

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
800 DOLOROSA, SUITE 300
SAN ANTONIO, TX 78207

IN THE MATTER OF)
)
D. [REDACTED] V. [REDACTED])
)
RESPONDENT)
)
IN REMOVAL PROCEEDINGS)

Case Number: A [REDACTED]

CHARGE: Section 212(a)(6)(A)(i) entry without admission or parole.

APPLICATION: Asylum under Section 208
Withholding of Removal under Section 241(b)(3)
Protection under the Convention Against Torture 8 CFR 208.16
Voluntary departure under Section 240(b)

ON BEHALF OF THE RESPONDENT

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ON BEHALF OF THE
GOVERNMENT

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DECISION OF THE IMMIGRATION JUDGE

I. Procedural History.

The respondent is a nineteen-year-old man who is a native and citizen of Honduras. He was placed in removal proceedings on July 6, 2002, by the filing with the immigration court of the Notice to Appear (NTA). [Exhibit 1]. The respondent was charged with being subject to removal under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act). This charge was

based upon allegations that the respondent had entered the United without admission or parole at or near Eagle Pass, Texas on or about June 20, 2002. [Exhibit 1].

The respondent, through counsel, conceded proper service of the NTA, admitted all four of the factual allegations contained in the NTA, and conceded removability as charged. Respondent refused to designate a county of removal, should removal become necessary; the Court then designated Honduras as the country of removal. Based upon the respondent's pleadings and there being no other issue of law or fact relating to the charge of removal, removability is established. *See* 8 C.F.R. § 1240.10(c) (2004).

As relief, the respondent indicated that he would apply for political asylum, withholding of removal under the Act, withholding of removal pursuant to the Convention Against Torture and, in the alternative, voluntary departure. The respondent submitted an application for asylum. [Exhibit 2]. The respondent testified in support of his application. He also submitted numerous documents in support of his application. [Exhibits 3, 4, 6 and 7]. The Court also considers the Profile of Asylum Claims and Country Conditions report filed by the government. [Exhibit 5].

II. Testimony.

The respondent arrived in the United States from San Pedro Sula, Honduras when he was seventeen years old. The respondent stated that he fled Honduras because members of the Mara Salvatrucha ("MS") gang harassed him and attempted to kill him for his refusal to join their gang. He testified that the MS gang has been operating in his neighborhood since approximately 1995. However, he stated that the MS gang did not start to harass him until 1998. The respondent then proceeded to detail different violent encounters with the MS gang.

The respondent testified that on one occasion, he was returning from work when he saw two MS gang members hiding near the entrance to the neighborhood. He stated that these two gang members carried homemade guns called "chinba." The respondent testified that as he tried to cross the road they fired shots at him. He stated that he rode his bicycle next to a truck to shield himself from their bullets. The respondent testified that the gang members were on foot and they could not keep up with him on his bicycle. The gang members were, however, able to shout

threats and obscenities at the respondent who was able to arrive at his home without further incident. However, the gang members went by the house and continued to threaten the respondent.

The respondent recounted a similar experience he had while going to work on his bicycle. He testified that he saw some gang members waiting for him at the exit of the neighborhood. As the respondent approached, one of the gangsters asked the respondent what he was waiting for, referring to the respondent's decision not to join the MS gang. The respondent answered and told the gang members that he was not going to join their gang because gang-life is not his style of life. The gang members pushed the respondent and grabbed him by the collar. At this time, a street vendor from across the street tried to intervene. As the gang members turned to push her away and tell her that this was not her problem, the respondent got back on his bike and rode back home. The gang members threw rocks at the respondent. The respondent went back to his home hoping the gang members would disperse, but they did not leave that day so the respondent did not go to work.

The respondent stated that he was attacked another time while riding his bike. He testified that MS gang members kicked him and told him that they were tired of waiting for him to join the gang. They told the respondent that "it was not worth wasting bullets in [his] body," so they left him beaten on the street.

