

Antonio v. Garland: Considering Imputed Sexual Orientation as a Particular Social Group in Asylum Determinations

I. OVERVIEW	135
II. HISTORICAL BACKGROUND.....	138
A. <i>Persecution and the “Nexus” Requirement</i>	140
B. <i>Particular Social Group and Imputed Characteristics</i>	142
III. COURT’S DECISION.....	144
IV. ANALYSIS	147

I. OVERVIEW

Rebeca Rufina Cristobal Antonio (Rebeca) is a native and citizen of Guatemala.¹ As an outdoor laborer, Rebeca was employed in a manually intensive job collecting logs and grasses, and she had worn pants in an effort to find work.² Seeing and hearing of this, Rebeca’s neighbors and community began to shout at her, harass her, and threaten her with injury and death for “dressing up as a man.”³ One day, the group came and forcibly took her to the police because she was setting a “bad example for [their] children” and becoming a blight on the community for looking like “a lesbian.”⁴ The police let her go, but the danger to Rebeca only increased.⁵

A few days before Christmas in 2013, a group of these people waited for her outside her workplace and threatened to “lynch” her, saying that unless she removed her men’s clothing, she “was going to burn.”⁶ Someone called the police, who were able to rescue her from the mob that night.⁷ Unfortunately, this was not the first time that Rebeca had been threatened with or experienced physical harm.⁸ Persecuted not only by her neighbors, Rebeca also was subjected to torments by the men in her

1. *Antonio v. Garland*, 58 F.4th 1067, 1070 (9th Cir. 2023).

2. *Id.* at 1071.

3. *Id.* at 1070-71, 1077 n.14.

4. *Id.* at 1071.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 1073-74.

family when her uncles would insult her “about being a lesbian,” beat her, and whip her.⁹

Despite the authorities being aware of the community’s torture and harassment, they did not make it stop nor address it.¹⁰ Instead, they told her she would have to say she was a member of the LGBTQ+ community when she is not.¹¹ Even though Rebeca had married a local man, the abuse on account of her perceived sexuality did not cease, and eventually, their marriage fell apart from the pressures their society placed upon them as a couple.¹² Rebeca even feared the town’s mayor, stating he was a supporter of the treatment and “would be behind” the community should they decide to kill her.¹³

In Guatemala, situations such as Rebeca’s are not only small-town problems but also a nation-wide issue.¹⁴ While same-sex relationships are not illegal, per se, Guatemala’s antidiscrimination laws do not extend to protect LGBTQ+ individuals, and there is no comprehensive legislative protection for sexual orientation or gender identity.¹⁵ Additionally, the Guatemalan population has high levels of religious affiliation and traditionally conservative views on gender roles and sexuality; over eighty percent of the population identifies as Evangelical or Catholic Christian.¹⁶ Many members of the LGBTQ+ community often suffer stigmatization and harm within these communities while simultaneously facing systemic oppression in a legal system that often grants impunity for perpetrators.¹⁷

9. *Id.*

10. *Id.* at 1078.

11. *Id.*

12. *Id.* at 1071.

13. *Id.*

14. See HUM. RTS. WATCH, GUATEMALA: SUBMISSION TO THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 5 (2022), https://www.hrw.org/sites/default/files/media_2022/10/HRW%20Submission%20to%20the%20Committee%20on%20the%20Elimination%20of%20Discrimination%20Against%20Women%20Review%20of%20Guatemala.pdf (detailing how many LGBTQ+ Guatemalans face abuses in their communities, “including violence by family members, intimate partners, gangs, and state security forces, as well as discrimination in access to employment and education”).

15. *Id.* (“Guatemala has no comprehensive civil non-discrimination legislation that explicitly protects people from discrimination on the grounds of sexual orientation and gender identity, nor a legal gender recognition procedure for transgender people.”).

16. *World Factbook: Explore All Countries—Guatemala*, CIA, <https://www.cia.gov/the-world-factbook/countries/guatemala/#people-and-society> (last updated June 6, 2024) (documenting Guatemalans’ religion as 45.7% Evangelical and 42.4% Roman Catholic).

