



QUESTIONS AND ANSWERS

December 7, 2000

The R-A- Rule

Q: What does the proposed rule do?

A: The rule proposes an analytical framework within which gender-related and other new kinds of claims should be considered. It states generally applicable principles to provide additional guidance on the definitions of "persecution" and "membership in a particular social group," as well as guidance on what it means for persecution to be "on account of" a protected characteristic. The rule was developed with an awareness of the circumstances surrounding persecution against women and recognizes that domestic violence is not only a private matter and may, under certain circumstances, qualify the victim for a grant of asylum.

Q: Why are the Attorney General and the INS Commissioner proposing this rule?

A: There is a sizeable body of case law that interprets the meaning of the refugee definition; however, most of it addresses asylum and withholding claims based on race, religion, and political opinion. Claims based on membership in a particular social group - such as those grounded on the applicant's gender or sexual orientation - are being made more often now than in previous decades. The Department of Justice (DOJ) believes that guidance is necessary to promote uniform interpretation of the relevant statutory provisions.

Q: Was the proposed rule developed because of *Matter of R-A*?

A: In part. Asylum applications based on membership in a particular social group, such as cases involving domestic violence, often pose complex analytical questions about the interpretation of asylum laws. The Board of Immigration Appeals (BIA) considered and rejected a domestic violence persecution claim in its decision in *Matter of R-A*. The proposed rule specifically addresses certain aspects of the *Matter of R-A* decision that might be read to be inconsistent with principles of asylum law, and that could impose unwarranted barriers to claims based on domestic violence.

Q: Does the proposed rule carve out a special eligibility category for gender-related and domestic violence claims?

A: No. The rule does not carve out any special categories. It articulates broadly applicable principles to guide adjudicators in applying the refugee definition and other statutory and regulatory provisions. Though applicable to all asylum and withholding

cases, these principles take into account our understanding of the circumstances surrounding persecution against women and clarify interpretive issues that could impose barriers to gender-related and domestic violence claims. The supplemental information to the rule gives examples of how the general interpretive principles may be applied to gender-related asylum cases, such as those involving domestic violence.

Q: Does the proposed rule constitute a shift in DOJ's approach to gender-related and domestic violence claims?

A: While the proposed rule is consistent with DOJ's interpretation of the refugee definition, it does propose a shift in the way that DOJ has decided to address this area of law. DOJ has always been committed to the fair adjudication of asylum cases. As this area of law has developed, DOJ's interpretation of the refugee definition has developed accordingly. Consistent with the Attorney General's statutory authority in immigration law, the Attorney General has decided to promulgate regulations to ensure that the law in this area develops in a fair and consistent way. These regulations reflect both sound principles of asylum law and the general nature of domestic violence.

Q: Does the proposed rule modify the position DOJ took in Matter of R-A-, Interim Decision 3403 (BIA 1999)?

A: Yes. On June 11, 1999 the BIA published a decision denying asylum to a Guatemalan woman who had been the victim of severe domestic violence and who feared that she would be at risk of continuing violence if she were returned to Guatemala. The applicant appealed the BIA's decision to the Ninth Circuit Court of Appeals. The case has been stayed in the Ninth Circuit to allow for review by the Attorney General, as is allowed under the immigration statutes. This rule clarifies the BIA's particular social group analysis and modifies the BIA's statement of the principles governing the requirement that persecution be "on account of" a statutory ground.

Q: How does the proposed rule modify Matter of R-A-'s "on account of" and "social group analysis"?

A: In *Matter of R-A-*, the applicant argued that she was persecuted on account of membership in a social group comprised of Guatemalan women intimately involved with abusive Guatemalan men. INS argued, and the BIA agreed, that the harm asserted by the applicant was not on account of membership in a particular social group because there was no indication that the applicant's husband would harm any other members of the group. DOJ has reconsidered this position. The proposed rule states that, although evidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered, this is not a required element. The rule and supplemental information to the rule restates that gender can be the basis for membership in a particular social group and indicate that in certain circumstances victims of domestic violence may be eligible for asylum. Consistent with U.S. domestic law, the rule recognizes that domestic violence is not a private matter and may, under certain circumstances, qualify the victim for a grant of asylum. Asylum law

in the United Kingdom, Australia, New Zealand, and Canada all recognize that domestic violence can, in certain circumstances, form the basis for asylum.

