

JANE B. KROESCHE, Esquire
Four Embarcadero Center, Suite 3800
San Francisco, California 94111
(415) 984-6400

KAREN MUSALO, Esquire
Center for Gender and Refugee Studies
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, California 94102-4978
(415) 565-4720

Attorneys for Petitioner
RODI ALVARADO PEÑA

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:)
)
RODI ALVARADO PEÑA,)
)
Respondent.)
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)
)
)

MEMORANDUM IN SUPPORT OF
MOTION TO REOPEN AND RE-
MAND PURSUANT TO THE CON-
VENTION AGAINST TORTURE
Lower Case No. A73 753 922
Board of Immigration Appeals
Interim Decision #3403

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INTRODUCTION

In May 1995, Ms. Alvarado fled her home country of Guatemala and arrived in the United States. Ms. Alvarado fled Guatemala to escape ten years of torture inflicted upon her by her husband, a career soldier in the Guatemalan army. For example, Ms. Alvarado's husband beat and raped her almost daily, pistol-whipped her, used her head as a battering ram to break mirrors and windows, tried to force her to abort her unborn child, and kicked and knocked her unconscious multiple times. Ms. Alvarado repeatedly sought governmental protection from both the Guatemalan police and the courts. Despite the governmental officials' knowledge of these repeated attacks, they explicitly stated that they would not get involved and refused to take steps to prevent the torture. Facing the certainty of continued maiming or imminent death, with no protection or recourse in her own country, Ms. Alvarado fled Guatemala, leaving behind her family and two children.

In 1996 an Immigration Judge granted Ms. Alvarado's application for asylum, finding that she had been persecuted on account of her membership in a social group and her political opinion by an actor her government was unwilling to control. The Immigration and Naturalization Service ("Service") appealed this decision, and on June 11, 1999 the Board vacated the Immigration Judge's decision. Prior to the Board's decision, Congress enacted legislation calling upon the Department of Justice to issue regulations implementing the United States' obligations

pursuant to the Convention Against Torture ("CAT"). The Department of Justice issued final regulations on February 19, 1999, effective March 22, 1999.

Ms. Alvarado petitions the Board to reopen and remand this matter for withholding of removal pursuant to the regulations governing requests for protection under the CAT. Because Ms. Alvarado has demonstrated, and this Board has found, that she will be subject to severe physical and psychological harm which constitutes torture under the CAT if she is returned to Guatemala, Ms. Alvarado is entitled to withholding of removal pursuant to the CAT.

STATEMENT OF FACTS

A. Factual History

The following facts are taken directly from this Board's decision and the record in this matter and are not disputed by the Service.

Ms. Alvarado is a native and citizen of Guatemala. She was married at age 16 to her husband, a career soldier in the Guatemalan army. From the beginning of their marriage, Ms. Alvarado's husband engaged in "tragic and severe" acts of physical and sexual abuse against Ms. Alvarado. In re R- A-, Board of Immigration Appeals Interim Decision #3403 at 3, 25 (June 11, 1999).

Ms. Alvarado's husband required that she accompany him wherever he went. He would scare her by telling stories of his killing babies and the elderly while serving in the Guatemalan army on country-wide patrols. As their marriage

proceeded, the level and frequency of her husband's rage increased, worsening when she protested the beatings. He raped her repeatedly. He beat her before and during the rapes. Ms. Alvarado's husband would wake her from sleep to beat and rape her. He whipped her with an electrical cord. When Ms. Alvarado resisted, he would threaten her with death. Id. at 3-4.

The rapes occurred almost daily and caused her severe pain. He caused severe pain to her when he forcefully sodomized her. He passed sexually transmitted disease to Ms. Alvarado from his sexual relations outside of the marriage. He kicked her in her vaginal area, causing her to bleed severely for eight days. He dislocated Ms. Alvarado's jaw when her menstrual period was 15 days late. When she refused to abort her as-yet-unborn son, he kicked her violently in her spine in an apparent attempt to force her to abort. When she protested, he would say, "You're my woman, you do what I say." Id.

Ms. Alvarado's husband used her head to break windows and mirrors. When he could not find something, he would grab her head and strike furniture with it. He pistol-whipped her. He would drag her down the street by her hair. When she protested his beatings, her husband would state, "I can do it if I want to." Id. at 4.

