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SAFAIE v. INS
25 F.3d 636 (8th Cir. 1994)
United States Court of Appeals for the Eighth Circuit

I. FACTS

Azar Safaie was authorized to remain in the United States as a nonimmigrant visitor from December 1984 until April 1985.¹ She remained in this country after her visitation period had expired, and in October 1987, the INS ordered her to show cause why the agency should not deport her. She conceded that she was deportable but requested asylum, claiming that the Iranian government might imprison or kill her for her opposition to the Khomeini regime and its treatment of women.²

At a hearing before an immigration judge, Safaie's testimony centered on her treatment in Iran. First, she described the manner in which the government treated her as a result of her Western dress, makeup, and perfume. For instance, an Iranian official had employed Safaie as a secretary in 1981, but he discharged her because she refused to wear traditional Iranian clothing.³ Additionally, while she was a student at the University of Teheran, Revolutionary Guard members threatened her due to her Western clothing and smoking.⁴ She began wearing the Islamic dress when it became mandatory by law in 1982. Second, Safaie described the manner in which she was treated because of her political opposition to the "lack of freedom" in Iran.⁵ She was a member of a pro-Shah⁶ party and participated in several demonstrations against the Khomeini regime. She had also allowed a group of people to meet at her house in order to plan a *coup d'etat*. The government later discovered the coup, and all the group members either were killed or fled the country. As a result,

Hezbollah members followed her everywhere she went. Third, Safaie testified about her treatment at the University of Teheran.⁷ In 1982, officials detained thousands of demonstrating students, including Safaie. A university official interrogated her for eight hours, threatened to kill her, and forced her to fill out a questionnaire and to undergo twenty separate interviews concerning her political beliefs. Although the university readmitted Safaie one month after the incident, she was expelled in 1984 because she refused to accept Islamic rules and failed to attend the funeral of the university official who had interrogated her two years earlier. In addition, the immigration judge heard that the Iranian authorities had taken her passport in 1983, but that a friend of Safaie's had arranged to have it returned. Safaie also managed to obtain a visa to visit the United States in 1984.⁸

Denying Safaie's request for asylum, the immigration judge found that her evidence "consisted primarily of blanket assertions" that she might be persecuted for her past criticisms of the Khomeini regime were she returned to Iran. Safaie appealed to the Board of Immigration Appeals. The Board affirmed and adopted the immigration judge's decision. Safaie petitioned the Eighth Circuit to review the final INS decision denying her request.

II. HOLDING

The Eighth Circuit affirmed the Board's decision denying Safaie's asylum request because Safaie failed to meet the statutory requirements for asy-

¹ *Safaie v. INS*, 25 F.3d 636, 638 (8th Cir. 1994).

² *Safaie*, 25 F.3d at 638. Islam preaches that the inferior station of women is fundamental to the survival of the state. Since the Islamic Revolution in Iran, the Khomeini regime has instituted Islamic tenets which have been recognized as the most conspicuous abuses of women in modern times. For a more detailed discussion of the abuses on women in the Khomeini regime, see David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution As Grounds for Asylum*, 20 Colum. Hum. Rights. L. Rev. 203, 207-22 (1988).

³ 25 F.3d at 638. Khomeini requires women to cover everything except their faces and hands with a wrap called a Hejab. The Hejab physically and psychologically oppresses women because unveiled women are ostracized and labeled as prostitutes. The minimal punishment for

refusing to wear a veil consists of 74 lashes without any formal review of the crime. The maximum punishment is death. See Neal, *supra* note 2, at 217-21.

⁴ *Id.* The government approves of the Hezbollah practice of upholding public morality by harassing, detaining, attacking, knifing, and maiming women who refuse to wear Hejab. See Neal, *supra* note 2, at 220.

⁵ *Id.* at 639.

⁶ *Id.* A shah ruled Iran's constitutional monarchy between 1906 and 1979. At that time, Islamic clergymen led a popular uprising which resulted in the establishment of a republic. See *Iran*, Microsoft Encarta (1995) (computer software).

⁷ *Id.* at 638-39.

