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In Praise of Creativity: Gang-Based "Social Group" Claims in Asylum Cases

Creativity in legal arguments is one of the hallmarks of our common law heritage: innovative attorneys and judges have driven progress in Anglo-American courts for centuries. This creative spirit is constantly on display among immigration attorneys, who often find themselves traversing some of the most difficult roads in all of American law.

Three factors generally combine to make immigration law tremendously difficult: a broken and often contradictory statutory framework, an infamously inefficient bureaucracy, and a regulatory system that is stacked against granting most immigrants lawful status. For better or worse, ours is now a system that is built to keep people out.

Of course, added to these three elements is a strong anti-immigrant impulse that has gripped the nation in recent years. Put simply, the voices of those advocating for immigrants can be difficult to hear over the banging of hammers and nails as we wall ourselves off from our neighbors to the south. In this article, we will briefly examine one very interesting example of the creative spirit that pervades the practice of immigration law: the gang-based asylum claim.

A Primer on Asylum

Asylum claims, one of the oldest examples of international law, allow persecuted individuals to avoid repatriation to their homelands. Under U.S. law, the attorney general is empowered to grant asylum claims made by those individuals who qualify as "refugees" under the Immigration and Nationality Act (INA). The INA defines a "refugee" as someone who is "unwilling or unable to avail himself or herself of the protection" of the home country because of a well-founded fear of persecution on account of any of the following:

- race,
- religion,
- nationality,
- membership in a particular social group, or
- political opinion.[1]

Contrary to popular opinion, then, persecution in and of itself does not entitle one to asylum in this country. In any asylum case, the question of persecution is only the initial inquiry; the key question is often whether the persecution fits into one of the five categories noted above. Many victims of gruesome violence have found themselves on the losing side of asylum claims, because the claimants could not show a nexus between the persecution and the enumerated categories.[2]

When the fairly well-defined categories of race, religion, nationality, and political opinion are in question, the answer is sometimes apparent from the outset. However, with the catchall category of "membership in a particular social group," as will be explained below, the path is still being cut. Also of consequence—although it will not be covered in detail in this article—is that the part of the definition included in the INA that refers to "protection of the home country" means that a successful asylum claim must show that the claimant's home government is unwilling or unable to stop the persecution that is part of the complaint.

Central America and the Rise of *Maras*

Tracing the beginnings of the large Central American *maras*, or gangs, is difficult, if not impossible. For example, *Mara Salvatrucha* (MS-13), the most infamous of the lot, grew from humble roots in the prisons of countries like El Salvador, drawing many of its first members from guerrilla groups who had fought the government. The gang made its way from those prisons to the streets of Los Angeles, and its influence now stretches to both coasts of the United States.

Even though MS-13 has changed tremendously since its inception, members' guerrilla mentality persists: the gang's clashes with government forces in Central America more closely resemble battles than shoot-outs between the police and the gang. In combating MS-13 and other gangs, many Central American countries have pursued extremely harsh methods—known as *mano dura* (the iron hand)—that, in blanket fashion, indiscriminately target all male youths regardless of their actual involvement in gangs.

In their home countries, then, many persons find themselves caught between, on the one side, gangs that will kill or injure those who do not join, and, on the other side, periodic government crackdowns that seem to view youth itself as a crime warranting severe punishment. Thus, in theory, it is easy to see the beginnings of a successful asylum claim: the existence of an environment that in some instances resembles all-

out war. This leads some creative lawyers to ask: Can we *really* send someone back to those conditions?

Although the hesitation to return young persons to an environment in which gang wars are prevalent is understandable, asylum law requires much more than an altruistic impulse. As noted above, the individual must have been the victim of persecution (or must reasonably fear future persecution) based on one of the five statutory grounds for asylum claims. Faced with this reality, some attorneys began to put forward creative cases claiming membership in a social group that is gang-related, arguing, for example, that "those who refuse to join gangs" constitutes a social group under the asylum statute. Even though there are several other broad categories of asylum claims based on membership in gangs,[3] this article will focus on the "refusal to join gangs" variety, because these claims have the potential to affect the largest group of people.

