

**GENDER-RELATED PERSECUTION  
in Canadian Refugee Determination**

Presentation  
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It is a pleasure for me to participate in this session on "Gender Issues in Refugee Affairs". I have been asked to explore the question of the public/private dichotomy as it affects the determination of gender-related refugee claims in Canada.

By way of introduction, let me say that I have been a Member of the Immigration and Refugee Board of Canada (IRB) since its inception in 1989. The Board is mandated by Parliament to determine Convention refugee status for those arriving at Canada's borders. It does so by applying the definition of who is a Convention refugee found in the 1951 United Nations Convention Relating to the Status of Refugees, now incorporated into Canadian law. As you know, this definition states that any person who has a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, who is outside her country of nationality, and is unable or unwilling because of that fear to avail herself of the protection of that country, is a Convention refugee.

Your course materials include my 1996 paper International Protection and Gender-Related Persecution which discusses the work of the IRB as well as the Board's efforts to address the procedural, substantive and training implications of gender-related persecution. The most significant development in the past year is that the Chairperson's groundbreaking Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (Gender Guidelines),<sup>1</sup> first issued in 1993, have been updated to reflect

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<sup>1</sup> Guidelines issued by the Chairperson pursuant to Section 65(3) of the Immigration Act, Women Refugee Claimants Fearing Gender-Related Persecution, Immigration and Refugee Board, Ottawa, Canada, March 9, 1993. Because the IRB is an administrative tribunal and its Members are independent decision-makers, the Guidelines are not mandatory. By law, only negative decisions must be given in writing, however, to promote consistency in decision-making Members are asked to write both positive and negative reasons on gender-related claims and to justify any departure from the Guidelines. The Federal Court of Canada has upheld this approach in Narvaez v. Canada, (1995) 2 F.C. 55).



developments in Canadian refugee law, especially the Supreme Court of Canada's landmark decision in Ward.<sup>2</sup> You have copies of the Updated Gender Guidelines in your course materials and you will have an opportunity to apply them to a case scenario involving sexual assault in the discussion which follows.

From the outset, the Gender Guidelines explicitly addressed the public/private distinction which historically has rendered women's experience and point of view invisible, preventing the recognition of women's societal rights as fundamental human rights deserving of national and international protection. In confronting the challenge of identifying forms of persecution directed primarily against women, the IRB has drawn on Canadian jurisprudence in the areas of refugee rights and women's equality rights. Canadian refugee law has long recognized that it is not necessary for the agent of persecution to be the state itself in order for the refugee claim to succeed,<sup>3</sup> a fact that is critical in many gender-related refugee claims where the agent of persecution is a private citizen ie., husband, father, male relatives or members of the community. The Supreme Court of Canada's decision in Ward also clarified that it is not necessary for state complicity to be present for the fear of persecution to be well-founded. If a woman fears the violation of a fundamental human right from which the state is unable or unwilling to adequately protect her, that is sufficient to found a refugee claim in Canada.

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<sup>2</sup> Canada (A.G.) v. Ward, [1993] 2 S.C.R. 689

<sup>3</sup> Rajudeen v. M.E.I. (1984), 55 N.R. 129 (F.C.A.). This case involved a Tamil whom the Sri Lankan police failed to protect from Sinhalese thugs.



Similarly, since the advent of the Canadian Charter of Rights and Freedoms,<sup>4</sup> Canadian jurisprudence on women's equality rights has challenged the public/private dichotomy by looking at issues such as domestic violence and sexual violence. The "private" sphere of the home was opened up to public scrutiny and the point of view of women was placed at the centre of legal analysis. In a number of landmark decisions the Supreme Court of Canada took direct aim at the view that "the home is a man's castle" where he has unfettered sway over his wife. Also challenged was the common misconception that sexual assault is an act of seduction, recognizing it instead as a form of violence which has a devastating impact on women. Let us look briefly at two of the leading decisions.

