4-2022

10th Circuit Panel Finds Well-Documented Persecution of Transgender Women in Honduras, Reversing Board of Immigration Appeals in Asylum Case

Arthur S. Leonard

or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." This is the whole quote.

Farmer was remanded for factual development. The Supreme Court rejected a request to affirm for other reasons. 511 U.S. at 848-51. Here, the Tenth Circuit not only failed to give Rios the favorable inference she was due; it affirmatively gave it to the moving parties.

It is a shame that the Tenth Circuit dodged the *Bivens* question, because Colorado courts will continue to dismiss cases brought by battered and sexually assaulted LGBT prisoners and others. Kansas' notorious Leavenworth penitentiary is in the Tenth Circuit. The better resolution of *Bivens/Ziglar* is found in the Third Circuit's decision in *Bistrian v. Levy*, 912 F.3d 79, 88 (3d Cir. 2018) ("Prisoner-on-prisoner violence is not a new context for Bivens claims.")

Rios was represented by the McArthur Justice Center (Washington, DC). There were two amicus briefs filed in support of Ms. Rios: one from a group of correctional officials filed by Harvard Law School; and one from a consortium of advocates that included Black & Pink National, Center for Constitutional Rights, Dee Farmer, GLBTQ Legal Advocates and Defenders, Justice Detention International, Lambda Legal Defense and Education Fund, Muslim Alliance for Sexual and Gender Diversity, National Center for Lesbian Rights, National Center for Transgender Equality, Transgender Law Center, and Transgender Legal Defense & Education Fund. ■

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

10th Circuit Panel Finds Well-Documented Persecution of Transgender Women in Honduras, Reversing Board of Immigration Appeals in Asylum Case

By Arthur S. Leonard

Reversing the Board of Immigration Appeals (BIA) and an Immigration Judge (IJ), a panel of the U.S. Court of Appeals voted 2-1 in *Gonzalez Aguilar v. Garland*, 2022 WL 905384, 2022 U.S. App. LEXIS 8183 (March 29, 2022), found that "any reasonable adjudicator would be compelled to find a pattern or practice of persecution against transgender women in Honduras." Holding by implication that the IJ and the BIA were "unreasonable" adjudicators in this case, the opinion by Circuit Judge Robert E. Bacharach scored the agency for ignoring evidence of *de facto* conditions and mistakenly exalting ineffective efforts by the Honduran government to deal with misbehaving law enforcement officers and a deeply transphobic population.

The petitioner, identified as male at birth, "displayed many feminine qualities" from an early age, which created "tensions at home." The petitioner's mother left for Mexico and the youngster and his two siblings (a brother and a sister) went to live with an uncle, who turned out to be brutish and deeply transphobic. He beat the petitioner and the petitioner's siblings. When petitioner was twelve, he and his sister fled to Mexico hoping to locate their mother, but they "suffered further abuse in Mexico, leading them to flee again – this time for the United States," where petitioner assumed a feminine name, obtained hormone therapy, and wore female cloths. When the government brought removal proceedings against petitioner, she sought asylum, withholding of removal and deferral of removal, explaining at her hearing "her fear of returning to Honduras, describing life there as 'very difficult' for transgender women." The IJ found her testimony credible but denied asylum, withholding and deferral, and on appeal one member of the BIA issued a brief dismissal order with no discussion or analysis. Specifically, as to asylum, the Board rejected petitioner's claims of past persecution and a fear of future persecution.

Turning first to past persecution, the IJ had concluded that since the uncle was abusive not only to petitioner but also to his sister and brother, and this was the only physical abuse cited by petitioner, the petitioner had failed to prove past persecution on account of her gender identity. Apparently, the IJ embraced the "equal opportunity abuser" theory that will be familiar to those acquainted with "hostile work environment" case law under Title VII of the Civil Rights Act of 1964. This comes up most often with abusive bosses who are mean and nasty to everybody, regardless of race or color, religion, sex, or national origin. In such cases many courts rejected Title VII hostile environment claims, because the mistreatment of the plaintiff was not primarily due to their race or color, religion, sex or national origin, and thus was not "discriminatory" in a way that violates the statute. Same here. The Board upheld the IJ's finding that any persecution suffered at home by petitioner was not due to her gender identity. "This finding was supported by substantial evidence," wrote Judge Bacharach. "[Petitioner] points to evidence of the uncle's slurs and threats, attributing his violence to disgust with [petitioner]'s feminine behavior. But other evidence suggested that the uncle would have abused [petitioner] anyway; the uncle abused not just [petitioner] but also her sister and brother, the uncle often resorted to violence when drunk,