The respondent testified that each of these confrontations took place before May 1, 2001. On May 1, 2001, the respondent was walking home with his girlfriend at approximately 8:30 p.m.. He noticed a gang member waiting for him one house away from the respondent's home. Soon after, other gang members approached them from behind and told the respondent not to stop walking. Other gang members appeared and demanded that the respondent pay "rent" so as not to have any trouble with them.¹ By this time, the respondent's family had come out of the house and was watching the events unfold. The respondent begged the gang leader not to do anything to him. The gang leader responded that this was the last chance for the respondent to join the gang or they would kill him.

¹The respondent explained to the Court that the gang members required people to pay a percentage of their paycheck every Friday to the gang as "rent" money. The respondent testified this was really protection money.

At this time, one of the gang members, [REDACTED], came and grabbed the gang leader's arm. The respondent and [REDACTED] had been classmates in school. [REDACTED] told the gang leader that the respondent did not want to be involved with the gang. The leader then told the respondent that he should follow [REDACTED]'s example and join the gang. The leader said that he had to threaten [REDACTED]'s family before he joined the gang. The gang leader had a gun in his hand and [REDACTED] pushed the gun down so it was no longer pointed directly at the respondent. The leader then reiterated that if the respondent wanted to live, he had to join the gang. The respondent told him that he did not want to join the gang because he wanted to go to school and get a job and support his family. The gang leader became "very mad" and fired his weapon at the respondent who fled into his house. He remembered hearing "many, many shots" before the shooting stopped.

After the shooting stopped, the respondent heard someone knocking on the door. He was too scared that there were gang members so he refused to open the door. However, after being convinced it was his family, he opened the door. His family saw that the respondent had been wounded and wanted to take him to the hospital. However, that they had no means of transportation, as they did not have a car. Two of the respondent's good friends then offered to drive him to the hospital.

The respondent does not remember anything else from that day. The next day, he learned that he had been shot two times in the right leg and one time in the left leg. Two of the three bullets entered and exited the leg, giving the respondent a total of five wounds. The doctors prescribed antibiotics and wanted him to remain in the hospital. However, the respondent and his family feared for his safety because it is common for gang members to appear at hospitals also. Thus, he left the hospital earlier than recommended. He did not return home; rather, he went to a different municipality to live with a family member.

The respondent stated that his problems did not end, despite not living in the same neighborhood. He still had to return to his native municipality because he attended school there and was employed there as well. He stated that he again saw gang members waiting for him, particularly at his job. His job was very secure and he could ride the bus to get to and from work without any problems. However, a friend of his, [REDACTED], told the respondent that he had heard the gang members were asking people about his whereabouts. [REDACTED] told the respondent he had overheard such conversations while working in a warehouse, whose owner's son was a gang

member. ██████ implored the respondent to quit working. The respondent had already stopped going to work when ██████ advised him of the circumstances.

The respondent also testified that he saw gang members waiting for him at school. He was able to avoid them by getting rides to and from school from a professor and by driving different routes to avoid detection.

On another occasion, the respondent was at a festival when he saw members of the gang. He tried to avoid them but they eventually saw him and chased him. He was able to escape by asking a taxi driver for help. The taxi driver drove him home before the gang members could catch him.

The respondent's family has experienced problems since his absence. He testified that some gang members saw the respondent's six year old nephew with his family. A gang member approached them and put a pistol to his nephew's head and asked for information about the respondent. The respondent's mother has been harassed by the gang members, too. She has been robbed and the respondent fears for her safety. He testified that they no longer communicate over the phone because she worries about the privacy of their conversations.

The respondent did not report being shot to the police. He stated that in many instances, the police and gang members are in cahoots and share the proceeds from robberies and other illicit activities. According to the respondent, the police do not care about the safety of the citizens because the police are connected to and work so closely with the gang members.

