Asylum Law: A Particular Social Group Practicum

Lauren Graham Sullivan
Advocacy Attorney
CLINIC
Speakers

Edna Yang: General Counsel for American Gateways

Denise Gilman: Professor and Co-Director of the Immigration Clinic at the University of Texas Law School
Overview

1. Origins and Source of particular social group (PSG) as a ground

2. Definition of PSG- *Acosta* approach

3. Social visibility and particularity requirements

4. Case examples/Group activity
Definition of a refugee

“Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion.”
Origin of Particular Social Group

- Origin of Asylum law: Treaty
- Origin of PSG: 1951 Convention

- Definition of PSG:
  - Not defined by the 1951 Convention or the 1967 Protocol
  - Not defined in the INA or CFR

- Definition of PSG: Caselaw only
PARTICULAR SOCIAL GROUP

MATTER OF ACOSTA, 19 I&N Dec. 211 (BIA 1985)

• COMMON, IMMUTABLE CHARACTERISTIC

• Members of the group CANNOT change, or should not be required to because it is FUNDAMENTAL to their identity or conscience
Particular Social Group Examples

• **Families** *(Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011); Demiraj v. Holder, 631 F.3d 194 (5th Cir. 2011); Torres v. Mukasey, 551 F.3d 616 (7th Cir. 2008))*

• **Somalian clan** *(Matter of H-, 21 I&N Dec. 337 (BIA 1996))*

• **Women of a particular tribe not yet subjected to FGM** *(Matter of Kasinga, Int. Dec. 3278 (BIA 1996))*

• **Gay men or women** *(Matter of Toboso-Alfonso, 20 I&N 819 (BIA 1990))*
Federal Court Treatment of PSG

- Acosta’s immutable or fundamental standard was adopted by circuit courts across the country with the exception of the Ninth Circuit.

- 9th Circuit: The Ninth Circuit initially required that groups be united by a “voluntary associational relationship” Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986).

- In 2000, the Ninth Circuit adopted the immutable or fundamental standard of Acosta, as an alternative to its voluntary associational relationship standard. Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).
Defining PSG: Additional Requirements

“social visibility” and “particularity”

**Social visibility** generally understood to require that the group be perceived as a group in a society.

**Particularity** refers to ability to define the group in a sufficiently distinct manner so that it would be recognized in the society in question as a discrete class of persons.
PSG: SOCIAL VISIBILITY

- *MATTER OF C-A-, 23 I&N DEC. 951 (BIA 2006)*

The social group must be *recognizable and perceived as a group in society*
SOCIAL VISIBILITY

EXAMPLES OF SUFFICIENT SOCIAL VISIBILITY:

• Social groups based on innate characteristics such as sex or family relationship

• “CAMEROONIAN WIDOWS”
  – NGENGWE V. MUKASEY, 543 F.3D 1029, 1034 (8TH CIR. 2008).
  – There was sufficient background authority in the record describing the rituals and societal treatment of the individuals in question
SOCIAL VISIBILITY

EXAMPLE OF **INSUFFICIENT** SOCIAL VISIBILITY

CONFIDENTIAL INFORMANTS

“…The very nature of the conduct at issues is such that is generally out of the public view.” *MATTER OF C-A-, 23 I&N DEC. AT 960.*
SOCIAL GROUP: PARTICULARITY

• … “Whether the proposed group can be described in a manner sufficiently distinct that the group would be recognized in the society in question, as a distinct class of persons.”
  *MATTER OF S-E-G-, 24 I&N DEC. 579, 584 (BIA 2008)*

• CAN’T BE TOO “AMORPHOUS”
PARTICULARITY

EXAMPLE OF INSUFFICIENT PARTICULARITY

Proposed social group comprised of male children who lack stable families and meaningful protection, who are from middle and low income classes, who live in territories controlled by gang, and who refuse recruitment
PSG “affluent Guatemalans”

1) Visibility

• Characterizes C-A- as affirming the “importance of social visibility” as a factor in PSG analysis
• social visibility must be analyzed in the “context of the country of concern and the persecution feared”
• No evidence that “affluent Guatemalans” are subject to greater human rights violations or violence than society at large, or that society perceives the group as distinct

2) Particularity

• “wealth” and “affluence” are too amorphous, indeterminate, and subjective to provide “adequate benchmark” for determining group membership
PSG: Salvadoran youth who have been recruited and have “rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities”

1) Visibility
   - Rules that the group lacks social visibility because it would not be perceived as a group by society

2) Particularity
   - Rules that it lacks particularity (because it is too amorphous). Particularity asks whether the “group can be accurately described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”

