

Third Circuit Court

Case: *Herrera-Reyes v. A.G.*, No. 19-2255 (3d Cir. Feb. 28, 2020)

Judges: Ambro, *Krause, Bibas

Date: February 28, 2020

Tags: Immigration, asylum, past persecution, threats, physical harm, cumulative record

Gravamen/Question(s) at issue: “Whether and under what circumstances threats of violence may contribute to a cumulative pattern of past persecution when not coupled with physical harm to the asylum-seeker and her family.” *Herrera-Reyes v. A.G.*, No. 19-2255, *2 (3d Cir. Feb. 28, 2020)

Holdings: IJ & BIA erred by

1. Failing to consider the record of threats and threatening actions cumulatively; and
2. Misapplying 3d Circuit case law regarding whether threats can constitute past persecution in the aggregate, minus actual physical harm (they can).

BIA’s decision vacated, case remanded.

Rationale: Even absent physical harm, a pattern of threats and menacing actions can so curtail a person’s liberty that they rise to the level of past persecution.

Facts: Nicaraguan citizen was deeply involved in political protest against the one-party Sandinista government. She received death threats, had her house burned down, and was present when pro-government supporters fired on her vehicle and killed a compatriot. Fled to U.S. and entered EWI in 2017, requesting asylum.

Prior Appeals & Trial Court Input:

- **IJ:** Deemed petitioner’s testimony credible, but she wasn’t physically harmed, arrested, or imprisoned, so this wasn’t past persecution.
- **BIA:** Affirmed IJ’s decision.
- **Nov. 2019:** Appealed to Third Circuit

Appeals to Statute & Precedent:

- ***Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330, 343 (3d Cir. 2008):** Threats should be sufficiently imminent, concrete, and menacing to constitute past persecution. These threats must be a “severe affront[] to the life or freedom of the applicant.” (*Gomez-Zuluaga* at 341) Look at the overall trajectory of harassment.
- ***Zhen Hua Li v. Att’y Gen.*, 400 F.3d 157, 164-65 (3d Cir. 2005):** Verbal threats experienced under Chinese one-child policy did not arise to level of past persecution because they were not sufficiently imminent, concrete, or menacing.
- ***Chavarria v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006):** Threats that were not fulfilled were sufficiently menacing and concrete because petitioner was held at gunpoint.

- ***Fei Mei Cheng v. Att’y Gen.*, 623 F.3d 175, 192 (3d Cir. 2010)**: The “cumulative effect of the applicant’s experience must be taken into account because [t]aking isolated incidents out of context may be misleading.” Even if one incident isn’t enough to rise to the level of persecution, “a series of incidents of physical or economic mistreatment could, taken together, be sufficiently abusive to amount to persecution.” *Id.* At 192-93. Escalating threats, past action suggesting present trajectory.
- ***Toure v. Att’y Gen.*, 443 F.3d 310, 318 (3d Cir. 2006)**: Weigh each incident in conjunction with prior incidents.
- ***De Sanatamaria v. U.S. Att’y Gen.*, 525 F.3d 999, 10009 (11th Cir. 2008)**: “[W]e have not required serious physical injury where the petitioner demonstrates repeated threats combined with other forms of severe mistreatment.”
- ***Tamara-Gomez v. Gonzales*, 447 F.3d 343, 348, 349 n.8 (5th Cir. 2006)**: “physical harm is not always a requirement for asylum.”
- ***Voci v. Gonzales*, 409 F.3d 607, 614 (3d Cir. 2005)**: threats and violence don’t need to be in close temporal proximity: “finding that verbal threats to the petitioner and his family unaccompanied by physical violence contributed to a pattern of persecution when those threats were made credible by separate incidents of physical violence to the petitioner,” *Herrera-Reyes v. A.G.*, No. 19-2255, *17 (3d Cir. Feb. 28, 2020).
- ***Camara v. Att’y Gen.*, 580 F.3d 196, 204-05 (3d Cir. 2009)**: mistreatment of family members may concretize threats made to a petitioner.
- ***Caushi v. Att’y Gen.*, 436 F.3d 220, 227 (3d Cir. 2006)**: violence, intimidation, assassination of political compatriots contributes to petitioner’s experience of past persecution.
- ***Lu Win Lin v. INS*, 238 F.3d 239, 244 (3d Cir. 2001)**: fellow student activists beaten and arrested, so more likely in petitioner’s case than not.

