



**Asylum:  
Immigration Clinic  
Aids Ex-Gang Member Seeking Hope**

# Caught in the Crossfire

*by Lauren Gold '14*

**JULIO MARTINEZ** was ahead of the pack. Like the thousands of young Central Americans who have streamed across U.S. borders this year, Martinez was fleeing the violence of his homeland. But he made his trip more than a decade ago. Today he lives in Baltimore with his family, after three years in federal civil detention in Maryland and Alabama. And the final resolution of his case may someday touch the lives of many of the young people now seeking refuge in the United States.

Martinez's story begins in 1992, when he was a 12-year-old boy in El Salvador whose stepfather had just died.

"He was my best friend," says Martinez, now 34 and the father of twin daughters. "He was the father I never had. When he died, my life changed."

He found comfort in the friendship of a group of older neighborhood boys, many of whom had lost family members as well. Within a few months, though, several new members joined the group. These were

recent deportees from the U.S.—men in their 20s—with connections to the Mara Salvatrucha, or MS-13, gang.

At 14, following the lead of his neighborhood friends, Martinez joined MS-13. But a year later, when the men ordered him to commit crimes against his neighbors, he refused and left the gang. The decision triggered three, near-fatal attempts on his life. In 2000, at 20, he fled to safety in Baltimore, where his sister lives. He started to work and was raising his twin daughters, who are U.S. citizens,



when his arrest for minor traffic violations in 2011 set in motion events that would lead to a bitter debate—in and out of U.S. federal court—about who should be eligible for asylum and related relief in the United States.

### A Path to Asylum

According to the Department of Justice, the U.S. received more than 36,000 asylum applications in 2013 (the most recent year reported). Of those, it granted almost 10,000—or 36 percent.

But the odds for gaining asylum are much smaller for those from the countries with the most serious gang problems—Guatemala, El Salvador, and Honduras. Although somewhere between 2,000 to 4,000 people from those countries have applied for asylum, just six to eight percent received it—or between 90 and 200 applications.

When Martinez was arrested and put into deportation proceedings, he had the good fortune to meet Emily Datnoff '08, an immigration attorney with the Maryland Office of the Public Defender. The more she learned about his case, the more complicated it got. He had a strong asylum claim, but had missed the one-year filing deadline and so was eligible only for withholding of removal—a status that would allow him to remain in the U.S., but without a pathway to eventual citizenship.

Still, any legal status in the U.S. was better than being executed by gang members in El Salvador. Upon hearing Martinez's story, Datnoff reached out to Professor Maureen Sweeney, who has directed the Maryland Carey Law

with both denying relief—to the Fourth Circuit Court of Appeals, which ruled in his favor on one narrow issue in January 2014, and remanded his case to the Immigration Court to decide two other unresolved questions.

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*Maureen Sweeney  
Law School Associate Professor  
Maryland Carey Law*

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With its decision, the Fourth Circuit became the fourth Circuit Court of Appeals to consider whether former members who face persecution from the gang they've renounced could constitute a so-called “particular social group” under the Immigration and Nationality Act, making them eligible for asylum and related forms of relief.

The Third and the Seventh Circuits have held that they could. But the First Circuit has held that former gang members are categorically barred from asylum relief, reasoning that the law was not intended to protect individuals who have associated with criminal groups. Practically speaking, asylum law already bars from relief anyone who has committed serious crimes, thus excluding the vast majority of former gang members. Julio Martinez and the few other former gang members who have refused out of conscience to commit such crimes are the exception.

On the flip side, courts have granted asylum to former members of other violent groups. Defectors from the Mungiki, a brutal criminal gang in Kenya, received





asylum in the Seventh Circuit in 2009. Former KGB agents received asylum in the Second Circuit in 2007. Former members of the military and police in various countries have received asylum as well. The problem, of course, is that gangs are criminal organizations, which means that gang members are former criminals. And the question is: Are these the kinds of people we want to protect?

