
¹The abbreviation "A.R." refers to the Administrative Record which was previously filed with this Court.

opinion and membership in a particular social group. A.R. 2-3.

While a member of the Salvadoran Military, Menjivar became involved in a criminal scheme, under the direction of his commanding officer, to steal airplane engines and fuel.

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A.R. 3. This petivion for reviefefollowed.

STATEMENT OF JURISDICTION

The BIA's jurisdiction arose under 8 C.F.R. §§ 3.1(b)(2) and 240.53(a) (1998), which grant the BIA appellate jurisdiction over

on account of membership in a "particular social group" where Menjivar's propomtivar rBT unt 8t come within this Court's definition of "particular social group." See INA § 208(a), 8 U.S.C. § 1158(a); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Elias-Zacarias, 502 U.S. at 478; Safaie v. INS, 25 F.3d 636 (8th Cir. 1994);

Menjivar has a mother, three sisters, and two brothers who are still living in El Salvador. A.R. 128. Menjivar's father was

²Menjivar also testified that two of his uncles, a cousin, and friends were killed by the Salvadoran Government as a result of the civil disturbance in that country. A.R. 123-24.

An evidentiary hearing on the merits of Menjivar's asylum

at the deportation hearing in 1994 whether his family had received recent inquiries as to his whereabouts, Menjivar was

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too broad. A.R. 62. The Immigration Judge stated that the individuals in the proposed group did not constitute a "recognizable and discreet particular social group for purposes of the Immigration and Nationality Act." A.R. 62-63. The Immigration Judge further noted that even if he narrowed the group to those members of the "military mafia" who spoke out against corruption, Menjivar's claim would still fail since he never took affirmative steps to reveal the corruption he was involved in. A.R. 63. Finally, the Immigration Judge stated that even if he were to conclude Menjivar is a member of a group, the evidence still fails to show that the government sought to persecute those members in the group. A.R. 63.

Stated simply, the Immigration Judge determined that Menjivar had a personal fear of retribution from his lieutenant on account of Menjivar's personal knowledge of, and ability to identify participants in, the criminal scheme. A.R. 63. The Immigration Judge concluded that this did not constitute persecution on account of a protected asylum ground. A.R. 63. Since Menjivar was unable to meet the standard for proving asylum, the Immigration Judge also concluded that Menjivar did not meet the higher standard of proof for withholding of removal. A.R. 64.

unaware of anyone attempting to locate him since 1991. A.R.

3. Based upon this information, the BIA concluded that there was no adequate basis to support Menjivar's claim of a well-founded fear of persecution if returned to El Salvador. A.R. 3.

SUMMARY OF THE ARGUMENT

Substantial evidence of record supports the BIA's conclusion that any interest shown in Menjivar by the army or Lt. Azanudo was on account of his ability to identify persec.

was limited to potential prosecution for any ade

founded fea.

Concerning membership in a particular social group, Menjivar fails to establish that his proposed social group is one that is recognized under the law of this Circuit and decisions of the BIA which are afforded substantial deference in this area. Specifically, Menjivar's proposed social group fails to display the necessary "immutable characteristic." Moreover, even if this Court accepts Menjivar's proposed social group, his claim still fails because Menjivar is unable to show that Lt. Azanudo specifically targeted him for Conceup is

I. EVIDENTIARY STANDARD AND STANDARD OF REVIEW FOR
MENJIVAR'S
ASYLUM AND WITHHOLDING CLAIM.

A. Burden of Proof.

Under section 208(a) of the INA, 8 U.S.C. § 1158(a), the Attorney General is authorized to grant asylum to "refugees." INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987); Daiga v. INS, 183 F.3d 797, 798 (8th Cir. 1999);

account of a

qualifying ground; and (2) that he merits asylum as a matter of discretion. See 8 C.F.R. § 208.13.

