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## CASE SUMMARY: SOTO-SOTO V. GARLAND: NINTH CIRCUIT RULES BIA APPLIED THE WRONG STANDARD OF REVIEW AND ERRED IN DENYING A VICTIM OF TORTURE DEFERRAL OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

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## CASE SUMMARY

### *SOTO-SOTO V. GARLAND*: NINTH CIRCUIT RULES BIA APPLIED THE WRONG STANDARD OF REVIEW AND ERRED IN DENYING A VICTIM OF TORTURE DEFERRAL OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

VANESSA LEE\*

#### INTRODUCTION

The Ninth Circuit granted a petition for review of the Board of Immigration Appeals’s (“BIA”) decision to deny a deferral of removal under the Convention Against Torture (“CAT”).<sup>1</sup> The BIA held that the Immigration Judge’s (“IJ”) findings that granted Delfina Soto-Soto relief under CAT were clearly erroneous.<sup>2</sup> The BIA reasoned that the IJ failed to acknowledge certain facts that indicate Soto-Soto is not likely to suffer torture if removed back to her country of origin, Mexico.<sup>3</sup> On appeal, Soto-Soto argues that the BIA did not apply the correct standard of review.<sup>4</sup> Instead of reviewing the IJ’s finding under the clear error standard, Soto-Soto contends that the BIA improperly engaged in *de novo* review.<sup>5</sup>

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<sup>1</sup> *Soto-Soto v. Garland*, 1 F.4th 655, 657 (9th Cir. 2021).

<sup>2</sup> *Id.* at 658.

<sup>3</sup> *Id.* at 658, 663.

<sup>4</sup> *Id.* at 659.

<sup>5</sup> *Id.* at 659.

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The parties agree that the proper standard of review for the BIA is clear error.<sup>6</sup> The Ninth Circuit determined that the BIA applied the wrong standard of review and held that Soto-Soto qualifies for relief under the clear error standard.<sup>7</sup>

## I. BACKGROUND

## A. FACTUAL BACKGROUND

On April 20, 2012, Soto-Soto was arrested by the state police at her home in Uruapan, a city located in the state of Michoacán, Mexico.<sup>8</sup> Soto-Soto, a forty-two-year-old indigenous Mexican woman, was arrested for allegedly kidnapping and murdering five-year-old Bernardino Bravo Gomez (“Bernardino”).<sup>9</sup> The Michoacán state police, specifically, from the Office of Anti-Kidnapping and Extortions, drove Soto-Soto approximately two hours away from her home to a town called Morelia in Michoacán, where she was brutally tortured.<sup>10</sup> Soto-Soto testified that she initially denied any involvement with the kidnapping of Bernardino and sustained hours of being pulled by the hair, thrown to the ground, repeatedly kicked with her hands tied behind her back, punched in the stomach, suffocated, and called a “fucking bitch.”<sup>11</sup>

As Soto-Soto continued to deny involvement with the kidnapping, the torture escalated.<sup>12</sup> The repeated sequence of slapping Soto-Soto’s face, throwing her to the ground, and suffocating her with a plastic bag intensified as police officers hit Soto-Soto’s head against the wall and pointed a gun at her head several times, stating the officers would “keep [her] right there like a bitch” if she did not sign a confession.<sup>13</sup> Despite being held at gunpoint, Soto-Soto did not accede until the police officers threatened to rape and kill her daughters if she did not sign the confession in the next fifteen minutes.<sup>14</sup> Soto-Soto signed the confession and was warned she would be tortured again if she were to report the officers to anyone.<sup>15</sup> During the next eight months, Soto-Soto was detained in Uruapan but was not tortured.<sup>16</sup>

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<sup>6</sup> *Id.* at 659.

<sup>7</sup> *Id.* at 659-63.

<sup>8</sup> *Id.* at 657.

<sup>9</sup> *Id.* at 657.

<sup>10</sup> *Id.* at 657-58; *Id.* at 662.

<sup>11</sup> *Id.* at 657.

<sup>12</sup> *Id.* at 657.

<sup>13</sup> *Id.* at 657.

<sup>14</sup> *Id.* at 657.

<sup>15</sup> *Id.* at 657.

<sup>16</sup> *Id.* at 657-58.