Q: Isn't it true that INS argued to BIA that the social group asserted by the applicant in *R-A-* was not a social group?

A: Yes. However, *Matter of R-A-* raised complex issues that INS believed were in need of further consideration. Following BIA's decision in *Matter of R-A-*, INS made a proposal to the Attorney General asking her to review DOJ's position. The proposed rule is the culmination of extensive INS analysis

Q: Does the proposed rule modify how BIA characterized domestic violence in *Matter of R-A-*?

A: Yes. The BIA characterized domestic violence by considering it a private, family matter. DOJ believes certain forms of domestic violence may constitute persecution, despite the fact that they occur within familial or intimate relationships. Domestic violence centers on power and control over the victim. The proposed rule recognizes that such patterns of violence are not private matters, but rather should be addressed when they are supported by a legal system or social norms that condone or perpetuate domestic violence.

Q: Did INS consult domestic violence experts when it was drafting the proposed rule?

A: Yes. INS consulted the Violence Against Women Office (VAWO) of Department of Justice, which has experience in the U.S., as well as with foreign governments and non-governmental organizations which have had experience with these types of claims. VAWO has concluded that domestic violence manifests similar characteristics across all racial, ethnic and socioeconomic groups. First, in relationships involving domestic violence, past behavior is a strong predictor of future behavior by the abuser. Victims report patterns of abuse—rather than single, isolated incidents—that tend to include the repeated use of physical, sexual and emotional abuse, threats, intimidation, isolation and economic coercion. Second, both here and abroad, domestic violence centers on power and control over the victim. Consequently, when victims attempt to flee the abusive relationship, or otherwise assert their independence, abusers often pursue them and escalate the violence to regain or reassert control. The risk of lethality to the victim is typically greatest when the victim attempts to escape the abuse and, in contrast to other persecution cases where the persecutor's desire to harm the victim may wane if the victim leaves, the victim's attempt to leave typically increases the abuser's motivation to locate and harm her. Third, because of the abuser's intimate or familial relationship with the victim, the abuser is likely to possess important information about where the victim could go or to whom the victim would turn for assistance.

Q: How many asylum applications does INS receive each year?

A: In fiscal year 1999, INS received 42,207 applications for asylum. In addition, immigration courts received approximately 12,000 (defensive) asylum applications from aliens in removal proceedings. Only 1,085 of the claims received by INS were filed by women seeking asylum based in whole or in part on membership in a particular social group. Neither the INS nor the immigration courts can provide statistical data on asylum claims based on grounds related to domestic violence.

Q: Does INS expect to receive a flood of asylum applications based on domestic violence?

A: No. INS does not anticipate a large number of claims based on domestic violence. Although there is no way to predict precise numbers, 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. Furthermore, INS believes that the Canadian experience with gender-related asylum claims is instructive. In 1995, Canada issued gender guidelines recognizing domestic violence as a basis for asylum. Rather than receiving a flood of applications, the Immigration and Refugee Board of Canada reports that gender-related claims have actually dropped steadily since a peak of 315 claims in 1995.

Q: Under the proposed regulations, will all victims of domestic violence be eligible for asylum?

A: No. Under U.S. law, a person can be granted asylum only if he or she establishes a well-founded fear of persecution on account of one of the five grounds authorized by the statute. DOJ recognizes that under certain circumstances domestic violence may fall within the refugee definition provided in the statutes. Asylum adjudications are highly fact specific and it is not necessary or practicable to establish a sixth enumerated ground in the refugee definition based on domestic violence.

Q: How does this proposed rule affect the disposition of *Matter of R-A*?

A: It would not be appropriate to comment while the case is under review by DOJ.

Q: What is the effect of the proposed rule on currently pending cases?

A: The proposed rule does not have any binding effect and a final rule will not be promulgated until the public has had the opportunity to comment and DOJ reviews and considers the comments. The proposed rule and supplemental information do, however, represent the analytical framework that DOJ believes is appropriate for gender-related and domestic violence-based cases.

Q: Who may comment on this proposed rule?

A: Any member of the public may submit written comments on this proposed rule. The proposed rule will have a 45-day notice and comment period to allow members of the public, advocacy groups, and others to comment on the approach DOJ has taken, and the specific interpretations of the refugee definition as stated in the rule. DOJ welcomes comment on all aspects of the proposed regulation and will review and consider all comments prior to publishing a final rule.