To satisfy the well-founded fear test for asylum eligibility "an asylum applicant must show that his or her fear is genuine (the subjective component), and that a reasonable person in the same circumstances would fear persecution if returned to the applicant's native country (the objective component)." Lopez-Zeron, 8 F.3d at 638; see also Cardozo-Fonseca, 480 U.S. at 430-31; Feleke, 118 F.3d at 598; Hamzehi v. INS, 64 F.3d 1240, 1242 (8th Cir. 1995).

Specifically, the "objective component is satisfied with credible, direct, and specific evidence of facts that show a reasonable person in the alien's position would fear persecution if returned to the alien's native country." Ghasemimehr v. INS, 7 F.3d 1389, 1390 (8th Cir. 1993) (per curiam); see also Yacoub v. INS, 999 F.2d 1296, 1297 (8th Cir. 1993).

B. Standard of Review.

This Court reviews issues of fact, including BIA determinations that an applicant failed to establish his statutory eligibility for asylum and withholding of

deportation, for substantial evidence. Elias-Zacarias

Menjivar's fear of potential criminal "prosecution" for desertion and larceny does not constitute a well-founded fear of "persecution" on account of a political opinion. In asylum

criminal scheme directed by Lt. Azanudo and that Lt. Azanudo may be working for a larger "military mafia" group. A.R. 110.

⁵ Respondent acknowledges the fact that Lt. Azanudo

conclusion that Menjivar does not have a well-founded fear of "persecution" on account of

a political opinion, and that Menjivar failed to produce the compelling evidence needed to overturn the BIA's decision.

B. Substantial Evidence Supports The BIA's Finding That

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A.R. 147; Petitioner's Brief at 15. This social group, as defined by Menjivar, does not meet the definition of "particular social group" that is recognized by this Court.

This Court has acknowledged a three-part test for obtaining asylum based upon membership in a particular social group. See Safaie v. INS

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Under the Matter of Acosta test, "immutability" is the central focus of the inquiry. Numerous circuit court and BIA decisions have applied the Acosta immutability standard to recognize particular social groups. See, e.g., Lwin, 144 F.3d at 511-12 (adopting the Acosta standard in accepting a group described as "parents of Burmese student dissidents"); Fatin, 12 F.3d at 1239-41 (observing that an Iranian woman who refused to conform to the Iranian Government's gender-specific laws and social norms may well satisfy the Acosta definition "simply because she [was] a woman"); Ananeh-Firemp [was] a INSj ET 349.

Hernandez-Montiel, 225 F.3d 1084, 1093 (9th Cir. 2000) ("We thus hold that a 'particular social group' is one united by a voluntary association, including a former association or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.").

"immutable" if it is the product of "voluntary" choice by the individual, and is subject to his "voluntary" control or change. Cf. Acosta, 19 I. & N. Dec. at 234 (finding group of taxi drivers did not constitute a particular social group since the membership in that group was something that the individuals had the power to change). Certainly an individual has the voluntary choice and control over whether he wants to report crimiu3fctndity, espesociinlt crimiu3fctndityer ichal

⁷Because substantial evidence supports the denial of asylum, this Court should also affirm the BIA's denial of withholding of deportation. See

⁸Menjivar also acknowledges that each of the

take administrative notice depends on the particular case before it."). The Tenth Circuit disapproved of administrative

the record. A.R. 2-3. The BIA's recitation of facts included information concerning Menjivar's criminal scheme, the fact that his family still resides in El Salvador unharmed, and that Menjivar is unaware of anyone seeking his whereabouts since 1991. A.R. 2-3. Based upon this thorough review of the record, the BIA concluded that a reasonable person would not fear persecution on account of political opinion or membership in a particular group.

Accordingly, the BIA, in compliance with the law of this Circuit (see Wojcik, 951 F.2d at 173) properly took administrative notice of facts concerning changes in the country conditions of El Salvador and complied with due process as evidence by a decision that was well-reasoned and represented a thorough reading of the record.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the BIA and deny the petition for review.

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