A Tale of Two Cases:

Two Intrepid Women in the Sixth Circuit Move the Lever on Domestic-Violence-Based Asylum Law

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Welcome to the Ping Pong Table

For decades—some might say too many decades—the conceptual validity of domestic-violence-based asylum has been a subject of controversy in U.S. jurisprudence.[1] When, in 2014, the Board of Immigration Appeals (BIA) issued Matter of A-R-C-G-, the subject was seemingly put to rest.[2] The case held that "married women in Guatemala who are unable to leave their relationship" constituted a "particular social group" (PSG) under the statutory definition of "refugee."[3] The U.S. refugee definition is derived directly from the United Nations Refugee Convention,[4]and it is specifically intended to ring consonant with our international obligations under that treaty. Thus, through A-R-C-G-, the BIA implicitly accepted that protection from domestic violence was a human right—meaning it was a matter of severe enough public concern to fall within the purview of those rights which, if denied, warrant surrogate national protection.[5]

Unfortunately, effecting *A-R-C-G-*'s intended protections for bona fide refugees proved challenging in U.S. courts. In the year following that decision, advocates recounted that "arbitrary and inconsistent outcomes ... continued to characterize asylum adjudication" in the domestic violence arena.[6] And, as time passed, recurring patterns of resistance began to emerge. Some adjudicators utilized an overly narrow or literal interpretation of the PSG—for example, surmising that a woman was "able to leave" a relationship if she simply left the building.[7]

In addition, and especially regarding the Northern Triangle, some adjudicators displayed a tendency to minimize, dismiss, or even altogether ignore evidence in the record. This "ostrich in the sand" approach to serious and often uncontroverted evidence, such as expert testimony or country-conditions reports, would often prove fatal to the claim, for such evidence can be necessary to demonstrate numerous required elements of the refugee definition.[8] Perhaps the most notable among such requirements is the asylum-seeker's duty to demonstrate that a nation is "unwilling or unable" to offer protection if the feared agents of persecution are nongovernment actors,[9] a category which, unless they are public officials, applies to most perpetrators of domestic abuse.

In 2018, resistance to the application of *A-R-C-G-* gave way to a new and reinstated resistance to the basic concept of domestic-violence based asylum. In a controversial decision that has since been overturned, then Attorney General Jeff Sessions overruled *A-R-C-G-*, holding its designated social group was circular and poorly deliberated.[10] In the midst of this decision, Sessions also ruled that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by nongovernmental actors will not qualify for asylum."[11] And, although this decision is no longer in effect as precedent, its temporary existence is nonetheless indicative of the fervently swinging, ping-pong nature of the "judicial" landscape that characterizes this arena of U.S. refugee and asylum law.

It was upon this kaleidoscope-landscape that two women chose to publicly fight their cases. In 2020, two Central American women

filed Petitions for Review in the Sixth Circuit Court of Appeals. Both had been denied asylum in Memphis Immigration Court, and both sought review of the subsequent BIA dismissals. Both also obtained highly positive results—one published, one unpublished—and these two decisions address numerous aspects of the aforementioned recurring problems. This article tells the experiences of these women and offers some take-aways from these decisions: *Zometa-Orellana v. Garland,* and *Navarro-Vega v. Garland*.[12]

Delmi Araceli Navarro-Vega

Delmi Araceli Navarro-Vega was a college student in Honduras whose educational career was thwarted when she had to flee domestic violence.[13] She also was a seamstress, running a small solo business from her home.

Delmi met her ex-partner when she was around 18 years old. When, to her dismay, he began to brutally assault her, she attempted to move away numerous times, but her ex did not comply with her wish to end the relationship. Over a period of years, he pursued her at no fewer than four locations—including the residence she had rented in an attempt to leave him for good. From this rented house, Delmi had hoped to go to school, run her business, and raise their two children. Instead, her ex showed up at this house time and again, breaking in and forcibly assaulting her. In a striking aspect of the case, the immigration judge noted in Delmi's testimony that she had been sexually assaulted over 10 times during this period—before later ruling that Delmi had failed to establish "past persecution" and also was "able to leave" her relationship.[14]

Delmi's time in that fateful house ended with a particularly dramatic episode. One day she returned home to find the building filled with smoke and discovered her ex-partner inside in a "crazed" state, attempting to burn down the house and all its contents. She did call the police, and in response to this incident, they detained Delmi's ex-partner for only one day; even though the "couple" were not married or dating, the police listed her as his "wife" on the official complaint. A previous attempt to involve the police, while the two *were* still together, had drawn similar results—the police had told her to "listen more" and work harder on the relationship.