The respondent stated that he has never been affiliated with the MS gang at anytime in his life. He never joined because he totally disagrees with them. He testified that he hopes to have a good future for himself. This would not be possible if respondent were to join the gang.

The respondent stated that he is aware of other youth who have refused to join gangs in Honduras. One such person left the city for a period of time. He returned home some time later and was killed almost immediately. Another young man who had refused to join a gang eventually gave in and joined, but later he tried to leave the gang. The gang broke into his home and killed his mother as she tried to protect her son. This young man has since disappeared.

The respondent stated that the MS gang is not only a strong presence in his neighborhood, but all over Honduras and, indeed, all over Central America. He testified that is why he came to the United States. The MS gang is well organized and has communication lines throughout Central America. He testified that he does not feel like he could be protected in other areas of Honduras. He testified that the situation in Honduras has not changed since he's been in the United States.

The respondent also testified that he has sleeping problems as a result of his attack in Honduras. He stated that his legs are weak and they often cramp. He testified that he cannot participate in sports and that he cannot walk "a lot." He also stated that he has "no hope of graduating" and describes his life as "backward."

III. Asylum.

An applicant requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under section 208 of the Act. *See* 8 C.F.R. § 208.13(a) (2004); *see also Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *Matter of Acosta*, 19 I&N Dec. 211, 215 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987). To qualify for a grant of asylum, the respondent must credibly demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act. *See* INA § 208(b)(1); *see also*, INA § 101(a)(42)(A); 8 C.F.R. § 208.13(a) (2004). As such, he must demonstrate that the alleged persecution or well-founded fear of persecution is "on account of his race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A). Additionally, the respondent must establish that he is unable or unwilling to avail himself of the protection of his country of nationality or last habitual residence. *Id.* Moreover, the respondent's fear of persecution must be countrywide. *See Matter of Acosta*, at 235; *see also, Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988). Finally, the respondent must demonstrate that he is eligible for asylum as a matter of discretion. *See* INA § 208(b)(1); *see also, INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

A. Credibility.

In all applications for asylum, the court must make a threshold determination of the applicant's credibility. *See Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998). In the present case, the court finds the respondent to be credible. He was open, descriptive and testified candidly about the circumstances that forced him to flee

Honduras. He provided dates and places where relevant. The respondent was consistent during his individual hearing, even under cross-examination. Importantly, the respondent's testimony in court echoed Respondent's twelve-page affidavit in the record. The respondent testified with confidence and showed great composure, especially for someone of his age. In sum, the respondent presented a plausible and coherent account of the basis of his alleged fear. *See Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989); *see also*, 8 C.F.R. § 208.13(a) (2004).

B. Past Persecution and/or Fear of Future Persecution.

An applicant has a well-founded fear of persecution if: (1) the applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group or political opinion; (2) there is a reasonable possibility of suffering such persecution if he or she were to return to the country; and (3) he or she is unable or unwilling to return to, or avail himself or herself of the protection of that country because of such fear. 8 C.F.R. § 208.13(b)(2)(i) (2004).

Persecution is defined by the UNHCR Handbook as a "threat to life or freedom". UNHCR Handbook, at para.51. The BIA has defined persecution as a "threat to the life or freedom of, or the infliction of suffering upon, those who differ in a way that is regarded as offensive." *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985), citing *Cardoza-Fonseca, supra*. Where there is a difference between the persecutor's view or status and that of the victim, oppression that is inflicted because of a difference that the persecutor will not tolerate has been held to be persecution. *Matter of Maldonado-Cruz*, 19 I&N Dec. 509, 513, citing *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985). The respondent's case demonstrates persecution.

