts within that society."⁸⁷ Counsel who make a strong record pertaining to the realities of trafficking in the country of origin are providing a solid basis on which to rest an appropriate finding that a victim of trafficking may face persecution linked to the relevant social group characteristics.⁸⁸ It is apparent in a number of these negative decisions, even judging solely from the IJ's record citations, that attorneys in these cases have frequently done exactly that.

UNHCR and a number of leading refugee-receiving countries have recognized and made explicit that at some point this reliance on circumstantial evidence amounts to finding a nexus based on the lack of state protection, without regard to the motivation of the persecutor:

[W]here a risk of persecution at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.⁸⁹

Given the centrality of state protection in the very nature of refugee status, a denial of that protection linked to state discrimination based on any of the five grounds for asylum is a viable basis on which to base a grant of refugee status.

Trafficking Victims: Never a Social Group. "Sophie" is a young ethnic Russian woman who was living in a former Soviet Republic when she was abducted by a local mafia leader, "Sergey."⁹⁰ He had seen her on television and wanted her to be his girlfriend. After she refused, she was raped by Sergey and then gang-raped by his friends and bodyguards. Sophie was then held in one of

his homes and forced to have sex with Sergey's guests. He told her that "you're now working for me, and you're my property...." Among the regular visitors who raped Sophie were the mayor and the chief of police. Sophie tried to escape, but she was caught and beaten. Later, Sergey traded her to another Russian mafia leader, who was planning to traffic her to the Mideast. She was able to escape with the help of one of the trafficker's associates. When she later called that person's cell phone from a third country to tell him she was safe, Sergey answered and told her that the associate had been murdered for helping her, that Sergey knew where she was, and that his people would find her. Sophie fled to the U.S.

An IJ found Sophie to be credible, and accepted as true all the facts in her case, including the statement by an expert that, if returned, "she would either be abducted again and again subject to torture and forced prostitution ..., or, more likely, be targeted for ritualized execution."⁹¹ The IJ nevertheless denied asylum, relying on the BIA's then-recent opinion in *Matter of R-A-*, finding it to be "directly on point...."⁹² The IJ found that Sophie's proposed social groups—including women from her country "forced into prostitution by the mafia who escape from sexual bondage"—failed "to pass muster with under the Board's analysis" in *Matter of R-A-*.⁹³ However, in a strong indication of how compelling the judge found Sophie's fear, the IJ granted her relief under the Convention Against Torture. The judge's willingness to grant CAT relief indicates how clearly the issue was solely one of social group and nexus, which need not be shown under CAT.⁹⁴

To give another example, "Maria" is a young woman from northern Albania whose father was active with the opposition Democratic Party.⁹⁵ In late 2000 her father was arrested and detained, beaten, and interrogated for participation in an anti-government demonstration. In early 2001, just a few months later, Maria was the victim of an attempted abduction by two men in a vehicle. She struggled and screamed for help. Before driving away in their van, the men fired shots in the air. The applicant argued that she narrowly escaped being sold into prostitution in Italy. Her family did not report the incident because they knew that the police would at best do nothing due to the family's Democratic Party activities. Maria left Albania later that year. Because of her father's Democratic Party involvement, she fears there is a substantial risk she would be trafficked if returned.

The IJ found Maria credible, but he denied her asylum for failure to demonstrate a social group or any nexus to that group. The judge ruled that Maria "could not say with any degree of certainty" the reason she was targeted:

the Court is left with no persuasive evidence that the kidnapping was motivated for any particular reason. It could have been for purposes of putting her into prostitution. It could have been for purposes of attacking her father for his political activities. It could have been for purposes of ransom. It could have been for purposes of sexual gratification by the individuals who were kidnapping her. It could have been for any one of a number of reasons.⁹⁶

The IJ rejected her claim to persecution on account of membership in the social group of "women in Albania." The judge noted that "kidnapping of women for the purposes of trafficking in prostitution is a fairly common event in Albania[,]"⁹⁷ but appeared to find the social group too broadly defined:

It is possible to either broaden or narrow that group to any degree that anyone would want to do so. She could be a group of 18 year-old women in Albania. She could be a member of a group of 18-year and younger women in Albania. She could be a group of every woman in Albania. She could be a group of teenage women in Albania. That particular group could be defined any way that somebody feels like defining it. It does not appear to the Court that this attack was on account of any membership in a particular social group within the meaning of that term as used in the Immigration and Nationality Act. Furthermore, it appears to the Court that...anyone could define a similar group in virtually any country in the world...⁹⁸

The IJ also found that state protection should have been available, and that the police if contacted would have provided that protection. The BIA summarily affirmed this decision.

On further appeal, however, a federal court reversed on the issue of state protection, and remanded for a decision in Maria's case on the particular social group question.⁹⁹ The court referenced the applicant's own testimony regarding why she did not and could not contact the police, and observed:

The IJ based this conclusion on his finding that [Maria] failed to prove that the police were unable or unwilling to protect her because she did not seek their assistance after the attempted kidnapping. Although the IJ noted that the Country Report indicates that the “police themselves are sometimes involved in such activities as trafficking women for prostitution,” the IJ reasoned that [Maria] could have approached the police to ask for their assistance because she had the support of her fellow villagers....However, the Country Report does not state that the police were “sometimes” involved in trafficking of persons but rather that they “were *often* directly or indirectly involved” (emphasis added).¹⁰⁰

On the subject of state protection, UNCHR’s guidelines suggest that adjudicators assess the adequacy of protection and assistance against the specific steps required of States under the Trafficking Protocol.¹⁰¹ “Where a State fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well-founded.”¹⁰²

Note that the U.S. State Department Trafficking in Persons Report for 2002, the year of the IJ’s decision in this case, ranked Albania as a “Tier 2” country and stated: “The Government of Albania does not yet fully comply with minimum standards for the elimination of trafficking; however, it is making significant efforts to do so.”¹⁰³ The latest such report, from 2007, makes the identical statement—with the exception of the deletion of the somewhat hopeful qualifying word, “yet.”¹⁰⁴ Whatever the content of these ongoing “significant efforts,” what is relevant for asylum purposes is the inability to protect its citizens. “Reasonable steps to control the infliction of harm or suffering...constitute measures that reduce the risk of claimed harm below the well-founded fear threshold.”¹⁰⁵

The federal court’s intervention is a welcome development for Maria, but future adjudicators could have benefited from the court’s analysis of the social group issue.¹⁰⁶