⁸ *Id.* at 639.

lum.⁹ Under the Refugee Act of 1990, the United States Attorney General may grant asylum¹⁰ to an applicant who “is persecuted or . . . has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹ The Eighth Circuit ruled that Safaie did not fit the statutory definition because Iranian women could not constitute a particular social group by virtue of gender alone.¹² Although the Eighth Circuit concluded that women who oppose dress and behavioral customs so profoundly that they would choose to suffer the severe consequences of non-compliance could constitute a particular social group within the meaning of the statute, it found that Safaie was not a member of such a group.¹³ Furthermore, the court found that Safaie lacked a well-founded fear of persecution based on her articulated political beliefs.¹⁴

III. ANALYSIS

A. EIGHTH CIRCUIT’S OPINION

In her request for asylum, Safaie first contended that she had a “well-founded fear of persecution on account of . . . [her] membership in a particular social group. . . .”¹⁵ To qualify for asylum on these grounds, she was required to “(1) identify a group that constitutes a ‘particular social group’ . . . , (2) establish that . . . she is a member of that group, and (3) show that . . . she would be persecuted or has a well-founded fear of persecution based on that membership.”¹⁶ A well-founded fear of persecution is one that is genuine and that a reasonable person in the same circumstances would have if returned to her native land.¹⁷

Safaie asserted that all Iranian women, by virtue of the harsh restrictions which the Iranian government placed on them, constitute a particular so-

cial group.¹⁸ The Eighth Circuit refused to accept this contention, stating that no reasonable fact finder could conclude that “*all* Iranian women had a well-founded fear of persecution based *solely* on their gender.”¹⁹

Safaie further asserted that those women who advocate women’s rights or oppose Iranian behavioral or dress customs constitute a “particular social group,” of which she was a member. The Eighth Circuit stated that a group of women such as Safaie could constitute a particular social group only if their opposition met the standard set forth in *Fatin v. INS*.²⁰ The Third Circuit in *Fatin* limited such a group to those women who find Iranian gender-specific laws “so abhorrent that they refuse to conform—even though . . . the routine penalty for noncompliance is 74 lashes, a year’s imprisonment, and in . . . many brutal rapes and death”²¹ The Eighth Circuit found that Safaie failed to meet this standard. It interpreted Safaie’s wearing of the mandatory garb as her choice to comply with the dress customs rather than suffer the harsh consequences of noncompliance. The court did not reach the issue of whether she had a well-founded fear of persecution because it inferred from her testimony that she would forego her opposition to the Khomeini regime in favor of compliance with the dress and behavioral customs in order to avoid punishment. Second, Safaie requested asylum based on her “well-founded fear of persecution on account of . . . [her] political opinion.” To qualify for asylum on these grounds, she had to “(1) specify the political opinion on which . . . she relie[d], (2) show that . . . she [held] that opinion, and (3) show that . . . she would be persecuted or ha[d] a well-founded fear of persecution based on that opinion.”²² Her claim hinged on her opposition to the Iranian Islamic government and the harsh restrictions which the government placed on women.²³ In denying her request, the Eighth Circuit did not deny that her opposition was

⁹ *Id.* at 639-41.

¹⁰ See 8 U.S.C. § 1158(b)(1) (1994).

¹¹ 8 U.S.C. § 1101(a)(42)(A) (1994) defines the statutory grounds for asylum:

The term “refugee” means . . . any person who is outside any country of such persons’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and 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

¹² *Safaie*, 25 F.3d at 640.

¹³ 25 F.3d at 640.

¹⁴ *Id.* at 640-41.

¹⁵ *Id.* at 640 (quoting 8 U.S.C. § 1101(a)(42)(A) (1994)).

¹⁶ *Id.* (quoting *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993)).

¹⁷ *Id.* at 639 (citing *Wojcik v. INS*, 951 F.2d 172, 173 (8th Cir. 1991) (per curiam)).

¹⁸ *Id.* at 640.

¹⁹ *Id.* (all emphasis added).

²⁰ *Id.* (citing *Fatin*, 12 F.3d at 1233).

²¹ *Fatin*, 12 F.3d at 1241 (quoting Petitioner’s Br. at 12-14) (internal citations omitted).

²² 12 F.3d at 1242.