An applicant who can establish that he or she has been the subject of persecution in the past shall be presumed to have a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1) (2004). This regulatory presumption may be rebutted if the DHS establishes by a preponderance of the evidence that either (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or (2) the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality and, under the circumstances,

it would be reasonable to do so. 8 C.F.R. §§ 208.13(b)(1)(i), (ii) (2004).²

The court finds that the respondent has established that he has suffered past persecution and is presumed to have a well-founded fear of future persecution in Honduras. The respondent credibly testified regarding various instances of mistreatment and harm which he endured at the hands of the MS gang members. Respondent was beaten, pushed off his bicycle, chased and had rocks thrown at him. Members of the MS gang waited for him in the mornings on the way to work, in the afternoons after work and at night. They found him during a city festival. They threatened him with death if he refused to join their gang. Finally, the respondent testified that he was shot three times in the leg as a result of his refusal to participate in their gang lifestyle.

Importantly, the respondent has submitted an affidavit from ██████████ ██████████, M.D., M.P.H. [Exhibit 3, pages 13-35]. He is a licensed physician in both Massachusetts and Texas. He currently serves as the senior medical advisor of the Boston Center for Refugee Health and Human Rights at Boston University Medical Center, a facility he describes as “a multidisciplinary clinic that receives federal monies and that provides comprehensive care to survivors of torture, refugee and related trauma.” He states that he has been trained in “in the use of medical skills for the documentation and treatment of survivors of torture and refugee trauma.”

Dr. ██████████ has seen the respondent on three different occasions for evaluation. Dr. ██████████ concluded that five lesions found on Respondent are consistent with either entry or exit wounds, such as gunshot wounds. Dr. ██████████ stated that Respondent “presents on examination all the criteria to define [post traumatic stress disorder] according to the American Psychiatric Association Diagnostic Statistical Manual (DSM) IV-TR: duration of symptoms for more than a month, re-experiencing trauma, avoidance, and hyper-vigilance.” In addition, Dr. ██████████ found that the respondent’s re-telling of the events in Honduras was consistent among his visits. In short, Dr. ██████████’s affidavit, with the accompanying photographs and medical evaluations, is strong evidence that the respondent indeed suffered, at the very least, various gunshot wounds to the legs. Certainly, being shot numerous times in the legs by members of a violent gang whom the Honduran government has heretofore been unable to contain would

²The Court notes that the government has not presented any evidence of either changed circumstances or of the possibility of relocation.

qualify as “infliction of suffering” or “infliction of harm” and thus be considered persecution for the purposes of immigration law. *See Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

The court finds that the respondent’s testimony, when considered in conjunction with the evidence in the record, is sufficient to establish that the respondent’s fear is both subjectively genuine and objectively reasonable, especially with the understanding that the respondent suffered persecution before reaching adulthood. *See Matter of R-O-*, 20 I. & N. Dec 455, 458 (BIA 1992). *See also, Guidelines for Children’s Asylum Claims*, INS Memo (December 10, 1998), as reproduced in 76 Interpreter Releases No. 1, pages 5-34.

C. Persecution on Account of One of the Five Enumerated Grounds.

A finding of past persecution and/or a fear of future persecution is not, of itself, sufficient to qualify the respondent for asylum. The respondent must also demonstrate that the persecution is on account of race, religion, nationality, membership in a particular social group or political opinion. *See* INA § 101(a)(42)(A); 8 C.F.R. § 208.13(b)(2)(i)(A) (2004). The respondent bases his fear of persecution on membership in a particular social group and political opinion.

1. Membership in a Particular Social Group.

To show that the respondent is a member of a particular social group, he must establish “that he was a member of a group of persons that share a common characteristic that they either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.” *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002), *citing, Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). This standard is often referred to as the “immutable characteristic” test. *Matter of Acosta* at 233. In addition, an applicant asserting membership in a particular social group must show how members of the social group are perceived by the alleged persecutor, by the asylum applicant and by other members of the society. *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), certified to the Atty. Gen. March 11, 2002. If the respondent can establish membership in a particular social group, he must then prove a nexus between his membership and the persecution he suffered. *Ontunez-Tursios* at 353.