Ms. Alvarado tried to escape her husband's torture by returning to her family, but her husband forced her each time to return to him. She also attempted to flee with her children outside the city, but, despite her efforts to keep their where-

about hidden, her husband found her. When he found her, he beat her until she lost consciousness. Even after she lost consciousness he continued to beat her. He threatened to maim and disfigure her with knives and machetes. He promised to cut off her arms and legs, and leave her in a wheelchair if she ever tried to leave him. He promised her that, because of his knowledge of the country and his contacts throughout, he would always find her wherever she went. Id.

Ms. Alvarado's repeated pleas for protection from the Guatemalan government were to no avail. Her husband told her that calling the police for protection was futile because he knew the law enforcement officials through his military service. She repeatedly sought police assistance. On only three occasions did the police issue summons for her husband to appear. When her husband ignored these citations, the police did not take any further action and did not respond to her follow-up inquiries. Ms. Alvarado appeared before a judge seeking a stop to the tortures and a divorce. The judge told her that he would not interfere with domestic disputes. She could not divorce her husband without his permission. Id. at 4-5.

Finally, Ms. Alvarado knew she had to flee Guatemala to escape further torture and eventual death at the hands of her husband. In May 1995, she was taken to the United States. Since escaping Guatemala, Ms. Alvarado's husband has promised to "hunt her down and kill her if she comes back to Guatemala." Id. at 5.

B. Procedural History

On September 20, 1996, an Immigration Judge in San Francisco, California granted Ms. Alvarado's application for asylum on the grounds that Ms. Alvarado had been persecuted, that the government of Guatemala knew of the persecution and was unwilling to protect her from her persecutor, and that the persecution of Ms. Alvarado was both on account of her membership in a particular social group and on account of her actual or imputed political opinion.

The Service appealed the Immigration Judge's grant of asylum to the Board. On June 11, 1999, the Board vacated the decision of the Immigration Judge. In re R-A-, Interim Decision #3043. The Board found that Ms. Alvarado was persecuted and that the government of Guatemala failed to protect her. Id. at 4-5, 10, 25. However, the Board ruled that she was not entitled to asylum because her persecution was not on account of her membership in a social group or on account of any actual or imputed political opinion. Id. at 15-16. The Board granted Ms. Alvarado thirty days' voluntary departure and ordered that she be deported to Guatemala if she did not depart within such thirty day period. Id. at 26.

Ms. Alvarado timely petitioned the Ninth Circuit Court of Appeals for review of the Board's decision and stay of deportation. The Ninth Circuit granted Ms. Alvarado's motion to stay deportation pending the appeal on August 13, 1999.

Ms. Alvarado's appeal of the Board's decision is currently pending before the Ninth Circuit.

Due to the sensitive nature of this case, the underlying facts and the issues addressed, Ms. Alvarado hereby affirmatively requests that all matters, exhibits and records pertaining to these proceedings and Ms. Alvarado's application for asylum and withholding of deportation be kept confidential and not disclosed to or by any person except in strict accordance with 8 C.F.R. § 208.6 (1999).

ARGUMENT

I. **MS. ALVARADO IS ENTITLED TO PROTECTION PURSUANT TO THE CONVENTION AGAINST TORTURE BECAUSE THE BOARD HAS DETERMINED THAT IT IS MORE LIKELY THAN NOT THAT SHE WILL BE TORTURED IF SHE IS RETURNED TO GUATEMALA**

The implementation of the Convention Against Torture prohibits the return of any individual to their country of origin if she is more likely than not to face torture in that country. Pub. L. 105-277 § 2242(a), reprinted in 144 Cong. Rec. H11265, Oct. 19, 1998; 8 C.F.R. §§ 208.16(c)(4), (d)(1) (1999); see Exec. Order No. 13107 § 1(a) (Dec. 10, 1998) (implementing the CAT). An application for withholding of removal must be granted if an individual makes this showing.¹

¹ The only exceptions to this rule are for aliens convicted of certain crimes. See 8 C.F.R. § 208.16(d)(2)-(3) (1999) (exceptions to automatic grants of withholding of deportation or removal). Ms. Alvarado is not subject to any criminal proceeding and has not been convicted of any crimes.

