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CASENOTE

PERSECUTION BASED ON PERSECUTION: HOW *GAO V. GONZALES* BROADENS THE INTERPRETATION OF ASYLUM LAW

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I. INTRODUCTION

Fraught with “widespread domestic violence and trafficking in brides and prostitutes,”¹ China is full of rural areas in which these activities go unchecked. These conditions are nurtured by political corruption and social norms that impede the government’s ability to eradicate these practices.² These practices have led some Chinese women to seek asylum in the United States. Such was the situation in the case of *Gao v. Gonzales*.

The petitioner, Hong Ying Gao, claimed that she was a member of a group of people subject to persecution, who would not be protected by their government from such persecution.³ For asylum to be granted in the United States, a person must prove that he or she will be persecuted on the basis of “race, religion, nationality, membership in a particular social group, or political opinion.”⁴ In order for a person to be a member of a “particular social group” and therefore to be granted asylum, it has been held that a person must share a “common, immutable characteristic” with other members of that group.⁵

The scope of “particular social group” was the essential determination made by the court in *Gao*. This casenote examines the social implications of broadening the “particular social group” category found in the Immigration and Nationality Act and how those implications balance with notions of morality and strict interpretation of asylum

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1. *Gao v. Gonzales*, 440 F.3d 62, 65 (2d Cir. 2006).

2. *Id.*

3. *Id.*

4. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006) (legislation providing definitions and statutory guidelines for granting asylum to citizens of foreign countries).

5. *Gao*, 440 F.3d at 67 (citing *In re Acosta*, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985) (explaining what constitutes membership in a social group and setting out the statutory requirements for asylum and the withholding of deportation)).

regulations. In defining Gao's group by the persecution being suffered, the court strayed from previously adopted tests.

This note first presents the facts of the case at hand and the judicial decisions made. The note then examines the state of asylum law as determined by statute and precedent. Finally, the note points out the differences that exist between the test the court adopted and the way it was applied.

II. THE CASE

When Hong Ying Gao was nineteen years-old, her parents sold her to a man named Chen Zhi in order to pay off the family's debts.⁶ The agreement was for Gao to marry Zhi, but she later refused.⁷ Zhi had a problem with gambling and a habit of beating Gao when she did not provide money to satisfy his addiction.⁸ Gao attempted to leave Zhi by moving an hour away by boat, but Zhi harassed Gao's family in response.⁹ On one occasion, Zhi followed Gao, after she had been visiting her family, to discover where she was living.¹⁰ Since Zhi's uncle was a political official in Gao's rural village, Gao concluded there was no way that the government could protect her from this treatment.¹¹ Gao relocated to the United States.¹²

Once in the United States, Gao petitioned for withholding of removal and asylum. She also stated a Convention Against Torture (CAT) claim.¹³ Her claim was heard by an immigration judge (IJ) who denied Gao's withholding of removal and asylum claims based on his finding that Gao was not a member of a "particular social group" as required by the Immigration and Nationality Act.¹⁴ The IJ also ruled that Gao failed to establish that the Chinese government could not protect her and that she could not successfully relocate in China.¹⁵ The judge did not give a reason for denying Gao's CAT claim. The Board of Immigration Appeals (BIA) affirmed this decision.¹⁶

The case was later appealed to the United States Second Circuit Court of Appeals.¹⁷ The court applied a *de novo* standard in review-

6. Gao, 440 F.3d at 64.

7. *Id.* at 64.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 65.

14. *Id.*

15. *Id.*

16. *Id.* (The BIA hears appeals from decisions made by IJs because it is the highest administrative agency dealing with immigration issues.).

17. *Id.* at 65.

ing questions of law, the application of law, and mixed questions of law and fact.¹⁸ With regard to findings of fact, the court applied a more deferential “substantial evidence” standard.¹⁹ Three main issues were examined:

- (1) whether Gao established that she might be forced into marriage “on account of . . . membership in a particular social group”; (2) whether the IJ had a substantial basis for finding insufficient evidence that the Chinese authorities would not protect Gao; and (3) whether the IJ had a substantial basis for finding that Gao could safely relocate within China.²⁰

The court assumed that forced marriage was persecution for the purposes of the Immigration and Nationality Act.²¹

