

**SURVIVAL OF ONLY THE FITTEST SOCIAL GROUPS: THE
EVOLUTIONARY IMPACT OF SOCIAL DISTINCTION AND
PARTICULARITY**

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ABSTRACT

U.S. asylum law has served as a model for other nations who are parties to the Convention on the Status of Refugees and its Protocol. The Board of Immigration Appeals approach to the protection of those who are persecuted because of their “Particular Social Group” has been applauded for “protecting [groups] against discriminatory denial of core human rights”. It has risen to be the preferred analytical approach of common law countries leading to groups such as homosexuals, transsexuals, and women subject to restrictive social and religious mores being granted protection from persecution. However over the past 10 years the Board has seemingly stepped away from its human rights stance in support of PSGs, leading to allegations that the United States is failing in its Convention obligations. This article seeks to assess the impact of the Board’s new analytical framework for determining PSGs. Other State parties to the Refugees Convention have adopted similar criteria in assessing PSG claims without the same concerns. An analysis of this jurisprudence provides a useful comparison to not only measure the impact of the new approach but also provides

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guidance for those involved in PSG claims. This article does conclude that the United States' new requirements of particularity and social distinction while aligning in many respects with the approach of other countries, ultimately poses a danger of denial of human rights; that this danger because of the interpretation and application of the framework preferred by the Board poses a greater threat to human rights than in other countries. Finally with this reality proven, the article seeks to address how asylum applicants and their counsel may counter these foreseeable dangers.

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1. INTRODUCTION

“An attempt to confine the denotation of the term ‘a particular social group’ in order to restrict the protection accorded by the [Refugee] Convention is inappropriate where the ‘object and purpose of the Convention is the protection so far as possible of the equal enjoyment by every person of fundamental rights and freedoms”¹

Signatories to the United Nations Convention on the Status of Refugees² (Refugee Convention) and its Protocol³ spent much of the final two decades of the Twentieth Century grappling with whether to recognize groups such as homosexuals, transsexuals, victims of domestic violence, and women subject to limiting social and religious mores. The issue was whether these groups should be protected when faced with persecutory acts within their state. At the time the Refugee Convention was created, these groups were not within the contemplation of the drafters—persecution having been focused upon those who differ because of their race, religion, nationality, or political opinion. However, in the wake of the horrors of the Holocaust, the United Nations (UN) responded to the conceivable threat of the yet to be foreseen atrocities against yet to be identified groups, incorporating the “Particular Social Group” (PSG) ground in Article 1(A)(2) of the Refugee Convention.⁴ It is the PSG ground that required parties to the Convention and Protocol to eventually afford protection against persecution to homosexuals, transsexuals, victims of domestic violence, and women subject to restrictive social and religious mores. While the United States (U.S.), like other countries, struggled with the extension of protection to these groups; ultimately, in light of the circumstances of the Twentieth Century world it was prepared to extend protection and grant asylum to those who were members of

¹ *A v Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 236 (Austl.).

² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, in IMMIGRATION & NATIONALITY LAWS OF THE UNITED STATES 633 (T. Alexander Aleinikoff et al. eds., 1967) [hereinafter Refugee Convention 1951].

³ United Nations Protocol Relating to the Status of Refugees, June 11, 1967, 606 U.N.T.S. 267, in IMMIGRATION & NATIONALITY LAWS OF THE UNITED STATES, *supra* note 2, at 648 [hereinafter 1967 Protocol].

