

# **Advancing Justice: Crafting Litigation Strategies for Gender-Based Asylum in Immigration Court**

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**Daniella Prieshoff, Managing Attorney - Tahirih Justice Center**

**Monica Mananzan, Managing Attorney - CAIR Coalition**

# Gender-Based Asylum

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**Daniella Prieshoff**  
**Managing Attorney, Baltimore**



# Introduction to Tahirih

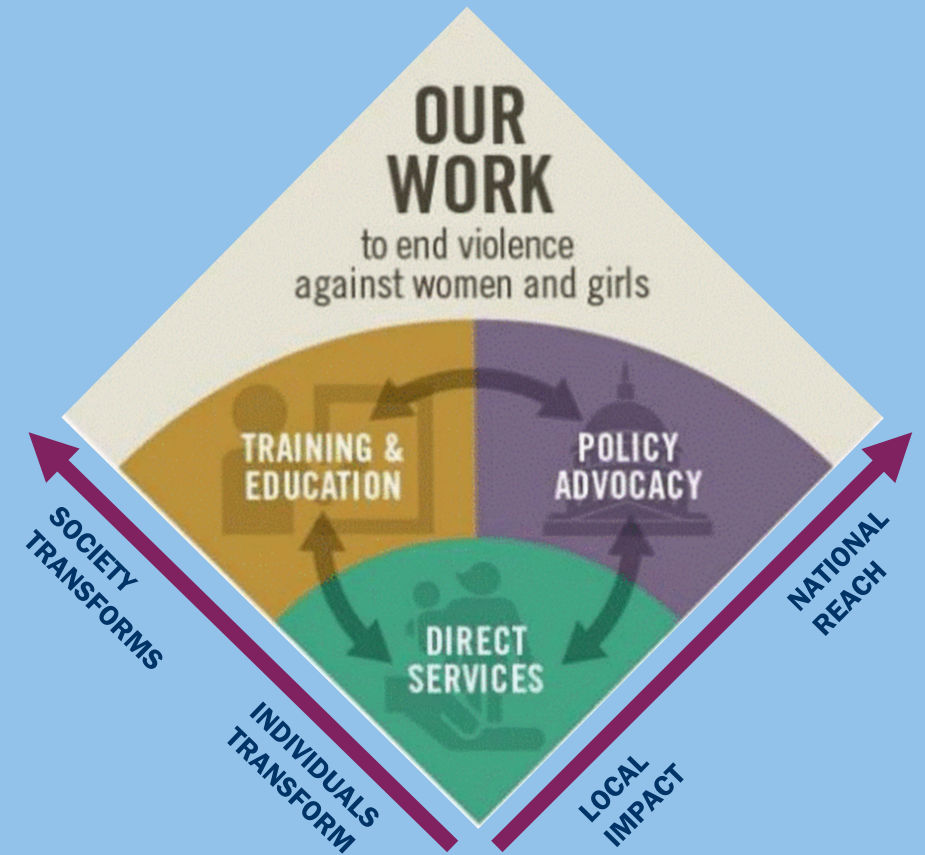
The Tahirih Justice Center is a national, nonprofit organization headquartered in the Greater DC Area and with offices in Baltimore, Atlanta, Houston, and the San Francisco Bay Area.

## The Mission of the Tahirih Justice Center

The Tahirih Justice Center supports immigrant women and other survivors of gender-based violence seeking safety and justice. Our interdisciplinary model of service combines free legal services, social services case management, with bridge-building policy advocacy, and training and education. We amplify the voices of survivors in communities, courts, and Congress to create a world where everyone can live in safety and with dignity.

