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Waiting for Asylum; Battered Women Stuck in a Legal Limbo

By Tresa Baldas, Staff Reporter

A 'complex issue'

Some happy endings

Hundreds of allegedly abused women seeking asylum in the United States are in legal limbo due to an ongoing policy debate within the U.S. Department of Justice, according to immigration lawyers and women's rights groups.

At issue are proposed regulations that would make domestic abuse a valid reason for seeking asylum. Proposals have been on the desks of three U.S. attorneys general for eight years, but they have yet to be approved.

The long delay has been attributed to several factors, including the demise of the Immigration and Naturalization Service (INS) and the absorption of its duties by the Department of Homeland Security.

The Department of Homeland Security has indicated that the new rules could be approved by this summer.

But in the meantime, attorneys say the worst part of the waiting game is that it has forced battered women to put their lives on hold.

"They are in a form of legal purgatory in the sense that they don't know if they're going to be saved, or sent to some horrible fate," said Philip Hwang, staff attorney at the Lawyers' Committee for Civil Rights, which provides pro bono legal services for indigent asylum seekers.

Hwang, whose group is currently handling more than a dozen asylum cases involving domestic or sex abuse, believes that the new regulations will help resolve many ongoing asylum cases. But he doubts a formal U.S. policy addressing domestic abuse will be adopted anytime soon.

"The truth be told, it could be years before the issue is finally answered," Hwang said.

What's the holdup?

“It’s a complex issue,” said Bill Strassberger, spokesman for the Department of Homeland Security.

Strassberger said that the DHS and the Department of Justice have been working closely on the asylum regulations. But so far, he said, “we can’t anticipate how soon” anything will be finalized.

He noted that the holdup is partly due to the reorganization that eliminated the INS. Strassberger also explained that a major sticking point has been whether domestic-abuse victims should be considered members of a social group; one of the five categories asylum applicants must fall into. Under current U.S. law, asylum applicants must prove that they face persecution because of their religion, race, nationality, politics or membership in a particular social group.

Under the proposed regulation, abused women would be considered members of a social group. That raises some complex issues, such as “how could she be a social group if it were a husband beating a wife,” Strassberger said.

“The Department of Homeland Security has always been concerned about women fleeing abuse, or any one fleeing persecution of any type, and wants to protect the ability to provide protection, which has been our country’s heritage,” he said.

Attorney Daniel Fessler, of counsel to the San Francisco office of Holland & Knight, is handling an asylum case for a woman from Central America. He doesn’t understand what the federal agencies are fussing about; for him, the issue of granting asylum to abused women is clear.

“I believe there is a basic human right not to have boiling water poured on a person. It’s a basic human right not to be disfigured with a broken bottle,” said Fessler, citing examples of gender abuse suffered by refugees. Fessler is calling on the United States to step up and “offer a haven” to battered women.

The stalling, Fessler argued, is only hurting his client – a woman who in 2003 was apprehended at the U.S. border with her two children while trying to cross the Rio Grande River.

“She has received no effective relief,” Fessler said. Fessler’s client is not alone.

According to the Center for Gender and Refugee Studies at the University of California Hastings College of the Law, several hundred gender-based asylum cases involving domestic abuse, rape or prostitution claims are waiting for approval in the United States.

The center’s total database, compiled over the last seven years, includes 2,400 such cases, of which 600 have resulted in a grant of asylum. The majority of the remaining cases are still hung up in court, either before an immigration judge or on appeal. Some women have given up and returned to their native land, while others have been denied asylum and sent home. The center did not provide statistics for denials.

Stephen Knight, attorney and deputy director of the center, said that a key problem facing immigration judges is that there are no national guidelines pertaining to this particular area of asylum law, nor much precedent. As a result, he said, judicial rulings are varied: Some deny asylum, some approve, and some are waiting for a final word from federal authorities.