Knowing well the police would not protect her, Delmi fled her residence once again, to another house that would prove to be her last try. Just a few weeks later, she arrived at college and saw her ex lurking outside of the classroom, a suspicious looking briefcase (which he never carried) in his hands. This was the last straw; Delmi fled with her children to the United States.

Delmi's "individual calendar" asylum hearing was March 18, 2018. She was the sole witness, and she testified compellingly and in detail. The immigration judge found her credible. Her second police report was in the record. A limited but nonetheless directly relevant set of country-conditions documents were submitted to the record, which contained numerous explicit factual indications that domestic violence victims in Honduras were not receiving effective police protection.

The immigration judge's decision was issued in March 2018. At that time, *A-R-C-G-* was still in effect, and, based on that case, the judge found "Honduran women in a domestic relationship who are unable to leave the relationship" was a cognizable PSG. However, the immigration judge (and the BIA) went on to hold that, although her PSG was cognizable, Delmi herself was not a member. This was purportedly because she had ceased living under the same roof with her partner when they formally broke up in 2010 and because, years before that time, she had once voluntarily returned to him. (It should be noted that, at the time of the immigration judge's decision, the Sixth Circuit had not yet issued *Juan Antonio v. Barr,*[15] in which the court held "physical separation does not necessarily indicate that a relationship has ended—if it did, then any woman who escaped her persecutor and then filed an application for asylum on these grounds would be denied."[16])

In a determination particularly contested at the BIA, the immigration judge found that the 10+ sexual assaults did not rise to the level of persecution, apparently based on the court finding it "somewhat implausible that someone with her level of education would tolerate that type of conduct without notifying law enforcement authorities or seeking some type of assistance." And, finally, outside of acknowledging their admission to the record, neither the Memphis immigration judge nor the BIA cited, referenced, or engaged with *any* of the country-conditions evidence Delmi had submitted in support of her claim.

When she lost her case at the BIA on Dec. 31, 2019, Delmi considered an appeal. She later told me that she chose to appeal her case because she believed in the system—she felt the appellate judges were a "necessary and indispensable" part of the "circle of authority" who were meant to "apply the law" and give her case "a second chance."[17] She knew from the start that her case *might* make a difference for others—and she wanted that, too.

The Sixth Circuit granted Delmi's petition on two dispositive grounds.[18] The court ruled: "Substantial evidence does not support the finding that Navarro-Vega could leave her relationship ..."[19] The court specifically cited the proposition from *Juan Antonio v. Barr* that physical separation does not indicate a relationship has ended.[20] Next, the court found "[t]he evidence also compels the conclusion that Navarro-Vega could not reasonably expect the assistance of Honduran officials ... Navarro-Vega's efforts to report the abuse resulted in no protection and almost no punishment."[21] In reaching this conclusion, the court cited a compelling fact from the record: "a 2014 United Nations report stated that 95 percent of sexual violence and femicide cases in Honduras were never investigated."[22] Accordingly, the court remanded Delmi's case to the BIA, where it presently awaits further adjudication.

Ana Mercedes Zometa-Orellana

Ana Mercedes Zometa-Orellana was a native of El Salvador who left behind her entire immediate family to flee repeated and degrading physical, verbal, and sexual violence at the hands of her domestic partner. At times, he would lock her in their residence, cutting her off from the outside world. It was her own parents who, upon learning what was happening, begged Ana to flee the country. When her partner learned Ana had left, he visited her parents' home and warned them: if he ever saw Ana again, he would kill her.

Ana was found to be a credible witness, and she gave a specific account of the nature and frequency of the violence her partner had committed against her—which, again, was strikingly brutal. She had been too terrified to even approach the police; however, numerous country-conditions documents were submitted to the record that had direct statements backing up Ana's assertion that the police would not have helped her. For example, the State Department report in the record had indicated laws against domestic violence were "not well enforced."[23] Likewise, a report from the Immigration