

WELCOMING WOMEN: RECENT CHANGES IN U.S. ASYLUM LAW

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INTRODUCTION

The Statue of Liberty, which has been called the “Mother of Exiles,” stands as a reminder of one of the foundational ideals of U.S. immigration policy—providing refuge to the vulnerable. Women worldwide have new reason to believe in this promise, because victims of domestic violence may now have a better chance of being granted asylum in a U.S. immigration court.

In the summer of 2009, the Obama Administration made public a Department of Homeland Security (“DHS”) brief submitted in the case of a Mexican woman who requested asylum based on the fear she would be killed by her former domestic partner if she returned to Mexico. The government’s brief in the case, the *Matter of L-R*,¹ proposed new legal justifications for granting battered women asylum, but stopped short of advocating a full grant of protected status.

In December 2009, a U.S. immigration court granted asylum to a Guatemalan woman, Rody Alvarado, who suffered ten years of abuse from her husband in her native country. Ms. Alvarado’s case, the *Matter of R-A*-, had been in limbo for more than fourteen years. She was initially granted asylum in 1996, but the Board of Immigration Appeals (“BIA”) overturned that decision three years later, finding that battered women were not a cognizable social group under the legal definition of refugee.²

While these two recent developments are extremely encouraging for women’s rights advocates, the U.S. government has yet to finalize the legal rules governing asylum claims for victims of gender-based violence. This essay endorses a specific legal regime, based on the arguments made in the *Matter of L-R*- and *Matter of R-A*-, and relevant international treaties governing asylum, and argues that deserving women should receive asylum protection in the United States.

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1. Brief of Dep’t of Homeland Security (April 13, 2009) (redacted) [hereinafter DHS Brief], available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>.

2. *Matter of R-A*-, 22 I. & N. Dec. 906 (B.I.A. 1999).

IS SHE A REFUGEE?

The international legal community has long debated whether battered women could be considered refugees. According to the 1951 United Nations Convention Related to the Status of Refugees, as amended by a 1967 Protocol, a refugee is:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it

This international definition is incorporated into U.S. law, with minor changes, via the Immigration and Nationality Act.³ The definition contains three core elements: a persecution ground—race, religion, nationality, membership of a particular social group, or political opinion; a nexus between the ground and the persecution suffered; and a lack of state protection. Because gender is not listed as a Convention ground, victims of gender-based persecution do not meet the definition of refugee.

Nonetheless, groups not enumerated in this definition often claim refugee status under the amorphous “membership of a particular social group” ground. According to the United Nations High Commissioner for Refugees a “particular social group” is:

[A] group of persons who share a common characteristic other than the risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one that is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.⁴

This definition contains two important characterizations of a particular social group: immutability—members of the group share a trait that is innate; and social perception—society views members of the group as such.

The legal maxim *ejusdem generis* supports the first, immutability view. According to this rule, general words in a statute should be interpreted in light of more specific words, or general terms should be interpreted as being consistent with enumerated items. The other Convention grounds are either immutable—race and nationality—or traits so fundamental that a person should not be required to change them—religion or political opinion. Therefore, if people share immutable characteristics, they can be said to form a particular social group.

3. 8 U.S.C. § 1101(a)(42).

4. United Nations High Commissioner for Refugees, Guidelines on International Protection, “Membership of a particular social group,” HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/3d58de2da.html>.

The social perception test has been adopted and articulated by the Australian High Court in *Applicant S v. Minister for Immigration and Multicultural Affairs*:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.⁵

In the United States, both immutability and social perception tests have been used to identify valid “particular social groups.” In the case *Matter of Acosta*, the BIA found the doctrine of *ejusdem generis* “to be most helpful in construing the phrase ‘particular social group.’”⁶ In *Matter of C-A-* the BIA declared that it would consider the “recognizability, i.e. the social visibility, of the group in question.”⁷

But even if victims of domestic violence can satisfy the first element of this test, they must also face the problem of establishing a causal link between the grounds for persecution and the persecution suffered. This nexus is established when the persecutor is motivated by the cognizable ground in inflicting the harm.⁸ “Women who suffer domestic violence in country X” would be an impermissibly circular social group. Battered women don’t suffer persecution because they are battered women—rather, the group is defined by a type of persecution. Furthermore, the particular social group “women in country X” would be too large. The word “particular” connotes a group that is certainly smaller than half the population.

RECENT CHANGES TO U.S. ASYLUM LAW

In April 2009, DHS submitted a brief to the BIA in the *Matter of L-R-*, opening the door for battered women to be considered refugees under the “particular social group” category, in a way that mitigates the circularity and particularity problems. According to the brief, “DHS accepts that in some cases a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership.”⁹

DHS argued that the particular social group for victims of domestic violence could be formulated by taking into account the way in which the abuser and society perceive their position in a domestic relationship. Accordingly, a group could be “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”

5. (2004) 217 C.L.R. 387 (Austl.).