The CAT defines "torture" as:

an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1) (1999). Based on this definition, there are three elements necessary to establish "torture" under CAT: (1) an act causing severe pain or suffering, either physical or mental; (2) the act was perpetrated to punish the victim for an act she committed or was suspected of committing, or to intimidate or coerce the victim; and (3) the act was committed with the consent or acquiescence of a public official.

The record in this case and this Board's own decision in this matter establishes that the facts in Ms. Alvarado's case meet each of these requirements.

A. Ms. Alvarado Was Subject To Numerous Acts Which Caused Severe Mental And Physical Pain And Suffering

It is undisputed that Ms. Alvarado was subject to numerous acts at the hands of her husband which caused severe pain and suffering. The Board has already found that her husband's almost daily rapes caused Ms. Alvarado "severe pain," that his sodomization of her caused "the most severe pain," and that Ms.

Alvarado had been the victim of "severe spouse abuse." In re R- A-, Interim Decision #3403 at 3, 25.² The Board also accepted the testimony of Ms. Alvarado's expert witness, Dr. Bersing, who testified that Ms. Alvarado's abuse had been "extremely severe." Id. at 5. The Board's decision further found that Ms. Alvarado's husband knocked her unconscious multiple times, kicked her in her vagina so hard that she bled severely for eight days, whipped her with an electrical cord, pistol-whipped her, broke windows and mirrors with her head, struck furniture with her head, and dragged her down the street by her hair. Id. at 3-4.³

In addition, Ms. Alvarado's husband's numerous threats of death, attempts to scare Ms. Alvarado with stories of his killing children and the elderly, "teasing" her with his machete, and threats to cut off her arms and legs constitute the infliction of severe mental suffering. Id. As Dr. Bersing testified, and the Board accepted, Ms. Alvarado "possessed an extraordinary fear of her husband." Id. at 5.

² Rape is a form of torture. Angoucheva v. Immigration & Naturalization Service, 106 F. 3d 781, 792 n.2 (7th Cir. 1997) (Rovner, J., concurring) (citing United Nations High Commissioner for Refugees Guidelines stating, "Like other forms of torture, [rape] is often meant to hurt, control and humiliate, violating a person's innermost physical and mental integrity." (emphasis supplied)).

³ The regulations implementing the CAT require that the acts causing severe pain be intended to cause such. 8 C.F.R. § 208.18(a)(5) (1999). There is no question that Ms. Alvarado's husband intended to cause severe pain and suffering by his actions.

Thus, the record is replete with examples of, and the Board's findings demonstrate that, Ms. Alvarado's husband inflicted severe physical and mental pain and suffering on her.

B. Ms. Alvarado's Husband Committed His Acts To Punish, Intimidate And Coerce Ms. Alvarado

The Board also found that Ms. Alvarado's husband caused her severe pain in order to punish, intimidate, and coerce Ms. Alvarado. Specifically, the Board found that Ms. Alvarado's husband:

- told her stories of his killing babies and the elderly in order to intimidate her (id. at 3);
- struck and punched her hands and arms her to punish her for disobeying him (id.);
- threatened her with death when she resisted his rapes in order to intimidate and coerce her (id.);
- struck, kicked and knocked her unconscious to punish her for trying to run away from him (id. at 4);
- struck her, whipped her with an electrical cord, and pulled out a machete and threatened to deface her and cut off her arms and legs in order to intimidate her into not trying to leave him (id.);
- intimidated her by stating that he would find her no matter where she tried to hide from him (id.);
- used her head to break windows and a mirror to punish her for not complying with his wishes (id.);
- struck furniture with her head to punish her when he could not find something (id.); and

- punched her to punish her for mentioning his tardiness (id.).

Beyond these specific acts of punishment, intimidation, and coercion, Ms. Alvarado's husband's ten year pattern of horrific spousal abuse demonstrates his desire to intimidate and coerce Ms. Alvarado into absolute obedience. See Report of the Committee on the Elimination of Discrimination Against Women, U.N. Comm. on the Elimination of Discrimination Against Women, 47th Sess., Supp. No. 38, para. 26, at 8, U.N. Doc. A/47/38 (1992) (fundamental purpose of domestic violence is to punish, humiliate, and exercise power over the victim).

