

11-1989

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

JOHANA CECE,

Petitioner,

v.

ERIC HOLDER, Jr. United States Attorney General

Respondent.

Petition for Review from the Decision of the Board of  
Immigration Appeals in Case No. A096 158 857

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SUPPLEMENTAL BRIEF OF PETITIONER

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## ARGUMENT

### **I. The social group of young Albanian women in danger of being trafficked as prostitutes is a cognizable social group.**

Ms. Cece is a member of the social group of young Albanian women in danger of being trafficked as prostitutes. Her social group is a cognizable social group under the law of this circuit. It is not defined solely by the harm feared. There is independence between the group and the persecutor.

#### *A. Law on Social Group*

In order to be granted asylum, an applicant must establish that she is a refugee as that term is defined in the Immigration and Nationality Act. *INA § 101(a)(42)(A)*. A refugee is a person who is unwilling or unable to return to, and unable and unwilling to avail herself to the protection of her country because of "persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *INA § 101(a)(42)(A)*. In the instant case, Ms. Cece contends that she meets the definition of refugee due to a well-founded fear of persecution on account of membership in a particular social group.

The parameters of what constitutes a social group have led to a great deal of litigation both at the agency level and in the federal appellate courts. The starting point for the social group

analysis is the Board's 1985 decision in *Matter of Acosta*. See *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1995). In that case, the Board stated:

"We interpret the phrase 'persecution on account of membership in a particular social group' to 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. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . 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."

*Id.* at 233-34. Thus, membership in a social group must be based on a shared characteristic that members cannot change or a characteristic that they should not be required to change. The Seventh Circuit has endorsed the *Acosta* framework. See *Lwin v. INS*, 144 F.3d 105 (7<sup>th</sup> Cir. 1998).

For nearly a quarter century, the Board's analysis of the social group issue was based on the test it set forth in *Acosta*. However, the Board later injected a social visibility element into the social group analysis. *Matter of R-A-*, 23 I&N Dec. 951 BIA 2006)(holding that "former noncriminal drug informants working against the Cali drug cartel" does not have the requisite social visibility in order to constitute a particular social group); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). However, this Court

has rejected the social visibility requirement as it is inconsistent with BIA and Seventh Circuit precedent. *Gatimi v. Holder*, 578 F.3d 611, 614-16 (7<sup>th</sup> Cir. 2009)(*Gatimi I*)

This Court has also held that a social group cannot be defined "solely by the fact that its members suffer persecution from the government or a group the government cannot or will not control." *Escobar v. Holder*, 657 F.3d 537 (7<sup>th</sup> Cir. 2011). In analyzing whether a proposed group suffers from this flaw, this Court has stated that "just because all members of a group do experience persecution, that does not mean that it is the only thing that links them." *Id.* at 545-46. The Court emphasized that the BIA looks at whether the members of the group share "common characteristics that members of the group either cannot change, or should not be required to change because such circumstances are fundamental to their individual identities." *Id.* at 546.

In *Escobar*, this Court concluded that the social group of "truckers who, because of their anti-FARC views and actions, have collaborated with law enforcement and refused to cooperate with FARC" is a cognizable social group. *Id.* at 545-47. The group in *Escobar* was not defined solely by the fact that Escobar is being persecuted for his collaboration with law enforcement. *Id.* at 546. Instead, he is being targeted because he bring together a number of characteristics, such as skills as a trucker, support of the government, and opposition to FARC. *Id.* In another 2011 case,