# Organizational Snapshot

- Founded in 1997 after the first-ever grant of asylum because of persecution on account of gender
- Provide free interdisciplinary legal and social services
- Focus legal work on immigration because it is key to accessing benefits, services, and safety
- Assisted more than 30,000 individuals
- Robust pro bono program, maintaining a 99% rate of successful litigation success despite the complex nature of the cases we accept
- Leader in public policy advocacy on issues affecting immigrant survivors of gender-based violence



# Gender-Based Asylum

# What would you do?

**What kinds of protected grounds would you pursue in Sandra's asylum claim?**

Your new client, Sandra, shares how her husband physically and sexually abused her when she tried to find a job, did not complete household chores to his satisfaction, and when she was unable to give him a son. When Sandra became pregnant and realized she was going to have a girl, she refused to abort her unborn daughter despite her husband's insistence. When she started standing up for herself, his abuse worsened. Sandra also shares with you that after living in the U.S. for some time, she realizes that she identifies as bisexual.

# A Refugee Is...

“any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” (INA § 101(a)(42(A))



# Nexus and Statutory Grounds

The persecution feared must be **on account of** one of five protected grounds. The statutory ground “was or at least will be one central reason for persecuting the applicant.” REAL ID Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2008)

## Grounds:

- Race
- Religion
- Nationality (ethnic group, linguistic group, citizenship)
- Membership in a particular social group
- Political opinion

\*Currently, “Gender” is not a protected ground statutorily, but Tahirih is working to update the law



# What is “gender-based asylum”?



Gender-based Asylum refers primarily to two types of claims:

- Claims where the form of persecution is unique to, or disproportionately inflicted on women (FGM, DV, rape, forced marriage) regardless of reason
- Claims where the harm may or may not be gendered, but the reason (nexus) it is inflicted is because of gender (or non-adherence to expected gender norms)

# Gender-Based Asylum and Political Opinion - Expressed

## Gender and Political Opinion: Expressed Political Opinion

- A woman who believes and expresses, e.g.,
  - Women should lead their lives without male domination
  - Women should control their own bodies
  - Belief in feminism - *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)
- Expression of Political Opinion Can Be....
  - Through Actions –attending a protest, joining a political party that advances women’s rights, involvement and membership in women’s rights groups
  - Through overt expressions of opinion –public oral expression of an opinion for or against something
  - Less overtly symbolic acts: i.e., defying custom, refusing to conform with cultural norms. See *Saldarriaga v. Gonzalez*, 4th Cir.

# Gender-Based Asylum and Political Opinion - Imputed

## Gender and Political Opinion: Imputed Political Opinion

- UNHCR, Guidelines on International Protection: Gender-Related Persecution ¶ 32 (May 7, 2002) (“[P]olitical opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged. This may include opinions about gender roles. It would also include nonconformist behavior which leads the persecutors to **impute** a political opinion on him or her.”)
- Relevant inquiry for imputed political opinion “is not the political views sincerely held or expressed by the victim, but rather the persecutor’s subjective perception of the victim’s views . . . . It does not matter ... whether the victim in fact held a particular political opinion; what matters is that she proves that her persecutors believed that she held that opinion.” *Alvarez-Lagos*, 927 F.3d at 254

# Gender-Based Asylum and Political Opinion - Imputed

- Examples of imputed political opinion:
  - *Alvarez-Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019) imputed anti-gang political opinion when petitioner, a Honduran single mother, told Barrio 18 gang that she was unable to pay extortion
  - *Hernandez-Chacon v. Barr*, 948 F.3d 94, 103 (2d Cir. 2020): imputed anti-gang political opinion found where female petitioner resisted sexual advances of MS-13 member and refused to be his woman
  - *Rodriguez Tornes v. Garland*, 993 F.3d 743, 752 (9th Cir. 2021): feminist political opinion found where record shows several persecutors stated that they harmed applicant “because she sought an equal perch in the social hierarchy”.
  - disobeying male partner’s demands, refusing to have sexual intercourse with domestic partner, while knowing will violence/threats as a result

