

# PSGs and Bars in UC Asylum Claims: Strategies and Best Practices

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# Asylum & PSG Overview

# PSG: BIA's Three-Part Test

- 1) Immutable characteristic(s)
- 2) Social distinction
- 3) Particularity

*Matter of MEVG*, 26 I&N Dec. 227 (BIA 2014); *Matter of WGR*, 26 I&N Dec. 208 (BIA 2014)

*\*BIA test in tension with UNHCR approach*

# Immutable Characteristic Test

*Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985)

Defining a PSG as “a group of persons all of whom share a common, immutable characteristic [which] members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”

## Examples

Gender

Ethnicity

Opposition to cultural practices

HIV+ status

Family or clan membership

Sexual orientation

Past experiences

# Social Distinction

“Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question.”  
*Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014).

Does *not* require “on sight” visibility

Evidenced by:

- Higher incidence of violence against group members
- Discrimination and harassment of group members
- Laws enacted that address the group in some way

# Particularity

“A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.” *Matter of M-E-V-G-*, 26 I&N Dec. 228, 239 (BIA 2014).

Does not refer to the “size” of the group nor should it be interpreted to require homogeneity

Evidenced by:

- Commonly accepted definitions of terms
- Social, cultural, and legal constructs of the group
- Police refusal to intervene because of group status

# Introduction of Particularity & Social Visibility

*Matter of C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006)

Rejecting “noncriminal informants” for being “too loosely defined to meet the requirement of particularity” and because the conduct at issue is “generally out of the public view” (i.e., not visible)

*Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008)

*Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008)

Particularity: the group must be “described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons”

Social visibility: the group “should be generally recognizable by other in the community”

# Affirmation of Particularity and Social Distinction

*Matter of W-G-R-*, 26 I. & N. Dec. 208 (B.I.A. 2014)

*Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014)

Particularity: requires groups to be defined by characteristics that provide a clear benchmark for determining who falls within the group and rejects those that are amorphous, overbroad, diffuse, or subjective

- Relevant evidence includes commonly accepted definitions of terms; social, cultural, and legal constructs of the group; and police refusal to intervene

Social distinction: requires that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group—not ocular visibility

- Relevant evidence includes country conditions reports, expert witness testimony, laws and policies addressing the group, historical animosities, high rates of violence



# Circuit Reactions

## Affirming deference first given to *S-E-G-* & *E-A-G-*

First Circuit<sup>1</sup>

Second Circuit<sup>2</sup>

Fifth Circuit<sup>3</sup>

Sixth Circuit<sup>4</sup>

Tenth Circuit<sup>5</sup>

Eleventh Circuit<sup>6</sup>

## Deferring to *W-G-R-* & *M-E-V-G-*

Ninth Circuit<sup>7</sup>

1. *Paiz-Morales v. Lynch*, 795 F.3d 238 (1st Cir. 2015)

2. *Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014)

3. *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784 (5th Cir. 2016)

4. *Zaldana Menijar v. Lynch*, 812 F.3d 491 (6th Cir. 2015)

5. *Rodas-Orellana v. Holder*, 780 F.3d 982 (10th Cir. 2015)

6. *Gonzalez v. U.S. Att’y Gen.*, 820 F.3d 399 (11th Cir. 2015)

7. *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016)

# Circuit Reactions

## Reserving the question of deference

- Fourth Circuit<sup>8</sup> (on social distinction only)
- Eighth Circuit<sup>9</sup>

## Rejecting *S-E-G-* & *M-E-V-G-*

- Third Circuit<sup>10</sup>
- Seventh Circuit<sup>11</sup>

8. *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014)

9. *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012)

10. *Valdiviezo-Galdamez v. US Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011)

11. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (en banc)

# Building and Defending a Winning PSG

# Key Takeaways

- Importance of case-by-case, record-specific adjudication
- Immutability as the cornerstone of group inquiry

# Practical Tips in Building a PSG

- Get to know your client
  - Meet with the client various times to hear their story
  - Always ask your client why they think they were targeted OR will be targeted
  - Have them draft a declaration to get more information
  - Talk to family members in home country and US

# Determine the Characteristic

- Ask “why did the persecutor target my client?”
- Find the shared characteristic that your client cannot change OR should not be required to change
- Make sure the other group members share this characteristic (Don’t be afraid to get creative!)
- Explore all theories
  - Remember some basis for persecution can be both PSG and its own basis
    - Ex. Race and “Mayan Quiche”

