



National Immigrant Justice Center

## *NIJC Pro Bono Seminar*

Asylum Claims Based on  
"Membership in a Particular Social Group"

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[www.immigrantjustice.org](http://www.immigrantjustice.org)



# Welcome

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# About the National Immigrant Justice Center

- The National Immigrant Justice Center (NIJC), a program of Heartland Alliance for Human Needs & Human Rights, promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. Throughout its over 30-year history as an organization and its more than 25 years of *pro bono* service, NIJC has been unique in blending individual client advocacy with broad-based systemic change.
- NIJC serves more than 8,000 immigrants annually with the support of a professional legal staff and a network of over 1,500 *pro bono* attorneys.
- NIJC has *pro bono* opportunities available for a variety of immigration case types, including asylum, detention, special immigrant juvenile status, VAWA & U visas, citizenship clinics, and asylee/refugee family petition and adjustment clinics
- NIJC's *pro bono* programs
  - Conduct in-depth case screening, assessment and acceptance
  - Placement with *pro bono* attorneys
  - Case management, attorney support and technical assistance

# About NIJC's Asylum Project

- NIJC's Asylum Project represents asylum seekers through *pro bono* attorneys at law firms in Chicago, Milwaukee, and Indiana.
- NIJC has over 200 open asylum cases today.
- The majority of NIJC's asylum clients currently come from Eritrea, the Republic of the Congo, the Democratic Republic of the Congo, and Central America.
- NIJC maintains a 90 percent success rate in representing asylum seekers. Nationwide, USCIS and EOIR have only approved about 30 percent of all asylum cases in recent years.
- In FY2011, NIJC and its network of *pro bono* attorneys obtained asylum and other protection-based relief for over 100 individuals.



# The Evolution of Particular Social Group Case Law

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# Asylum: Definition

- An individual is eligible for asylum if she “is outside any country of such person’s nationality . . . 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.” INA §§ 101(a)(42)(A); 208(b)(1)(A).
  - Definition based on international law: UN Protocol Relating to the Status of Refugees, Art I(2)

# Asylum: Elements

1. "Well-Founded Fear"
2. of "Persecution"
3. Perpetrated by the government or an entity the government cannot control
4. On account of the following factor(s)
  - Race
  - Religion
  - Nationality
  - Political Opinion
  - Membership in a Particular Social Group

# "On Account Of"

➤ Must establish that one of the five protected grounds

- Race
- Religion
- Nationality
- Political Opinion
- Membership in a Particular Social Group

was or will be at least one central reason for the persecution.

# *Matter of Acosta (BIA 1989) – Acosta Test*

- BIA examined what other protected grounds share:
  - a characteristic that members cannot change (race and nationality) or a characteristic that members should not be required to change (religion and political opinion).
- Therefore, a particular social group must be based on a characteristic that members either cannot change or should not be required to change.
- Decided on a case-by-case basis

# *Acosta* definition of PSG

- “A group whose members share common characteristics that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities or consciences.”
- Examples of the shared characteristic may include: “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.”

# Departure from *Acosta*

- In 2006, the BIA abruptly departed from the *Acosta* test and added two additional factor/requirements to the PSG test: “social visibility” and “particularity.”
  - *Matter of C-A-* (BIA 2006): The group of “Former non-criminal informants working against the Cali drug cartel” is not social visible
  - *Matter of A-M-E- & J-G-U-* (BIA 2007): “wealthy or affluent Guatemalans” is too amorphous and subjective – not defined in a sufficiently particular manner – to constitute a PSG

# Departure from *Acosta* cont.

- In creating the social visibility test, the BIA relied on the UNHCR's definition "particular social group," but collapsed the UNHCR's two pronged either/or test into one, single definition:

"A particular social group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."

UNHCR, "Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," at ¶ 11.

# Visibility, Particularity and Confusion with Nexus

## ➤ *Matter of C-A-*:

- Not in a “substantially different” situation from anyone who “threatens the cartels interests”
- Characteristics of social group must have significance to persecutor
- Cannot encompass general population, must be “narrower”

## ➤ *Matter of S-E-G-*,

- The motivations of the gang members in targeting young males could arise apart from any perception that the males in question were members of a class.

