

GUIDELINE 4

WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION

Guidelines Issued by the
Chairperson Pursuant to
Section 65(3) of the Immigration Act

UPDATE

Immigration and Refugee Board
Ottawa, Canada
Effective date: November 13, 1996

TABLE OF CONTENTS

UPDATE

- A. Determining the Nature and Grounds of the Persecution
 - I. General Proposition
 - II. Grounds Other Than Membership in a Particular Social Group
 - III. Membership in a Particular Social Group
- B. Assessing the Feared Harm
- C. Evidentiary Matters
- D. Special Problems at Determination Hearings

FRAMEWORK OF ANALYSIS

ENDNOTES

UPDATE

The definition of a Convention refugee in the Immigration Act does not include gender as an independent enumerated ground for a well-founded fear of persecution warranting the recognition of Convention refugee status. As a developing area of the law, it has been more widely recognized that gender-related persecution is a form of persecution which can and should be assessed by the Refugee Division panel hearing the claim. Where a woman claims to have a gender-related fear of persecution, the central issue is thus the need to determine the linkage between gender, the feared persecution and one or more of the definition grounds.

Most gender-related refugee claims brought forward by women raise four critical issues which these Guidelines seek to address:

1. To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or a combination, of the five enumerated grounds of the Convention refugee definition?

2. Under what circumstances does sexual violence, or a threat thereof, or any other prejudicial treatment of women constitute persecution as that term is jurisprudentially understood?
3. What are the key evidentiary elements which decision-makers have to look at when considering a gender-related claim?
4. What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and often humiliating to speak about?

A. DETERMINING THE NATURE AND THE GROUNDS OF THE PERSECUTION

Obviously, not all claims brought forward by women are specifically gender-related. Women frequently claim fear of persecution in common with their male fellow citizens, though not necessarily of the same nature or at the same level of vulnerability, for such reasons as belonging to an ethnic or a linguistic minority, or membership in a political movement, a trade union or a religious denomination.

I. GENERAL PROPOSITION

Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.

Before determining the appropriate ground(s) applicable to the claim, decision-makers must first identify the nature of the persecution feared by the claimant.

Generally speaking, women refugee claimants may be put into four broad categories, although these categories are not mutually exclusive or exhaustive:¹

1. Women who fear persecution on the same Convention grounds, and in similar circumstances, as men. That is, the risk factor is not their sexual status, per se, but rather their particular identity (i.e. racial, national or social) or what they believe in, or are perceived to believe in (i.e. religion or political opinion). In such claims, the substantive analysis does not vary as a function of the person's gender, although the nature of the harm feared and procedural issues at the hearing may vary as a function of the claimant's gender.
2. Women who fear persecution solely for reasons pertaining to kinship, i.e. because of the status, activities or views of their spouses, parents, and siblings, or other family members. Such cases of "persecution of kin" typically involve violence or other forms of harassment against women, who are not themselves accused of any antagonistic views or political convictions, in order to pressure them into revealing information about the whereabouts or the political activities of their family members. Women may also have political opinions imputed to them based on the activities of members of their family.
3. Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons. In the refugee law context, such

discrimination may amount to persecution if it leads to consequences of a substantially prejudicial nature for the claimant and if it is imposed on account of any one, or a combination, of the statutory grounds for persecution. The acts of violence which a woman may fear include violence inflicted in situations of domestic violence² and situations of civil war.³

4. Women who fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin. Such laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions for the existence of a gender-defined social group. The religious precepts, social traditions or cultural norms which women may be accused of violating can range from choosing their own spouses instead of accepting an arranged marriage, to such matters as the wearing of make-up, the visibility or length of hair, or the type of clothing a woman chooses to wear.

II. GROUNDS OTHER THAN MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Race:

There may be cases where a woman claims a fear of persecution because of her race and her gender. For example, a woman from a minority race in her country may be persecuted not only for her race, but also for her gender.

Religion:

A woman who, in a theocracy for example, chooses not to subscribe to or follow the precepts of a state religion may be at risk of persecution for reasons of religion. In the context of the Convention refugee definition, the notion of religion may encompass, among other freedoms, the freedom to hold a belief system of one's choice or not to hold a particular belief system and the freedom to practise a religion of one's choice or not to practise a prescribed religion. In certain states, the religion assigns certain roles to women; if a woman does not fulfill her assigned role and is punished for that, she may have a well-founded fear of persecution for reasons of religion. A woman may also be perceived as expressing a political view (and have a political opinion imputed to her) because of her attitude and/or behaviour towards religion.