²³ *Safaie*, 25 F.3d at 640-41.

political; rather, it concluded that she lacked a well-founded fear of persecution based on her political opinion.²⁴

In order to establish a well-founded fear of persecution, Safaie had to establish that she had both a subjective and an objective fear of persecution.²⁵ The Eighth Circuit found that she met the subjective component because the record demonstrated her genuine fear that the government would hurt her.²⁶ However, the court concluded that she failed to meet the objective component because no reasonable person in Safaie's circumstances would fear persecution if returned to Iran. It based its conclusion in part on the evidence that she remained in Iran physically unharmed after expulsion from the university and that neither she nor her family were harmed after the coup attempt. Additionally, the court highlighted the Iranian government's willingness to issue a visa to Safaie even after her expulsion and participation in the coup attempt. Even though she reasonably feared imprisonment upon her return to Iran, the court found that brief confinement for opposition to a totalitarian regime was not persecution.²⁷

The Eighth Circuit also concluded that Safaie faced the same risk of persecution as all other Iranian women because she failed to show that the persecution was directed specifically at her for her political opinion.²⁸ Even if she had presented facts that demonstrated a well-founded fear of persecution, the court could not have granted her asylum request. Additionally, she had to show that the persecution was grounded in more than "general condi-

tions of upheaval and unrest"²⁹; for "random violence [could] not substantiate a claim of persecution under immigration laws."³⁰

B. EVALUATION OF THE COURT'S OPINION

By ruling that women who advocate feminism are not a "particular social group" unless they choose to accept severe physical punishment over compliance with behavioral and dress customs, the Eighth Circuit established a high standard for female asylum applicants to meet. To require a person to choose between sacrificing bodily integrity and demonstrating a commitment to her political beliefs is essentially a false choice. When the Eighth Circuit examined whether Safaie had a reasonable "well-founded fear," the court first considered that the Iranian government had not physically harmed her and that it issued a visa to her after expulsion from the university and the coup attempt. It also considered that the Iranian government had readmitted her to the university after her expulsion. Each of these facts was unknown to Safaie at the time of their occurrence. Hence, the court used its hindsight to evaluate the totality of her circumstances. The court disregarded the fact that a reasonable person does not have the benefit of time passing to decide whether she should have actual fear of persecution. In doing so, the Eighth Circuit established a potentially insurmountable standard for female applicants to meet.

²⁴ 25 F.3d at 640-41. While the *Fatin* court acknowledged that "feminism qualified as a political opinion" protected under the statute, the court did not grant asylum to *Fatin* because she failed to demonstrate that Iranian feminists were subject to treatment "extreme" enough to constitute persecution. *Fatin*, 12 F.3d at 1242-43.

²⁵ *Id.* at 640.

²⁶ *Id.* At the hearing, a psychologist from the Center for Treatment of Torture Victims testified that she had treated Safaie for post-traumatic stress disorder in June 1987. Safaie had experienced nightmares, anxiety, panic attacks, and mood swings. While the psychologist testified that these symptoms were consistent with physical torture, the psychologist could not confirm that Iranian government's actions caused Safaie's symptoms. *Id.* at 639.

²⁷ *Id.* at 640 (citing *Kapcia v. INS*, 944 F.2d 702, 708 (10th Cir. 1991)).

²⁸ *Id.* In order to meet the statutory definition of persecution, the applicant must show that the persecutory policies were enforced selectively against her. See Anne M. Gomez, *The New INS Guidelines on Gender Persecu-*

tion: Their Effect on Asylum in the United States for Women Fleeing the Forced Sterilization and Abortion Policies of the People's Republic of China, 21 N.C.J. Int'l L. & Com. Reg. 621, 634-35 (1996). The courts continually deny asylum to Chinese citizens opposing the government's "one couple, one-child" policy because the applicants cannot prove that they are more likely than any other citizen to suffer the consequences of not obeying the policy. Population control is the sole purpose of the "one couple, one child" policy, and the government punishes all who disobey. Therefore, the Chinese government does not selectively enforce the policies against only those persons who disagree with the policy. See Gomez, *supra*, at 634-35. (citing *Matter of Chang*, No. A-27202715, 1989 BIA LEXIS 13; *Chen Zhou Chai v. Carroll*, 858 F. Supp. 569 (E.D. Va. (1994), *aff'd* 48 F.3d 1331 (4th Cir. 1995)).

²⁹ *Huaman-Cornelio v. Board of Immigration Appeals*, 979 F.2d 995, 1000 (4th Cir. 1992).

³⁰ *Rodriguez-Rivera v. United States Dep't of Immigration & Naturalization*, 848 F.2d 998, 1006 (9th Cir. 1988) (per curiam).