⁴ Refugee Convention 1951, *supra* note 2, at art. 1.

these PSGs.⁵ In fact, U.S. jurisprudence in determining which groups should or should not be protected rose to become the dominant approach of common law countries.⁶ The U.S. Board of Immigration Appeals' protected characteristics test was applauded for supporting the spirit of the Refugee Convention by affording "protection against discriminatory denial of core human rights entitlements."⁷

In the twenty-first century, it is former gang members, youth vulnerable to recruitment by gangs, homeless and abandoned children, females subject to forced sexual relationships with gang members, and informants on drug cartels and organized crime that form a sample of the groups now seeking protection under the PSG ground. The association with organized crime, gangs, and drugs make many of them unpalatable to sections of U.S. society. Their undesirable nature coupled with concerns over the growing numbers seeking asylum under the PSG ground may have been the catalyst for the Board of Immigration Appeals rejecting its prior humanitarian approach to protecting PSGs from persecution. The approach of the Board has been met with outcry from asylum advocates, human rights commentators, and rejection by the United Nations High Commissioner for Refugees (UNHCR). The United States has been accused of failing to accord protection to those whose core human rights are being denied and thus failing in its

⁵ See *Herandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000) (granting asylum to a member of the PSG of "gay men with female sexual identities in Mexico"); *In re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996) (granting asylum to a young woman who, because of her tribal membership, faced FGM); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 823 (BIA 1990) (granting asylum to a gay Cuban man).

⁶ MICHELLE FOSTER, *THE 'GROUND WITH THE LEAST CLARITY': A COMPARATIVE STUDY OF JURISPRUDENTIAL DEVELOPMENTS RELATING TO 'MEMBERSHIP OF A PARTICULAR SOCIAL GROUP'* 6 (2012), <http://www.unhcr.org/4f7d8d189.html> [<https://perma.cc/6RAA-XXNH>]. See also T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group' in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS IN INTERNATIONAL PROTECTION* 263, 275 (Erika Feller, Volker Türk & Frances Nicholson eds., 2003) (discussing the United States' approach to social groups).

⁷ *Sec'y of State for the Home Dep't v. Montoya*, Appeal No. CC/15806/2000, at 13–15 (27 Apr. 2001) (IAT) (Eng.); *Refugee Appeal No. 71427/99*, [2000] NZAR 545, ¶ 104 (N.Z.); *Islam v. Sec'y of State for the Home Dep't and Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah* [1999] 2 A.C. 629, 640 (HL) (appeal taken from Eng.); *Ward v. Canada*, [1993] 2 S.C.R. 689, 739 (Can.).

responsibilities as a party to the Refugee Convention.⁸ The Board has responded by stating its current approach to the PSG ground is not a departure from its earlier jurisprudence and, in fact, is in conformity with its prior approach to determining whether or not a claimed group qualified for Convention protection.⁹

It is the aim of this article to determine whether or not the current approach of the Board of Immigration Appeals does in fact impose additional limitations on the ability of groups to seek protection under the PSG ground, and if so, whether this is a failure on the part of the United States to uphold its Convention obligations. Despite the evolution of the Board of Immigration Appeals' protected characteristics test to become the dominant approach of common law countries, it has not been the sole methodology employed. Moreover, the Board's new approach does bear striking similarity to that of other party nations to the Refugee Convention. The UNHCR has not claimed that these analytical frameworks constitute a failure in Convention protection.

To make an informed assessment this article will first analyze the evolution of the PSG ground including the significant role that the United States has played in creating an internationally accepted humanitarian approach to PSG protection. The Board's new tripartite test will then be explicated and a comparative analysis of the test will be undertaken with those nations who have adopted similar methodologies for assessing protection under the PSG ground. Ultimately however, it will be shown that the Board's new tripartite test while having commonality with these approaches is not equivalent and indeed falls short of the protective measures advocated by these countries. Finally, the greatest weakness of the new test, its malleability, will be explored to expose the dangers that may ultimately lead the United States to violate its international obligations.

2. THE CREATION AND EARLY EVOLUTION OF THE PSG GROUND

Membership of a Particular Social Group constitutes one of the five protected grounds by which persons fleeing persecution in

⁸ Refugee Convention 1951, *supra* note 2.