17. See *Guatemala: Events of 2021*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2022/country-chapters/guatemala#e81181> (last visited June 18, 2024) (discussing issues of judicial independence, corruption, and impunity for perpetrators of human rights abuses and citing

2025]

ANTONIO v. GARLAND

137

Desperate to escape the torturous circumstances, based only upon a perception of her sexuality she could do nothing to change, Rebeca fled her job, her family, her town, and her country to seek refuge in the United States.¹⁸ Upon applying for entry into the United States, the interviewing asylum officer found her fear to be credible and summarized she was claiming asylum based upon persecution as a member of a specific social group: a Guatemalan woman perceived to be a lesbian.¹⁹ The Department of Homeland Security (DHS) then issued her a notice to appear before an immigration judge, charging Rebeca with deportability under 8 U.S.C. § 1182(a)(7)(A)(i)(I), as she had no valid entry document at the time of her application for entry to the United States.²⁰ As a result, Rebeca applied for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).²¹ To qualify for asylum based on past persecution, the applicant must prove “(1) [the] treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control.”²²

In her hearing before the Executive Office of Immigration Review (EOIR), the immigration judge found her fear to be credible but concluded her past suffering “did not rise to the level of persecution” and that her “style of dress” was amorphous and not an immutable characteristic under the social group analysis—particularly, the judge determined there was no real issue of sexual orientation because Rebeca was not a lesbian.²³ Finally, the judge found the Guatemalan government did not take part in or acquiesce to her persecution, as the San Pedro Soloma Court of La Paz had condemned the discriminatory acts and remanded the issue for a police investigation—even though there was no evidence in the record showing an investigation had ever taken place.²⁴ On these three issues, the judge denied her application for asylum and other claims for relief.²⁵

to a 2021 Human Rights Watch report, which found that the government is systematically “failing to protect LGBT[Q+] people adequately”).

18. *See Antonio*, 58 F.4th at 1070-71.

19. *Id.* at 1070.

20. *Id.* at 1071.

21. *Id.*

22. *Id.* at 1073 (citing to *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017)).

23. *Id.* at 1071-72.

24. *Id.* at 1072, 1077.

25. *Id.* at 1072.

On appeal to the Board of Immigration Appeals (BIA), a single member affirmed the immigration judge's decision without issuing an opinion pursuant to 8 C.F.R. § 1003.1(e)(4).²⁶ The petitioner then appealed to the U.S. Court of Appeals for the Ninth Circuit, which granted her petition for review of the final order of removal under 8 U.S.C. § 1252(a)(1), addressing the presented questions of both law and fact.²⁷

In a three-judge panel, the Ninth Circuit emphasized that while they nor the BIA had ever explicitly recognized “perceived or imputed sexual orientation [to be] a cognizable social group” in a published opinion, the court has discussed the issue and recognized “perceived sexual orientation” as a cognizable social group in two unpublished opinions.²⁸ Therefore, because the agency failed to analyze all relevant evidence and apply prior precedent, the court reversed and remanded for further proceedings.²⁹ The court held “[t]he agency erred in finding that the harm Antonio suffered did not rise to the level of persecution” and that it “also failed to analyze the correct social group and may have failed to analyze all probative evidence regarding the government’s acquiescence in Antonio’s persecution.” *Antonio v. Garland*, 58 F.4th 1067, 1078-79 (9th Cir. 2023).

II. HISTORICAL BACKGROUND

The United States is often referred to as a “nation of immigrants.”³⁰ The very concept of refugee has been an integral part of the American cultural myth since the first Separatist Puritans left England to escape the pressures of the Church of England and establish their colony at Plymouth.³¹ While immigration regulations in the United States formed slowly across decades, there has always been some avenue for individuals to seek refuge (albeit formally constrained to specific circumstances),

26. *Id.*

27. *Id.*

28. *Id.* at 1076.

29. *Id.* at 1078-79.

30. *Id.* (quoting *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1079 (9th Cir. 2015); see Roxanne Dunbar-Ortiz, *The United States Is Not “A Nation of Immigrants”*, BOSTON REVIEW (Aug. 16, 2021), <https://www.bostonreview.net/articles/the-united-states-is-not-a-nation-of-immigrants/>).

31. See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 2, 79 (Yale Univ. 1999) (reasoning that religious tolerance and the idea of “[f]reedom was mainly the product of New World conditions . . . unencumbered by oppressions associated with ancien régime” such as a “single established church extirpating dissent”).

such as seeking relief from religious oppression.³² However, formal rights for asylum seekers were not substantially addressed in a traditional legal framework until after the Second World War with the development of international human rights law.³³

To account for the immense post-war humanitarian crisis, mainly in Europe, Congress passed the Displaced Persons Act of 1948, the Refugee Relief Act of 1953, and later the Migration and Refugee Act of 1962.³⁴ These specifically tailored laws, albeit problematic in their own right, allowed for certain refugees—from particular military conflicts the United States was involved in—to bypass the national quota system that existed at the time.³⁵ Aside from these scattered and limited provisions, a clear and comprehensive understanding of the rights of refugees was not established until Congress passed the 1965 amendments to the INA, which for the first time provided a permanent basis for the admission of refugees.³⁶ The Refugee Act of 1980 finally removed the geographic and ideological limits on who was considered a refugee and provided the first statutory basis for asylum.³⁷ In 1988, the United States signed and ratified

32. *Id.*; see David W. Haines, *Learning from Our Past: The Refugee Experience in the United States*, AM. IMMIGR. COUNCIL (Nov. 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/learning_from_our_past_the_refugee_experience_in_the_united_state_s.pdf (noting that “persecution and flight also lay at the core of the experience of many new American arrivals who are often characterized simply as immigrants”).