The Second, Third, and Eighth Circuits have established such high standards for gender-based asylum claims for two reasons. First, allowing gender alone to define a "particular social group" would mean that a number of countries' entire female populations would become eligible for asylum.³¹ However, the fear of the flood of asylum claimants is not itself well-founded. On March 9, 1993, the Canadian Immigration and Refugee Board issued its *Guidelines on Women Refugee Claimants Fearing Gender Related Persecution*. These were the first national guidelines to recognize women who flee persecution based on their gender as refugees.³² Under these guidelines, Canada began granting asylum to women subjected to reproductive persecution.³³ As of yet, the floodgates have not opened in Canada.³⁴ Notably, the flow of immigrants into the United States has not increased since the beginning of this century.³⁵ Female applicants make up only thirty percent of the 145,000 asylum applicants.³⁶ An even smaller number of women are able to satisfy the procedural and legal requirements to obtain asylum—especially the "well-founded fear" requirement.³⁷ Therefore, the courts' fear of floodgates may be misplaced.

Second, courts are probably reluctant to condemn the policy decisions that other governments make regarding important social issues. For example, while courts recognize that individuals may disagree with Chinese reproductive policies supporting forced abortion or sterilization, they also acknowledge that China faces a population crisis.³⁸ Courts prefer not to second-guess the means by which the Chinese government has decided to address this dilemma even when those means are abhorrent to American culture.

C. NEW INS GUIDELINES FOR ADJUDICATING ASYLUM CLAIMS BASED ON GENDER PERSECUTION

On May 26, 1995, the INS Office of International Affairs issued a memo entitled *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*.³⁹ This memo was "to provide the INS Asylum Officer Corps . . . with guidance and background on adjudicating cases of women based wholly or in part on their gender."⁴⁰ The new guidelines do not mandate asylum officers to make any changes to current asylum law. They simply synthesize current law on gender-based persecution claims and describe the new interview procedures which asylum officers are encouraged to follow when evaluating gender-based claims.⁴¹

1. ANALYSIS FOR ASYLUM OFFICERS' ADJUDICATION OF GENDER-BASED CLAIMS

The guidelines outline the various factors which asylum officers must consider in order for courts to uphold their decision to grant or withhold asylum status. Although they do not distinguish between male and female applicants with respect to the legal analysis conducted on their claims, they warn asylum officers that gender-based claims, particularly those which females make, may be more complex to adjudicate than other claims. The guidelines instruct asylum officers to be attentive to three issues which might arise in gender-related claims: (1) whether the gender-based harm is serious enough to constitute persecution; (2) whether the gender-based persecution has a statutory foundation; and (3) whether gender precludes the applicant from seeking her own government's protection or from relocating within her country.⁴²

³¹ See Gomez, *supra* note 28, at 632, 645.

³² Immigration and Naturalization Service, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, at 3 (May 26, 1995) (citing Immigration and Refugee Board, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, Canada: Immigration and Refugee Board, 9 March 1993) [hereinafter INS Guidelines].

³³ Gomez, *supra* note 28, at 645.

³⁴ *Id.*

³⁵ Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum*

Law, 4 Am. U.J. Gender & L. 415, 452 (1996). In 1995, about 900,000 people immigrated into the United States. *Id.* at 452.

³⁶ Bashir, *supra* note 35, at 452.

³⁷ *Id.*

³⁸ Gomez, *supra* note 28, at 634-35 (discussing the selective enforcement requirement with respect to the Chinese "one couple, one child" policy).

³⁹ INS Guidelines.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 4-18.

⁴² *Id.* at 8-18.

Harms that are serious enough to constitute persecution include “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.”⁴³ If many people within a country suffer from the same harms, the applicant’s claims may not rise to the level of persecution.⁴⁴ Discriminatory practices and experiences alone will not constitute persecution; however, if they accumulate over time and increase in intensity, they might rise to the requisite level.⁴⁵

The guidelines list harms that may constitute persecution and are typically unique to female gender-based asylum claims: sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion.⁴⁶ Nevertheless, the guidelines do not require asylum officers to conclude that a claim of sexual violence amounts to persecution.⁴⁷ Even when the applicant asserts that she has been raped, she must still meet the statutory requirements by proving that (1) she has a well-founded fear of persecution and (2) the persecution is based on race, religion, nationality, membership in a particular social group, or political opinion.⁴⁸ The guidelines also suggest that forced behavior which is “profoundly abhorrent” to the applicant’s fundamental beliefs may constitute persecution.⁴⁹ However, they recognize the high standard which the *Fatin* court set⁵⁰ and emphasize that our society’s views of what is unfair, unjust, unlawful, or unconstitutional should not define persecution.⁵¹