# Gender-Based Asylum and Religion



## Gender and Religion:

- Different religious beliefs from husband/partner, male relatives, or family concerning the role of women in society
  - *In re S-A-*: Father's abuse of a daughter on account of her refusal to confirm to his conservative interpretation of Islamic religion – views regarding women's behavior and attire. (Interim Decision #3433, BIA 2000)

# Gender-Based Asylum and Religion

## Gender and Religion:

- Persecution on account of religion can include “prohibition of membership of a religious community, or worship in private or in public, or religious instruction, or religious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.” Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to Status of Refugees, Reedited, January 1992, at ¶ 72. See *Matter of S-A-*, 22 I&N Dec. at 1335.
- *Kossov v. I.N.S.*, 132 F.3d 405, 409 (7th Cir. 1998) (finding past persecution where a woman applicant was beaten and taunted because of her religious beliefs and eventually suffered a miscarriage);
- *Fisher v. I.N.S.*, 79 F.3d 955, 970 (9th Cir. 1995) (holding that dress and conduct rules pertaining to women may amount to persecution if a woman’s refusal to comply is on account of her religious or political views)

# Gender-Based Asylum and Particular Social Groups

## Gender and Particular Social Group (PSG)

### A cognizable PSG must:

- Be defined by common, immutable traits/characteristics
  - “beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.” (*Matter of Acosta*, 19 I&N Dec. 211, 233–34 (BIA 1985))
- Meet the particularity requirement
  - “particular and well-defined boundaries” and constitute a “discrete class of persons” (*Matter of S-E-G-*, 24 I&N Dec. 579, 582, 584 (BIA 2008)); “discrete and definable boundaries” (*Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014)).
- Be socially distinct
  - “society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.” (*Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014))

# Formulating a Gender-Based PSG

## PSG Elements

- Gender
- Age
- Nationality / Ethnicity
- Family/Kinship Ties
- Marital / Relationship Status
- Historical Fact / Shared Past Experience
  - Lack of male protection?
- Refusal to Conform



# But...

- **“Gender + nationality” PSG is not a cognizable PSG**
  - **Counter:** Gender + nationality PSG is analogous to the “former Salvadoran MS-13 members” PSG found cognizable by the 4th Circuit in *Amaya v. Rosen*, 986 F.3d 424 (4th Cir. 2021). Compare PSG of “returning migrants” – unclear who is in/who isn’t in that PSG, which could include short-term vacationers. *Moreno-Osorio v. Garland*, 2 F. 4<sup>th</sup> 245, 255-56 (4th Cir. 2021).
- **“Gender + nationality + unable to leave/viewed as property ” is impermissibly circular (not independent of the harm suffered)**
  - **Counter:** A person’s inability to leave abusive relationships/being viewed as property is due to reasons beyond physical violence, i.e., economic, social, religious norms that subordinate women to men
  - **Tips:** make sure that the record shows how *each* element of a PSG is met and how your client is a member of the group

# Viability Gender-Based PSGs

- **Gender-Based Violence PSGs**
  - Gender + nationality (“[T]he size and breadth of a group alone does not preclude a group from qualifying as [a particular] social group,” *Alvarez Lagos v. Barr*, 927 F.3d 236, 253, (4th Cir. 2019) (quoting *Perdomo v. Holder*, 4th Cir.)
  - Gender + nationality + inability to leave/status in a domestic relationship/viewed as property by virtue of status in relationship/ resistance to patriarchal norms
  - Gender + nationality/ethnicity + opposition to/flouting of social norm (such as FGM)
  - Gender + nationality + status as a single woman + age;
  - Gender + nationality + past victimization status;
  - Gender + nuclear female family members of X (i.e., for an applicant who was abused along with other female family members by same persecutor)

# Examples of Gender-Based PSGs

*Matter of A-R-C-G*- “Married women in Guatemala who are unable to leave their relationship”. “[A]ny claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question.” 26 I&N Dec. 388, 392 (BIA 2014)