# Strategies for Success in PSG Cases

- Articulate the characteristics of the PSG
- Argue that social group is to be determined on a case-by-case, record-specific basis
- Define PSGs that satisfy the BIA's 3-prong test (but challenge SD/P where appropriate)
- Put forth your understanding of the proper meaning of the terms
- Avoid circular reasoning and defining the PSG by the harm
- Build the record

# Consider Using Alternate PSGs

- More than one PSG can be provided, but too many may create confusion and overwhelm the IJ or officer, and a create a complex brief.
  - Asylum Office v. EOIR
- The PSG must be preserved before the immigration court to argue on appeal



# Preserving the Record

- Present multiple theories
  - Brief and argue all theories
  - Asylum office vs. EOIR
- Considerations for appeals
  - Resources
  - How far do you go? Circuit courts or BIA
  - Creating bad caselaw

# Investigate PSG Case Law

- Asylum claims are very fact-specific – look but don't expect to find case law that mirrors your client's case.
  - Look for analogies and similarities in other asylum claims – even if they are from entirely different countries and involve completely different protected grounds
    - ex: *Cece v. Holder* (“young women who are targeted for prostitution by traffickers in Albania” or “young women living alone”)

# Child Abuse and *Matter of A-R-C-G*

- ***Matter of A-R-C-G-***, 26 I.&N. Dec. 388 (BIA 2014)
  - PSG: “married women in Guatemala who are unable to leave their relationship”
    - children viewed as property by virtue of status in family relationship
    - children of women in domestic relationships they are unable to leave
    - children unable to leave the familial relationship
- ***Hui v. Holder***, 769 F.3d 984 (8th Cir. 2014) (“Chinese daughters viewed as property by virtue of their position within a domestic relationship”)

# Common Child PSG Formulations

- Family Membership
  - Ex. Child of x, step-child of x, family member of x
- Children on their own (e.g., children who have been abandoned by their parents, children without effective parental protection)
- Disability
- Orphans
- Adopted children or step-children
- Indigenous children
- LGBT children, or children perceived to be LGBT
- Children born out of wedlock, children perceived as illegitimate, children with contested paternity

**TIP: AVOID circular PSGs such as “abused children”**

# PSG: Gender Claims

**Intimate Partner Claims:** gender + nationality + relationship status

**Other gender-based violence** (e.g. sex trafficking, rape, female genital cutting): gender + nationality +

- Childhood
- Tribe/ethnicity
- Indigenous status
- Lacking parental protection
- Living alone
- Marital status (e.g. single, unmarried)

# PSG: Gang Claims

## Witnesses

- Individuals who testify against gang members
- Witnesses to gang crimes/violence in [country]
- Salvadoran trial witnesses who actively oppose gangs by testifying against them in open court

## Former Gang Members

- Former [X gang] member
- Tattooed, former [nationality] gang members
- Defectors of X
- Past members of X

## Family

- Immediate family of X
- Children of X
- Family members of prosecutorial witnesses

## Recruitment

- Recruitment + resistance (e.g., “persons taking concrete steps to oppose gang membership and gang authority”)

## Gender

- Guatemalan girls viewed as property of the gang
- nationality + girl children
- Mexican girls without effective parental protection
- Salvadoran female orphans
- Single Salvadoran women who are working professionals
- What about former boyfriends?

## Extortion

- PSGs defined by wealth and length of time in U.S. generally rejected
- Some opening for landowners (e.g. N.L.A. v. Holder, 744 F.3d 425 (7th Cir. 2014))

*Explore alternate protected grounds PO or religion!*

# Other Examples of PSGs in Gang Cases

- Perceived/imputed gang members
- Perceived gang collaborators/supporters
- Males from female-headed households
- Unprotected children
- People with moral/religious objection to gangs
- Trafficking-based PSGs

# Challenging Circuit Law

- Know your circuit
  - 5<sup>th</sup> circuit vs. 4<sup>th</sup> circuit → family members of gang resisters
    - *Orellana-Monson v. Holder*, 685 F.3d 511 (5<sup>th</sup> Cir. 2012) – too broad, just as PSG defined by Salvadoran youth who resist gang activity is too broad
    - *Crespin-Valladares v. Holder*, 632 F.3d 117 (4<sup>th</sup> Cir. 2011) – relying on “kinship ties” rather than a broader definition, the court recognized the PSG and found that the BIA improperly found it to be too broad
    - Also see: *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017) (rejecting “PSG+” approach to family claims, but imposing stringent nexus requirements for these claims).
- How to handle bad precedent?
  - Distinguish on the facts
  - Distinguish your legal theory from the arguments in the unfavorable case
  - Know your adjudicator and how to craft the PSG appropriately