⁹ *In re W-G-R-*, 26 I. & N. Dec. 208, 211 (BIA 2014) (citing *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1084 (9th Cir. 2013) (en banc)).

their countries of origin may seek asylum.¹⁰ In theory, individuals who have been persecuted, or face a well-founded fear of persecution, because of their race, religion, political opinion, nationality, or particular social group are equally entitled to the protection afforded by International Law¹¹ and the laws of the United States.¹² In assessing asylum claims, there has always been deference to those seeking protection from persecution based on race, religion, nationality, and political opinion as opposed to those seeking protection from persecution induced by their PSG. This is even though membership in a PSG is the second most claimed ground in the United States.¹³

Part of the reason can be traced to the legal jurisprudence that has evolved in relation to the respective grounds. Over the past thirty years, a consistent and well-understood line of precedent has evolved as to the groupings of “race,” “religion,” “nationality,” and “political opinion.” Society’s familiarity with these classifications, the ability to understand what is meant by persons being of a particular race—having a certain nationality, holding a political opinion, or being part of and or practicing a certain religion—has necessarily resulted in an ease of understanding and a comfort of application within the realm of asylum law. Despite attempts by the legal system, the same degree of clarity has not been attained for the PSG ground.

The circumstances surrounding the inclusion of “membership in a particular social group” in the Refugee Convention have fueled this uncertainty.¹⁴ Its last minute inclusion at the behest of Sweden and its unanimous adoption by the members of the United Nations without further debate¹⁵ has led to the perception that the

¹⁰ 8 U.S.C. 1101(a)(42) (2014). *See also* Refugee Convention 1951, *supra* note 2, at art. 1(A)(2) (stating the five grounds for refugee protection).

¹¹ *Id.* at art. 12(2).

¹² Immigration & Nationality Act of 1952 § 101, 8 U.S.C. § 1101 (1952); 8 C.F.R. § 101.1 (2015).

¹³ “After political opinion claims, the largest body of U.S. asylum and withholding jurisprudence is based upon claims of membership in a particular social group.” 2 SHANE DIZON & NADINE WETTSTEIN, *IMMIGRATION LAW SERVICE* § 10:137 (2d ed. 2008).

¹⁴ Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 769 (2003); FOSTER, *supra* note 6, at 2; Alienikoff, *supra* note 6, at 265–66.

¹⁵ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Rec. of the Twenty-Third Mtg., U.N. Doc. A/CONF.2/SR.3.19,

criterion was ill conceived—simply “an afterthought.”¹⁶ The explanation at the time provided by the Swedish Representative was that “experience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included.”¹⁷ Arguably, recognition that a forward-thinking, rather than a response-driven, approach by the United Nations was essential in the wake of the Holocaust—the need to counter as yet unforeseen forms of persecution to yet to be identified groups.¹⁸

That the Immigration and Nationality Act (INA) does not provide a definition of any of the protected grounds has compounded the difficulties associated with establishing protection under the PSG ground.¹⁹ When this provision was incorporated into the Refugee Act of 1980,²⁰ Congress did not debate nor discuss the inclusion of the PSG ground.²¹ Rather, Congress was primarily con-

at 14 (Nov. 26, 1951) (including members from: Australia, Austria, Belgium, Canada, Colombia, Denmark, Egypt, Federal Republic of Germany, France, Greece, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland, Turkey, United Kingdom, United States of America, Venezuela, and Yugoslavia).

¹⁶ ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966).

¹⁷ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Rec. of the Third Mtg., U.N. Doc. A/CONF.2/SR.3, at 14 (Nov. 19, 1951). See also *Fatin v. I.N.S.*, 12 F.3d 1233, 1239 (3d Cir. 1993) (acknowledging that the term social group in the context of refugees is ill-defined).

¹⁸ Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 41–42, 45 (1983); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 229 (1998). See also *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 236 (Austl.) (stating the PSG ground “was intended to be a ‘safety net’ for any who fell within it”); GRAHL-MADSEN, *supra* note 16, at 20.

