

Analysis of the [Asylum Rule's](#) Impact on Survivors of Gender-Based Violence

Asylum applicants fleeing gender-based persecution will be impacted by the rule in both the same ways as all other asylum seekers, and in different ways that reflect the various dynamics specific to gender-based violence (GBV). Examples of GBV include rape, forced marriage, honor crimes, human trafficking, domestic violence, female genital mutilation/cutting (FGM/C), femicide, forced impregnation, and punishment on account of sexual orientation/gender identity. Common characteristics of GBV include, but are not limited to:

- persecution perpetrated by non-state-actors (NSAs) such as family or community members;
- extreme social stigmas, ostracization, blame, disbelief of, and additional violence and punishment of survivors for their victimhood and/or for reporting and seeking redress against abuse;
- multiple victimization and re-victimization;
- internalization by survivors of blame and stigmas;
- extreme fear of cis-male authority figures such as police;
- inability to disclose or discuss GBV in front of children and cis-male family members;
- lack of laws to protect survivors from GBV and lack of or open hostility to enforcement of laws designed to protect survivors / broad tolerance of GBV by society/predominant culture;
- discriminatory laws prohibiting land ownership, inheritance, and court access;
- barriers to medical or mental health treatment for GBV;
- forced dependence, eg, through economic isolation and denial of education and literacy access;
- forced caretaking of dependents/unequal caretaking responsibilities; and
- near insurmountable obstacles to escape and lack of access to corroborating evidence of persecution due to these and other factors.

Women and girls seeking asylum on any basis, not just gender, are also among the most vulnerable asylum seekers worldwide. For example, even if a woman is fleeing political or religious persecution, she is still likely to have suffered GBV and/or gender-based discrimination in some form which in turn limits her access to safety and assistance in seeking it. Finally, asylum applicants who fled any type of persecution - including gender-based - might

ATLANTA

230 Peachtree Street NW
Atlanta, GA 30303
Tel: 470-481-4700
Fax: 470-481-7400
Atlanta@tahirih.org

BALTIMORE

211 E. Lombard Street
Suite 307
Baltimore, MD 21202
Tel: 410-999-1900
Fax: 410-630-7539
Baltimore@tahirih.org

GREATER DC | NATIONAL

6402 Arlington Boulevard
Suite 300
Tel: 571-282-6161
Fax: 571-282-6162
TTY: 711
Falls Church, VA 22042
GreaterDC@tahirih.org
Justice@tahirih.org

HOUSTON

1717 St. James Place
Suite 450
Houston, TX 77056
Tel: 713-496-0100
Fax: 713-481-1793
Houston@tahirih.org

SAN FRANCISCO BAY AREA

881 Sneath Lane
Suite 115
San Bruno, CA 94066
Tel: 650-270-2100
Fax: 650-466-0006
SFBayArea@tahirih.org

simultaneously be experiencing GBV in the United States (US) during the application process. The ways in which the rule impacts these groups is outlined below.

I. Credible Fear/Reasonable Possibility Screenings

The vast majority if not all survivors of GBV who are subject to the expedited removal process will fail their credible fear/reasonable possibility screenings due to various provisions alone or in combination with one another as outlined below. In addition to these provisions and higher burdens of proof for withholding of removal and CAT screenings, survivors in search of safe haven intercepted by US authorities are profoundly traumatized, exhausted, hungry, terrified, unaware of our legal process, and face language and cultural barriers. They may have been separated from family and may still be suffering physical effects of violence in addition to emotional trauma. With no time to collect their thoughts, let alone corroborative evidence to support highly fact-specific inquiries, the bar for initial screenings should appropriately remain low. In addition, those referred for screenings will be put into “asylum/withholding only” proceedings, preventing them from applying for any other survivor-based relief, eg, where an applicant also fears an abuser or trafficker who has harmed them in the US.

The following factors must now be formally considered when officers - including minimally trained border agents with an enforcement background - evaluate asylum seekers during the interview process:

- **Legal precedents** including *Matter of A-B-*, which most immigration judges read as foreclosing domestic violence-based asylum claims. This provision would nullify the holding in *Grace v. Sessions* to the contrary, even if *Grace* is ultimately upheld on appeal.
- **Internal relocation** – Under the rule, applicants who fear NSAs bear the burden of proving that it is unreasonable for them to internally relocate by a preponderance of the evidence. Adjudicators must also now consider the “size, reach, or numerosity of the alleged persecutor.” Survivors will rarely if ever meet these standards. A survivor often fears persecution from one individual. A common tactic of perpetrators is to threaten to find and punish victims for escaping, wherever they escape to. A survivor would have to be harmed because her persecutor carried out his threats, and then have objective evidence of such harm in order to even have a chance of meeting this burden which is highly unlikely.
- **Asylum bars** – Survivors of human trafficking who were forced by their traffickers to engage in crimes such as commercial sex/prostitution, drug smuggling, etc. will be barred from asylum under the “serious non-political crime” bar.
- **Grounds of Persecution**
 - *Political Opinion* - A political opinion as grounds for persecution under the rule must involve a “discrete cause related to political control of a state or unit thereof.” This would exclude survivors persecuted for trying to advance equal access to education, employment, marriage, property ownership and

inheritance, legal systems, and even the political process. Thus, persecution on account of “feminism” or advancement of LGBTQI+ rights in the civil and political arena will not be accepted.

