



## **Former Peruvian Soldier Threatened By Shining Path; Does He Get Asylum?**

From: New York attorney Gary E. Rosenberg ([immigration attorney and lawyer; serving Brooklyn Queens Bronx](#))

U.S. Court of Appeals (1<sup>st</sup> Circuit)

CASE: DAVID EDUARDO CASTAÑEDA-CASTILLO (husband); CARMEN JULIA DE LA CRUZ-CASTA ÑEDA (wife); PIERA DINA CASTA ÑEDA (daughter).

### FACTS:

This immigration case, to use the Court's words, "has been ping-ponging around for over eighteen years."

In 1985, Castañeda was a military officer stationed in Perú's Ayacucho region, the birthplace of the Shining Path, a violent Maoist insurgent group. He was part of an operation to search a local village – Accomarca – for Shining Path guerrillas. Four patrols were sent. Two to assault the village and two to block escape route that the guerrillas make try to follow to escape. Castañeda's patrol was one of the latter, and was assigned to guard a location on a path several miles from the village, through which fleeing militants would likely pass. Castañeda was therefore not present when the two patrols that entered the village, led by Lieutenant Riveri Rondón and Sub-Lieutenant Telmo Hurtado, proceeded to massacre dozens of civilians.

Castañeda later testified that he did not know about the massacre and did not see anyone traveling on the path his men were guarding. Nor did Castañeda or his patrol fire any shots.

Castañeda testified that he did not learn of the bloodletting until three weeks later, when he heard on the radio that another commander had confessed to executing civilians. A few weeks later, in September of 1985, Castañeda was called to testify before a Peruvian Senate Human Rights Commission investigating the matter. The Commission noted that Castañeda's patrol was "not involved in any confrontations with fugitive civilians." Charges were subsequently filed in the Peruvian military courts against the leaders of all four patrol units, including Castañeda. He was acquitted of all charges by the Appeals Division of the Supreme Council of Military Justice.

Castañeda and his family subsequently began to receive death threats from the Shining Path. Castañeda was attacked several times. The Shining Path also targeted Castañeda's family.

In October of 1990, Castañeda's neighbor and colleague was murdered at home, in front of his family. Like Castañeda, he was a member of the military who had been involved in the counter-insurgency, and had also been receiving death threats from the Shining Path over a number of years. After this incident, the Castañedas moved frequently, staying with relatives, but never together and never for more than a few days at a time. Castañeda received an honorable discharge from the Peruvian military on June 4, 1991, and the family fled for the United States shortly thereafter.

While conceding that he was [removable](#), Castañeda sought asylum.

THE LAW:

The Board of Immigration Appeals "affirmed the Immigration Judge's adverse credibility finding and stated that, even if Castañeda were credible, he had assisted or otherwise participated in the persecution of others."

Asylum eligibility can be established in one of two ways. The alien may demonstrate either past persecution or a well-founded fear of future persecution due to "race, religion, nationality, membership in a particular social group, or political opinion." To establish a well-founded fear of future persecution, the alien must establish that his or her fear is both subjectively genuine and objectively reasonable. On the other hand, if the alien establishes that he or she suffered past persecution based on one of the indicated grounds, then he or she is presumed to have a well-founded fear of future persecution which the government may rebut by a preponderance of the evidence.

There is a persecutor bar, which excludes former persecutors from eligibility for asylum, requires that the asylum seeker have prior or contemporaneous knowledge that the effect of his or her actions is to assist in persecution. The issue for this immigrant has become: did Castañeda engage in persecution of others, which would render him ineligible.

LEGAL HOLDING:

As Castañeda rightly points out, to say that the Shining Path's assaults were motivated by "revenge" is tantamount to saying that they were motivated by the fact that he was a military officer that the group viewed as responsible for the Accomarca massacre.

After all, Castañeda's status as an officer associated with Accomarca is precisely what explains the Shining Path's desire for revenge. Furthermore, as the leader of one of the army patrols associated with that incident, his status as an officer would make him particularly likely to become a target of the Shining Path's violence.

On the facts of this case, the Shining Path's attempts to exact retribution were not only consistent with persecution on the basis of group membership, but in fact constituted such persecution.

However, "[W]e do not afford protection based on social group membership to persons exposed to risks normally associated with employment in occupations such as the police or the military. In part, this is because persons accepting such employment are aware of the risks involved and undertake the risks in return for compensation."

But if there is an exception for former police officers on the grounds that that kind of persecution is not inherent to their job, then it would be inexplicable to not also make an exception for people who, like Castañeda, are persecuted beyond the scope of their employment, even though they happen to be on active duty when such persecution occurs. In other words, the sheer fact of being on active duty is not dispositive, but rather whether the alleged persecution was in response to the petitioner's role as a "highly visible embodiment[] of the power of the state" or was directed against his or her "personal characteristics or political beliefs." There is no per se bar to consideration of attacks that occurred while the respondent happened to have been on active duty, where the attacks were not directly related to that fact. Not to put too fine a point on it, there is a significant difference between dangers that are directed against the role one occupies

-- for instance, as a member of a counterinsurgency squad -- and dangers that attach themselves to an individual personally, even if originating out of actions undertaken and associations forged while occupying such a role.

The attacks on Castañeda, were not tied to whoever happened to be filling the role of police officer or embassy guard or member of the military, but were directed at Castañeda and his family personally. It is surely notable in this regard that the attacks occurred when he was not undertaking official duties, included his family, and included specific intimations of retribution for Accomarca. This does not appear to be the kind of danger that a military officer should expect to face simply in virtue of being a military officer.

This brings us to the Board of Immigration Appeals's treatment of Castañeda's claim of a well-founded fear of future persecution, should he be forced to return to Perú. The Board of Immigration Appeals concluded that Castañeda's fear of future persecution, while subjectively genuine, was not objectively reasonable in light of the years that have since elapsed and the Shining Path's weakened condition. In reaching its conclusion, the Board of Immigration Appeals placed the burden on Castañeda to establish that his fear of future persecution was well-founded. The burden was shifted to Castañeda because of the Board of Immigration Appeals's ruling that he had not shown past persecution on a protected ground. If it becomes clear on remand that the persecution Castañeda undoubtedly suffered was motivated at least in part by his membership in a cognizable social group, then Castañeda will be entitled to a presumption of a well-founded fear of future persecution. 8 C.F.R. § 1208.13 (b)(1). The burden will then be on the government to rebut this presumption by a preponderance of the evidence. 8 C.F.R. § 1208.13 (b)(1)(i)(A).

We vacate the Board of Immigration Appeals's denial of Castañeda's asylum claim, and remand to provide the Board of Immigration Appeals with an opportunity to consider whether "Peruvian military officers whose names became associated with Accomarca" is a cognizable social group.

Should that question be answered in the affirmative, Castañeda would then be entitled to a presumption of a well-founded fear of future persecution, and absent a sufficient rebuttal by the government, should be deemed eligible for asylum.

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