¹⁹ *In re Acosta*, 19 I. & N. Dec. 211, 232 (BIA 1985). Courts have commented upon the difficulties this has created in its interpretation and application. See *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582, 594 (3d Cir. 2011) (“The concept is even more elusive because there is no clear evidence of legislative intent.”); *HongYing Gao v. Gonzales*, 440 F.3d 62, 66–67 (2d Cir. 2006) (stating that social group is “the least well defined” ground); *Fatin*, 12 F.3d at 1238 (noting the struggle in defining what a social group is); *In re M-E-V-G-*, 26 I. & N. Dec. 227, 230 (BIA 2014) (“is ambiguous and difficult to define”).

²⁰ Pub.L. 96-212, §101(b), 94 Stat. 102, 102 (1980).

²¹ See *Valdiviezo-Galdamez*, 663 F.3d at 594 (stating that looking into the legislative intent does not provide clarifications); *Koudriachova v. Gonzales*, 490 F.3d 255, 260 (2d Cir. 2007) (indicating that the value gained from the legislative his-

cerned “to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.”²²

What seemed a forward-thinking idea, a living provision capable of evolving in a rapidly changing world, has been met with confusion, resistance, and some would argue panic. The lack of certainty in its meaning, the potential breadth of its application, and its fecundity for bringing fictitious claims cultivated an atmosphere of fear that countries who were parties to the Convention would be inundated by those claiming protection. “The ‘social group’ category was meant to be a catch-all that could include all the bases for and types of persecution which an imaginative despot might conjure up.”²³

Despite this, when first confronted with the issue, the Board of Immigration Appeals²⁴ seemed intent to pay due adherence to the spirit of the Convention.

tory is little to zero); *Fatin*, 12 F.3d at 1239 (discussing lack of legislative intent).

²² *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987). *See also Fatin*, 12 F.3d at 1239 (discussing how social group was added to U.S. refugee law). While the lack of discussion by Congress of the PSG ground is often cited, it is imprudent not to recognize that there was similarly no discussion of the other four protection grounds.

²³ Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 *CORNELL INT’L L.J.* 625, 648 (1993) (citing Arthur C. Helton, *Persecution on Account of Membership in a Social Groups as a Basis for Refugee Status*, 15 *COLUM. HUM. RTS. L. REV.* 39, 41–42, 45 (1983)).

²⁴ The Board of Immigration Appeals is part of the Executive Office of Immigration Review. “Its basic purpose is, officially, to correct errors made by the immigration judges [and certain decisions of the United States Citizenship and Immigration Services] and to resolve complex legal questions concerning the administration of the immigration and refugee laws.” Judge Stephen Reinhardt, *Judicial Independence and Asylum Law in INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES 5TH CONFERENCE 327, 332 (2002)*, <http://www.iarjl.org/general/images/stories/WorldConferences/5-2002-wellington.pdf> [<https://perma.cc/9QRC-83EQ>]. The Board issues both precedential and non-precedential decisions. For a general discussion of the role of the Board see DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 13–15 (2011). *See also Organization, Jurisdiction, and Powers of the Board of Immigration Appeal*, 8 C.F.R. § 1003.1 (describing the Board’s functions and characteristics).

3. U.S. EVOLUTION OF THE PSG GROUND—FROM CLARITY TO CONFUSION

3.1. 1985–2006 – *Acosta* and “Protected Characteristics”

In the 1985 seminal case of *Acosta*,²⁵ the Board of Immigration Appeals sought to bring clarity²⁶ to the “Particular Social Group” ground, through the creation of its “protected characteristics” test.²⁷ The doctrine was fashioned to provide homogeneity with the other enumerated grounds of “race, religion, nationality or political opinion,” which the Board concluded “restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”²⁸ The immutability or fundamental ideology of the characteristic being central to the assessment of whether or not a PSG falls within the protective intentions of the INA and the Refugee Convention, the Court in *Acosta* noted:

[P]ersecution on account of membership in a particular social group [encompasses] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the

²⁵ *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

²⁶ *Id.* at 232.