The answer is clear for Sweeney. As she told *The Washington Post*, which published a story about the Martinez case, “One foundation of our asylum law is that someone’s conscience should not have to be sacrificed for their safety. The burden of proof in asylum cases is difficult to meet, but if

someone can convince a judge they genuinely left a gang and face danger as a result, they have met that burden of proof and should be protected.”

### **Adapting Standards for Changing Needs**

The requirements for asylum and withholding are based on international standards drafted after World War II by the United Nations to protect people who are unable or unwilling to return to their country of nationality “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.”

Applicants for asylum must also show that the persecution is on account of one of those five protected grounds. Of those, four characteristics—race, religion, nationality, and political opinion—are relatively straightforward. But the fifth—membership in a particular social group—is anything but.

The first four share two fundamental elements: they are qualities that individuals are either powerless to change or so fundamental to their identities that society should not require them to change. With this in mind, the BIA concluded that a qualifying particular social group should similarly be “a group of persons all of whom share a common, immutable characteristic” which they cannot change or should not be asked to change because it’s fundamental to their identities or consciences.



*Julio Martinez's defense team included (from left to right) Immigration Clinic Professor Maureen Sweeney, and former Immigration Clinic students Emily Datnoff '08, Alison Yoder '13, and Lauren Gold '14. Datnoff brought the case to Sweeney's attention. Yoder and Gold continued to work on the case as Clinic II students and after graduation.*

The BIA has added restrictions to the definition of the term. For example, the social group must also be "particularized," meaning it must have well-defined boundaries. "You have to be able to tell who is in and who is out," notes Sweeney.

The BIA and some courts also require that the group be "socially visible," or "socially distinct." Other courts—notably the Third and Seventh Circuits—have criticized the social visibility requirement. The Fourth Circuit, where Julio Martinez's case was heard, has expressly reserved opinion on the issue.

The United States adopted the U.N. standards when it passed the Refugee Act of 1980. To qualify for asylum here, an applicant must show at least a 10 percent likelihood of persecution upon return. To qualify for withholding of removal—a stingier alternative available to those who miss the one-year filing deadline

for asylum—the standard is higher. An applicant must show that persecution is "more likely than not"—in other words, a 51 percent probability or greater.

#### **The Case is Made**

Once the Immigration Clinic accepted Martinez's case, Datnoff began work to get him released from jail, while Sweeney and then-students Alison Yoder '13 and Andrew Barreto '12 brought the withholding case in the Baltimore Immigration Court.

When the immigration judge ruled that former gang members did not qualify for relief—a decision contrary to precedent in other circuits—the student attorneys appealed to the BIA, and then to the Court of Appeals for the Fourth Circuit.

Yoder and Sweeney worked together on the Fourth Circuit brief and after months of preparation with some of

the region's top immigration attorneys, Sweeney argued the case before a three-judge panel in Richmond in October 2013.

In January, the Fourth Circuit issued its decision. Overturning the two lower courts, the panel found that former gang members are not categorically barred from qualifying for asylum and withholding of removal.

The victory was a huge one for the Immigration Clinic, and it puts Martinez's name among those whose cases have helped shape the nation's asylum law. As for Martinez, the future is still very much in question. While the Fourth Circuit found that former gang membership is an immutable characteristic—one of three requirements needed to qualify as a "particular social group" under asylum law—whether Martinez's group is sufficiently particularized and socially

distinct remains to be decided by the Immigration Court, the BIA, or the Fourth Circuit.

In the meantime, Martinez remains in limbo. While finally free after nearly three years in immigration detention, thanks to a judge's ruling reducing his bond to \$10,000 and a generous friend who stepped in to help, he is still waiting for a resolution in his case, which could be years away. As his sister Melva told the *Baltimore Sun* in May, "If he goes to his country, he won't live—this is the truth. His kids will have no father."

"I ran away from my country to save my life, and I never did any harm," Martinez told *The Washington Post*. "The gang leaders said we were all brothers, but it was a lie. They just want to use you. Once you're in, the only way you leave is dead."

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