6. 19 I. & N. Dec. 211, 211 (B.I.A. 1985).

7. 23 I. & N. Dec. 951, 958 (B.I.A. 2006).

8. *INS v. Elias-Zacarias*, 502 U.S. 478, 482–83 (1992).

9. DHS Brief, at 12.

Following the public release of the DHS brief, Ms. Alvarado filed a brief arguing that she was a member of the social group “married women in Guatemala who are unable to leave the relationship,” similar in construction to the group, “Mexican women in domestic relationships who are unable to leave.” In October 2009, DHS responded that Ms. Alvarado was “eligible for asylum and merits a grant of asylum as a matter of discretion.” Two months later, the immigration court issued a summary decision, granting Ms. Alvarado asylum.¹⁰

DHS outlined in its brief the legal justification for the particular social group “married women in Guatemala who are unable to leave the relationship.” The social group is “broadly defined by gender, by marital status, her inability to leave the relationship, or by Guatemalan nationality.”¹¹ DHS argued that the applicant’s marital status is immutable because it is an integral part of one’s religious and moral identity. And “even accepting the premise that one should be required to change marital status to avoid persecution, there may be circumstances in which it would be impossible to do so, such that the characteristic would be immutable for that reason.”

PARTICULAR SOCIAL GROUP FOR BATTERED WOMEN: A FINAL RULE

Although the grant of asylum for Ms. Alvarado is a welcome development, a final rule governing grants of asylum for victims of domestic violence should adopt the second category suggested by DHS, rather than the first: “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.” This formulation better meets the immutability and social perception tests that govern grants of asylum under the current case law. Moreover, it is more likely to cover women deserving of international protection.

The particular social group “married women in Guatemala who are unable to leave the relationship” is not a coherent grouping for several reasons. First, the premise is self-contradictory—obviously the woman was able to leave the relationship because she is in a new country seeking asylum. Second, the reason for the persecution is unlikely to be that she cannot leave the relationship. More often it is that the persecutor has certain views of women. The fact that a woman cannot easily leave her marriage may make it easier for her husband to persecute her, but her inability to leave is not the core reason for the persecution. Third, it requires a negative view of marriage in certain countries, as a male-dominated patriarchal institution. In fact, the problem of domestic violence is not inherently tied to the institution of marriage, but rather to the views of women held by men that they enter intimate relationships with. Finally, many women who suffer from

10. Center for Gender & Refugee Studies, Documents and Information on Rody Alvarado’s Claim for Asylum in the U.S., <http://cgrs.uchastings.edu/campaigns/alvarado.php>.

11. Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 27, *In re Rody Alvarado-Pena*, File No. A 73 753 922, available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf.

domestic violence are not married, so relying on marital status to fulfill an immutability requirement will exclude many women deserving of asylum.

The second formulation proposed in *Matter of L-R* avoids many of the pitfalls of the category accepted in *Matter of R-A*. A final rule could follow the pattern: “Mexican women who are viewed as property by virtue of their positions within a domestic relationship,” which requires that an asylum seeker fall into each of the four categories—nationality, sex or gender, social situation, and social perception. The persecutor could be any private individual, such as a domestic partner or husband.

This second formulation is a rational social group for several reasons. First, the characteristic of gender is more immutable than the characteristic of being in a relationship or a marriage. This is because it is almost impossible to change gender, while it is indeed possible to leave a relationship, and in fact the applicant often will have left one already if she is applying for asylum in the United States. Second, the formulation correctly captures the reason for the persecution—that a woman is viewed as a piece of property or that there is some hatred towards women in the mind of the persecutor. Finally, the social situation is one that is common to the immutable group—being in a domestic relationship—but doesn’t impose any value judgment on that relationship in and of itself. Therefore “women who are in domestic relationships” would not form a cognizable group. But “women who are in domestic relationships and viewed as subordinate by their partners” would. The proposed grouping is not circular, because merely being viewed as subordinate would not meet the criteria of persecution. Rather, the persecution would have to include some form of domestic violence, motivated by membership in the particular social group, which is exactly what the Refugee Convention calls for.

CONCLUSION

Women’s rights advocates have reason to be hopeful, because U.S. immigration courts appear more open to accepting asylum claims from battered women. At the same time, the current Administration must move forward in establishing a broad decision or set of guidelines for these cases. The final rule put forward by the government should reflect the social reality women face in their home country, and cover women most in need of international protection.