



LEGAL AFFAIRS

## Battered Asylum Seekers May Find U.S. Relief

by Jennifer Ludden

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*Morning Edition*, July 22, 2009 · For more than a decade, U.S. administrations have struggled with whether female victims of domestic violence can qualify for asylum. Now, in a move that could bring the issue closer to resolution, the Obama administration is arguing that yes, it's possible they can.

In court documents recently made public, a Mexican woman identified only as "L.R." says she was abused repeatedly by her husband starting in 1987. According to the documents, he would put a gun to her head and force her to have sex. The woman's lawyer, Karen Musalo, says once when her client was pregnant with one of the couple's three children, her husband set fire to the bed she was in.

"She actually tried to get away from him a number of times by coming to the U.S., and then he came to the U.S. and told her that if she didn't come back he would kill her family."

L.R. did go back to Mexico, but came to the U.S. again seeking asylum.

Musalo teaches refugee law at the University of California Hastings College of Law in San Francisco and has long been involved with gender-based asylum. She admits it's a difficult area. Other asylum seekers must prove a well-founded fear of persecution based on race, religion, nationality or political opinion. But Musalo's abused Mexican client has to fit into another category.

"She has to meet this sticky, amorphous, confusing legal standard to show that she's what is called a member of a particular social group," says Musalo.

That social group is battered women, which is, of course, impossibly broad. But in a legal brief in L.R.'s case, the Department of Homeland Security has laid out how this group could be narrowed.

Musalo says that's a tall order, but a fair one.

"What she would have to show is that violence against women is pervasive, and that it's so widely accepted that nobody — neighbors, family members — nobody would intervene or try to stop it, and the government certainly wouldn't intervene," Musalo says.

The woman would also have to prove she couldn't find refuge anywhere else in her home country.

### **'Impermissibly Circular'**

The DHS stance is based largely on a similar agency brief from 2004 under President Bush. But then-Attorney General John Ashcroft opposed the position, and the cases of other battered women seeking asylum fell into limbo.

"This is a very problematic way to interpret the law," says Kris Kobach, a counsel to Ashcroft. He now teaches at the University of Missouri. Kobach points out that courts have previously found this definition of persecution to be "impermissibly circular."

"Basically the battered woman is saying, 'I'm being persecuted, that is to say, I'm being battered, because I'm a member of a group.' What's the group? People who are being battered." Kobach says.

But the DHS brief explicitly addresses this problem, and Musalo says its more narrow definition of this group of asylum seekers will pass court muster.

Kobach says if the Obama administration wants to change policy, it'd be better off going through Congress. A number of countries, including Germany, Spain and Sweden, have passed laws recognizing persecution based on gender or sex. But Kobach has other concerns. He worries courts would get it wrong a lot, ruling on something so private. And he believes it could be hard for courts to appear fair.

"It's really hard to draw valid distinctions," Kobach says. "In other words, why do we let this person have a valid asylum claim in the United States but not another person who is in very similar circumstances?"

In a statement, DHS said each case "requires scrutiny of the specific threat," and the agency is "interested in developing regulations" to help do that.

Musalo's Mexican client doesn't go back to court until next spring.