

**Fourth Circuit Court**

**Case:** *Mocktar A. Tairou v. Matthew G. Whitaker, A.A.G.*, No. 17-1404

**Judges:** Gregory\*, Motz, Osteen

**Date:** Nov. 30, 2018

**Tags:** Asylum, persecution, death threats, Benin, homosexuality as PSG,

**Gravamen/Question(s) at issue:** Did the BIA err in finding that plaintiff “was not subjected to past persecution and that he lacked a well-founded fear of persecution were he to return to Benin”? (2<sup>1</sup>)

**Holdings:** Yes, BIA erred in dismissing the evidence of past persecution. Reversed and remanded to BIA to examine possibility of future persecution.

**Rationale:** Binding precedent says that death threat constitutes persecution.

- “Contrary to the BIA’s reasoning, the threat of death alone constitutes persecution, and Tairou was not required to additionally prove long-term physical or mental harm to establish past persecution.” (10)

**Facts:** Native & citizen of Benin. Homosexual attraction since 2007. Persecuted by his extended family and neighbors in father’s home village—lectures, slaps, beatings, death threats for five hours. Police unhelpful. Applied for asylum at POE 2014.

**History of the Case:**

- **2014:** applied for asylum to IJ. Denied because he had not suffered past persecution.
- BIA found *de novo* that Tairou had failed to establish past persecution, and issued final removal order. (Since it’s a *de novo* opinion, it’s the one the CA will review.)

**Appeals to Statute & Precedent:**

- ***INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992):** whole record needs to be considered to determine eligibility for asylum.
- ***Li v. Gonzales*, 405 F.3d 171, 177 (4<sup>th</sup> Cir. 2005):** “Persecution involves the infliction or threat of death, torture, or injury to one’s person or freedom, on account of one of the enumerated grounds in the refugee definition.”
- ***Naizgi v. Gonzales*, 455 F.3d 484, 486 (4<sup>th</sup> Cir. 2006):** applicant bears burden of proving eligibility for asylum.
- ***Djadjou v. Holder*, 662 F.3d 265, 273 (4<sup>th</sup> Cir. 2011):** the BIA abuses its discretion if it disregards or distorts important parts of applicant’s claim.
- ***Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4<sup>th</sup> Cir. 2015):** death threat qualifies as persecution

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<sup>1</sup> Page numbers correspond to initial pdf of case released Nov. 30, 2018.

- ***Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9<sup>th</sup> Cir. 2017)**: particular social group
- **8 U.S.C. §1158(b)(1)(A)**: asylum
- **8 U.S.C. §1101(a)(42)(A)**: asylum

**Dicta:**

- “...the record indicates that Tairou received multiple death threats that the BIA failed to address.” (10)
- “Because Tairou received multiple threats of death, the BIA’s determination that Tairou had not suffered persecution was ‘manifestly contrary to the law’ of this Court and constituted an abuse of discretion.” (10)

**Attorneys’ Arguments:**

- “Had the BIA properly considered the cumulative effects of the harm inflicted on him and his family members, including the death threats he received at the public gathering at the village and the violent home invasion, Tairou argues that the BIA would have found him to be a victim of past persecution and he would have been entitled to a rebuttal presumption of a well-founded fear of future persecution.” (8)
- **BIA**: No physical injuries or long-term mental harm or problems; therefore no persecution.