The lack of a social group has been the basis for the denial of asylum to a number of Albanian cases. In one, an IJ ruled that “the social group defined as ‘young Albanian women who will not voluntarily enter a life of prostitution’ is far too broad and not the type of ‘cohesive, homogenous group to which the term “particular social group”

was intended to apply.”¹⁰⁷ Another potential trafficking victim lost her effort to win asylum based on a particular social group of “young women in Albania who have no protection from criminal gangs who would kidnap them and force them into prostitution.”¹⁰⁸

One of the few federal court decisions in this area led to the rejection of a claim from another Albanian applicant.¹⁰⁹ Ms. Rreshjpa is a young Albanian woman who claimed to have escaped an attempted kidnap for prostitution. She argued that she was a member of a group defined as “women and young girls who are sold for prostitution by criminals in Albania.”¹¹⁰ An IJ found her not credible, and, in addition, ruled there was no social group. Reviewing the evidence, the IJ pointed to indications that trafficking happened to children and some males, to support a ruling that the gender-based group Ms. Rreshjpa put forward was too narrow:

The totality of evidence in this case establishes that kidnapping of persons for prostitution includes both males and females, that the majority appear to be under the age of 18, and this respondent is now 20 years of age.¹¹¹

(The IJ’s holding here is the opposite of the far more typical objection to social groups in gender cases, that they are too broad.) The IJ further held that she had failed to demonstrate that the persecutor was motivated to harm her because of her membership in that group. The BIA affirmed, without opinion.

A federal court affirmed the agency’s denial of asylum to Ms. Rreshjpa. Assuming that she was credible, the court ruled against her on the rationale that “young..., attractive Albanian women who are forced into prostitution” was not a cognizable social group, for two reasons. First, the court stated that “almost all of the pertinent decisions have rejected generalized, sweeping classifications for purposes of asylum.”¹¹² Second, the court noted that a social group cannot be circularly defined, by the fact that it suffers persecution.¹¹³ The court ruled against what it calls the “noncircular” alternative—“young, attractive Albanian women”—on the basis that “then virtually any young Albanian woman who possesses the subjective criterion of being ‘attractive’ would be eligible for asylum in the United States.”¹¹⁴

Leaving aside the characteristic of ‘attractive’ (which is problematic in terms of the *Acosta* standard of defining social groups with characteris-

tics which are either immutable or fundamental), young Albanian women who have been forced into prostitution might well be a valid social group when considering the applicant's *future* fear. But the court in *Rreshjpa* neatly avoided the social group issue in its discussion of her future fear, denying her claim instead on the basis that the "isolated and apparently random" assault was "simply not sufficient to establish persecution by the government of Albania."¹¹⁵ This statement would appear to be a legal error—because Ms. Rreshjpa does not fear persecution by the government of Albania, but from agents that the government was unable or unwilling to control. It also amounted to the final word on Ms. Rreshjpa's claim for protection in the U.S.

The social group rejected by the IJ ("women and young girls who are sold for prostitution by criminals in Albania") was, in fact, circular—and thus insufficient for the purposes of her claim of past persecution, because it failed to identify the characteristics which placed Ms. Rreshjpa at risk of kidnap and prostitution. Clearly attorneys have been struggling to identify a viable social group, narrower than gender plus nationality, to describe why their clients have been targeted for persecution. But the social groups being rejected again and again are not dissimilar from the well-reasoned position taken by the Department of Homeland Security in the Rodi Alvarado case, where it suggested a social group of "married Guatemalan women who are unable to escape the relationship"¹¹⁶ The social group approved by the IJ in the Thai case—"sex slaves from foreign countries who are brought to the U.S. under false pretenses and forced at the threat of death and destruction to participate in sexual activities"¹¹⁷—may be imperfect, but distilled to its essence it amounts essentially to "trafficked sex slaves." Existing case law supports non-consensual, unchangeable past experience as valid social group characteristics.¹¹⁸

The Floodgates, State Protection, Relocation, and Other Reasons for Denial. Often lurking, and sometimes explicit, in these decisions is an apparent concern over the large numbers of women potentially eligible for asylum, should the individual's claim be recognized. This is frequently an issue in gender-based claims, although it has no basis in law: "the size of the purported social group is not a relevant criterion....[T]he fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate."¹¹⁹ Nor is it consistent with well-established facts.¹²⁰

After noting that criminal violence in Albania is at high levels, however, one IJ ruled that "[t]o accept respondent's argument would mean that all young women in Albania who believe they have been similarly harassed would merit asylum, clearly that is not the intent of Congress."¹²¹ Similarly, in *Rreshjpa*, the federal court rejected the applicant's claim in part because "then virtually any young Albanian woman who possesses the subjective criterion of being 'attractive' would be eligible for asylum in the United States."¹²²

It is true that social groups should not be casually formulated in sweeping terms but instead clearly defined with reference to the specific immutable and/or fundamental characteristics which led to the applicants' being targeted for persecution. But the court's evident fear over broadly defined social groups leading to "virtually any young Albanian woman [then being] eligible for asylum in the United States" fails to take into account that a finding of social group membership is simply one of a number of substantial hurdles that an asylum applicant faces in making out a successful claim.¹²³

Several cases have involved issues of relocation. One was brought by an Albanian women's rights activist who feared ongoing efforts to force her into prostitution and trafficking.¹²⁴ She lived alone without male relatives; a man in her village had offered her marriage in an attempt to force her into prostitution. The IJ found her credible, and that her fear of trafficking on account of the social group of single women living alone in north-east Albania without the support of male relatives may be well-founded, being "somewhat supported by" the 2000 State Department report noting "that violence against women and spousal abuse are serious problems in the country's traditionally male dominated society...[and that] trafficking in women and girls for the purpose of prostitution is a serious problem."¹²⁵ But the IJ held that since Albania is "in flux and is being modernized," she could now easily avoid being trafficked by relocating to another region in Albania. The IJ concluded that she may have a well-founded fear in her region but that as a young single woman in Albania she could relocate and "could certainly have escaped from this problem."¹²⁶ The IJ's decision was summarily affirmed by the BIA.

