



Adjudicating Children's Asylum Claims: *Particular Social Groups*



U.S. Citizenship
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Photograph by Hiram A. Ruiz, courtesy of the US Committee for Refugees,



Objectives

1. Identify common bases for children's particular social groups.
2. Describe how family can constitute a particular social group.
3. Explain why a gang-related particular social group may or may not succeed.
4. Describe an appropriate particular social group formulation for female genital mutilation and forced marriage claims, and describe when such claims may or may not succeed.
5. Identify the traits for which a child may be targeted for abuse within the family, and describe an appropriate particular social group.





Children and PSGs

- Particular social groups often arise in children's claims. Persecutors of children are often non-state actors.
- Common bases for children's PSGs:
 - Family
 - Gang issues
 - FGM
 - Forced Marriage
 - Abuse Within the Family





Formulating a PSG

Two prongs required:

1. Immutable/fundamental characteristic

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

2. Socially distinct group

Matter of C-A-, 23 I&N Dec. 591 (BIA 2006).





Delineating the PSG is Critical

- Describe the group with particularity.
 - The traits should accurately reflect those for which the applicant is targeted. It should be possible to determine who comes within the scope of the group.
- Exclude any extraneous characteristics.
 - Ask yourself: *“Is this characteristic an essential element of this group?”*
- Defining the PSG is a threshold issue that impacts the presumption of well-founded fear.

Matter of A-T-, 25 I. & N. Dec. 4 (AG, 2009).





Family



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Defining a Group for Family

- “Immediate [or nuclear] family”

or

- “Immediate [or nuclear] family of [X individual]”





Family as a PSG

- As noted by a number of circuit courts, a group of family members constitutes the “*prototypical example*” of a particular social group.
- The *shared familial relationship* should be analyzed as the common trait that defines the group.





The Analysis of PSG of Family

- **Immutability** – Generally, a family relationship is something the applicant cannot or should not be expected to change.
- **Social Distinction** – In most societies, the nuclear or immediate family is socially distinct. In some societies, more extended relationships may also be socially distinct.





Family Can Stand Alone

- Family as a group is an *independent* nexus ground.



No need for family “*plus*” another ground.

- If a person is targeted because of the family connection, then the PSG of family would be appropriate.





Gang-related



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Gang Recruitment



- Youths who resist gang recruitment generally do **not** constitute a PSG.

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





Gang Recruitment

- Failed PSGs:
 1. *“Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities.”*
 2. *“Male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in territories controlled by the MS-13 gang, and who refuse recruitment.”*





Gang Recruitment

- S-E-G-'s proposed PSGs lack particularity & visibility.
 - The terms used are too amorphous and subject to different interpretations.
 - The proposed PSGs make up a large and diffuse segment of society.
 - Those recruited by gangs but who refuse are not perceived as a group by society.
- Additionally, S-E-G- respondents not targeted on account of PSG but in order to fill the gang's ranks.





Gang Recruitment

- Always examine whether there are other factors involved.
 - Political opinion?
 - PSG of family?
 - Imputed PSG – LGBT issues?
 - Religion?





Case Example #1 in Gang-Related Case

Facts: The applicant led his church youth group's efforts to dissuade other youth from joining gangs. Even when gang members warned him to stop his activities, the applicant continued because of his conviction that gangs should not oblige youth to use drugs or engage in theft.





Case Example #1 in Gang-Related Case

- **Protected ground:** Political Opinion
- **Reason:** The applicant's activities went beyond mere resistance to recruitment. The applicant's reasons for engaging in these activities, which the gang members opposed, constitute a political opinion. The applicant's political opinion, as expressed through his efforts to convince other youth not to use drugs, is akin to other forms of non-traditional political opinion. Since drug use and theft can be said to be a fundamental part of the gang's activities, the applicant's advocacy against these activities threatens the very nature of the gang's existence, and that advocacy (not just resistance to recruitment) was a central reason the gang targeted him.





Case Example #2 in Gang-Related Case

Facts: An applicant was attacked twice and repeatedly called by gang members wanting to know the whereabouts of her brother. In the first attack, they asked where her brother was. The gang members also repeatedly called the family and stated that they would take drastic measures if the family did not tell the gang members her brother's location.