this court held that women in Jordan who flouted repressive cultural norms, and thus faced a high risk of honor killing, qualified as a particular social group. *Sarhan v. Holder*, 658 F.3d 649 (BIA 2011). In *Sarhan*, this Court again rejected the Board's conclusion that the social group set forth had little in common beyond being the target of persecution. *Id.* at 655. The social group was considered to be a function of a pre-existing moral code in Jordan. *Id.* "Social stigma causes the violence. Society as a whole brands women who flout its norms as outcasts, and it delegates to family the task of meting out the appropriate punishment- in this case, death." *Id.* The Seventh Circuit noted that its decision was consistent with other appellate decisions finding a cognizable social group in similar circumstances. See *Sepulveda v. Gonzales*, 464 F.3d 770, 771 (7<sup>th</sup> Cir. 2006)(holding that former subordinates of the attorney general of Colombia who had information about insurgents plaguing the nation is a social group); *Agbor v. Gonzales*, 487 F.3d 499, 502 (7<sup>th</sup> Cir. 2007)(women who fear being subjected to female genital mutilation); *Lin v. Ashcroft*, 385 F.3d 748, 752 (7<sup>th</sup> Cir. 2004)(Chinese women facing forced sterilization); *Bi Xia Qu v. Holder*, 618 F.3d 602, 607-08 (6<sup>th</sup> Cir. 2010)(women who are sold or forced into involuntary servitude or marriage); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7<sup>th</sup> Cir. 2002)(Christian women who do not adhere to the Islamic female dress code).

B. *Ms. Cece has set forth a social group under the Immigration and Nationality Act*

Ms. Cece is a member of the social group of young women in danger of being trafficked as prostitutes in Albania. Her social group is a cognizable social group under the law of this circuit and under the Board's definition of social group in *Acosta*.<sup>1</sup> The group was found to be a social group by the Immigration Judge. However, the Board rejected the group.

The basis for the Board's finding that Cece did not set forth a cognizable social group was that "[t]he respondent's proposed social group of young Albanian women who have been targeted for prostitution by traffickers is defined in large part by the harm inflicted on the group, and does not exist independently of the group."<sup>2</sup> (R. 9) The majority decision in the instant case

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<sup>1</sup>During the Agency proceedings, Cece also proposed two additional social groups: (1) young, single women in Albania (R. 20); and (2) single Christian Orthodox women in Albania who are trafficked by Muslim gang members (R. 19). Only the first group was addressed by this Court and the Board. In its September 28, 2011 28(j) letter to the Court, Respondent states that a remand would be required if Cece prevails on the resettlement issue and the Court agrees with the Board on the one proposed social group that it did address. This would allow the Agency to address the other two social groups in the first instance.

<sup>2</sup>The actual social group proffered by Cece is different than the one analyzed by the BIA. The BIA stated the group was young Albanian women who have been targeted for prostitution. In any event, either group is a cognizable social group. Dr. Fischer testified that the fact that Cece was targeted in the past would make it more likely she would be targeted in the future. (R. 477) Additionally, a social group can be defined in reference to past events that unite the group. See *Gomez-Zuluaga v. Att'y Gen.*, 527 F.3d 330, 345-49 (3d. Cir.

rejects Cece's social group as being one that is defined solely by the harm its members suffer. This is incorrect.

The asylum claim made by Ms. Cece is a well-founded fear claim based on persecution she will suffer if she returns to Albania on account of membership in a particular social group. The group does not rely on past harm to define the group. The social group in this case is not defined solely by the harm feared.

This Court does not require complete independence of any relationship between the group and the persecutor. The law of this circuit only precludes a group from being defined solely by the harm feared. In *Escobar*, this Court rejected the government's argument that there be an absence of any link to the persecutor. *Escobar*, 657 F.3d at 545. This is consistent with prior precedent of this Court. See *Tapiero De Orejula v. Gonzales*, 423 F.3d 666, 672 (7<sup>th</sup> Cir. 2005)(finding that "the educated, landowning class of cattle farmers targeted by FARC" constitutes a particular social group).

As set forth above, in analyzing a social group claim, the Court must look at whether the group shares "common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities." *Gatimi I*, 578 F.3d at 614. Although the group may share a common experience of being targets of

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2008)(finding a social group of women who escaped servitude after

persecution, members of the group may also share another unchangeable trait that renders them a social group for purposes of asylum. See e.g. *Escobar*, 657 F.3d at 545.