# Status of the Social Visibility Test

- Accepted or Upheld the Social Visibility Test
  - 1<sup>st</sup> Circuit
  - 2<sup>nd</sup> Circuit
  - 4<sup>th</sup> Circuit
  - 6<sup>th</sup> Circuit
  - 10<sup>th</sup> Circuit (but provided different definition of social visibility)
- Rejected the Social Visibility Test
  - 3<sup>rd</sup> Circuit
  - 7<sup>th</sup> Circuit
- Possibly Open
  - 8<sup>th</sup> Circuit – pending decision (*Granados-Gaitan*)
  - 9<sup>th</sup> Circuit – rehearing en banc (*Henriquez-Rivas*)

# The 7th Circuit has:

- Adopted the *Acosta* definition of PSG (shared, immutable characteristics): *Lwin v. INS*, 144 F.3d 505 (7th Cir.1998).
- Rejected the social visibility requirement: *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Benitez-Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).
- Repeatedly affirmed that “former membership” can form the basis of a PSG, even where the former membership was in a criminal organization. *Benitez-Ramos*.
- Expressed concern about groups that share few common characteristics. *Gatimi; Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011).

# 7th Circuit Continued

*Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011)

- PSG: “truckers who, because of their anti-FARC views and actions, have collaborated with law enforcement and refused to cooperate with the FARC.”
  - Judge Easterbrook (concurring) criticizes this group as only sharing the characteristic of having been persecuted in the past.
  - Majority says the group shares many other common characteristics (former trucks, having rebelled against the FARC, anti-FARC opinions). Can’t just look at parts of PSG in isolation.
  - Majority explicitly rejects idea that PSG must exist entirely independently of persecutor/persecution.

# PSGs Recognized by the 7th Circuit

- The educated, landowning class of cattle farmers in Colombia
- Women in Iran who oppose the Islamic dress code for women
- Parents of Burmese student dissidents
- Former subordinates of the attorney general of Colombia
- Former members of the Mungiki in Kenya
- Tattooed, former Salvadoran gang members
- Jordanian women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals

(This list is not exhaustive)



Particular Social Group

vs.

Nexus

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# Why does a proper PSG analysis matter?

Improper analysis:

- Makes for an *ad hoc* system
- Creates overly narrow refugee determinations
- Prevents attorneys from being able to meaningfully counsel clients

# Revisiting the Elements of Asylum

1. "Well-Founded Fear"
2. of "Persecution"
3. Perpetrated by the government or an entity the government cannot control
4. On account of the following factor(s)
  - Race
  - Religion
  - Nationality
  - Political Opinion
  - Membership in a Particular Social Group

# Relationship Between the Elements

## PERSECUTION

The harm feared or suffered

## NEXUS

Evidence showing that the protected ground was the reason that the persecutor targeted the asylum seeker for persecution

## PROTECTED GROUND

The characteristic of an asylum seeker that causes the persecutor to target the asylum seeker for persecution

**ALWAYS KEEP THESE THREE ELEMENTS SEPARATE**

# Conflating the PSG Element with the Nexus Element:

“The question whether a proposed group [meets the PSG requirements] must be considered in the context of the country of concern and the persecution feared....The respondents in this case are victims of harassment, beatings, and threats from a criminal gang in El Salvador. There is little . . . evidence . . . To indicate that Salvadoran youth who are recruited by gangs but refuse to join . . . suffer from a higher incidence of crime than the rest of the population....[S]uch gangs have directed harm against anyone . . . . The respondents are therefore not in a substantially different situation from anyone who has cross the gang, or who is perceived to be a threat to the gangs interests.”

*Matter of S-E-G-*, 24 I&N Dec. 579, 586-87 (BIA 2008)

# Conflating the PSG Element with the Nexus Element:

"We also disagree with the respondent's claimed social group . . . The respondent's reliance on *Tapiero de Orejuela v. Gonzales*...is misplaced. In *Tapiero*...the group was defined not simply as wealthy landowners, but as wealthy and educated cattle farmers....The record there reflected that this particular combination of features was a target of the FARC's violent campaigns. Here . . . [t]he record does not demonstrate that the FARC targets the proposed group."

