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5th Circuit Upholds BIA's Denial of Gay Honduran's Past Persecution Claim

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By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the 5th Circuit has ruled that a gay Honduran man beaten twice by police and threatened three times by gangs on account of his sexual orientation had not suffered past persecution, in *Guillen Cedio v. Garland*, 2021 WL 6119989, 2021 U.S. App. LEXIS 38148 (Dec. 27, 2021).

The Petitioner received a handwritten letter sent to his mother from “Gang 18” warning he would be tortured he if continued to be gay. He took the letter to the police, who “read the letter, laughed, and kicked [him] for five minutes.” He was not badly injured and did not see a doctor. Shortly thereafter, Petitioner and his boyfriend were stopped by police who beat them for eight minutes for being gay. They were able to escape and were not badly injured. Petitioner received two additional written threats from the gang. He departed Honduras and fled to the United States where he passed a credible fear interview.

Before an Immigration Judge, Petitioner sought asylum, withholding of removal, and CAT relief. The Immigration Judge ruled the past beatings and threats did not amount to past persecution and that Petitioner had not established he had a well-founded fear of future persecution. The Board of Immigration Appeals affirmed the decision, ruling that the past harm did not rise to persecution “even in the aggregate,” and that Petitioner did not establish a future fear of persecution. Petitioner filed a timely petition for review, raising only past persecution issues.

A panel of the 5th Circuit ruled in a *per curiam* opinion that Petitioner had not administratively exhausted some of his arguments on appeal and that only his argument that the Board failed to consider his past harms in the aggregate remained. The panel ruled that the Board *did* consider both the police beatings and gang threats

in the aggregate and cumulatively to determine that they did not rise to the level of persecution. The panel ruled that the Board “considered the cumulative effect of the letters, and the cumulative effect of the beatings. It also considered how the letters and the beatings interacted with each other. Thus, it did not commit legal error.”

In discussing persecution, the panel noted that “neither discrimination nor harassment ordinarily amounts to persecution . . . repeated beatings, even severe ones, do not necessarily constitute persecution.” They noted that “where the death threats reflect sporadic incidents, rather than methodical targeting, we have declined to overturn the BIA’s decision even if those death threats were paired with physical attacks.” With respect to Petitioner, the panel found the evidence “while disturbing, does not *compel* the conclusion that this was a ‘sustained, systemic effort’ by Gang 18,” and that “the BIA was free to conclude that the police and Gang 18 actions were not an organized effort targeting [Petitioner] but rather were individual, sporadic events.” The panel concluded that “the harassment and abuse that [Petitioner] has suffered is distressing and unacceptable, but we are unable to substitute our own judgment for that of the BIA” and denied the petition for review.

The panel consisted of Senior Judge Carolyn D. King (appointed by President Jimmy Carter), Gregg Costa (appointed by President Barack Obama), and Don Willett (appointed by President Donald Trump). Petitioner was represented by Sean Michael Marotta and Matthew J. Higgins, of Hogan Lovells US, L.L.P., Washington, DC. ■

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Hiring a Homophobe: New York District Court Dismisses Photographer's Case

By Corey L. Gibbs

New York State requires that public accommodations provide services without discrimination. A wedding photographer sought to exempt her business from the public accommodation laws in order to discriminate against same-sex couples. On December 13, 2021, the U.S. District Judge Frank P. Geraci, Jr. (W.D. N.Y.), dismissed her case with as much prejudice as the plaintiff harbored in her own heart. *Emilee Carpenter, LLC v. James*, 2021 U.S. Dist. LEXIS 238021; 2021 WL 5879090.

Emilee Carpenter is a photographer in New York State. She described herself as a Christian photographer who only accepted wedding projects that conformed to her beliefs of what marriage was meant to be. While she did not have any issues with photographing LGBT individuals, she did have issues with photographing same-sex weddings. Additionally, Carpenter wanted to include these limitations in her advertising and her LLC’s operating agreement.

However, New York’s public accommodation law does not allow for such discriminatory practices at any public accommodation. According to New York’s law, a public accommodation should not deny accommodations, publish the denial of accommodations, publish that anyone is unwelcome, or discriminate against anyone based on sexual orientation, gender identity, or any other protected class. Carpenter sought to bring the action in advance of any future prosecution that might arise from the public accommodation law.

Judge Geraci began his opinion by highlighting the Supreme Court’s decisions that “memorialize the necessary, but oftentimes painful, process of reconciling our values and our practices.” By doing so, the