It is hard to evaluate the ruling without more access to the record. It is unclear from the decision itself whether evidence supported the IJ's conclusion that forcing an Albanian woman to relocate away from her family in "traditionally

male dominated society...[where] trafficking in women and girls for the purpose of prostitution is a serious problem[.]”¹²⁷ was consistent with the requirement that relocation be reasonable under all the circumstances.¹²⁸ Training materials for Asylum Officers clearly state that:

restrictions on travel, education, and employment could make relocation within a country unreasonable. In some countries, women are prohibited from taking public transportation without permission from a man, allowed to work without permission from her husband, forbidden to travel without a male chaperone. It may not be economically feasible for a woman to relocate if she has been deprived of the opportunity to an education or her ability to work outside the home has been severely restricted.¹²⁹

DHS has observed that in some countries, “it is assumed that a woman living on her own or with other unrelated women is a prostitute.”¹³⁰

Another basis seen for denial of trafficking victims is the absence of a reasonable fear of future persecution. These rulings are frequently supported with the rationale that the harm is simply a random, criminal one. In one case, discussed above with reference to other bases for the denial,¹³¹ an IJ denied the applicant’s claim to a fear of future persecution by seizing on her claim of feared “kidnap.” The IJ’s close reading of the country reports conceded the “problem with the smuggling and movement of women out of Albania” but found that “most cases” involve women who are “lured by false promises... [or] sold unwillingly by their family....”¹³² The IJ noted that while the evidence “strongly demonstrates that Albania currently has an overwhelming problem with the trafficking of women, the respondent did not offer sufficient evidence of the *kidnap* of women for purposes of forced prostitution.”¹³³

The State Department report, which did mention kidnapping, was discounted because it did so only in the context of “children,” not women.¹³⁴ Another report also mentioned kidnaps, but apparently placed primary emphasis on the sale or luring of women. The applicant’s mother’s testimony about a kidnap she was personally aware of was dismissed because she “had not been present at the alleged kidnapping.”¹³⁵ (She had learned of the kidnap later, when the young woman called from Italy to report she had been forced into prostitution.) The judge concluded: “Considered [sic] the fact that the instances of actual kidnap seem

rare, and that the respondent has shown herself to be resistant to being lured, the Court finds that the chances of the respondent’s being kidnapped and forced into prostitution are minimal if any, and that her fear is not objectively reasonable.”¹³⁶

◆ Positive Decisions

Of the small group of four unreversed positive written decisions in trafficking cases, it is perhaps notable that only one involves a ruling squarely on the issue of a social group defined in principal part by gender, and also just one clearly involves recruitment for prostitution and international trafficking. The others, as will be seen below, primarily involve being forced into prostitution in a domestic context. All, however, appear to fit the legal definition of trafficking in the Trafficking Protocol.¹³⁷

The Albanian Political Opinion Case.¹³⁸ The applicant is a young Albanian woman who from a young age was a member of the opposition Democratic Party. In the mid-1990s, she was arrested while at a political demonstration and held overnight without charge. Shortly thereafter, she was kidnapped off the street by four masked men while walking with a friend. She was taken to Italy and forced into prostitution. Her captors, who included a police officer, stated that she was being punished for her involvement with the Democratic Party, and they burned her leg to mark her and make her identifiable in case of escape.

She was rescued by her fiancé after a number of months, and they returned to Albania, where she lived in hiding. But the couple fled to Italy after her fiancé was attacked and beaten by masked men. Her hometown remained under the control of the Socialist Party, where all of her family still lived. The couple then lived together in Italy for several years; however, depressed from her memories there, the applicant was afraid to leave the apartment. Eventually they came to the U.S. If returned to Albania, she fears being captured and re-trafficked into sex slavery.

The IJ found her credible, and ruled that she had suffered past persecution on account of “a political opinion imputed to her by her membership in her country’s democratic movement. She was arrested and detained for her political activities, and eventually abducted and forced into prostitution for her beliefs.”¹³⁹ The applicant was granted asylum on the basis of the presumption of future persecution in the absence of evidence of “fundamentally changed circumstances or a reasonably available internal relocation alternative....”¹⁴⁰

This is a brief positive decision, with just a few short paragraphs of analysis. Clearly the severe harm she suffered in the past readily met the threshold for persecution, and the involvement of a police officer in her trafficking along with the express linkage of her mistreatment to her political activity presented a clear case of a failure of state protection and a nexus to a protected ground. As UNCHR observes in its Trafficking Guidelines, there are circumstances in which:

trafficking activities are *de facto* tolerated or condoned by the authorities or even actively facilitated by corrupt State officials. In these circumstances, the agent of persecution may well be the State itself, which becomes responsible, whether directly or as a result of inaction, for a failure to protect those within its jurisdiction.¹⁴¹

The Ethnic Chinese/Thai Salon Case.¹⁴² One widely-circulated decision involves an ethnic Chinese woman from Thailand who was given by her birth family to a man she knew as “Pa” when she was around three years old. She grew up in a northern Thai village and did not attend school. She had a brutal childhood, including sexual violence from her adoptive father. At the age of 12, after an abortive escape, her adoptive father agreed that she go to Bangkok with an acquaintance of his who had a beauty salon. In Bangkok, she worked in the salon; the applicant was occasionally fondled by customers, and once she was raped. Eventually she met a woman who promised her that life could be far better in the U.S., and the applicant agreed to travel there. Arriving on a false Thai passport with a woman she knew only as “Pee,” she was apprehended at the airport in the U.S. The woman she was traveling with was convicted of alien smuggling.

After finding the applicant to be stateless, the IJ ruled that her particular social group was defined as “a member of an ethnic group in Thailand, who has been forced into indentured servitude and deprived of the right of citizenship.”¹⁴³ The IJ observed that “the trafficking of humans has moved to the forefront of international refugee law.”¹⁴⁴ Citing to the strong record of documentary evidence and expert testimony regarding trafficking and lack of state protection in Thailand, the IJ concluded without further specific discussion of nexus that “the respondent has established a well-founded fear of future persecution.”¹⁴⁵

This decision demonstrates the importance of a solid factual record. The judge’s conclusory

analysis, however, together with the case’s unusual and highly-specific facts, may make it of limited use as an example or prototype for other trafficking decisions.

The Honduran Brothel Case.¹⁴⁶ “Laura” is a Honduran national in her 30s with three U.S.-born children. As a young girl in Honduras, she was given away by her birth family to be raised by another family, who mistreated and abused her. As a teenager, she fled to live with relatives in La Paz; a few years later, Laura moved by herself to another town to finish high school and become a teacher.

Laura worked to support herself while she studied. One evening, a group of masked men attacked Laura and some friends at their workplace, beating them, burning them with cigarettes, and raping them. One of Laura’s friends was killed; Laura was beaten unconscious.