Nationality:

A gender-related claim of fear of persecution may be linked to reasons of nationality in situations where a national law causes a woman to lose her nationality (i.e. citizenship) because of marriage to a foreign national. What would constitute good grounds for fearing persecution is not the fact of losing her nationality as such (notwithstanding that such laws are discriminatory to the extent that they do not apply to men married to foreign nationals), but the consequences she may suffer as a result.⁴

Political Opinion:

A woman who opposes institutionalized discrimination against women, or expresses views of independence from male social/cultural dominance in her society, may be found to fear persecution by reason of her actual political opinion or a political opinion imputed to her (i.e. she is perceived by the agent of persecution to be expressing politically antagonistic views). Two considerations are of paramount importance when interpreting the notion of "political opinion":

1. In a society where women are "assigned" a subordinate status and the authority exercised by men over women results in a general oppression of women, their political protest and activism do not always manifest themselves in the same way as those of men.⁵

2. The political nature of oppression of women in the context of religious laws and rituals should be recognized. Where tenets of the governing religion in a given country require certain kinds of behaviour exclusively from women, contrary behaviour may be perceived by the authorities as evidence of an unacceptable political opinion that threatens the basic structure from which their political power flows.⁶

III. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

In considering the application of the "membership in a particular social group" ground, decision-makers should refer to the Supreme Court of Canada decision in *Ward*.⁷ The *Ward* decision indicated three possible categories of "particular social group":

- 1) groups defined by an innate or unchangeable characteristic;
- 2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- 3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The Court gave examples of the three categories as follows:

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

Depending on the basis of the claim, women refugee claimants may belong to a group defined in any of these categories.

A further holding of the *Ward* decision is that a particular social group cannot be based solely on the common victimization of its members. A group is not defined solely by common victimization if the claimant's fear of persecution is also based on her gender, or on another innate or unchangeable characteristic of the claimant.⁸

Family as a particular social group

There is jurisprudential authority for recognizing claims grounded in familial affiliation (i.e. where kinship is the risk factor) as coming within the ambit of the "membership in a particular social group" category. See, for example, *Al-Busaidy, Talal Ali Said v. M.E.I.*,⁹

...the [Immigration and Refugee] Board has committed reviewable error in not giving due effect to the applicant's uncontradicted evidence with respect to his membership in a particular social group, namely, his own immediate family.

Gender-defined particular social group

There is increasing international support for the application of the particular social group ground to the claims of women who allege a fear of persecution solely by reason of their gender. See Conclusion no. 39 (XXXVI) Refugee Women and International Protection, 1985, where the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR)...

(k) Recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.¹⁰

Application of the statutory ground

In evaluating the "membership in a particular social group" ground for a fear of gender-related persecution, two considerations are necessary:

1. Most of the gender-specific claims involving fear of persecution for transgressing religious or social norms may be determined on grounds of religion or political opinion. Such women may be seen by the governing authorities or private citizens as having made a religious or political statement in transgressing those norms of their society, even though UNHCR Conclusion no. 39, above, contemplates the use of "particular social group" as an appropriate ground.

2. For a woman to establish a well-founded fear of persecution by reason of her membership in a gender-defined particular social group¹¹ under the first category in Ward (i.e. groups defined by an innate or unchangeable characteristic):

- * The fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant -- race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.

- * Gender is an innate characteristic¹² and, therefore, women may form a particular social group within the Convention refugee definition. The relevant assessment is whether the claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group.

- * Particular social groups comprised of sub-groups of women may also be an appropriate finding in a case involving gender-related persecution. These particular social groups can be identified by reference to factors, in addition to gender, which may also be innate or unchangeable characteristics. Examples of other such characteristics are age, race, marital status and economic status. Thus, for example, there may be sub-groups of women identified as old women, indigenous women, single women or poor women. In determining whether these factors are unchangeable, consideration should be given to the cultural and social context in which the woman lives, as well as to the perception of the agents of persecution and those responsible for providing state protection.

- * Because refugee status is an individual remedy, the fact that a claim is based on social group membership may not be sufficient in and of itself to give rise to refugee status. The woman will need to show that she has a genuine fear of harm, that one of the grounds of the definition is the reason for the feared harm, that the harm is sufficiently serious to amount to persecution, that there is a reasonable possibility that the feared persecution would occur if she was to return to her country of origin and that she has no reasonable expectation of adequate national protection.

B. ASSESSING THE FEARED HARM

Claims involving gender-related fear of persecution often fall quite comfortably within one of the five grounds of the Convention refugee definition. The difficulty sometimes lies in establishing whether the various forms of prejudicial treatment or sanctions imposed on women making such claims come within the scope of the concept of "persecution".

