

Women seeking asylum  
for claims based on  
rape or domestic violence  
still get a skeptical  
hearing in the U.S.

[ THE GENDER GAP ]

BY D.M. OSBORNE

*Illustration by Lauren Simkin Berke*

**SURELY, BEING GANG-RAPED AND BEATEN** by soldiers in uniform is enough to qualify for asylum in the United States? That's what Reina Garcia-Martinez hoped as she recounted just such a harrowing ordeal in testimony before an immigration judge in San Francisco in 2001. Before she fled her war-wrecked home in Guatemala, army soldiers raped Martinez and other women from her village as retribution for their families' perceived support of guerrillas. The judge, a woman, believed the story, but failed to see a political motive for the assaults. Instead, she sided with the U.S. government lawyers' contention that Martinez "could only guess as to why she was raped." The judge denied Martinez asylum—a decision the Board of Immigration Appeals (BIA) later affirmed in a curt, one-line order.

So when Reed Smith's Jayne Fleming took the case up to the U.S. Court of Appeals for the Ninth Circuit in 2003, she figured the odds were against her. "We had no precedent on point," notes Fleming, an associate based in Oakland who has handled a half-dozen political asylum appeals. Indeed, Fleming faced a major challenge in distinguishing Martinez's appeal from others in which rape victims had lost, and had long since been deported.

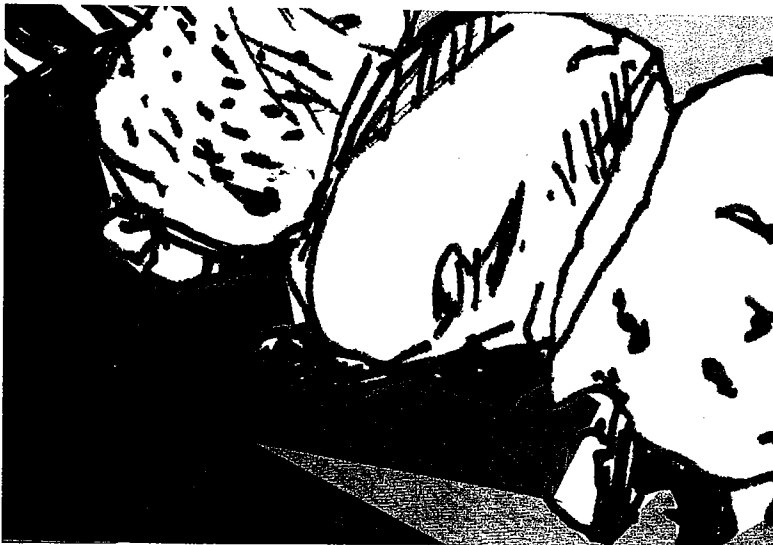
Fleming's strategy: prove that Guatemalan soldiers had engaged in

"a pattern and practice of rape as a deliberate tactic" to punish the women in Martinez's town. "That allowed us to show the political connection," recalls Fleming, who logged 237 hours on the case. Fleming also took pains to persuade the appeals panel that Martinez had been persecuted "on account of" her membership in a social group worthy of refugee protection—namely, all the women in her village who the soldiers believed were guerrilla sympathizers. Under U.S. law, persecution on account of one's membership in a particular social group meets one of five possible statutory requirements for asylum.

In 2004 the Ninth Circuit sided with Martinez and remanded her case to the BIA, which granted her asylum last year, marking a victory for Fleming—one that refugee advocates laud as an important precedent. "It's very valuable in recognizing that when rape happens in these sorts of situations, it is clearly political persecution," says Stephen Knight, deputy director of the Center for Gender and Refugee Studies at the University of California, Hastings College of the Law.