On December 10, 2012, Soto-Soto was released from custody as the Mexican trial court dismissed the charges for lack of evidence and she immediately fled to the United States.<sup>17</sup> On December 19, 2012, the Michoacán State Human Rights Commission filed a complaint regarding Soto-Soto's torture, however, the complaint was dismissed because Soto-Soto failed to provide a contact address.<sup>18</sup> In 2013, the Mexican government refiled the charges against Soto-Soto and obtained a warrant for Soto-Soto's arrest.<sup>19</sup> On November 12, 2015, INTERPOL issued a Red Notice for Soto-Soto's extradition to Michoacán, Mexico.<sup>20</sup> On November 28, 2017, the Department of Homeland Security took Soto-Soto into custody and placed her in removal proceedings.<sup>21</sup>

#### B. PROCEDURAL BACKGROUND

During the removal hearings, the IJ found Soto-Soto's claim to be credible and tendered Soto-Soto's testimony full evidentiary weight.<sup>22</sup> Soto-Soto's arrest warrant from the renewed investigation in 2013 supported "serious reasons to believe" that Soto-Soto committed a "serious nonpolitical crime" before she arrived to the United States.<sup>23</sup> Therefore, IJ held Soto-Soto was "statutorily ineligible for asylum, withholding of removal under the [Immigration and Nationality Act ("INA")], and withholding of removal under [CAT]."<sup>24</sup> However, IJ also determined that the "alleged serious nonpolitical crime" did not bar Soto-Soto from obtaining a deferral of removal under CAT and considered Soto-Soto's eligibility for that relief.<sup>25</sup>

The IJ granted Soto-Soto deferral of removal under CAT because Soto-Soto met her burden by showing "it was more likely than not that she would be tortured with government involvement or acquiescence if removed to Mexico."<sup>26</sup> The IJ determined that the following facts demonstrated Soto-Soto's likelihood of future torture: (1) Soto-Soto had been tortured by the Michoacán state police from the Office of Anti-Kidnapping and Extorsions; (2) Mexican authorities are "more likely than not" to stop and take Soto-Soto back into custody upon her return because the Mexican authorities reinitiated the prosecution against Soto-

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<sup>17</sup> *Id.* at 658.

<sup>18</sup> *Id.* at 658.

<sup>19</sup> *Id.* at 658.

<sup>20</sup> *Id.* at 657-58.

<sup>21</sup> *Id.* at 657-58.

<sup>22</sup> *Id.* at 658.

<sup>23</sup> *Id.* at 658.

<sup>24</sup> *Id.* at 658.

<sup>25</sup> *Id.* at 658.

<sup>26</sup> *Id.* at 658.

Soto and had an arrest warrant; (3) indigenous women like Soto-Soto are particularly vulnerable to torture as evidenced in the country conditions report on Mexico; and (4) Soto-Soto reported her torture to the Michoacán State Commission of Human Rights after she was specifically threatened to be tortured again if she were to report the torture to anyone.<sup>27</sup>

The Government appealed the IJ's grant of deferral of removal under CAT to the Board of Immigration Review (BIA).<sup>28</sup> The BIA reversed the IJ's grant and held the IJ's finding that Soto-Soto was "more likely than not" to be tortured upon returning to Mexico was clearly erroneous.<sup>29</sup> The BIA stated that the IJ failed to acknowledge certain facts in determining Soto-Soto's eligibility and provided three reasons for reversing the IJ's decision.<sup>30</sup> First, the IJ did not acknowledge the fact that the Mexican judicial system had taken steps to correct Soto-Soto's past due process errors.<sup>31</sup> Although there was a new investigation, "the Mexican judicial system excluded the evidence obtained through torture and conducted a new investigation that independently resulted in the current charges against [Soto-Soto]."<sup>32</sup> Second, the IJ did not acknowledge that Soto-Soto was not harmed by the officers during the eight months she was held in custody.<sup>33</sup> Third, Soto-Soto's family in Mexico remained unharmed.<sup>34</sup>

Soto-Soto appealed the BIA's reversal of IJ's grant of deferral of removal under CAT.<sup>35</sup>

## II. ANALYSIS

Soto-Soto appealed to the Ninth Circuit Court of Appeals on grounds that the BIA improperly reviewed the IJ's finding.<sup>36</sup> The BIA erroneously reviewed the IJ's finding under *de novo* review, instead clear error, which is the correct standard.<sup>37</sup> The Ninth Circuit first analyzed the BIA's reasoning for reversing the IJ's decision to determine whether the BIA applied the appropriate standard of review.<sup>38</sup> The Ninth Circuit then

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<sup>27</sup> *Id.* at 658

<sup>28</sup> *Id.* at 658.