*-Unpublished BIA decision, 2011.*

# Requiring that the PSG Be Narrowly Defined

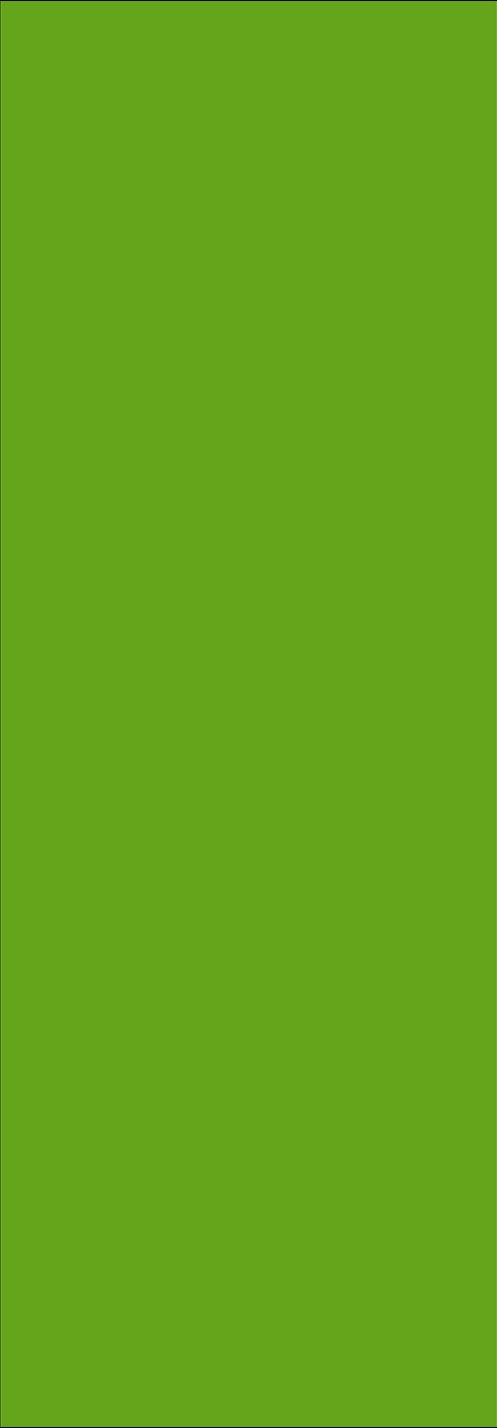
“Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”

*Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994)

# Rejecting a PSG on Policy Grounds

“The Board has a legitimate interest in resisting efforts to classify people who are targets of persecution as members of a particular social group when they have little or nothing in common beyond being targets.”

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



# Creating and Defending a Particular Social Group

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# Tips for Creating a Particular Social Group

- Ask, “why did the persecutor target my client in the past?” and “why will the persecutor target my client in the future?”
- Find the immutable characteristic
  - Remember that the characteristic can be one that the members cannot change
  - OR
  - that members should not be required to change because the characteristic is fundamental to their identities OR consciences

# Tips for Creating a Particular Social Group

## Common Errors to Avoid

- Defining the social group by the persecution
  - But remember that if the future harmed fear is different than the past harm, the social group for the future persecution can be related to the past persecution suffered
- Using ambiguous terms
  - E.g., “wealthy/affluent”; “Americanized”; “family members”;

# Defending Your Particular Social Group

Common adjudicator concerns and possible responses:

- Criticism: the social group is too broad
  - Response: there is no requirement that PSGs be narrowly defined. All of the other protected grounds are extremely broad.
  
- Criticism: not all members of the group are being persecuted
  - Response: this relates to nexus, not to the existence of a PSG.
  - Also, there is no requirement that all members of the group be persecuted. Individuals seeking asylum based on another protected ground do not need to show that all individuals with that protected characteristic have been persecuted.

# Defending Your Particular Social Group

Common adjudicator concerns and possible responses:

- Criticism: the persecutor targets other people not included in the social group
  - Response: the only relevant question is whether the persecutor targeted my client on account of her PSG.
  
- Criticism: the group is not based on an immutable characteristic.
  - Response: the group is based on a characteristic that is fundamental to the group members' identities or consciences.

