

2017 UC Davis

Asylum and Refugee Law

National Moot Court Competition

TRANSCRIPT OF THE RECORD

Brief Due: 10 February 2017

Oral Argument: 4 March – 5 March 2017

IN THE
Supreme Court of the United States

Viviane Sala,

Petitioner,

v.

United States of America,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

The petition for certiorari is GRANTED. The issues certified on appeal are:

1. Whether a nexus exists between Sala's alleged persecution and a protected ground; *and*
2. Whether substantial evidence supports a finding that the San Martino government was unwilling or unable to protect Sala. Assuming a finding that the San Martino government was unwilling or unable to protect Sala, does substantial evidence support a finding of reasonable relocation within San Martino?

Note to competitors: No cases decided, nor legislation passed after November 1, 2016, may be cited or relied upon in either briefs or oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Viviane Sala,

Appellant,

v.

Attorney General of the United States,

Appellee.

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

HERBERT, Circuit Judge, Joined by SWEENEY, Circuit Judge:

I. FACTUAL BACKGROUND

A. HISTORICAL CONTEXT

The small nation of San Martino occupies approximately 50,000 square kilometers in the heart of South America and is home to about 5,000,000 people. Most of the nation's population lives in its two largest cities; the capital, Paraisa, and the slightly smaller city of Juarez. The remainder of the population is dispersed throughout the rural countryside. Spanish is the most widely spoken language in San Martino.

San Martino portrays itself to the world as an inclusive and multicultural republic. For decades, San Martino served as a model to the region because of its progressive policies, including: reparations for native South Americans, the decriminalization of sex work, and the renunciation of state sponsored religion. Backed by a growing conservative sentiment, a backlash movement arose. The white nationalist, Christian identity group Alianza de Colonos Cristianos Europeos (also known as ACCE, pronounced "ace" or "ās") grew out of online message boards in the early 2000s and quickly evolved into small cell-based operations. ACCE does not possess centralized leadership, and the United States ("U.S.") State Department's 2013 report on San Martino ("2013 San Martino Report") estimates its membership anywhere from 5,000 to 35,000 individual members, based mostly in rural areas. The group believes "white culture" is under assault, and that multiculturalism is akin to genocide of the white race. They follow a fundamentalist sect of Christianity that prioritizes the strict entrenchment of traditional gender, sexual, and familial norms. To ACCE, inter-racial marriage, homosexuality, women working outside the home, and intercourse before marriage are all grave sins. The group has vowed to fight back against progressive policies that are counter to their beliefs.

In 2008, the recognized hate group reached its peak of infamy as violence erupted across San Martino, in both the cities and rural areas. The widespread murders of sex workers and transgendered individuals' garnered international attention, and ACCE was the assumed culprit. In response, the San Martino government cracked down on ACCE and enacted comprehensive hate crime legislation. According to the 2013 San Martino Report, by 2009, the number of hate crimes decreased and the group dwindled in presence. But in recent years, a number of U.S. media outlets have discussed the possibility of an ACCE resurgence and its connection to a potential rightward shift within the San Martino government.

B. CASE FACTS

At the age of 21, Viviane Sala completed a daunting, nearly 5,000-mile journey from San Martino to the U.S. Traveling alone, she undertook the trek with the hope of finding refuge from a society that no longer felt safe for people like her. Sala entered the U.S. illegally in early 2015 and the Department of Homeland Security (DHS) became aware of her presence shortly thereafter. Local police detained Sala in Sacramento, California while she took part in a large immigration protest at the state capitol building. On February 17, 2015, DHS served Sala with a notice to appear, charging her with removability. In response, Sala requested asylum.

She was represented *pro bono* by a top-flight law firm. Her counsel provided to the Immigration Judge ("IJ") the 2013 San Martino Report and various news articles. Sala also testified extensively before the IJ.

Sala alleged that several acts occurred to her over a period of four months, that these acts occurred on account of a protected ground, and that they amount to past persecution. More specifically, Sala believes her persecution occurred on account of her status as a transgender

woman, a recognized protected ground. DHS contends that the acts committed against Sala occurred on account of her status as a sex worker, an unprotected ground.