Laura awoke to find herself not—as she first thought—in a hospital, but held captive in a brothel in San Pedro Sula. She was told that she had been sold to the brothel owner, “Carolina.” For over a year she was forced to work as a prostitute in order to pay off what she “owed.” Carolina was well-known in Honduras as a person who ran brothels and who had powerful connections, including a brother in the military. Laura was forced to have sex with police officers and soldiers, among others. If the brothel management received complaints from customers, she was beaten. She was accompanied whenever she went out.

Laura made repeated efforts to escape, for which she was beaten and threatened with death. However, her relatives eventually learned of her whereabouts, and were able to plan her escape. Carolina made efforts to locate Laura, including a visit to her relatives homes. Shortly afterwards, Laura fled Honduras for the U.S.

Laura submitted voluminous evidence in support of her testimony, including the death certificate for her friend who was killed in the attack on the sewing shop, indicating that her friend had been raped and that she died from blows to the skull. Laura also submitted the diagnosis of an experienced clinical psychologist, who stated that he found her to be suffering from “one of the most clear-cut cases of post-traumatic stress disorder I have ever witnessed in my clinical career.” Furthermore, Laura submitted the affidavit of a member of the Center for Women’s Rights in Honduras who testified that many women in Honduras were forced into prostitution, that Carolina was a

well-known brothel owner, and that the Honduran government “has done nothing to protect women and children from this crime.”¹⁴⁷ Laura also submitted an array of documentary evidence regarding the kidnapping of women for prostitution in Honduras, on conditions for women in Honduras generally, and on sexual slavery worldwide indicating insufficient efforts by national governments to end the practice.

Laura was denied asylum by an IJ. She was found not credible on multiple grounds, many of them which the IJ admitted to be immaterial—including such inconsistencies as having mentioned her friend’s rape in her declaration but not in her trial testimony, and whether she had tried to escape from the brothel two times or three.

The IJ further ruled that even if she was credible, Laura was not a refugee because forcible prostitution, while “a horrible crime,...is not ground for the grant [sic] of asylum.”¹⁴⁸

CGRS submitted an amicus to the BIA supporting her counsel’s argument that Laura was a member of a social group defined by gender plus nationality, age, and inability to escape from forced prostitution.¹⁴⁹

The BIA eventually overturned the IJ’s decision and granted Laura asylum in an unpublished decision. After reversing each of the IJ’s credibility rulings, the Board found that Laura was a member of a particular social group it came up with on its own, defined as “children who have been abandoned by their parents and who have not received surrogate form of protection.”¹⁵⁰ The Board’s decision identified “extreme vulnerability” as the critical characteristic. The BIA held that Laura’s “kidnapping, detention against her will, forcible sexual intercourse, repeated beatings, and punishment for escape for a period of 1 year constitute past persecution.”¹⁵¹ Laura was then granted asylum because there was no rebuttal of her showing of past persecution.

One BIA member (Filppu) filed a single-sentence dissent asserting that “there has been no showing that the majority’s social group exists except in the minds of the majority or that it played any part in the motivation of those who abducted the respondent when she was 19....”¹⁵²

The Chinese Salon Case.¹⁵³ The applicant is a Chinese woman who grew up in a poor family and worked as a hotel maid. The hotel manager made passes at the applicant and asked her to go out with him. One night the manager assaulted

and tried to rape her, and she grabbed a pair of scissors and stabbed him in the leg. She was arrested. When she told the police of the attempted rape, she was told that she should be glad to have the attention of a man with such wealth and status. The police never investigated her accusation.

The applicant was held in detention for 30 days. She never had a trial but was told that she would receive a three-year sentence for stabbing the hotel manager. Her parents begged the manager to drop the charge. The manager offered to let the applicant pay off his alleged medical expenses from the stabbing by working at a beauty salon which he managed. The applicant quickly discovered that the salon was really a brothel that he ran together with the local police. The applicant was able to escape from the brothel after a few days, but the police later put out a warrant for her arrest.

The applicant was granted asylum by an IJ, who ruled that “clearly requiring her to work in a house of prostitution to pay for her crime is an inappropriate punishment.”¹⁵⁴ The IJ noted that the deal to dismiss the charges was “done with the concurrence of the police, and apparently the police would use the services of the beauty salon.”¹⁵⁵ Discussing the social group, the judge noted that the applicant was a woman who was opposed to prostitution, but was being forced to engage in it against her will, and she cited the *Kasinga* decision. The government appealed.¹⁵⁶

The BIA rejected the government’s appeal, affirming the grant of asylum in a very brief opinion. The Board’s unpublished decision did not directly address the nexus issues in the case. Instead, the BIA said “Whether deemed as arising on account of imputed political opinion or membership in a particular social group of women in China who oppose coerced involvement in government sanctioned prostitution, we are not persuaded that the Immigration Judge erred in finding that the applicant has adequately established through credible testimony a well-founded fear of persecution.”¹⁵⁷

CONCLUSION

In the words of Baroness Hale from the United Kingdom’s highest court’s unanimous 2006 ruling in favor of genital cutting and family-based asylum claims:

[T]he world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded

to their gender in their home society. States parties to the Refugee Convention, at least if they are also parties to the International Covenant on Civil and Political Rights and to the Convention on the Elimination of All Forms of Discrimination against Women, are obliged to interpret and apply the Refugee Convention compatibly with the commitment to gender equality in those two instruments.¹⁵⁸

President Bush has declared that refugee women “deserve our special admiration for overcoming the daunting challenges they face every day.”¹⁵⁹ In the words of Secretary Powell on World Refugee Day in 2002, which was dedicated to refugee women:

We have seen it again and again, from Cambodia to Colombia, from Kosovo to Congo, from Liberia to Bosnia, from Sierra Leone to East Timor to Afghanistan. Wherever tyranny and terror, conflict and chaos, force families to flee their homelands, it is the women...

who become the most vulnerable to the worst kind of violence.¹⁶⁰

Unfortunately, this rhetoric has not been matched by action to protect trafficking victims who escape their persecutors and seek the protection of asylum in the United States.

A person could review some of these denials individually and feel that—while perhaps a mistake was made and that asylum might better have been granted rather than denied—the individual determination may have fallen within acceptable bounds. As a body of decision-making, however—representing unpublished opinions from immigration courts across the country and the nation’s top administrative immigration appeal court—these cases raise troubling questions about the application of U.S. refugee law, and they amount to powerful evidence of a troubling failure to protect women fleeing a serious violation of human rights, against which the entire world has risen up in opposition.