<sup>29</sup> *Id.* at 658.

<sup>30</sup> *Id.* at 658.

<sup>31</sup> *Id.* at 658.

<sup>32</sup> *Id.* at 658-59.

<sup>33</sup> *Id.* at 658.

<sup>34</sup> *Id.* at 658.

<sup>35</sup> *Id.* at 659.

<sup>36</sup> *Id.* at 659.

<sup>37</sup> *Id.* at 659.

<sup>38</sup> *Id.* at 659.

determined whether the IJ's findings were clearly erroneous under the proper standard of review.<sup>39</sup>

#### A. THE BIA IMPROPERLY ENGAGED IN *DE NOVO* REVIEW

When the issue of the BIA's standard of review is raised, the court determines "whether the BIA faithfully employed the clear error standard or engaged in improper *de novo* review of the IJ's factual findings."<sup>40</sup> The BIA commits an error of law if the BIA does not limit its review to clear error and instead engages in *de novo* review.<sup>41</sup> The BIA "faithfully employ[s] the clear error standard" if the BIA reverses an IJ's factual finding because it is "illogical or implausible, or without support in inferences that may be drawn from the facts in the record."<sup>42</sup> A strong indication that the BIA did not "faithfully employ the clear error standard" is when the "BIA does not address the 'key factual findings' that the IJ based its conclusion."<sup>43</sup> Another justifiable inference that the BIA applied a *de novo* review is when the BIA reaches a different conclusion from the IJ because the BIA gave more weight to some facts over others.<sup>44</sup>

In *Soto-Soto's* case, the Ninth Circuit found that the BIA had a different view of the evidence than the IJ did.<sup>45</sup> However, the three reasons the BIA provided for reversing the IJ (the Mexican judicial system had taken steps to correct past due process errors, *Soto-Soto* was unharmed for eight months, and *Soto-Soto's* family in Mexico remained unharmed) failed to explain how the IJ's finding of *Soto-Soto's* future persecution lacked logic, plausibility, or support in the record.<sup>46</sup> The IJ held that *Soto-Soto* was "more likely than not" to suffer torture because: (1) *Soto-Soto* had already been tortured by the officers before; (2) *Soto-Soto* is more likely to be arrested than not upon returning to Mexico; (3) *Soto-Soto* is an indigenous woman who is more likely to be tortured per country condition reports on Mexico; and (4) *Soto-Soto* reported her torture,

<sup>39</sup> *Id.* at 659-63.

<sup>40</sup> *Id.* at 659 (citing *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012)).

<sup>41</sup> *Id.* at 659.

<sup>42</sup> *Id.* at 659 (citing *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012)).

<sup>43</sup> *Id.* at 659 (citing *Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012)).

<sup>44</sup> *Id.* at 659; *See also* *Guerra v. Barr*, 974 F.3d 909, 914 (9th Cir. 2020) (holding that the BIA reviewed the IJ's decision *de novo* because "the clear error standard does not allow the BIA to reweigh the evidence when the IJ's account of the evidence is plausible") (citing *Rodriguez*, 683 F.3d at 1171); *see also* *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857-58 (1982) (stating "an appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction [or] resolve the ambiguities differently[.]").

<sup>45</sup> *Id.* at 660.