Notwithstanding the Martinez precedent, women seeking U.S. asylum confront a system that is wildly inconsistent in resolving gender-specific asylum claims. In the Fifth Circuit, for instance, a 1987 decision refusing to rehear BIA's denial of asylum to a brutalized Salvadoran woman still stands as good law—even though the government's own brief in that case strongly suggested a political motive. Specifically, Salvadoran soldiers forced the applicant and other women from her town to watch while their husbands, sons, and brothers were mutilated and murdered. The soldiers then raped the women while onlookers shouted political slogans. "Alien failed to establish that she personally held political beliefs which would subject her to further persecution in country of deportation," the opinion explained dryly, adding that the woman, who was allowed 12 days to return to El Salvador, "did not establish that [she] was persecuted on account of any political opinion."

That gender-neutral immigration laws have wrongly impeded female asylum seekers is something the United Nations Commission on Human Rights officially recognized in 1993, when it urged member states to adopt policies to better protect victims of harms suffered only by women. Two years later, following Canada's lead,



the U.S. Department of Justice issued a memorandum, "Considerations for Asylum Officers Adjudicating Asylum Claims from Women." Intended primarily for agents at the border control and interdiction levels, but also for immigration judges, the document provided guidelines for assessing social groups, and clearly identified rape, genital mutilation, and domestic violence among the gender-specific human rights violations that might qualify for refugee protection.

"The purpose was to have women's claims treated equally and fairly with men's, and to promote an understanding that human rights norms govern the structure of asylum protection," recalls Deborah Anker, a lecturer on law at Harvard Law School and director of its Immigration and Refugee Clinical Program, which the Justice Department credited with helping formulate the guidelines. "They were monumentally important in that way."

The recommendations were not binding, however, leaving the door open for immigration judges to stick with their old ways. Within five months, a judge did just that, triggering an appeal that would emerge as groundbreaking precedent. The case started in 1994, when 18-year-old Fauziya Kasinga presented herself at Newark International Airport as a refugee who had fled her African home for fear of female genital mutilation (FGM)—a custom practiced by her tribe in northern Togo. According to a transcript of his oral decision, Kasinga's immigration judge didn't find her credible, and wasn't persuaded that FGM equated with persecution.

Disturbed by the judge's apparent disregard for the new guidelines, Karen Musalo, then teaching at American University's International Human Rights Clinic, appealed on Kasinga's behalf. Then, in a rare published decision in June 1996, the BIA reversed the immigration judge and granted Kasinga asylum based on a social group defined principally by gender. The BIA not only concluded that FGM constituted persecution, it also found that Kasinga was at risk of persecution "on account of" her membership in a social group it defined as "young women in [her] tribe who have not had FGM . . . and who oppose the practice." With that holding, the BIA went farther than ever before in establishing that gender could fulfill the long-standing "immutable trait" requirement in defining an asylum-worthy social group. For women asylum seekers, the Kasinga decision was especially important, too, in that the BIA distinguished it from earlier decisions by holding that a punitive or malicious intent was not necessary to show persecution.

Because the Kasinga decision was not specific to any U.S. circuit, advocates had hoped it would level the field for female asylum seekers. Yet, in the ensuing decade, immigration judges, circuit courts, and even the BIA have been anything but uniform in how they apply—or ignore—the principles it established.