The INS guidelines permit officers to grant asylum only for persecution based on those grounds included in the Refugee Act: “race, religion, nationality, membership in a particular social group, or political opinion.”⁵² They recognize that gender-based claims will typically arise under two of these grounds: persecution based on political opinion and persecution based on membership in a particular social group.⁵³ The guidelines seem to recognize the unpredictability of determining the factual circumstances which might constitute persecution based

on political opinion. Citing *Fatin*, they note that feminism may equal a political opinion. While acknowledging that the Third Circuit viewed *Fatin* as a feminist, the guidelines emphasize that she did not meet the asylum standard.⁵⁴ By specifying that *Fatin* did not meet this standard, the guidelines imply that the *Fatin* court did not construct a standard which asylum officers could easily apply.

The guidelines also indicate that the INS is uncertain about which factual circumstances might comprise persecution based on membership in a particular social group. They require persons in a “particular social group” to “share a common, immutable characteristic” which the members of the group either cannot change or should not change “because it is fundamental to their individual identities,”⁵⁵ and they recognize that gender may be one such characteristic.⁵⁶ However, they note that the Second Circuit has ruled that gender alone will not endow applicants with membership to a particular social group.⁵⁷ Although the Third and Eighth Circuits have concluded that gender alone may constitute a particular social group, the guidelines emphasize that neither court has ever found an individual who has met that definition.⁵⁸

In addition, the guidelines recognize that, in theory, applicants may use a combination of gender and other factors to demonstrate their membership in a particular social group. However, no court accepting that gender may combine with other factors to constitute membership in a particular social group has found that an applicant’s experience amounted to persecution under this criteria.⁵⁹ The guidelines further emphasize that, if an applicant attributes her persecution to her gender plus other factors, the other factors must be cognizable to the group responsible for the persecution.⁶⁰ Under this rationale, a persecutor who lacks knowledge of those factors cannot single out and harm an individual on the basis of those factors. This could be the underlying reason for the *Fatin* and *Safaie* courts to re-

⁴³ *Id.* at 8-9 (quoting *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)).

⁴⁴ *Id.* at 9 (citing *Matter of Acosta*, 19 I&N Dec. at 222; *Kovac v. INS*, 407 F.2d 107 (9th Cir. 1969)).

⁴⁵ *Id.* (citing *Basic Law Manual: Asylum* at 22).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 8; see 8 U.S.C. § 1101(a)(42)(A) (1994).

⁴⁹ *Id.* at 9-10.

⁵⁰ *Id.* (citing *Fatin*, 12 F.3d at 1233).

⁵¹ *Id.* at 10.

⁵² *Id.*

⁵³ *Id.* at 10-16.

⁵⁴ *Id.* at 11.

⁵⁵ *Id.* at 12 (citing *Acosta*, 19 I&N Dec. at 233).

⁵⁶ *Id.* (citing *Acosta*, 19 I&N Dec. at 233).

⁵⁷ *Id.* at 13 (citing *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991)).

⁵⁸ *Id.* (citing *Fatin*, 12 F.3d at 1240); see also INS Guidelines, *supra* note 32, at 13 n.13 (citing *Safaie*, 25 F.3d at 640).

⁵⁹ *Id.* (citing *Fatin*, 12 F.3d at 1241; *Safaie*, 25 F.3d at 640).

⁶⁰ *Id.* at 15 (citing UNHCR Programme, No. 39(k) (36th Session 1985)).

quire women to suffer the consequences of feminist beliefs rather than conform to the Khomeini lifestyle. A persecutor can single out a female who opposes dress and behavioral customs only when she does not conform with the customs.

After considering whether the harm constitutes persecution and whether the persecutor inflicted the harm on one of the five statutory grounds, the asylum adjudicator must determine whether the applicant may seek protection elsewhere in her country.⁶¹ The guidelines encourage officers to consider several factors especially. First, applicants subject to persecution by the government or someone whom the government cannot control might not be able to avoid harm by relocating elsewhere in the country.⁶² Second, the agency does not have to grant asylum to applicants solely on the ground that a public official was responsible for the persecution.⁶³ For example, in *Matter of Pierre*,⁶⁴ the applicant's claim was denied even though the Haitian government would not restrain her husband from abusing her due to his position as a legislator.⁶⁵ Third, the law of the applicant's country may preclude females from seeking residency elsewhere in the country.⁶⁶

