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Immigration and Nationality

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I. Federal and Administrative Court Decisions

The plenary power of the federal government to regulate immigration matters owes its beginnings to article 1, section 8, clause 4 of the U.S. Constitution, which provides that Congress shall have the power to establish a "uniform Rule of Naturalization," and to the principles of national sovereignty.[1] During the early years of the development of immigration law in the United States, federal courts viewed immigration law as a subject mainly relegated to the authority of Congress. Federal courts were reticent in reviewing immigration law issues.[2] In recent years, however, Congress and the federal courts, with the exception of the U.S. Supreme Court, have changed their attitude and allowed more judicial review of immigration law issues. The year 1999 was no exception to this increasing willingness of the courts of appeal and the federal district courts to hear immigration law issues, as evidenced by the importance, complexity, and variety of immigration law questions accepted for judicial review and the public attention given to immigration cases.

A. THE U.S. SUPREME COURT

The U.S. Supreme Court in 1999 continued to reserve narrow grounds for review of immigration law issues. The Court preferred instead to give deference to the lower federal district courts and courts of appeal and denied certiorari in several immigration law cases dealing with loss of nationality, naturalization, withholding of deportation, and eligibility for asylum.

One immigration case that the Supreme Court agreed to hear in 1999 was *INS v. Aguirre-Aguirre*.[3] The case concerned whether the Ninth Circuit Court of Appeals had failed to give an adequate level of deference to the Board of Immigration Appeals' (BIA) construction

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1. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972); *see also* Maurice Roberts, *Immigration and Nationality Decisions in the Federal Courts*, Immigration Briefings, No. 95-12 (1995).

2. *See id.*; Chae Chan Ping v. United States, 130 U.S. 581 (1889); *see also* Roberts, *supra* note 1.

3. INS v. Aguirre-Aguirre, 119 S. Ct. 1439 (1999).

of 8 U.S.C. §§ 1253(h)(1) and 1253(h)(2)(C) dealing with serious nonpolitical crimes when the BIA refused to withhold an alien's deportation and denied him asylum.[4] Section 1253(h)(1) provides that the Immigration and Naturalization Service (INS) may withhold deportation of an alien to a country if the Attorney General determines that an alien's life or freedom would be threatened in such country on account of political opinion or if the alien is subject to persecution on such ground. Section 1253(h)(2)(C) states, however, that if the Attorney General determines that the alien has committed a serious nonpolitical crime outside the United States prior to entering the United States, withholding does not apply and asylum will be denied.

In *Aguirre-Aguirre*, the respondent, a Guatemalan national, requested a withholding of deportation and a grant of asylum in an administrative hearing in front of an immigration judge. The respondent testified that when he was in Guatemala he had protested against the Guatemalan government's economic policies by burning buses, assaulting passengers, and vandalizing property.[5] The immigration judge granted the respondent's request.[6] The BIA, however, vacated the immigration judge's order and found that the respondent had committed serious nonpolitical crimes before he entered the United States. The BIA rendered its decision by weighing the common-law or criminal character of the respondent's actions against the political nature of his actions.[7]

The Ninth Circuit remanded the case and held that the BIA's analysis was deficient because the BIA should have balanced the respondent's criminal actions against the threat of persecution, should have considered whether the respondent's acts were grossly disproportionate to their alleged objective and were atrocious, and should have considered the political necessity and success of the respondent's methods.[8] The INS petitioned for a writ of certiorari to the U.S. Supreme Court.

The U.S. Supreme Court held that the Ninth Circuit failed to give the level of deference to the BIA's statutory interpretation required under its landmark administrative law decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] and that the BIA's statutory construction and analysis were correct.[10] Justice Kennedy, writing for a unanimous Court, stated,

> [W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.' . . . [T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication'. . . . Our decision takes into account that the BIA's test identifies a general standard (whether the political aspect of an offense outweighs its common-law character) and then provides two or more specific inquiries that may be used in applying the rule: whether there is a gross disproportion between means and ends, and whether atrocious acts are involved. Under this approach, atrocious acts provide a clear indication that an alien's offense is a serious nonpolitical crime."[11]

4. *Id.* at 1440–41.
5. *See id.* at 1440.
6. *Id.* at 1444.
7. *See id.* at 1444–45.
8. *Id.*
9. Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
10. *Aguirre-Aguirre*, 119 S. Ct. at 1445–47.
11. *Id.* at 1445, 1448.

