Sanctuary for Families

FRAMING PARTICULAR SOCIAL GROUPS IN ASYLUM CASES

The applicant for asylum bear the burden to establish eligibility for asylum, including through credible testimony and corroborating evidence (where reasonably available) of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This chapter discusses the "particular social group" (hereafter "PSG") ground for asylum, and provides a step-by-step analysis that you may find useful in defining a PSG for your client's asylum claim.

The BIA's Definition of "Particular Social Group"

The question of whether a group is a PSG within the meaning of the Immigration and Nationality Act (INA) is a question of law, while the question of whether the applicant is a member of that group is a question of fact. 8 C.F.R. § 1003.1(d)(3)(i), (ii)(2014). In Matter of Acosta, the case that laid the foundation for PSG analysis, the Board of Immigration Appeals (BIA) defined persecution on account of membership in a PSG as "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985). The common characteristic that defines the group 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." Id. The BIA subsequently incorporated the concepts of "particularity" and "social visibility" into the PSG analysis. See Matter of C-A-, 23 I&N Dec. 951 (BIA 2006); Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007); Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008).

In 2014, the BIA issued two precedential decisions that clarified the inquiry for determining what constitutes a PSG. In Matter of W-G-R- and Matter of M-E-V-G-, the Board clarified that a PSG must be (1) composed of members who share a **common immutable characteristic**, (2) defined with **particularity**, and (3) **socially distinct** within the society in question. Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014); Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014). These decisions rehash but do not fundamentally change the definition of "common immutable characteristic." The most important change brought about by these cases is the substitution of "social distinction" for the previous requirement of "social visibility."

- The **"immutability"** element is consistent with the principle set forth in Matter of Acosta: immutable characteristics are ones that "members of the [PSG] either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." Acosta, 19 I&N Dec. at 233.

- The **"particularity"** requirement refers to "whether the group is 'sufficiently distinct' that it would constitute a 'discrete class of persons'" in the society in question. W-G-R-, 26 I&N Dec. at 210 (quoting S-E-G-, 24 I&N Dec. at 584). The group must be defined by terms that have "commonly accepted definitions in the society of which the group is part," and the group "must also be discrete and have definable boundaries." W-G-R-, 26 I&N Dec. at 214. The particularity element addresses delineation and precision, distinct from the immutability concept; for example, "not every immutable characteristic is sufficiently precise to define a

particular social group." Id. at 213-14. Critically, particularity must be assessed in context of the society at issue. Id. at 214.

- The **"social distinction"** requirement refers to "recognition by society." Matter of W-G-R-, 26 I&N Dec. at 216. In renaming the former "social visibility" requirement as "social distinction," the BIA clarified that a PSG need not be literally visible to the naked eye; rather, evidence must show that society in general "perceives, considers, or recognizes persons sharing the particular characteristic to be a group." Id. at 126-17. For example, even though a person's FGM status or sexual orientation cannot be identified just by looking at them, the society in question may perceive individuals sharing these characteristics as a social group by treating them differently from others.

Finally, a PSG may not be defined by persecutory conduct alone when claiming past persecution. Matter of W-G-R-, 26 I&N Dec. at 215. For example, you cannot claim that your client suffered past persecution on account of her membership in the group "victims of domestic violence" because the definition of the group circularly rests on the acts of persecution committed against members of the group. However, a shared experience of suffering past persecution could form the basis of a particular social group in future persecution claims. See, e.g., Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003). For example, your client may face further violence and retribution on account of her past experience of having been raped or trafficked in a society that ostracizes sexual assault and trafficking victims.

Family as a Particular Social Group

The family is the quintessential PSG. The long-standing principle that persecution based on membership in a family can qualify an applicant for asylum was confirmed in Matter of L-E-A-, a precedential BIA decision from 2017. In that decision, the BIA held that family relationships can form a basis for a particular social group depending on the nature and degree of the relationship and how the relationship is viewed in society. *See* Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2017). Applying this standard, the BIA concluded that a respondent persecuted by a drug cartel after his father refused to sell their drugs in his grocery store could establish membership in a particular social group if the respondent was targeted based on his relationship to his father. In the second part of the decision, however, the BIA made clear that even if family members are targeted for persecution, one cannot automatically assume that there is nexus to a protected ground. Instead, a respondent must establish that the particular social group is at least one central reason for the claimed harm. In this case, the BIA concluded that the respondent did not establish that his fear of persecution was on account of his membership in a particular social group, concluding that respondent was targeted because he had access to his father's store, and not because of his relationship with his father.

In light of this decision, when making a family-based particular social group claim where there are other, non-protected grounds, be sure to argue that the familial relationship is at least one central reason for the persecution. See Hernandez-Avalos v. Lynch, 784 F.3d 944, 950 fn. 7 (4th Cir. 2015) ("…the two threats that directed Hernandez to turn her son over to the gang were meaningful only because of her maternal authority over her son's actions, and there is no evidence that she would have been selected as the recipient of those threats absent that familial connection.").

In December 2018, Acting Attorney General Matthew Whitaker referred Matter of L-E-A- to himself to review the question of "Whether, and under what circumstances, an alien may establish persecution on account of membership in a 'particular social group' under 8 U.S.C. § 1101(a)(42)(A) based on the alien's membership in a family unit." Although the case remains under consideration, Matter of L-E-A- is still good law. Moreover, Matter of L-E-A- was correctly decided and regardless of what happens with that particular case, we should continue to argue that family is a viable PSG. In cases based on family as PSG while Matter of L-E-A- remains under consideration by the A.G., advocates should also cite to positive Second Circuit case law such as Vumi v. Gonzalez, 502 F.3d. 150 (2d. Cir. 2007) and Celedon-Herrera v. Lynch, 627 F. App'x 6, 7 (2d Cir. 2015) to argue that family has been found to be a PSG and that regardless of what the Acting Attorney General does with Matter of L-E-A- and the Second Circuit should continue to find that family is a viable PSG.