CONSIDERATIONS

The circumstances which give rise to women's fear of persecution are often unique to women.¹³ The existing bank of jurisprudence on the meaning of persecution is based, for the most part, on the experiences of male claimants. Aside from a few cases of rape, the definition has not been widely applied to female-specific experiences, such as infanticide, genital mutilation,¹⁴ bride-burning, forced marriage,¹⁵ domestic violence,¹⁶ forced abortion or compulsory sterilization.¹⁷

The fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution. The real issues are whether the violence -- experienced or feared -- is a serious violation of a fundamental human right for a Convention ground¹⁸ and in what circumstances can the risk of that violence be said to result from a failure of state protection.¹⁹

The social, cultural, traditional and religious norms and the laws affecting women in the claimant's country of origin ought to be assessed by reference to human rights instruments which provide a framework of international standards for recognizing the protection needs of women. What constitutes permissible conduct by the agent of persecution towards women may be determined, therefore, by reference to international instruments such as:

Universal Declaration of Human Rights
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Convention on the Elimination of All Forms of Discrimination Against Women²⁰
Convention on the Political Rights of Women
Convention on the Nationality of Married Women
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Declaration on the Elimination of Violence Against Women²¹

A woman's claim to Convention refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects. The claimant will need to establish that:

- (a) the policy or law is inherently persecutory; or
- (b) the policy or law is used as a means of persecution for one of the enumerated reasons; or
- (c) the policy or law, although having legitimate goals, is administered through persecutory means; or
- (d) the penalty for non-compliance with the policy or law is disproportionately severe.²²

C. EVIDENTIARY MATTERS

When an assessment of a woman's claim of gender-related fear of persecution is made, the evidence must show that what the claimant genuinely fears is persecution for a Convention reason as distinguished from random violence or random criminal activity perpetrated against her as an individual. The central factor in such an assessment is, of course, the claimant's particular circumstances in relation to both the general human rights record of her country of origin and the experiences of other similarly situated women. Evaluation of the weight and credibility of the claimant's evidence ought to include evaluation of the following considerations, among others:

1. A gender-related claim cannot be rejected simply because the claimant comes from a country where women face generalized oppression and violence and the claimant's fear of persecution is not identifiable to her on the basis of an individualized set of facts. This so-called "particularized evidence rule" was rejected by the Federal Court of Appeal in *Salibian v. M.E.I.*,²³ and other decisions.
2. Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant's country of origin are unwilling or unable to provide adequate protection from gender-related persecution.²⁴ If the claimant can demonstrate that it was objectively unreasonable for her to seek the protection of her state, then her failure to approach the state for protection will not defeat her claim. Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection.²⁵

When considering whether it is objectively unreasonable for the claimant not to have sought the protection of the state, the decision-maker should consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself. If, for example, a woman has suffered gender-related persecution in the form of rape, she may be ostracized from her community for seeking protection from the state. Decision-makers should consider this type of information when determining if the claimant should reasonably have sought state protection.

In determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution, decision-makers should consider the fact that the forms of evidence which the claimant might normally provide as "clear and convincing proof" of state inability to protect, will not always be either available or useful in cases of gender-related persecution.

For example, where a gender-related claim involves threats of or actual sexual violence at the hands of government authorities (or at the hands of non-state agents of persecution, where the state is either unwilling or unable to protect), the claimant may have difficulty in substantiating her claim with any "statistical data" on the incidence of sexual violence in her country.

In cases where the claimant cannot rely on the more standard or typical forms of evidence as "clear and convincing proof" of failure of state protection, reference may need to be made to alternative forms of evidence to meet the "clear and convincing" test. Such alternative forms of evidence might include the testimony of women in similar situations where there was a failure of state protection, or the testimony of the claimant herself regarding past personal incidents where state protection did not materialize.

3. A change in country circumstances, generally viewed as a positive change, may have no impact, or even a negative impact, on a woman's fear of gender-related persecution. In situations where a woman's fear is related to personal-status laws or where her human rights are being violated by private citizens, a change in country circumstances may not mean a positive change for the woman, as these areas are often the last to change. An assessment should be made of the claimant's particular fear and of whether the changes are meaningful and effective enough for her fear of gender-related persecution to no longer be well-founded.²⁶

4. In determining the reasonableness of a woman's recourse to an internal flight alternative (IFA), decision-makers should consider the ability of women, because of their gender, to travel safely to the IFA and to stay there without facing undue hardship.²⁷ In determining the reasonableness of an IFA, the decision-makers should take into account factors including religious, economic, and cultural factors, and consider whether and how these factors affect women in the IFA.