²⁷ *Id.*

²⁸ “Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.” *Id.* at 233 (internal citations omitted).

common characteristic that defines the group, it must be one that members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.²⁹

The “protected characteristics approach” supports the fundamental ideals behind the Refugee Convention of safeguarding the core human rights of individuals when their state refuses to or fails to provide protection.³⁰

For the next 20 years the protected characteristics test was applied by all Federal Circuit Courts save for the Ninth Circuit,³¹ and by 2000 it too was prepared to adopt the protected characteristics test as an alternative test³² for establishing a protected PSG.³³ The application of protected characteristics permitted the recognition of numerous PSGs not within the specific consideration of the members of the UN at the time of the adoption of the Refugee Convention or then contemplated as a source of persecution by a 1951 world—an effective application of the Swede’s living, breathing

²⁹ *Id.*

³⁰ As the Supreme Court of Canada explained when adopting the *Acosta* approach, it is consistent with the object and purpose of the Convention: “general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative.” *Ward v. Canada*, [1993] 2 S.C.R. 689, 739 (Can.). See also Decision of the Refugee Appeal Board South Africa (Applicant’s name redacted), May 13, 2002, 15–16 (S. Afr.) (on file with author) (determining that homosexuals in Nigeria are a social group under the *Acosta* definition); Refugee Appeal No. 1312/93, at 61 (N.Z.) (stating that an Iraqi homosexual belongs to a social group); Refugee Appeal No. 71427/99, [2000] NZAR 545, ¶ 104 (N.Z.) (indicating that women make up a social group); JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 161 (1991) (asserting that the protected characteristics approach upholds “the specific situation known to the drafters—concern for the plight of persons whose social origins put them at more general commitment to grounding refugee claims in civil or political status.”).

³¹ The Ninth Circuit required that for a PSG to be protected its members must be united by a “voluntary associational relationship.” *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986).

³² *Artega v. Mukasey*, 511 F.3d 940, 944 (9th Cir. 2007); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1027 (9th Cir. 2004); *Aguirre-Cervantes v. I.N.S.*, 242 F.3d 1169, 1175 (9th Cir. 2001); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000).

³³ After 2001, the “protected characteristics” test became the test of prevalence in the Ninth Circuit. See *Artega*, 511 F.3d at 944 (explaining the standard applied by the Ninth Circuit); *Lin*, 377 F.3d at 1027 (discussing protected characteristics as it relates to refugee status claims based on family membership); *Aguirre-Cervantes*, 242 F.3d at 1175 (applying the protected characteristics in the context of the families as a particular social group).

provision. As a result of the protected characteristics approach, groups facing a threat of persecution based on gender,³⁴ sexual orientation,³⁵ tribal and clan membership,³⁶ family membership,³⁷ and shared past experiences³⁸ were afforded protection as the common characteristic shared by the members of each of these groups is a core human right that compels protection.

The *Acosta* protected characteristics test has been highly influential beyond the borders of the United States, finding favor in other signatory states including Canada,³⁹ the United Kingdom,⁴⁰ South Africa,⁴¹ and New Zealand,⁴² to ultimately become “the dominant approach among common law countries.”⁴³ Its concordance with the human rights purpose behind the Convention,⁴⁴ its

³⁴ *Yadegar-Sargis v. I.N.S.*, 297 F.3d 596, 604 (7th Cir. 2002) (involving Christian women in Iran who do not comply with Islamic dress requirements); *In re Kasinga*, 21 I. & N. Dec. 357, 365–66 (BIA 1996) (describing women of the Tchamba-Kusuntu tribe who had not been subject to FGM and who opposed it).

