

Third Circuit Court

Case: *Sumaila v. Attorney General*, No. 18-1342 (3d Cir. 2020)

Judges: Restrepo, Roth, Fisher

Date: March 31, 2020

Tags: Immigration, asylum, LGBTQ, homosexuality, reasonable fear, Ghana, death threats

Gravamen/Question(s) at issue: Did the BIA err in finding that petitioner did not suffer past persecution and did not have a well-founded fear of future persecution?

Holdings: BIA decision vacated, case remanded.
Persecution was obviously on account of sexual orientation.
Threats are sufficient to establish persecution and fear of future persecution.
Medical records and serious physical injury are not necessary to establish persecution.
Intimate details of sexual relationships are not necessary to establish sexual orientation.

Rationale: BIA and IJ ignored record and relevant case law for all of the above.

Facts: Homosexual citizen of Ghana had hidden his sexual orientation until his father discovered him having sex with his partner and outed him to his Muslim family and neighbors. Petitioner was beaten with pipes, doused with kerosene, and threatened with burning or beheading before he ran from the crowd to a friend's house and managed to escape the country. Entered U.S. EWI after flying from Ghana to Ecuador. Applied for asylum during removal proceedings.

Prior Appeals & Trial Court Input:

- **2016:** Escaped from Ghana, entered U.S. EWI. Removal proceedings, asylum claim.
- **IJ:** Petitioner had not established past persecution or fear of future persecution. He could resettle in Ghana and keep his homosexuality a secret.
- **BIA Appeal:** Affirmed IJ re. persecution.
- **April 30, 2019:** 3d Circuit Appeal

Appeals to Statute & Precedent:

- ***Camara v. Att'y Gen. U.S.*, 580 F.3d 196 (3d Cir. 2009):** on past persecution and well-founded fear of future persecution.
- ***Chavarria v. Gonzales*, 446 F.3d 508, 517 (3d Cir. 2006):** on BIA mischaracterizing evidence; persecution must be on account of statutorily protected ground; persecution doesn't encompass all forms of hardship; death threats are forms of persecution if they are "highly imminent, concrete and menacing" and that "cause significant actual suffering or harm." (518, 520)
- ***Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003):** persecution must be motivated at least in part by protected ground.

- ***Herrera-Reyes v. Att’y Gen. U.S.*, ___ F.3d ___, No. 19-2255, 2020 WL 962071 (3d Cir. Feb. 28, 2020)**: Tests for when a threat = persecution: “when the cumulative effect of the threat and its corroboration presents a real threat to a petitioner’s life and freedom.” (at *5) “concrete” = corroborated; “menacing” = intention to inflict harm. Physical harm not required; it’s an aggregate thing.
- ***Voci v. Att’y Gen. U.S.*, 409 F.3d 607, 615 (3d Cir. 2005)**: isolated incidents with no serious injury don’t rise to level of persecution.
- ***Gomez-Zuluaga*, 527 F.3d 330 (3d Cir. 2008)**: death threats (inter alia) rise to the level of persecution.

LGBTQ Cases

- ***Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir.2003)**: sexual orientation cognizable for PSG
- ***Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (en banc)**: sexual orientation can be basis for PSG
- ***Ayala v. Att’y Gen. U.S.*, 605 F. 3d 941, 949 (11th Cir. 2010)**: sexual orientation can be basis for PSG
- ***Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008)**: sexual orientation can be basis for PSG
- ***Moab v. Gonzales*, 500 F.3d 656, 661 n.2 (7th Cir. 2007)**: sexual orientation can be basis for PSG
- ***Nabulwala v. Gonzales*, 481 F.3d 1115, 1117 (8th Cir. 2007)**: lesbians as PSG
- ***Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1094 (9th Cir.), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005)**: transgender individuals as PSG
- ***Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990)**: sexual orientation can be basis for PSG

Standard of Review:

- Persecution & well-founded fear of persecution: findings of fact; *deferential substantive evidence standard*.
 - Defer to factual findings unless unreasonable or not based on record as a whole, or based on presumptions absent from record, or based on mischaracterizations or understatement of the evidence, or misunderstanding of the law.
 - “When the BIA affirms the IJ’s determinations without expressly rejecting any of its findings and only adds its own gloss to the analysis, we may review both the BIA’s and the IJ’s decisions.” (7)