In the present case, the respondent asserts that he “is a member of the

particular social group who have been actively recruited by gangs, but who have refused to join because they oppose the gangs.” The respondent categorizes this group as “limited” and “discrete,” explaining that it “does not include, for example, youth who were targeted by gangs for criminal purposes.” Likewise, his claimed social group “does not include all youth in Honduras, because the gangs do not persecute all youth, only those who are opposed to them and resist their attempts at recruitment because of that opposition.”

At first blush, the respondent’s claimed social group seems very similar to a social group that has already been addressed by the Board of Immigration Appeals (“Board”). In *Matter of Sanchez-Escobar*, 19 I&N Dec. 276, 285 (BIA 1985), *aff’d*, *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), the Board found that a claimed social group which was “comprised of young (18 to 30 years of age), urban, working-class males who have not served in the military or otherwise affirmatively demonstrated their support for the Government of El Salvador” did not constitute a social group. The Board stated that “the above characteristics, singularly or in the aggregate, [do not] form the basis of a realistic likelihood of persecution.” *Id.* at 286. The Board explained that the only characteristic which could form the basis of persecution, as contemplated by the Act, is the “non-support or opposition to the respective political positions of the Government and the guerilla forces.” *Id.* Even in that circumstance, the Board held that, “the resulting risk of persecution is not limited to young urban males but equally affects all segments of the rural and urban populations of El Salvador.” *Id.*

The key difference between the respondent’s situation and the respondents’ circumstances in *Sanchez-Escobar* is that the respondent has demonstrated why the MS gang targeted him for persecution. The respondent was not harassed by the gang members because he is young, or because he is male or because he comes from the lower economic class in Honduras. Indeed, the respondent testified that he had learned to adjust to the strong gang-presence of every day life. It was not until the MS gang actively sought him out for membership that he began to be persecuted. The respondent has credibly testified numerous times that he does not agree with the gang member style of life and that he expressed his views many times to different gang members. Even risking serious bodily harm, indeed death, He told the leader of the MS gang that he would rather go to school, obtain employment and have a family than become a member of his gang. That stance against the gang culture and lifestyle resulted in the respondent suffering multiple gunshot wounds. It also evidences that his anti-gang sentiments are an immutable

characteristic of the respondent such that he “cannot change [it] or should not be required to change [it] because it is fundamental to [his] individual identit[y] or conscience[.]” *Matter of Acosta*, at 233.

Moreover, the evidence in the record shows that the gang members view people similarly situated to the respondent as threats to their control and their power over the territories the gangs control. The respondent testified that the gang did not harass him until it became clear that he did not want to participate in gang life. Importantly, the respondent testified that he personally knows of two people who refused to join a gang. According to the respondent, one fled the city for a period of time, only to be killed very shortly after he returned. In another instance, an individual who gave in and finally joined the gang but later decided to leave the gang was shot in his own home. That person’s mother was killed as she tried to prevent the gang members from killing her son. The respondent also testified that a friend of his, ~~████~~, refused to join the gang as well. However, ~~████~~ joined the gang after his family was threatened. The court finds that the respondent’s credible testimony has established that the MS gang perceives the respondent as a threat and will take whatever measures necessary to see that Respondent either joins the gang or is eliminated. *See Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999).

The respondent is aware that the MS gang seeks his membership in their gang. He has seen gang members waiting for him as he goes to work, as he returns from work and during a city festival. When the respondent was shot, it was evening and there many gang members waiting for his arrival on his home street. In addition, the gang has found members of the respondent’s family and threatened the respondent through their actions toward his nephew and mother. The respondent has been told on different occasions that he is to join the gang or suffer the consequences. Furthermore, he recognizes that it is his refusal to join their gang that has resulted in the persecution he has endured.

