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Particular Social Group (PSG)

Formulating a successful PSG for asylum.

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PSG REGULATIONS

PSG REGULATIONS

8 CFR 208.1(c)

Particular social group. For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim.

The Secretary, in general, will **not** favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States. This list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes

under the Act, *including on appeal*. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group constituted egregious conduct.

THE PSG MUST BE ARTICULATED TO THE COURT ON THE RECORD

No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, *including on appeal*. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group constituted egregious conduct.

Formulating a PSG

When trying to formulate your PSG, one can take into consideration:

- Applicants Nationality and Gender
- Applicants Nationality and Child Status
- Applicants Nationality, Gender and Marital Status
- Applicants Nationality, Gender and Race/Ethnicity/Tribe

- Applicants Nationality, Gender and Viewed as Property in the Society
- Applicants Gender and Family Membership
- Applicants Nationality, Gender and their Beliefs or Social Norms
- Applicants Nationality, Gender and Lack of Protection from native country
- Applicants Gender and Inability to Leave for or in the country

LGBT Particular Social Group Cases

LGBT Particular Social Group

The applicant must prove that the persecution they fear in the future is motivated by their actual or imputed membership in a PSG. Since 1994, when Attorney General Janet Reno designated *Matter of Toboso-Alfonso* as precedent, “homosexual men” has been recognized as a PSG under asylum law. More recently, the Ninth Circuit has ruled that “all alien homosexuals are members of a ‘particular social group.’” [~LINK~](#)

In the case *Amanfi v. Ashcroft*, the Third Circuit held that imputed membership in the PSG of gay men can also be grounds for an asylum claim. In *Amanfi*, the Court recognized that persecution on account of sexual orientation may be sufficient for an asylum claim even if the victim is actually not gay but is thought to be by the persecutor. In that case, a man from Ghana engaged in homosexual activity with another man in order to be spared from being ritually sacrificed, after which he was continuously beaten by police for his perceived homosexuality.

The Ninth Circuit has also found in the case of *Hernandez-Montiel* that “gay men with female sexual identities” constitute a PSG. The Court rejected the argument that *Hernandez-Montiel*’s female identity was volitional, concluding that his presentation as female was immutable and inherent in his identity and that he could not be required to change it. The Court reaffirmed its holding in *Reyes-Reyes v. Ashcroft*. [\[link\]](#) Although transgender persons have not been explicitly found to constitute a PSG, there have been many successful non-precedential cases. [-link-](#)

Proving LGBT

An essential component of an asylum application for a **lesbian, gay, or bisexual applicant** will be proving that they are in fact lesbian, gay, or bisexual. Relevant proof may include testimony or

documentation by past partners or friends living in the United States.

The applicant must also provide evidence, either direct or circumstantial, that the persecution is on account of their sexual orientation, gender identity, or HIV status. In an unpublished decision, *Pena-Torres v. Gonzales*, the Ninth Circuit reversed an IJ's decision that a gay man from Mexico had suffered from police brutality rather than persecution on account of his sexual orientation. The Ninth Circuit remanded the case for a new determination regarding asylum eligibility because it found that an incident where the applicant was beaten to the point where he required medical attention and was threatened by the police after leaving a gay bar, did amount to past persecution on account of his sexual orientation. The Court reached this conclusion by citing evidence that the police had attacked the applicant only after they asked him whether he was gay.

Applicants Living With HIV

People living with HIV have not explicitly been found to constitute a PSG for the purposes of asylum. In 1996, the legacy INS Office of the General Counsel recommended that the PSG of people with HIV be recognized for the purposes of asylum law. [~LINK~](#) Some IJs have found that HIV status can form the basis of a PSG membership. [~link~](#) The BIA has also recognized, in an unpublished opinion, that people living with AIDS can comprise a PSG*. Although these decisions are significant for applicants living with HIV, because the rulings are not precedential, such applicants will still need to individually establish that people living with HIV in their countries constitute a PSG.

Mixed Motives Doctrine

Unsupported block

Significantly, the BIA has consistently followed the doctrine of "mixed motives" which holds that there can be more than one motivation for the persecution, as long as the harm was motivated in part by an actual or imputed ground as shown by direct or circumstantial evidence produced by the applicant.