Sala testified that she has openly identified as a woman her entire life, despite being born a biological male. She believes she benefited from an early childhood in Paraisa and the generally more inclusive culture associated with the metropolis. Her parents worked in education until Sala reached secondary school age. In 2009, Sala's parents began working with a prominent San Martino non-profit organization specializing in rural education. Their work required them to relocate to a small town several hours outside of Juarez. The move frustrated Sala, because rural San Martino culture starkly contrasted to that of Paraisa. Sala became more reserved with her gender identity. She passed as a cisgender female in public, which was easier than explaining her identity to the more conservative folks of her new rural home.

After finishing secondary school, Sala decided not to pursue further education. Her decision led to a deep personal rift with her parents, whom she has not spoken to since. Shortly thereafter, around 2012, Sala took up sex work in another rural town some distance away from her parents' home. This was well after the 2008 spree of violence perpetrated by ACCE and the passage of the expansive hate-crime legislation.

Sala testified that the alleged persecutory acts began the summer of 2014. The first incident occurred during the first week of June, while Sala and other sex workers were walking to their shared home from the area of town where they often worked. Sala testified that a man inside a moving vehicle launched an improvised tear gas explosive at Sala and the others. Sala did not recognize the man who threw the explosive, but she confidently testified as to his general appearance. She described him as a middle-aged, Western European male. Sala testified that the man yelled several slurs as he drove by. The slurs included derogatory terms for sex workers.

According to Sala, while the group consisted entirely of women, the assailant used some male-gendered words. The slurs shocked Sala, while the other women were more concerned with the improvised explosive device. The women suffered minimal injuries. As a group, they decided not to report the incident. They felt that this harassment was just a part of the job and it is unlikely that the police would catch the assailants.

A week after the attack, the state-run public media organization, Televisión San Martino (TVSM), conducted an extensive profile on sex workers across the country. The exposé also discussed the possible reemergence of ACCE. One reporter interviewed Sala and her housemates. Sala spoke openly of her transgender status during the interview. The exposé noted that Sala was the only trans woman in her small town. Audiences tuned in *en masse* for the TVSM insight to the sex worker community, which was unsurprising, since the exposé coincided with the five-year anniversary of the passage of the hate crime legislation.

The second incident occurred no more than a week after the exposé. Unknown individual(s) vandalized Sala's home by spray painting graffiti on the exterior walls. The graffiti consisted of threats of violence and similar slurs to the first incident, including male-gendered slurs. Sala's housemates cleaned up the graffiti within a day, and insisted that the vandalism did not warrant reporting. They told Sala that it was not worth the risk of further agitating the vandals. While Sala could not be sure that the drive-by and vandalism were related, she believed the TVSM report emboldened the vandals.

At least a month passed between the vandalism and the third incident, an assault. What began as a rather unassuming night became the last straw for Sala. She was approached by a man she assumed to be a customer. As soon as they were alone, the man physically attacked Sala. Despite suffering significant injuries, Sala was still acutely aware of her attacker. Sala did

not know or recognize the assailant. He appeared to be ethnically Western European, but was not the man from the drive-by incident. During the attack, Sala noted a Celtic cross tattoo on the man's forearm. Sala testified that the derogatory terms the assailant yelled at her were similar to the male-gendered slurs from the previous incidents. The assailant did not inflict life-threatening injuries on Sala, but the attack permanently changed her perception of San Martino. Sala was fearful of reporting the latest incident, based in part on her housemates' insistence that they not report the previous incidents. She was also afraid of possible retaliation and thought contacting the police was pointless. Sala feared worse violence would befall her if she did not leave San Martino. She considered seeking refuge with her wealthy cousins living in Paraisa, with whom she is close. She knew they would be supportive of her in her time of need. However, she believed simply relocating within San Martino would not be enough to keep her safe.