Discussion:

- “By finding it dispositive that Petitioner ‘was never physically harmed,’ A.R. 53, and ‘the threats [she] faced here were [not] so menacing as to cause significant *actual* suffering or harm,’ A.R. 4 (emphasis added), the IJ and BIA treated our approach to unfulfilled threats as an exception to the general rule that incidents of allegedly past persecution must be considered cumulatively. And by purporting to ground that treatment in cases where we described threats as ‘imminent [or] concrete’ and ‘menacing,’ A.R. 4, the IJ and BIA suggested the test for persecution in a threat case is different from the one used in other persecution cases. . . . Neither proposition is supported by our precedent.” *Herrera-Reyes v. A.G.*, No. 19-2255, *7 (3d Cir. Feb. 28, 2020).
- Re. past use of “imminence” as a qualifier: “‘Imminence’ is a misnomer here. We have neither required that the threat portend immediate harm nor that it be in close temporal proximity to other acts of mistreatment.” *Herrera-Reyes v. A.G.*, No. 19-2255, *11 (3d Cir. Feb. 28, 2020).
- “Thus, a threat is ‘concrete and menacing,’ constituting past persecution, where the aggregate effect of a petitioner’s experiences, including or culminating in the threat in question, placed a petitioner’s life in peril or created an atmosphere of fear so oppressive that it severely curtailed the petitioner’s liberty.” *Herrera-Reyes v. A.G.*, No. 19-2255, *12 (3d Cir. Feb. 28, 2020).
- “We conclude that the IJ and BIA misapplied our precedent in two respects: First, although they purported to consider the incidents ‘cumulatively,’ A.R. 3, 53, in practice they evaluated the threats to Petitioner in isolation and without accounting for the broader campaign of intimidation, harassment, and

violence substantiated by the record; second, they treated the absence of physical harm to Petitioner herself as fatal to her claim without acknowledging the significance of violence to Petitioner's property and close associates." *Herrera-Reyes v. A.G.*, No. 19-2255, *12 (3d Cir. Feb. 28, 2020).

- "In this case, moreover, the BIA based its threat analysis exclusively on our precedent—a body of authority we create and are well qualified to interpret." *Herrera-Reyes v. A.G.*, No. 19-2255, *12 n.1 (3d Cir. Feb. 28, 2020).
- Re. IJ's piecemeal treatment of record: "That was not a faithful application of our cumulative approach to past persecution. . . . A cursory invocation of the word 'cumulative' is insufficient." *Herrera-Reyes v. A.G.*, No. 19-2255, *14 (3d Cir. Feb. 28, 2020).
- "The BIA, like the IJ, thus paid lip service to our cumulative approach. . ." *Herrera-Reyes v. A.G.*, No. 19-2255, *15 (3d Cir. Feb. 28, 2020).
- "The agency's second error flows from its first: In failing to look to the surrounding context of the threat, the IJ and BIA placed undue emphasis on whether Petitioner herself experienced physical harm and found its absence fatal to her claim. . . . That was contrary to our case law." *Herrera-Reyes v. A.G.*, No. 19-2255, *15 (3d Cir. Feb. 28, 2020).
- "We have never reduced our persecution analysis to a checklist or suggested that physical violence—or any other single type of mistreatment—is a required element of the past persecution determination." *Herrera-Reyes v. A.G.*, No. 19-2255, *15 (3d Cir. Feb. 28, 2020).
- "In evaluating whether a threat is 'concrete and menacing' in the absence of physical harm to a petitioner, we have considered more broadly whether surrounding acts of mistreatment had corroborated that threat with the ultimate effect of placing the petitioner's life or liberty in peril." *Herrera-Reyes v. A.G.*, No. 19-2255, *16 (3d Cir. Feb. 28, 2020).
- "As relevant to this case and as logically flows from this precedent, physical harm to a petitioner's close associates may also, in combination with verbal threats, establish past persecution. This harm—no less than destruction of personal property and physical or economic harm to a petitioner's family—can contribute to an overall experience of past persecution by rendering verbal threats 'concrete and menacing,' establishing a 'severe affront[] to the [petitioner's] life or freedom.'" (quoting *Gomez Zuluaga* at 341-42) *Herrera-Reyes v. A.G.*, No. 19-2255, *17 (3d Cir. Feb. 28, 2020).
 - *Zhen Hua Li* isn't contradictory here: the other person who may have experienced the realization of the verbal threats was not personally known to the petitioner, and he only heard about it remotely.
- "On reconsideration of Petitioner's CAT claim on remand, the agency should consider the record in its entirety and in context and should provide the explanation required for the decision it ultimately reaches." *Herrera-Reyes v. A.G.*, No. 19-2255, *21 n.5 (3d Cir. Feb. 28, 2020).