If an applicant does not clearly fit within a precedentially defined PSG, they must establish that they are a member of a PSG. The major case setting forth what constitutes membership in a PSG is *Matter of Acosta*.

‘Persecution on account of membership in a particular social group’ mean[s] 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. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, 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.

PSGs should be defined in specific terms rather than in broad, generally applicable terms such as youth and gender. For instance, the following PSGs have met the requirements for asylum: young women of the Tchamba-Kunsuntu tribe who have not suffered FGM, as practiced by that tribe, and who oppose the practice, and HIV-positive individuals living in the Ivory Coast and Togo. As noted, broad PSGs, such as gender, will not satisfy the membership requirement as it is currently construed. This exclusion long created difficulties for those who sought asylum in order to escape domestic violence or other forms of violence within the private sphere, before the BIA’s precedential decision in *Matter of A-R-C-G-*. Even today, PSGs must be defined with sufficient particularity that its boundaries are discrete and definable. The group must also be socially distinct—that is, the society in question must distinguish individuals who share the defining characteristic of the PSG from those who do not. This “visibility” does not mean ocular or literal visibility, or explicit, outward identification by the applicant with the PSG.

Political opinion may be an additional ground that LGBTQ/H individuals can claim asylum. LGBTQ/H people who are involved with gay rights groups may use political opinion as a supplemental ground for asylum claims. In addition, the BIA has found that persecution can be based on an imputed political opinion.

Recognized PSG's

SECOND CIRCUIT

Resistance to Female Subordination to Male Dominance in El Salvador

Hernandez Chacon v. Barr, No. (2d Cir. Jan. 23, 2020): “resistance to the norm of female subordination to male dominance that pervades El Salvador.”

- “There is ample evidence in the record to support her claim: Gangs control much of El Salvador, including the neighborhood in which Hernandez-Chacon lived. The law enforcement systems that would normally protect women -- police, prosecutors, judges, officials -- do not have the resources or desire to address the brutal treatment of women, and the Salvadoran justice system “favors aggressors and assassins” and “punish[es] victims of gender violence.”

OTHER CIRCUITS

Women of Country X

Miguelina De Pena-Paniagua v. Barr, (1st Cir. 2020)

It is not clear why a larger group defined as "women," or "women in country X" -- without reference to additional limiting terms -- fails either the "particularity" or "social distinction" requirement.

Certainly, it is difficult to think of a country in which women are not viewed as "distinct" from other members of society.... It is equally difficult to think of a country in which women do not form a "particular" and "well-defined" group of persons.”

It is unsurprising, then, that if race, religion, and nationality typically refer to large classes of persons, particular social groups -- which are equally based on innate characteristics -- may sometimes do so as well. See *Perdomo v. Holder*.

Female Victims of Domestic Violence

• **Garcia v. U.S. Att’y Gen.**, 665 F.3d 496 (3d Cir. 2011) (PSG: individuals who testify against gang members)v • **Valdiviezo-Galdamez v. Holder**, 663 F.3d 582 (3d Cir. 2011) (PSG: young men who have been actively recruited by gangs and who have refused to join the gangs” is a “particular social group) • **Crespin-Valladares v. Holder**, 632 F.3d 117 (4th Cir. 2011) (PSG: family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses) • **Martinez v. Holder**, 740 F.3d 902 (4th Cir. 2014) (PSG: former gang members) • **Perdomo v. Holder**, 611 F.3d 662 (9th Cir. 2010) (PSG: Guatemalan women) • **Henriquez-Rivas v. Holder**, 707 F.3d 1081 (9th Cir. 2013) (PSG: people who testify against gang members) • **Cordoba v. Holder**, 726 F.3d 1106 (9th Cir. 2013) (PSG: landowners in X country) • **Niang v. Gonzales**, 422 F.3d 1187 (10th Cir. 2005) (PSG: females within a particular tribe)

Formulating PSG's

Formulating a PSG

During the past decade, it has become increasingly important that attorneys formulate PSGs carefully and with a clear understanding of the current law in their jurisdictions. Moreover, since PSG claims are now more likely to result in federal litigation, it is important that the strongest PSG(s) possible be preserved at the IJ level since new PSG definitions cannot be introduced on appeal.