First, the court, citing *In re Acosta*, found that gender could be a common characteristic that would form the basis for Gao’s membership in a “particular social group.”²² The court also ruled that she must show a “well-founded fear of persecution,” and a nexus between that fear of persecution and the “particular social group.”²³ The court found that Gao satisfied these elements successfully.²⁴

Second, the court ruled on the Chinese government’s ability to protect Gao from persecution.²⁵ The court relied on the 2001 State Department Country Report on Human Rights Practices in China (Country Report) and concluded that political corruption and social norms based on gender imbalance, along with the fact that Zhi threatened to have Gao imprisoned, were sufficient to show that the Chinese government could not protect Gao from a forced marriage.²⁶

Finally, the court reasoned that since Gao had attempted to relocate within China to escape from Zhi, and that Zhi had followed her and terrorized her family, it was not possible for Gao to relocate within China to avoid this persecution.²⁷ Based on these findings, the court reversed the decisions of the IJ and the BIA, and remanded the asylum claim, the withholding of removal claim, and the CAT claim.²⁸

18. *Id.*

19. *Id.*

20. *Id.* at 66.

21. *Id.* (“The government appears to concede, as it must, that forced marriage is a form of abuse that rises to the level of persecution.”).

22. *Id.* at 67 (citing *In re Acosta*, 19 I. & N. Dec. at 233).

23. Gao, 440 F.3d at 71.

24. *Id.*

25. *Id.* at 70.

26. *Id.* at 71 (referencing U.S. Dep’t of St., *Country Rep. on Hum. Rts. Prac.* (released by Bureau of Democracy, Hum. Rts., & Lab., Wash. D.C.) (2002) <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm>).

27. *Id.*

28. *Id.* at 72.

III. BACKGROUND

The development of asylum case law in the United States was significantly impacted by the landmark case *In re Acosta*.²⁹ This BIA decision upheld denial of asylum for a taxi driver from El Salvador.³⁰ This decision described the elements, found in the Immigration and Nationality Act, which an alien must satisfy when petitioning for asylum and the withholding of removal.³¹ According to *In re Acosta*, the petitioner must establish

(1) the alien must have a fear of persecution; (2) the fear must be well-founded; (3) the persecution must be on account of race, religion, nationality, membership in a particular social group, or political opinion; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.³²

The BIA subsequently examined each of these elements and provided interpretations of each.

The first interpretation the BIA made was the meaning of the word “fear” as it related to refugees. The BIA stated that fear is, in fact, “subjective” and is defined as “a genuine apprehension or awareness of danger in another country.”³³ The BIA determined that the amount of fear necessary to satisfy the statute would depend on the facts and circumstances of each case, but must still satisfy the definition given.³⁴

The second element discussed was the meaning of “well-founded fear.” The BIA held that in order to show a fear is “well-founded,” there must be objective evidence showing a “likelihood” that a person will be persecuted if he returned to his home country, or, as the BIA stated, “If there is a real chance that he will suffer persecution, that is reason good enough and his ‘fear’ is ‘well-founded.’”³⁵

The third element the court addressed dealt with causation. The feared persecution must be “on account of race, religion, nationality, membership in a particular social group, or political opinion.”³⁶ Where the test for “well-founded fear” is lax, the test for the cause of the persecution is strict.³⁷ There must be a characteristic shared by the “particular social group” that “cannot be changed or should not be

29. *In re Acosta*, 19 I. & N. Dec. at 211.

30. *Id.*

31. *Id.* at 218-19 (citing Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(42)(A) (2006)).

32. *In re Acosta*, 19 I. & N. Dec. at 219 (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

33. *In re Acosta*, 19 I. & N. Dec. at 211.

34. *Id.*

35. *Id.* at 224-25.

36. *Id.* at 232 (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

37. *In re Acosta*, 19 I. & N. Dec. at 232.

required to change because it is fundamental to their individual identities or consciences.”³⁸ An example of a characteristic which refugees should not be required to change is religion. Refugees suffering from persecution because they are members of a belief system, which is “fundamental to their individual identities,” should not have to change their religion to avoid persecution.³⁹

The final element discussed by the BIA in *In re Acosta* was that “the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.”⁴⁰ The BIA stated that the fear of persecution must be based on a threat that is “country-wide,” not just isolated to one area.⁴¹

In re Acosta stated that, in order to establish an asylum claim, one must establish that he or she “has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”⁴² In *Diallo v. INS*, a decision rendered after *In re Acosta*, the Second Circuit held that the legal test for a “well-founded fear” is not a strict or narrow one and that fear may be “well-founded even if there is only a slight, though discernible, chance of persecution.”⁴³ This lowers the standard established in *In re Acosta*.