³⁵ *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (“homosexuals”); *Amfani v. Ashcroft*, 328 F.3d 719, 728–30 (3d Cir. 2003) (imputing PSG to Ghanaians mistakenly believed to be homosexual); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000) (involving gay men with female sexual identities in Mexico); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1994).

³⁶ *Kasinga*, 21 I. & N. at 366–67; *In re H-*, 21 I. & N. Dec. 337, 342–43 (BIA 1996).

³⁷ *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998) (regarding parents of Burmese dissidents); *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993) (involving the nuclear family).

³⁸ *Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009) (depicting a former Salvadoran gang member); *Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) (relating to former employees in the AG’s office in Colombia); *Lukwago v. Ashcroft*, 329 F.3d 157, 173 (3d Cir. 2003) (mentioning children from northern Uganda who have escaped from involuntary servitude after being abducted and enslaved); *In re Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) (involving a former member of the national police).

³⁹ *Ward v. Canada*, [1993] 2 S.C.R. 689, 739 (Can.)

⁴⁰ *E.g.*, *K v. Sec’y of State for the Home Dep’t and Fornah v. Sec’y of State for the Home Dep’t*, [2007] 1 A.C. 412, 419 (U.K.); *Islam v. Sec’y of State for the Home Dep’t and Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah* [1999] 2 A.C. 629, 640 (HL) (appeal taken from Eng.).

⁴¹ *Jian-Qiang Fang v. Refugee Appeal Board et al*, Case No. 40771/05, [2006] ZAGPHC 101 (HC) ¶ 6 (S. Afr.), <http://www.saflii.org/za/cases/ZAGPHC/2006/101.pdf> [<https://perma.cc/8YE4-LUUW>].

⁴² *Refugee Appeal No. 1312/93*, at 61 (N.Z.); *Refugee Appeal No. 71427/99*, [2000] NZAR 545, ¶ 104 (N.Z.).

⁴³ FOSTER, *supra* note 6, at 6; Aleinikoff, *supra* note 6, at 275.

⁴⁴ *Sec’y of State for the Home Dep’t v. Montoya*, Appeal No. CC/15806/2000, at 13–15 (27 Apr. 2001) (IAT) (Eng.) (recognizing that the protect-

homogeneity with the grounds of race, religion, nationality, and political opinion, and its ability to provide a measure that is “not so vague as to admit persons without a serious basis for claims to international protection”⁴⁵ led to its acceptance by these nations.⁴⁶

3.2. 2006–2014 – *The Ascendance of the Requirements of “Social Visibility” & “Particularity”*

In 2006, after some twenty-plus years of applying the protected characteristics doctrine and facilitating its acceptance by most common-law countries who are parties to the Refugee Convention, the Board of Immigration Appeals changed the playing field⁴⁷ in a bid to constrain what groups may qualify for protection.⁴⁸ Two additional factors ascended to become obligatory requirements in establishing a PSG: “social visibility” and “particularity.”⁴⁹

Social visibility had made a brief appearance in the controversial 1999 decision of *In re R-A*,⁵⁰ a claim of a Guatemalan woman who had suffered horrific domestic abuse. In rejecting the claimed PSG of “Guatemalan women who have been intimately involved with Guatemalan male companions, who believe that women are to live under male domination,” the Board opined that while the claimed PSG met the protected characteristics test, the group was artificially conceived for the purposes of the case⁵¹ and

ed characteristics approach accords “the underlying need for the Convention to afford protection against discriminatory denial of core human rights entitlements.”).

⁴⁵ HATHAWAY, *supra* note 30, at 161.

⁴⁶ As will be discussed below in Section 4, these countries refused to follow the “social perception” approach upon the basis that it was too wide and all encompassing.

⁴⁷ *In re C-A*, 23 I. & N. Dec. 951, 956–57 (BIA 2006).

⁴⁸ FOSTER, *supra* note 6, at 29–30.

