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IS "GUATEMALAN WOMEN" A VIABLE PARTICULAR SOCIAL GROUP FOR ASYLUM PETITIONS? CIRCUIT SPLIT BETWEEN THE UNITED STATES COURTS OF APPEAL FOR THE NINTH AND THIRD CIRCUITS

By Jazmin Moya¹

ABSTRACT

Membership in a particular social group ("PSG") is one of five protected grounds that can form the basis for an asylum claim under U.S. law.¹ This protected ground can be persuasively and effectively used to establish asylum eligibility for an applicant who may not "fit" into another of the five protected grounds. Recently, Guatemala has seen a substantial increase in femicide rates which are rarely investigated or prosecuted.² As a result, some Guatemalan women who apply for asylum in the United States have claimed membership in a particular social group of "Guatemalan women" (and "young women in Guatemala").³ The Ninth and Third Circuits disagree on whether "Guatemalan women" qualifies as a particular social group and have each issued conflicting tests to determine PSG eligibility. This article will analyze the contradictory decisions of each circuit and explain why the Ninth Circuit's broad inclusion of "Guatemalan women" as a PSG is consistent with the requirements of the Immigration and Nationality Act ("INA").

INTRODUCTION

Guatemalan women fleeing gender-based violence face a significant barrier to obtaining asylum in the United States.⁴ All asylum applicants must fall within the definition of "refugee" as stated in the Immigration and Nationality Act ("INA"): "any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁵

The violence and persecution of women in Guatemala has forced many women to flee to the United States or other countries for protection.⁶ United States asylum law requires applicants to base their asylum claims on either past persecution or a well-founded fear of future persecution through one of the five protected grounds listed in the INA.⁷ Rampant gender-based violence towards women exacerbated by Guatemalan authorities' inability to protect them should be sufficient to establish a new particular social group ("PSG") as long as it is consistent with the established criteria under existing case law. This would place Guatemalan women's asylum claims under a more appropriate category; other protected categories may not apply to those claims or reflect the specific kind of violence from which the applicant is fleeing.⁸

There is a circuit split on the categorization of Guatemalan women as a specific PSG.⁹ The Ninth Circuit held in *Perdomo v. Holder* that "Guatemalan women" is a PSG for asylum application purposes.¹⁰ The court distinguished this PSG from other groups, relying on the notion that "Guatemalan women" are a PSG on because of their gender.¹¹ However, about eleven years after *Perdomo*, the Third Circuit held in *Chavez-Chilel v. Attorney General* that the group is too broad and should not be a PSG entitled to asylum in the United States.¹² This article will analyze the holdings and reasoning provided by each circuit to argue that "Guatemalan women" should be treated as a PSG because of the extreme gender-based violence that women in Guatemala face and because they are continuously at risk of being victims of such violence.

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I. BACKGROUND

A. RATES OF FEMICIDE IN GUATEMALA

The United Nations defines femicide as the killing of women and girls because of their gender.¹³ Femicides can be committed by both intimate partners and strangers and include many forms of violence such as torture or punishment for sexual orientation or gender identity.¹⁴ Femicides can be “justified” as an “honor killing” and are thus rarely investigated or prosecuted.¹⁵ This remains true in Guatemala today. Increasing rates of femicide in Guatemala have pushed women to seek asylum in the United States.¹⁶ Guatemala is one of the three countries known collectively as the “Northern Triangle” along with Honduras and El Salvador.¹⁷ These countries are among the top five in the world for rates of femicide which has led to increased numbers of women migrating from these countries to the United States and Mexico.¹⁸ For example, between 2014 to 2016, 2,264 women in Guatemala were killed with 611 murders reported as femicide and less than two percent of perpetrators imprisoned.¹⁹ Recently, reports showed a 31.1% increase in femicide rates in Guatemala between 2020 to 2021.²⁰ The high rates of gender-based violence and femicide are a significant factor that push women to seek asylum in other countries, including the United States.²¹ Despite these alarming trends, claims of gender-based violence have been unsuccessful because the INA's grounds do not specifically categorize gender as a protected group.²²