33. In 1948, three years after the official end of the Second World War, the General Assembly of the United Nations adopted The Universal Declaration of Human Rights (UDHR), becoming the foundational human rights document for the further development of the discipline on the international level. See Frans Viljoen, *International Human Rights Law: A Short History*, U.N. CHRON., <https://www.un.org/en/chronicle/article/international-human-rights-law-short-history> (last visited Apr. 26, 2024). In 1992, the United States finally adopted the International Covenant on Civil & Political Rights (ICCPR). *Id.* Together, the two documents are considered to be the international version of the “Bill of Rights,” paving the way for further treaties and conventions to address more specified issues on both the global and regional level. *Id.*

34. See Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948), <https://uscode.house.gov/statviewer.htm?volume=62&page=1009#>; Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (1953), <https://www.govinfo.gov/content/pkg/STATUTE-67/pdf/STATUTE-67-Pg400.pdf>; Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (1962), <https://www.congress.gov/87/statute/STATUTE-76/STATUTE-76-Pg121.pdf>.

35. See Natalie Walker, *The Displaced Persons Act of 1948*, TRUMAN LIBR. INST. (Apr. 29, 2019), <https://www.trumanlibraryinstitute.org/the-displaced-persons-act-of-1948/#:~:text=On%20June%2025%2C%201948%2C%20Harry,du%20to%20World%20War%20II;RefugeeTimeline,U.S.CITIZENSHIP&IMMIGR.SERVS.,https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline> (last updated Feb. 7, 2023).

36. See Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

37. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

the Convention Against Torture (CAT),³⁸ which among other protections, prohibits state parties from forcibly returning refugees to the countries when there is a reasonable belief that they would be “subjected to torture” upon their return.³⁹

A. *Persecution and the “Nexus” Requirement*

“What is torture?” remains one of the most litigated questions in U.S. courts.⁴⁰ As asylum claims are necessarily fact-intensive inquiries, courts remain divided on statutory meaning and intent.⁴¹ Thus, the legal tests vary at the circuit level, where the exact elements must be proven for an applicant to qualify for asylum in each situation.⁴²

In 1985, the BIA, in *Matter of Acosta*, clarified that the elements an applicant must prove to qualify as a refugee and claim relief under asylum law.⁴³ To qualify as a “refugee” for asylum, an applicant must satisfy all elements created by INA § 1101(a)(42)(A)—specifically, the person must have suffered past persecution or a “well-founded fear” of persecution *on account of* their race, religion, nationality, political opinion, or membership in a particular social group, and the person must be unable or unwilling to return to their country of nationality and origin.⁴⁴ Additionally, the persecution must be perpetrated by a government actor or third party that the government is unwilling or unable to control.⁴⁵ While an applicant can set forth multiple claims under a protected ground,

38. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Oct. 21, 1994, 18 U.S.C. §§2340-2340A, 1465 U.N.T.S. 85 [hereinafter CAT]. The United States signed the Convention in 1988, but it was not formally ratified until 1994. *Depositary: Status of Treaties: Human Rights: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-9&chapter=4&clang=_en (last updated June 18, 2024). However, the U.S. Senate’s ratification of CAT was subject to certain regulations, understandings, and declarations, including that the Convention was not self-executing. *See Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999) (codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, and 507).

39. Article 3 of the Convention prevents state parties from removing refugees to countries where they will be subjected to torture (known as “refoulment”). CAT, *supra* note 38, at art. 3; *see also* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. at 8478.

40. *See* Trent Buatte, *The Convention Against Torture and Nonrefoulement in U.S. Courts*, 35 GEO. IMMIGR. L. J. 701, 701 (2021).

41. *See id.* at 714-27.

42. *See id.*

43. 19 I. & N. Dec. 211, 219 (B.I.A. 1985).

44. *Id.* at 218-19; *see also* 8 U.S.C. 1101(a)(42).