D. SPECIAL PROBLEMS AT DETERMINATION HEARINGS

Women refugee claimants face special problems in demonstrating that their claims are credible and trustworthy. Some of the difficulties may arise because of cross-cultural misunderstandings. For example:

1. Women from societies where the preservation of one's virginity or marital dignity is the cultural norm may be reluctant to disclose their experiences of sexual violence in order to keep their "shame" to themselves and not dishonour their family or community. ²⁸

2. Women from certain cultures where men do not share the details of their political, military or even social activities with their spouses, daughters or mothers may find themselves in a difficult situation when questioned about the experiences of their male relatives.²⁹

3. Women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome,³⁰ and may require extremely sensitive handling. Similarly, women who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome and may also be reluctant to testify.³¹ In some cases it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women. Members should be familiar with the UNHCR Executive Committee Guidelines on the Protection of Refugee Women.³²

FRAMEWORK OF ANALYSIS

1. Assess the harm feared by the claimant. Does the harm feared constitute persecution?

(a) For the treatment to likely amount to persecution, it must be a serious form of harm which detracts from the claimant's fundamental human rights.

(b) To assist decision-makers in determining what kinds of treatment are considered persecution, an objective standard is provided by international human rights instruments. The following instruments, among others, may be considered:

Universal Declaration of Human Rights,
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Right
Convention on the Elimination of All Forms of Discrimination Against Women
Convention on the Political Rights of Women,
Convention on the Nationality of Married Women
Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
Declaration on the Elimination of Violence Against Women

2.

Ascertain whether the claimant's fear of persecution is based on any of the grounds, singly or in combination, enumerated in the Convention refugee definition.
Considerations:

- * It is necessary to ascertain the characteristic of the claimant which places her or members of her group at risk, and to ascertain the linkage of that characteristic to a Convention ground.
- * Gender is an innate characteristic and it may form a particular social group.
- * A subgroup of women may also form a particular social group. Women in these particular social groups have characteristics (possibly innate or unchangeable) additional to gender, which make them fear persecution.
- * The gender-defined group cannot be defined solely by the fact that its members share common persecution.

3.

Determine whether the claimant's fear of persecution is well-founded. This includes an assessment of the evidence related to the ability or willingness of the state to protect the claimant and, more generally, the objective basis of the claim. Considerations:

- * There may be little or no documentary evidence presented with respect to the inadequacy of state protection as it relates to gender-related persecution. There may be a need for greater reliance on evidence of similarly situated women and the claimant's own experiences.
- * The claimant need not have approached non-state organizations for protection.
- * Factors including the social, cultural, religious, and economic context in which the claimant finds herself should be considered in determining whether it was objectively unreasonable for the claimant not to have sought state protection.

* Where a woman's fear relates to personal-status laws or where her human rights are being violated by private citizens, an otherwise positive change in country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution.

4.

If required, determine whether there is a possibility of an internal flight alternative.
Considerations:

* Whether there would be undue hardship for the claimant, both in reaching the location of the IFA and in establishing residence there.

* Religious, economic, social and cultural factors, among others, may be relevant in determining the reasonableness of an IFA for a woman fearing gender-related persecution.

* Please note that all of the sources referred to in the endnotes can be found in the IRB Documentation Centres.

1. See generally M. Meyer, "Oppression of Women and Refugee Status", in Proceedings of the International Seminar on Refugee Women (Amsterdam: Dutch Refugee Council, 1985) at pp. 30-33, and A.B. Johnsson, "The International Protection of Women Refugees - A Summary of Principal Problems and Issues" (1989) 1 International Journal of Refugee Law 221, at pp. 223-224, for a more detailed discussion of the different categories of women refugee claimants. Similar categories have been used in the Amnesty International report, Women in the Front Line: Human Rights Violations Against Women (New York: Amnesty International Publications, 1991) at pp. 1-3, in enumerating human rights violations against women.

2. In this context, domestic violence is meant to include violence perpetrated against women by family members or other persons with whom the woman lives.

3. See C. Niarchos, "Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia" (1995) 17 Human Rights Quarterly 649. With respect to the former Yugoslavia,

At several levels, the rapes reflect the policy of "ethnic cleansing", rape is used as a means to terrorize and displace the local population, to force the birth of children of mixed "ethnic" descent in the group, and to demoralize and destroy. The rapes are also an expression of misogyny: women are targeted not simply because they are the "enemy" but also because they are women. Gender is essential to the method of assault. (at p. 658)

The author concludes that "Women's suffering in war is specifically related to gender - women are raped, forced into prostitution, forcibly impregnated." (at p. 689)

See also the Chairperson's Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations, Immigration and Refugee Board, Ottawa, Canada, March 7, 1996.