- Similar cognizable PSGs: *De Pena-Paniagua v. Barr*; *Najera v. Whitaker*
- But see: *Hernandez-Cabrera v. Barr*, 837 Fed. Appx. 148 (4th Cir. 2020) (unpublished)

*Alvarez Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019): “Unmarried mothers in Honduras living under the control of gangs”

*Safaie v. I.N.S.*, 25 F.3d 636 (8th Cir. 1994): “Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior”

*Gomis v. Holder*, 571 F.3d 353 (4th Cir. 2009): “Women who oppose female genital mutilation”

*Matter of Toboso-Alfonso*, 20 I.& N. Dec. 819 (BIA 1990): “Cuban homosexuals”

# Gender-Based PSGs and FGM

- Future Fear of female genital mutilation (“FGM”): Young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe (and who oppose the practice) (*Matter of Kasinga*, 21 I. & N. 357 (BIA 1996))
- Past FGM (Past FGM/C can be seen as “continuing persecution” as physical and psychological effects can last a lifetime; also, doesn’t preclude future FGM)
- **NOTE!** Parent-protector cases (very challenging) – ask:
  - Any fear of physical harm for parent?
  - Ostracism?
  - What if they express anti-FGM opinion?
  - What would parent do if child faces danger of forcible FGM?

# What would you do?

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# Gender-Based Asylum Litigation

## Credibility and Competency

Monica Mananzan  
Managing Attorney, Detained Adult Program  
CAIR Coalition



# Credibility in Immigration Court

*Generally, credible testimony  
can be enough to satisfy  
burden and win!*



# Basis of Credibility Findings under the REAL ID Act

*Determined by the totality of the circumstances*

- Demeanor, candor, or responsiveness  
Inherent plausibility
- Consistency between oral or written statements, but consider circumstances
- Internal consistency of each statement
- Consistency of such statements with evidence of record
- Any inaccuracies or falsehoods contained in the statement, even if not material





# Effect of Trauma on a Person's Ability to Tell their Story

- Credibility determinations involving individuals with indicia of mental illness are accorded more flexibility.
- Past trauma and other obstacles often impede asylum seekers from effectively telling their story
- Where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim.



# Competency



## The test for determining whether [respondent] is competent to participate in immigration proceedings is whether he/she/they:

- Have a rational and factual understanding of the nature and object of the proceedings,
- Can consult with the attorney or representative if there is one, and
- Have a reasonable opportunity to examine and present evidence and cross-examine witnesses.”



# Determining Competency

- Respondents in removal proceedings are presumed to be competent.
- Where there is indicia of incompetency, the Immigration Judge must make an inquiry into competency.
- Non-adversarial and collaborative
  - a. Indicia of incompetency can come from evidence presented by respondent or DHS, or from the observation by the judge
  - b. Where the indicia of incompetency exists, the DHS is obligated to provide the court with materials in its possession related to respondent's mental competency





# Indicia of Incompetency

Indicia means evidence in the record resulting in a “bona fide doubt” about the respondent’s competency to represent himself/herself/themselves, which can include:

- a. Respondent’s in-court behavior (e.g., responses to questions);
- b. Documentary evidence (e.g., mental health treatment records, past competency evaluations);
- c. Attorney-client interactions.
- d. Family and client interactions.

# Examples of Indicia

## Past or current evidence of interventions related to mental disorder

- Outpatient mental health treatment
- Psychiatric hospitalization
- Intervention for self-injurious behavior or suicide attempts
- Limited academic achievement
- Currently receiving mental health treatment

## Current manifestations of behavior suggesting mental disorder

- Poor memory
- Poor attention or concentration
- Confused or disorganized thinking
- Paranoid thinking (unreasonable fears)
- Grandiose thinking (overestimating own ability)
- Seeing or hearing things not present
- Serious depression or anxiety
- Poor intellectual functioning
- Irrational behavior or speech in court
- Lack of responsiveness in court