# Defending Against Common Pushback

- **Overbroad or Generalized violence**
  - Address this directly in a closing
  - Analyze your PSG, going through each of the 3-part test
  - Define your group with specificity (ex: gender + narrowing characteristic)
- **Argue and preserve**
  - “...undoubtedly any of the six million Jews ultimately killed in concentration camps in Nazi-controlled Europe could have made valid claims for asylum, if only they had had that opportunity.-Many of our asylum laws originated out of a need to address just such refugees from World War II. It would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.” *Cece v. Holder*, 733 F.3d 662, 675 (7th Cir. 2013)

# Addressing Nexus

# Nexus

- Protected ground must be “at least one central reason” for the persecution. REAL ID Act of 2005
- Persecutor can have mixed motives. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211 (BIA 2007)
- Children often have limited knowledge or understanding
- Prove nexus by either:
  1. **Direct evidence:** Evidence of reason for persecution can come from explicit words and actions of persecutor
  2. **Circumstantial evidence:** Can include evidence of country conditions including legal and social norms which reinforce the persecutor’s belief that he can persecute without “interference or reprisal”

# Proving Nexus: Child Abuse Claims

Direct evidence:

- of subordinate status of child in family: “you are just a child,” “I’m your father and you need to do what I say.”
- that abuse directed at specific children in family: “You are going to pay for what your mother did.”

Circumstantial evidence showing that the state and society accept violence against children (e.g. country conditions showing the prevalence of child abuse, failure of state to respond and protect children).

# Proving Nexus: Gender Claims

Direct evidence of gender as a central motivating factor: a persecutor's words calling a woman a "bitch," "whore," saying she's "just a woman," he is "the man" and he decides, etc.

Circumstantial evidence showing that the state and society accept violence against women (e.g. country conditions showing the prevalence of and failure of state to respond to violence against women).

- *See, e.g., Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011) (recognizing relevance of societal attitudes and gender norms to establishing nexus)
- Discriminatory laws (e.g. no recognition of marital rape, allowing for marriage of girls under the age of 18)

# Proving Nexus: Gang Claims

The challenge is to show that the reasons for the persecution is the protected ground (e.g. political opinion/social group) rather than just a gang's desire to grow or as retribution.

- Don't overlook recruitment itself – WHO do gangs target and why?

Direct evidence: Did gangs say anything about being an enemy?  
Snitch? Government supporter? About family? About religion?

Circumstantial evidence: a country conditions expert can be especially useful to establish how gangs understand resistance and view resisters, and why they are motivated to suppress resistance, and who they target for recruitment and why.

# Alternative Theories

- Remember: Some basis for persecution can be both PSG and its own basis
  - Ex. Race/Nationality and “Mayan Quiche” PSG
- Race/Nationality
- Political Opinion (or imputed political opinion)
- Religion

# Bars to Asylum



# Mandatory Bars to Asylum

1. Persecution of others
2. Conviction for a particularly serious crime in U.S.
3. Serious reasons to believe committed serious non-political crime outside U.S.
4. Danger to U.S. security
5. Described in the terrorism grounds of inadmissibility
6. Can be removed to safe third country
7. Firm resettlement
8. Previous denial asylum application
9. Filed more than 1 year after last arrival

# Bars and UACs

## NOT Applicable to UACs

One-year filing deadline

- UACs exempt – time of entry vs. time of filing
- Non-UAC children – under legal disability; extraordinary circumstance

Safe third country bar

Bars should be evaluated considering child's individual culpability, developmental stage, and factors that may negate culpability, such as duress, coercion, self-defense

## Applicable to UACs

Firm Resettlement

National security

Particular serious crime/Aggravated felony

Persecutor of others

Previous asylum application denial (absent change in circumstances)

Serious nonpolitical crime

Terrorism

# Persecutor of Others

- Bars applicants who have ordered, incited, assisted, or otherwise participated in the persecution of any person on account of a protected ground
  - Actions must rise to the level of persecution
  - Actions must be on account of a protected ground
    - Inquiry is the motive of the group, not necessarily that of the individual
  - Action must further the persecution

## Open question

### Applicability of the bar where applicant acted under duress

- BIA heard argument on this question in fall 2017

#### Key authorities:

- 8 U.S.C. § 1158(b)(2)(A)(i)
- *Matter of A-H-*, 23 I. & N. Dec. 774 (AG 2005)
- *Negusie v. Holder*, 555 U.S. 511 (2009)
- *Matter of J. M. Alvarado*, 27 I. & N. Dec. 27 (BIA 2017)