II. The Federal District Courts and U.S. Courts of Appeals

A. Female Genital Mutilation and Asylum

The U.S. Court of Appeals for the Second Circuit handed down an important decision dealing with the question of whether immigration officials erred in denying a Ghanaian woman's application for asylum on the grounds that her fear of forced genital mutilation was not objectively reasonable. In *Abankwah v. INS*,[12] a unanimous three-judge panel settled an important evidentiary issue concerning the objective component of the standard of proof for asylum in the United States and opened a new basis for refugee status.

The petitioner, Ms. Abankwah, a twenty-nine-year-old native of Ghana and a member of the Nkumssa tribe located in central Ghana, was to become the next Queen Mother of the tribe.[13] According to Nkumssa tradition, a girl or woman who is to become the next tribal Queen Mother must remain a virgin. Her virginity is then verified by a ceremony called "enstooling," in which the woman holds water in her cupped hands. The tribe believes that if the woman has engaged in premarital sex, she will be unable to hold the water in her hands, and the tribe will determine that she is no longer a virgin. As punishment for violation of this tribal taboo, tribal leaders mutilate the woman's genitals.[14]

In spite of tradition, Ms. Abankwah fell in love with a man from her tribe and began a sexual relationship with him. To avoid discovery and punishment by the tribe, Ms. Abankwah fled to the United States, where she was arrested at John F. Kennedy Airport. She then applied for asylum, claiming that she would have to undergo genital mutilation by tribal leaders if she were returned to Ghana.[15]

To satisfy the standard of proof to obtain asylum in the United States, a petitioner must show that he or she is a refugee unable or unwilling to return to his or her native country based on a well-founded fear of persecution due to race, religion, nationality, membership in a social group, or political opinion. The well-founded fear of persecution must be based on subjective and objective components.[16]

In October 1997, Immigration Judge Donald Livingston denied Ms. Abankwah's asylum case and found that even though Ms. Abankwah's testimony had been credible, she failed to establish that an objectively reasonable person would fear female genital mutilation in Ghana.[17] The judge based his finding on the following factors: Ghanian law outlawed the practice, recent reports showed that the practice was in decline, and Ms. Abankwah could seek assistance from the Ghanian government and several nongovernmental organizations. In addition, Judge Livingston found that Ms. Abankwah's fear of genital mutilation was a "personal problem," rather than a "matter of general practice imposed upon a particular social group."[18] Ms. Abankwah appealed this decision to the BIA. The BIA dismissed the appeal, holding that although her fear of genital mutilation was due to her membership in a particular social group, Ms. Abankwah failed to meet the burden of proof for "past persecution" and that the evidence was insufficient to support her claim of persecution based

12. Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999).
13. *See id.* at 20.
14. *See id.*
15. *See id.* at 20–21.
16. *See* 8 C.F.R. § 208.13 (1999).
17. *Abankwah*, 185 F.3d at 21.
18. *Id.*

on her membership in a social group.[19] In addition, the BIA rejected the testimony of expert witness Victoria Otumfuor because she did not have personal knowledge of the Nkumssa tribe.[20]

The U.S. Court of Appeals for the Second Circuit, however, disagreed; holding that Ms. Abankwah had established a well-founded fear that was objectively reasonable based on credible evidence.[21] District Judge Robert W. Sweet stated that the "BIA was too exacting both in the quantity and quality of evidence that it required" and that "INS regulations do not require that credible testimony . . . consistent and specific—be corroborated by objective evidence."[22] The court held that a reading of Ms. Abankwah's testimony in its entirety, combined with her affidavit, revealed that her fear of being mutilated was based on her knowledge of and experience with the customs of her tribe.[23] In addition, Judge Sweet stated that Ms. Abankwah's fear was credible in light of the insignificant number of prosecutions for female genital mutilation in Ghana and that genuine refugees usually do not have an abundance of affidavits, expert witnesses, and documentation when they seek refugee status in another country.[24] Moreover, Judge Sweet gave credence to Victoria Otumfuor's testimony and stated that requiring the witness to have specific personal knowledge of the Nkumssa tribe was "overly restrictive" and remanded the case for further immigration court proceedings.[25]

B. Due Process and INS Use of Secret Evidence

The District Court of New Jersey in *Kiareldeen v. Reno*,[26] confronted the issues of whether the use of secret evidence in deportation proceedings violated procedural fairness guaranteed by the Fifth Amendment of the U.S. Constitution and whether use of such evidence prevented the BIA from providing an independent adjudication to an alien in deportation proceedings.

