

DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS

Stephen Meili

University of Minnesota Law School

Minnesota CLE Conference Center

February 28, 2011

Domestic Violence-Based Asylum Claims

- Abuser typically non-governmental actor; must show government will not/cannot protect .
- Have suffered or will suffer persecution – must document physical or psychological effects of abuse, at a minimum through testimony.
- On account of membership in a particular social group – varying ways to define social group.

IDENTIFYING THE PERSECUTOR

- Non-governmental actor whom government is unwilling or unable to control
 - Does gov't take reasonable, effective steps to control?
 - Does applicant have access to gov't protection?
- Must demonstrate no ability for internal flight

Social Group Generally

- **Immutability**

- *Matter of Acosta*, 19 I & N Dec. 211, 232 (BIA 1985), *modified*, *Matter of Mogharrabi*, 19 I & N Dec. 439 (BIA 1987)

- **Visibility**

- *Matter of C-A-*, 23 I & N Dec. 951 (BIA 2006), *aff'd*, *Castillo-Arias v. U.S. Att'y Gen.*, 446 F. 3d 1190 (11th Cir. 2006)

- **Particularity**

- *Matter of S-E-G-*, 24 I & N Dec. 579, 584 (BIA 2008)

Domestic Violence as a Social Group

- Specific characteristic persecutor targets
 - Not gender alone – status as wife (or domestic partner) results in greater subordination
- Immutability of status
 - Marital status as unchangeable due to religious, cultural or legal constraints
 - Country context – given the social, political, historical setting is it possible to change status?
- Cannot be defined by persecution suffered.

Source: http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf & <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>

Social Group in Domestic Violence Cases

- “Best defined in light of the evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship”.
- DHS brief in *Matter of L-R-* (April 13, 2009)

Social Group in Domestic Violence Cases

Possible definitions from DHS Brief in *Matter of L-R-*:

1. “Mexican women in domestic relationships who are unable to leave.”
2. “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”

Social Group in Domestic Violence Cases

- Evidence showing that abuser believes that women should occupy a subordinate position within a domestic relationship.
- Evidence showing that abuser believes the Applicant remains in this subordinate position in the relationship even if physically separated from abuser.

Social Group in Domestic Violence Cases

- Evidence that social expectations within the country of origin reinforce the view that abuse of women within domestic relationships can be tolerated.

Evidence Relating to Immutability

- Economic, social, physical or other constraints making it impossible for the Applicant to leave the relationship during the period when the persecution was inflicted.
- Fear of returning to home country if abuser would not recognize a divorce or separation as ending the abuser's right to continue abusing the victim.

Evidence Relating to Visibility

Applicant's social group must reflect social perceptions or distinctions.

Inability of government forces to assist the Applicant because of her relationship status (as opposed to strangers)

Country condition evidence relating to social perceptions of domestic violence in the home country.

Evidence Relating to Particularity

- Overcome ambiguity of “domestic relationship”. (DHS cites to definition of “crimes of domestic violence” in INA § 237(a)(2)(E)(I) as an example of sufficient specificity for purposes of particularity.

Evidence Relating to Particularity

“Inability to leave” evidence:

- Persecution by abuser after attempts to leave;
- Abuser pursuit of Applicant;
- Applicant’s concern for children;
- Evidence that abuser believes he can abuse Applicant despite physical separation;
- Abuser’s perception that Applicant cannot leave the relationship.

Impact of DHS Brief in L-R-

- Relevant to Gender-based claims generally: Gender and status in a relationship, status in the family, and/or status in society can define a social group.
- DHS Brief is not binding on immigration judges, the BIA or federal judges (but may be persuasive).
- DHS Brief is binding on Asylum Officers.

The One Year Filing Deadline

Sources:

INA § 208(a)(2)(D)

8 C.F.R. § 208.4(a)(4)(i)

No basis in international law or treaty

Legislative Rationale

- Prevention of fraudulent claims and abuse of the asylum process.
- Reduce backlog of applications that prevents the resolution of legitimate applications.

Barriers to Meeting the Deadline

- Lack of awareness (of deadline, right to asylum)
- Avoidance of government officials.
- PTSD and other psychological barriers.
- Fear of implications in U.S. and in home country.
- Wait and see if country conditions improve

Critical Role in Asylum Decisions

October 2010 Report by Heartland

Alliance/National Immigrant Justice Center,
Human Rights *First*, and Penn State Law:

- 19 % of cases analyzed involved the one-year filing deadline.
- For approximately half of applicants denied asylum because of the deadline, the delayed filing was the *only* reason for denial.

BIA and the Deadline

- BIA provided no substantive analysis of denials in 68% of the study's filing deadline cases.
- BIA more likely to reverse the grant of an exception to the deadline than to reverse the denial of an exception.
- Limited review of BIA decisions on the deadline.

Two Exceptions

1. **Changed Circumstances:**

- Circumstances that materially affect “the applicant’s eligibility for asylum” including “changes in conditions in the applicant’s country”

8 C.F.R. § 208.4(a)(4).

Standard of Proof for Changed Circumstances

- Burden on Applicant to prove that the exception exists “to the satisfaction of the Attorney General” - INA § 208(a)(2)(D)
- Similar to the preponderance of the evidence standard (*Matter of Bufalino*, 12 I & N Dec. 277, 282 (BIA 1967))

Changed Circumstances

- Changed circumstances can arise when multiple events occur over time (i.e. not limited to only one event).

Fakhry v. Mukasey, 524 F. 3d 1057, 1064 (9th Cir. 2008).

Shi Je Ge v. Holder, 588 F. 3d 90, 94-95 (2d Cir. 2009).

Changed Circumstances

More than one post-deadline event acceptable
(as long as time between most recent event
and actual filing date is reasonable).

Establish a link between subsequent events and
objective reasonableness of Applicant's fear.

Show activities, not mere membership, in
particular groups.

Two Exceptions

2. Extraordinary Circumstances

Extraordinary circumstances occurring during an Applicant's first year in the U.S. that impede the Applicant's ability to file for asylum.

8 C.F.R. § 208.4(a)(5)

Extraordinary Circumstances

Can be a mental or physical disability including the effects of past persecution.

The illness or disability must have been present, though not necessarily incurred, during at least part of the one year period within arrival.

8 C.F.R. §208.4(a)(5)(i).

Extraordinary Circumstances

- “Effects of persecution can include inability to recall details, severe lack of focus, problems with eating and sleeping and other post-traumatic stress disorder (PTSD) symptoms.”
-Asylum Officer Basic Training Course, One-Year Filing Deadline, Section V(b)(2)(a) (March 23, 2009).
<http://www.uscis.gov/files/article/One-Year-Filing-Deadline.pdf>

Extraordinary Circumstances

Applicant's diagnoses of depression and PTSD, as well as her fear of discovery by immigration officials, constituted an extraordinary circumstance.

Matter of Anon. , 34 Immig. Rptr. B1-22 (BIA Aug. 8, 2006)(unpublished decision).

Extraordinary Circumstances

Importance of obtaining diagnoses of mental or physical disability and their impact on the Applicant's ability to file in a timely manner.