In *Gao*, the Second Circuit used three elements, established by the Third Circuit Court of Appeals in *Fatin v. INS*, to establish eligibility for asylum claims based on membership in a “particular social group.”⁴⁴ The three elements were (1) the person seeking asylum must show that the “particular social group” exists; (2) that person is a member of that group; and that (3) there is a “well-founded fear” that the person will be persecuted because they are a member of that group.⁴⁵ The *Gao* court applied this three-step process to determine eligibility under the “particular social group” definition and used the *Fatin* decision as an instructive in concluding that this term should be interpreted broadly.⁴⁶

38. *Id.* at 233.

39. *Id.*

40. *Id.* at 235 (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

41. *In re Acosta*, 19 I. & N. Dec. at 235

42. *Id.* at 211 (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

43. *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000) (holding that a slight chance of persecution based on race was enough to establish a well-founded fear of future persecution).

44. *Gao*, 440 F.3d at 67 (citing *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (case where an Iranian woman who lived in Iran before the Islamic revolution failed to show a well-founded fear of future persecution based solely on her gender when she claimed that subsequent to the revolution she would have to conform to the ways of the Islamic fundamentalists)).

45. *Fatin v. INS*, 12 F.3d at 1240.

46. *Gao*, 440 F.3d at 67, 68.

First, sex may be a characteristic that constitutes a social group, but should be determined on a “case-by-case” basis.⁴⁷ The court also reiterated that the characteristic defining membership in that group must be something that “cannot be changed or should not be required to change because it is fundamental to their individual identities or consciences.”⁴⁸

Second, the nexus between membership in the group and the persecution based on that membership is strictly interpreted.⁴⁹ The *Gao* court cited *Niang v. Gonzales*, which stated that social groups should not be based on gender alone but should be based on the persecution that membership in that group, due to the main characteristic, would likely bring.⁵⁰ Therefore, it is not enough to simply share the same characteristics as other people, but that shared characteristic must also be the basis for persecution.⁵¹ The BIA found such a nexus in *In re Fauziya Kasinga*. Here, females of a tribe that practiced female genital mutilation were considered persecuted based on their membership in a social group all sharing the characteristic of gender.⁵²

Third, the *Gao* court stated this shared characteristic must be the basis for the fear of persecution, especially in light of the Second Circuit’s interpretation in *Gomez v. INS*.⁵³ In that case, the Second Circuit affirmed the denial of a woman’s asylum claim because the court did not see a connection between her numerous rapes and beatings and any other characteristics that would establish membership in a particular social group that would be the likely basis for future persecution.⁵⁴ The court reasoned that a different finding would lead to the “on account of” language, or the causation required by the Immigration and Nationality Act, to be interpreted too broadly.⁵⁵ In proving future persecution, while the petitioner need only show that there is a “likelihood of future persecution,” the persecution must be based on membership in the “particular social group.”⁵⁶

47. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

48. *Id.*

49. *Gao*, 440 F.3d at 68.

50. *Id.* at 68 (citing *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005)).

51. *Niang*, 422 F.3d at 1199-1200.

52. *In re Fauziya Kasinga*, 2 I. & N. Dec. 357, 365 (B.I.A. 1996) (females belonged to a “particular social group” that were persecuted because they were female members of Tchamba-Kunsuntu Tribe who were opposed to the tribal practices of female genital mutilation.).

53. *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (case involving a woman who had been raped and beaten by guerilla soldiers five times in her home country and whose asylum claim was rejected due to that fact that the nexus was strictly interpreted and likelihood of future persecution could not be shown).

54. *Id.* at 663-64.

55. *Id.* at 664-65.

56. *In re Acosta*, 19 I. & N. Dec. at 224-25 (citing 8 U.S.C. § 1101(a)(42)(A) (2006)).