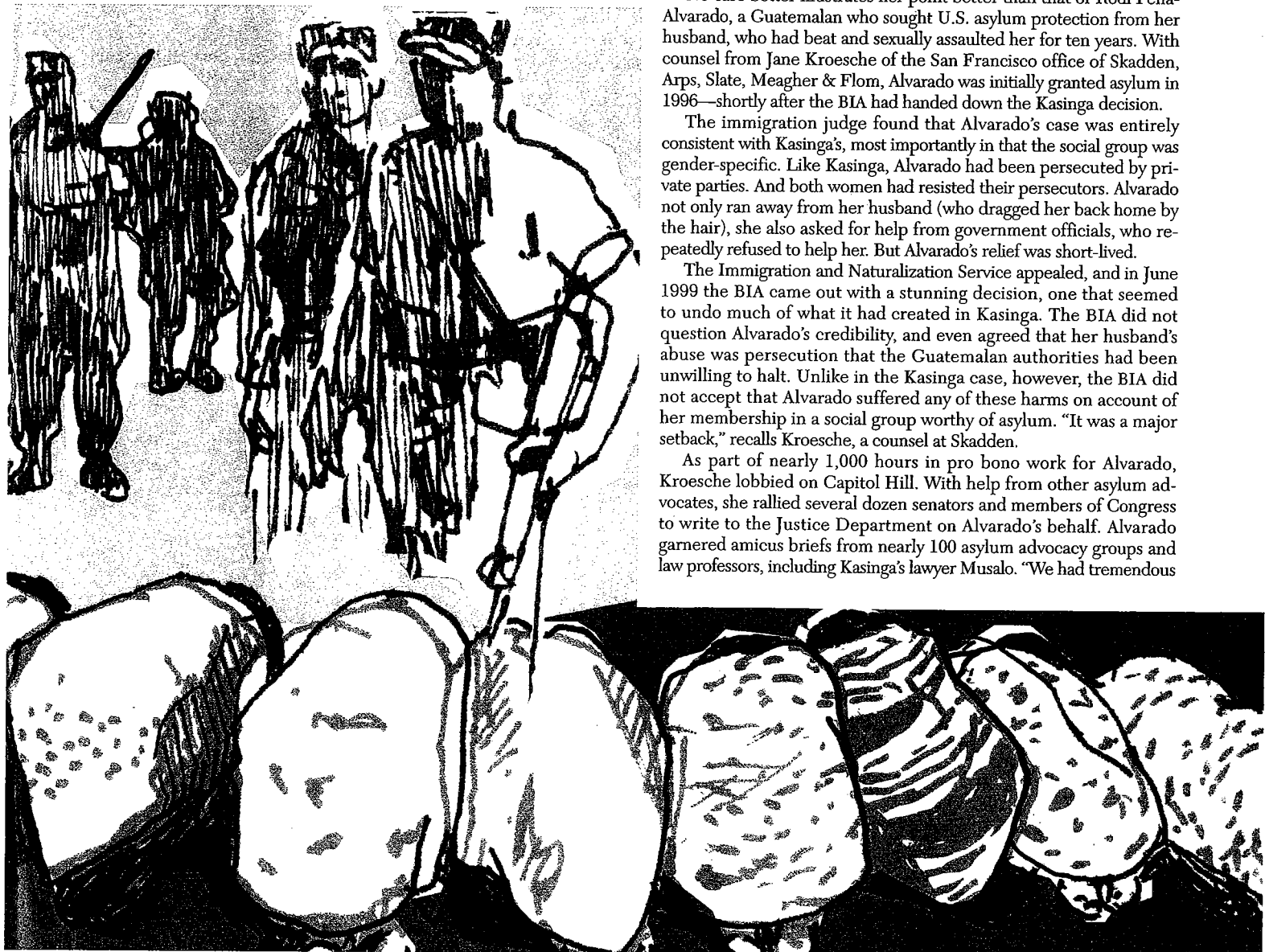
"There is a kind of lingering hostility to the idea of accepting claims that haven't historically been accepted," notes Musalo, now director of Hastings's gender and refugee center. "We continue to see resistance to gender cases and an almost willing blindness to what the law provides for."

No case better illustrates her point better than that of Rodi Peña-Alvarado, a Guatemalan who sought U.S. asylum protection from her husband, who had beat and sexually assaulted her for ten years. With counsel from Jane Kroesche of the San Francisco office of Skadden, Arps, Slate, Meagher & Flom, Alvarado was initially granted asylum in 1996—shortly after the BIA had handed down the Kasinga decision.

The immigration judge found that Alvarado's case was entirely consistent with Kasinga's, most importantly in that the social group was gender-specific. Like Kasinga, Alvarado had been persecuted by private parties. And both women had resisted their persecutors. Alvarado not only ran away from her husband (who dragged her back home by the hair), she also asked for help from government officials, who repeatedly refused to help her. But Alvarado's relief was short-lived.