In 1990 The Queen v. Lavallee<sup>5</sup> dealt with a woman on trial for shooting her common-law husband after many years of domestic violence. She argued that because of the long history of battery she had a reasonable apprehension of bodily harm and was thus entitled to defend herself. In weighing whether her actions were what a reasonable person would do in those circumstances, the Supreme Court accepted the scientific evidence regarding the battered woman syndrome to explain why the woman stayed with the batterer for so many years and why she eventually lashed out against him. Writing for a unanimous Court, Madame Justice Wilson stated:

Expert evidence on the psychological effect of battering on wives and common-law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the Appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why would she continue to live with such a

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<sup>4</sup> Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), 1982, c.11

<sup>5</sup> The Queen v. Lavallee (1990), 1 S.C.R. 852



man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect a woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

The Court not only found that Ms. Lavalley's actions in shooting her common-law husband were objectively reasonable in the circumstances, it also repudiated the notion that a woman is her husband's property by stating categorically that "...no man has a right to abuse any woman under any circumstances."

The following year, McGraw v. The Queen<sup>6</sup> dealt with a man on trial for threatening to rape an Ottawa cheerleader who was the object of his twisted infatuation. The issue before the Court was whether the threat of rape could be seen as a threat of grievous bodily harm. In coming to its decision, the Court wrote:

Violence is inherent in the act of rape. The element of sexuality aggravates the physical interference caused by the assault. Sexual assault results in greater impact on the victim than a non-sexual assault...to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave harm, is to ignore the perspective of women. For women, rape under any circumstances must constitute a profound interference with their physical integrity.

What is striking about this decision is that the experience of rape was examined from the point of view of the woman herself, casting aside the age-old notion that rape is an act of sexual desire and recognizing it instead as an act of violence.

In developing the Gender Guidelines the IRB also reflected and reinforced the efforts of the international community to recognize the particular forms of persecution suffered primarily by women. In 1985 the Executive Committee of the United Nations

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<sup>6</sup> McGraw v. The Queen (1991), 3 S.C.R. 72



High Commissioner for Refugees (UNHCR) recognized that women who face harsh and inhumane treatment for transgressing the social mores of their societies may be considered a "particular social group" within the definition of a Convention refugee.<sup>7</sup>

In 1991 the UNHCR issued its first Guidelines on the Protection of Refugee Women<sup>8</sup> and in 1993 the UNHCR Executive Committee adopted Resolution 73 which encourages states to interpret sexual violence as a form of persecution.<sup>9</sup> Also in 1993, the United Nations Commission on Human Rights adopted a resolution expressing its concern and acknowledging that women are susceptible to particular sorts of human rights abuses.

The United Nations Committee on the Elimination of Discrimination Against Women, charged with the responsibility of overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted the position in 1992, that gender-related violence is a "form of discrimination which seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."<sup>10</sup>

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<sup>7</sup> Conclusion No. 39 (XXXVI) Refugee Women and International Protection, Executive Committee 36th Session, 1985.

<sup>8</sup> Guidelines on the Protection of Refugee Women, prepared by the Office of the United Nations High Commissioner for Refugees (Document EC/SCP67), Geneva, Switzerland, July 1991.

<sup>9</sup> UNHCR "Executive Committee Conclusion No. 73 Refugee Protection and Sexual Violence" Report of 44th Session [Geneva: Office of the United Nations High Commissioner for Refugees, U.N. Doc.A/AC.96/821 (1993)]

<sup>10</sup> U.N. Committee on the Elimination of Discrimination Against Women, 11th Session, General Recommendations No. 19, at 1, U.S. Doc. CEDAW/C 1992/L.1/Add. 15 (1992).



More recently, the 1995 United Nations Fourth World Conference on Women, in Beijing, China, agreed that discrimination on the basis of gender can be grounds for granting Convention refugee status.