Sala's counsel framed her story as that of a woman who experienced violence at the hands of ACCE members. Sala offered evidence suggesting that ACCE directly targeted trans women. Trans women are disproportionately represented in sex work compared to the general population. Evidence also suggests a disproportionate number of victims during the violent unrest in 2008 were trans women. Sala testified ACCE holds anti-trans sentiment as a core tenet. Sala believes that ACCE activity is beginning to spike across the country after five years of retreat. Sala argued that ACCE was behind the drive-by, the vandalism, and the assault.

DHS characterized Sala's inferences as inapposite. DHS asserted ACCE did not perpetrate the acts of violence; nor is the group going through some form of renaissance. Further, DHS claims the hate crime legislation effectively incapacitated the group and ACCE no longer commits overt acts of violence. Moreover, the attacks and vandalism were unrelated acts of violence not unfamiliar to sex workers. DHS stressed that Sala only assumed the attacks were

connected and perpetrated on account of her trans status. However, none of the assailants actually claimed ACCE affiliation.

Notably, the parties stipulated that the cumulative effect of the harms from all three incidents were sufficiently severe to constitute persecution. The only disagreement is whether there was sufficient nexus to establish persecution and whether the San Martino government was unwilling or unable to protect Sala. DHS also argued that even if Sala could show past persecution, they established by preponderance of the evidence that Sala could reasonably relocate. Particularly, they point to Sala's testimony regarding her wealthy cousins living in Paraisa and the fact that ACCE is mostly based in rural areas.

II. PROCEDURAL HISTORY

The IJ denied Sala's application for asylum. The IJ found the following: (1) Sala was a credible witness; (2) despite her forthrightness, Sala's inferences and assumptions were not sufficiently substantiated; (3) that Sala failed to establish a sufficient nexus between the three incidents and her alleged protected status as a trans woman; (4) the evidence supported DHS's claim that the acts occurred on account of Sala's status as a sex worker; (5) the San Martino government was able and willing to protect Sala from possible persecution; and (6) relocation within San Martino was reasonable. On appeal, the Board of Immigration Appeals (BIA) summarily affirmed the IJ's decision without opinion.

III. ANALYSIS

When the BIA summarily affirms the IJ opinion, the IJ's decision is the *de facto* final removal order and subject to review. *Mendoza v. U.S. Atty. Gen.*, 327 F.3d 1283, 1284 n. 1 (11th Cir. 2003). This court grants deference to factual findings in the final order when applying the substantial evidence standard; we only reverse if the record compels us to find a contrary result.

See I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481 (1992). However, conclusions of law are reviewed *de novo*. *Patel v. Gonzales*, 432 F.3d 685, 692 (6th Cir. 2005). Here, the issues on appeal are reviewed under the substantial evidence test. *Bi Xia Qu v. Holder*, 618 F.3d 602, 608 (6th Cir. 2010). We review the evidence in the light most favorable to the agency’s decision, and draw all inferences in light of that decision. 8 U.S.C. § 1252(b)(4)(B). Both direct and circumstantial evidence from the record should be considered. *See Bi Xia Qu*, 618 F.3d at 608; *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 (9th Cir. 2004). However, this standard does not allow us to “reweigh the evidence from scratch.” *Lorisme v. I.N.S.*, 129 F.3d 1441, 1444-1445 (11th Cir. 1997) (citing *Martinez-Benitez v. I.N.S.*, 956 F.2d 1053, 1055 (11th Cir. 1992)).

To qualify for asylum, an applicant must prove they are a ‘refugee’ for purposes of the Immigration and Nationality Act (INA). *See Velasquez-Velasquez v. I.N.S.*, 53 F. App’x 359, 360 (6th Cir. 2002). A refugee is a person persecuted on account of protected grounds. 8 U.S.C. 1101(a)(42)(A). Race, religion, political opinion, nationality, and membership in a particular social group constitute the five protected grounds. *Id.* An applicant must demonstrate that she suffered harms that rise to the level of persecution; the persecution occurred on account of a protected ground; and the source of persecution is the government or an entity that the government is unwilling or unable to control. *Parussimova v. Mukasey*, 555 F.3d 734, 738 (9th Cir. 2009). Whether the harms Sala suffered rise to the level of persecution is not on appeal. Here, what must be resolved is whether the record supports a finding that Sala’s persecution occurred on account of a protected ground. The court must also determine whether the record supports a finding that the San Martino government was unwilling or unable to protect Sala. Finally, assuming that Sala could demonstrate past persecution, whether the record supports a finding that relocation within San Martino is reasonable.