4. A separate issue to be determined is whether the woman concerned has acquired her spouse's nationality, thereby enabling her to avail herself of the protection of that country.

5. See F. Stairs & L. Pope, "No Place Like Home: Assaulted Migrant Women's Claims to Refugee Status" (1990) 6 Journal of Law and Social Policy 148, at p. 163, where the authors assert that, "Where an ostensibly non-political act such as choice of dress is seen to in fact be political in nature, it may provide the basis for a claim to refugee status."

J. Greatbatch, in "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1 International Journal of Refugee Law 518, gives examples of how the refusal by Iranian women to conform to the dress code can be viewed as opposition to the Iranian government, thereby constituting a political act. The author also discusses the development of Chilean communal kitchens and co-operative nurseries and the search for missing relatives as examples of how Chilean women demonstrated their resistance to the Pinochet regime.

See also Shahabaldin, Modjgan v. M.E.I. (IAB V85-6161), MacLeod, Mawani, Singh, March 2, 1987, where the former Immigration Appeal Board found the claimant to be a Convention refugee on the basis of her political opinion, because she opposed the Iranian laws governing dress.

In CRDD T90-01845, Jackson, Wright (dissenting in part), December 21, 1990, the Refugee Division was of the view that the claimant's opposition to the government's enforcement of the dress laws, "could possibly result in her being persecuted because of political opinion should she be returned to Iran." The panel noted that Iranian women are subject to "extreme discrimination".

6. See Namitabar v. M.E.I., [1994] 2 F.C. 42 (T.D.). In this case, the Court said that "I consider that in the case at bar the female applicant has demonstrated that her fear of persecution is connected to her political opinion. In a country where the oppression of women is institutionalized any independent point of view or act opposed to the imposition of a clothing code will be seen as a manifestation of opposition to the established theocratic regime."

7. Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.

8. The Federal Court of Canada has found "women subject to domestic abuse" to be a particular social group in two cases -- Narvaez v. M.C.I., [1995] 2 F.C. 55 (T.D.) and Diluna v. M.E.I. (1995), 29 Imm. L.R. (2d) 156 (T.D.). The issue which must then be addressed is whether the claimant's fear of persecution is well-founded.

9. (1992), 16 Imm. L.R. (2d) 119 (F.C.A.) at 121.

The former Immigration Appeal Board also considered the family as constituting a "particular social group" in Astudillo v. M.E.I. (1979), 31 N.R. 121 (F.C.A.), Barra-Velasquez, Marie Mabel De La v. M.E.I. (IAB 80-6330), Hlady, Weselak, Howard, April 29, 1981, and in Zarketa, Ignacio v. M.E.I. (IAB M81-9776), D. Davey, Suppa, Tisshaw, February 6, 1985.

Several Refugee Division decisions have also found women to be members of a particular social group, the family. See, for example, CRDD M89-02465, Hebert,

Champoux-Ohrst (dissenting), January 4, 1990, and CRDD T89-03943, Kapasi, Jew, July 25, 1990, where a political opinion was imputed to the Somali claimant because of the actions of her brothers. See also CRDD M89-00057, Wills, Gauthier, February 16, 1989, where the Iranian claimant was found to be a member of the social group, "a pro-Shah family", and CRDD M89-00971, Wolfe, Hendricks, June 13, 1989, where the Refugee Division found the Peruvian claimant to be a member of a particular social group, her family. In CRDD M89-01098, Van der Buhs, Lamarche, June 14, 1989, the Sri Lankan claimant was also found to be a refugee because she was a young Tamil in a Tamil family.

In CRDD T89-02313, T89-02314, T89-02315, Teitelbaum (dissenting), Sri-Skanda-Rajah, October 17, 1990, the Refugee Division found that the Guatemalan claimant was found to be a member of the social group, "targeted family". The Refugee Division, in CRDD C90-00299, C90-00300, Lo, Pawa, December 18, 1990, also found a Salvadoran claimant to belong to a particular social group, her husband's family.

10. In July 1991, the UNHCR Executive Committee released Guidelines on the Protection of Refugee Women, EC/SCP/67 (July 22, 1991). These guidelines stress that women,

...fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status. Others may be seen as having made a religious or political statement in transgressing the social norms of their society.

In an Information Note submitted by the High Commissioner with the release of the above Guidelines, it was noted that "ensuring the protection of refugee women requires compliance not only with the 1951 Convention and its 1967 Protocol, but also with other relevant international instruments." (at p. 1)

During its 41st session in 1990, the UNHCR Executive Committee stated that severe discrimination experienced by women, prohibited by the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), can form the basis for the granting of refugee status. The importance of documentation regarding gender-based persecution and its consequences in the countries of origin of refugee women was discussed. See, in this regard, the UNHCR Executive Committee, Note on Refugee Women and International Protection, EC/SCP/59 (August 28, 1990) at p. 5.

