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UPDATE ON ASYLUM LAW: NEW HOPE FOR VICTIMS OF DOMESTIC VIOLENCE

By

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I. MEETING "ANA"

One afternoon not so long ago, we met "Ana," a young woman from El Salvador. At the age of 14, Ana met and formed a "relationship" with a 43-year-old man who would later become the father of her two daughters. "He was nice in the beginning," Ana recounted, but then one day he got jealous and beat her. In fact, he beat her several times that night. The beatings grew more vicious, continuing for more than a decade, and often occurring in the presence of their two young daughters. "You can never leave me," he would tell her, "you belong to me."

Ana sought the help of local police and the courts, but to no avail. Her family and friends knew of the abuse, but no one did anything to stop it. Ana knew she must leave or risk losing her life and the lives of her children. Ana decided to make the long and treacherous journey to the United States, and with our help, recently applied for asylum before the U.S. Executive Office of Immigration Review (EOIR) based on fear of continued persecution and abuse if returned to El Salvador. Thanks to a recent change in policy by the Obama administration, Ana, and others like her, have a chance at obtaining asylum and rescuing themselves and their families from further abuse.

II. DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS: ONCE HOPELESS, NOW HOPEFUL?

Asylum is available to an alien physically present in the U.S. who can establish himself/herself to be a refugee according to section 101(a)(42) of the Immigration and Nationality Act (INA).¹ To qualify as a refugee, an applicant for asylum must show that he or she has suffered persecution in the past or has a well-founded fear of persecution in the future on account of at least one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.² A request for asylum may be based on past persecution, as well as a well-founded fear of future persecution.³

The term "well-founded fear" was defined by the Supreme Court as containing an objective and a subjective component referring to, respectively, the known country conditions and the applicant's own beliefs.⁴ A foreign national "possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country."⁵ Quantitatively stated, an applicant's fear is well-founded if there is as little as a 10 percent chance of the feared event happening.⁶ Yet, practically speaking, at least once before an immigration judge, applicants are often forced prove their cases beyond a shadow of a doubt.⁷ Asylum applicants must show that relocation within their own country is either not an option or would not protect them from persecution.⁸ Finally, the persecution must be by the government or by a persecutor which the government is unwilling or unable to control.⁹

Domestic violence victims seeking asylum in the U.S. often assert their fear of persecution on account of membership in a social group. The Board of Immigration Appeals (BIA) defined this ground as persecution "that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic...that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."¹⁰ Subsequent BIA decisions further qualified the definition of social group, requiring that "the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility."¹¹ The "social visibility"¹² and "particularity" requirements further support the idea that to qualify for asylum, victims must show they are persecuted because of an immutable characteristic known to their persecutor.

Whether a battered woman may be a member of a cognizable social group has been a subject of much contention, as reflected in the Department of Homeland Security's nine year delay in producing regulations or an authoritative precedent on the issue.¹³ In *Matter of R-A-*, first heard in 1996, the BIA analyzed an asylum claim involving a young woman from Guatemala, Rody Alvarado, who suffered horrific domestic abuse at the hands of her husband.¹⁴ Ms. Alvarado applied for asylum on account of her membership in a particular social group and political opinion, specifically, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."¹⁵ In 1999, the BIA denied Ms. Alvarado asylum, finding she was not a part of a cognizable social group and that her persecution was not on account of her political opinion.¹⁶ The BIA's decision was subsequently reviewed by several attorney generals, and recently came before the BIA for entry of a new decision. This time, lawyers for the Department of Homeland Security have recommended asylum for this horribly abused woman, virtually guaranteeing the entry of a grant of asylum.¹⁷

III. DEFINING ANA'S SOCIAL GROUP: THE KEY TO A SUCCESSFUL ASYLUM CLAIM

The decision to recommend asylum in Ms. Alvarado's case came after the Department laid out its new stance on domestic violence based claims in a related case involving an abused woman from Mexico, respondent in *Matter of L-R-*. In April of 2009, DHS, now under Secretary Janet Napolitano, acknowledged the difficult issues and challenges presented by the application of asylum in the domestic violence context¹⁸ and recommended remand in *Matter of L-R-*.¹⁹ More importantly for immigration law practitioners and advocates, the brief provides a set of important guidelines on what a successful domestic violence-based claim might look like.²⁰ For the first time, the DHS's brief opens

the door to the possibility that foreign domestic violence victims can qualify for asylum in the United States.²¹

According to DHS, a particular social group based on domestic violence “is best defined in light of the evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship.”²² The key is identifying what characteristics the persecutor targeted in choosing his victim.²³ In Ana’s case, for example, it may have been her youth,²⁴ her gender, her economic disadvantage, and the fact that she was unprotected and vulnerable. Ana was 14 years old when she met her abuser, who was both older and wealthier than she was, and even though family and friends knew of the abuse, nobody did anything to stop it.

According to DHS, an applicant’s status within a domestic relationship is immutable where the applicant is economically, socially, or physically unable to leave the abusive relationship, or where “the abuser would not recognize a divorce or separation as ending the abuser’s right to abuse the victim.”²⁵ Ana, for example, because of her age, her financial dependence, and her fear of retaliation, was unable to leave the abusive relationship. Every time she tried to escape, her family would encourage her to return to her abuser because he was her only means of financial support and security. Even when she tried to end the relationship or relocate to a different city, her abuser would find her and force her to resume the relationship.

