

Third Circuit Court**Case:** *Garcia v. A.G.*, 665 F.3d 496 (3d Cir. 2011)**Date:** Nov. 28, 2011 (Amended Jan. 13, 2012)**Panel:** Hardiman, Aldisert, Restani**Opinion:** Hardiman**Tags:** Immigration, PSG, asylum / WH / CAT, persecution, testifying witness**Question(s) Presented:**

- Was Silvia's claimed PSG (individuals who testify against gang members) cognizable?
- Was Silvia "unwilling or unwilling to avail herself of the protection" of the Guatemalan gov't?

Holdings:

- Silvia's petition has merit enough for a remand.
- Claudia's is denied.

Rationale:

- "Individuals who testify against gang members" is a cognizable PSG because its members share an immutable history and are distinct in society.
- The Guatemalan government's drastic measures to protect Silvia and her younger sister indicate that they are not entirely able to control the gang that was targeting her.

Facts: Claudia and Silvia are Guatemalan sisters. Claudia entered EWI 1999, Silvia in 2005. In 2006 they were served NTAs. Applied for asylum claiming gang persecution because of a cousin's association with Valle del Sol. The gang carried out a murder in 2003 that police connected to Silvia because cousin used her phone to plan it. Silvia spoke and met with police several times, but did not actually assist them. Her house was ransacked, she was threatened, and she went into hiding. Later she agreed to assist the prosecution with a statement and with testimony in exchange for witness protection and resettlement in another country. Protected around the clock with her little sister, moved from hotel to hotel because of security breaches. **Testified in court while wearing a disguise and a bulletproof vest.** Kept being threatened by phone. Threats extended to her mother and Claudia in U.S. Relocated to Mexico and granted refugee status. Threats persisted, and she saw one of the murderers in the city. Finally entered U.S. to live with her mother and sister in NJ. Still saw the murderers in NJ. (Claudia, by contrast, had no such need for Guatemalan protection.)

Procedural History:

- **2006: IJ:** denied Silvia's asylum application because she had firmly resettled in MX as a refugee. Denied that she was part of a PSG (individuals who testify against gang members), and noted that the Guatemalan government was willing to protect her. (Denied Claudia's because time-barred and too remote to find a nexus with persecution.)
- **BIA:** Affirmed IJ's decision about Silvia because of Guatemalan government's protection; also affirmed PSG rejection. (Affirmed decision about Claudia, too.)

Appeals to Statute & Precedent:

- **8 U.S.C. § 1101(a)(42)(A):** asylum applicant must establish that he or she 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 [past] persecution or a well-founded fear of [future] persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”
- ***Sukwanputra v. Gonzales*, 434 F.3d 627, 637 (3d Cir. 2006):** The persecution underlying an asylum claim “must be committed by the government or forces the government is either unable or unwilling to control.”

Discussion:

- “Ultimately, the Guatemalan authorities took the drastic measure of working with the Mexican government, the United Nations, and several international organizations to obtain refugee status for Silvia and Danay in Mexico. These extraordinary measures demonstrate that the Guatemalan government believed there was a “reasonable possibility” Silvia would be persecuted if she remained in Guatemala. For that reason, we find no support for the BIA's finding that Silvia does not have a reasonable fear of persecution if she is returned there.” 503
- “Although the Guatemalan government displayed great willingness to protect Silvia before and after her testimony in the Lopez–Lopez murder trial, this willingness sheds no light on Guatemala's ability to protect her.” 503
- “The fact that Guatemala saw fit to relocate Silvia to Mexico is tantamount to an admission that it could not protect her in Guatemala.” 503
- **PSG:** “The parties agree that Silvia testified against Hilda and other members of Valle del Sol. She therefore shares a “common, immutable characteristic” with other civilian witnesses who have the “shared past experience” of assisting law enforcement against violent gangs that threaten communities in Guatemala. It is a characteristic that members cannot change because it is based on past conduct that cannot be undone. To the extent that members of this group can recant their testimony, they “should not be required to” do so.” 504