

Riding the Waves of Immigration Law: The Tempest-Tossed Shore and the Women Behind It

By Hannah Hayes

“Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me . . .”

—engraving on the Statue of Liberty

In 1996, Rodi Alvarado appeared before an immigration court judge in San Francisco seeking asylum. The previous year she left her two children in Guatemala, fleeing a violent husband who routinely beat her, raped her, and shoved her head through mirrors and windows. He had threatened her with a machete and kicked her in the spine in an effort to make her miscarry.

The judge granted her asylum, but the former Immigration and Naturalization Service (INS) appealed the decision, and it was overturned. Fourteen years since fleeing her husband, Alvarado is still waiting. Her

case remains undecided despite the involvement of three attorneys general and the judge’s statement that he believed testimony that her husband had vowed to “hunt her down and kill her” should she return to Guatemala.

Alvarado’s situation is one of many gender-based asylum cases held hostage by the ever-changing bureaucratic landscape and uncertain political climate enveloping refugee and immigrant law. With the nation currently riveted on health care reform, those practicing in the field of immigration and refugee law are tentatively hopeful that comprehensive immigration reform will be next.

“Things change from one year to the next in terms of how the existing law is applied or how myriad laws get enforced,” says Carlina Tapio-Ruano, a past president of the American Immigration Lawyers Association

(AILA), who currently sits on the ABA Commission on Immigration. “Depending on who is in charge, there could be a change in political climate. There are always different policies and different enforcements, and the immigrant population suffers.”

And in a system that is outdated, disorganized, and subject to the political winds of change, women are often the biggest losers.

Violence Not a Reason

“Immigration law and refugee law have become very controversial in today’s political and social discourse, and that’s part of the reason it [Alvarado’s case] is still not resolved,” says Karen Musalo, Alvarado’s lawyer, a clinical professor of law at Hastings College of the Law at the University of California, and the director of its Center for Gender and Refugee Studies. “There’s controversy over questions like should we allow more people in? Who should we protect?”

Furthermore, Musalo points out, lack of consensus within government has contributed to the often chaotic changes in how laws are applied.

Until recently, domestic violence has not been considered a reason for asylum because gender is not one of the social subgroups specified in the Department of Justice’s (DOJ) legal standard for granting asylum. Asylum claims must be based on persecution because of “race, religion, nationality, membership in a particular social group, or political opinion.”

In some cases, women have been considered part of a “particular social group.” One immigration judge agreed with her lawyers that Alvarado belonged to a social group consisting of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male

domination,” but the Board of Immigration Appeals (BIA) overruled the decision.

However, in another 1996 ruling, the BIA ruled that a woman fleeing genital mutilation did in fact belong to a subgroup of “women . . . who opposed the practice” within that tribe and granted her asylum. In early 2001 near the end of her term in office, then–Attorney General Janet Reno ordered a review of the DOJ regulations in view of the formal recognition of gender-based persecution as a possible basis for asylum, but the Bush administration never finalized that order.

Meanwhile, women continue to apply for asylum not only to escape abuse, but also to escape situations ranging from genital mutilation to forced marriages and death threats for refusing to adhere to gender-specific laws or codes of conduct.

For other women, the fear of deportation may keep victims of abuse from speaking out. And while the Violence Against Women Act includes provisions that may help abuse victims who do not have access to legal residency to stay here, many immigrant women are not aware of their options.

“Women working in the informal economy are especially susceptible to abuse,” says Nina Rabin, director of border research at the University of Arizona’s Southwest Institute for Research on Women. Rabin points out that unscrupulous employers can use sexual harassment or refuse to pay because women are afraid of deportation and will not speak up.

“Women also tend to feel more pressured to keep their heads down so as to not attract attention and to protect family members,” Rabin says. “They are often vulnerable both with employers and within the family who use immigration status as a power tool that creates abusive situations.”

As primary caregivers, women who are in the United States illegally also are impacted by policies that may separate them from their children or the primary wage earner. U.S. legislation passed in 1996 requires anyone

who has been in the country illegally for more than a year to return to his or her country of origin, where the individual has to wait 10 years before filing for immigration. For women, this means separating them from their families or making a decision to leave their U.S. citizen children behind to try to achieve legal status.

Women seek asylum to escape genital mutilation, forced marriages, and death threats for resisting gender-specific laws.

In the Chicago law offices of Macarena Tamayo–Calabrese, another Guatemalan woman described her decision to leave her gravely ill child in the United States so she could try to obtain residency legally. Even though she had fled her home country because of violence done to her family, she was forced to return to Guatemala and leave her U.S.-born child behind because he needed a third heart surgery and could not get the operation in Guatemala.

“If every day Americans heard the stories that we do, they would know what we should do,” Tamayo–Calabrese says. “From a lawyer’s point of view, it’s very frustrating, but from a parent’s point of view, I can’t imagine having to leave a child that sick.”

The Women on the Frontlines

Perhaps because so many women are impacted, the area of immigration law seems to attract many more women than men. The AILA reports that more than half of its members are women, as are a majority of its board members and staff.