45. *See Matter of Acosta*, 19 I. & N. Dec. at 222 (citing *Matter of Pierre*, 15 I. & N. Dec. 461, 462 (B.I.A. 1975)).

they must prove the persecution was directly because of the specific belief or identification—the nexus requirement.⁴⁶ Once they have proven they fall under a protected status, the applicant must then (1) meet the elements of reasonable fear;⁴⁷ (2) be unable or unwilling to return to the country; and (3) show an acquiescence in or failure of state protection to stop the persecution.⁴⁸

In *Matter of Mogharrabi*, the board further clarified the elements required to establish a “well-founded fear” of persecution.⁴⁹ First, the applicant must possess “a belief or characteristic [the] persecutor seeks to overcome in others by means of punishment.”⁵⁰ Second, the persecutor must be “already aware, or could easily become aware, that the [person] [has this] belief or characteristic.”⁵¹ Third, the persecutor must have the actual capability of punishing or harming the person.⁵² And lastly, the persecutor must have the inclination to punish them or has already done so.⁵³

While the subjective intent of the persecutor to harm or punish is generally immaterial to an asylum claim, in cases where the harm occurs on account of *imputed* characteristics, “the social group exists independent of the persecution, and the perception of the persecutor [becomes] relevant to the issue of nexus.”⁵⁴ Additionally, even if the abuser did not necessarily have the intent to cause harm but was motivated by some other reason, if the victim subjectively experiences the harm as abuse, this can rise to the level of persecution.⁵⁵ In *Antonio v. Garland*, the court relied on its definition of persecution as an “extreme concept” and an “infliction of suffering or harm upon those who differ . . . in a way

46. *Antonio v. Garland*, 58 F.4th 1067, 1074 (9th Cir. 2023).

47. For Withholding of Removal under CAT, the standard of fear is that it is “more likely than not” to occur (more than a fifty-percent chance). *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987) (quoting *I.N.S. v. Stevic*, 467 U.S. 407, 429-30 (1984)). For an asylum claim, the standard is lower—a well-founded fear can occur “when there is less than a 50% chance of the occurrence taking place.” *Id.* at 431; *see also* AM. IMMIGR. COUNCIL & NAT’L IMMIGR. JUSTICE CTR., *The Difference Between Asylum and Withholding of Removal* (Oct. 6, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf.

48. *See Cardoza-Fonseca*, 480 U.S. at 428; AM. IMMIGR. COUNCIL & NAT’L IMMIGR. JUSTICE CTR., *supra* note 47.

49. 19 I. & N. Dec. 439, 446 (B.I.A. 1987).

50. *Id.* at 446 (quoting *Matter of Acosta*, 19 I. & N. at 226).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 243 (B.I.A. 2014).

55. *See Pitcherskaia v. I.N.S.*, 118 F.3d 641, 646-47 (9th Cir. 1997).

regarded as offensive.”⁵⁶ This definition, when fused with the “frequency, escalation, and seriousness of threats” and the actions themselves, is considered in the determination of persecution.⁵⁷

Another step in the evidentiary process is showing that the torture or persecution giving rise to the claim was either perpetrated by the government of the country itself, by a government actor, or, if committed by a third party, the authorities acquiesced to the treatment.⁵⁸ There is further circuit divide on how this metric is satisfied.⁵⁹ The general consensus is that such acquiescence can be established, not only through knowledge itself but also by willful blindness—a deliberate avoidance of knowledge by failure to make a reasonable inquiry despite being directly aware of a crime’s occurrence or a high probability that it exists.⁶⁰ The regulations themselves provide that a public official acquiesces to torture when the public official “[has] awareness of such activity and thereafter breach[es] his or her legal responsibility to intervene to prevent such activity.”⁶¹ In other words, there is likely acquiescence if the governmental authorities would approve or accept atrocities committed against the applicant or those who would be in their same position.⁶²

B. Particular Social Group and Imputed Characteristics

Although the INA does not define “particular social group,” the board held, in *Matter of M-E-V-G-*, “an applicant for asylum or withholding of removal [who seeks] relief based on ‘membership in a particular social group’ must establish that the group is (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.”⁶³ While the social group does not have to be literally, ocularly visible, it must have “social distinction” with clearly identifiable markers that a society agrees upon.⁶⁴

56. *Antonio v. Garland*, 58 F.4th 1067, 1073 (9th Cir. 2023) (first quoting *Nagoulko v. I.N.S.*, 333 F.3d 1012, 1016 (9th Cir. 2003); and then quoting *Lanza v. Ashcroft*, 389 F.3d 917, 934 (9th Cir. 2004)).