References

1. *Matter of R-A-*, 22 I. & N. Dec. (B.I.A. 1999), reversed and remanded (AG 2001, 2005).
2. See, e.g., letter from Rep. Chris Smith (R-NJ) to Attorney General John Ashcroft and Secretary of Homeland Security Tom Ridge (June 24, 2003) (“One of my concerns is that if the new regulation is issued eliminating the opportunity for gender-based asylum, a woman who flees a sex trafficking ring in another country and arrives in the United States could also be denied asylum.”) (on file with author); letter from Senators Leahy, Brownback, Jeffords, Kerry, Kennedy, Feingold and Schumer to Attorney General Janet Reno (February 14, 2000) (raising concerns about the denial of asylum to a Jordanian woman fleeing honor killing, which together with *Matter of R-A-* and “other recent decisions indicate that the BIA lacks sufficient understanding of current standards in the United States asylum law and policy and international human rights law, which recognizes that women’s persecution often takes gender-specific forms, including ‘honor killings,’ domestic violence and rape.”), available at http://cgrs.uchastings.edu/documents/advocacy/hk_senate.pdf;
3. Amnesty International Refugee Action NS 4/00 (Feb. 11, 2000) (“Amnesty International is concerned about U.S. decisions in the asylum case of a Jordanian national, who alleges she fled her country in fear of being subjected to an ‘honor killing’ at the hands of the male members of her family.”) (on file with author).
4. Trafficking is of course not limited to women or to the sex trade.
5. U.S. Dept. Of Justice, web site, About Us, “What We Do: Fight Trafficking in Persons,” http://www.usdoj.gov/whatwedo/whatwedo_ctip.html. The web page continues with its focus on prosecution of traffickers:
It is a high priority of the Department of Justice to pursue and prosecute human traffickers. Human trafficking frequently involves the trafficking of women and children for sexual exploitation, a brutal crime the Department is committed to aggressively investigating and prosecuting. Trafficking also often involves exploitation of agricultural and sweatshop workers, as well as individuals working as domestic servants.

The Thirteenth Amendment to the U.S. Constitution outlaws slavery and involuntary servitude. The Victims of Trafficking and Violence Protection Act of 2000 (TVPA) supplements existing laws and establishes new tools and resources to combat trafficking in persons and to provide services and protections for victims.

Id.

5. Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol to the Status of Refugees to victims of trafficking and persons at risk of being trafficked ¶ 15 (HCR/GIP/06/07, 7 April 2006) (hereafter "UNHCR Trafficking Guidelines").
6. Quoted in Jenna Shearer Demir, *The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?*, UNHCR, Evaluation and Policy Analysis Unit - New Issues in Refugee Research, Working Paper No. 80, n.1 (March 2003).
7. Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children, which Supplements the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR 55th Sess., Annex II, U.N. Doc. A/RES/55/25 (2001), available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf. The United States is a party. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, available at http://www.unodc.org/unodc/en/crime_cicp_signatures_trafficking.html.

Congress has passed the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 Division A, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 22 U.S.C.) (TVPA); *see also* the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193. The TVPA definition is as follows: "(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 or 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. § 7102(7)(B). Under the TVPA, women who are trafficked into United States can gain legal status in exchange for their cooperation with criminal investigations. For women who escape to the U.S., rather than being trafficked into the U.S., the TVPA does not apply.

8. Signing the Trafficking Victims Protection Reauthorization Act in January 2006, the President declared:

Human trafficking is an offense against human dignity, a crime in which human beings, many of them teenagers and young children, are bought and sold and often sexually abused by violent criminals. Our nation is determined to fight and end this modern form of slavery.

President Signs H.R. 972, Trafficking Victims Protection Reauthorization Act, Jan. 10, 2006 <http://www.whitehouse.gov/news/releases/2006/01/20060110-3.html>.

9. President Speaks to the United Nations General Assembly, United Nations Headquarters New York, New York, Sept. 21, 2004 <http://www.whitehouse.gov/news/releases/2004/09/20040921-3.html>. The White House web site has an entire section devoted to the issue of human trafficking: <http://www.whitehouse.gov/infocus/traffic/>.
10. U S State Department, Potential for Trafficking by Marriage Brokers Called Serious; "Mail-order brides" often victims of deception, says State's Miller (July 14, 2004) <http://usinfo.state.gov/eap/Archive/2004/Jul/19-729671.html>.
11. Prepared Remarks of Attorney General Alberto R. Gonzales at the 2006 National Conference on Human Trafficking, New Orleans, Louisiana (Oct. 3, 2006) http://www.usdoj.gov/ag/speeches/2006/ag_speech_061003.html.
12. Letter from Secretary Condoleezza Rice, Trafficking in Persons Report, June 5, 2006 <http://www.state.gov/g/tip/rls/tiprpt/2006/65982.htm>.
13. 2004 Report, Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report www.state.gov/g/tip/rls/tiprpt/2004/.
14. Trafficking Convention, *supra* note 7, Article 14, ¶ 1; Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954; Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