The UNHCR has noted repeatedly that refugee women have special needs in the area of protection. See, for example, the discussion at the 41st session in the Note on Refugee Women and International Protection, cited above, at pp. 2-4. See also the United Nations General Assembly, Executive Committee of the High Commissioner's Programme, Report on Refugee Women, A/AC.96/727 (July 19, 1989) at p. 2.

It is interesting to observe that the European Parliament, as early as 1984, had passed a resolution similar to the 1985 UNHCR Resolution. The European Parliament called upon member states "to apply the UN treaty of 1951, as well as the 1967 Protocol regarding the status of refugees, in accordance with this interpretation." For a discussion of the resolution of the European Parliament, see the Proceedings of the International Seminar on Refugee Women (Amsterdam: Dutch Refugee Council, 1985) at p. 33.

In 1984, the Dutch Refugee Council issued the following policy directive:

It is the opinion of the Dutch Refugee Council that persecution for reasons of membership of a particular social group, may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations

where discrimination against women in society, contrary to the rulings of international law, has been institutionalized and where women who oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or unable to offer protection.

11. Although the former Immigration Appeal Board decided few claims dealing specifically with gender-related persecution, there is one decision that merits discussion. In *Incirciyan, Zeyiye v. M.E.I.* (IAB M87-1541X, M87-1248), P. Davey, Cardinal, Angé, August 10, 1987, an Armenian claimant and her daughter who had been living in Turkey were found to be refugees on the basis of membership in a particular social group "made up of single women living in a Moslem country without the protection of a male relative (father, brother, husband, son)." Since the claimant had requested and had been refused the protection of the Turkish authorities on several occasions, the Board concluded that there was a lack of adequate state protection.

On several occasions, the Refugee Division has found women refugee claimants to have a well-founded fear of persecution by reason of their membership in a particular social group. In CRDD T89-06969, T89-06970, T89-06971, Nicholson, Bajwa, July 17, 1990, the Refugee Division found that the claimant and her two daughters had a well-founded fear of persecution on the basis of their membership in a particular social group, "consisting of women and girls who do not conform to Islamic fundamentalist norms." In CRDD U91-04008, Goldman, Bajwa, December 24, 1991, the Somali claimant was found to be a refugee on the basis of her membership in a particular social group, "young women without male protection." The Refugee Division, in CRDD T89-02248, Maraj, E.R. Smith, April 3, 1990, found the claimant to be a member of the particular social group composed of women who belong to a "women's organization objecting to the treatment of women in Iran."

12. In the Ward decision, the Court described the first of the three possible categories of particular social group as "groups defined by an innate or unchangeable characteristic." The Court held that this category would include individuals fearing persecution on such basis as gender, linguistic background and sexual orientation. In CRDD T93-05935/36, Liebich, Larke, December 31, 1993, the Refugee Division found that a woman who was a divorced mother living under the jurisdiction of Sharia law had a well-founded fear of persecution by reason of her membership in a particular social group of "women." In CRDD T93-12198/12199/12197, Ramirez, McCaffrey, May 10, 1994 (reasons signed July 13, 1994), the panel found that "women" was a particular social group.

13. Several commentators argue that the Convention refugee definition,

...ignores the persecution that girls and women endure, even die under, for stepping out of the closed circle of social norms; choosing a husband in place of accepting an arranged marriage; undergoing an abortion where it is illegal; becoming politically active in the women's movement. Women are also abandoned or persecuted for being rape victims, bearing illegitimate children or marrying men of different races. See L. Bonnerjea, *Shaming the World: The Needs of Women Refugees* (London: Change, 1985) at p. 6.

See also Greatbatch, *supra*, footnote 3, at p. 218, and Stairs and Pope, *supra*, footnote 3, at pp. 163-164.

14. In CRDD T93-12198/12199/12187, Ramirez, McCaffrey, May 10, 1994 (reasons signed July 13, 1994), the Refugee Division concluded that the claimant's right to personal security would be grossly infringed if she were forced to undergo female

genital mutilation. The panel found that this was a contravention of Article 3 of the Universal Declaration of Human Rights and the United Nations Convention on the Rights of the Child.

The Federal Court of Canada in *Annan v. Canada* [1995] 3 F.C. 25 (T.D.) in considering the case of a woman fearing female genital mutilation stated that Ghana, "according to the documentary evidence, has failed to demonstrate any intention of protecting its female citizens from the horrific torture of excision practised at various places throughout the country."