The petitioner, Hany Mahmoud Kiareldeen, a Palestinian national, filed a habeas corpus petition to review his continued detention and a final removal order by the INS based on summaries of secret evidence from several unidentified sources.[27] The Federal Bureau of Investigation's Joint Terrorism Task Force developed the summaries. The secret evidence accused Kiareldeen of being a member of a terrorist organization.[28] The petitioner argued that his detention violated the due process clause because it was based on secret evidence that he did not have the opportunity to confront and that the government's evidence consisted of uncorroborated hearsay.[29] The INS argued that Kiareldeen was not entitled to examine the evidence because it was national security information.

The district court held that the use of secret evidence denied the petitioner due process.[30] In addition, because the evidence consisted of uncorroborated hearsay from unidentified

19. *See id.*
20. *See id.*
21. *Id.* at 21, 23–25.
22. *Id.* at 24.
23. *Id.* at 23–25.
24. *Id.* at 26.
25. *Id.* at 26.
26. Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999).
27. *See id.* at 404.
28. *See id.*
29. *See id.*
30. *Id.* at 413–19.

sources, the BIA did not provide the alien with an independent adjudication.[31] The district court followed the analysis of the U.S. Supreme Court in *Bridges v. Wixon*,[32] where the INS violated due process by basing a deportation order on unsigned, unsworn hearsay allegations. The district court stated,

> Meticulous care must be exercised lest the procedure by which [the detainee] is deprived of [his] liberty not meet the essential standards of fairness. . . . [T]he court cannot justify the government's attempt to "allow [persons] to be convicted on unsworn testimony of witnesses a practice which runs counter to the notions of fairness on which our legal system is founded."[33]

C. Ineligibility for Refugee Status for Foreigners Committing Serious Crimes

The federal courts also dealt with the issue of ineligibility for refugee status for foreigners committing serious crimes. In *Brahimi v. INS*,[34] the petitioner, Brahimi, challenged the BIA's decision denying him asylum and declining to withhold his deportation. Brahimi sought a writ of habeas corpus from the District Court of Massachusetts releasing him from the custody of the INS. The INS made a motion to dismiss the petitioner's writ of habeas corpus. Previously, Brahimi had been convicted for assault and battery with a dangerous weapon. The main issue for the court was whether the petitioner committed an offense that met the definition of a "particularly serious crime" under the Immigration and Nationality Act (INA) § 208(b). Section 208(b) provides several grounds, including serious crimes, upon which an alien's refugee status will be denied.

The district court held that the BIA's decision denying the petitioner asylum was correct. The court rendered its decision based on the First Circuit's "categorical approach," which looked to the statutory definition of a conviction under state and federal law only and not to the particular facts underlying the conviction. The court stated,

> Pursuant to 8 U.S.C. § 1101(a)(43)(F), a Massachusetts conviction for assault and battery with a dangerous weapon is an aggravated felony. As an aggravated felony, it is a 'particularly serious crime' under section 243(h)(2)(B). As a particularly serious crime, it deprives Brahimi of eligibility for withholding of deportation, and his petition must accordingly be dismissed.[35]

D. Judicial Review of Deportation Orders and Habeas Corpus Petitions

Several federal district and circuit courts of appeals also handed down important decisions clarifying the availability of judicial review of habeas corpus petitions and other immigration law issues.