In the instant case, the proffered group is linked by the persecution they suffer. However, the group is also linked in a way that renders them a social group for purposes of asylum. They are linked by being young women who meet the profile of the traffickers in Albania. See *Mohammed v. Gonzales*, 400 F.3d 785 (9<sup>th</sup> Cir. 2005)(social group of Somalian females); *Niang v. Gonzales*, 422 F.3d 1187, 1198-1200 (10<sup>th</sup> Cir. 2005)(social group of young female members of the Tukolor Fulani tribe in Senegal that practices FGM); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996)(social group of "young women of the Tchamba-Kunsuntu Tribe, who have not had FGM, as practiced by the that tribe, and who oppose FGM). Women in a particular country can constitute a particular social group. Gender is "an innate characteristic" that is "fundamental to [one's] identit[y]." *Perdomo v. Holder*, 611 F.3d. 662, 667 (9<sup>th</sup> Cir. 2010) citing *Mohammed*, 400 F.3d at 798.3 In *Acosta*, the Board expressly recognized that gender can be the basis for a social group. The group in this case is further limited by age. Thus, it was incorrect to state members of the

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being abducted by FARC guerrillas).

3As set forth in *Mohammed*, finding that gender can serve as the basis for a social group is consistent with the Legacy INS "Gender Guidelines" for asylum claims and the United Nations High Commissioner for Refugees discussion of social group. *Mohammed*, 400 F.3d at 797-98.

group have little or nothing in common besides being targets.  
(majority decision, p. 7)

The majority supports its position that the group does not have a narrowing characteristic other than being forced into prostitution by stating that Cece has not presented evidence that trafficking is deeply imbedded in Albania culture. (majority decision, p. 7) The majority further states that the evidence does not state that sex trafficking poses the same particularized, inescapable threat to all young Albania women as FGM in Cameroon. See *Agbor*, 487 F.3d at 502. The BIA never directly addressed the issue of the pervasiveness of trafficking in Albania. However, there is no requirement that it be as prevalent as FGM in Cameroon.

In assessing this aspect of the claim, the majority also overlooks the expert's testimony and other evidence in the record of the prevalence of forced prostitution and trafficking in Albania. Dr. Fischer testified that human trafficking and kidnapping women for prostitution are substantial problems in Albania. (R. 469-70) Dr. Fischer testified that forced prostitution is pervasive because of political instability. (R. 224-28) Police turn a blind eye to the problem as they are often involved. *Id.* Albania is also unique among other Balkan states and Europe because on a number of factors, including political and economic instability. (R. 232) Cece also submitted other documentation showing the pervasiveness of trafficking in Albania.

(R. 590-620) When reviewing the evidence as a whole, the trafficking and prostitution problem is pervasive. Young women in Cece's position are targeted.

Ms. Cece set forth a cognizable social group. Cece's group meets the definition of particular social group as set forth in *Acosta* and interpreted by this Court. Like the other groups found to constitute particular social groups by this and other courts, the group in the present case shares traits beyond just being targets for trafficking and prostitution.

**II. Ms. Cece cannot safely relocate and relocation is not reasonable under all the circumstances.**

The majority's decision on internal relocation is based on an incorrect legal standard. The majority states that the record provides sufficient evidence for the BIA's decision that Cece can safely relocate. (majority decision, pp. 6-7) However, the possibility of safe relocation is only part of the relocation standard.

Under 8 C.F.R. § 1208.13(b)(2)(ii), the applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality, "if under all the circumstances it would be reasonable to expect the applicant to do so." (emphasis added) The regulations also specifically set forth factors to consider in determining whether relocation would be reasonable under all the

circumstances. 8 C.F.R. § 1208.13(b)(3). The regulation states:

"For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate."

8 C.F.R. § 1208.13(b)(3). One may be able to safely relocate but it may not be reasonable to expect her to do so.

This Court has previously concluded that the regulations contemplate two separate inquiries to determine whether an applicant could reasonably relocate within his country: (1) whether safe relocation is possible, and if so, (2) whether it would be reasonable to expect the applicant to safely relocate." *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008); see also *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (the court reversed and remanded stating that the IJ had applied an incorrect legal standard in finding that the applicants could avoid persecution by relocating internally because the IJ should have also determined whether it was reasonable to expect them to relocate internally). At issue in *Oryakhil* was whether an Afghan man who had previously worked for the United States could reasonably relocate within Afghanistan. This Court granted the

petition for review because the Agency had not explained how it would be possible for Oryakhil to safely relocate in Afghanistan.