57. *Id.* (citing *Ruano v. Ashcroft*, 301 F.3d 1155, 1160-61 (9th Cir. 2002)).

58. *See id.* at 1077.

59. *Buatte*, *supra* note 40, at 714-27.

60. *See In re S-V-*, 22 I. & N. Dec. 1306, 1311-12 (B.I.A. 2000).

61. 8 C.F.R. § 1208.18(a)(7); *see also* Lissette Eusebio, *The Convention Against Torture and Third-Party Abuse: When Does a Government Breach Its Duty Through Acquiescence?*, 9 IMMIGR. L. ADVISOR 1, 1 (2015).

62. *In re Y-L-*, 23 I. & N. Dec. 270, 283 (A.G. 2002).

63. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014).

64. *Id.* at 228, 236.

The Ninth Circuit interprets the term “particular social group” as one that is “united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”⁶⁵ The court applies a less stringent test, instead opting to apply this more philosophical definition.

Members of the LGBTQ+ community have long been considered members of a particular social group both by the BIA and at the circuit level for immigration purposes.⁶⁶ As such, “the BIA has consistently held that applicants persecuted for imputed grounds are eligible for asylum.”⁶⁷ Following this reasoning, the Third Circuit found, in *Amanfi v. Ashcroft*, that it is possible to proceed with an asylum claim based on persecution due to imputed membership in a particular social group, such as sexual orientation, even if the applicant is not actually gay.⁶⁸ There, Amanfi, a Ghanaian man, was forced to engage in a homosexual act with another man upon threat of being ritually sacrificed.⁶⁹ He was thereafter grossly mistreated because the authorities consequently believed he was gay.⁷⁰ The court determined his “theory of imputed membership in a particular social group” was supported by legal precedent and remanded the case to the BIA for further consideration.⁷¹ Thus, both members of the LGBTQ+ community as well as those who are believed to be LGBTQ+ have been recognized as a particular social group in asylum analyses.

The Ninth Circuit has applied similar reasoning as its sister circuits to asylum claims brought on other grounds, which also had a question of imputed characteristics by the persecutor other than a particular social group analysis.⁷² By way of illustration, for an individual to show persecution based upon political opinion, the Ninth Circuit has previously held that the important factor is not that the political belief was actually held or acted on, but rather “that the *persecutor* was motivated by a *belief*

65. *Antonio v. Garland*, 58 F.4th 1067, 1075 n.12 (9th Cir. 2023) (quoting *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000)).

66. *See Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“[W]e affirm that *all* homosexuals are members of a ‘particular social group.’”); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990).

67. *Antonio*, 58 F.4th at 1079 (Sanchez, J., concurring) (citing *In Re S-P-*, 21 I. & N. Dec. 486, 489-90 (B.I.A. 1996)).

68. 328 F.3d 719, 721, 730 (3rd Cir. 2003) (remanding Amanfi’s claims of persecution to the BIA for further investigation).

69. *Id.* at 722-23.

70. *Id.* at 723.

71. *Id.* at 721, 730.

72. *See Khudaverdyan v. Holder*, 778 F.3d 1101, 1106 (9th Cir. 2015).

that the petitioner held the political opinion.”⁷³ The same principle was applied by the same circuit in a case of imputed religious identification.⁷⁴ In general, setting the specific fact-bound analysis aside, both the BIA and the Ninth Circuit have held that persecution on account of a particular social group *includes* persecution on account of perceived membership in that group; such individuals can qualify for asylum.⁷⁵

III. COURT’S DECISION

In the noted case, the Ninth Circuit remanded to the BIA for further proceedings consistent with the holding that the agency erred in (1) “finding that the harm [Rebeca] suffered did not rise to the level of persecution;” (2) analyzing the correct social group claim; and (3) considering all probative evidence regarding the government’s tolerance of the persecution.⁷⁶ In its holding, the court noted that the failure to address a social group claim using the correct legal standard is an error that requires remand.⁷⁷

First, the court addresses the immigration judge’s finding that the actions against Rebeca did not amount to persecution but were merely threats.⁷⁸ Here, the court disagreed with the immigration judge’s conclusion.⁷⁹ Even if the panel had agreed with the immigration judge on this point, the agency still failed to consider the court’s previous holding that threats alone may be compelling evidence of past persecution, particularly when they are specific and menacing.⁸⁰ Additionally, the court points to Rebeca experiencing “actual violent attacks” that went beyond mere words or verbal assaults.⁸¹ Although the record contained Rebeca’s testimony that she was frequently whipped, beaten, and insulted by her uncles on account of their belief she was a lesbian, this was not

73. *Id.* at 1106 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)).