“Visibility,” another requirement for establishing asylum based on social group, may be demonstrated by submitting evidence of country conditions related to the social perception of domestic violence.²⁶ It is not surprising that Ana’s family and

friends knew of the abuse, but did nothing to stop it, since 9 out of 10 women in El Salvador have suffered from domestic violence.²⁷ The fact that Salvadoran society is accepting of relationships between older men and younger women, even in cases of abuse, made Ana an easy target. Finally, according to DHS, the “particularity” requirement in social group assessments can be met with the use of the term “domestic relationship,” since the term itself suggests a certain level of specificity.²⁸

We are tasked with showing that Ana and other victims of domestic violence were viewed and treated as property by their abusers, and that this behavior was deemed socially acceptable. Importantly, DHS warns against “circularity,” or defining the social group by the persecution suffered or feared.²⁹ In other words, practitioners should avoid defining the particular social group as “targeted for persecution because they belong to a group of individuals who are targeted for persecution.”³⁰

IV. CONCLUSION: YES WE CAN!

Victims of abuse, like all other asylum applicants, must meet their heavy burden of persuasion by providing testimony and evidence documenting their statutory eligibility for asylum. For Ana and others similarly situated there is no denying that the road ahead remains difficult and long, and that the United States has not traditionally accepted domestic violence based asylum claims, but careful and creative lawyering combined with a keen understanding of the law relating to social group-based asylum claims, may yet change the landscape of what is possible.

ENDNOTES

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¹ 8 C.F.R. § 208(a) (2009).

² 8 C.F.R. § 208.13 (b)(1) (2009); *see also*, *INS v. Elias Zacarias*, 502 U.S. 478, 481 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

³ *See* *Matter of Chen*, 20 I. & N. Dec. 16, 18 (1989) (“If an alien establish that he has been persecuted in the past for one of the five reasons listed in the statute, he is eligible for a grant of asylum. The likelihood of present or future persecution then becomes relevant as to the exercise of discretion, and asylum may be denied as a matter of discretion if there is little likelihood of present persecution.”).

⁴ *Cardoza-Fonseca*, 480 U.S. at 430.

⁵ *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).

⁶ *Cardoza-Fonseca*, 480 U.S. at 431.

⁷ *See also* *Matter of Dass*, 20 I. & N. Dec. 120, (BIA 1989).

⁸ 8 C.F.R. § 208.13(b)(1)(i)(B) (2009).

⁹ *See, e.g.*, *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

¹⁰ *Id.* at 233.

¹¹ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008) (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007)).

¹² *Matter In Re C-A-*, 23 I. & N. Dec. 951 (BIA 2006) (“former noncriminal informants working against the Cali drug cartel’ did not have the requisite social visibility to constitute a particular social.”); *see also*, *Matter of S-E-G-*, 24 I. & N. Dec. 579 at 584 (“the proposed group, which consists of young Salvadorans who have been subject to recruitment efforts by criminal gangs, but who have refused to join for personal, religious, or moral reasons, fails the ‘social visibility’ test and does not qualify as a particular social group.”).

¹³ *See* Brief of Dep’t of Homeland Security at 4 (B.I.A. April 13, 2009), *available at* <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> [hereinafter DHS Brief].

¹⁴ *See* *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999).

¹⁵ *Id.*

¹⁶ *Id.* at 946.

¹⁷ *See* Response of Dep’t of Homeland Security to the Respondent’s Supplemental filing of August 18, 2009, *Matter of Rodi Alvarado-Pena*, No. A073-753-922 (Dep’t of Justice Oct. 28, 2009)..

¹⁸ DHS Brief, *supra* note 13, at 4.

¹⁹ *Id.* at 29.

²⁰ *Id.* at 4-5.

²¹ *Id.* at 11.

²² *Id.* at 14.

²³ *Id.* at 15.

²⁴ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 583-84 (BIA 2008) (questioning whether “youth” is an immutable characteristic, but acknowledging that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable.”).

ENDNOTES CONTINUED

²⁵ DHS Brief, *supra* note 13, at 16.

²⁶ *Id.* at 17.

²⁷ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/2005/72/Add.2 (December 20, 2004) (prepared by Yakin Ertürk) at 10; *see also*, United States Department

of State, 2008 Human Rights Report: El Salvador (Feb. 25 2009), available at <http://www.state.gov/drl/rls/hrrpt/2008/wha/119159.htm> (last visited October 5, 2009) (“Violence against women, including domestic violence, [is] a widespread and serious problem.”).

²⁸ DHS Brief, *supra* note 13, at 19.

²⁹ *Id.* at 6.

³⁰ *Id.* at 10.



(from left to right) Sandra A. Grossman—founder and owner of Grossman Law, LLC and contributing author to *The Modern American's* Fall 2009 Issue; Tatiana Miranda—Editor-in-Chief, *The Modern American*; María Mañón—associate at Grossman Law, LLC and contributing author to *The Modern American's* Fall 2009 Issue; Claudio Grossman—Dean, American University Washington College of Law; and Leslye E. Orloff—Vice President and Director, Immigrant Women Program, Legal Momentum

***The Modern American* Annual Symposium: Exploring the Marginalized Community: How Can Lawyers Work With and in Marginalized Communities?**

**APRIL 14, 2010
4:00 pm - 6:00 pm**

How do common misconceptions of marginalized groups affect their legal representation? How, as attorneys, can we make the legal process less intimidating and more accessible for these groups? Do attorneys have a duty to reach out to marginalized peoples? How can this be accomplished? *The Modern American*, the American University Washington College of Law's (WCL) student-run diversity legal publication, hopes to provide answers to these questions while provoking new ones at the annual symposium.

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