Practice Tips

When determining the parameters of a PSG, attorneys should first follow these steps:

1. Explore why the persecutor targeted or will target your client and determine whether those reasons are characteristics your client cannot change or should not be required to change.
2. Be sure to differentiate between the initial reason for targeting and the subsequent targeting based on an action by your client. For example, Central American gangs often target young men for recruitment and the population generally for extortion. But once an individual opposes recruitment or extortion, or takes steps such as reporting the gang to the police, the gang's persecution frequently shifts and becomes more severe. It is generally best to focus on that secondary reason – the act in opposition or violation of the gang's demands, rules, or norms – as the characteristic forming the social group, rather than the general socio-economic reasons the gang may have targeted the individual in the first place.
3. Do NOT define the PSG by the harm suffered or feared. Although referencing the harm suffered does not necessarily invalidate the social group, it will make the nexus element almost impossible to prove because of the circularity problem – “young Salvadoran men who have been targeted by gangs” are not targeted by gangs because they “have been targeted by gangs” and “Guatemalan women who have suffered domestic violence” are

not targeted with domestic violence because they “have suffered domestic violence.” In many instances, young men in Central American are targeted after taking the irretrievable step of refusing the gang and that is what prompts the harm. Similarly, many women are abused because of their gender. These characteristics – having opposed the gang and/or being female – are immutable characteristics that exist independent of the persecution. Attorneys must clearly explain the difference and be prepared to respond to government attorneys who will assert the characteristic and the harm are one.

The First Circuit’s decision in *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020) (discussing the reasons why a woman may be unable to leave a relationship other than the persecution itself) and the Ninth Circuit’s decision in *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020) (explaining why the mere reference to the feared persecution does not disqualify an otherwise valid group), while not binding in the Seventh Circuit, are particularly useful for strategizing on this point.

4. When looking for supportive case law, look to Seventh Circuit law first, then to BIA precedent that may have found viable social groups in cases with similar rationales, but different countries of origin; and then to other circuits. For example, the Seventh Circuit has recognized the PSG of “former Salvadoran gang members,” *Benitez Ramos*, 589 F.3d at 429; “the educated, landowning class of cattle farmers in Colombia,” *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005); and “Jordanian women who have allegedly flouted moral norms,” *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011). The Seventh Circuit has not yet recognized a group based on resistance to gangs, but it has recognized a group based on resistance to the FARC. *Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011). Similarly, the Seventh Circuit has not had occasion to recognize a group that followed the A-R-C-G- definition, but it has recognized the group of “single women in Albania who live alone.” *Cece*, 733 F.3d at 671. Significantly, the BIA has also recognized a particular social group related to gender and resistance to a particular activity. In *Matter of Kasinga*, (which the BIA has repeatedly asserted remains viable even under the BIA’s new PSG test, see *M-E-V-G-*), the BIA found viable the PSG of “young women of the Tchamba Kunsuntu tribe who had not been subjected to female genital mutilation and opposed the practice.” 21 I&N Dec. 357.

Domestic violence/forced relationships claims:

“Ms. X belongs to the particular social group of “Salvadoran women,” or more narrowly “Salvadoran women in [domestic/intimate/marital] relationships they are unable to leave” or “women in the X family/immediate family members of Mr. X” or “Salvadoran women who have flouted or resisted Salvadoran social norms.”

Gang-based claims:

“Mr. X belongs to the particular social group of “Salvadorans who have [violated/opposed/disobeyed] gang norms;” “Salvadoran small business owners who have opposed the MS-13;” “Salvadorans who have witnessed gang crimes and reported them to law enforcement;” “family members of MS-13 gang members,” or more narrowly, “the immediate family members of Mr. X.”

Family Membership

[PSG practice advisory final 7 19 21.pdf](#)

[Nexus - Particular Social Group PSG LP RAIO.pdf](#)

[Family Membership Nexus & Matter of M-R-M-S](#)

[\(BIA 2023\).](#)