15. In *Vidhani v. M.C.I.*, [1995] 3 F.C. 60 (T.D.), the Court held that "women who are forced into marriages against their will have had a basic human right violated."

16. The CRDD in C93-00433, *Wieler, Lazo*, December 3, 1993, in dealing with the case of a woman fearing her husband and her family, found that the claimant's fear of "the violent behaviour of her husband condoned by that society, the traditional rituals which include the searing of her body with a heated instrument and the continuing domination and demands causing her to be enslaved" amounted to persecution.

17. In L. Heise, "Crimes of Gender" (1989) 2 *Worldwatch* 12, the many forms of violence against women are discussed. The author notes that,

Every day, thousands of women are beaten in their homes by their partners, and thousands more are raped, assaulted and sexually harassed. And, there are the less recognized forms of violence: In Nepal, female babies die from neglect because parents value sons over daughters; in Sudan, girls' genitals are mutilated to ensure virginity until marriage; and in India, young brides are murdered by their husbands when parents fail to provide enough dowry. In all these instances, women are targets of violence because of their sex. This is not random violence; the risk factor is being female.

With respect to compulsory or forced sterilization, the Federal Court of Canada in *Cheung v. M.E.I.*, [1993] 2 F.C. 314 (C.A.) held that "The forced sterilization of women is a fundamental violation of basic human rights. It violates Articles 3 and 5 of the United Nations Universal Declaration of Human Rights...The forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment."

18. When considering whether sexual violence or domestic violence (both of which may involve mental and physical suffering) are forms of torture or cruel, inhuman and degrading treatment amounting to persecution, decision-makers should examine the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment. This Convention which, like the 1951 Refugee Convention, incorporates the principle of non-refoulement, defines "torture" as:

...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from [her] or a third person information or a confession, punishing [her] for an act [she] or a third person has committed or is suspected of having committed, or intimidating or coercing [her] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. (Article 1)

Reference should also be made to Article 16 as it relates to "...other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1...".

19. In their influential study, *Sexual Violence Against Refugee Women* (The Hague, Ministry for Social Affairs, 1984) at pp. 6 & 7, C.E.J. de Neef & S.J. de Ruiter document the manner in which sexual violence "may have played a role in the flight from the country of origin in any of a variety of ways:

1. It may have been part of the way in which the persecution based on her political conviction was expressed; (When a woman has been imprisoned in the country of origin she may have suffered sexual violence. Both for men and women in a number of countries sexual violence is an integral part of the methods of torture.)

2. It may be that a woman by not conforming to the cultural traditions in the country of origin which prescribe a certain behaviour for women is fearful to be subjected to violence. (An example of this type of violence is decapitating or stoning women who have committed adultery in some Islamic cultures.)

3. It may be that through the threat of, or through actual sexual violence against women, conflicts between different political or religious groups are decided. (...Sexual violence against women here can be a means to hurt an entire group and to reinforce the superiority of the one group over the other.)

4. It may be that women who have fled because of conditions of war or of a reign of terror...are a victim of sexual violence because they are exceptionally vulnerable when they are deprived of the men's traditional protection and have lost their status of wife."

The Dutch Refugee Council publication, *Sexual Violence: You Have Hardly Any Future Left* (Amsterdam: Dutch Refugee Council, 1987), contains an excellent discussion of the meaning and forms of sexual violence. Excerpts from this publication form part of the documentation for the workshop, "Socio-cultural Context to Refugee Claims made by Women - Case Studies: Iran, Somalia and Latin America," organized by the Toronto I CRDD Working Group on Women Refugee Claimants, Toronto, June 21, 1990. The documentation is available in the Board's regional Documentation Centres.

20. During its 41st session in 1990, the UNHCR Executive Committee stated that severe discrimination experienced by women and prohibited by Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) can form the basis for the granting of refugee status. The importance of documentation regarding gender-based persecution and its consequences in the countries of origin of refugee women was discussed. See, in this regard, the UNHCR Executive Committee, Note on Refugee Women and International Protection, EC/SCP/59 (August 28, 1990) at p. 5.

The Refugee Division in T91-01497, T91-01498, Ramirez, Toth, August 9, 1994 (reasons signed November 1, 1994), referred to the Convention on the Elimination of All Forms of Discrimination Against Women in finding that the claimants, from Bulgaria, had a well-founded fear of persecution. The adult claimant had been subjected to spousal abuse throughout her marriage in the form of battering, threats of death, and rape. The panel held that despite Bulgaria's signing of the above Convention, the authorities had repeatedly ignored the violence against the adult claimant. The panel also referred to several other international human rights instruments and to the IRB's Guidelines on women refugee claimants, and held that

the adult claimant had "an internationally protected right to protection from domestic violence and failure to give that protection is a form of gender-based discrimination."