The U.S. District Court for the District of Connecticut faced the issue in *Dunbar v. INS*,[36] of whether the district courts have jurisdiction under 28 U.S.C. § 2241 to review the Attorney General's decision denying an alien discretionary relief. Section 2241 allows the federal courts to grant writs of habeas corpus when a petitioner is unlawfully deprived of his or her liberty by the government.[37]

31. *Id.* at 418–19.
32. Bridges v. Wixon, 326 U.S. 135 (1945).
33. *Kiareldeen*, 71 F. Supp. 2d at 415, 419.
34. Brahimi v. INS, 1999 WL 172795 (D. Mass. 1999) (unpublished opinion).
35. *Id.* at *2.
36. Dunbar v. INS, 64 F. Supp. 2d 47 (D. Conn. 1999).
37. 28 U.S.C. § 2241 (1999).

The petitioner Dunbar was admitted to the United States as a legal permanent resident in 1984. Subsequently, he was convicted for assault in the second degree. The INS issued an Order to Show Cause and held a hearing in which the immigration court determined that Dunbar was subject to deportation as an alien because he committed an aggravated felony.[38] Dunbar appealed the immigration court's decision to the BIA. The BIA dismissed his appeal, and Dunbar filed a petition for a writ of habeas corpus.[39]

The district court held that the district courts have jurisdiction under section 2241 to consider an alien's challenge to the Attorney General's decision to deny discretionary relief.[40] The court based its decision on the failure of the two controlling federal statutes, the Anti-Terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, to explicitly limit federal judicial review of petitions for writs of habeas corpus.[41] Judge Nevas stated, "The Court . . . retains habeas jurisdiction over all of the [petitioner's] claims. [T]he Court concludes that Congress has not explicitly repealed or limited section 2241 habeas jurisdiction."[42] The 1996 amendments neither expressly nor implicitly repealed the ability of a petitioner to seek judicial review by a writ of habeas corpus pursuant to section 2241.

In *Saini v. INS*,[43] an alien filed a request for stay of his removal from the United States. The U.S. District Court of Arizona faced the issue of whether an alien's due process rights were violated if the alien did not receive notice of his exclusion proceedings.[44] The INS argued that under INA § 242(g), the petitioner was precluded from requesting a stay because the petitioner's claim challenged the Attorney General's prosecutorial discretion. Section 242(g) precludes the courts from having jurisdiction over claims arising from decisions or actions by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against aliens under the INA.[45]

The district court disagreed, holding that section 242(g) should be construed narrowly.[46] The district court, referring to U.S. Supreme Court precedent, noted that although the statute precluded jurisdiction of the federal courts when the action is one in which the subject matter involves a challenge to the Attorney General's exercise of prosecutorial discretion, the statute is inapplicable to actions involving a completely different subject matter in which a stay of deportation is merely requested as a temporary remedy.[47] The court stated,

> [t]he INS's argument about the types of actions subject to the jurisdictional bar of section 1252(g) is inconsistent with the Supreme Court's narrow construction of the statute. . . . [I]t was implausible that the mention of these three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.[48]

38. *See Dunbar*, 64 F. Supp. 2d at 49.
39. *See id.*
40. *Id.* at 51.
41. *Id.*
42. *Id.*
43. Saini v. INS, 64 F. Supp. 2d 923 (D. Ariz. 1999).
44. *Id.* at 43.
45. Immigration & Nationality Act, § 242(g) (1999).
46. *Saini*, 64 F. Supp. 2d at 926–28.
47. *Id.*
48. *Id.* at 926, 928 (citing to and quoting Reno v. AADC, 119 S. Ct. 936, 943, 945 (1999)).

The District Court of the District of Rhode Island in *Hermanowski v. Farquharson*[49] faced the important constitutional question of whether an indefinite detention of an alien awaiting deportation violated the alien's right to substantive due process by placing an arbitrary restraint on an alien's liberty. The petitioner Hermanowski was a Polish national and a legal permanent resident of the United States through marriage to a U.S. citizen. Hermanowski committed several petty crimes in the United States.[50] Because of his criminal history, the INS obtained an immigration judge's order deporting Hermanowski to Poland. Hermanowski was taken into custody by the INS, but the Polish government refused to consent to his deportation. With no change in the Polish government's position, Hermanowski petitioned for a writ of habeas corpus from the District Court of Rhode Island.[51] U.S. Magistrate Judge Jacob Hagopian granted the writ, stating that the continued detention was "no longer rationally related to a legitimate governmental purpose" and that "deportation of Hermanowski to Poland in the foreseeable future is, at best, improbable."[52] The INS challenged the district court's jurisdiction over the habeas corpus petition, claiming that recent immigration legislation passed by Congress limited habeas corpus review for deportable aliens and that the detention was constitutional.[53]