and the uncle became increasingly violent when he stopped getting money for [petitioner]'s care. A reasonable adjudicator could thus regard gender identity as subordinate or incidental to the uncle's other reasons for beating [petitioner]. So, we conclude that the Board had substantial evidence to reject [petitioner]'s claim of past persecution based on the uncle's abuse." The court also found that allegations first raised on appeal about [petitioner] being expelled from school for "refusing to cut her hair or wear male clothing" and after being called "gay" by classmates, could not be the basis for a persecution finding. "[Petitioner] never characterized the denial of educational access as persecution," wrote Bacharach, "so these two references did not present a distinct theory of past persecution involving the denial of education." (Not surprisingly, the dissent concurred in this part of the opinion.)

However, the majority of the panel found that the BIA and IJ erred by finding that [petitioner] failed to show a pattern or practice of persecution against transgender adults in Honduras. Here, State Department Country Reports published during the Obama Administration provided detailed analysis, with statistics, on the basis of which the court found that any "reasonable adjudicator" would be *compelled* to find a pattern or practice of persecution of transgender women in Honduras. The IJ and the Board were apparently seduced by the government's argument that meetings between LGBT community representatives and government officials, some legal developments (hate crime and antidiscrimination statutes), and some prosecutions of people for anti-LGBT violence, were sufficient to show there was not a pattern or practice of persecution. Stating disagreement with the BIA's conclusion affirming the IJ, the court said, "The acts of violence are so widespread that any reasonable adjudicator would find a pattern or practice of persecution against transgender women in Honduras," going on to cite chapter and verse from the 2015 and 2016 Country Reports. (Note well the dates. Once the Trump Administration came in starting in 2017, State Department annual country by country human rights reports required by statute became increasing unhelpful for LGBQ refugees seeking to prove a pattern or practice of persecution in their home country. Documenting such things was apparently not a priority for the State Department under Trump.)

The court pointed out that although at the high government level there may have been some attempt to deal with the problem, what counts is whether the problem continued to exist. In sections of the opinion headed "Anti-discrimination laws in Honduras are ineffective in curbing the pervasive persecution of transgender women" and "The Honduran government does not effectively prosecute crimes committed against transgender women," the opinion summarizes the extensive documentation presented in the record. The IJ, the BIA, and the dissent are ready to make much about a relative handful of prosecutions, some of which were successful, but "overlooking" what a small percentage they were of all enumerated cases of violence against transgender women. Particularly telling from the 2015 Country Report is a paragraph, quoted by Judge Bacharach, pointing out that security forces and other officials were implicated in the violence, and "*the poor functioning of the justice system contributed to widespread impunity*" (emphasis added by the court).

"Indeed," continued Judge Bacharach, "the record overwhelmingly shows that law-enforcement officers are frequently the perpetrators of violence against transgender women," citing an expert declaration accepted in evidence by the IJ. The court also pointed out the basic irrelevance to the question before it – asylum and evidence of a pattern of persecution – of cases cited and relied upon by the dissent, all of which the court found to be relevantly distinguishable, reiterating again that "the record as a whole would have compelled any reasonable adjudicator to find a pattern or practice of persecution against transgender women in Honduras."

Petitioner had applied for asylum and withholding or deferral of removal. "The Board rejected these applications based solely on [petitioner]'s ineligibility for asylum," wrote Bacharach. "But we conclude that [petitioner] is eligible for asylum. So we remand for the Board to reconsider not only the availability of asylum, but also the potential availability of withholding of removal and deferral of removal."

Judge Joel M. Carson, II, dissenting, insisted that the result found by the majority was not compelled by the record as to pattern or practice of persecution. "Congress mandates that we reverse factual findings *only* when evidence is so compelling that no reasonable factfinder could find as the BIA did – a high bar indeed. In my opinion, the evidence is not so compelling. The perhaps unintended result of the majority opinion is a policy victory for certain asylum seekers. But in my opinion, one we should not award. That responsibility lies with the other branches of government." But he prefaces this statement by admitting that "no one can question the suffering [Petitioner] has experienced over the course of her life. Her tragic story evokes sympathy for her plight and, while I might decide this case differently than the immigration judge or the BIA, my de novo review of this petition matters not."

Judge Carson concluded that the various legislative initiatives undertaken by the Honduran government were "something a reasonable jurist could hang her hat on to find that Petitioner does not have a well-founded fear of persecution." He suggests that the majority "disregards portions of the State Department's Country Report to suggest the Honduran government is unwilling or unable to protect its citizens." Yes, indeed, for which it has a poor reputation through the Americas! And he cites decisions from other circuits that have rejected pattern or practice claims from other countries based on evidence of formalities such as the passage of laws against hate crimes or discrimination. "Given that other reasonable jurists throughout the country have affirmed similar BIA decisions with similar evidence in the record," he asks, "how does the

majority reach a different result? First, the majority reweighs the evidence, and second, it disregards portions of the State Department's Country Report to suggest the Honduran government is unwilling or unable to protect its citizens." Sweeping generalizations!!