The Immigration and Naturalization Service appealed, and in June 1999 the BIA came out with a stunning decision, one that seemed to undo much of what it had created in Kasinga. The BIA did not question Alvarado's credibility, and even agreed that her husband's abuse was persecution that the Guatemalan authorities had been unwilling to halt. Unlike in the Kasinga case, however, the BIA did not accept that Alvarado suffered any of these harms on account of her membership in a social group worthy of asylum. "It was a major setback," recalls Kroesche, a counsel at Skadden.

As part of nearly 1,000 hours in pro bono work for Alvarado, Kroesche lobbied on Capitol Hill. With help from other asylum advocates, she rallied several dozen senators and members of Congress to write to the Justice Department on Alvarado's behalf. Alvarado garnered amicus briefs from nearly 100 asylum advocacy groups and law professors, including Kasinga's lawyer Musalo. "We had tremendous



bipartisan support," says Kroesche, "which really shows how important this issue is."

The PR effort made some headway: In January 2001 then-attorney general Janet Reno vacated the BIA decision, and her staff, working with the then INS, drafted a proposed regulation that would, finally, provide a binding legal framework for analyzing gender-related asylum claims. Reno then remanded the case to the BIA, ordering that it be decided based on the new rule. Her successor, John Ashcroft, certified the case to himself for reconsideration, but, like Reno, he sent it back to BIA during his final weeks in office.

Five years after the proposed rule was drafted, the U.S. Department of Homeland Security and the Justice Department "are still in the process of finalizing the regs," says Homeland Security spokesperson William Strassberger. Unless and until the U.S. finalizes that rule, it will lag behind Australia, Canada, New Zealand, Spain, and the United Kingdom in adopting binding immigration policies that recognize as refugees victims of domestic violence. In the meantime, Alvarado may be the only such applicant whose fate isn't hanging in the balance. Homeland Security has stated that, whatever the outcome of her asylum appeal, it has no plans to seek her removal.

In an era dominated by fear of unchecked

immigration, however, it's far from certain that the proposed rule—if ever finalized—will significantly expand U.S. refugee protections for women. Groups such as the Federation for American Immigration Reform (FAIR) objected to the original language of the Reno-era regulation, fretting that it could result in a flood of asylum seekers with claims that are impossible to verify, or, worse, that are made-up. "If we make spousal abuse, or cultural practices, grounds for asylum, then it will become unmanageable," asserts FAIR spokesperson Ira Mehlman.

Experience suggests such fears may not be well-founded. Since 1993, when Canada adopted gender-specific immigration laws, fewer than 2 percent of all asylum seekers in that country have based their claims on domestic violence. And on the heels of Kasinga, the U.S. Citizen Immigration Service, then part of the INS, and now part of Homeland Security, looked for but found no sudden jump in the number of FGM cases.

In one rather celebrated case, however, it did turn out that the asylum applicant was a fraud. Identifying herself as Adelaide Abankwah of Ghana, Africa, a young woman picked up by immigration officials in New York claimed that she would face certain genital mutilation if returned to her country. In 1998, after an immigration judge and the BIA denied her claim, Abankwah, who had

been incarcerated for many months at the Wackenhut Detention Center in New York, attracted the sympathies of Hillary Rodham Clinton and Gloria Steinem, as well as pro bono help from the New York office of Orrick, Herrington & Sutcliffe.

Jonathan Rauchway, then a junior associate at Orrick, volunteered to brief and argue the case in the U.S. Court of Appeals for the Second Circuit—and won. Seventeen months later, though, *The Washington Post* exposed Abankwah as an impostor. Having independently verified the existence of an INS investigation into Abankwah's identity, the *Post* reported that her real name was Regina Norman Danson and that she had assumed the identity of another Ghanaian immigrant.

Now a partner at Denver's Davis Graham & Stubbs, Rauchway admits he had some doubts about his client's credibility. But looking back on the experience, he can find no rationale for slamming the doors on female asylum seekers. That some women may gain refugee protections on false grounds "is a consequence we have to be willing to accept," Rauchway says. "It may be that we will let some people in who don't really qualify. But that's better than turning away people who do."

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