IV. ANALYSIS

Despite the Second Circuit's holding in *Gomez v. INS*, the court in *Gao v. Gonzales* reversed the decision of the IJ and the BIA and found Gao eligible for asylum.⁵⁷ In effect, this ruling broadened the once-strict view of the nexus that must exist between membership in a "particular social group" and the persecution based on belonging to that social group.⁵⁸ *Gao's* facts were unique in that membership in the "particular social group" was also the persecution that the members of that group faced. The Second Circuit Court of Appeals stated in the decision that "Gao's social group consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable."⁵⁹ This common characteristic that the women sold into marriage in rural China shared was precisely the persecution they wished to avoid.

By comparison, in *In re Fauziya Kasinga*, the females of the Tchamba-Kunsuntu Tribe, which practiced female genital mutilation, shared the common characteristic of being females and being members of the tribe that practiced this ritual.⁶⁰ In Gao's village, the persecuting practice was being sold into marriage with no protection from the government. This was the only characteristic the women in that particular social group shared other than being female. A careful distinction can be made here from the females of the Tchamba-Kunsuntu Tribe, which persecutes all women in the tribe because they are members. Unlike the Tchamba-Kunsuntu Tribe, the members of Gao's village were not all sold into marriage. Therefore, the nexus needed to satisfy the *Fatin* test did not exist – and could not possibly exist – because the persecution and the membership characteristic were the same. Women in rural Chinese villages must have been forced into marriage before they could become a member of the social group.

The effect of the *Gao v. Gonzales* decision is that women who are sold into marriage need not prove the nexus between membership in the group and persecution due to membership, because the fact that they are in the group at all shows they have been and will be persecuted. This key result was driven by the government's concession, which the court noted the government had to make, "that forced marriage is a form of abuse that rises to the level of persecution."⁶¹ By making it easier for women in forced marriages to assert a claim for

57. Gao, 440 F.3d at 71-72.

58. *Id.* at 71.

59. *Id.* at 70.

60. *In re Fauziya Kasinga*, 21 I. & N. Dec. 357.

61. Gao, 440 F.3d at 66.

asylum, the United States is open to an influx of women seeking asylum who were sold into marriage. The “on account of” language in the Immigration and Nationality Act no longer receives the strict interpretation it was previously accorded.⁶²

This “floodgates” argument may have merit, but it is not necessarily a negative result. The fact that these women are sold like slaves with no choice as to whom they marry seems to go to the very purpose of asylum law. Asylum law in the United States gives refuge to those whose “life or freedom” is threatened or not protected by their government.⁶³ The inability of a person to choose not only whom he or she will marry but also whether he or she will marry at all deals with life and freedom. Being sold into marriage is a life-long deprivation of choice, and the inability to choose the person to whom you will be married takes away freedoms that the citizens of the United States enjoy. These freedoms should be celebrated instead of cast aside as casualties of a strict interpretation of elements that must be met. The Second Circuit modified the way the question of who gets granted asylum and who does not is answered, because the ramifications of strictly interpreting regulations would lead to an immoral result. Whether the court intended it or not, this is the result. The fact that women in countries other than the United States, specifically China, are sold into marriage is against the morals and values embodied in the asylum law of the United States, regardless of whether the practice is a social norm in a foreign country.

V. CONCLUSION

The decision in *Gao v. Gonzales* takes the three elements for asylum laid out in *Fatin*, which are (1) the person seeking asylum must show that the “particular social group” exists; (2) that person is a member of that group; and (3) there is a “well-founded fear” that the person will be persecuted because they are a member of the group,⁶⁴ and combines (2) and (3), making it less difficult for women who are sold into marriage to prove that their membership in the “particular social group” causes the persecution that they suffer. This decision very well may lead to an influx of women seeking protection from persecution, but morality must prevail in some instances, especially those in which less fortunate people do not have their freedoms protected by their government. This decision takes asylum law a neces-

62. *Gao*, 440 F.3d at 68 (citing 8 U.S.C. § 1101(a)(42) (2006)).

63. 8 C.F.R. 208.16(b)(1)(i) (2006) (addressing the standard for withholding of removal under section 241(b)(3)(B) of the Immigration and Nationality Act and withholding of removal under the Convention Against Torture).

64. *Fatin*, 12 F.3d at 1240.

sary step closer to embracing morality and compassion rather than strict red tape regulations. When the purpose of the law would be served by one decision and the mold that the law has created equates to an opposite decision, the law has and does change in order to serve its purpose, as it did in *Gao v. Gonzales*.

