

SECOND CIRCUIT REVIEW

Asylum: The Sufficiency of Death Threats in Proving Past Persecution

By Martin Flumenbaum and Brad S. Karp

July 30, 2024

In *KC v. Garland*, ___ F.4th ___ (2d Cir. 2024), the U.S. Court of Appeals for the Second Circuit addressed whether death threats are sufficient to establish that an asylum applicant has faced past persecution. In a unanimous opinion authored by Circuit Judge Richard Sullivan and joined by Chief Judge Debra Ann Livingston and Senior Circuit Judge José Cabranes, the Second Circuit rejected a per se rule that an asylum applicant who has received death threats has demonstrated past persecution. Instead, in line with prior Second Circuit precedent, death threats “will constitute past persecution only if the applicant can point to aggravating circumstances indicating that the death threat was ‘so imminent or concrete’ or ‘so menacing as itself to cause actual suffering or harm.’” 2024 WL 3433555 at *4 (quoting *Scarlett v. Barr*, 957 F.3d 316, 328 (2d Cir. 2020)). Going forward, it will behoove asylum applicants and their counsel to present evidence of these aggravating circumstances when seeking asylum.

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Second Circuit Approach to Past Persecution in Asylum Claims

In the Second Circuit, an asylum applicant bears the burden of proving eligibility for asylum. *Id.* at *3. One way to meet that burden is to demonstrate a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* An applicant that can demonstrate past persecution is “presumed to have a well-founded fear of [future] persecution.” *Id.* (quoting *Singh v. Garland*, 11 F.4th 106, 114 (2d Cir. 2021)). The government may rebut that presumption by showing that there has been a “fundamental change in circumstances” or that the applicant can avoid future persecution by relocating to a different part of the country. *Id.* (quoting *Singh*, 11 F.4th at 114).

Factual Background

Arjun KC is a native and citizen of Nepal who entered the U.S. through Mexico in January 2016. Id. at *1–*2. Shortly after crossing the U.S.-Mexican border, KC was detained and placed in removal proceedings. Id. at *2. KC conceded that he was removable as charged and applied for asylum, withholding of removal, and relief under the Convention Against Torture. Id. In relevant part, KC alleged that he was eligible for asylum based on a well-founded fear of future persecution due to the past persecution he allegedly experienced. Id.

KC alleged that he faced past persecution from the Maoists—supporters of the Nepal Communist

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Party—for his refusal to support their cause. Id. at *1. After he returned from a United Nations peacekeeping mission in 2014, he alleges that members of the Maoist party began to demand his support for the party. Id. The first incident allegedly occurred in August 2014 when a group of 10 to 15 Maoists appeared at his home and insisted that he join their party and donate money. Id. KC’s father had similarly faced and rebuffed similar pressure. Id. When KC refused, he says that the Maoists threatened to kill him. Id.

KC testified that he was adamant that he would not support the Maoists “at any cost.” Id. Over the several weeks that followed, the Maoists allegedly continued to pressure him through several phone calls and additional visits to his house. Id. The Maoists allegedly told him that they believed his experience in the army would benefit their party and that they knew he had money from his salary during the peacekeeping mission. Id. According to KC, the Maoists repeated their death threats, telling his family that they would kill him if he continued to ignore their demand. Id.

KC testified that he fled to Kathmandu, the capital of Nepal, after his uncle called to warn him that the Maoists were plotting to return to KC’s house and kill him. Id. at *2. According to his wife, the Maoists did in fact show up to KC’s house and threatened to kill him if he returned. Id. The police refused to take KC’s report, which KC attributed either to fear of or influence from the Maoists. Id. Undeterred, the Maoists came looking for KC again and warned his wife that “as soon as we meet KC, we will kill him.” Id. (alterations adopted).

After a year in Kathmandu, KC left Nepal and made his way to the U.S. Id. Even then, KC alleges that the Maoists continued their pressure campaign. Id. In May 2016, they confronted KC’s father, accusing him and KC of ignoring their orders and again demanding KC’s father’s support. Id. KC’s father continued to resist the Maoists’ pressure, and this time they allegedly hit him. Id. When they left, they threatened to “take care of [KC’s father] later.” Id.