In the past decade international human rights organizations have also taken important steps in identifying specific human rights violations suffered by women. Amnesty International's 1991 report, Women in the Front Line: Human Rights Violations Against Women, documented cases of women subjected to human rights violations by state authorities in their countries. Among those targeted were women's rights activists who organized literacy classes for women (Morocco), community kitchens in agricultural areas (Peru), and a women's clinic to counsel victims of rape and battery (El Salvador).<sup>11</sup>

In 1991 Amnesty International also released Rape and Sexual Abuse: Torture and Ill-treatment of Women in Detention which documented the pervasive refusal of governments to recognize rape and sexual abuse by government agents as serious human rights violations. The report stated unequivocally that whenever a policeman or soldier rapes a woman in his custody "...that rape is no longer an act of private violence, but an act of torture or ill-treatment for which the state bears responsibility."<sup>12</sup>

In 1995 Amnesty International released Human Rights are Women's Rights, a report which broke new ground by dealing with persecution on the grounds of sexual orientation.<sup>13</sup> Also in 1995 The Human Rights Watch Global Report on Women's Human

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<sup>11</sup> Women in the Front Line: Human Rights Violations Against Women, Amnesty International Publications, March 1991, New York, New York, U.S.A.

<sup>12</sup> Rape and Sexual Abuse: Torture and Ill-treatment of Women in Detention, Amnesty International, International Secretariat, December 1991, London, United Kingdom.



Rights<sup>14</sup> documented, inter alia, the use of rape as a tool of political repression, abuses against women in custody and domestic violence, all subjects which the IRB frequently deals with when hearing gender-related refugee claims.

The Gender Guidelines classify women refugee claimants into four broad categories:

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 (ie. racial, national or social) or what they believe in, or are perceived to believe in (ie. religion or political opinion). In such cases, the nature of the harm feared and procedural issues at the hearing may still vary as a function of the claimant's gender;

2. Women who fear persecution solely for reasons pertaining to kinship, ie. because of the status, activities or views family members, and who may have political opinions imputed to them as a result of kinship ties;

3. Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence (in the home or in situations of civil war) either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect them;

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<sup>13</sup> Human Rights are Women's Rights, Amnesty International, New York, March 1995.

<sup>14</sup> The Human Rights Watch Global Report on Women's Human Rights, Human Rights Watch, August 1995, U.S.A.



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 practice, 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 Updated Gender Guidelines incorporate the binding analysis of the Supreme Court of Canada in Ward regarding the application of the “membership in a particular social group” ground. The Ward decision indicated three possible categories, including “groups defined by an innate or unchangeable characteristic” which would “embrace individuals fearing persecution on such bases as gender, linguistic background, and sexual orientation”. This analysis confirms the approach taken in the original Gender Guidelines that, although not specifically enumerated as one of the grounds for establishing refugee status, “gender” may properly be the basis for the particular social group ground in the definition. As such, “gender” becomes a ground analogous to the enumerated grounds of race, religion, nationality and political opinion, and is thus recognized as a ground protected against discrimination and one involving fundamental human rights which individuals cannot be expected to renounce.

The Supreme Court in Ward defines persecution as a “sustained or systematic violation of basic human rights demonstrative of a failure of state protection”. The emphasis is on the lack of state protection not on whether or not the state itself is



complicit in the persecution.<sup>15</sup> In Ward there is a presumption that the state protects its citizens and thus the onus is on the refugee claimant to provide "clear and convincing confirmation of the state's inability to protect".

To illustrate how the Gender Guidelines are applied in practice to challenge the public/private dichotomy in women's refugee claims, I will cite some decisions from the IRB bank of jurisprudence. In a domestic violence case that came before me, a woman from Bulgaria had suffered many years of battery and rape at the hands of her husband and, despite repeated attempts to seek protection from the authorities, none was forthcoming.<sup>16</sup> In arriving at a positive determination, the panel cited the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment and found that "The rape and battery inflicted on the claimant...caused her physical and psychological harm serious enough to bring it within the meaning of "torture" as outlined in the Convention". The panel also found that "...spousal rape and battery contravene the claimant's internationally protected right to personal integrity as enshrined in Article 3 of the Universal Declaration of Human Rights which states 'Everyone has the right to life, liberty and the security of person'." Regarding state protection, the panel found that Bulgaria, a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, had failed to take appropriate and effective measures to overcome all forms of gender-based violence, whether by private or public act (General Recommendation 19 on Violence Against Women). The panel concluded that "...the

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<sup>15</sup> This approach differs from that of many countries in Europe, ie. Germany, France, Italy, Norway, Sweden and Switzerland, who do not generally accept as Convention refugees people targeted by non-state agents.