# Particularly Serious Crime

- Bars applicants who are convicted of a particularly serious crime in the United States
- What is severe?
  - All aggravated felonies are particularly serious crimes for asylum
    - Aggravated felonies that carry a 5+ year sentence or involve drug trafficking are particularly serious crimes for withholding
  - For other crimes, severity is a fact-specific inquiry considering:
    1. Nature of the conviction
    2. Type of sentence imposed
    3. Circumstances and underlying facts of the conviction

Exception available for juvenile delinquency adjudications

#### Key authorities:

- 8 U.S.C. § 1158(b)(2)(A)(ii)
- 8 U.S.C. § 1101(a)(43)
- *Matter of N-A-M-*, 24 I. & N. Dec. 336 (BIA 2007)

# Serious Nonpolitical Crime

- Bars applicants who have committed a serious nonpolitical crime prior to arrival in the United States
  - Does not require a conviction; only probable cause
- Level of severity
  - Fact-specific inquiry considering:
    1. Circumstances surrounding the crime
    2. Whether it was directed at people or property
    3. Turpitudinous nature of the crime
    4. Punishments for analogous activity in the United States
  - Examples: assault, arson, armed and unarmed robbery, and drug trafficking
  - Conspiracies & aiding and abetting will trigger the bar
  - Covers more actions than the “particularly serious crime” bar

## Key authorities:

- 8 U.S.C. § 1158(b)(2)(A)(iii)
- *Matter of E-A-*, 26 I. & N. Dec. 1 (BIA 2012)
- *Matter of McMullen*, 19 I. & N. Dec. 90 (BIA 1984)

# Terrorism & Security Bars

- Two bars apply to applicants who are (1) associated with terrorism; or who (2) are otherwise a danger to the security of the United States
  - In practice, there is significant overlap between these two bars
  - The terrorism bars are more widely used than the security bar
- The terrorism bar incorporates all nine terrorism-related grounds of inadmissibility, barring applicants who:
  1. Engage in or encourage terrorist activity
  2. Are members of terrorist organizations
  3. Receiving training from terrorist organizations
  4. Are the child/spouse of someone who triggers the terrorism bar

## Key authorities:

- 8 U.S.C. § 1158(b)(2)(A)(v)
- 8 U.S.C. § 1182(a)(3)(B)
- *Matter of S-K-*, 23 I. & N. Dec. 936 (BIA 2006)
- *Matter of M-H-Z-*, 26 I. & N. Dec. 757 (BIA 2016)

# Terrorism & Security Bars

1. Terrorist activity: includes using an explosive, firearm, or other weapon with the intent to endanger the safety of at least one person or to cause substantial property damage—unless done for mere personal monetary gain.
2. Engaging in terrorism: includes providing material support for the commission of a terrorist activity; to a person who will commit terrorism; or to a terrorist organization
  - Material support includes provision of a safe house; transportation; communications; funds; false IDs; weapons; explosives; or training
  - No statutory exception for support provided under duress; no statutory exception for support provided to nonviolent/political arms of terrorist organizations
3. Terrorist organization: groups are sorted into three tiers; Tier III organizations are designated by IJ's or asylum officers and defined as (1) a group of at least two people that (2) engages in any terrorist activity
  - No statutory exception for groups fighting illegitimate regimes – the group motives are immaterial
  - Should not include gangs which are more properly classified as criminal organizations

# Strategies for Bars in Children's Claims

- Argue that children acted under duress, due to coercive facts present in case as well as children's overall vulnerability and lack of culpability.
  - *See Negusie v. Holder*, 129 S. Ct. 1159 (2009); UNHCR 2009 Guidelines.
- Argue that juvenile delinquency dispositions, and therefore acts committed as juvenile, do not constitute crimes and therefore cannot trigger "particularly serious crime" or "serious nonpolitical crime" bars
  - *See Matter of Devison-Charles*, 22 I. & N. Dec. 1362, 1365-66 (BIA 2000) ("[w]e have consistently held . . . that acts of juvenile delinquency are not crimes")
- Argue child did not have requisite culpability



# Discretion

Applicant who is statutorily eligible for asylum may still be denied in the exercise of discretion, which involves a balancing of positive and negative factors.

- Humanitarian factors, such as age, health, and family, should be considered.
- “Danger of persecution should outweigh all but the most egregious adverse factors.” *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).

Questions & comments