Respondent has shown that society acknowledges a problem exists between the gangs and those who choose not to become gang members. Bruce C. Harris, Executive Director for Latin American Programs for Covenant House (“Casa Alianza”) submitted an affidavit on behalf of the respondent. [Exhibit 4, page 12]. Mr. Harris states that when “a young person refuses to join [a gang], the gang takes action against [the young person], just as they would against members of rival gangs.” Mr. Harris also states that based on his experience, “a person such as [Respondent] who has been targeted by the MS gang for assassination because he

refused to acquiesce and support their actions, would be at severe risk of harm if he returns to Honduras because he refused to join their gang.” From Mr. Harris’ statements, it is clear that the respondent’s persecution at the hands of the MS gang is not unique to the respondent; that is, the gang has harassed so many other people in the respondent’s situation that society is acutely aware of the consequences waiting those who choose not to participate in gang life.

Finally, the court would also note that a proposed rule would require an applicant to show that the “particular social group in which an applicant claims membership [is not] defined by the harm which the applicant claims as persecution.” Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76594-95 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208). The respondent meets this standard as well. In other words, the respondent’s defined social group precedes the persecution. That is, the respondent’s social group exists independently of any persecution members of the group suffer.

In sum, the court finds that the respondent has demonstrated that he has been persecuted on account of his membership in a social group. He has satisfied the requirements of both the Fifth Circuit and of the Board. The respondent has established that his refusal to join the MS gang directly resulted in his persecution.

2. Political Opinion.

In the alternative, the respondent asserts that he is eligible for asylum because he was persecuted on account of his political opinion. Applicants seeking “to gain asylum because of persecution due to political opinion . . . must show that [the] persecutor’s actions were motivated by the [applicant’s] political opinions.” *Ontunez-Tursios, supra* at 352, citing, *Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993). Central to such a claim is that the applicant “demonstrate through some evidence, either direct or circumstantial, that the persecutors know of [the applicant’s] political opinion and have or likely will persecute [the applicant] because of it.” *Id.*

The record evidences that at least some Honduran youth who join a gang do not do so for the purpose of committing criminal acts. [Exhibit 6, page 5]. Rather, gang membership may be a means to gain identity, protection and companionship. [Exhibit 3, page 48]. This is especially evident as many of the gang members are between the ages of 13 and 21 who come from structure-less families. [Exhibit 3,

page 47]. Understood in such a light, the role of gangs in Honduras, particularly the MS gang, becomes somewhat clearer. That is, implicit in the gang culture and lifestyle is a belief that the current political and social system has left many youth feeling abandoned. As a result, gang relationships are forged to combat the Honduran government's politics and youth are thus recruited to strengthen the gangs' numbers. In this way the Honduran gang movement is similar to guerilla recruiting in other South and Central American nations.

In the context of forced guerilla recruitment, an applicant's political opinion must be the focus of the claim. *INS v. Elias*, 502 U.S. 478 (1992). The Fifth Circuit has interpreted this language to require that the applicant show that (1) the alleged persecutor was motivated by political opinion; (2) that an applicant has made known his or her opposition to the persecutor's political opinion; and (3) that the persecution was because of the applicant's opposition to the persecutor's political opinion. *Rivas-Martinez v. INS*, 997 F.2d 1143, 1148 (5th Cir. 1993). In the context of general violence or civil disorder, the Fifth Circuit has restated that the asylum law is not intended to protect all persons who suffer harm from civil disturbances, which necessarily have political implications. *Campos-Guajardo v. INS*, 809 F.2d 285, 290 (5th Cir. 1987). "Asylum is not available to every victim of civil strife, but is restricted to those persecuted for particular reasons." *Id.* The respondent has such a particular reason. He does not base his fear of persecution on being a victim of gang crime. He does not base his fear on fear of the general danger caused by the violent existence of gangs. His fear is based particularly on his direct refusal to join the dominant gang in Honduras. His fear is not negated simply because general violence or civil disorder also exists in Honduras. *Eduard v. Ashcroft*, No. 03-60092 (5th Cir. July 21, 2004).