<sup>46</sup> *Id.* at 660.

increasing her likelihood of being tortured again.<sup>47</sup> Instead of showing how the IJ erred in its factual determination, the BIA's reasoning demonstrated a "*de novo* weighing of the evidence."<sup>48</sup>

The Ninth Circuit next held that no facts support the BIA's view of the evidence.<sup>49</sup> In response to the first reason the BIA provided for reversing the IJ's finding that Soto-Soto was "more likely than not" to be tortured upon removal, the court stated that the record did not show that Soto-Soto's charges were dismissed because the Mexican judicial system took steps to cure past due process errors.<sup>50</sup> Rather, the record showed that the reason the Mexican court dismissed Soto-Soto's charges was because they lacked evidence to charge Soto-Soto.<sup>51</sup> The Mexican court found that the evidence against Soto-Soto was insufficient because Soto-Soto's confession lacked probative value for two reasons: (1) police not only failed to obtain judicial authorization to carry out questionings at several domiciles but also had contradictions regarding Soto-Soto's confession; and (2) Soto-Soto speaks the indigenous language Purepecha, however, she was not provided with a Purepecha interpreter during questioning.<sup>52</sup> Moreover, the Mexican court that dismissed Soto-Soto's charges did not acknowledge the fact that Soto-Soto was tortured by the police officers and failed to impose safeguards to ensure that Soto-Soto would not be further tortured for another improper confession.<sup>53</sup>

The Ninth Circuit further held that the BIA would not be able to reverse the IJ under the clear error standard of review even if the record supported the BIA's view of the evidence.<sup>54</sup> The court stated that the IJ "is entitled to broad deference from the BIA" when determining whether the facts in the record would affect the likelihood of future torture.<sup>55</sup> For example, the IJ reasoned that the Mexican authorities would detain Soto-Soto again because of the second arrest warrant, which increases Soto-Soto's likelihood of torture.<sup>56</sup> However, the BIA's review gave no deference to the IJ's fact finding.<sup>57</sup> The Ninth Circuit also stated that the BIA's second and third reasons for reversing the IJ were also not supported by the record and irrelevant.<sup>58</sup> The BIA's second reason that Soto-

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<sup>47</sup> *Id.* at 658-60.

<sup>48</sup> *Id.* at 660.

<sup>49</sup> *Id.* at 660.

<sup>50</sup> *Id.* at 660.

<sup>51</sup> *Id.* at 657-60.

<sup>52</sup> *Id.* at 660.

<sup>53</sup> *Id.* at 660.

<sup>54</sup> *Id.* at 661 (citing *Inwood Labs., Inc.*, 456 U.S. at 857-58).

<sup>55</sup> *Id.* at 661.

<sup>56</sup> *Id.* at 661.

<sup>57</sup> *Id.* at 661.

<sup>58</sup> *Id.* at 661.

Soto was not harmed by the officers for eight months does not demonstrate whether the police officers intend to carry out their threat in the future because no fact suggests state police officers knew Soto-Soto had filed a complaint with the human rights commission after being released from custody.<sup>59</sup> Similarly, the Ninth Circuit held that the BIA's third argument regarding the safety of Soto-Soto's family members in Mexico was irrelevant because the threat "hinged on whether Soto-Soto returns to Mexico."<sup>60</sup>

Finally, the Ninth Circuit stated that BIA engaged in "re-weighing evidence" when it failed to discuss other "key factual findings" of the IJ like the country condition reports regarding indigenous women in Mexico.<sup>61</sup> The BIA did not engage in clear error review when it concluded that the Mexican government's effort to eliminate torture outweighed the country conditions report, which conversely, the IJ found to increase Soto-Soto's likelihood of future torture.<sup>62</sup> Therefore, the Ninth Circuit held that the BIA applied the wrong standard of review by giving no deference to IJ's view of the evidence and substituting its own.<sup>63</sup>

**B. IJ FINDINGS WERE NOT CLEARLY ERRONEOUS UNDER THE PROPER STANDARD OF REVIEW: CLEAR ERROR**

When determining whether an applicant is "more likely than not" to be tortured upon removal, the following factors must be considered:

- (1) Evidence of past torture inflicted upon the applicant;
- (2) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
- (3) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- (4) Other relevant information regarding conditions in the country of removal.<sup>64</sup>

Of the factors above,

[p]ast torture is ordinarily the principal factor on which we rely when an applicant who has been previously tortured seeks relief under [CAT] because, absent changed circumstances, if an individual has

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<sup>59</sup> *Id.* at 661.

<sup>60</sup> *Id.* at 661.

<sup>61</sup> *Id.* at 661.

<sup>62</sup> *Id.* at 660-61.

<sup>63</sup> *Id.* at 661.