Case Example #2 in Gang-Related Case

- **Protected ground:** PSG of immediate [or nuclear] family [of X individual].
- **Reason:** The applicant's family membership due to her relationship to her brother can constitute a PSG, without contravening *Matter of S-E-G*. The Board expressly noted that it was not addressing "the question whether 'family' alone is a social group under the circumstances of this case" because "the respondents testified that gang members attempted to recruit all the young males in their neighborhood."





Former Gang Membership as PSG

- **Q:** Can criminal association form the basis of a particular social group?
- **A: Outside the 6th or 7th Circuit, no.** The shared characteristic of terrorist, criminal or persecutory activity or association, past or present, **cannot** form the basis of a particular social group.

See USCIS OCC Memorandum from Lynden Melmed, *Guidance on Matter of C-A-* (Jan. 12, 2007); *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).





Former Gang Membership as PSG

- In the 6th and 7th Circuits, former gang membership **may** form a particular social group if the former membership is immutable and the group of former gang members is socially distinct.

See Urbina-Mejia v. Holder, 597 F.3d 360(6th Cir. 2010); Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009). See also, USCIS Asylum Division Memorandum, Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit (Mar. 2, 2010).





FGM



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Defining a Group for FGM

- “Females [of the applicant’s tribe or nationality] who have not yet undergone FGM as practiced in their culture.”

Sex/gender
+
Nationality/ethnicity/tribe
+
**Uncircumcised status (or status of
having not yet undergone FGM as
practiced in their culture)**





Past FGM

- Has the presumption of well-founded fear been rebutted?
 - Is there a chance for further FGM?
- Courts have found that FGM is often more than a one-time act.
 - *See Matter of A-T-*, 24 I&N Dec. 617, 622 (AG 2008); *Bah v. Mukasey*, 529 F.3d 99 (1st Cir. 2008).





Past FGM

- If there is no well-founded fear, we must consider the discretionary grounds:
 1. Severity of the harm
 - *Chen; S-A-K- & H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008).
 2. Other serious harm
 - *Kone v. Holder*, 596 F.3d 141, 153 (2nd Cir. 2010) (future FGM to petitioner's 2 USC daughters should be evaluated for other serious harm to petitioner).





No Well-Founded Fear due to Past FGM

- If a well-founded fear of FGM to self has been rebutted, is there a separate claim of future harm due to a different basis?
 - e.g., FGM to child, not to self?
 - e.g., political opinion?
 - e.g., forced marriage?





Fear of Future FGM

- Does the applicant fear that his/her (future) children will be subjected to FGM?
 - *Matter of A-K-* holds that a parent is not eligible where FGM to his/her child is not on account of the parent's protected trait.
- Does the applicant fear FGM due to her political opinion?
 - *Matter of A-K-* does not foreclose the possibility of FGM due to one's political opinion.
- Can past FGM and other future harm be combined into one nexus?
 - e.g., PSG based on forced marriage may work if the applicant experienced past FGM in order to prepare her for a specific marriage and now fears that forced marriage.





Forced Marriage





Defining a Group for Forced Marriage

- “Females/males [of the applicant’s tribe or nationality] who are subject to cultural expectations that they will submit to arranged marriages.”

Sex/gender
+
Nationality/ethnicity
+
**Social status in which individual is
expected to submit to arranged
marriage**





When Can Marriage Constitute Serious Harm?

- Arranged marriages are an important tradition in many cultures.
- The issue is whether the applicant subjectively experiences or would experience the marriage as serious harm.





Abuse Within the Family





Defining a Group for Abuse Within the Family

“[Nationality] children without effective familial protection.”





What Factors Precipitate Abuse Within the Family?