The district court disagreed, holding that the court had authority to review constitutional complaints delivered by a writ of habeas corpus, and based its conclusion on the lack in the recently enacted legislation of explicit language repealing habeas corpus or limiting habeas corpus in cases dealing with superior rights such as fundamental rights.[54] In addition, the court held that the indefinite detention violated Hermanowski's substantive due process right of personal liberty.[55]

The court balanced several factors such as the specific conditions of the detention, the gravity of the INS's concerns over Hermanowski's release, and the excessiveness of the restrictions on Hermanowski's liberty against the important policy objectives that detention pending deportation was designed to serve.[56] Chief Judge Langueux stated,

> [t]he power of executive branch officers to detain aliens pending deportation pursuant to a statutory grant of authority is not without its limits. . . . The uncertain duration of this incarceration compounds the inequity. . . . This Court has no basis to conclude that Hermanowski will be deported in the foreseeable future. Consequently, Hermanowski's detention is potentially the equivalent of a life sentence in prison. . . . [T]he danger posed by Hermanowski is of the milder sort. . . . [C]ontinued detention violates his substantive due process right to be free from an arbitrary restraint on his liberty.[57]

E. Continuing Trends in Immigration Law and Practice among the Federal Courts and Consequences

In light of these decisions, federal court activity for the year 1999 shows a distinct trend continuing among the federal courts concerning immigration law issues. Because of the

49. Hermanowski v. Farquharson, 39 F. Supp. 2d 148 (D.R.I. 1999).
50. *See id.* at 150.
51. *See id.* at 150–51.
52. *Id.* at 151–52.
53. *See id.* at 152.
54. *Id.* at 153.
55. *Id.* at 163.
56. *Id.* at 159–63.
57. *Id.* at 156, 160, and 163.

U.S. Supreme Court's reluctance to grant certiorari in immigration law cases and the lower federal courts' willingness to review immigration law matters, the Supreme Court appears to be deferring to the guidance of the lower federal courts on immigration issues.[58] Unfortunately, the absence of a last word on these matters from the Supreme Court will continue to impact immigration litigation in the lower federal courts and administrative courts.

Some legal scholars like Maurice Roberts believe this failure of the Court to definitively settle several confusing areas of immigration law and conflicting holdings of the federal circuits may lead to increasing federal circuit forum-shopping by immigration litigants.[59] Rather than litigating in a circuit with holdings against their case, immigrant litigants may change their residences to take advantage of another circuit's more favorable holdings.[60] In contrast, increasing conflicts in decisions among the federal courts on immigration law matters may discourage aliens from litigating for fear of loss of time and incurring great expense if they litigate in such a murky legal environment. Ultimately, attorneys may have to consider other alternatives in legal strategy when dealing with the INS.

Moreover, the lack of definitive settlement by the Supreme Court of several questions dealing with immigration law may further perpetuate inconsistencies between the federal courts and the BIA. For instance, some scholars note that the BIA refuses to apply the holdings of the federal district courts and the courts of appeal as general rules of applicability. Rather, the BIA often applies restrictive holdings in cases where the federal court's holdings are broader on an issue.[61]

III. Administrative Agency Action of the INS and the BIA

A. Miscounting of H-1B Visas

The year 1999 can be characterized as one of systemic problems and chronic delays for the INS. The INS overshot the limit established by Congress on H-1B visas by 10,000 to 20,000 visas.[62] In order to rectify the miscounting of visas, the INS has suggested reducing the number of H-1B visas for fiscal year 2000. Several members of Congress have criticized this proposal including Senator Spencer Abraham (R-Mich.), Chairman of the Senate Subcommittee on Immigration. On October 5, 1999, Senator Abraham sent a letter to INS Commissioner Doris Meissner explaining that the INS proposal caused "grave concerns" to Congress.[63] Senator Abraham stated,

