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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.”

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