

LOS ANGELES

Daily Journal

— SINCE 1888 —

OFFICIAL NEWSPAPER OF THE CITY OF LOS ANGELES AND THE COUNTY OF LOS ANGELES

THURSDAY, SEPTEMBER 1, 2005

Forum

Domestic-Violence Victims Deserve Uniform Asylum Rules

By Olivier Theard

Except for a capital murder trial, no legal process is as fraught with the true, raw emotions of life and death as an asylum case. For applicants with bona fide claims, the equation is simple: (1) win your case, survive and start a new life or (2) lose your case, get deported and die.

This stark reality crystallized for me when I first accepted the case of a woman I'll call Victoria — not her real name — referred to me by Public Counsel.

I knew when I took the case it would be a major legal challenge, because Victoria was not claiming asylum on any traditional ground, such as race, ethnicity or political opinion. Instead, she was seeking asylum based on the brutal domestic violence she suffered from her husband. What followed was an emotional but successful labor of love through the morass of asylum law.

Fortunately, because Victoria was in the United States on a valid visa, she could apply affirmatively rather than defensively. Affirmative applications are filed with and heard by the local asylum office, which is under the auspices of the Department of Homeland Security.

Affirmative applications have two major advantages. First, the affirmative asylum process is nonadversarial. An asylum interview is conducted by an asylum officer in his or her office. In stark contrast, defensive asylum petitions usually occur when an individual is stopped at a border crossing and detained for deportation. The individual claims asylum while detained, presenting his or her case in a courtroom against the U.S. government and before an immigration judge, who is under the

auspices of the Department of Justice.

The second advantage of an affirmative application is that, under Department of Homeland Security legal standards, a domestic-violence victim can obtain asylum, provided that certain strict standards are met. On the other hand, defensive applications usually are either denied or held up indefinitely because the Justice Department, through the attorney general, has yet to decide whether it will grant gender-based domestic-violence claims.

The background and importance of this jurisdictional disconnect is crucial.

Whether applying affirmatively or defensively, a person can be granted asylum only if he or she can establish past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

The first major hurdle is "persecution," which has two requirements: (1) the acts committed against the victim are severe enough that they constitute "persecution" (or the victim has a well-founded fear of persecution); and (2) the persecution must be at hands of either the government or some entity that the government is not able or willing to control (the "state action" requirement).

Most domestic-violence victims do not have difficulty establishing that the brutality of the acts committed against them constitute persecution. In this regard, Victoria had been stabbed, burned, beaten to the point of suffering a miscarriage, and threatened with disfigurement, gang rape and death if she ever defied her husband.

The second prong of the "persecution"

requirement, "state action," can be difficult to establish. The state action requirement is generally satisfied if the victim can establish that she went to the police and was ignored. In Victoria's case, the law in her home country allowed domestic violence; she went to the police, who told her that they did not get involved in domestic affairs.

The most difficult hurdles for the domestic-violence victim are establishing the existence of a "particular social group" and establishing that the persecution was "on account of" that membership. This is where the law is unsettled. How does one define membership "in a particular social group" for purposes of domestic violence?

Answering this question requires returning to the source of the problem, which is the crucial jurisdictional difference between the Department of Homeland Security (which handles affirmative claims) and the Department of Justice (which handles defensive claims).

The jurisdictional confusion can be explained with reference to the seminal case, *In re Rodi-Alvarado*, pending before the Board of Immigration Appeals. In *Rodi-Alvarado*, a woman from Guatemala applied defensively for asylum after suffering horrific violence by her husband. Her claim was denied, and she was ordered deported, but she appealed, and Attorney General Janet Reno responded by overturning the Board of Immigration's decision.

Reno ordered the Board of Immigration Appeals to reconsider Rodi's case after the issuance of proposed Department of Justice regulations on the subject of gender asylum. Those regulations were prepared

under the Clinton administration but have never been finalized by the Bush administration.

Before Attorney General John Ashcroft left office, he considered making a precedential ruling on Rodi's claim, and he requested that the Department of Homeland Security submit a brief on the subject. Most observers believed the brief would be against granting asylum to domestic-violence victims, but, to everyone's surprise (including, perhaps, Ashcroft's), the Department of Homeland Security brief recommended granting asylum.

The critical issue for the department was defining the social group, which it defined as "Guatemalan women who are unable to leave the relationship." The Department of Homeland Security position was that, if a woman could prove that she was subjected to persecution "on account of" her status as a wife who is subordinate to her husband because of the marital bond (and if she could satisfy the state action and well-founded fear elements), she should be granted asylum.

Rather than make a decision, just before leaving office Ashcroft remanded the case to the Board of Immigration Appeals pending the adoption of the final regulations. Thus, there are no definitive guidelines for defensive domestic-violence asylum claims.

Meanwhile, however, the Department of Homeland Security brief is the de facto standard used for affirmative applications. This means that women who are in a position to file affirmatively have a realistic chance of success, whereas women who file defensively do not. This is patently unfair.

The Department of Justice should adopt the Department of Homeland Security brief so that the standards are clear and uniform.

Victims of domestic violence should not be made to face almost certain death if they are recaptured by abusive husbands in countries with little regard for women's rights.

Those opposing asylum for domestic-violence victims argue that such claims will overwhelm the system and that the United States simply cannot let everyone in. However, only a tiny percentage of claims are domestic-violence-related, and such claims will succeed only if the victim is considered credible and meets the stringent Department of Homeland Security criteria.

Furthermore, decision makers will continue to define narrowly what constitutes a "social group" and will have to decide whether persecution was "on account of" that social group. Every determination will be made on an individual basis by discerning judges or asylum officers, which will ensure that only appropriate cases are approved for asylum.

After conducting massive amounts of research on Victoria's home country (which was necessary to establish the customs and laws of the country and document the human rights abuses). I filed the affirmative asylum claim and readied Victoria for her asylum interview.

Victoria testified to her abuse and was found credible by the asylum officer. However, her claim was initially denied because the officer believed that he had to follow Department of Justice precedent, and he believed that, pending a decision in the *Rodi-Alvarado* case, the Department of Justice did not allow domestic-violence claims.

Victoria was devastated. She knew she would be deported and killed. She had risked everything to escape the only life she had ever known, and her fighting spirit was gone. My role switched from legal counsel to psychologist, as I tried to console

Victoria and tell her we could rebut the decision.

In my rebuttal brief, I explained the jurisdictional difference between Department of Homeland Security and Department of Justice and explained that, under the former's guidelines, Victoria should be granted asylum because she belonged to the particular social group of women from her home country who are unable to leave the relationship.

I argued that she was persecuted by her husband because of her marital relationship and that, under the laws and customs of her home country, Victoria's husband was entitled and even encouraged to abuse her.

After considering my brief, the local asylum office re-interviewed Victoria and made a recommendation, which was not immediately disclosed. Because it was a gender claim, the local agency's recommendation had to be reviewed by the main asylum office in Washington, D.C., a process that took eight months — a painful wait.

Finally, Victoria won approval for asylum in the United States.

Words cannot describe the elation of that moment. Victoria was ecstatic and grateful beyond belief. The sullen, scared woman I had met 18 months before became a new person, with a chance for a new life.

Victoria is in school and working to build a bright future for herself. She has been an inspiration to me, always graceful and strong through adversity. In one year, Victoria can obtain her green card. Five years after that, she can become a U.S. citizen, something she is eager to do. I look forward to being there that day.

Olivier Theard is an associate in the business trial and construction and environmental practice groups at Sheppard, Mullin, Richter & Hampton in Los Angeles.