

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40151

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VINCENTE PAZ-CABALLERO,

Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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Petition for Review of an Order of  
the Board of Immigration Appeals  
(A-72-409-291)

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(February 2, 1995)

Before SMITH and BARKSDALE, Circuit Judges, and BUCHMEYER,\*  
District Judge.

JERRY E. SMITH, Circuit Judge:\*\*

Vincente Paz-Caballero seeks review of the denial of his application for asylum and withholding of deportation by the Board of Immigration Appeals ("BIA"). He argues that the Immigration Judge ("IJ") erred in finding that he does not face persecution on

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\* Chief District Judge of the Northern District of Texas, sitting by designation.

\*\* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

account of a required statutory ground. Concluding that the IJ's decision was based upon substantial evidence, we deny the petition for review.

I.

Paz-Caballero is a citizen of Honduras. At age sixteen, he was conscripted into the military, where, he claims, Captain Quintanilla, his superior officer, ordered him to murder an army sergeant. Paz-Caballero refused, but Quintanilla threatened to kill him unless he obeyed. He then obeyed.

Not surprisingly, Paz-Caballero's deed was not the end of his troubles. The Honduran security forces targeted him in their investigation of the killing. He was arrested and interrogated, obtaining release only by bribe. When he returned to his unit, the duplicitous Quintanilla ordered him to desert. Paz-Caballero, fearing for his life because of Quintanilla's threats and the sergeant's vengeful family, fled to the United States, entering the country in 1989. He later learned that he had been charged with the sergeant's murder.

The Immigration and Naturalization Service eventually caught up with Paz-Caballero. After being served with an order to show cause in 1993, he admitted that he had entered the United States without inspection. An IJ found him deportable pursuant to 8 U.S.C. § 1251(a)(1)(B). Although crediting his testimony, the IJ found Paz-Caballero ineligible for either asylum or withholding of deportation, because he had not met his burden of proof in showing

that he faced persecution on account of a statutory basis. The BIA affirmed.

## II.

The amended Immigration and Nationality Act of 1952 (the "Act") allows the Attorney General to permit a grant of asylum to aliens who demonstrate that they are "refugees." 8 U.S.C. § 1158(a). The Act in relevant part defines refugees as

any person who is outside of such person's nationality . . . , and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

8 U.S.C. § 1101(a)(42) (emphasis added). The mechanism by which an alien may apply for asylum is set forth at 8 C.F.R. § 208 (1993).

In order to present a prima facie case for asylum, an alien must demonstrate either past persecution or that a reasonable person in his circumstances would fear persecution if deported. Guevara Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987); see also 8 C.F.R. § 208.13(1), (2) (establishing refugee status). The alien must also demonstrate that the fear of persecution is "on account of" one of the five enumerated factors. Zamora-Morel v. INS, 905 F.2d 833, 837 (5th Cir. 1990). Finally, an applicant must show that "he is unable or unwilling to return to or avail himself of the protection of that country because of such fear." Adebisi v. INS, 952 F.2d 910, 912-13 (5th Cir. 1992) (quoting 8 C.F.R. § 208.13(1)).

The requirements for a prima facie claim for withholding of deportation are similar to those for an application of asylum. Adebisi, 952 F.2d at 9138; 8 C.F.R. § 208.16. For a petitioner to establish withholding of deportation, however, he must demonstrate not simply past persecution or a well-founded fear of persecution but that, if deported, "it is more likely than not that he would be subject to persecution on one of the specified grounds." INS v. Stevic, 467 U.S. 407, 429-30 (1984); 8 C.F.R. § 208.16(b). This standard is "more stringent" than that required for an application for asylum. Castillo-Rodriguez v. INS, 929 F.2d 181, 185 (5th Cir. 1991). Accordingly, a petitioner who fails to present a claim for asylum necessarily fails to present a claim for withholding of deportation.

We review the determination of the BIA for denials of asylum and withholding of deportation under the substantial evidence standard and will uphold its decision if it is "supported by reasonable, substantial, and particular evidence on the record considered as a whole." INS v. Elias-Zacarios, 112 S. Ct. 812, 815 (1992). "It can be reversed only if the evidence presented . . . was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." Id.

Here, Paz-Caballero argues that he was or will be persecuted, because he is a member of a "particular social group." He was a sixteen-year-old military conscriptee who was forced to obey the orders of his superior officers. He also claims that he has a well-founded fear of persecution if he returns to Honduras, as he

is a member of the "non-military elite" and will not be able to defend himself effectively against either official prosecution or execution by Quintanilla or the sergeant's family.