B. PARTICULAR SOCIAL GROUPS FOR RECOGNITION OF REFUGEE STATUS

Particular social groups must meet the following three criteria established through case law: immutability, particularity, and social distinction. An immutable (or fundamental) characteristic is “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”²³ The particularity requirement is met if “the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”²⁴

The social distinction requirement refers to a group that must be *perceived* as a group by society.²⁵

A federal circuit split resulted from Board of Immigration Appeals (“BIA”) decisions. The Executive Office for Immigration Review (“EOIR”) is responsible for the management of the Immigration Court and the BIA.²⁶ The BIA has the administrative authority to review cases that are appealed from the lower-level immigration court within the EOIR.²⁷ BIA decisions can be appealed to the federal circuit where the case originated.²⁸

II. ANALYSIS

A. NINTH CIRCUIT: *PERDOMO V. HOLDER*

Lesly Yajayra Perdomo applied for asylum, withholding of removal, and Convention Against Torture relief because of a well-founded fear of persecution on account of her membership in the “young women in Guatemala” PSG.²⁹ Perdomo argued solely for asylum eligibility on the ground that she feared persecution because she was a young woman in Guatemala.³⁰ The immigration judge denied her relief, rejecting “young women in Guatemala” as a PSG because it was not a “cognizable social group.”³¹ The BIA affirmed the immigration court decision; however, the Ninth Circuit found that in other cases, particularly regarding female genital mutilation, groups were found to be PSGs *because* of their gender.³² The Ninth Circuit applied this reasoning to Perdomo’s case and determined that “women in Guatemala” could be a PSG.³³ The case was remanded to the BIA for further proceedings consistent with the opinion of the Ninth Circuit.

The Ninth Circuit previously implemented a two-part test in *Hernandez-Montiel* where a “[PSG] is one 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.”³⁴ In *Perdomo*, the Ninth Circuit reiterated the criteria for PSG eligibility and identified “Guatemalan women” as sufficient to meet immutability and social distinction requirements.³⁵ Relying on previous Ninth Circuit decision in *Hernandez-Montiel*, the Circuit reintroduced the two-part test to determine particularity that would

allow “Guatemalan women” to be considered a PSG.³⁶

B. THIRD CIRCUIT: *CHAVEZ-CHILEL V. ATTORNEY GENERAL*

Eleven years later, the Third Circuit held that “Guatemalan women” cannot be a particular social group by applying a narrow definition of PSGs. Martha Elena Chavez-Chilel petitioned the Third Circuit for review of a BIA decision which affirmed the immigration judge’s decision to deny her applications for asylum and withholding of removal.³⁷ The Third Circuit required Chavez-Chilel to show that the PSG of which she was a part was one with members who share a “common immutable characteristic” that is “defined with particularity” and is “socially distinct within the society in question.”³⁸

By narrowly applying the three PSG criteria, the Third Circuit held that the seemingly large group of “Guatemalan women” was not a PSG without properly reviewing each requirement based on case law definitions of particular social groups.³⁹ The court disagreed that “Guatemalan women” is a PSG because it lacks the “particularity” requirement, arguing that “a proposed PSG of all women in a particular country [] is overbroad.”⁴⁰ In addressing other circuits’ adoptions of a PSG definition for all women in a country, such as Iranian and Somalian women, the Third Circuit found that those “reasons to depart from [the] general rule are not present here” for Guatemalan women.⁴¹ In particular, the court explained countries like women from countries like Somalia qualify as a PSG because of the widespread prevalence of female genital mutilation.⁴² The Third Circuit applied a very narrow PSG definition specifically regarding particularity, alleging that “no factfinder could reasonably conclude that all [of a country’s] women had a well-founded fear of persecution based solely on their gender.”⁴³ The court stated that there is no evidence to suggest that all Guatemalan women “share a unifying characteristic that results in them being targeted for any form of persecution based solely on their gender.”⁴⁴ The court gave undue weight to Chavez-Chilel’s testimony that she knew of no other women who suffered sexual or domestic violence as the basis to discredit the claim that Guatemalan women share

a unifying characteristic: persecution based solely on their gender.⁴⁵ The court’s rationale in this case is inconsistent with the cases it relies on for its argument and is unfairly prejudicial to Guatemalan women’s gender-based persecution claims. The Third Circuit misapplied the holding of *Hassan v. Gonzales* regarding particularity of a large PSG where the Eighth Circuit held that the *prevalence* of persecution against that large group (Somali women) could allow a factfinder to conclude that all members of that group have a well-founded fear of persecution.⁴⁶