When initially conceived, the idea of seeking asylum based on membership in a gang seemed promising—or as promising as any asylum claim can be in the current political climate—mainly because of the absence of a clear answer as to what constitutes a social group under the asylum statute. Unfortunately, the logic can appear somewhat circular if the argument is not framed correctly: the social group seems defined by the persecution itself, which is specifically prohibited under the asylum regulations.[4] In other words, the argument cannot seem to suggest that, once a person has been harmed by a gang, this same person is now officially a member of a "social group" of similarly situated victims (a statutorily recognized "Victims Anonymous," if you will).

Still, the major struggle in gang-based asylum claims has centered on the ambiguity of the term "social group." This ambiguity initially appeared to lend itself to liberal interpretations, even though, in practice, it was difficult to convince most judges that gangs were social groups. Relying on such ambiguity, creative attorneys were able to develop an argument that appeared more and more convincing as it was refined through various briefs and adverse rulings.

Welcome Ambiguity: What Makes Membership in a Particular Social Group Persecution?

The Board of Immigration Appeals (BIA) first sought to bring some clarity to this issue in the seminal case of *In re Acosta*, 19 I & N Dec. 211 (BIA 1985), in which the board offered its test for determining what constitutes persecution on the basis of membership in a particular social group. The board noted that such persecution must "mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, *immutable characteristic*" (emphasis added). The BIA went on to explain that the determination of what meets this test must be made on a case-by-case basis, but "whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."

Welcoming such guidance and applying the *Chevron* doctrine, most circuits have deferred to the BIA's test, requiring that the claimed social group reflects some immutable characteristic of its members. It is not surprising that the Ninth Circuit has carved a somewhat more liberal interpretation, although that court has slowly altered its test to more closely resemble the immutability standard handed down by the BIA in the *Acosta* case.

One of the relatively few instances in which a claimant was able to convince a court that "those who refuse to join gangs" can meet the immutability test used in the *Acosta* case was the case of *In re D- V-* heard in 2004.[5] In that case, a 17-year-old Honduran boy argued that members of MS-13 had, among other things, harassed him (even shooting him once) and threatened to kill him for refusing to join the gang. The court viewed the case as fairly straightforward; after all, the boy had refused to join the local gang, whose members had persecuted him as a result. In addition, the court found that the Honduran authorities were powerless against MS-13, and any attempt by the claimant to seek the protection of the Honduran government "would be at best, pointless, and at worst, dangerous."[6] Pretty simple, right?

In re D- V- by no means opened the floodgates; judges generally shot down gang-based asylum claims, and even the few successful claims could often be explained away in part by the perceived liberal leanings of the courts in which they were heard. Regardless, the last few years have seen a definite increase in the (albeit still small) number of successful gang-based asylum claims, and at least one circuit court appeared to be warming up to the idea: In *Valdiviezo-Galdamez v. Attorney General of the United States*,[7] the third circuit disagreed with an immigration judge's ruling that "young Honduran men … who have refused to join gangs" cannot be considered a "social group" for asylum purposes. The appeals court strongly suggested that the claimed social group was valid but refused to say so definitively, given that the Board of Immigration Appeals had been strangely silent on this issue.

The BIA was silent until July 30, 2008, when it finally handed down an opinion (two, in fact) clearing up much of the ambiguity inherent in the "social group" category.[8] And clarity is not what proponents of gang-based asylum claims were seeking. The two opinions are nearly identical in many respects, but *Matter of S- E- G-*, the first of the two opinions, is somewhat more detailed and therefore will be the focus of this discussion.

In *S- E- G-*, building on earlier opinions that social groups must have "immutability," "particularity," and "visibility," the BIA found that Salvadoran youths (and their families) who refuse to join gangs do not constitute a "particular social group." For one thing, the BIA noted that "youth" can by no means be considered immutable, in that it is inherently temporary (and the 18- and 21-year-

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ment merely enlarging class definition does not because it does not add new parties to the suit); *Schillinger v. Union Pac. R.R.*, 425 F.3d 330 (7th Cir. 2005) (amendment adding new defendant creates new right of removal under CAFA, but amendment changing class from a statewide to a nationwide class does not, and amendment merely correcting the name of a defendant incorrectly named in the original complaint does not); *Senterfitt v. Suntrust Mortg. Inc.*, 385 F. Supp. 2d 1377 (S.D. Ga. 2005) (amendment expanding the class period from four to 20 years did not relate back to filing of original complaint and therefore "commenced" new action for purposes of CAFA); *Plummer v. Farmers Group Inc.*, 388 F. Supp. 2d 1310 (E.D. Okla. 2005) (amendment changing the case from an individual action to a class action constituted "de facto commencement of a new suit" for purposes of CAFA removal, as did amendment adding new plaintiffs with separate contracts and separate factual allegations from original plaintiffs); *Plubell v. Merck & Co.*, 434 F.3d 1070 (8th Cir. 2006) (amendment adding a new class representative without materially changing the underlying claims or class definition does not create a new right of removal under CAFA).