2. INTERVIEW PROCESS

One of the primary goals of the new INS guidelines is to implement application procedures which make the asylum process more amicable to women with gender-based persecution claims.⁶⁷ The guidelines encourage, but do not require, female asylum officers to conduct interviews of women asserting gender-based claims.⁶⁸ They encourage officers to use female interpreters and to conduct interviews outside the hearing of other family members in order to encourage more candid responses.⁶⁹ The guidelines highlight that female applicants might have particular difficulties in discussing sexual violence and, hence, might exhibit a demeanor that makes them appear less credible.⁷⁰ In addition, the guidelines require officers to review the merits of a wife's claim when filed as a derivative claim of her husband's, even though his fails to meet asylum standards.⁷¹

⁶¹ *Id.* at 16.

⁶² *Id.* at 18.

⁶³ *Id.* at 16-17.

⁶⁴ *Matter of Pierre*, 15 I&N Dec. 461 (BIA (1975)).

⁶⁵ INS Guidelines at 16-17 (citing *Matter of Pierre*, 15 I&N Dec. 461 (BIA (1975))).

⁶⁶ *Id.* at 18.

IV. CONCLUSION

The new INS guidelines explain when adjudicators should grant asylum for claims grounded on gender-based persecution. They highlight those cases, including *Fatin* and *Safaie*, which conclude that a female applicant had a cognizable claim but that the circumstances surrounding her claim fell short of persecution. The guidelines stress that adjudicators must "carefully ascertain all the facts surrounding an allegation of persecution . . .,"⁷² thus highlighting the same conclusion to which *Safaie* leads—that practitioners must meticulously establish and argue that the factual bases of the applicant's case rise to persecution.

Without more evidence indicating *Safaie's* choice to suffer the consequences of noncompliance, the guidelines probably would not have changed the outcome of *Safaie* had they been in effect when *Safaie* applied for asylum. The guidelines present the opportunity for applicants to show that a violation of fundamental beliefs amounts to persecution, but the record in *Safaie* failed to establish, even under the guidelines, that the harm inflicted on her rose to the level of persecution. Although the guidelines would recognize that *Safaie* had a cognizable claim, they stress the Third and Eighth Circuits' opinions which accept that a women has views fundamental to her system only when she has risked the severe consequences of noncompliance. In this case, the record failed to establish that *Safaie* risked suffering to this extent. The record also failed to establish that she could not seek protection elsewhere in Iran. The Eighth Circuit's opinion fails to indicate whether certain regions of Iran could provide protection for women with feminist views.

The guidelines do not specifically limit asylum to women who have suffered physical abuses, but they specifically mention that the applicant in *Fatin* avoided foreseeable physical abuses. The Eighth Circuit's statement of facts reveals that *Safaie* was threatened but does not mention any concrete acts of sexual or physical violence. Neither *Fatin* nor the guidelines preclude a court from finding persecution based on non-physical abuse. However, because

⁶⁷ *Id.* at 5; see also Deborah E. Anker, *Women Refugees: Forgotten No Longer?* 32 San Diego L. Rev. 771, 798-99 (1995) (suggesting reform of interview process).

⁶⁸ *Id.*

⁶⁹ *Id.* at 5-6.

⁷⁰ *Id.* at 6-7.

⁷¹ *Id.* at 7.

⁷² *Id.* at 11.

the guidelines define fundamental beliefs in terms of a choice to suffer physical harm, a successful claim may very well lie in the proof of physical abuse.

An immigration attorney would have to fill these gaps in the factual record before an applicant like Safaie could prevail. Hence, under the new guidelines, the immigration attorney's most pressing jobs are to present the details surrounding a gender-based persecution claim and to demonstrate clearly how that particular factual record rises to a level of persecution. While the guidelines do not require an applicant to suffer physical abuse, it appears that the INS places great emphasis on physical abuse. Hence, the immigration attorney should specifically list and describe the physical abuses which an applicant has suffered.

Although the guidelines do not appear to change the legal analysis with which adjudicators will examine gender-based asylum claims, they encourage asylum officers to develop more complete and descriptive factual records that demonstrate a choice of noncompliance. Had the guidelines been in place at the time of *Safaie*, the interviewer may have been able to recreate the factual circumstances that would have demonstrated such a choice. Only with a complete and detailed record can a court decide in favor of an asylum applicant with a gender-based claim.

Summary and Analysis Prepared by:

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