

2003

Where is the Protection?: A Failed Response to Gender-Based Persecution

Elissa Steglich

Managing Attorney, Midwest Immigration & Human Rights Center

Follow this and additional works at: <http://lawcommons.luc.edu/pilr>

 Part of the [Human Rights Law Commons](#), [Immigration Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Elissa Steglich, *Where is the Protection?: A Failed Response to Gender-Based Persecution*, 8 Pub. Interest L. Rptr. 7 (2003).
Available at: <http://lawcommons.luc.edu/pilr/vol8/iss2/3>

This Feature is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

WHERE IS THE PROTECTION?:

A FAILED RESPONSE TO GENDER-BASED PERSECUTION

By Elissa Steglich*

I sat across from A., a middle-aged woman from a country in the Middle East, unsure of what she would say next and unsure of what I would say if I were in her position. She had come to the United States with her husband and children some time ago. It was not her choice to come, but rather the election of her husband, who had controlled her every move since they were married. I am sure that she was curious as to what life would be like here, although I never asked. Perhaps she thought it would give her an out – provide her with a context whereby she could work away from the severe physical abuse and emotional mistreatment she had suffered all her life and watched her children suffer as well. If she had sought an escape, she had found it. The safety net she had probably presumed was airtight, was in fact, weak and filled with holes.

The decision I had asked her to make was an impossible one. Would she file for the uncertain protection of political asylum in order to possibly avoid the detention of her son who was being ordered by the U.S. government to report for special registration?¹ In seeking asylum, she would place herself in the hands of Attorney General John Ashcroft who has sent clear signals that A. is not a person he wishes to protect. She would also risk deportation to a country where her husband's family awaits to punish her. They have threatened her numerous times in no uncertain terms. According to them, her courage in asking the United States for protection for herself and her children is a dishonor to the family and an unforgivable act of defiance and independence.

* Elissa Steglich is Managing Attorney at the Midwest Immigrant & Human Rights Center. The views expressed herein are those of the author.

By not acting, however, she would risk the detention of her son in the special registration process. Unfortunately, she is currently in a shelter with no friends and no access to the thousands of dollars it may take to obtain the release of her son. Either choice would risk lives, and potentially return her and her children to the abuse away from which she had finally stepped.

Two new developments in immigration law placed A. in these complicated circumstances. The first is the new special registration requirement for males 16 years old and older from certain Middle Eastern and African nations who arrived in the United States as nonimmigrants and who

Reports indicate that the Department of Justice plans to reverse the policy of protecting women fleeing gender-related violence in their home countries.

will be remaining past a date fixed by the government. Conceived as a strategy to guard against terrorism within our borders, the Special Registration program has resulted in the detention of hundreds of individuals, many of whom have been waiting years for the Immigration and Naturalization Service (INS) (now known as the Bureau of Citizenship and Immigration Services of the Department of Homeland Security (DHS)) to process their visa and legal residency paperwork.² In order to avoid the registration, many individuals affected have chosen to move to Canada. The mass migration, however, has failed to attract Canada's favor. Many heading

FEATURE: Gender-Based Persecution

north are being turned back and placed in detention facing charges of immigration violations that can result in deportation.³ Where immigration relief may be available, individuals subject to special registration are forced to make life-altering decisions in a very short period of time, often within days.

The second development is even more troubling and threatens to leave individuals fleeing gender-based persecution such as domestic violence, honor killings, rape as a weapon of war, human trafficking and sexual slavery completely unprotected. Implementing the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol to the Refugee Convention, U.S. law

provides asylum to individuals fleeing from or fearing persecution based on their race, nationality, religion, political opinion or membership in a particular social group in their country of origin. As gender-based persecution became more recognized, a small but increasing number of

petitions for asylum based on this form of violence has appeared before the INS/DHS and the Immigration Courts. Often, the applicants have fled situations of extreme violence and brutality; these mostly women and children have nowhere else to turn, and the denial of protection here can be a sentence of death.

In the late 1990s, a woman from Guatemala who had endured disturbing levels of domestic abuse appealed to an Immigration Judge for safe haven. While in Guatemala, her husband beat her repeatedly, threatened to kill her, and kicked her so hard that he caused a miscarriage. She sought police assistance time and again, but her calls were never heeded.