Like many drawn to the practice of immigration law, Marielena

Hincapie is the daughter of immigrants. The current Los Angeles–based lawyer and executive director of the National Immigration Law Center describes growing up in the 1970s as the typical immigrant story. “I had to translate for my parents and other community members, which meant I went to social service offices and other places.”

Her Colombian parents also gave her the sense of giving back to the community and the strong family values that come with making a new start in a new country.

“My parents were factory workers, and every single one of us went to college and contributed to society in a valuable way,” she says. “That is really the majority of people and immigrants today, and yet we continue to put up so many barriers for them to succeed.”

Tamayo–Calabrese immigrated from Ecuador and after leading several initiatives for the American Bar Association, she opened her own office. “I left an administrative position and returned to practicing immigration law precisely because it’s hard, and I got sick and tired hearing about how terrible all immigrants are. I felt this is a place where I can make a difference.”

However, it is also a field that can take its toll emotionally. “If our clients lose, they lose an entire way of life,” Tamayo–Calabrese points out. “It’s not merely about losing a deal, a house, or a thing. They lose their ability to stay here. If they get deported or if they get admitted, it’s a life-changing result.”

“I learned long ago that it’s important not to get emotionally involved, so we give them realistic predictions as to what their options are,” Tapio–Ruano says. “Having said that, I can’t imagine another area that is more rewarding.”

Shirley Sadjadi has two part-time lawyers working in her practice in Elgin, Illinois. The daughter of Iranian-born parents, Sadjadi became interested in immigration law after experiencing the process through her Bolivian-born husband. While she loves the people-oriented part of her

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practice, she admits to waking up in the middle of the night. “I worry that I didn’t cross a t or dot an i, and you get so involved in people’s personal lives. But I am totally upfront with a client from the very beginning and try to manage expectations so they make their own decisions.”

Riding the Waves

In addition to the emotional component, the uncertainties and vagaries inherent in the practice of immigration law can make it difficult to manage a practice efficiently.

“Adjudications and standards can change on a weekly basis. We might see a change initiated by the Immigration Services, which then will see a trend or a profile and the standards change. Occasionally there’s a law change and everyone runs to comply with it,” says Susan Fortino-Brown, another Chicago practitioner who serves as a liaison to the U.S. Citizenship and Immigration Services in Lincoln, Nebraska.

Fortino-Brown remembers filing 100 applications in 2007 when the State Department briefly extended filings of applications for Adjustment of Status. “In terms of staffing, it’s very

difficult because anything could disrupt our normal work flow.”

“This area is one where we ride the waves. Sometimes the practice is more focused on getting people through the process because there is an amnesty or a visa lottery; other times it’s about enforcement,” Fortino-Brown says. “The swings have a big effect on how one runs and organizes the practice, but it also affects us emotionally. The first [the process] is filled with many more joys; the second [enforcement] is often sad and more frustrating.”

The Current Climate: What’s to Come

As evidenced in the controversy over health care reform and coverage for undocumented residents, the upcoming immigration reform will most likely be fueled by emotion and heated debate.

While the Obama administration has indicated it will move forward in a positive way, others say workplace enforcement and raids have increased. “This has such an impact on women and children that it gives us call for concern,” Hincapie notes. However, others say that

enforcement is now focused more on keeping employers in compliance rather than punishing workers.

Stricter enforcement at the local level by state or municipalities has civil rights advocates concerned because local officials don’t have the capacity or training for enforcement. “When does it become racial profiling?” Hincapie asks.

For Rodi Alvarado, however, there is hope. In August the Obama administration signaled in a brief concerning the case of a Mexican woman that it is open to granting asylum in cases where women have suffered battery in home countries. More importantly, the brief laid out the criteria for required proof, something that has been unclear in the 13 years since Alvarado first filed.

“We are heartened by that, and hopefully it also will be applied in Rodi Alvarado’s case and it will get resolved in the next couple of months,” Musalo says. “With these two cases we can establish some models and principles that will have an impact in terms of legal standards needed for gender cases.”

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sentence for up to three years, enhance policing, provide access to federal databases, and improve training in sexual assault investigations.

Murkowski, a cosponsor of the bill, says, “One important section requires federal employees to testify in tribal court in certain situations. For example, if a woman is harmed, and examined by Indian Health Service providers, that federal employee of the Indian Health Service would be required to testify in tribal court. Too often without adequate evidence, offenders cannot be prosecuted.”

Many Indian advocates see the legislation as positive—if incremental. “The long vision I have is to empower tribes to respond at the tribal level,” Deer says.

“The women are the Natives, and they’re in this no man’s land. People understand the problem of jurisdiction,” Tuell says. “We’ve got to do something about the lack of resources, the lack of will.”

Tribal leaders also are working to build public and community support. Juana Majel-Dixon, a vice president of the National Congress of American

Indians, says violence against women is outside traditional Native cultures. “The stories I’ve been told by elders clearly and profoundly give evidence that, in our societies, domestic violence was not tolerated. Prior to colonization, the men were banished or they weren’t allowed to marry because their seed was sour. You’ve got to wonder, where does this get fixed? As tribal leaders, we want to fix this together,” she says.

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