Discussion:

- “Although past persecution and future persecution are independent, ‘doctrinally distinct’ grounds for asylum, they ‘intersect’ in one significant respect: a showing of past persecution entitles the applicant to a rebuttable presumption of a well-founded fear of future persecution, which, if rebutted, could remove the basis for granting asylum. *Camara v. Att’y Gen. U.S.*, 580 F.3d 196, 202 (3d Cir. 2009) (citing 8 C.F.R. § 208.13(b)(1)). ‘Ultimately, therefore, a well-founded fear of future persecution is the touchstone of asylum.’ *Id.*” (8-9)
- “We find it odd for the Government to make this argument here [threats not sufficiently concrete and menacing because they weren’t fulfilled] considering that Sumaila was threatened with death by fire or decapitation while being assaulted, doused with fuel and exposed to a cutlass. All that was left for the mob to do was to cut off his head or set him on fire. . . Had Sumaila not managed to escape, he might very well be dead. To expect Sumaila to remain idle in that situation—waiting to see if his would-be executioners would go through with their threats—before he could qualify as a refugee would upend the

‘fundamental humanitarian concerns of asylum law.’ *Matter of S-P-*, 21 I&N Dec. 486, 492 (BIA 1996).” (15)

- “We have never held that persecution requires more than one incident. Rather, we have left open the possibility that a single incident, if sufficiently egregious, may constitute persecution.” (16)
- “Nor have we conditioned a finding of past persecution on whether the victim required medical attention or on whether he was too hurt to escape his aggressors, or even on whether the victim was physically harmed at all.” (16)
- “Had Sumaila reported the beatings or threats, he would have outed himself and his partner to the police and, on that basis, he could have been arrested, prosecuted and incarcerated, compounding the persecution he had already suffered. This fact alone is compelling, if not dispositive, evidence that Sumaila had no meaningful recourse against his father’s and the mob’s homophobic violence. At best, seeking help from the police would have been counterproductive.” (22)
- Re. IJ’s and BIA’s decisions about gov’t actors: “Given the totality of the record, these findings cannot withstand even our most deferential review.” (25)
- Re. IJ’s finding that there would be no fear of future persecution: “These findings are not supported by substantial evidence, because they are based on mischaracterizations, unreasonable inferences, and an incomplete assessment of the record. . . . The IJ’s and the BIA’s failure to consider the risk presented by these threats in light of Sumaila’s experience doomed their future persecution analysis.” (30-31)
- “Tellingly, the IJ’s observation, no matter how ill-advised, that Sumaila could avoid persecution and live a ‘full life’ if he kept ‘his homosexuality a secret,’ JA25, was a tacit admission that suppressing his identity and sexuality as a gay man is the only option Sumaila has to stay safe in Ghana. The notion that one can live a ‘full life’ while being forced to hide or suppress a core component of one’s identity is an oxymoron.” (35)
- “In case the BIA decides to remand to the IJ for any reason, we caution the IJ to exercise greater sensitivity when processing Sumaila’s application, as we are troubled by some of the IJ’s comments and questions. In addition to suggesting that Sumaila would be better off hiding his identity as a gay man, the IJ questioned Sumaila in explicit detail about his sexual relations with Inusah, going so far as to ask about sexual positions. It is unclear why that line of questioning would be relevant to Sumaila’s claim, but to the extent those questions were intended to establish or test his self-identification as a gay man, they were off-base and inappropriate. We urge IJs to heed sensible questioning techniques for all applicants, including LGBTI applicants.” (38 n.10)

Commentary:

- If there was no report to police, applicant may fill the gap re. government involvement in other ways:
 - Evidence of country’s laws or customs;
 - Prior interactions with authorities;
 - Other people’s vain attempts to report;
 - Establish widespread private persecution;
 - Convincingly establish that reporting would lead to further abuse.
- See Bringas-Rodriguez*, 850 F.3d at 1066 (9th Cir. 2017)