- *Membership in a Particular Social Group* (PSG) - PSGs cannot be circular and “must have existed independently of the alleged persecutory acts.” FGM/C was recognized as a basis for asylum in *Matter of Kasinga*, in which the cognizable PSG was “Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to FGM, and who oppose it.” Subsequently, many cases involving IPV have been brought by members of PSGs defined in part by elements of domestic abuse itself; eg, *Matter of A-C-R-G*: “**Married women in Guatemala who suffer domestic abuse but are unable to leave their marriages due to cultural and legal constraints.**” **Neither PSG would be acceptable under the rule.**

PSGs also cannot be based on “interpersonal disputes of which governmental authorities were unaware or uninvolved” and/or “private criminal acts of which governmental authorities were unaware or uninvolved” with exceptions in “rare circumstances.” This framing reverts us back to the 1950’s, or even the 1990’s prior to passage of the Violence Against Women Act. Domestic violence in the US was dismissed as a private family matter, meant to stay behind closed doors with victims suffering in silence. It is noteworthy that the government was uninvolved precisely for this reason.

In addition, the “rare circumstances” exception to this provision is meaningless, because applicants won’t be able to assert an exception at all - their cases will be first deemed frivolous or pretermitted as explained below. This standard also requires survivors to report NSA persecution to authorities. Reporting GBV in and of itself can be life threatening, due to retribution by persecutors or punishment by law enforcement itself. Current law permits submission of evidence as to why reporting was not possible or dangerous. The rule would now prohibit an applicant from even presenting such evidence. Rather, she’d have to show that she potentially risked her life.

Finally, PSGs not raised before the immigration court cannot be raised later, even on a finding of ineffective assistance of counsel. Survivors face many barriers to access to counsel to help them frame their cases, such as economic and social isolation as noted above.

- **Nexus** – “Gender” is explicitly deemed invalid as a basis for establishing a nexus between persecution and a protected ground under the rule except in rare circumstances. Furthermore, claims involving acts of persecution where the alleged nexus is the following, will fail:
 - personal animus or retribution

- interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged particular social group in addition to the member who has raised the claim at issue
- generalized disapproval of, disagreement with, or opposition to...non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state

GBV such as honor crimes often involves these scenarios, alone or in combination with one another. Another example is where an abuser has not committed acts of intimate partner violence (IPV) (or there is no evidence of such acts) prior to abusing the asylum applicant. Thus, this provision also serves to shut out most GBV claims.

Finally, the rule notes that “pernicious cultural stereotypes — *machismo* as the example—have no place in the adjudication of applications for asylum and statutory withholding of removal.” This provision conflates allegations of negative stereotypes with objective country conditions information. In doing so, it disparages submission of key corroborative evidence in support of gender-based claims; eg, documentation of the prevalence of honor crimes, the practice of forced marriage, tolerance or encouragement within a society of punishing women through IPV, rape, and femicide, etc.

- **Convention Against Torture (CAT)** – Torture only qualifies as a basis for CAT relief if perpetrated under color of law – ie, if it is *not* inflicted by “rogue officials.” It must also be intentionally inflicted “by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity.” “Acquiescence” means actual knowledge or willful blindness *and* “requires an omission of an act that the official had a duty to do and was able to do.” These changes under the rule will make it near impossible for survivors of GBV to succeed in CAT claims. For example, a survivor would have to show that her policeman-husband tortured her deliberately to further an official purpose, despite her utter powerlessness because of his position of authority. And, in countries where certain forms of IPV, sexual assault, and honor crimes are legal, there would be no affirmative duty of an official to protect a survivor from this harm. A government official could be enlisted by a woman’s family to torture her to compel her to submit to a forced marriage. The official would be considered “rogue,” yet she would still suffer at the hands of authorities with absolutely no possibility of recourse at all.
- **No Immigration Judge review of denial unless proactive request from applicant** – Due to pervasive social stigmas and accompanying fear of reporting GBV, especially to government officials, it is highly unlikely that survivors will 1) disclose key, required elements of their claims (which will no longer form the basis of a claim under the rule anyway); 2) have sufficient objective evidence corroborating such claims; and 3) affirmatively request an appeal.

II. Substantive Asylum Claim

The few who do manage to pass their initial screening must still meet the rule's new redefined standards when presenting their claims on the merits. Please see the analyses above relating to internal relocation, grounds of persecution, and nexus.

In addition, women and girls who present claims on any basis such as religion or political opinion, are still likely to have suffered GBV and/or gender-based discrimination in some form even if this harm is ostensibly unrelated to their asylum claims. For example, limited access to household resources makes flight directly from home to the US very challenging for women and girls. Their escape will be circuitous and arduous; they might be more likely to need false documents or to leave under false pretenses, if they would otherwise need permission of an abusive male relative to exit their country.