Neither the Agency nor the Board ever analyzed or specifically addressed the reasonableness of the location to Tirane, a city where Cece lived only temporarily and where she now has no family. Although the second BIA decision uses the word reasonable, it simply references the first BIA decision which never discusses the reasonableness of the relocation. (R. 8-9, 330-31) This is insufficient to show the Agency considered and addressed the issue. There is absolutely no mention of any of the factors set forth in 8 C.F.R. § 1208.13(b)(3), which should be considered in making a reasonableness determination. The case must be remanded to the Agency to address the reasonableness of the relocation with reference to the factors set forth in the regulations.

Even if the claim was addressed under the proper legal standard, the decision on relocation clearly is not supported by substantial evidence. Ms. Cece's claim is that she will be targeted for prostitution and trafficking as a young woman who lives alone. The IJ initially ruled in Cece's favor and expressed disagreement with the BIA on the relocation issue after the case was remanded. The Board agreed that Dr. Fischer was properly classified as an expert witness but then impermissibly completely ignored his testimony. See *Escobar*, 657 F.3d at 544 (7th Cir. 2011), quoting *Espinosa-Cortez v. Attorney General*, 607 F. 3d 101

(3d Cir. 2010). Dr. Fischer's affidavit specifically addresses the relocation issue. (R. 648-49) Dr. Fisher's testimony should have been considered and given significant weight in light of his expertise. It was impermissible to fail to even consider the testimony.

Cece had problems in Korce and was forced to relocate. It was so bad that her friends and family did not want her to live with them because they feared for their safety. (R. 410, 414) She was able to go and live with her sister in Tirane. (R. 411) However, when her sister left for the United States in 2002, Cece could no longer live in the dorm. (R. 411-13, 16) She only lived in Albania for two more weeks because she did not feel safe. (R. 417) She had no other place she could live where she would not be alone. (R. 416-17) The fact that she would have to live alone would make her a target. (R. 416) She believed that eventually Reqi or another trafficker would find her and force her into prostitution. (R. 416)

Under these circumstances, it cannot be said that Cece could safely relocate within Albania and that it would be reasonable for her to do so. Her problems occurred when she lived alone. She now has no family in Albania. She was only safe when she lived with her sister who is now in the United States. Substantial evidence does not support the Board's decision.

**III. Other issues addressed by the majority in its decision do not support the denial of the Petition.**

In its decision, the majority states that even if Ms. Cece's proposed group could be considered a social group, Cece still would face a number of obstacles. The Court lists three obstacles.

First, the Court states that Cece could have been summarily ejected when her fraudulent entry under the visa waiver program was discovered. However, a visa waiver entrant is entitled to an asylum-only hearing before an Immigration Judge even if the entry was by fraud. *Matter of Kanagasundram*, 22 I&N Dec. 963 (BIA 1999). This is exactly what occurred.

Second, the Court found that substantial evidence supported the Agency's conclusion that Cece has not established an objective fear of persecution if she did establish membership in a social group. However, this issue was never addressed by the Board and cannot be considered in the first instance by this Court. See *Gonzales v. Thomas*, 547 U.S. 183 (2006)(per curiam). However, the evidence clearly establishes that Cece has a well-founded fear based on her unique circumstances. She was left alone to live by her family where it is rare for women to live alone. She was specifically targeted by a leader of a gang that was known for trafficking. The police would not help. This is not a case where Cece has a generalized fear of trafficking or being forced into prostitution.

Third, the Court concluded that Cece did not meet her burden of showing that she could not safely relocate within Albania. This was addressed in the previous section.

#### Conclusion

In light of the foregoing, the Petitioner respectfully requests that the decision of the Board of Immigration Appeals be vacated and the case be remanded to the Board for proceedings consistent with the arguments raised herein.

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**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)**

This Supplemental Brief complies with the page limitations of Fed. R. App. P. 40(b). The Brief contains 15 pages, excluding those parts of the Brief exempted by Fed. R. App. P. 32(a)(7)B(iii). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Word 2007 in 12-point Courier New font in the body and 11-point Courier New in footnotes.

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**CERTIFICATE OF SERVICE**

I, Scott E. Bratton, certify that I have electronically filed the foregoing Supplemental Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system to the following:

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