A. SALA HAS NOT MET HER BURDEN OF PROVING THAT SHE WAS PERSECUTED ON ACCOUNT OF HER STATUS AS A TRANSGENDER WOMAN.

Sala first claims that she was persecuted on account of her status as a transgender woman, requiring her to prove a nexus exists. *Parussimova*, 555 F.3d at 738. The phrase “on account of” equates to “because of” membership to a protected group. *Elias-Zacarias*, 502 U.S. at 483. This necessitates an assessment of the persecutors’ motives. *Parussimova*, 555 F.3d at 739. Unquestionably, an individual may face persecution under mixed motivations. *Bi Xia Qu*, 618 F.3d at 608 (applicant alleged that her persecutor targeted her to secure the repayment of his loan *and* because she was a woman whom he could force into marriage in a place where forced marriages are accepted); *Parussimova*, 555 F.3d at 739 (applicant alleged that she was persecuted on account of her religion *and* ethnicity); *Vata v. Gonzales*, 243 Fed. Appx. 930, 941 (6th Cir. 2007) (applicant alleged that she was targeted for her religious activism *and* political beliefs); *Briones v. I.N.S.*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc) (applicant alleged that he was targeted for discontinuing his role as a government informant *and* for his political opinion); *Borja v. I.N.S.*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc) (applicant alleged that she was targeted for economic reasons *and* her political opinion).

This body of mixed-motive jurisprudence has been superseded by statute. In 2005, Congress enacted the Real ID Act, Pub. L. No. 109-13, div. B, 119 Stat. 231, altering several aspects of the asylum system, including the evidentiary burden placed on asylum applicants seeking to demonstrate that they have been or will be victims of persecution. Notably, the Act replaced the “at least in part” rule previously applied. Section 101(a)(3)(B)(i) of the Act states “[t]o establish that the applicant is a refugee . . . the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least

one central reason for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added).

As the BIA explains, “the protected ground cannot play a minor role in the alien’s past mistreatment . . . [that] is, it cannot be incidental, tangential, superficial, or subordinate to another reason for harm.” *In Re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007).

The record suggests that in all three incidents, the assailants had at least two possible reasons for their actions: (1) Sala’s status as a sex worker and (2) Sala’s status as a trans woman. This court has previously decided that status as a sex worker is not a protected ground, and that status as a transgender¹ person is. Further, these questions were not raised on appeal.

Substantial evidence supports the BIA’s finding that Sala’s occupation status was the central reason that she was targeted, and that her status as a trans woman was incidental. The record reflects three separate occurrences over a relatively short period of time: (1) An unknown individual threw an improvised tear gas explosive at Sala and other sex workers while the women walked home from the area of town where they worked; (2) threatening graffiti appeared on the home Sala shares with other sex workers; and (3) Sala suffered an assault at the hands of an unknown assailant who posed as a customer. Direct and circumstantial evidence in the record indicate the central reason for the persecution was Sala’s sex worker status.

First, we consider the tear-gassing incident. The group of women, all sex workers, was targeted as they left the “red light district” early in the morning. Sala did not recognize the assailant in this incident, but she did hear him yell several slurs at the women as he drove past, indicating he assumed the women were sex workers. Considering these facts, it is difficult to

¹ In 1994, Attorney General Janet Reno designated the decision in *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820 (BIA 1990) as a precedential decision, meaning that homosexuality was established as a particular social group for asylum purposes. This has become an accepted interpretation of the INA by most, if not all, federal courts, including this one. This court has also applied this rationale to transgender status.

glean any inferences other than Sala was attacked for being a sex worker. The BIA correctly held this attack was not on account of Sala's status as a trans woman.