The respondent's anti-gang opinions are political in nature. His refusal to join the MS is an expression of an "anti-crime" opinion. The record is replete with evidence that gang membership necessarily involves criminal activities. Refusing to participate in a gang is a refusal to participate in crime and the criminal lifestyle. Opinions and views concerning crime are ultimately political opinion, even in this country. How to control it, how to prevent it, how to punish it, and even what it is, all are ultimately debated, defined and, one hopes, ultimately resolved in the political arena. Refusing to associate, even in the face of injury or death, with an organization whose culture and lifestyle is integrally involved in the business of crime is the ultimate expression of a political opinion. As the documentary evidence reflects, the gangs offer other benefits to their members, such as identity,

companionship, and self-esteem which have nothing to do with criminal activities. [Exhibit 3, pages 47-48]. The overriding concern for the respondent, however, was rejecting the pervasive criminal activities that went with the other "benefits" of gang membership.

The record shows that the MS gang's activities fall within the parameters of political opposition. The gang's conduct surely relates "to the . . . administration of government"; it "pertain[s] to . . . the exercise of the functions vested in those charged with the conduct of government"; and it has to "do with [the] organization or action of individuals, parties or interests that seek to control . . . action of those who manage affairs of a state."³ *Black's Law Dictionary* 1158 (7th Edition 1990). *See also, Chang v. INS*, 119 F.3d 1055, 1063 n.5 (3d. Cir. 1997) (quoting *Black's Law Dictionary* to define the term "political").⁴ The record shows that the MS directly affects the society and thus politics of the areas in which it operates. The MS essentially dictates to society with little interference from the established government.

The respondent made it known to the MS gang on numerous occasions that he opposed their gang-style of life. He was clear that he intended to follow the rules of society, to find honorable employment, to further his education and, at some point, to raise a family. That the respondent consciously made a decision not to participate the MS gang is the factual equivalent to voicing his support for the Honduran government and opposition to the gang's view of the ruling government. Finally, Respondent credibly testified that he the MS gang did not harass the respondent until he adamantly voiced his opposition to their gangster lifestyle. The court finds that the respondent has satisfactorily presented a credible claim for asylum based on political opinion.

³The court notes that Congress chose not to define the reach of the term "political opinion." When Congress passed the Refugee Act of 1980, which amended the asylum provisions, it reiterated that it wished to "insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations." *Campos v. Guardado*, 809 F.2d 285, 290 (5th Cir. 1987), *quoting*, H.R.Rep. No. 608, 96th Cong., 1st Sess. 17 (1979).

⁴While the Court is bound only by the precedent decisions of the Fifth Circuit Court of Appeals, *Matter of Cerna*, 20 I&N Dec. 399, 401 (BIA 1991), the Court may give due consideration to publicized decisions of a district court or other courts of appeals where the reasoning is persuasive, *Matter of K-S-*, 20 I&N Dec. 715, 718-719 (BIA 1993).

D. Unable or Unwilling to Avail Himself of His Country's Protection.

The evidence reflects that the respondent did not report his problems with the MS gang to the Honduran authorities. The documentary evidence, however, corroborates the respondent's testimony concerning his reluctance to do so. Reporting gang activities would be at best, pointless, and at worst, dangerous. The record shows that Honduras has experienced "serious" gang problems for decades. [Exhibit 5, page 10; Exhibit 6, page 5]. Amnesty International reports that from 1998 the extrajudicial killing and murder of young people in Honduras has increased dramatically and that "the involvement of members of the security forces and other people acting with the implicit consent of the authorities has been reported in an alarming number of cases. . . ." [Exhibit 6, page 2]. San Pedro Sula, the respondent's home city, was considered the most violent and dangerous city for youth in 2003. [Exhibit 6, page 31].