74. *See Popova v. I.N.S.*, 273 F.3d 1251, 1258-59 (9th Cir. 2001).

75. *See e.g.*, *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9th Cir. 2005), *cert. granted*, *rev’d on other grounds*, 547 U.S. 183, 186 (2006); *Matter of N-M-*, 25 I. & N. Dec. 526, 532 (B.I.A. 2011) (“[A]n alien must persuade the trier of fact not just that the alleged persecutor was motivated in some measure by the alien’s actual or imputed political belief, but that the protected trait was “one central reason” for the persecution.”).

76. *Antonio v. Garland*, 58 F.4th 1067, 1078-79 (9th Cir. 2023) (noting the BIA may elect to remand the case back to the immigration judge for further fact investigation if necessary).

77. *Id.* at 1075 (citing *Rios v. Lynch*, 807 F. 3d 1123, 1126 (9th Cir. 2015)).

78. *Id.* at 1073-74.

79. *Id.*

80. *Id.* at 1073 (calling attention to the threats by the community of burning, death, and other violence on account of her imputed characteristics of an LGBTQ+ individual).

81. *Id.* at 1073-74.

considered in the judge’s initial opinion.⁸² The court considers these elements as more than isolated events.⁸³ As such, “the death threats, mob violence, involuntary transport to the police station, and repeated whipping by her uncles” show a pattern of conduct that leads to an altogether different conclusion than the agency’s.⁸⁴

Second, the court notes the immigration judge seemed to have mischaracterized Rebeca’s argument on the issue of membership in a particular social group.⁸⁵ The immigration judge felt that “style of dress” or “male tendencies” was not an immutable characteristic and that it was not an issue of gender or sexuality on its face because Rebeca did not claim to be a lesbian.⁸⁶ The court addresses the flaws in this rationale by pointing out the judge ignored the reasonable argument for a completely different social group, which was mentioned at every step of the asylum process.⁸⁷ While the community attributed Rebeca to be a lesbian because she wore men’s clothing, this was but one of many reasons, including her broad defiance of traditional Guatemalan gender roles and expectations.⁸⁸ The court reflects, “[Rebeca’s] manner of dress was one reason her community associated her with a relevant proposed social group, not the basis of the group itself[;] [t]hus, the agency failed to conduct its particular social group analysis with respect to the correct group—women perceived to be lesbians.”⁸⁹ The panel concluded this was enough to allow the BIA to conduct the necessary inquiry despite imputed sexual orientation not being a previously recognized cognizable social group in the published opinion.⁹⁰

Third, the court engages in a close scrutiny of the record, finding the immigration judge disregarded integral uncontradicted evidence in the record that supported a conclusion that “the [Guatemalan] government failed to take appropriate action to protect the petitioner, despite her [many] attempts to invoke its aid.”⁹¹ The immigration judge focused on Rebeca’s complaint to the local Justice of the Peace and the subsequent decision to remit the issue back to law enforcement for a criminal

82. *Id.* at 1072.

83. *Id.* at 1074.

84. *Id.*

85. *Id.* at 1075; see also Arthur S. Leonard, *Guatemalan Petitioner Wins Remand of Asylum Claim on Several Grounds by 9th Circuit Panel*, LGBT L. NOTES, Feb. 2023, at 16.

86. *Antonio*, 58 F.4th at 1075.

87. *Id.*

88. *Id.*

89. *Id.* at 1076.

90. *Id.* at 1076-77.

91. *Id.* at 1077-78; Leonard, *supra* note 85, at 17.

investigation.⁹² However, there is no evidence to show that this action led to any results or rendered any protection to Rebeca.⁹³ Specifically, there was no evidence as to whether the criminal referral led to any “arrests, criminal prosecution, or other action by authorities to minimize the threats” that took place.⁹⁴ Additionally, the immigration judge did not inquire into how the mayor of her village knew of the abuse and was either encouraging or taking part in it.⁹⁵ The judge’s failure to mention this portion of the record gives the court the impression that it was not considered in the determination.⁹⁶ While law enforcement authorities did take some action in Rebeca’s situation, the harassment, discrimination, and mistreatment continued after they had been made aware.⁹⁷ This left the court to conclude that the government was either a part of the persecution or “unwilling or unable to control” the third-party actors, thereby meeting the standard under the INA, regulations, and applicable case law.⁹⁸