Second, we must consider the TVSM story featuring Sala that ran between the first incident and the latter two. The dissent believes this is a crucial piece of circumstantial evidence; that Sala was targeted after outing herself. Yet, Sala acknowledged she has been open about her trans identity well before TVSM interviewed her. Sala was one of several women, including her housemates, featured in the news story about sex workers throughout San Martino. Shortly after this story, their shared home was vandalized. The graffiti included slurs similar to the ones used by the first assailant. Sala was not directly attacked, but was a part of a group with whom she shared a common characteristic—status as sex workers. Further, by Sala's account, her assailant did not mention the TVSM story during the attack, weighing against any inference that the story played a role in the attack. Again, the evidence supports an inference that this threatening graffiti was because Sala and her housemates were sex workers.

Last, substantial evidence supports an inference that the assault did not occur on account of Sala's status as a transgender. She did not recognize her attacker, though she was confident he was not the same individual from the tear gas incident. The assailant posed as a customer and approached Sala while she was working, so as to isolate her. Her attacker also used pejorative terms for sex workers. The direct evidence suggests Sala was targeted for, and because of, her status as a sex worker. Thus, while the acts Sala suffered in total were severe enough to otherwise constitute persecution, the evidence does not support Sala's claim that a nexus exists between those acts and a protected status.

B. SALA HAS FAILED TO MEET HER BURDEN OF PROVING THAT THE SAN MARTINO GOVERNMENT WAS UNWILLING OR UNABLE TO PROTECT HER.

In order to qualify for asylum, the source of the persecution must be the government, quasi-official group, or persons or groups that the government is unwilling or unable to control. *See Avetovo-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). Whether the San Martino government is unwilling or unable to control ACCE is a question of fact. *Ngengwe v. Mukasey*, 543 F.3d 1029, 1033 (8th Cir.2008). We review both the IJ's opinion and any portion adopted by the BIA under the deferential substantial evidence standard. *Khan v. Holder*, 727 F.3d 1, 6 (1st Cir. 2013). Under the substantial evidence standard, we uphold any determination unless "any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252 (b)(4)(B).

i. Sala's assertion that ACCE was involved in the incidents is not supported by substantial evidence in the record.

Here, Sala contends that ACCE was involved in all three incidents and is a group the government is unwilling or unable to control. Prior to considering the government's willingness and ability to control ACCE, we first consider whether sufficient evidence supports Sala's contention that ACCE was involved in all three incidents. The record is void of any credible evidence that ACCE was involved in either the drive-by or graffiti incident. As to the third incident, the fact that Sala came face to face with her assailant does not bolster her contention that the assailant was a member or sympathizer of ACCE. The violence Sala suffered does not match the group's historical pattern. After all, ACCE reached its peak of infamy due to a spate of killings, not assaults. It seems a stretch that, as the dissent suggests, this single act of violence amounts to the resurgence of ACCE.

Rather than considering the facts as they appear in the record, the dissent reads too closely between the lines to reach its conclusion. It also relies heavily on circumstantial evidence, and makes inferences that even Sala did not rely on during her testimony. What the records shows is that the incidents were unfortunate, but isolated. Sala only assumed, but did not know for certain, that each of these incidents was related to ACCE.

ii. Substantial evidence supports the conclusion that the San Martino government is willing and able to protect Sala from future persecution.

When an applicant is persecuted, there is an implied connection to governmental action or inaction. *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1st Cir.2005). However, when the violence is perpetrated by private citizens, absent proof that the state is unwilling or unable to address it, the claims do not rise to the level of persecution. *Butt v. Keisler*, 506 F.3d 87, 92 (1st Cir. 2007); *see Pavlova v. I.N.S.*, 441 F.3d 82, 91 (2d Cir. 2006).