## Sources of Indicia

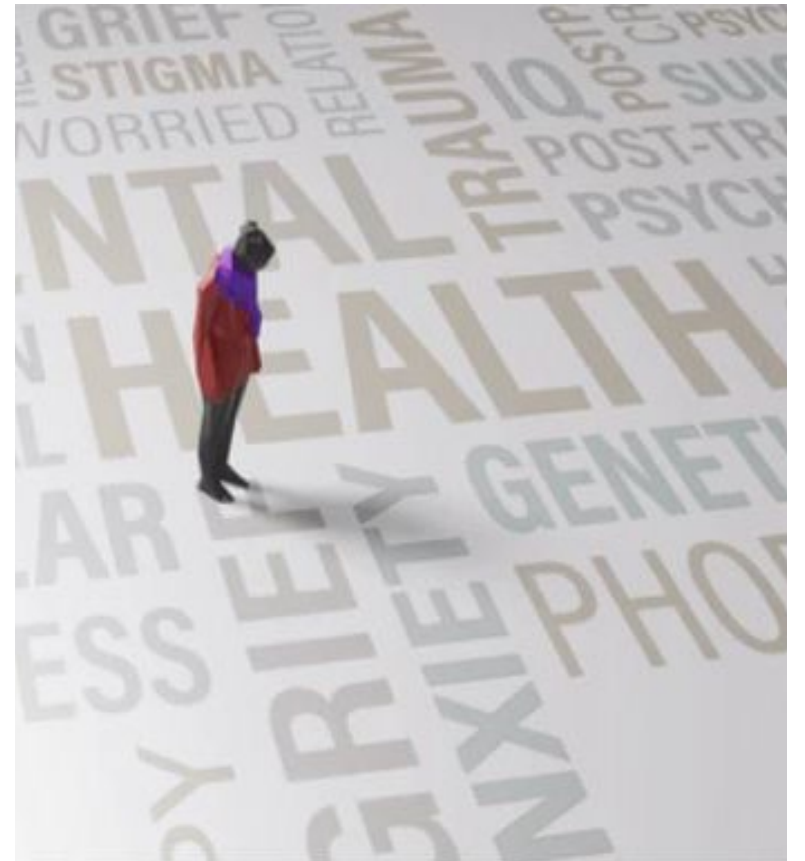
- any reliable source including family members, friends, legal service providers, health care providers, social service providers, caseworkers, clergy, detention personnel, or other collateral informants or third parties knowledgeable about the respondent.

## Form of Indicia

- Indicia of incompetence may appear in any form, such as observed behaviors, letters, government, legal, educational, employment, or health care records, or other verbal or written accounts.

## Timing of Indicia

- Because competence is fluid and may change over time, indicia of incompetence may appear and must be considered throughout all stages of the proceeding.





# Safeguards for Incompetency

- “**Safeguard**” is the term used to describe the **legal accommodation** for an incompetent immigrant respondent.
- **Case-by-case, circumstance-specific** determination.
- May still be **appropriate even if** the respondent’s **mental illness does not rise to the level of incompetency**
- Counsels should put forth safeguards they believe will **protect** their client’s **due process rights**