With the Guatemalan government unable to support and protect her, Rodi Alvarado made

her way to the United States. The Immigration Judge who heard her case granted her asylum. The Board of Immigration Appeals (BIA), the administrative court with jurisdiction to hear appeals from the Immigration Courts, reversed the decision, stripping Ms. Alvarado of relief. This decision, *Matter of R. A.*, was denounced by advocates throughout the world as being overly restrictive and incorrect in its interpretation of asylum law as applied to gender-related cases. In one of her final acts as Attorney General, Janet Reno vacated the BIA's decision in January 2001 and ordered the BIA to reconsider the decision in the case in light of proposed regulations on these types of cases. The regulations, which Reno's Justice Department had authored to

provide clear guidelines on how to consider gender-based asylum claims, were never finalized. As a result, Rodi Alvarado's case is still pending.

This past February, as the Department of Homeland Security assumed control over most immigration responsibilities, Attorney

General Ashcroft confirmed that he had recertified *Matter of R.A.* to himself and that his office was in the process of drafting new regulations covering gender-based cases. Reports indicate that the Department of Justice plans to reverse the policy of protecting women fleeing gender-related violence in their home countries. While not yet issued, the new regulations may well curtail the ability of women and children to obtain asylum protection in the United States from where they have fled and fear return based on the range of gender-based abuses, including domestic violence.

Under the current U.S. law on asylum protection, in accordance with international standards, cases of gender-related violence, and particularly domestic violence, have been

The persecution itself must have been motivated by a desire to act out against the individual due to her race, religion, nationality, political opinion or membership in a particular social group.

FEATURE: Gender-Based Persecution

evaluated similar to other asylum claims. First, the individual must establish that she has a “well-founded fear” of persecution, which may be presumed from having experienced past persecution. In addition, the fear must be shown to be both objectively and subjectively reasonable. The persecution itself must have been motivated by a desire to act out against the individual due to her race, religion, nationality, political opinion or membership in a particular social group. The “social group” must be cognizable, but can be defined by gender and/or age. Most domestic violence-based asylum claims have been argued under a social group theory, comprised of women involved with spouses who believe in male dominance, women victims/survivors of domestic abuse, or women who reject notions of male dominance. Cases have also been litigated under theories of political opinion or imputed political opinion, where the women have sought services or police protection in their home countries and been further abused as a result.

The position of the Department of Justice on this issue would be a tragic departure from guarantees provided for in the Refugee

“The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual’s claim to refugee status is not valid.”

– UNHCR gender guidelines

Convention and Protocol and specifically recognized by the United Nations High Commissioner for Refugees (UNHCR) and the governments of Canada, the United Kingdom, Australia and New Zealand. UNHCR’s guidance on refugee protection based on gender-related persecution is clear: that it is important “to ensure

that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognized as such.”⁴ Further,

There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence and trafficking are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.⁵

Importantly, the Refugee Convention and Protocol provides protection not only to those individuals fleeing from or fearing State-sponsored violence on account of the five enumerated grounds, but also to those fleeing from a private agent of persecution against whom the government cannot, or will not, properly protect the individual. U.S. law is likewise clear on this point, considering asylum petitions where the persecutor is someone that the government is “unable or unwilling to control.”⁶ As the UNHCR gender guidelines highlight,

Even though a particular state may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. ... The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual’s claim to refugee status is not valid.⁷

In most cases of gender-related violence, the persecutor will be a private individual – the spouse or family member of the individual seeking protection. It is critical, therefore, that the law reflects and responds to the nature of that persecution. Rodi Alvarez was denied

Continued on Page 27.

FEATURE: Impact of *Klaeren v. Lisle*

IF IT AIN'T BROKE, FIX IT?: ASSESSING THE IMPACT OF *KLAEREN V. LISLE* ON ILLINOIS ZONING LAW

By Victor P. Filippini, Jr., Barbara A. Adams, and
Elliot M. Regenstein*

When the Illinois Supreme Court agreed to review the case of *People ex rel. Klaeren v. Village of Lisle*,¹

most observers expected the Court to clarify the procedural rights associated with local public hearings in Illinois. Although the Supreme Court did address public hearing procedures, the more

significant and startling aspect of its decision was the abandonment of more than 40 years of precedent through its proclamation that “municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition.”²

Certainly, the mere fact that a well-established precedent has been overturned is

reason enough to take notice of a judicial decision. When that decision will literally affect every local government in Illinois that has zoning authority, and every property owner or developer who may seek a special use permit in connection with the use and development of a property, there is even more reason to pay attention. But when such a dramatic turnabout in the law occurs for no apparent reason, it is time to do more than read the Court’s opinion; it is time to question it.