Here, ACCE is a “non-state actor” because it is comprised entirely of private citizens. Thus, assuming that ACCE was involved in all three incidents, we must consider whether the San Martino government is unwilling or unable to protect Sala from ACCE. Enactment of protective laws is crucial to determining whether effective state protection is available to applicants. *See e.g. Ritonga v. Holder*, 633 F.3d 971, 977-78 (10th Cir. 2011). Evidence that the government ignores or does not adequately respond to requests for protection is strong indication of the state’s unwillingness or inability to provide protection to the applicant. *See Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010).

During the relevant period, San Martino has maintained a rigorous legal framework to prevent the type of persecution Sala alleges. The adequacy of the law is without challenge.² Evidence of reduction in such crimes since the 2009 enactment buttresses the success of the

² The current framework, enacted in 2009 as a response to a violent period of persecution of transgender citizens, has received praise from Human Rights Groups worldwide.

state's ability to protect its citizens against the types of violence for which Sala seeks asylum. If Sala sought asylum prior to the 2009 enactment, we could have entertained such an argument. Additionally, Sala never sought protection from government officials after any of the three incidents that she alleges to have been perpetrated by ACCE. She claims she did not seek government protection because of her subjective fear of retaliation and because her attempt to acquire protection from the government would have been futile. However, given the weight of evidence in support of the state's willingness and ability to provide protection, we are unconvinced by Sala's testimony.

In summary, the San Martino government was willing and able to protect Sala. The San Martino government has made strides to provide the type of protection Sala seeks and she chose not to seek that protection. Thus, Sala does not qualify for asylum.

C. SUBSTANTIAL EVIDENCE SUPPORTS A FINDING OF REASONABLE RELOCATION WITHIN SAN MARTINO.

The IJ at his or her discretion, deny the asylum application if “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality...and under all the circumstances, it would be reasonable to expect the applicant to do so.” 8 C.F.R. §208.13(b)(i)(B) and (b)(ii); *see also Melkonian v. Ashcroft*, 320 F.3d 1061, 1069-70 (9th Cir. 2003). *If* past persecution is established, a rebuttable presumption of a well-founded fear arises. 8 C.F.R. § 208.13(b)(1) (emphasis added). The burden then shifts to the government to demonstrate by a preponderance of the evidence that the applicant can reasonably relocate internally to an area of safety. *Melkonian*, 320 F.3d at 1070. Though the record does not support a finding of past persecution, we address all issues on appeal, including Sala’s challenge against the BIA’s finding of reasonable relocation.

To resolve the relocation inquiry, we must determine whether Sala could *safely* relocate to another part of the country. *Melkonian*, 320 F.3d at 1070 (emphasis added). If the evidence offered indicates that Sala could safely relocate, we must then determine whether relocation is *reasonable*. *Id* (emphasis added). If it is shown that relocation is both safe and reasonable, then Sala does not have a well-founded fear of persecution. 8 C.F.R. § 208.13(b)(2)(ii).

Where the non-state actor has limited influence over regions of a country, we are compelled to find that relocation is a feasible course of action. *See e.g. Silva v. Ashcroft*, 394 F.3d 1, 7-8 (1st Cir. 2005). Here, DHS offered evidence that ACCE’s strongholds were limited primarily to rural areas of San Martino. While there is evidence of a small faction of ACCE in Juarez, San Martino’s second most populated metropolis, this appears to be an outlier.

Additionally, Paraisa, as the capital and most populated city of San Martino, shows no signs of ACCE presence. Thus, it seems fitting that Sala could safely relocate to Paraisa.

“The reasonableness of internal relocation is determined by considering (1) whether the applicant would face other serious harm in the place of suggested relocation; (2) any ongoing civil strife; (3) administrative, economic, or judicial infrastructure; (4) geographical limitations; and (5) social and cultural constraints, such as age, gender, health, and social and family ties.” *Knezevic v. Ashcroft*, 367 F.3d 1214, 1216 (9th Cir. 2004) (citing 8 C.F.R. §1208.13(b)(3)). The regulations emphasize that this list is non-exhaustive and an adjudicator may consider additional factors, depending on the facts of the case. 8 C.F.R. §§208.13(b)(3).