[2]*See*, for example, *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 298 (4th Cir. 2008) ("the party seeking to invoke federal jurisdiction [under CAFA] must allege it in his notice of removal and, when challenged, demonstrate the basis for federal jurisdiction"); *Smith v. Nationwide Prop. and Cas. Ins. Co.*, 505 F.3d 401, 404–405 (6th Cir. 2007); *Blockbuster v. Galeno*, 472 F.3d 53, 57–58 (2nd Cir. 2006) (accord); *Morgan v. Gay*, 471 F. 3d 469, 473 (3rd Cir. 2006), *cert. denied*, 128 S.Ct. 66 (2007) ("Under CAFA, the party seeking to remove the case to federal court bears the burden to establish that the amount in controversy requirement is satisfied."); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 685 (9th Cir. 2006) ("under CAFA the burden of establishing removal jurisdiction remains, as before, on the proponent of federal jurisdiction"); *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328–1329 (11th Cir. 2006); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005).

[3]*See*, for example, *Serrano v. 180 Connect Inc.*, 478 F.3d 1018, 1019 (9th Cir. 2007) ("[T]he party seeking remand bears the burden of proof as to any exception under CAFA."); *Hart v. FedEx Ground Package System Inc.*, 457 F.3d 675, 679–682 (7th Cir. 2006); *Frazier*, 455 F.3d 546; *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164–1165 (11th Cir. 2006). The Second Circuit has acknowledged the foregoing decisions but has expressly declined to say whether it agrees with them; *see Blockbuster*, at 58.

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old claimants in this case were no longer youths).

What is perhaps the most important is the BIA's attack on the perceived circularity of the accepted definition: "Youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared experience. … However … we do not find that in this case the social group can be defined exclusively by the fact that its members have been subjected to harm in the past."[9] Even though the board noted that this shared experience could be a factor in determining the visibility of the claimed social group, the opinion made it clear that there had to be more of a connection.

With respect to particularity, the BIA found that the claimed social group was simply too amorphous: the group was not "described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[10] Similarly, with respect to the "visibility" element, the social group must be one that is perceived as a group in society.[11] What's more, according to the board, the very pervasiveness of gang violence in El Salvador lessens the distinctiveness of the perceived group: "Victims of gang violence come from all segments of society, and it is difficult to conclude that any 'group,' as actually perceived by the criminal gangs, is much narrower than the general population of El Salvador."

In some sense, the BIA's decisions in these two cases are not trailblazing rulings—very little of the reasoning behind the opinions had not been employed in other cases. What is incredibly significant about the reasoning, however, is the entity handing it down: the Board of Immigration Appeals, which until then had been silent on this issue and had theretofore provided an opening for immigration attorneys to argue vehemently for gang-based asylum claims. Even though the BIA by no means shut the door on such claims via these rulings, there is no doubt that a hard road just became a little more difficult. **TFL**

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Endnotes

[1]8 U.S.C. § 1101(a)(42)(A); 8 U.S.C. § 1158(b)(1)(B)(i).

[2]*See*, for example, *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991) (determination that a female who had been raped and beaten by guerrillas was not a member of a particular social group for asylum purposes).

[3]These claims include those from former gang members and women who fear being raped by gang members. For a good discussion of these other groups, *see* Matthew J. Lister, *Gang-Related Asylum Claims: An Overview and Prescription*, 38 U. Mem. L. Rev. 827, 831–832 (Summer 2008).

[4]8 C.F.R. § 208.

[5]*In re D- V-* (IJ Castro, Sept. 9, 2004). The slip opinion can be found at refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/H.002.pdf.

[6]*Id.*, slip opinion at 15.

[7]502 F.3d 285 (3rd Cir. 2007).

[8]*Matter of S- E- G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E- A- G-*, 24 I&N Dec. 591 (BIA 2008).

[9]*Matter of S- E- G-*, at 584.

[10]*Id.*

[11]*Id.* at 587.