> [G]iven past INS counting procedures on H-1B visas it is far more likely that the INS miscounted in a manner that deprived employers of available visas in FY 1999, rather than issued too many visas. . . . I don't believe it when I hear the agency tell Congress that now it is counting correctly. In FY 1996, in response to inquiries from industry, and in FY 1997, in response to my own inquiry, the INS went back and checked its H-1B counting procedures and concluded in both instances that it had double-counted thousands of visas and therefore had not reached the H-1B visa cap at times when the agency concluded that it had. . . . [It] is

58. *See* Roberts, *supra* note 1.
59. *Id.*
60. *See id.*
61. *See id.*
62. *See Senator Blasts INS Proposal to Shift H-13 Visas*, 76 Interpreter Releases 1697 (Nov. 22, 1999).
63. *Id.*, Appendix III, at 1710.

hard to understand how it could have awarded too many visas, when it had months to calibrate visa issuance.[64]

Senator Abraham also warned the INS that its plan for unilateral reduction of the limit on H-1B visas in fiscal year 2000 would exceed the legal authority delegated to the INS by Congress. Senator Abraham stated, "I would object to the INS unilaterally reducing the FY2000 cap on H-1B visas. Such action not only would lack statutory authority, but would be based on what time and again has proved to be inaccurate methods utilized by the INS."[65]

B. INS Announces New Interim Rules Carrying Out The U.N. Convention Against Torture

On February 19, 1999, the INS published interim regulations on the procedure for a petitioner to claim protection under the U.N.'s Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).[66] The interim regulations were published in response to the Foreign Affairs Reform and Restructuring Act passed by Congress in 1998. According to section 2242 of the Act, Congress required implementing regulations to be published within 120 days of the legislation.[67]

Article 3 of the Convention Against Torture says that the United States will not "expel, return (refouler) or extradite" a person to a nation where that person would undergo torture.[68] The interim rule was passed to ensure that the INS complies with article 3 by incorporating requests for protection under article 3 with the adjudication procedures of asylum and withholding of removal by immigration judges.[69]

The new interim rule contains two provisions for protection under article 3. First, 8 C.F.R. § 298.16(c) establishes a new form of withholding of deportation for aliens who are not barred from this form of relief from removal under INA § 241(b)(3)(B), which prohibits this form of relief to aliens who have committed particularly serious crimes. Second, under 8 C.F.R. § 208.17(a), individuals who have the likelihood of being tortured if removed to a certain country and who are barred from relief under INA § 241(b)(3)(B) can now receive a new form of relief called "deferral of removal."[70] In addition, the interim rule announces the factors to determine whether an act qualifies as torture under article three.[71]

C. The BIA's Denial of Asylum to Guatemalan Women Escaping Domestic Abuse

In *In re R-A-, Interim Decision*,[72] the BIA confronted the important issue of whether repeated spousal abuse of a wife by her husband makes her eligible for asylum as an alien

64. *Id.*

65. *Id.* at 1711.

66. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8,478–96 (Feb. 19, 1999); *INS Publishes Torture Convention Regulations*, 76 Interpreter Releases 275 (Feb. 22, 1999).

67. *INS Publishes Torture Convention Regulations*, 76 Interpreter Releases 275.

68. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39th Sess., 93rd mtg., U.N. Doc. A/RES/39/46 (1985) (ratified by the U.S. Senate, October 27, 1990).

69. *See Chief IJ Issues Operating Policies and Procedures on Implementation of Torture Convention*, 76 Interpreter Releases 971 (June 28, 1999).

70. *INS Publishes Torture Convention Regulations*, 76 Interpreter Releases 275.

71. *Id.*

72. *In re* R-A-, Interim Decision 3403 (BIA 1999), *available in* 1999 BIA Lexis 31 (1999).

who is persecuted on account of her membership in a particular social group or her political opinion. On September 20, 1996, an immigration judge granted the respondent, a Guatemalan woman, asylum under INA § 208(a). The respondent claimed that she was eligible for asylum because of her membership in a particular social group of Guatemalan women who were intimate with Guatemalan men who held the belief that women are to live under male domination, and that the respondent's opposition to her husband's abuse was a political opinion that motivated the husband to persecute her.[73] The immigration judge agreed.[74] The INS appealed to the BIA, arguing that the respondent was not a member of a particular social group and that the respondent's husband did not persecute his wife based on an imputed political view.[75] The Refugee Law Center and the International Human Rights and Migration Project filed a joint amicus curiae brief on behalf of the respondent.[76]

