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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found to constitute a PSG, there have been many successful non-precedential cases.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 In an unpublished decision, *Pena-Torres v. Gonzales*, the Ninth Circuit reversed an IJ's decision that a gay man from Mexico had suffered from police brutality rather than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.

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