⁴⁹ An asylum petitioner must now prove: (1) that the claimed PSG group members meet the protected characteristics doctrine; (2) that the group was sufficiently “particular”; and (3) was “perceived by the community in which they lived as a social group. *C-A*, 23 I. & N. Dec. at 956–57 (explaining how “protected characteristics” and “particularity” were referred to by the Board as requirements; whereas social visibility was referred to as a “relevant factor”).

⁵⁰ 22 I. & N. Dec. 906 (BIA 1999). *In re R-A* was later vacated by the Attorney General in anticipation of new rules. *In re R-A*, 22 I. & N. Dec. 906 (BIA 2001).

⁵¹ While the group may have been artificially conceived, this was a product

bore no relation to whether Guatemalans perceived the group to exist.⁵² The Board asserted for the first time that *Acosta* was “the starting point for assessing social group claims”⁵³ and had never claimed it to be “the ending point,”⁵⁴ though in so stating they were not asserting that the factors taken into account in *In re R-A-* were requirements for all cases.⁵⁵

Social visibility did not surface again until 2006, when the Board saw it as appropriate to apply this factor in rejecting “former noncriminal drug informants working against the Cali drug cartel” as a PSG.⁵⁶ *In re C-A-* provides insight into the Board’s claimed basis for the social visibility requirement. Interestingly, the Board professed not to be the author of social visibility criterion but rather asserted that the birth of the concept could be traced to a 1991 decision of the Second Circuit⁵⁷ and Guidelines issued by the UNHCR.⁵⁸ The claimed support for social visibility is questionable. The Board’s application of the Second Circuit’s decision in the case of *In Re C-A-*⁵⁹ is at best selective and at its worst is outright contortion, and the UNHCR strenuously denies that it endorses the

of the Board’s approach to date in dealing with the issue of gender claimed groupings and its bid to limit those who are able to claim asylum on the basis of gender-based persecution for fear of floodgates. This approach commenced with the Board’s articulation of PSGs in *In re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996) (describing women of the Tchamba-Kusuntu tribe who had not been subject to female genital cutting and who opposed it). The success of this claim led asylum advocates to articulate PSG claims in a similarly circumscribed and artificial manner.

⁵² “For the group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien’s society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm.” *R-A-*, 22 I. & N. Dec. at 918.

⁵³ *Id.* at 920.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *In re C-A-*, 23 I. & N. Dec. 951, 958 (BIA 2006).

⁵⁷ *Id.* at 956 (citing *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991)).

⁵⁸ *C-A-*, 23 I. & N. Dec. at 956, 960 (citing U.N. High Comm’r Human Rights, 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, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <http://www.unhcr.org/3d58de2da.pdf> [<https://perma.cc/5W54-TXFD>] [hereinafter UNHCR Guidelines]).

⁵⁹ See generally *In re C-A-*, 23 I. & N. Dec. 951 (BIA 2006).

Board's approach to determining a qualifying PSG.⁶⁰

The Board, in relying on *Gomez*,⁶¹ asserted the Second Circuit's precedent "that the members of a social group must be externally distinguishable"⁶² to constitute a social group, requires that the group be "socially visible."⁶³ While the explanation of the test as "socially visible" may appear to be synonymous with the Second Circuit's test of "externally distinguishable,"⁶⁴ the Second Circuit had adopted a test of social perception, not social visibility, finding that the claimed PSG had to be recognizable by either the applicant's general society or by the persecutor.⁶⁵

In comparison, the Board's application of social visibility in *In re C-A*⁶⁶ and in a number of subsequent decisions was literal; that a person who was from the claimed PSG should be visually recognizable to others as belonging to that group for the PSG to exist,⁶⁷ what the Board ultimately labeled "ocular visibility."⁶⁸ *In re C-A*⁶⁹

⁶⁰ Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner at 22, *Bueso-Avila v. Holder*, 663 F.3d 934 (7th Cir. 2010) (No. 09-2878); Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner at 14, *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2010) (No. 10-1724); *UNHCR Valdiviezo-Galdamez*, *infra* note 76, at 17.