15. Secretary Colin L. Powell, *Remarks at World Refugee Day Event*, June 20, 2002, <http://www.state.gov/secretary/former/powell/remarks/2002/11310.htm>. At World Refugee Day in 2005, Secretary of State Condoleezza Rice cited refugees who fled “to escape persecution or physical or mental or sexual abuse at the hands of the government or rebel forces.” Secretary Condoleezza Rice, *World Refugee Day at National Geographic Society*, June 20, 2005, <http://www.state.gov/secretary/rm/2005/47977.htm>.
 16. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (“If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees....”).
 17. 8 U.S.C. § 1101(a)(42), INA § 101(a)(42).
 18. 8 C.F.R. § 208.13(b).
 19. See, e.g., *Abdulrahman v. Ashcroft*, 330 F.3d 587, 592 (3d Cir. 2003), *Navas v. INS*, 217 F.3d 646, 655-56 (9th Cir. 2000).
 20. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992).
 21. INA § 208(b)(1)(B)(i).
 22. *Elias-Zacarias*, supra note 20, 502 U.S. at 483-84; *Matter of Kasinga*, 21 I. & N. Dec. 357, 366-67 (BIA 1996).
 23. *Matter of S-A-*, Int. Dec. 3433 (BIA 2000); DHS, Asylum Officer Training Manual - Lesson Plan Overview: One Year Filing Deadline 23 (Nov. 2001).
 24. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).
 25. *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (social group could be defined as “Somalian females” or “young girls in the Benadiri clan”); *Fatin v. INS*, 12 F.3d 1233, 1240-41 (3d Cir. 1993) (“Iranian women who refuse to conform to the government’s gender-specific laws and norms”); *Kasinga*, supra note 22, at 365-66 (“young women of the Tchamba-Kunsumtu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice”).
- The BIA has recently sought to add social “visibility” onto the *Acosta* standard, stating that it requires that the group be recognized within a society. In *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006), the Board found that a group of former noncriminal drug informants working against the Cali drug cartel does not have the requisite social visibility to constitute a “particular social group” because persons working as informants are not generally known to society as informants. *Matter of C-A-*, 23 I. & N. 951, at 960-61. See also *Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007). The BIA’s reasoning in these cases rests explicitly on a misreading of the UNHCR Social Group Guidelines. The general rule is that you cannot define a social group with reference to the harm, e.g. “victim of domestic violence.” UNHCR explains, however, that the fact that persecution has been aimed at a group may help determine “the visibility of the group in a particular society.” UNHCR, *Guidelines on International Protection: Membership in a Particular Social Group* ¶ 14 (HCR/GIP/02/02, 7 May 2002). In such a case, a group may then be defined in part by the harm. This narrow point does not support the undue weight placed on it by the BIA for a much broader reading which impacts all social group cases. See also Brief to the BIA of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae, *Matter of Thomas 5-10* (January 25, 2007) (copy on file with author).
26. See, e.g., *Sagaydak v. Gonzales*, 405 F.3d 1035, 1041-45 (9th Cir. 2005) (retaliation for exposing corruption); *Chang v. INS*, 119 F.3d 1055, 1062 n.4 (3d Cir. 1997) (refusal to report persons who violate China’s security rules); *Osorio v. INS*, 18 F.3d 1017, 1031 (2d Cir. 1994) (labor activities); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (feminism).
 27. For a discussion of the treatment of asylum cases brought by trafficking victims in other countries, see Jenna Shearer Demir, supra note 6; Jen Casey, *Trafficking Victims and Refugee Protection in Australia, Canada, the United Kingdom and New Zealand* (unpublished manuscript on file with author).
 28. Trafficking Protocol Article 14, para. 1; see above note 8 and accompanying text.
 29. Guidelines on International Protection on gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01) (7 May 2002), available at http://cgrs.uchastings.edu/law/unhcr_un.php.
 30. Guidelines on International Protection on “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) (7 May 2002), available at http://cgrs.uchastings.edu/law/unhcr_un.php.

31. The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (HCR/GIP/06/07) (April 7, 2006) (“Trafficking Guidelines”), available at http://cgrs.uchastings.edu/law/unhcr_un.php.
32. UNHCR Trafficking Guidelines, *supra* note 5, ¶ 5.
33. *Id.*, ¶ 13.
34. *Id.*, ¶ 15.
35. *Id.*, ¶ 37-39
36. *Id.*, ¶¶ 17-18
37. U.S. Citizenship and Immigration Services, Immigration Officer Academy—Asylum Officer Basic Training Course: *Female Asylum Applicants and Gender-Related Claims* 20 (November 30, 2001).
38. UNCHR Trafficking Guidelines, *supra* note 5, ¶ 18.
39. *Id.*, ¶ 18.
40. *Id.*, ¶ 39.
41. *Id.*, ¶ 16. This is consistent with U.S. law which recognizes that a grant of asylum may rest on severe past persecution alone. *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989).
42. *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (resistance to female genital cutting).
43. Phyllis Coven, U.S. Dep’t of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women 5 (1995).
44. The regulations provide for a grant “in the absence of well-founded fear of persecution,” as follows:

An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker’s discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

8 C.F.R. § 208.13(b)(1)(iii).

45. Cases denied by the Asylum Office are referred to Immigration Court, but none of these court cases here overlap with the four Asylum Office referrals; they are all different cases.
46. Ten of the BIA decisions represent the same cases as those reported at the Immigration Court level, now on appeal at the BIA—including two of the three grants, one of which was affirmed (CGRS Case #364) and one reversed (CGRS Case #3695). Both are described in detail below.
47. All three federal court decisions overlap with BIA decisions in the database.
48. The full breakdown by nationality is as follows: Albania: 33; Bolivia: 1; Burma (Myanmar): 1; Cambodia: 1; China: 5; El Salvador: 2; Eritrea: 2; Ethiopia: 1; Ghana: 1; Guatemala: 6; Guinea: 1; Honduras: 5; India: 3; Ivory Coast: 2; Lithuania: 1; Macedonia: 1; Mexico: 4; n/a: 3; Nigeria: 4; Peru: 1; Russia: 2; Slovenia: 1; Sudan: 1; Thailand: 3; Ukraine: 3; Uzbekistan: 3; Venezuela: 1; Vietnam: 1.
49. See, e.g., U.S. State Department Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: Country Narratives A-G* (June 5, 2006) (“Albania is primarily a source country for women and children trafficked for the purposes of sexual exploitation and forced labor. Victims are trafficked to Greece and Italy, with many of these victims trafficked onward.... The Government of Albania does not fully comply with the minimum standards for the elimination of trafficking....”), available at <http://www.state.gov/g/tip/rls/tiprpt/2006/65988.htm>.
50. None of the Immigration Court cases overlap with the two AO referrals.
51. All five of the negative BIA decisions overlap with negative IJ decisions in the database.
52. Both federal court decisions overlap with BIA decisions.
53. Every effort has been made to provide the latest possible information. Attorneys frequently share materials with CGRS in redacted form, and for a number of reasons it is not always possible to determine whether the decision analyzed is the final decision in