“There’s a lot of confusion out there,” Knight said. “The trend I have seen is more judges are declining to resolve the cases and prefer to wait for the [federal] resolutions.”

At the center of the refugee debate is the case of Rodi Alvarado, a Guatemalan refugee whose 10-year-old asylum case is still pending before the Board of Immigration Appeals at the Justice Department. In re Rodi Alvarado, No. A 73 753 922 (B.I.A.). It was her case that prompted former Clinton administration Attorney General Janet Reno to introduce the regulations, still awaiting approval that would grant abused women asylum.

But instead of adopting a new U.S. policy, women’s advocates argue, the Justice Department has been dragging its feet.

“The question has yet to be answered: Will the U.S. protect women who flee violations of their fundamental rights?” said Karen Musalo, attorney of record in the Alvarado case. She is the director of the Center for Gender and Refugee Studies at Hastings. “We really are waiting for the answer to that question.”

Musalo was lead attorney in the landmark case of African refugee Fauziya Kassindja, who in 1996 became the first person to get political asylum in the U.S. based on the threat of female genital mutilation. In re Fauziya Kassindja , No. A73 476 695 (B.I.A.).

“It was the first decision granting a woman protection by saying, ‘Yes, when a woman is persecuted because of her gender, you could include this within the social group,’” said Musalo, referring to one of the criteria for asylum.

Despite that case, however, Musalo noted that other gender-based claims, such as honor killings, forced prostitution or family violence have not been formally recognized as grounds for asylum. She is calling for a U.S. policy that will recognize women fleeing several types of gender-related persecutions.

“I think the silence at the executive level on this has been troubling,” Musalo said.

For refugee Aruna Vallabhaneni, the government’s stalling is especially troubling, argued the woman’s attorney, Royal Berg, a solo immigration lawyer in Chicago. His client fled India in 1997 after years of alleged physical abuse – one time the husband allegedly purposefully caused the stove to explode – and left her children behind. It’s been almost seven years, and she is still fighting to stay here. Her case is currently pending before an immigration judge in Chicago. In the Matter of Aruna C. Vallabhaneni (Exec. Office Immig. Review, DOJ, Chicago).

“I had hoped that we would have positive regulations saying that domestic violence could be a basis for asylum in the U.S. Unfortunately, that hasn’t happened. And in the interim, my client has suffered the uncertainty of not knowing if she is going to be sent back to India,” Berg said. “I will keep fighting for her until we prevail in this case.”

That type of perseverance does pay off.

Most recently, in what refugee advocates are hailing a precedent-setting decision, the 2d U.S. Circuit Court of Appeals on March 3 granted asylum to a Chinese woman who fled a forced marriage. *Gao v. Gonzales*, No. 04-1874-ag (2d. Cir. 2006). The decision was the first to address the issue of forced marriage as a basis for asylum, finding that the woman’s claim was more than a private family dispute, and that she had a well-founded fear of prosecution.

In a separate case, Nancy Paik, a pro-bono asylum lawyer with the San Francisco office of Philadelphia’s Schnader Harrison Segal & Lewis, secured asylum for a Nicaraguan woman who was allegedly beaten and raped routinely by her common law husband of 15 years.

According to Paik, the husband allegedly prevented the woman from taking birth control pills, hid her shoes so she couldn’t leave the house, and tried to strangle her once when she refused to have sex with him.

Paik said the woman eventually left the country with the help of her mother, who took out a second mortgage on her house to help her daughter flee to the United States in June 2004, when she was detained in Texas.

Paik admitted that she felt unsure about winning the case. Her client never sought police protection, there were no hospital records, and U.S. policy on the matter was gray. But the turning point for Paik’s case was the testimony of an expert witness on Nicaraguan culture, who, she said, painted for the judge a picture of a desperate woman stuck in a society that condoned abuse and could not protect her.

“The judge herself commented that she was planning on denying the case before she heard the expert testimony. Our expert made our case, no denying it,” said Paik.

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