The IJ discussed the reasonable feasibility of relocation. Relying on reports of ACCE activity and justice reports of related crimes within the capital, it is in our view the government met its burden in establishing that relocation is reasonable. Furthermore, Sala admitted that as a practical matter, she could relocate within the country. This is supported by the fact that Sala

had close family members residing in the capital. Her cousins were both wealthy and sympathetic to her current situation.

Therefore, we agree with both DHS and the IJ that Sala could relocate safely and reasonably within San Martino. In finding as much, Sala is ineligible for asylum.

AFFIRMED.

LEWIS, Circuit Judge, Dissenting:

I respectfully disagree with the majority's holding on several grounds. The majority misapplies relevant law while inappropriately discounting and overstating evidence. I believe the substantial evidence in the record supports the existence of a nexus between Sala's persecution and a protected ground. I also believe the evidence demonstrates San Martino was unable to protect Sala. Finally, the record does not support reasonable relocation.

A. THE RECORD SUPPORTS A FINDING OF NEXUS.

The majority's view is fundamentally flawed. It is true that the substantial evidence standard is a limited review, but we are not required to uphold a BIA's decision if it is "manifestly contrary to law." *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 545 (6th Cir. 2003). Both the BIA and majority misapply the law concerning Sala's testimony. Where the IJ gives credit to an applicant, and the statements in the application and testimony are consistent, we are to take the statements as true. *Silva v. U.S. Atty. Gen.*, 448 F.3d 1229, 1244 (11th Cir. 2006) (Carnes, CJ dissenting) (citing *Vasquez-Mondragon v. INS*, 560 F.2d 1225, 1226 (5th Cir. 1977)). Here, Sala's statements were consistent throughout her application and testimony. Sala's narrative describes a rising threat from the reemerging ACCE presence. While the BIA and the IJ stand in a better position than this court to review the record, Sala herself provides the

best insight to the true circumstances in San Martino. If Sala believes that her persecution is connected and representative of a broader systemic issue, our courts ought to give credence to such information, should we find her credible.

In mixed motive persecution cases such as this one, proving an assailant's motive is difficult. To overcome this difficulty, we only ask applicants to provide some evidence of motive. *Baballah v. Ashcroft*, 367 F.3d 1067, 1077 (9th Cir. 2004) (citing *Elias-Zacarias*, 502 U.S. at 483). In certain cases, "factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of . . . protected grounds." *Navas v. I.N.S.*, 217 F.3d 646, 657 (9th Cir. 2000). Sala's testimony and circumstantial evidence demonstrate that her persecution was on account of her status as a trans woman.

It is an abuse of discretion for the BIA to ignore any arguments or evidence. *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013). The majority, to its credit, accounted for substantial dispositive evidence in the record. However, as they approached this evidence looking to uphold the BIA's decision, the majority failed to examine the evidence critically.

First, consider the recurring slurs used in all three incidents. The majority classified these slurs as pejorative terms for sex workers, and they are technically correct. However, the majority opinion did not confront the gender of the pejorative terms used. In doing so, it failed to recognize the importance of the use of *male*-gendered words during an attack on a trans woman. I refuse to believe this distinction is coincidental.

Second, the TVSM feature supports the finding of nexus. The program profiled sex workers throughout San Martino and prominently featured Sala. In her interview, Sala not only discussed her trans identity but also indicated that she was the only trans woman in her town. The second and third incidents occurred shortly after the exposé. To deny the connection

between the public revelation of Sala's identity and the subsequent acts of violence perpetrated against her is disingenuous.

The last incident, the assault, cannot be characterized as another random act of violence. Sala's description of her assailant supports her assumption that he was a member of ACCE. Sala recognized a Celtic cross tattoo on the assailant's arm, ubiquitously known as a symbol favored by white supremacists. Moreover, this court would be remiss if we did not acknowledge ACCE's fraught history with trans women. ACCE's 2008 spree of violence disproportionately targeted *trans sex workers*. This ugly truth goes unspoken by San Martino society, but there is little reason to believe it is unfortunate happenstance. Accordingly, I respectfully disagree with the majority's holding that Sala failed to establish a nexus.