To reiterate, though, there is no question that Matter of L-E-A- remains good law unless, and until, the Acting AG renders a formal decision on the case. The BIA has stated that "…under the plain language of the regulatory provision addressing the controlling effect of Board precedent decisions, and the recently promulgated case management regulations requiring prompt and timely adjudication of Board decisions, a Board precedent decision applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the Board, Congress, or a Federal court." Matter of E-L-H-, 23 I. & N. Dec. 814 (BIA 2005).

Gender-based Particular Social Groups

Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985) – the foundational case on PSG—recognized "sex" as an immutable characteristic that could define a group for asylum purposes. That was the case in which the BIA defined a PSG as **"a group of persons all of whom share a common, immutable characteristic" which is one that members of the group "either cannot change or should not be required to change because it is fundamental to their identities or consciences**."

The BIA later relied on Matter of Acosta to define other PSGs, including in cases where the applicants feared various forms of gender-based harm. In Matter of Kasinga, the BIA recognized that female genital mutilation (FGM) is a form of persecution and that individuals who are targeted for that form of harm can form a PSG. The PSG articulated in that case was "young women of the Tchamba-Kunsunto tribe [in Togo] who had not been subjected to FGM as practiced by that tribe and who oppose the practice."

On August 26, 2014, the BIA issued a landmark decision to hold that "married women in Guatemala who are unable to leave their relationship" is a cognizable PSG. That case was Matter of A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014). That was an important case because it was the first domestic violence asylum case to be issued as a precedential decision. It was not, though, the first case in which an applicant had been granted asylum based on domestic violence.

Former Attorney General Sessions certified Matter of A-R-C-G- to himself and requested briefing on the issue of "whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." Ms. A-B-, the many groups that filed amicus briefs in support, and DHS requested that he clarify the issue, and also expressed support for the

holding in Matter of A-R-C-G- that a successful asylum claim can be based upon domestic violence. Nevertheless, on June 11, 2018, then-AG Sessions issued a precedential decision to overrule Matter of A-R-C-G-. That case is Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

With that decision, he attempted to severely limit the circumstances under which asylum can be granted to survivors of gender-based persecution. He stated in his decision that "[g]enerally, claims by aliens pertaining to domestic violence… perpetrated by non-governmental actors will not qualify for asylum." He did, however, note that asylum claims must be considered on a case-by-case basis, and acknowledged that his ruling does not hold that domestic violence may never serve as the basis for an asylum grant. In his decision, former AG Sessions overruled the PSG formulation in Matter of A-R-C-G-: "Guatemalan women who are unable to leave their domestic relationship."

He did not address, *and therefore did not foreclose*, other PSG formulations for survivors of gender-based violence, including:

- "Women from [country X]" (for example: "Guatemalan women")
- "Women from [country X] who are treated as property due to their position in a domestic relationship"

Attorneys representing asylum-seekers should continue using those PSGs, and should distinguish Matter of A-B- as a case in which the AG rejected evidence that had been submitted in support of the specific PSG articulated there. Sanctuary for Families generally advises that in post-A-B- cases involving domestic violence, we should use the gender + nationality formulation (for example: "Guatemalan women") instead of other more complex PSGs, where possible.

In all asylum cases, but especially in cases involving PSG analysis, it is important to thoroughly document each element of the claim (including severity of the harm, failure of state protection, lack of availability of safe internal relocation, and well-founded fear of return). It is also advisable to present other grounds for asylum (i.e. religion, political opinion), when possible, and to seek protection, in the alternative, under the UN Convention Against Torture, which requires a showing of likelihood of future torture, but does not also require nexus to a protected ground.

A Step-by-Step PSG Analysis

Applying the relevant case law, the following is the necessary inquiry in the Second Circuit to determine whether your client will be able to establish membership in a PSG. You may arguably follow only steps 1, 4, and 5 in the Third Circuit.

1) Is the proposed PSG comprised of members who share a **common immutable characteristic** (i.e. a characteristic that cannot be changed, or that cannot reasonably be expected to be changed)? If so,

2) Is the proposed PSG defined with **particularity**? (e.g. Do the terms used to describe the group have commonly accepted definitions in the society of which the group is a part? Can the group be described in sufficiently distinct terms such that it would be recognized as a discrete class of persons in the society in question?) If so,

3) Is the proposed PSG **socially distinct** within the society in question? (e.g. Would the society in question treat members of the proposed PSG differently from others based on the shared immutable characteristics?) If so,

4) Is the applicant a **member** of the proposed PSG? If so,

5) Has the applicant been persecuted, or does the applicant face a well-founded fear of persecution, **on account of** their membership in that PSG?

The arguments as to why your proposed group meets the particularity and social distinction requirements may significantly overlap. They might even be virtually identical. The BIA recognizes that these two requirements overlap but nonetheless holds that it is necessary to address both elements. W-G-R-, 26 I. & N. Dec. 208 (BIA 2014). The BIA also recognizes that there might be more than one reason for the persecution that the applicant suffered or fears. In such cases, the applicant must show that a protected group (for example, membership in a particular social group) is "at least one central reason" for the persecution. *Id.*

The claim regarding the existence of a PSG will be evaluated in context of the evidence you present regarding the circumstances in the country in question. Accordingly, you should be careful to develop each prong of the PSG inquiry in the context of the society and culture from which your client's claim arises.