Applying both BIA and circuit precedent, including unpublished opinions, Justice Sanchez writes a compelling concurrence.⁹⁹ On the court’s remand, he encourages the board that a “[f]aithful application of [longstanding BIA and circuit] precedent should lead the BIA to the same conclusion” as the court reached in its review.¹⁰⁰ He points out the immigration judge clearly focused on the wrong elements in his determination in Rebeca’s case.¹⁰¹ By focusing on Rebeca’s self-identification as a heterosexual woman, he misidentified the persecution she suffered was “not a sexual orientation issue” but rather “a dress issue.”¹⁰² By focusing merely on Rebeca, rather than assigning weight to the “perceptions of her persecutors,” the IJ placed the improper burden on her to establish that she was a homosexual in order to claim protection when she should have only been required to provide evidence that her persecutors were “motivated by a belief” that she was.¹⁰³

92. *Antonio*, 58 F.4th at 1077.

93. *Id.*

94. *Id.*

95. *Id.* at 1078.

96. *Id.*

97. *Id.*

98. *Id.* at 1077-78.

99. *Id.* at 1079-80 (Sanchez, J., concurring).

100. *Id.* at 1080.

101. *Id.*

102. *Id.*

103. *Id.* (citations omitted).

2025]

ANTONIO v. GARLAND

147

IV. ANALYSIS

The United States has seen one of the largest waves of anti-LGBTQ+ state legislation in recent years.¹⁰⁴ In 2023 alone, at least 510 anti-LGBTQ+ bills had been introduced or passed, which was more than double the number of the previous year.¹⁰⁵ As reflected by governmental politics, the sentiment and public discourse surrounding issues of gender and sexuality has become increasingly hostile, including attacks on gender-affirming healthcare, education, and expression.¹⁰⁶ Another topic of intense debate in the public square is that of immigration, with a consistent debate between federal and state power to police migration.¹⁰⁷ Suits are often brought by individual plaintiffs and by human rights organizations on behalf of those suffering from abuses within the private prison systems that house Immigration and Customs Enforcement (ICE) detainees.¹⁰⁸ These detention centers are usually located in rural areas where migrants are cut off from their families, legal representation, and other resources.¹⁰⁹ The private companies that run them see little to no accountability or oversight, and the staff are not subject to the same trainings and standards as with state or federal prisons.¹¹⁰ Conditions for

104. Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN, <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html> (last updated Jan. 22, 2024).

105. *Id.*

106. *Id.*

107. See e.g., Acacia Coronado & Associated Press, *Federal Judge Blocks Texas Law That Gives Police Broad Powers to Arrest People Suspected of Illegally Entering U.S.*, PBS (Feb. 29, 2024 12:08 PM), <https://www.pbs.org/newshour/politics/federal-judge-blocks-texas-law-that-gives-police-broad-powers-to-arrest-people-suspected-of-illegally-entering-u-s>; Colleen Long, *Texas Wants to Arrest Immigrants in the Country Illegally. Why Would That Be Such a Major Shift?*, AP NEWS, <https://apnews.com/article/migrants-immigration-texas-e3c6bb365005047c837ec2f8666d95be> (last updated Mar. 20, 2024).

108. See e.g., PHYSICIANS FOR HUM. RTS. “ENDLESS NIGHTMARE”: TORTURE AND INHUMAN TREATMENT IN SOLITARY CONFINEMENT IN U.S. IMMIGRATION DETENTION, (Feb. 6, 2024), <https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf>.

109. Hanna Johnson, *The Questions You Probably THINK You Know the Answer to—But Likely Don’t—About ICE Detention*, ACLU (Nov. 30, 2020), <https://www.aclu.org/news/immigrants-rights/the-questions-you-probably-think-you-know-the-answer-to-but-likely-dont-about-ice-detention>; see also Patrick Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, PROPUBLICA (May 16, 2017, 4:00 PM), <https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help>.

110. See Tom Dreisbach, *Government’s Own Experts Found ‘Barbaric’ and ‘Negligent’ Conditions in ICE Detention*, NPR (Aug. 16, 2023, 5:01 AM), <https://www.npr.org/2023/08/16/1190767610/ice-detention-immigration-government-inspectors-barbaric-negligent-conditions>.