C. Ms. Alvarado's Husband Committed His Acts With The Consent And Acquiescence Of Guatemalan Public Officials

The Board's decision makes evident that Ms. Alvarado repeatedly sought assistance from the Guatemalan police and courts to protect her from her husband's attacks, and that they failed to take any meaningful action. In re R- A-, Interim Decision #3403 at 4-5. The Board found that Ms. Alvarado sought protection, but "was unable to avail herself the protection of the Government of Guatemala." Id. at 10. Ms. Alvarado's husband told her that her attempts to obtain protection were pointless because of his connections to enforcement officials. Id. at 5. A Guatemalan Judge specifically told Ms. Alvarado that he would not interfere in domestic disputes, thus consenting and acquiescing to the torture of Ms. Alvarado. Id. at 5.

Numerous Guatemalan public officials had full knowledge of the severe pain and suffering that Ms. Alvarado's husband was inflicting upon her, and refused to take measures to prevent it. Such inaction demonstrates that Ms. Alvarado's husband's acts took place with the public officials' consent and acquiescence. The World Organization Against Torture USA, "Guidelines for Applying for Protection Under the Convention Against Torture," May 13, 1999, at 2 ("consent or acquiescence of the government" exists where "the government knows about [the] torture but does not do anything to stop it" (emphasis original)). As the dissent in the Board decision stated, "The harm to [Ms. Alvarado] occurred in the context of egregious governmental acquiescence." In re R- A-, Interim Decision #3403 at 28 (Guendelsberger, dissenting) (emphasis supplied); see id. at 29 (Ms. Alvarado's abuse occurred with "state acquiescence") (Guendelsberger, dissenting).

The implementing regulations of the CAT state that "[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 208.18(a)(7) (1999). As shown above, public officials had awareness of the activity constituting torture prior to its occurrence. The public officials also had a legal responsibility under international law to take action in response to this knowledge. American Convention on Human Rights, Art. 5, 25 (1969) (every person has the right to simple and prompt

recourse and a competent court for protection from torture or cruel, inhuman, or degrading treatment, and signatory states (which include Guatemala) shall develop and enforce remedies to protect these rights); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111 at preamble, Art. 4(c), (d), U.N. Doc. A/Res/48/104 (1994) (violence against women, including domestic violence, is a per se violation of human rights; states should "Exercise due diligence to prevent, investigate and . . . punish acts of violence against women . . . by private persons"; "women who are subjected to violence should be provided with access to the mechanisms of justice"); The Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Agenda Item 75, U.N. Doc. A/RES/34/180 (1980) (requiring states to take affirmative steps to eliminate discriminatory treatment of women by both state and private actors).

Related to the 'consent or acquiescence of a public official' element of torture, a subsection of the CAT regulations notes that, in order to constitute torture, an act "must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 208.18(a)(6) (1999). The regulations do not contain a definition of "control." However, the fact that Ms. Alvarado's husband was able to thwart her numerous attempts to flee him demonstrates that he exercised absolute physical control over her. The domestic violence he inflicted upon her further evidences his

control over her. See Report of the Committee on the Elimination of Discrimination Against Women, 47th Sess., Supp. No. 38, para. 26, at 8 (domestic violence is used to control women); Rhonda Copelon, Recognizing the Egregious in the Everyday: Domestic Violence as Torture, 25 Colum. Hum. Rts. L. Rev. 291, 303-06 (1994) (Ex. 2J of the Certified Administrative Record in this matter) (domestic violence is used to take away women's power).

The Board's decision is replete with findings that Guatemalan public officials were unwilling to control Ms. Alvarado's husband to stop the torture and that her husband had the ability to carry out the torture. See In re R- A-, Interim Decision #3403 at 3-5, 10, 25. Because the Guatemalan public officials knew of, and refused to take meaningful steps to prevent, the horrific attacks which Ms. Alvarado's husband perpetrated upon her, the public officials consented and acquiesced to such attacks.