This court has never defined directly the meaning of "particular social group" as used in the Act. We note that this potentially far-reaching phrase is not self-defining. Both the BIA and other courts have struggled to limit the concept. See, e.g., Matter of Acosta, I. & N. Dec. 211, 233 (BIA 1985); Fatin v. INS, 12 F.3d 1233, 1238-40 (3d Cir. 1993).

We need not and do not take on that task here. Instead, we assume, arguendo, that Paz is a member of a particular social group, either Honduran male draftees or non-military elites. Nonetheless, Paz is not a refugee under the Act

Conscription, without more, is not persecution under the Act. "International law and Board precedent are very clear that a sovereign nation enjoys the right to enforce its laws of conscription, and the penalties for evasion are not considered persecution." M.A. A26851062 v. INS, 899 F.2d 304, 312 (4th Cir. 1990) (en banc).

Paz-Caballero, who credibly testified that he was drafted at age sixteen, does note that the legal draft age according to the Honduran Constitution is eighteen to thirty. He thus argues that the act of conscription was persecution, because he was under age.

It may be true that military forces in Honduras are conscripted in an overly broad manner that is inconsistent with the tenants of Honduran law. This point is relevant to whether Paz-

Caballero was a member of a particular group different from the usual draftee. We have conceded that point for the sake of argument. Paz-Caballero's age, however, is not relevant to whether military service is itself persecution: The act of military service is not transformed from persecution to a necessary patriotic duty by the mere passing of a birthday.

Persecution is "a showing by the alien that 'harm or suffering will be inflicted upon him for possessing a belief or characteristic a persecutor sought to overcome.'" Guevara Flores, 786 F.2d at 1249 (quoting Matter of Acosta, I. & N. Dec. 211 (BIA 1985)); see also Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452 (9th Cir. 1985) (holding that persecution is infliction of suffering or harm upon one who differs in a way regarded as offensive to the persecutor). Paz-Caballero, however, was drafted in spite of his age, not because of it. The record merely supports the finding that the selection of sixteen-year-old draftees was based upon their membership in the pool of potentially effective soldiers. Paz-Caballero has made no showing that he was singled out for any other reason. Substantial evidence supports the conclusion that Paz-Caballero's military service was nothing more than that.

Paz-Caballero also argues that he has a well-founded fear of persecution if he is returned to Honduras, because he is a "non-military elite." He seizes upon a State Department advisory that reports that military personnel enjoy "relative immunity from prosecution and punishment." Accordingly, he believes that he will not be able to defend himself effectively.

Paz-Caballero may be prosecuted if he is returned to Honduras. That prosecution, however, will not be on account of his "race, religion, nationality, membership in a particular social group, or political opinion." Rather, he faces the legal sanctions of the state because he committed murder. See Saleh v. United States Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992) (holding that punishment for violation of a generally applicable criminal law is not persecution under the Act). While we are willing to assume, arguendo, that "military non-elites" could be a particular social group within the meaning of the Act, we cannot go so far as to believe that Congress meant to include murderers within the protected categories.

Paz-Caballero also argues that his status as a military "non-elite" may make his legal defense impossible. Such a conclusion, however, is grossly speculative. The record at best supports a finding that military personnel))a group that included Paz-Caballero))may enjoy a level of extra-judicial immunity in Honduras. Nonetheless, the IJ found that the result of Paz-Caballero's case was not foreordained, and Paz-Caballero could raise any defense of duress in a criminal case against him. Based upon our review of the record, we find that this conclusion is supported by substantial evidence.

Moreover, while Paz-Caballero may justifiably fear retribution by the sergeant's family or Quintanilla, such persecution would be the result of a private vendetta. Private vendettas are not usually a basis to support refugee status. The Act relates only to

persecution by authorities, supporters of the regime, the military, or the government, unless political conditions in the country are so specially oppressive that a wider range of claims of persecution must be given credence. Adebisi, 952 F.2d at 913-14 (citations and quotations omitted). Substantial evidence in the record supports the IJ's conclusion that any persecution that Paz-Caballero would face upon his return to Honduras would not be "on account of" a statutory factor. The record does not support the conclusion that political conditions in Honduras are so unsettled as to expand justifiably the meaning of "persecution" as used in the Act.

For the foregoing reasons, the petition for review is DENIED.