An immigration judge (IJ) denied KC’s application for relief. Id. The IJ found that KC was credible but that he failed to show past persecution or a well-founded fear of future persecution. Id. The Board of Immigration Appeals affirmed the IJ’s decision without opinion. Id. KC then petitioned the Second Circuit for review of the agency’s decision.

The Second Circuit’s Opinion

The Second Circuit denied KC’s petition and affirmed the Board of Immigration Appeal’s order. Writing for a unanimous panel, Sullivan rejected KC’s argument that death threats are per se indicative of past persecution. Id. at *1, *4. Instead, the court held that death threats should be treated in a similar manner to other types of unfulfilled threats. Id. at *4. Accordingly, death threats are to be examined on a case-by-case basis and “will constitute past persecution only if the applicant can point to aggravating circumstances indicating that the death threat was ‘so imminent or concrete’ or ‘so menacing as itself to cause actual suffering or harm.’” Id. at *4 (quoting *Scarlett*, 957 F.3d at 328).

The panel explained that persecution is an “extreme concept” that must be “more than mere harassment.” *Id.* at *3 (quotations omitted). And because the “difference between harassment and persecution is necessarily one of degree,” it must be “decided on a case-by-case basis.” *Id.* (quoting *Ivanishvili v. U.S. Dep’t of Just.*, 433 F.3d 332, 341 (2d Cir. 2006)). The panel said that it saw “no reason why death threats should automatically or even presumptively qualify as past persecution.” *Id.* at *4. As the panel saw it, in some circumstances “a death threat may be too speculative or specious—as opposed to imminent or concrete—to constitute persecution.” *Id.* And relying on reasoning of the Ninth Circuit, the panel warned

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that “treating death threats as per se would ‘unduly handcuff’ immigration authorities.” *Id.* (quoting *Lim v. I.N.S.*, 224 F.3d 929, 936 (9th Cir. 2000)). The panel reasoned that because “claims of threats are hard to disprove, many applicants could establish past persecution simply by alleging that such threats occurred.” *Id.*

The panel recognized that “some death threats are more ‘menacing’ than other types of threats.” *Id.* at *4 n.3. Nonetheless, the court held that it must “assess each threat ... on a case-by-case basis to determine whether it was imminent, concrete, or menacing enough to constitute persecution.” *Id.* It also pointed to decisions of eight of its sister circuits that similarly do not adopt a per se rule of persecution for death threats. *Id.* at *4. According to the panel, only the Fourth Circuit has adopted a per se rule, and in

that circuit many “cases finding persecution based on death threats involved aggravating circumstances that might be sufficient to constitute persecution even under our case-by-case inquiry.” *Id.* at *4 n.4.

Applying that case-by-case approach to the facts of KC’s case, the panel affirmed the agency’s finding that KC had not demonstrated past persecution. *Id.* at *5. The court reasoned that while the death threats directed to KC were “serious allegations, none of the surrounding circumstances indicate that the threats to his life were sufficiently ‘imminent or concrete’ or ‘menacing’ under [the] unfulfilled-threats doctrine.” *Id.* Critical to the court’s reasoning was that the Maoists did not “attempt to carry out the death threat or otherwise subject [KC] to violence.” *Id.* And the attack on KC’s father, the court pointed out, occurred nearly two years after KC left his hometown, was not severe, and was apparently motivated by the Maoists’ desire for his father’s money. *Id.* Because KC had failed to adequately demonstrate past persecution and did not present any additional evidence of a threat of future persecution, the Second Circuit denied his petition and affirmed the agency’s order. *Id.*

Conclusion

The Second Circuit’s decision in *KC v. Garland* clarifies that, like other types of unfulfilled threats, an asylum applicant seeking to demonstrate past persecution based on unfulfilled death threats must show that there were aggravating circumstances suggesting the threat was imminent, concrete, or extremely menacing such that the threat itself caused actual harm. Thus, applicants and their counsel should ensure that they introduce evidence of any aggravating circumstances surrounding death threats when seeking to support an asylum claim based on those threats.