D. Ms. Alvarado's Husband Will Torture Her If She Is Returned To Guatemala

In order to be entitled to protection under the CAT, an individual must establish that it is more likely than not that she will be tortured if she is returned to her country. 8 C.F.R. §§ 208.16(c)(4), (d)(1) (1999). The implementing regulations specifically state that "all evidence relevant to the possibility of future

torture shall be considered." 8 C.F.R. § 208.16(c)(3) (1999). Such evidence includes (but is not limited to):

- (i) Evidence of past torture inflicted upon the applicant;
- (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- (iv) Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 208.16(c)(3) (1999).

In claims for protection under the 1980 Refugee Act, evidence of past persecution alone, absent any evidence that conditions have changed, establishes a presumption of a well-founded fear of future persecution. See Singh v. INS, 94 F.3d 1353, 1360-61 (9th Cir. 1996) (a finding of past persecution creates a presumption that there is a well-founded fear of future persecution); 8 C.F.R. § 208.13(b)(1)(i) (1999) (if an individual has established past persecution, the individual shall be presumed to have established a well-founded fear of future persecution). Likewise, a showing of past torture, absent any evidence that conditions have changed, is adequate to establish that it is more likely than not that future torture will occur.

As discussed above, the Board has found that Ms. Alvarado suffered past torture. Such acts demonstrate that, were Ms. Alvarado returned to Guatemala, her life and freedom truly would be at risk. Further, as this Board itself noted, Ms. Alvarado has an extreme and well-founded fear of future persecution by her

husband. In re R- A-, Interim Decision #3403 at 5. Her own well-founded fear is confirmed by reports from Ms. Alvarado's family that her husband has threatened to "hunt her down and kill her" if she returns to Guatemala. Id. Ms. Alvarado's husband's death threat is not an idle one. The Board found that Ms. Alvarado cannot relocate to another part of Guatemala and thereby free herself from torture by her husband. Id. at 4. Ms. Alvarado's husband has stated that he will be able to find her no matter where she goes and he has shown this to be true. Id. at 3-5.

Furthermore, the Board found that the conditions in Guatemala are such that Ms. Alvarado would likely continue to be subject to the same forms of egregious abuse she suffered before her flight from Guatemala. The Board accepted Dr. Bersing's testimony that spousal abuse was a particular problem in Latin America, particularly in Guatemala, that she was not aware of any available social or legal resources for battered women in Guatemala, and that a battered married woman in Guatemala has few options. Id. at 5.

Ms. Alvarado has suffered physical and psychological harm which individually and cumulatively rises to the level of torture under the CAT. The torture has been at the hands of her husband, with the intent to punish, intimidate and coerce her. Furthermore, the torture was carried out with the clear consent and acquiescence of her government, which was aware of the horrific abuse, and refused

to intervene. Finally, Ms. Alvarado's husband has threatened to "hunt her down and kill her" if she returns to Guatemala. Id. at 5.

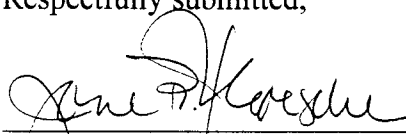
The findings by the Board thus demonstrate that Ms. Alvarado's husband will try to kill her if she returns, that he has been able to find her everywhere she has tried to hide within Guatemala, and that the Guatemalan police and courts will do nothing to prevent his actions. These findings amply establish that it is more likely than not that Ms. Alvarado will be tortured if she is returned to Guatemala. The implementation of the CAT therefore mandates withholding of her removal. 8 C.F.R. §§ 208.16(c)(4), (d)(1) (1999).

CONCLUSION

For the foregoing reasons, the Board should reopen Ms. Alvarado's deportation proceedings and remand Ms. Alvarado's case for withholding of removal pursuant to the implementation of the Convention Against Torture. The Board should issue an order to stay deportation pending its decision on this matter.

Dated: September 2, 1999

Respectfully submitted,



JANE B. KROESCHE, Esquire
Four Embarcadero Center, Suite 3800
San Francisco, California 94111
(415) 984-6400

KAREN MUSALO, Esquire
Center for Gender and Refugee Studies
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, California 94102-4978
(415) 565-4720

Attorneys for Petitioner
RODI ALVARADO PEÑA