

**Third Circuit Court****Case:** *Guzman Orellana v. A.G.*, No. 19-1793 (3d Cir. 2020)**Date:** April 17, 2020**Judges:** Restrepo, Roth, Fisher**Opinion:** Roth**Tags:** Immigration, asylum, withholding, CAT, PSG, imputed political opinion, assisting police, El Salvador**Question(s) Presented:**

- (1) Did BIA err when it did not recognize as a PSG Salvadorans who assist police in solving gang-related crimes?
- (2) Did BIA err when it did not recognize an imputed political opinion as a ground of persecution in Guzman's case?
- (3) Did BIA err in considering Guzman's CAT claim (re. likelihood of torture)?

**Holdings:** Vacated; remanded to BIA.

- (1) "Persons who publicly provide assistance against major Salvadoran gangs do constitute a particular social group." *Guzman Orellana v. A.G.*, No. 19-1793, \*3 (3d Cir. 2020).
- (2) Guzman did not provide substantive evidence for his claim of imputed political opinion as a ground of persecution.
- (3) The BIA failed to consider the totality of the evidence regarding the likelihood that Guzman would be tortured if repatriated.

**Rationale:**

- (1) Appearing to have assisted the police in a gang murder is the reason Guzman drew the attention and violence of the M-13 gang members.
- (2) Guzman didn't show evidence of an imputed anti-gang political opinion; the gang members simply imputed to him the sin of helping the police.
- (3) Plenty of evidence pointing to probability of torture.

**Facts:** El Salvadoran citizen came to US in 2017 at age 18 because he had witnessed a double murder by members of the M-13 gang, and they had observed him interacting with police right before the bodies were found. He had not actually assisted the police, but the gang members thought he did and began accosting and beating him as he returned home from school. Guzman fled to the US, was intercepted and issued an NTA.**Legal History, Prior Appeals & Trial Court Input:**

- **2017:** Witnessed murder, beaten by gang members. Fled to US, entered EWI.
- **2018:** IJ denied asylum claim, saying that he didn't belong to a PSG and there was little likelihood of torture if returned. Also said (erroneously) that imputed membership in a PSG is insufficient for asylum.
- **2019:** BIA affirmed.

**Appeals to Statute & Precedent:**

- *INS v. Elias-Zacarias*, 502 U.S. 478, 481-84 (1992): nexus between political opinion and persecution.
- *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985): Sets the standard for immutability of PSG. Includes “shared past experience” as a possibility.
- *Garcia v. Att’y General*, 665 F.3d 496, 502 (3d Cir. 2011), *as amended* (Jan. 13, 2012): Guatemalan witness who testified in court against a gang was member of PSG because persecuted for this action by gang members later.
- *Kang v. Att’y Gen.*, 611 F.3d 157, 164 (3d Cir. 2010): CAT relief and when to uphold BIA’s reversal of IJ’s decision
- *Kibinda v. Att’y Gen.*, 477 F.3d 113, 119 (3d Cir. 2007): Gov’t unable or unwilling to control persecutors.
- *Chen v. Gonzales*, 434 F.3d 212, 216 (3d Cir. 2005): Standard for withholding of removal is “clear probability” of persecution.
- *Radiowala v. Att’y Gen.*, 930 F.3d 577, 583 (3d Cir. 2019): Particularity & determining boundaries of the PSG.
- *Amanfi v. Ashcroft*, 328 F.3d 719, 729–30 (3d Cir. 2003): Membership in PSG can be just imputed and not actual.
- *Espinoza-Cortex v. Att’y Gen.*, 607 F.3d 101, 107 (3d Cir. 2010): BIA must not ignore or misconstrue evidence. Persecutor may attribute political opinion to someone and act on that belief.
- *Tilija v. Att’y Gen.*, 930 F.3d 165, 169-70, 172 (3d Cir. 2019): prima facie political asylum claim for being attacked and threatened for political support.
- *Myrie v. Att’y Gen.*, 855 F.3d 509 (3d Cir. 2017): two-part test for identifying torture and gov’t acquiescence:
  - *What is likely to happen if petitioner is removed?*
    - *Does what is likely to happen constitute torture?*
  - *How are public officials likely to respond to the harm the petitioner describes?*
    - *Will the response qualify as acquiescence?*

**Discussion:**

- “We held previously in *Garcia v. Attorney General* that persons who have assisted law enforcement against violent gangs that threaten communities in Guatemala share a common, immutable characteristic because they have the shared experience of assisting law enforcement, which is based on past conduct that cannot be undone and that they should not be asked to undo.” *Guzman Orellana v. A.G.*, No. 19-1793, 10 (3d Cir. 2020).
  - BIA distinguished this case from *Garcia* because Guzman did not testify in court.
  - “That is too narrow a reading. In our analysis, it is indistinguishable whether someone testifies in court or publicly provides out of court assistance to law enforcement. In both circumstances, that person will have been visible to the public and is likely to be targeted because of his cooperation.” *Guzman Orellana v. A.G.*, No. 19-1793, 10 (3d Cir. 2020).
- “Contrary to the IJ’s unsupported assertion, asylum and withholding of removal under the INA may be granted on the basis of imputed, not just actual, membership in a particular social group.” *Guzman Orellana v. A.G.*, No. 19-1793, 13 (3d Cir. 2020).

- Re. applying *Myrie* to CAT claim: "...without engaging in any acquiescence analysis, the BIA stopped at either step one or two of the torture analysis after concluding that nothing that amounts to torture is likely to happen to Guzman. This conclusion is erroneous." *Guzman Orellana v. A.G.*, No. 19-1793, 16 (3d Cir. 2020).
- "We have made clear that while the IJ and the BIA need not discuss every piece of evidence in the record, they are required to consider 'all evidence relevant to the possibility of future torture' and they 'may not ignore evidence favorable to the alien.' [Quoting *Quinteros* at 786] We emphasize that principle again today because we are troubled by the BIA's apparent distortion of evidence favorable to Guzman in this case." *Guzman Orellana v. A.G.*, No. 19-1793, 17 (3d Cir. 2020).

**Commentary:**

- Jurisdiction because follows a final order of removal by BIA.
  - Can review only BIA decision and as much of the IJ's decision that the BIA incorporated.
- Review of Q#1 = both law and fact:
  - "We review the BIA's legal conclusion as to the existence of a particular social group de novo while reviewing its underlying factual conclusions for substantial evidence." *Guzman Orellana v. A.G.*, No. 19-1793, 7 (3d Cir. 2020).