

Introduction

An individual seeking refugee status must establish a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. With the support of the Barbara McDowell and Gerald S. Hartman Foundation, Heartland Alliance's National Immigrant Justice Center (NIJC) has expanded justice for vulnerable survivors of gender-based violence by establishing precedent in federal courts that recognize survivors as a member of a particular social group, thereby meeting the refugee definition. Given the inadequate response of the Immigration Courts to the need for protection by women who have fled this type of persecution, NIJC is addressing this issue by litigating this issue in the courts.

Litigation

A fundamental problem for individuals seeking asylum protection is the erroneous interpretation by courts of the definition of particular social group. NIJC seeks to preserve the integrity of the definition of particular social group as defined by the Board of Immigration Appeals' (BIA) pivotal 1985 decision, *Matter of Acosta*.¹ To this end, NIJC litigated the following cases:

- ***Henriquez-Rivas v. Holder***:² In February of 2013, NIJC and allies scored an important victory at the U.S. Court of Appeals for the Ninth Circuit. NIJC and other advocates successfully argued that asylum seekers should not have to prove that their protected characteristics, such as gender or sexual orientation, are visible to the eye in order to obtain asylum. The Ninth Circuit reversed its prior panel decision to hold that a young Salvadoran woman, who had testified against the gang members that killed her father, met the BIA's test for establishing membership in a particular social group. The Court determined that the group of "people who had testified against gang members" was clearly recognized as such by Salvadoran society even if not literally visible to society. The Court's *en banc* decision will positively impact future cases where individuals fleeing persecution based on an immutable characteristic they possess – such as having witnessed a crime – seek protections in the United States. The reasoning of this case can also be extended to benefit gender-based asylum claims; affirming that gender-related shared characteristics – being in an abusive relationship, being designated for forced marriage, or having not experienced female genital mutilation – do not have to be visible to the naked eye in order to constitute a particular social group.

The Court further agreed with the points raised by NIJC's *amicus* that a group need not be homogenous in lifestyle or origin to constitute a particular social group. It therefore overruled two Ninth Circuit decisions and clarified the circuit's law. The Court declined to resolve the question of whether the BIA's current test for determining membership in a particular social group is valid, leaving the current circuit split on this issue intact.

- ***Cece v. Holder***³ remains pending before the Court of Appeals for the Seventh Circuit. The decision, when released, has the potential to greatly impact the manner in which gender-based

¹ *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) *Matter of Acosta* established that a particular social group is a group of individuals who share a characteristic that is either immutable or so central to the identity of group members that they should not be required to change it.

² *Henriquez-Rivas v. Holder*, No. 09-71571, 2013 WL 518048 (9th Cir., Feb. 13, 2013)

³ *Cece v. Holder*, (7th Cir., February 6, 2012)

asylum claims are considered by the courts. Ms. Cece sought asylum based on her membership in the particular social group of “young Albanian women in danger of being trafficked for prostitution.” Before the U.S. Court of Appeals for the Seventh Circuit sitting *en banc*, NIJC, arguing as *amicus*, asserted that Ms. Cece’s particular social group is viable despite containing reference to the persecution she fears because other elements of the proposed group are immutable characteristics for which she faces persecution. NIJC further argued that gender may form the basis of a particular social group and that the court need not be concerned with the breadth of the group as the other elements of the refugee definition will serve to narrow the number of people who ultimately win asylum.

- ***Gjura v. Holder***:⁴ This Second Circuit issued a precedential decision containing troubling language about the viability of gender-based particular social groups. NIJC and the Center for Gender and Refugee Studies filed an *amicus* brief in support of rehearing, arguing that human trafficking is a form of gender-based persecution for which individuals should be able to seek asylum. In response, the published decision was withdrawn by the court, modified, and re-issued as an unpublished decision in November 2012. This action eliminated damaging language about gender-based particular social groups. NIJC subsequently filed notice of the *Gjura* modification with the Seventh Circuit to bolster its argument in *Cece* since the facts of the cases are similar and NIJC’s arguments in *Cece* are similar to the arguments made by *amicus* in *Gjura*.
- ***Matter of Valdiviezo-Galdamez***:⁵ NIJC and other allies became involved as *amicus curiae* after the Third Circuit reversed and remanded to the BIA with instructions to revisit its analysis of social group claims. NIJC’s goal is to convince the Board to reverse or alter its prior precedent, a victory which would immediately apply nationwide. The oral argument at the Board – itself quite rare – occurred in early December. A positive decision could provide protection for many social group claimants, and could positively resolve one part of NIJC’s campaign to protect victims of gender violence. An improvement of this nature would extend protection to thousands of asylum seekers nationwide.

Moving Forward

As Congress engages on questions of comprehensive immigration reform, the potential for positive changes to asylum laws are within reach. NIJC and other advocates are pushing strenuously to abolish the one-year filing deadline, which prevents many *bona fide* asylum seekers from receiving asylum, particularly women fleeing gender-based violence and victims of crimes targeted at women such as rape. Additionally, the government continues to signal an intention to issue regulations that may make asylum for survivors of domestic violence more feasible. Though these adjustments to the law would be huge accomplishments, the task of securing recognition of all gender-based particular social groups will remain dependent on litigation for the foreseeable future. It is a near certainty that regulations – if issued – would focus on survivors of domestic violence and would not go far enough to protect victims who face trafficking, forced marriage, femicide and other gender violence. Given this reality, NIJC continues to make novel arguments in gender-based asylum claims before the asylum office, immigration courts, BIA, and federal courts. As cases percolate up to the federal courts, NIJC will continue to serve as primary counsel and *amicus* on gender-based asylum cases in order to impact the law and expand protections for all individuals who face gender violence.

⁴ *Gjura v. Holder*, (2nd Circuit, September 25, 2012)

⁵ The prior Third Circuit decision is *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3rd Cir. 2011).