III. Discretion

Among other things, the failure of an applicant to seek asylum in a country through which she transited will be deemed "significantly adverse" to her claim and must be considered. Yet, survivors of GBV are often followed by their persecutors wherever they try to escape to, including neighboring countries. A survivor might also face threats to her safety as a woman traveling alone in a country of transit. Asylum is also barred, except in "extraordinary circumstances" – if the applicant:

- accrued more than one year of lawful presence before applying;
- failed to timely file any required tax return;
- failed to satisfy any tax obligation;
- withdrew a prior asylum application with prejudice or abandoned a previous application;
- missed an asylum interview; and
- had a final order and did not file a motion to reopen based on changed country conditions within one year of the changed conditions.

Many asylum seekers, including survivors of GBV, suffer from Post-Traumatic-Stress-Disorder (PTSD) as a result of persecution. PTSD can severely disrupt day-to-day life and interfere with basic administrative tasks. On top of this, survivors of IPV in the US who are seeking asylum contend with threats from perpetrators for asserting independence – financial or otherwise. This can take the form of abusers thwarting survivors' attempts to file paperwork or pay bills, attend key appointments or meetings with service providers, communicate with potential witnesses who can corroborate their claims, and learn about their legal rights.

IV. Firm resettlement

Firm resettlement under the rule encompasses, among other things, whether an asylum seeker "resided or could have resided in any permanent legal immigration status or any non-permanent but potentially indefinitely renewable legal immigration status (including asylee,

refugee, or similar status, but excluding a status such as a tourist) in a country through which the alien transited prior to arriving in or entering the United States.” Survivors may be unable to firmly resettle in certain countries of transit, even though they technically offer refugee or asylee status. As noted above, persecutors are known to pursue survivors in neighboring countries after they try to escape, and a survivor might also face threats to her safety as a woman residing alone in a country of transit or even in a refugee camp where there is little if any protection from sexual assault.

VIII. Withholding of Removal

Please see above for discussion of substantive elements of asylum claims, for impacts of the rule on survivors’ applications for statutory withholding of removal.

IX. CAT

Please see above for discussion of the impact of the new CAT provisions on survivors.

X. Frivolous applications

“Frivolous” under the rule includes cases where “applicable law clearly prohibits the grant of asylum” and applications are “filed without regard to the merits of the claim.” “Knowingly” includes willful blindness, not just actual knowledge. Asylum officers can find applications frivolous and refer cases to immigration judges on that basis. There are no warnings about frivolousness beyond the statutorily required notice (8 USC 1158(d)(4)(A)). Survivors of GBV, including those appearing *pro se*, will have their claims deemed frivolous if based on such abuse for any or all of the reasons described above. The rule’s prohibition on “gender” as a nexus between persecution and a protected ground does contain an exception in “rare circumstances.” However, the broad definition of “frivolous,” and its harsh consequences will deter and prevent anyone from successfully arguing that their case meets the exception. Also, a survivor whose case is deemed frivolous under the rule will be permanently ineligible for any relief (other than withholding of removal), including VAWA cancellation of removal, or a VAWA, U, or T visa petition. As explained above, survivors applying for asylum who are also experiencing IPV in the US are often blocked by abusers from accessing counsel and other service providers. Traumatized and isolated, they are in no position to learn about their legal rights or access or pay lawyers to help them frame their claims in order to preserve their right to seek other relief.

XI. Pretermission

Survivors, like all asylum seekers, will suffer swift pretermission for failing to establish a *prima facie* claim. Again, along with the new “frivolous” standard, pretermission will prevent even those who might ultimately meet the “rare circumstances” exception in gender-based cases from framing and presenting evidence of such circumstances in court. The parameters of the “rare circumstances” exception will go untested. In addition, those who

simultaneously have pending VAWA, T, or U petitions will be deported in the meantime which could severely prejudice their cases.

XI. Information disclosure

The rule expressly allows disclosure of information in an asylum application “as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien’s immigration or custody status; an adjudication of the application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.” Abusers frequently lodge false accusations against victims to retaliate if they report abuse, or to manipulate and wreak havoc on their lives to reinforce control. Asylum seekers simultaneously experiencing DV in the US will be at the mercy of abusers who report victims to law enforcement for fabricated allegations of crime, child abuse, immigration violations, etc. Release of information about asylum applications can also put survivors at grave risk of harm, as recognized by the current protection of such information other than in exceptional circumstances. Survivors will be both penalized for withholding any information about their fear of harm yet might also be deterred from disclosing critical details if they fear disclosure of such information.

XII. Additional Considerations

The rule both explicitly and implicitly excludes gender-based persecution as a basis for asylum, largely dismissing it as a ‘private dispute.’ Doing so undermines US foreign policy initiatives as well as domestic efforts to eradicate GBV as the systemic, pervasive, and life-threatening human rights abuse that it is.