<sup>64</sup> *See* 8 C.F.R. § 1208.16(c)(3).



been tortured and has escaped to another country, it is likely that she will be tortured again if returned to the site of her prior suffering.<sup>65</sup>

The Ninth Circuit held that IJ's factual determinations in accordance with the factors above and based on the record, "compels the conclusion that Soto-Soto 'met her burden of proof to establish that it is more likely than not that she will suffer torture if removed to her native country.'"<sup>66</sup> Therefore, under the clear error standard, the IJ did not err in granting Soto-Soto relief for deferral of removal under CAT.<sup>67</sup>

### III. IMPLICATIONS

As Judge Wallace raised in the dissent, the majority in *Soto-Soto* deviated from ordinary practice.<sup>68</sup> When the BIA applies the incorrect standard, the court ordinarily remands the petition to the BIA.<sup>69</sup> However, instead of having the case remanded to the BIA for reconsideration, the majority went further and remanded the petition for the BIA to grant deferral of removal.<sup>70</sup>

Judge Wallace did not join the majority opinion because of this deviation and dissents on two grounds.<sup>71</sup> First, although the BIA inappropriately conducted a *de novo* review, the IJ also erred in granting Soto-Soto CAT relief.<sup>72</sup> Judge Wallace argues that the IJ conflated the various Mexican law enforcement actors in Michoacán into one actor and assumed that Soto-Soto would be returned to the same officers who had tortured her at the Office of Anti-Kidnapping and Extortions in Morelia, Michoacán despite INTERPOL's red notice specifying Soto-Soto be returned to Uruapan, Michoacán.<sup>73</sup> Judge Wallace also highlights that Soto-Soto had remained unharmed for eight months in Uruapan, Michoacán, which is sixty-seven miles away from Morelia, Michoacán.<sup>74</sup> Second, Judge Wallace dissents on grounds that the court did not reverse and remand for BIA's further reconsideration, deviating from ordinary practice.<sup>75</sup>

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<sup>65</sup> *Id.* at 662 (citing *Xochihua-Jaimes v. Barr*, 962 F.3d 1175,1188 (9th Cir. 2020)).

<sup>66</sup> *Id.* at 662.

<sup>67</sup> *Id.* at 662-63.

<sup>68</sup> *Id.* at 667 (Wallace, J., dissenting).

<sup>69</sup> *Id.* at 667 (Wallace, J., dissenting).

<sup>70</sup> *Id.* at 663, 667 (Wallace, J., dissenting).

<sup>71</sup> *Id.* at 663 (Wallace, J., dissenting).

<sup>72</sup> *Id.* at 663 (Wallace, J., dissenting).

<sup>73</sup> *Id.* at 663-64 (Wallace, J., dissenting).

<sup>74</sup> *Id.* at 664 (Wallace, J., dissenting).

<sup>75</sup> *Id.* at 664 (Wallace, J., dissenting).

Judge Wallace did concur in part with the majority's holding that the BIA impermissibly applied the *de novo* review and engaged in reweighing the evidence, instead of providing thorough arguments that demonstrate the IJ's finding as illogical or impermissible inferences.<sup>76</sup> However, Judge Wallace argues that the court should not "interfere with our usual role as an appellate court to decide factual issues" and remanding to the BIA for reconsideration as is ordinary procedure would "overcome this mistake."<sup>77</sup>

#### CONCLUSION

After reviewing the facts in the record, the Ninth Circuit held that the BIA applied the wrong standard of review by engaging in *de novo* review, rather than clear error.<sup>78</sup> The Ninth Circuit also found that the IJ was not clearly erroneous under the clear error standard because Soto-Soto "met her burden of proof to establish that it is more likely than not that she will suffer torture if removed to her native country."<sup>79</sup> Furthermore, the court stated that IJ is "entitled to broad deference from the BIA" when fact finding the effect on the likelihood of future torture.<sup>80</sup> Therefore, the Ninth Circuit vacated the BIA's order and granted Soto-Soto CAT relief.<sup>81</sup>

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<sup>76</sup> *Id.* at 663 (Wallace, J., concurring).

<sup>77</sup> *Id.* at 667.

<sup>78</sup> *Id.* at 662.

<sup>79</sup> *Id.* at 662.

<sup>80</sup> *Id.* at 661.

<sup>81</sup> *Id.* at 657.