- Status as a child
- Lack of effective protection within the family
- Subordinate status in the family
 - e.g., a step-child, adopted child, foster child
- Social stigma
 - e.g., ethnicity
 - e.g. gender, gender orientation, or (perceived) sexual orientation
 - e.g., disability





Abuse Within the Family: Establishing the PSG

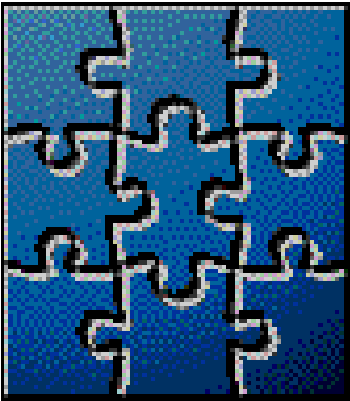
- *Immutability*: Applicant's age at the time of the abuse is unchangeable within the meaning of *Acosta*. Similarly, as a child's lack of effective familial protection is not a trait within a child's ability to choose or to change, it meets the *Acosta* immutability standard. Finally, nationality is generally immutable.
- *Social distinction*: country conditions information that children are subject to different laws and treatment (not necessarily harmful) can indicate that children as a group are distinguished from adults in society. Additionally, reports on domestic violence, including child abuse, are a good indication that the PSG is socially distinct.





Is it Discipline or Serious Harm?

- Given the nature of the parent-child relationship, strong deference is generally shown to parents in determining the child's best interests.
- Examine whether the parent is motivated by a disciplinary or child-rearing goal.





Is it Discipline or Serious Harm?

- Factors indicating that the harm is not rationally related to child rearing:
 - The harm is clearly disproportionate or unrelated to a possible child-rearing goal.
 - Where the harm is coupled with repeated remarks devaluing the child.
 - Where the abuser tries to cover up the harm.





Is Abuse Persecution?

- **Remember**, “child abuse” is a term of art in U.S. domestic law, and should not be confused with the analysis necessary for determining asylum eligibility.
- Nonetheless, U.S. domestic law on child abuse is useful:
 - A number of U.S. states deem physical discipline not to constitute child abuse where the purpose is disciplinary and the discipline is moderate in degree.
 - **Child abuse and neglect** – “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”





Abuse Within the Family ≠ “Family” PSG

- Generally, **intra-familial** child abuse is **not** conducive to forming a “family” PSG.
- There are traits other than family membership that lead the abuser to harm others within the family.
- Define the PSG as:
 - “Children [of X nationality] without effective familial protection”





Past Persecution

Where No State Protection

- To establish past persecution by a non-State actor, the applicant must demonstrate that, at the time of the incident, the State from which the applicant fled was unable or unwilling to control the non-State actor. The applicant must show that he or she sought the protection of the State, or provide a reasonable explanation as to why he or she did not.
- Reasonable explanations include evidence that:
 - the applicant was so young that he or she would not have been able to seek government protection,
 - the government has shown itself unable or unwilling to act in similar situations, or
 - the applicant would have increased his or her risk by affirmatively seeking protection.





Past Persecution for Abuse Within the Family: Rebuttal of Presumption?

- When there is a finding of past persecution based on abuse within the family, what rebuts the presumption of well-founded fear?
 - *Changed circumstances*
 - No longer part of the PSG of children who are lacking effective familial protection.
 - *Internal relocation*
 - Can he/she reasonably relocate?





Other PSGs for Children Lacking Effective Protection

- Other harms faced by children without protection may include trafficking, gender-based violence, rape, forced prostitution, and child exploitation.
- The appropriate PSG depends on the facts of the case. Here are some possible PSG formulations:
 - [Nationality] children without effective familial protection
 - Young [nationality] females without tribal protection
 - Formerly trafficked [nationality] [gender, if relevant]





Summary

1. Common bases for children's particular social group claims include family membership, gangs, female genital mutilation, forced marriage, and abuse within the family.
2. Family alone can constitute a particular social group.





Summary

3. A particular social group for gang recruitment may not succeed because recruitment is conducted in order to fill the ranks and not on account of a protected ground. Nonetheless, there may be protected grounds involved in a gang-related case.

4. “Females [of the applicant’s tribe or nationality] who have not yet undergone FGM as practiced in their culture” may be an appropriate particular social group formulation when the claim is based on FGM.





Summary

5. “Females [of the applicant’s tribe or nationality] who are subject to cultural expectations that they will submit to arranged marriages” may be an appropriate particular social group for forced marriage claims.

6. A child may be targeted for abuse within the family due to the characteristics of being a child of a certain nationality and being without effective familial protection.