- the case, or if there may be a later decision by a higher administrative body or federal court. Several decisions have been affirmed by a federal court, and while discussion of those rulings is included as relevant, the focus of this article is on decision-making by the administrative agencies.
54. CGRS Cases ##21, 1034.
 55. CGRS Cases ##275, 364, 1034.
 56. The personal names used in this *Briefing* have been altered and are not actual names from the cases.
 57. CGRS Case #1034.
 58. The Asylum Officer Basic Training Manual on the One-Year Deadline cites minority status as an "exceptional circumstance" due to legal disability. DHS, *Asylum Officer Training Manual - Lesson Plan Overview: One Year Filing Deadline* 12 (Nov. 2001).
 59. IJ Dec. at 20.
 60. *Matter of Anon.*, A# redacted (New York, NY, Immigration Court, Feb. 4, 2004) at 19-20 (CGRS Case #1034).
 61. U.S. State Department, Potential for Trafficking by Marriage Brokers Called Serious; "Mail-order brides" often victims of deception, says State's Miller (July 14, 2004) <http://usinfo.state.gov/eap/Archive/2004/Jul/19-729671.html>.
 62. U.S. Department of Justice, Part I: "Introduction to Human Trafficking" http://www.usdoj.gov/crt/crim/part_1.pdf.
 63. IJ Dec. at 20-21. Note in this part of the decision the IJ appears confused in asserting that there was no "nexus between the rape in the trafficking." IJ Dec. at 20.
 64. IJ Dec. #1034, *supra* note 60, at 21.
 65. IJ Dec. at 21.
 66. IJ Dec. at 13.
 67. *Matter of A-M-*, A# redacted (BIA July 7, 2005) (CGRS Case #1034). CGRS had submitted an amicus brief to the BIA on Ann's behalf. After the BIA affirmed the IJ's decision, Ann's counsel then worked with CGRS to bring the troubling case to the attention of policymakers at the Departments of Justice and Homeland Security, including a joint national grassroots action alert with *US Women Without Borders*. After the case was referred to federal court mediation, the Department of Justice agreed to a remand to the BIA (rather than defend the case on appeal). The case remains pending.
 68. CGRS Case #3695.
 69. She was not eligible for asylum due to a criminal conviction for prostitution.
 70. *Matter of P-H-*, A# redacted (Houston, TX, Immigration Court, March 4, 2004) at 13 (CGRS Case #3695).
 71. *Id.* at 2 (citations omitted).
 72. BIA Dec. #3695 at 2.
 73. *Matter of H-H-*, A# redacted (Chicago, IL, Immigration Court, May 29, 2003) at 7 (CGRS Case #2506).
 74. *Id.*
 75. *Id.* at 7.
 76. *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); *Kasinga*, *supra* note 22.
 77. *Matter of A-L-*, A# A76-868-511 (Chicago, IL, Immigration Court, May 3, 2001) at 5 (CGRS Case #562).
 78. *Id.* at 9 (emphasis added).
 79. *Id.* at 5.
 80. *See, e.g., Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (death threats); *Shoaf v. INS*, 228 F.3d 1070, 1074 (rape, sexual assault); *Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997) (threats to life, confinement and torture); *Montoya-Ulloa v. INS*, 79 F.3d 930 (9th Cir. 1996) (beatings); *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996) (multiple robberies, home invasions, threats of rape and murder).
 81. *See Elias-Zacarias*, *supra* note 20, at 482-83.
 82. Pursuant to the INA as revised by REAL ID Act in 2005, "at least one central reason for persecuting the applicant" must be a motivation linked to one of the five statutory grounds for asylum. INA § 208(b)(1)(B)(i).
 83. UNHCR Trafficking Guidelines, *supra* note 5, ¶ 31.
 84. *Id.*, ¶ 31.
 85. *Id.*
 86. *Elias-Zacarias*, *supra* note 20, at 483-84; *Kasinga*, *supra* note 22, at 366-67.
 87. U.S. Dept. of Justice, Proposed Asylum Rule, 65 Fed. Reg. 76588, 76593 (Dec. 7, 2000); Brief of the Department of Homeland Security at 35-36, 36 n.11, *Matter of R-A-*, A #73-753-922 (DOJ, Feb. 19, 2004), available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.
 88. *See Nilaj v. Gonzales*, 205 Fed.Appx. 902, 2006 WL 3326771 *4 (2d Cir 2006) (citing record that human trafficking is prevalent in Albania

- and remanding because agency “failed to sufficiently address Prek’s claim that Silvane had a well-founded fear of persecution if returned to Albania because of the likelihood that she would be kidnaped by groups that engage in illicit trafficking of women.”).
89. UNHCR Trafficking Guidelines, *supra* note 5, ¶ 30. See also Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: a Unifying Rationale for Evolving Jurisprudence*, 52 DePaul L. Rev. 777 (2003); Minister for Immigration and Multicultural Affairs V Khawar and Others, [2002] HCA 14 (Australian High Court); *Islam v. Secretary of State for the Home Department*, and *Regina v. Immigration Appeal Tribunal*, *ex parte Shah*. [1999] 2 A.C. 629; SSHD v K; *Fornah v SSHD* [2006] UKHL 46.
 90. CGRS Case #275.
 91. Expert affidavit of Professor Jeffrey Burds (on file with author).
 92. *Matter of Anon.*, A# redacted (Seattle, WA, Immigration Court, Feb. 7, 2000) at 5 (CGRS Case #275).
 93. IJ Dec. #275 at 5. The BIA’s opinion in *Matter of R-A-* had not yet been vacated at the time of the IJ’s ruling.
 94. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987. After Sophie’s case was featured in an urgent action by Amnesty Intl, the immigration authorities dropped their opposition to her appeal of her denial of asylum, and the BIA granted her asylum in a summary order without explanation. The judge’s ruling shows the broad potential impact of RA, which many have focused on as solely involving DV.
 95. CGRS Case #4486.
 96. *Matter of P-C-*, A# redacted (New York, NY, Immigration Court, Nov. 8, 2002) at 5 (CGRS Case #4486).
 97. *Id.* at 6.
 98. *Id.*
 99. *Celaj v. Gonzales*, 186 Fed.Appx. 44, 2006 WL 1642337 (2nd Cir. 2006).
 100. *Celaj*. 2006 WL 1642337 at *3.
 101. UNCHR Trafficking Guidelines, *supra* note 5, ¶ 22.
 102. *Id.*, ¶ 23
 103. U.S. State Department, 2002 Trafficking in Persons Report, *Country Narratives—Countries A through G*, available at <http://www.state.gov/g/tip/rls/tiprpt/2002/10679.htm>.
 104. U.S. State Department, 2007 Trafficking in Persons Report, *Country Narratives—Countries A through G* (“The Government of Albania does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so.”), available at <http://www.state.gov/g/tip/rls/tiprpt/2007/82805.htm>.
 105. DHS, *Asylum Officer Training Manual - Lesson Plan Overview: One Year Filing Deadline* 22 (Nov. 2001); accord Refugee Appeal No. 71427/99 ¶ 62 (Aug. 16, 2000) (New Zealand).
 106. The court’s ruling that the Supreme Court’s “ordinary remand” jurisprudence required remand on the issue of social group is strained. The applicant made a social group argument to the IJ, and then appealed the IJ’s denial to the BIA. The Board’s summary affirmance procedure is no model for an expression of administrative expertise, but nor is it clear under what legal principle the BIA should be accorded a second chance to address an issue.
 107. IJ Dec. #2506, *supra* note 73, at 7 (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir 1986)).
 108. IJ Dec. #562, *supra* note 77, at 5.
 109. *Matter of V-R-*, A# redacted (Detroit, MI, Immigration Court, March 24, 2003) at 17 (CGRS Case #2928); *Rreshjpa v. Gonzales*, 420 F.3d 551 (6th Cir. 2005).
 110. CGRS Case #2928, *supra* note 109.
 111. *Id.* at 18.
 112. *Rreshjpa*, *supra* note 109, at 555. Note this is the opposite rationale to the one given by the IJ for rejecting the same social group, that it was too narrow. The broad social group approved by the Ninth Circuit in *Mohamed* was distinguished due to an absence of proof in this case “that the practice of forcing young women into prostitution in Albania is nearly as pervasive as the practice of female genital mutilation in Somalia.” at 555.
 113. See UNCHR Trafficking Guidelines, *supra* note 5, ¶ 37 (“It is... necessary that they either share a common characteristic other than their risk of being persecuted or are perceived as a group by society.”).
 114. *Rreshjpa*, *supra* note 109, at 556.
 115. *Id.*