Perhaps it is not surprising that the two judges in the majority, Robert E. Bacharach and Gregory A. Phillips, were appointed by President Barack Obama, or that dissenter Joel Carson was appointed by Donald J. Trump. Unlike most typical court of appeals asylum cases that are not officially published in full text, being shunted to Fed. App'x or listed in tables as summary dispositions, this opinion has been submitted to F.4th for official publication. One likely explanation for this is that unlike many cases in which petitioners are *pro se* or struggling with underfunded *pro bono* counsel, this petitioner had a high-power legal team pitching for her. The Petitioner is represented by Nicole Henning, of Jones Day, Chicago (Dennis D'Aquila, of Jones Day, and Keren Zwick and Tania Linares Garcia of the National Immigration Justice Center, with her on the brief). They evidently did an excellent job in building a record and presenting it effectively to the court of appeals. An *en banc* suggestion by Carson or the government is unlikely to be successful. Of the eleven active judges in the circuit, five were appointed by Obama and one by President Joe Biden, making up a majority of active judges. Three were appointed by George W. Bush and two by Donald J. Trump. There is one vacancy. ■

9th Circuit Panel Affirms Arizona District Court's Denial of a Preliminary Injunction Against the State's Categorical Medicaid Exclusion for Gender Confirmation Surgeries

By Joseph Hayes Rochman

On March 10, 2022, a three-judge panel of the U.S. Court of Appeals for the 9th Circuit affirmed the District of Arizona's ruling denying the plaintiffs'—two transgender teenagers—motion for preliminary injunction seeking to remove the Arizona Medicaid agency's categorical exclusion for gender affirming surgeries. *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022). The plaintiffs sought an individualized assessment from their Medicaid provider. Although the panel opinion by Judge Consuelo María Callahan denied the plaintiffs motion for a preliminary injunction, the court found that District Court Judge Scott H. Rash clearly erred by reading *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) too narrowly to only cover Title VII claims.

John Doe and D.H. filed their class-action lawsuit On August 6, 2020, in the District of Arizona challenging Arizona Medicaid's categorical exclusion for medically necessary surgeries for transgender patients as treatment for their gender dysphoria. Doe and D.H. receive health coverage through Medicaid and sought an individualized assessment from AHCCCS to determine whether their male chest reconstructive surgery, also called gender-affirming mastectomy, top surgery, or chest masculinization, would be covered. According to the plaintiffs' filings, AHCCCS covers medically necessary mastectomies and reconstruction services for women. According to the complaint, AHCCCS has prohibited coverage for "gender reassignment surgeries" since 1982.

Doe and D.H. claimed violations of the Medicaid Act, Section 1557 of the Patient Protection and Affordable Care Act (ACA), and the Equal Protection Clause of the 14th Amendment. Judge Rash denied the plaintiffs' motion for a preliminary injunction in March 2021 in *Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031 (D. Ariz. 2021). D.H. withdrew from the case on appeal and the court only addressed an injunction for Doe. The appeal was also limited to Section 1557 and the Equal Protection Clause and did not challenge the district court's ruling on the Medicaid Act.

The primary question on Doe's appeal was whether the preliminary injunction Doe sought was a prohibitory injunction or a mandatory injunction. Generally speaking, a mandatory injunction, which comes with a higher standard of review, seeks to compel a party to act and "change the status quo." In contrast, a prohibitory injunction typically seeks to maintain the status quo to prevent an injury from occurring. There was some dispute whether Doe and D.H. sought to compel coverage for the surgeries, or whether they were seeking an individualized assessment with the ultimate relief being coverage for their surgeries. Judge Rash rejected Doe's argument they were seeking a prohibitory injunction. Instead, Judge Rash agreed with AHCCCS that Doe and D.H. sought mandatory injunctive relief.

On appeal, Doe contended in his opening brief that Judge Rash erred in deciding they sought a mandatory injunction. Doe contended he did not seek to "compel AHCCCS to take a particular action." On the contrary, Doe argued, he merely sought for AHCCCS "to cease enforcing their unlawful exclusion and follow their ordinary practice for other Medicaid services." He only asked that AHCCCS gave him an individualized assessment to evaluate their insurance coverage without the discriminatory categorical