Size may be relevant, but key question is whether the group is too amorphous to determine a benchmark for membership
Circuits that have adopted social visibility and particularity

- First Circuit: *Scatambuli v Holder*, 558 F.3d 53 (1st Cir. 2009)
- Second Circuit: *Koudriachova v Gonzales*, 490 F.3d 255 (2d Cir. 2007)
- Fourth Circuit – *Lizama v Holder*, 629 F.3d 440 (4th Cir. 2011)
- Eighth Circuit – *Davila-Mejia v Mukasey*, 531 F.3d 624 (8th Cir. 2008)
- Ninth Circuit initially adopted social visibility and particularity. *See eg Ramos Lopez v Holder*, 563 F.3d 855 (9th Cir. 2009) But more recently, the court described these as “factor(s) to consider” rather than requirements. *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010)
- Eleventh Circuit – *Castillo-Arias v U.S. Atty Gen*, 446 F.3d 1190 (11th Cir. 2006)
Seventh Circuit - Rejection of Visibility and Particularity

- *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)

PSG: “Mungiki defectors”

Court rejects social visibility, finding the criteria “makes no sense” because the BIA failed to provide rationale for it, because members of a targeted group “take pains to avoid being socially visible,” and because and it is contradictory to earlier BIA precedent.

- *Benitez-Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (rejecting particularity requirement)
Third Circuit – Questioning Visibility and Particularity

- Valdiviezo-Galdamez v. AG, 663 F.3d 582 (3rd Cir. 2011)

PSG: “Honduran youth recruited by gangs who refused to join because they oppose the gangs”

Visibility problematic because BIA has recognized PSGs where group members did not possess "characteristics that were highly visible and recognizable“ (eg FGM, sexual orientation).

Particularity similar to visibility so also problematic.

Requirements of "social visibility" and "particularity" inconsistent with prior decisions, and the BIA has not given a "principled reason" for new requirements.
Karla is from Honduras. She has 4 children. Her two oldest children are from her abusive partner, Martin. She met him when she was 20 years old. They began a relationship, but never married. Martin was extremely abusive to Karla. She never reported any of the abuse to the authorities in Honduras. She attempted to leave Martin on 2 different occasions and flee to her mother’s house. He came and found her after each attempt and forced her to return with him. Karla escaped from Martin when she was 26 and was able to relocate to the capital where he could not find her.

After she relocated, she met her second partner, Gregorio. She had two children with him. Gregorio was not abusive to her, but they split after 4 years. A year after she split from Gregorio, she began to receive phone calls from Martin. She did not know where Martin was calling from, but was fearful for her life. He threatened to find her and harm her. The calls continued for about 3 weeks. Karla feared that Martin would carry through his threats to harm her. She borrowed money from her aunt and left all four of her children with her mother and came to the US. She is now seeking asylum.
Fact Pattern #2

Ms. Lopez was raised in a rural area of El Salvador with her mother and father and two sisters. She is 22 years old.

In July 2011, the body of Ms. Lopez’s cousin Mario was discovered in a ditch in a town located a short distance away from where Ms. Lopez lived. Ms. Lopez’s cousin had been stabbed to death by mareros (gang members). The initials “MS-13” were written on his chest. Before his death, Mario had mentioned to Ms. Lopez that members of the gang were trying to recruit him and that he did not want to join. Mario had also mentioned that the mareros had asked Mario for money after they found out that he had lived in the United States for a few years.

The same day Mario’s body was discovered, the family held a wake. Ms. Lopez and her family attended the wake along with other members of their community. At the wake, Ms. Lopez’s father stated that the mareros who killed Mario “would pay for justice” and said that he was going to report them to the police.
Fact Pattern #2

In the month after the wake, MS-13 left several threatening letters for Ms. Lopez’s father at the family’s home, warning him that he would be killed if he filed a police report. Ms. Lopez’s father has since fled to another area of El Salvador.

A short time after Ms. Lopez’s father left home, three members of MS-13 came to the house. The men talked to Ms. Lopez and demanded that she give them money. She refused. The men then said that Ms. Lopez’s father needed to pay for what he had said at the wake. The men threw her on the ground and beat her. They threatened to kill Ms. Lopez the next time and then left.

After this incident, Ms. Lopez went to the police. She told the police that members of MS-13 had been asking about her father and had beaten her. She also asked whether there had been any investigation into the murder of her cousin Mario.

About two weeks later, Ms. Lopez left for the United States. Ms. Lopez’s mother has told her that the mareros returned one more time to the house to make more threats.