The BIA held that the respondent was not eligible for asylum based on an imputed political opinion or membership in a particular social group because the respondent failed to show how "the harm arose in response to any objections made by the respondent to her husband's domination" and that the abusive behavior was not dependent on the views held by the respondent.[77] Rather, the BIA noted the record showed that the husband's behavior was due to his own personal and psychological makeup along with his perception of the respondent's actions.[78] Board member Filppu, writing for a majority of the Board stated,

> It is certainly logical and only human to presume that no victim of violence desires to be such a victim and will resist in some manner. But it is another matter to presume that the perpetrator of the violence inflicts it because the perpetrator believes the victim opposes either the abuse or the authority of the abuser. . . . It seems to us that this approach ignores the question of what motivated the abuse at the outset. . . . The respondent here has failed to establish that her persecutor attributed to her a political view and then harmed her because of that view.[79]

Board member Guendelsberger, however, joined by four members in dissent, stated,

> Opposition to male domination and violence against women, and support for gender equity, constitutes a political opinion. . . . Both we and the federal courts recognize the merit to asylum claims involving rape and other forms of physical and mental violence against women on account of their actual or imputed political opinion. . . . The evidence in the record before us establishes, with chilling certainty, that the respondent's husband was aware of, and imputed to the respondent, her beliefs in opposition to domestic violence. . . . [T]he abuser is motivated in order to stifle and overcome his victim's opposition to it. . . . Had the respondent been subjected to such heinous abuse due to communism, imputed as a result of her family's economic class or political activities, the majority would recognize her situation as one of persecution on account of political opinion.[80]

On the issue of whether the respondent was a member of a political group, the majority looked at whether the makeup of the respondent's group was a "voluntary associational

73. *See id.* at 11–12.
74. *Id.*
75. *See id.* at 12.
76. *See id.* at 13.
77. *Id.* at 19–21.
78. *See id.*
79. *Id.* at 25–27.
80. *Id.* at 82, 97.

relationship" and whether the group was defined "largely in the abstract or recognized as specific faction in Guatemalan society."[81]

The majority, finding neither test satisfied, stated,

> [T]he respondent's claimed social group fails under our own independent assessment of what constitutes a qualifying social group. . . . [T]he group is defined largely in the abstract. . . . The respondent has shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.[82]

The dissent disagreed and contended that a particular social group should be defined in relation to the enumerated grounds for asylum, such as race, religion, nationality, or political opinion.[83] The dissent noted that these grounds refer to "a common, immutable characteristic which a person either cannot change, or should not be required to change, because it is fundamental to individual identity or conscience."[84] Drawing similarities between another Board case, *Matter of Kasinga*,[85] which dealt with gender and female genital mutilation and the respondent's case, the dissent stated,

> As the Immigration Judge below correctly observed, the respondent's relationship to, and association with, her husband is something she cannot change. . . . Both cases involve a form of persecution inflicted by private parties upon family members. . . . In addition, most courts . . . have applied [the] immutability standard, rather than a 'voluntariness' standard in deciding whether a group is cognizable under the Act.[86]

The dissent also noted that the 1995 Department of Justice Guidelines directly addressed asylum claims involving violence against women and that "as they are currently formulated, provide a sound basis for providing protection to this respondent."[87]

IV. Conclusion

An examination of immigration law developments for the year 1999 shows the complex legal questions that Congress, the INS, and the federal courts are asked to resolve. As we begin a new century, the migration of people to the United States seeking economic opportunity and basic freedoms will continue because of the internationalization of the world economy and increasing political upheaval in several areas of the world. In turn, the American legal system will face many new challenges in immigration law.

81. *Id.* at 27–39.
82. *Id.* at 29–30.
83. *Id.* at 59–65.
84. *Id.* at 60.
85. *In re* Kasinga, Interim Decision 3278 (BIA 1996).
86. *In re R-A-*, 1999 BIA Lexis at 62–63, 68–69.
87. *Id.* at 75.