B. THE MAJORITY RELIES TOO HEAVILY ON THE 2013 SAN MARTINO REPORT.

The court places an improper deference on outdated and speculative reports. The majority also ignores testimony from Sala, who the IJ found to be credible. While it is without question that violence caused by ACCE peaked in 2008, the lack of reporting in the last three years leaves unanswered questions of fact as to the current climate in San Martino. Without more recent and accurate reports, we only have Sala's testimony and the increased media coverage of ACCE's growth to inform our decision.

The 2013 San Martino Report is inadequate because of its timing and uncertainty. First, the report is three years old. Organizations such as ACCE can grow and shrink in both size and influence in a relatively short period. This is primarily due to the cellular nature of the organization. Furthermore, media outlets in the U.S. have increased their coverage of ACCE's acts of violence in South American countries, including San Martino. The outdated nature of the 2013 San Martino Report, coupled with the existence of more recent reports, places serious

doubt on the 2013 report's reliability. Second, the 2013 San Martino Report is itself vague as to ACCE's presence. The membership numbers suggested by the report range from a number that at its highest is seven times the number it could be at its lowest. The report suggests that San Martino has little clue as to the strength of ACCE. This, in turn, suggests ACCE eludes the purview of the San Martino government. It further demonstrates that San Martino is unable to control ACCE. Accordingly, I respectfully disagree with the majority's reliance on the 2013 San Martino Report.

C. SALA'S DECISION NOT TO REPORT THE INCIDENT DOES NOT UNDERMINE HER CLAIM THAT THE SAN MARTINO GOVERNMENT IS UNWILLING OR UNABLE TO PROTECT HER.

The majority is hasty to dismiss Sala's "subjective fear of retaliation" and belief that reporting the crimes would have been futile, simply because she did not attempt to contact San Martino officials for assistance. However, reporting persecution to government authorities is not required to demonstrate that the government is unable or unwilling to protect an applicant from private actors. *Afriyie*, 613 F.3d at 931; *see also* *Vitug*, 723 F.3d at 1064 ("While Vitug did not report these attacks, he credibly testified that it is well known in the Philippines that police harass gay men and turn a blind eye to hate crimes committed against gay men"); *Cf. Vahora v. Holder*, 707 F.3d 904, 909 (7th Cir. 2013) (court denied applicant's asylum claim in part because he never sought assistance from the government).

Again, the majority ignores the already established credibility of Sala's testimony. Additionally, the fact that others within Sala's circle chose not report the incidents because they also feared retaliation and believed an attempt would be futile weighs in favor of concluding that reporting such crimes need not be necessary for a finding of asylum protection. Accordingly, I

respectfully disagree with the majority's assertion that Sala's decision not to report the incidents is case dispositive.

D. THE RECORD DOES NOT SUPPORT A FINDING OF SAFE RELOCATION WITHIN SAN MARTINO.

In order to rebut the presumption of well-founded fear, the government carries the burden of proving that relocation within the applicant's native country is both reasonable *and* safe. *See Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090-91 (9th Cir. 2005). I agree with the majority's finding that DHS met its burden of proof as to the reasonableness of the relocation. However, the issue of safety is not so settled. Imperative to this analysis is the following: a majority of the evidence cited by DHS stems from 2013, a year before the alleged persecution began and two years before Sala escaped to the U.S. This temporal gap between the 2013 San Martino Report and this case is troubling. DHS failed to offer more recent evidence to support that moving to the capital is currently safe. Meanwhile, Sala provided evidence of a growing ACCE presence across South America. Thus, the government failed to demonstrate by preponderance of the evidence that relocation within San Martino is safe. Accordingly, I respectfully disagree that the record supports a finding that Sala could safely and reasonably relocate within San Martino.