# Common Safeguards

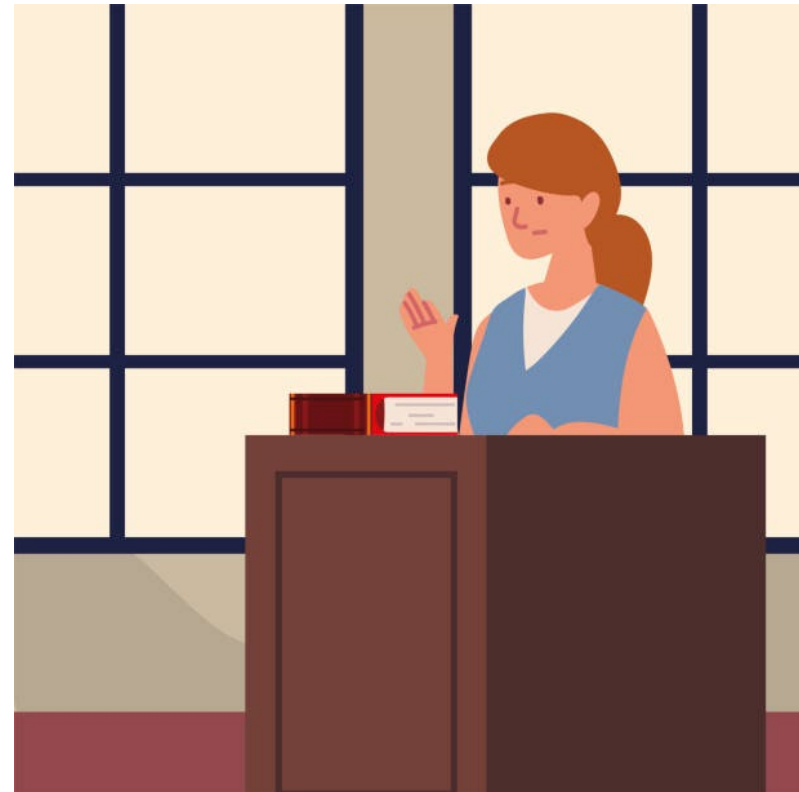
- Legal representation
- Identification and appearance of a family member or close friend who can assist the respondent and/or his legal representative
- Docketing or managing the case to enable the respondent to obtain legal representation and/or medical treatment intended to restore competency
- Waiving the respondent's appearance
- Closing the hearing to the public
- Actively aiding in the development of the record
- Allowing leading questions
- Exempting respondent from testifying, considering declaration in lieu of testimony
- Considering that inconsistencies, inaccurate details, or inappropriate demeanor during testimony may be reflective of a mental illness or disability, rather than an attempt to deceive the IJ.
- Accepting that respondent believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim.



# Competency Procedures

Where there are indicia of incompetency, the Immigration Judge must:

1. Take measures to assess the respondent's competency.
  - *Competency hearing*
  - *Mental health evaluation.*
2. Articulate a finding on competency and the reasoning behind it.
3. Prescribe the “safeguards” that are necessary to protect the respondent’s “rights and privileges” in the proceeding.



# Examples of Findings of Incompetency:

“Based on the documentary evidence presented, the Respondent does not have an adequate rational and factual understanding of the proceedings, nor does he have a sufficient ability to present testimony and other evidence on his behalf without the assistance of capable counsel. By his own admission, he does not fully understand the scope of his attorney’s representation in these proceedings. Exh. 3, Tab A at 4. The neuropsychological evaluation indicates that the Respondent has low cognitive ability and limited executive functioning, as well as likely TBI. Exh. 3, Tab B. The preliminary diagnoses in Dr. X’s report and the Respondent’s own acknowledgment of his cognitive deficiencies demonstrate that the Respondent does not meet the test for competency set out in Matter of M-A-M-, 25 I&N Dec. at



# Examples of Findings of Incompetency:

The Respondent submitted a detailed neuropsychological evaluation completed by Dr. X. Tab B. Dr. X concluded that the Respondent's test results are "strongly suggestive" of a Traumatic Brain Injury ("TBI"), which likely resulted from the Respondent's repeated head trauma. Id. at 10. Dr. X further found that the Respondent's intelligence "is consistent with an Intellectual Disability." Id. at 9. According to Dr. X, the Respondent has a similar "cognitive capacity" to that of a six-year-old child. Id. at 9-10. The report indicates that the Respondent's executive functioning is severely impaired and that he displays significant problems in communicating information. Id. at 11. The court has ultimately determined that the Respondent's difficulty in expressing himself is likely to interfere with his ability to assist his lawyer and to testify on his own behalf effectively."