C. WHY THE BOARD OF IMMIGRATION APPEALS SHOULD DESIGNATE “GUATEMALAN WOMEN” AS A PSG

The Ninth and Third Circuits disagree about whether a PSG can be of a substantially large size at all. The Ninth Circuit rejects the notion that an applicant is ineligible for asylum merely because *all* members of a persecuted group might be eligible for asylum.⁴⁷ However, relying on narrow requirements for PSG eligibility, the Third Circuit does not accommodate the humanitarian need to allow Guatemalan women to flee the extreme gender-based violence they could face by remaining in their country. Further, the Third Circuit acknowledges that there are exceptions where a PSG can be broad enough to include all women of a country or region.⁴⁸ Failure to include Guatemalan women as an exception to establish PSG eligibility is discriminatory because the other groups the Third Circuit recognizes as “acceptable exceptions” are also broad groups of women (Iranian, Somalian, and a particular tribe in Togo) who are at risk of very substantial harm to their bodies or lives.⁴⁹ A common critique of expanding asylum definitions to include larger groups is that expanding asylum definitions could lead to a “floodgate” of more applicants, and subsequently, approvals for asylum.⁵⁰ However, other analyses of this potential floodgate show that these fears are misplaced; there are multiple factors precluding a “flood” of immigration, including poverty, family obligations, and cultural restrictions.⁵¹ These restrictions pose their own barriers to Guatemalan women who may otherwise be eligible for asylum to enter the United States.

III. RECOMMENDATIONS

The Board of Immigration Appeals has defined the criteria of PSGs too narrowly, which has led to inconsistencies that vary by circuit and that have harsh effects on individuals seeking relief.⁵² By narrowly applying the definition of PSG, the BIA has created inconsistencies in federal courts, forcing asylum applicants to navigate an unpredictable system. The Supreme Court has the authority to review the BIA's definition of PSGs and redefine the term to include a "social distinction requirement" that would accommodate the inconsistencies between PSG definitions that several circuits have adopted.⁵³ Additionally, the Supreme Court has the authority to review the decisions of the Circuit Courts, and to resolve the split between the two.⁵⁴ Although the inconsistency between the Ninth and Third Circuits is based on particularity, the BIA has

indicated that some groups that may be "broad and diffuse" can meet the particularity requirement if they are sufficiently distinct in the context of that culture.⁵⁵

IV. CONCLUSION

The circuit split on this matter creates an unclear, unnavigable asylum system for refugees fleeing gender-based violence and possible femicides in Guatemala. Using the Third and Ninth Circuits as a case study, the system as it stands creates gaps for current and potential asylum applicants. Classifying "Guatemalan women" as a PSG would provide increased access to the asylum system of the United States, increase the likelihood of their successful claims, and prevent further inconsistencies in this key area of asylum law at the federal circuit level.

ENDNOTES

¹ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) (stating the five protected grounds for asylum eligibility: race, religion, nationality, membership in a particular social group, and political opinion).

² *Symposium on Femicide: A Global Issue that Demands Action!*, UNITED NATIONS (last visited Oct. 24, 2022) [hereinafter *United Nations Symposium on Femicide*].

³ *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010); *Chavez-Chilel v. Att'y Gen.*, 20 F.4th 138, 141 (3d Cir. 2021).

⁴ Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1202 (2009).

⁵ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

⁶ Reimann, *supra* note 4, at 1200.

⁷ INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A).

⁸ Reimann, *supra* note 4, at 1250.