116. See Department of Homeland Security's Position on Respondent's Eligibility for Relief, Feb. 19, 2004, at 35-36, 36 n.11, available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.
117. *Matter of P-H-*, A# redacted (Houston, TX, Immigration Court, March 4, 2004) at 13 (CGRS Case #3695).
118. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985); *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988).
119. UNHCR Social Group Guidelines, *supra* note 25, ¶ 18-19; UNHCR Trafficking Guidelines, *supra* note 5, ¶ 37.
120. USCIS, *Questions & Answers: The R-A- Rule* (Dec. 7, 2000) ("INS does not anticipate a large number of claims based on domestic violence.... INS believes that the situation will be analogous to that of claims based on female genital mutilation (FGM). In the 1996 precedent decision *Matter of Kasinga*, the BIA recognized FGM as a basis for asylum. Although genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM.") (copy on file with author). See also Alex Kotlowitz, "Asylum for the World's Battered Women," *The New York Times Magazine* (Feb 11, 2007) ("There are a number of reasons that today's floodgate concerns are a red herring. Asylum seekers need to provide corroboration of their stories, and in the case of domestic violence, that could mean obtaining evidence like hospital records or affidavits from family members They also must be able to show that they can't get governmental protection from their abusive husbands. What's more, it is especially difficult for women, who often have little or no resources, to leave their home countries. It has also become more difficult to enter this country post-9/11.").
121. IJ Dec. #562, *supra* note 77, at 5-6.
122. *Rreshjpa*, *supra* note 109, at 556.
123. See, e.g., *Gao v. Gonzales*, 440 F.3d 62, 70 n.5 (2d. Cir. 2006) ("it may be readily assumed in the circumstances of a particular country that virtually every individual in a racial or ethnic group may reasonably fear future persecution, even though the group is very large."), cert. petition pending.
124. CGRS Case #1445.
125. *Matter of M-M-*, A# redacted (New York, NY, Immigration Court, Nov. 8, 2002) at 10 (CGRS Case #1445).
126. IJ Dec. #1445 at 11.
127. IJ Dec. at 10.
128. To deny asylum on the basis that an applicant can avoid persecution by relocating, it must also be shown that "under all the circumstances it would be reasonable to expect the applicant to do so," 8 C.F.R. § 208.13(b)(2)(ii). The regulations direct adjudicators to consider, among other things, "whether the applicant would face other serious harm in the place of suggested relocation; ... administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 208.13(b)(3).
129. U.S. Citizenship and Immigration Services, Immigration Officer Academy—Asylum Officer Basic Training Course: *Female Asylum Applicants and Gender-Related Claims* 7 (November 30, 2001).
130. *Id.* at 32.
131. CGRS Case #562, *supra* note 77.
132. IJ Dec. at 9.
133. *Id.* (emphasis added).
134. *Id.*
135. *Id.*
136. *Id.*
137. See *supra* text accompanying note 7.
138. *Matter of Anon.*, A79-607-478 (Oakdale, LA, Immigration Court, Dec. 20, 2005) at 4 (CGRS Case #3438).
139. *Id.* at 4.
140. *Id.* at 4-5.
141. UNHCR Trafficking Guidelines, *supra* note 5, ¶ 16.
142. *Matter of S-*, A# redacted (Chicago, IL, Immigration Court, June 18, 2001) (CGRS Case #560).
143. *Id.* at 8.
144. *Id.* at 9.
145. *Id.* at 10.
146. *Matter of F-L-*, A# redacted (Anchorage, AK, Immigration Court, July 24, 1998) (CGRS Case #216).
147. Record at 96, 98; see CGRS Case #216, CGRS amicus brief at 8.
148. CGRS Case #216, *supra* note 146, at 30.
149. *Id.*, CGRS amicus brief at 20 ("The record evidences that [Laura] was persecuted on account of her membership in a particular social

group of young women who do not have family or other societal connections adequate to protect them from forced prostitution. Clearly it was [Laura]'s gender, and her resulting disenfranchised status in Honduran society, that left her vulnerable to kidnappers looking for women to sell to brothel owners. [Laura] was vulnerable specifically as a young woman living away from her family, working and attending school. Abundant documentation in this case indicates that women in Honduras play a subordinate role in virtually every aspect of life.”).

150. *Id.* at 4.
151. CGRS Case #216, BIA Dec. at 5.
152. *Id.* at 6.
153. *Matter of J- M- A# redacted* (San Pedro, CA, Immigration Court, December 3, 1996) (CGRS Case #364).
154. *Id.* at 16
155. *Id.* at 15.
156. CGRS became involved, bringing the case to the attention of the national media. For more information on this case, *see* Lisa Margonelli, “We Don’t Care About Women,” *Jane Magazine* (March 2001), available at <http://cgrs.uchastings.edu/documents/media/jane%203-01.pdf>.
157. CGRS Case #364, *supra* note 153, at 2.
158. *Fornah v SSHD* [2006] UKHL 46, ¶ 86.
159. President George Bush, *Statement by the President*, June 20, 2002 <http://www.whitehouse.gov/news/releases/2002/06/20020620-10.html>.
160. Secretary Colin L. Powell, *Remarks at World Refugee Day Event*, June 20, 2002, <http://www.state.gov/secretary/former/powell/remarks/2002/11310.htm>.

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