BACKGROUND:

THE CASE AND THE LAW

In *Klaeren*, landowners living adjacent to a proposed Meijer development challenged the procedure by which the Village of Lisle approved the development. Specifically, Lisle

used the uncommon procedure of a joint hearing of its Zoning Board of Appeals, Plan Commission, and Board of Trustees on the proposed development to hear evidence on the requested annexation, annexation agreement, rezoning, and special use permits for a planned development and for a gas station. Over 500 people attended the public hearing. The

mayor of Lisle presided at the hearing, allowing the petitioners to make a full presentation of their case but setting a two-minute time limit on all

...in filing suit, the plaintiffs did not challenge the substance of Lisle’s zoning decisions. Rather, the basis for their zoning challenge was that the public hearing process did not afford them an adequate opportunity to be heard.

* Victor P. Filippini, Jr. and Barbara A. Adams are partners and Elliot M. Regenstein is an associate of the Chicago office of Holland & Knight, LLC. They principally practice in local government law and land use law, representing many Chicago area municipalities and governmental agencies.

FEATURE: Impact of *Klaeren v. Lisle*

speakers from the audience – a limitation that prevented a citizen group from making a prepared presentation on behalf of 2,000 residents who had signed a petition. The mayor also barred citizens from presenting poster board exhibits as evidence. Moreover, the mayor prohibited any of the citizens from cross-examining any of the petitioner's witnesses.³

After the joint hearing was adjourned, the Plan Commission and Zoning Board of Appeals each considered the evidence relating to the requested planned development and gas station special use permits, and both of these bodies ultimately recommended that the special use permits should be denied.⁴ Nevertheless, the Village Board in Lisle decided not to follow the recommendations of the Plan Commission and Zoning Board of Appeals, and it approved the annexation and zoning petitions needed to permit the Meijer development to proceed.

The plaintiffs, disappointed residents of Lisle, filed their lawsuit to prevent the Meijer development from proceeding. The trial court held a preliminary injunction hearing at which at least ten witnesses testified to matters both within and without the public hearing record. Following the hearing, the trial court granted a preliminary injunction from which the case was appealed.⁵ Significantly, in filing suit, the plaintiffs did not challenge the substance of Lisle's zoning decisions. Rather, the basis for their zoning challenge was that the public hearing process did not afford them an adequate opportunity to be heard.⁶

In reviewing this case, the Appellate Court of Illinois, Second District, held that the procedures used at the public hearing in Lisle violated the public hearing rights of the adjacent landowners. In doing so, the Second District determined that *all* public hearings "in all municipalities" must allow not only the right of cross-examination, but the "full panoply of rights" to subpoena witnesses, present witnesses, and request continuances for purposes of developing rebuttal evidence.⁷

The Supreme Court expressly rejected

the Second District's conclusion that *any* public hearing before *any* municipal body required the municipal body to provide the full spectrum of rights identified by the Second District. The Supreme Court held that the Second District had construed the phrase "public hearing" too broadly.⁸ The Supreme Court properly distinguished between the process necessary at "legislative" hearings and "quasi-judicial" or adjudicative hearings, noting that quasi-judicial hearings must provide certain procedures for public participation not required for legislative hearings.⁹

It was the next step of the Court's analysis that turned Illinois zoning law on its head. The Court decided that, when considering special use permits, the corporate authorities of municipalities were acting in a quasi-judicial rather than legislative capacity.¹⁰ This overturned the longstanding rule in Illinois that zoning decisions of a local governing board are legislative.¹¹ The Supreme Court supported its decision that special use permits are adjudicative hearings by noting that "the property rights of the interested parties are at issue."¹² Of course, the same could be said of nearly *every* zoning decision and many other matters coming before municipalities, including annexations (which do not ordinarily require public hearings) and annexation agreements. Thus, the Court's new litmus test for distinguishing between legislative and adjudicative decisions of a local governing body is at best unclear, and will lead to many false positives if applied as the Court directed.¹³

Ironically, the Court's decision was largely unnecessary for several reasons. First, there is no constitutional requirement for a public hearing in the zoning or annexation context.¹⁴ Thus, the only rights that the plaintiffs had were the public hearing rights provided by statute. With respect to the special use permits, the plaintiffs received exactly the outcome they sought from the hearing bodies: negative recommendations. Moreover, the plaintiffs did not challenge the substantive decision of the Village Board, only the procedural process. Thus, the Court could