⁹ Bernie Pazanowski, *Status as 'Guatemalan Woman' Fails to Provide Deportation Shield*, BLOOMBERG L. (Dec. 9, 2021, 3:10 PM).

¹⁰ 611 F.3d 662, 668 (9th Cir. 2010).

¹¹ *Id.* at 667–69.

¹² 20 F.4th 138, 141 (3d Cir. 2021).

¹³ *United Nations Symposium on Femicide*, *supra* note 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Reimann, *supra* note 4, at 1215.

¹⁷ Anne Weis, *Fleeing for Their Lives: Domestic Violence Asylum and Matter of A-B-*, 108 CAL. L. REV. 1319, 1325 (2020).

¹⁸ *Id.*

¹⁹ Sarah Johnson, *Can Health Workers Stop Thousands of Women Being Killed in Guatemala?*, GUARDIAN (Mar. 7, 2018, 4:57 AM).

²⁰ *See Femicides increase by 31% in Guatemala during 2021*, RIO TIMES (Sept. 15, 2021) (stating that the drop in homicides and crimes against women in 2020 was due to the Covid-19 closures and confinement of the country for at least four months).

²¹ Reimann, *supra* note 4, at 1200.

²² Hannah Cohen, *When Will Asylum Law Protect Women?: The Abusive Relationship Between Agency Decision Making and Asylum Claims Involving Domestic Violence*, 61 B.C.L. REV. 1855, 1872–73 (2020).

²³ *See Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

²⁴ *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008).

²⁵ See *In Re C-A-*, 23 I. & N. Dec. 951, 956 (BIA 2006).

²⁶ AM. BAR ASS’N COMM’N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 27 (2010).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Perdomo v. Holder*, 611 F.3d 662, 662–63 (9th Cir. 2010).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 667

³³ *Id.*

³⁴ *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010); see also *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000) (overruled for other reason by *Thomas v. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005)).

³⁵ *Perdomo*, 611 F.3d at 667.

³⁶ *Id.*

³⁷ See *Chavez-Chilel v. Att’y Gen.*, 20 F.4th at 141–42 (explaining that BIA and IJ both denied *Chavez-Chilel*’s motion to terminate removal proceedings despite the Notice to Appear not including a specific date and time to appear).

³⁸ *Id.* at 146.

³⁹ See *id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Chavez-Chilel v. Att’y Gen.*, 20 F.4th 138, 146 (3d Cir. 2021) (“[h]ere, by contrast, there is no record evidence that all Guatemalan women share a unifying characteristic that results in them being

targeted for any form of persecution based solely on their gender.”) (internal citations omitted).

⁴³ *Id.* (internal citations omitted).

⁴⁴ *Id.* (arguing that this is the distinction between Guatemalan women and Somali women, who were found to be a particular social group).

⁴⁵ *Id.*

⁴⁶ See *Hassan v. Gonzalez*, 484 F.3d 513 (8th Cir. 2007).

⁴⁷ See *Perdomo*, 611 F.3d at 669 (holding that the size and breadth of a group alone does not preclude a group from qualifying as such a social group).

⁴⁸ *Chavez-Chilel*, 20 F.4th at 146.

⁴⁹ *Id.*

⁵⁰ Reimann, *supra* note 4, at 1258–59.

⁵¹ See *id.* at 1259–60 (citing Helen P. Grant, *The Floodgates Are Not Going to Open, But Will the U.S. Border?*, 29 HOUS. J. INT’L L. 1, 28–29 (2006)).

⁵² Pazanowski, *supra* note 9.

⁵³ Liliya Paraketsova, *Why Guidance from the Supreme Court Is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 466–67 (2018) (illustrating that the Supreme Court’s current conservative composition would not be as favorable to petitioners as it was in 2018).

⁵⁴ See *Wright v. North Carolina*, 415 U.S. 936, 937 (1974) (noting that the Supreme Court is the only body capable of resolving a circuit court split, and that it is the Court’s responsibility to ensure uniformity between circuits).

⁵⁵ See *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (BIA 2008).