<sup>16</sup> CRDD, T91-01497/01498, Ramirez, Toth, August 9, 1994



claimant has an internationally protected right to protection from domestic violence and failure to give that protection is a form of gender-related discrimination."<sup>17</sup>

Where claims based on domestic violence have failed, typically the claimant has not rebutted the presumption of state protection. In a recent Israeli case, the claimant had failed to consistently report her common-law husband's assaults to the police. She sought medical attention but did not disclose the true reason for her injuries. The panel considered the fact that the Israeli Domestic Violence Prevention Law grants the court the right to order removal of an offending family member and deny his entry into the home. It also considered the fact that there are shelters for battered women and counseling centres for victims of violence.

Last year I coordinated a national training module on Domestic Violence as a Form of Gender-Related Persecution for the IRB.<sup>18</sup> Workshops were held throughout the country in November 1996 to coincide with the release of the Updated Gender Guidelines which identify domestic violence as a form of gender-related persecution along with rape, infanticide, genital mutilation, bride-burning, forced marriage, forced abortion and compulsory sterilization.

The workshops focused on common myths about domestic violence which can interfere with a decision-maker's ability to correctly assess the evidence. One such myth is

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<sup>17</sup> The Federal Court of Canada has found that "women subject to domestic violence in Ecuador" were members of a particular social group (Narvaez v. M.C.I. (1995), 2 F.C. 55 (T.D.) and that the IRB had erred in not finding that "women subject to domestic violence in Brazil" constituted a particular social group (Diluna v. M.E.I. (1995), 29 IMM. L.R. (2d) 156 (F.C.T.D.)

<sup>18</sup> Domestic Violence as a Form of Gender-Related Persecution, Immigration and Refugee Board Training Module, Toronto Working Group on Women Refugee Claimants, November 1996.



that assaulted women would leave their abusive partners if they wanted to. In reality, a woman may stay in an abusive relationship for many reasons: she hopes the relationship will improve; she does not want to break up the family; relatives and in-laws pressure her to stay; she is dependent on her partner's income and cannot support herself; her partner has threatened to harm her and/or the children if she leaves.

The workshops also examined common survival strategies adopted by victims of domestic violence, such as: denial that a problem exists; fondness for the victimizer, accompanied by fear; adoption of the victimizer's perspective; and fear of interference by the authorities because it could lead to additional abuse. Findings of credibility are central to any refugee claim and specialized training gives decision-makers the tools they need to understand the assaulted woman's own point of view, why she may have remained in an abusive relationship and whether or not her actions were reasonable in all the circumstances.

Another claim I recently heard involved a lesbian woman from Venezuela who, along with her lover, had been detained by the police. Both women were threatened with rape and sexually touched while in detention. In coming to a positive determination, the panel cited international human rights monitors such as the Human Rights Watch which in its Statement on Lesbian and Gay Rights says: "Human Rights Watch opposes state-sponsored and state-tolerated violence, detention and prosecution of individuals because of their sexual orientation, or private sexual practices. Human Rights Watch derives this policy from the right to life, liberty and security of person (Universal Declaration of Human Rights Article 3...). Amnesty International's report Human Rights are Women's



Rights was also cited: "Lesbians are often targeted by governments seeking to control their identities and activism. Lesbians face double jeopardy: vulnerable because they are women, lesbians are further marginalized and stigmatized because of their sexual orientation." Following Ward, the reasons for the decision set out "gender" and "sexual orientation" as groups defined by innate and unchangeable characteristics, and found that the claimant was a member of two social groups "women" and "homosexuals", "...the two indivisible elements of being a lesbian woman."

The refugee claims and young girls routinely come before the Board along with those of other minor claimants. In your course materials there are copies of the Chairperson's Guidelines on Child Refugee Claimants: Procedural and Evidentiary Issues,<sup>19</sup> issued last fall. These new guidelines assert the primacy of the "best interest of the child" principle in selecting all processes and procedures in a child's refugee claim, and they point to the international human rights instruments for guidance, especially the Convention on the Rights of the Child (CRC).