LGBTQ+ migrants are especially horrific with many individuals suffering daily from gender discrimination and violence behind bars.¹¹¹

Nevertheless, the United States remains a haven for many individuals from across the globe who seek protection from state-sponsored oppression or cultures of impunity for those who commit gendered violence against women and LGBTQ+ individuals and those facing adjacent discrimination.¹¹² Homosexuality is criminalized in more than sixty-four countries, punishable by death in at least twelve of those, and while many countries have decriminalized homosexuality, many have yet to establish positive legislation to protect those interests.¹¹³ In fact, as a data sample, from 2012-2017, 3,899 applications for asylum were related to LGBTQ+ status.¹¹⁴

It is hard to imagine an area in immigration and nationality law more compelling than granting relief to refugees in the form of asylum. However, it is also an area where it is more difficult to resolve the competing values of humanitarian compassion and international obligations with national self-interest when considering the sheer scale of the ongoing global crisis of displacement and resettlement.¹¹⁵ These considerations are reflected in the relatively recent doctrinal development of asylum law and in the ever-shifting definitions and guidelines for those seeking relief under the INA and CAT as social values change.

The noted case is an example of adapting existing judicial precedents to fill such a need.¹¹⁶ For instance, in *Matter of M-E-V-G-*, the board wrote,

[A]n individual may present a valid asylum claim if he is incorrectly identified as a homosexual . . . in a society that considers homosexuals a distinct group united by a common immutable characteristic. In such a case, the social group exists independent of the persecution, and the

111. See Jose A. Del Real, *'They Were Abusing Us the Whole Way': A Tough Path for Gay and Transgender Migrants*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/us/lgbt-migrants-abuse.html>.

112. See *id.*

113. *Map of Jurisdictions that Criminalise LGBT People*, HUM. DIGNITY TR., https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/?gad_source=1&gclid=CjwKCAjw7-SvBhB6EiwAwYdCAVFZi9C0szcwpoUkK1Tb9pDj2UVdqvYBq00Baa_3itgzFuZqaLAztRoC3FsQAvD_BwE (last visited June 9, 2024).

114. ARI SHAW ET AL., UCLA SCH. L. WILLIAMS INST., *LGBT ASYLUM CLAIMS IN THE UNITED STATES* 1 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Asylum-LGBT-Claims-Mar-2021.pdf>.

115. See STEPHEN H. LEGOMSKY & DAVID B. THRONSON, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1133 (West Acad., 7th Ed. 2019); see also GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 13-14 (Princeton Univ. Press 1996).

116. See *Antonio v. Garland*, 58 F.4th 1067 (9th Cir. 2023).

perception of the persecutor is relevant to the issue of nexus (whether the persecution was or would be on account of the applicant's imputed homosexuality).¹¹⁷

While the BIA so clearly discussed that such a situation could exist hypothetically, when faced with a real-life scenario, the agency failed to apply its own reasoning to the apparent legal gap presented by the facts in Rebeca's case.¹¹⁸

Justice Sanchez highlights this lack of consistency in asylum claim adjudications in his concurrence.¹¹⁹ When presented with qualifying facts, the agency failed to conduct the correct analysis. With this remand, the court's decision highlights a problematic issue within immigration courts—simply applying incorrect conclusions of law and improperly weighing evidence or outright failure to take certain evidence into account.¹²⁰

While this decision by the Ninth Circuit lays the groundwork for a determination of a new category of protected grounds not previously discussed by the court in a published decision (nor in a precedential BIA decision), there is still much to be desired in the process overall.¹²¹ The outcome of this case provides a broader understanding of particular social group analysis and provides a significant advance in an otherwise narrow interpretation. However, due to the rigidity of the analysis, many legitimate asylum seekers are barred every year from receiving refuge in the United States despite the purpose of the legislation and the obligation to honor international treaty obligations for victims of persecution.¹²²

Courts are hesitant to create too broad of a particular social group category for fear that it would, in effect, open the door for large numbers of asylum seekers to see their applications granted.¹²³ However, as the Ninth Circuit aptly writes, it has “reject[ed] the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum.”¹²⁴ Where the legislative intent of Congress was to create a pathway for refugees to safely migrate when

117. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 243 (B.I.A. 2014).

118. See *Antonio*, 58 F.4th 1067.

119. *Id.* at 1079-80 (Sanchez, J., concurring).

120. *Id.* at 1073-79; see also Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 421, 424 (2011).

121. See *Antonio*, 58 F.4th at 1073-77.

122. See Implementation of the Convention Against Torture, 8 CFR § 208.18 (2012).

123. See Peter Godfrey, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, 280 (1994).

124. *Antonio*, 58 F.4th at 1076 (citing *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010)).

faced with persecution, in accordance with international treaty obligations,¹²⁵ succeeding case law has often served to make it more difficult to do so, revealing a deviation from the plain language of the provisions of the INA and accompanying legislation. The relevant agencies would be served well in following the clarity of reasoning presented by the Ninth Circuit instead of paying mere lip service to the intention of Congress in the creation of our body of asylum laws.

Lydia Prislovsky*

125. *See supra* notes 37-39.

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