## Ana's Case:

Ana grew up in El Salvador. In 2008, Ana met Juan at her job and they began dating. Soon after they began dating, Juan became controlling and began verbally and emotionally abusing Ana. In December 2009, Juan began to physically abuse Ana. While beating her, he often told her that she was his woman and if she did not do as he said, she would have to face the consequences. Ana called the police during one violent incident, but although the police only detained him for 24 hours and then let him go without any punishment. When Juan returned home, he grabbed a pair of scissors and threatened to cut out Ana's tongue for calling the police. Ana fled El Salvador two days later and entered the United States on May 6, 2010.

## Mariama from Mali:

Mariama is a 17-year-old girl from Mali. When she was 14 years old, her father ordered that she undergo female genital mutilation (FGM) to prepare her for an arranged marriage. Mariama's older sister had been subjected to FGM when she was a teenager and suffered many medical problems afterwards as a result. After Mariama's cousin was subjected to FGM, she bled to death. Mariama was terrified of being subjected to FGM and told her father she did not want to undergo the procedure. In response, her father beat her and threatened to disown her if she refused to undergo FGM. Mariama's aunt helped her to flee Mali and she entered the United States on a tourist visa.

## Irene's Case

Irene is from the Republic of the Congo. In the late 1990s, refugees returning to the Congo from the Democratic Republic of the Congo were massacred by individuals affiliated with the Congolese government. The brother of Irene's ex-husband was one of the individuals murdered during the massacre. Several years afterwards, family members of the victims, including Irene's ex-husband, sued the government for their role in the massacre. Although the court ordered the government to pay indemnities to the family members of the victims, the government threatened that those who participated in the law suit would pay. Shortly after the trial ended, soldiers began coming to Irene's home at night and threatening to kill her if she did not tell them where her ex-husband was located. After the third time Irene told the soldiers she did not know her ex-husband's location, the soldiers beat Irene and her young children. Irene and her children fled the Congo and entered the United States on May 6, 2011.

## Hector from Mexico:

Hector is a 35-year-old man from Mexico. He lives with his wife and two sons in Cuernavaca and works as a mechanic. In 2010, a drug cartel came to his garage and told him that he had to begin paying the cartel a tax if he wanted to continue operating his business. The cartel went to every other small business in the town and threatened that they all had to pay a tax as well. Hector and several other of the businesses decided that they would all oppose the cartel and refuse to pay the tax. Two weeks later, the cartel killed one of the other businessmen in the group who had refused to pay the tax and left threatening notes at the businesses of all the other men warning them to pay the tax. Two days later, the body of one of the other businessmen in the group was found. The following day, cartel members attempted to kidnap Hector's son on his way home from school and shot at Hector's garage. Hector and his family fled to the U.S. border and requested asylum. After he passed a credible fear interview, Hector and his family were paroled into the United States so they could apply for asylum.

## Jose from Guatemala:

Jose is a 17-year-old boy from Guatemala. He has never known his father and his mother went to the United States when he was five years old, leaving him in the care of his grandmother. Jose's grandmother was unable to support him and from a young age, Jose worked in the streets as a shoe shiner to earn money to buy food for himself. When he was 12 years old, he began selling drugs on occasion for the Mara 18 gang. Sometimes, the gang paid him in drugs instead of money. When Jose was 14 years old, the gang began pressuring him to join them and repeatedly beat him up until eventually, he was initiated into the gang. When Jose was 15 years old, the gang ordered him to kill the uncle of Jose's childhood friend. Jose did not want to kill the man, but knew the gang would kill him if he did not obey. He left his town the next day and fled Guatemala. He eventually entered the United States without inspection.

## Luis from Honduras:

Luis is a 19-year-old man from Honduras. When Luis was a teenager, the Mara Salvatrucha gang began gaining power in his neighborhood. Soon Luis began to see young men with MS tattoos outside his school and the field where he played soccer with his friends. They began threatening Luis and his friends that they had to join MS. On several different occasions, MS members waited for Luis outside his school and outside his home. The MS members had guns and would follow Luis menacingly. In May 2009, two MS members flashed their guns at Luis outside of his school. Two weeks later, MS killed one of Luis's friends after he had repeatedly refused to join the gang. For the next three weeks, Luis stayed inside his house and did not go to school because he feared the gang would kill him next. In early July 2009, Luis left his home to buy food. After leaving his house, two MS members saw him and began chasing him. Luis was able to get away and ran to the home of his aunt. He fled Honduras two days later and entered the United States in late 2009.

# THANK YOU!

*National Immigrant Justice Center*

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