As in the case of the Gender Guidelines, the guidelines on minor claimants are the outgrowth of discussions in the former Working Groups on Women Refugee Claimants which first identified the need to address both the procedural and substantive issues in the claims of refugee children. In 1995 the Toronto IRB celebrated International Women's Day with a panel discussion organized by the Working Groups on Women Refugee Claimants entitled "The Human Rights of Young Women and Girls: Focus on Young

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<sup>19</sup> Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act, Child Refugee Claimants: Procedural and Evidentiary Issues, Immigration and Refugee Board, Ottawa, Canada, September 30, 1996)



Refugee Women". One of the speakers, Prof. Cynthia Price-Cohen, Executive Director of Child Rights International Institute, shared her expertise on the United Nations Convention on the Rights of the Child and the principle of "the best interest of the child" in relation to child prostitution, arranged marriage and female genital mutilation.

The case of a ten-year-old girl from Somalia who feared female genital mutilation (FGM)<sup>20</sup> illustrates key hearing room procedures now codified in the Guidelines on Child Refugee Claimants. Because of her youth, the child required a designated representative for the refugee hearing, the selection of which is discussed at length in the guidelines, and which in the case of this claimant was her mother.<sup>21</sup> Minor claimants may be asked to give oral evidence at the refugee hearing and the approach for eliciting such evidence is discussed in detail in the guidelines. However, my colleague and I did not call the Somali girl to testify because of her very young age and the sensitivity of the subject of matter, facts which mitigated against her even being present in the hearing room.

In considering the merits of her claim, the panel relied on the international human rights instruments for guidance and found that "the minor claimant's right to personal security would be grossly infringed if she were forced to undergo female genital mutilation" pursuant to Article 3 of the Universal Declaration of Human Rights ("Everyone has the right to life, liberty and the security of person"). We also considered

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<sup>20</sup> CRDD T93-12197/8/9, Ramirez, MacCaffrey, May 10, 1994. With this decision Canada became the first country to recognize female genital mutilation as a form of gender-related persecution. The Federal Court of Canada has since recognized FGM as a "cruel and barbaric practice" leading to "a valid fear of persecution" in IMM-215-95, July 25, 1995 (F.C.T.D.)

<sup>21</sup> Section 69(4) of the Immigration Act provides special protection to refugee claimants under the age of 18 in the form of a designated representative in proceedings before the Convention Refugee Determination Division.



the Convention on the Rights of the Child which calls on governments to “protect the child from all forms of physical and mental violence, injury or abuse...” (Article 19) and to “...take all effective and appropriate measures...to (abolish) traditional practices prejudicial to the health of children (Article 24). The Convention recognizes the “...right of the child to the enjoyment of the highest attainable standards of health” (Article 24) and explicitly protects children from acts of cruelty, torture and any other form of “inhuman or degrading treatment” (Article 37).

Documentary evidence established conclusively that while Somalia outlawed FGM in 1947, the overwhelming majority of women and girls in that country continue to undergo mutilation. The panel concluded that “the authorities will not protect the minor female claimant from the physical and emotional ravages of FGM given the evidence of its widespread practice in that country.”

The Guidelines on Child Refugee Claimants urge Members to make reference to the Gender Guidelines when dealing with the claims of young women and girls, especially where rape, sexual assault, genital mutilation and other forms of gender-related persecution are involved.

In conclusion, the Canadian Gender Guidelines have served as a model internationally in identifying forms of persecution suffered by women and girls which are unique to their gender. Other countries have taken Canada’s lead, notably the United States which issued its Asylum Gender-Based Guidelines<sup>22</sup> in 1995, and Australia which

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<sup>22</sup> Immigration and Naturalization Service (INS), Considerations for Asylum Officers Adjudicating Asylum Claims for Women (May 16, 1995), U.S.A.



issued its Guidelines on Gender Issues for Decision Makers<sup>23</sup> in 1996. Canada will continue to draw on developments in domestic and international law in the areas of refugee rights and women's equality rights to maintain its leadership position on the protection of refugee women.

Thank you. I welcome your questions and comments.

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<sup>23</sup> Department of Immigration and Cultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers (July 1996), Australia.