The MS gang has been described as an international organization that is involved with drug trafficking, weapons smuggling, narcotic sales, aggravated assaults and rapes. [Exhibit 3, pages 85-86; Exhibit 4, page 1]. It is the largest gang in Honduras where the two main gangs are the MS and the "18". Each has its affiliate gangs. [Exhibit 3, page 57]. Gang members have their own code of justice, are not easily scared, and are not easily intimidated by authority. [Exhibit 3, page 47]. The respondent testified that MS gang members collected protection money from residents in the areas under the gang's control, which residents pay in order to ensure their safety. This assertion is supported by the record. [Exhibit 3, pages 55-56, 86]. In areas controlled by a gang the civilians must adapt to the system imposed by the gang or suffer the consequences, including death. [Exhibit 3, page 56]. The record also shows that the Honduran government has been unable to quell the "human rights crises" stemming from the street children and the subsequent gang problems. [Exhibit 6, pages 7, 33; Exhibit 4, page 1].

The record contains numerous examples of the effects of gangs on society in Honduras and the government's inability to control them. The documentation supports the continuing and even increasing risk to Hondurans from gangs. The court is satisfied that the Honduran government is unable to protect the respondent from persecution by the MS, a group which the government is unable, and in some instances unwilling, to control.

E. Relocation within Honduras.

In cases where the applicant for asylum has established past persecution it is presumed that internal relocation would not be reasonable unless the government establishes by a preponderance of the evidence that, *under all the circumstances*, it would be reasonable for the applicant to relocate. 8 C.F.R. §208.13(b)(3)(ii) (emphasis added). If past persecution does not exist then the asylum applicant has the burden of establishing that relocation would not be reasonable. 8 C.F.R. 208.13(b)(3)(i). Factors to consider when evaluating all the circumstances include such things as any ongoing civil strife; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. 8 C.F.R. 208.13(b)(3).

The fact that the respondent could relocate "if necessary" is not indicative of whether relocation would be "not reasonable" as required by the regulations. *Eduard v. Ashcroft, supra* at p. 20. The only evidence offered by the government, Exhibit 5, does not address the issue of internal relocation as it relates to the respondent's situation. The respondent's documentary evidence, previously discussed, reflects that the gang influence in Honduras is pervasive and growing. The court is satisfied under all the facts and circumstances presented herein that it is not reasonable for the respondent to relocate to another part of Honduras safely.

F. Discretion.

Statutory and regulatory eligibility for asylum, whether based on past persecution or a well-founded fear of future persecution, does not necessarily compel a grant of asylum. *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). An applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted. *Id. See also, Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984). The record is absent any factors that would necessitate an adverse discretionary finding. As such, the Court finds that Respondent is statutorily eligible for asylum and merits such relief as a matter of discretion.

Moreover, the court finds respondent eligible for asylum under *Matter of Chen*, 20 I&N Dec. 16, Int. Dec. 3104 (BIA 1989). *Chen* recognizes that there are instances where a favorable exercise of discretion is warranted for humanitarian reasons even when the likelihood of future persecution is remote. *Id.* at 19. The

respondent's case is such an instance. The respondent was barely turning 16 years of age when the events about which he testified occurred. It was two weeks after his 16th birthday that he was shot. The respondent suffered not only physical injuries but emotional injuries as well. He was forced to abandon his education, his employment, and ultimately, his family and country. The effects on the respondent of these events have been significant, as evidenced by the record. Given the respondent's young age and the pervasive nature of the harm he suffered at the hands of the MS, the court is satisfied that even if there were no likelihood that the respondent would suffer future persecution on their hands, the respondent merits a humanitarian grant of asylum under *Chen*.

IV. Other Forms of Relief

As Respondent has shown that he merits a grant of asylum, the Court does not find it necessary to reach the issue of whether Respondent qualifies for withholding of removal pursuant to either section 241(b)(3) of the Act or 8 C.F.R. § 208.16 (2004). Likewise, it is not necessary to determine Respondent's eligibility for voluntary departure.

Accordingly, after careful consideration, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's application for asylum pursuant to section 208 of the Act is **GRANTED**.

Date September 9, 2004



Susan E. Castro
Immigration Judge