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After Rody Alvarado's Victory, Obstacles Remain for Domestic Violence Victims Seeking Asylum

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Although Rody Alvarado, a Guatemalan victim of domestic violence, recently won her 14-year-long battle to gain asylum in the U.S., there remain obstacles for other victims of domestic violence seeking asylum in our country. In this guest blog post, Lisa Frydman, of the [Center for Gender & Refugee Studies](#), explains the legal challenges that still must be overcome for victims of domestic violence seeking protection in the U.S.

Despite the recent victory in Rody Alvarado's 14-year fight for asylum, there continue to be impediments in our law that prevent domestic violence victims from gaining protection in the U.S. An asylum applicant must establish that she has suffered or fears persecution on account of her race, religion, nationality, political opinion, or membership in a particular social group. Since the enactment of the United States Refugee Act in 1980, skeptical adjudicators have denied gender-based claims, ruling that harms such as domestic violence or rape are not acts of persecution, or that harm committed because of gender is not covered by the Act.

Domestic violence claims can arise under any of the above grounds, but are most frequently analyzed under that of a "particular social group." The Board of Immigration Appeals (BIA), the highest immigration court in the nation, first articulated the standard for social group cases in its 1985 decision, [Matter of Acosta](#). It defined the term as a group of individuals who share a common characteristic that is immutable or so fundamental to identity or conscience that an individual should not be required to change. The BIA listed sex as an example of an immutable characteristic. As the BIA recognized, this approach was consistent with analysis of claims under the other grounds for asylum, because race, religion, political opinion, and nationality are immutable or fundamental characteristics. Following the Acosta decision, the BIA and federal courts ruled in favor of social groups defined by gender alone, or in combination with other characteristics. Foreign jurisdictions also cited favorably to *Acosta*.

Groups recognized by the BIA as social groups over the years have included: women from a particular tribe in Northern Togo who have not undergone female genital cutting and who oppose the practice, individuals identified as homosexuals by the Cuban government, and former members of the national police of El Salvador. For over twenty years, every federal court that reviewed the Acosta test upheld it. However, in a 2008 decision, known as [Matter of S-E-G-](#), the BIA raised the bar significantly in social group cases. In addition to group members sharing an immutable or fundamental characteristic, the BIA now required social groups to be “socially visible” and defined with “particularity.” The BIA first mentioned social visibility and particularity in a 2006 case known as *In re C-A-*, as “relevant factor[s]” for consideration, not requirements.

Attorneys have struggled to satisfy the new requirements because the BIA decisions explaining social visibility and particularity – and the federal decisions upholding them – are muddled, to say the least. Some decisions explain social visibility as the precondition that the *applicant* literally be identifiable as a group member (essentially requiring that anyone looking at the individual on the street would identify her as a member of the group), while others require societal recognition of the *defined group*, or evidence of distinct treatment toward group members. “Particularity” in essence is a question of whether the group is defined with enough specificity to identify who is in the group, and who is outside of the group; decisions explaining this requirement are also unclear. In addition to being analytically confusing, BIA decisions often conflate social visibility and particularity with other elements of the refugee definition, such as whether the causal link (nexus) to a protected ground has been established and whether there is sufficient likelihood that the applicant would be targeted for future persecution. While these decisions assert that the various social groups the BIA had formerly approved would all meet the social visibility test, they fail to explain how or why.

The BIA erroneously justified its imposition of social visibility as consistent with [guidelines issued in 2002](#) by the United Nations High Commissioner for Refugees (UNHCR) regarding claims based on membership in a particular social group. However, this is incorrect. UNHCR does not require that members of a social group be socially visible. While the guidelines advise that groups perceived as groups by society may be social groups, this approach is an *alternative* to the immutable or fundamental characteristics test, *not in addition* to it. The UNHCR has repeatedly clarified its position and has explicitly rejected the requirements of social visibility and particularity as inconsistent with the purpose and intent of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, but the BIA has continued to apply them.

Social visibility and particularity are burdensome requirements that have posed further obstacles in gender-based cases and have frequently resulted in denials of refugee status. In two recent published decisions out of the Seventh Circuit Court of Appeals, the court recognized the BIA’s significant departure from *Matter of Acosta* and rejected the BIA’s new standard for social group claims. Writing for the court, [Judge Posner criticized](#) “social visibility” as simply making “no sense” because members of a group targeted for persecution “take pains to avoid being socially visible.” He illustrated the absurdity of the requirement by pointing to social groups the BIA had previously approved whose members would not be individually identifiable, such as homosexuals who would “pass as heterosexual” to avoid persecution in a “homophobic society” and women who have not yet undergone female genital cutting, who “do not look different from anyone else.”

In April 2009, the Department of Homeland Security (DHS) [filed a brief](#) in a domestic violence case known as “L.R.,” in which it argued that women who have suffered domestic violence may qualify for asylum as members of a particular social group under the current BIA standard if they met certain, clearly defined criteria. The case received national media attention in July 2009; journalists reported that victims of domestic violence could now qualify for asylum in the U.S. Although the L.R. brief explains how social visibility and particularity should be understood and provides a roadmap for how to establish these requirements in a domestic violence case, it does not rectify the problems they cause. Five months after the L.R. brief became public, Rody Alvarado - whose highly publicized case had become the lead domestic violence case in the U.S. – was finally granted asylum after the parties agreed on her eligibility.

Despite the DHS brief in L.R. and the grant of asylum to Rody Alvarado, victims of domestic violence continue to face impediments to protection. The Center for Gender & Refugee Studies (CGRS), national experts on gender-based refugee claims, has been informed of a number of cases in which DHS attorneys have taken a position that contradicts the L.R. brief, refused to acknowledge the brief or that it represents the position of the agency, or indicated at the beginning of a case - before the submission of any evidence - that they would appeal a grant of asylum to the highest level. In addition, decisions by immigration judges in domestic violence cases continue to be inconsistent, with some judges granting asylum based on the framework set out in the L.R. brief, and others denying protection due to the lack of binding authority in the form of a precedential decision, federal regulations, or legislation.

While the grant of asylum to Ms. Alvarado is cause for celebration, the U.S.’s position that social groups cannot be defined by immutable or fundamental criteria alone, but also require a showing of social visibility and particularity, remains troubling. These criteria have no basis in the BIA’s own precedent or in UNHCR guidance. Furthermore, they are poorly understood by adjudicators, and have proved to be an obstruction in countless claims based on social group membership. Legislation and/or regulations are needed to eliminate these problematic requirements and ensure refugee protection to women like Rody Alvarado.