21. The Declaration on the Elimination of Violence Against Women provides in Article 2 that

Violence against women shall be understood to encompass, but not be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

22. In *Fathi-Rad, Farideh v. S.S.C.* (F.C.T.D., no. IMM-2438-93), McGillis, April 13, 1994, the Court had to deal with the issue of whether the Islamic dress code is a policy of general application applied to all citizens of Iran. In the Court's view, "The Islamic dress code is a law applicable only to women in Iran. It dictates the manner in which Iranian women must dress to comply with the religious beliefs of the theocratic governing regime and prescribes punishments for any violation of the law. A law which specifically targets the manner in which women dress may not properly be characterized as a law of general application which applies to all citizens." In the alternative, the Court concluded that the punishment for minor infractions of the Islamic dress code was disproportionate to the objective of the law and, therefore, constituted persecution. Since the decision in *Fathi-Rad*, the Documentation, Information and Research Branch, IRB, has published a document entitled "Human Rights Brief: Women in the Islamic Republic of Iran", June 1994, which indicates that the dress code in Iran applies equally to men and women.

23. [1990] 3 F.C. 250 (C.A.) at 258.

24. The Supreme Court of Canada in *Ward* held that except in situations where the state is in a condition of complete breakdown, states must be presumed capable of protecting their citizens. The Court found that this presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect.

25. It is clear that the claimant's failure to seek protection from non-government groups can have no impact on the assessment of the availability of state protection. In certain circumstances, however, the fact that the claimant did not approach existing non-government organizations in her country of origin may have an impact on her credibility or, more generally, on the well foundedness of her claim.

26. See *Yusuf, Sofia Mohamed v. M.E.I.* (F.C.A., no. A-130-92), Hugessen, Strayer, Décary, January 9, 1995. See also Legal Services' Commentary on Change of Circumstances, IRB Legal Services, September 1994.

27. See *Thirunavukkarasu v. M.E.I.*, [1994] 1 F.C. 589, at p. 598, where the Court ruled as follows: "The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there." See also Legal

Services' Commentary "Internal Flight: When is it an Alternative?", IRB Legal Services, April 1994.

28. The UNHCR Executive Committee notes that decision-makers should refrain from asking women refugee claimants for details of sexual abuse. They note that, "the important thing in establishing a well-founded fear of persecution is to establish that some form of it has occurred." Guidelines on the Protection of Refugee Women, *supra*, footnote 10, at p. 27.

29. In two cases in the Federal Court of Canada, the issue of the woman's place within her society and her lack of knowledge about the activities of male family members was addressed. In *Roble v. M.E.I.* (1994), 25 Imm. L.R. (2d) 186 (F.C.T.D.), the Court stated that in Somali culture it is often the case that a wife is not privy to information concerning her husband's occupation. In *Montenegro, Suleyama v. M.C.I.* (F.C.T.D., no. IMM-3173-94), Mackay, February 29, 1996, the Court faulted the CRDD for ignoring the claimant's explanation that her knowledge of her husband's political involvement in El Salvador was based entirely on what he had been willing to tell her, pointing out that "within their social order wives were not expected to question their husband's activities."

30. The UNHCR Executive Committee Guidelines on the Protection of Refugee Women, *supra*, footnote 10, at p. 27, discuss the symptoms of Rape Trauma Syndrome as including "persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss of distortion."

31. F. Stairs & L. Pope, *supra*, footnote 5, at p. 202, stress that decision-makers should be,

...sensitive to the fact that women whose children are attached to their claim may also be reticent to describe the details of their persecution in front of their children. Further, if the claimant's culture dictates that she should suffer battering silently, the use of an interpreter from her community may also intimidate her.

For a discussion of the battered woman syndrome see *R. v. Lavallee*, [1990] 1 S.C.R. 852. In *Lavallee*, Madame Justice Wilson addressed the mythology about domestic violence and phrased the myth as "[e]ither she was not as badly beaten as she claims, or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it." The Court further indicated that a manifestation of the victimization of battered women is a "reluctance to disclose to others the fact or extent of the beatings". In *Lavallee*, the Court indicated that expert evidence can assist in dispelling these myths and be used to explain why a woman would remain in a battering relationship.

32. It should be noted that Amnesty International, in *Women in the Front Line: Human Rights Violations Against Women*, *supra*, footnote 1, at p. 54, recommends that:

In procedures for the determination of refugee status governments should provide interviewers trained to recognize the specific protection needs of women refugee and asylum-seekers.