

Third Circuit Court

Case: *Saravia v. A.G.*, 905 F.3d 729 (3d Cir. 2018)

Date: October 1, 2018

Panel: Chagares, Greenberg, Fuentes

Opinion: Fuentes

Tags: Asylum, corroboration, withholding of removal, PSG, notice of corroboration expectations

Question(s) Presented: Did BIA err in affirming IJ's denial of withholding of removal due to lack of corroborating evidence for persecution on account of a particular social group?

Holdings: Yes, BIA failed to follow 3rd Circuit precedent that requires the IJ to communicate to the applicant what facts are expected to be corroborated. (This is despite BIA's ruling to the contrary in *Matter of L-A-C-*!) Vacated and remanded.

Rationale: IJs in 3rd Circuit are expected to follow the law of the 3rd Circuit. Notice must be given.

Facts: (731-732) Citizen of El Salvador entered U.S. as a UAC in 2006 to live with his mother who had settled in NJ. Had been target of MS-13 gang for recruitment, threatened and beaten. In 2011, his cousin, a police officer, was killed in El Salvador. Other cousin was kidnapped and tortured re. respondent's whereabouts, then released and subsequently murdered. In 2015, his father was attacked and severely beaten. Also in 2015, respondent was arrested in NJ for assault and resisting arrest. Released on probation, arrested for DUI.

Procedural History:

- **March 2016:** NTA, applied for asylum & withholding
- **Nov. 15, 2016:** IJ: denied application because no corroborating statements were presented from two fact witnesses. Said he didn't have to give respondent advanced notice of corroboration expectations because of BIA's *Matter of L-A-C-*. Also, asylum application was untimely.

Appeals to Statute & Precedent:

- ***Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001):** *Abdulai* test (predating REAL ID Act):
 - Identify facts for which it is reasonable to expect corroboration
 - Inquire as to whether respondent has produced this evidence
 - Analyze whether the respondent has adequately explained any failure to do so
- ***Toure v. A.G.*, 443 F.3d 310 (3d Cir. 2006):** Applicant should be given a chance to explain why corroborating evidence is unavailable. IJ should give the applicant notice about this.
- ***Chukwu v. A.G.*, 484 F.3d 185 (3d Cir. 2007):** IJ must give applicant notice of what facts are expected to be corroborated and an opportunity to present corroboration or an explanation of why it's not available.
- ***Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015):** "Applicants have the burden to establish their claim without prompting from the Immigration Judge." [contrary to *Chukwu*—but *Chukwu* still governs in the 3rd Circuit!]
- **8 U.S.C. § 1158(b)(1)(B)(ii):** as amended by **REAL ID Act 2005:** testimony and corroboration.

- **8 U.S.C. § 1231(b)(3)(C)**: same applies to withholding of removal.
- **Circuit Split on issue of Notice of Corroboration:**
 - ***Gaye v. Lynch*, 788 F.3d 519 (6th Cir. 2015)**: no notice requirement in corroboration cases
 - ***Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009)**: “the alien bears the ultimate burden of introducing [corroborating] evidence without prompting from the IJ”
 - ***Rapheal v. Mukasey*, 533 F.3d 521 (7th Cir. 2008)**: No prompting from IJ required for corroboration cases
 - ***Ren v. Holder*, 648 F.3d 1079, 1091-92 (9th Cir. 2011)**: “An applicant must be given notice of the corroboration required, and an opportunity to either provide that corroboration or explain why he cannot do so.”
 - ***Zhi v. Holder*, 751 F.3d 1088 (9th Cir. 2014)**: accord with *Ren v. Holder*: applicant must be given notice for corroboration.

Discussion:

- Proposed PSG: “young men looked at to be recruited by the MS-13 gang in El Salvador” 734

Corroboration:

- “Whether we construe under § 1252(b)(4)(D) or § 1158(b)(1)(B)(ii), we cannot conclude on review that it was fair to require Saravia to provide further corroboration without telling him so and giving him the opportunity either to supply that evidence or to explain why it was not available.” 737
- “That opportunity to supply evidence or explain why it is not available can only occur before the IJ rules [738] on the applicant’s petition. To decide otherwise is illogical temporally and would allow for ‘gotcha’ conclusions in IJ opinions.” 737-38
- “While our result aligns with *Ren*, our rule derives principally from the fact that we cannot have meaningful judicial review without giving the applicant notice and an opportunity to corroborate.” 738
- “For an applicant to provide an explanation ‘if he cannot produce’ corroboration, he must be provided an opportunity to produce it.” 738

Commentary:

- Argued by Greg Bischooping when he was a law student at U. Penn.
- “To be eligible for withholding of removal, the applicant must “establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 C.F.R. § 1208.16(b).
- To obtain relief under the Convention Against Torture, the applicant must show “that it is more likely than not that he would be tortured upon return to his country.” 8 C.F.R. § 1208.16(c).