⁶¹ *Gomez v. I.N.S.*, 947 F.2d 660 (2d Cir. 1991).

⁶² *C-A*, 23 I. & N. Dec. at 956.

⁶³ *Id.* at 960-61.

⁶⁴ See *Gomez*, 947 F.2d at 663 (describing the Second Circuit's refusal to recognize the PSG of "women who have been previously battered and raped by Salvadorian guerillas" under the following reasoning: "A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor-or in the eyes of the outside world in general A 'particular social group' normally comprises persons of similar *background*, habits or *social status*. . . . Like the traits which distinguish the other four enumerated categories-race, religion, nationality, and political opinion-the attributes of a particular social group must be recognizable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.")

⁶⁵ *Id.* at 664.

⁶⁶ 23 I. & N. Dec. 951 (BIA 2006).

⁶⁷ See *In re E-A-G*, 24 I. & N. Dec. 591, 594 (BIA 2008) (describing that "'persons resistant to gang membership' lacks the social visibility that would allow others to identify its members as part of such a group The respondent does not allege that he possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment."); *In re A-T*, 24 I. & N. Dec. 296, 302 (BIA, 2007) ("we are doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them"), *vacated and remanded*, 24 I. & N. Dec. 617 (BIA 2008).

⁶⁸ *In re M-E-V-G*, 26 I. & N. Dec. 227, 246 (BIA 2014); *In re W-G-R*, 26 I. & N.

itself is a perfect example of the Board's own application of "ocular visibility":

[T]he very nature of the conduct at issue is such that [the claimed PSG of confidential informants] are generally out of the public view. In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered. Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.⁷⁰

The unmistakable implication being that any group that remains underground cannot be literally seen by society and thereby cannot be a PSG deserving of protection. Such an interpretation failed to pay due consideration to whether C-A- was perceived by either his persecutor or in the eyes of the outside world as different, as the Second Circuit had clearly articulated.⁷¹ The Board instead fixated upon whether C-A- would be known on sight as a criminal informant by members of the public.⁷²

The adoption of social visibility signaled abandonment by the Board of an approach that interpreted the PSG ground homogeneously with the grounds of race, religion, nationality and political opinion. Literal visibility necessitates that a person's fundamental human rights are only worthy of protection once there is actual knowledge that he or she is different, and for this to occur, the applicant must literally become visible to their persecutors. As a consequence, the applicant is required to place themselves in the face of the very jeopardy that they are fleeing and asking nations such as the United States to protect them against. That the individual be persecuted before they can claim protection has never been the threshold to protection under the Refugee Convention, only that the applicant has a "well-founded fear" of persecution. Such an approach is inconsistent with a long line of authority in U.S. immi-

Dec. 208, 216 (BIA 2014).

⁶⁹ 23 I. & N. Dec. 951 (BIA 2006).

⁷⁰ *Id.* at 960.

⁷¹ *Gomez v. I.N.S.*, 947 F.2d 660, 663 (2d Cir. 1991) ("distinguish them in the eyes of a persecutor-or in the eyes of the outside world in general.")

⁷² C-A-, 23 I. & N. Dec. at 960 ("Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.")

gration law, that simply because an individual can avoid persecution by, for example, remaining 'in the closet' as a homosexual, or practicing their religion underground, or disguising their heritage does not mean the person should not be protected.⁷³ Such an approach is inconsistent with the United States' obligations under the Refugee Convention.⁷⁴

The Board, as previously mentioned, claimed support for the criterion of social visibility as an "And" requirement from the United Nations High Commissioner of Refugees.⁷⁵ The UNHCR does indeed endorse an approach of "social perception;" however, there are two very important factors that the Board did not disclose when citing to the UNHCR Social Group Guidelines: First, the UNHCR advocated and still advocates that the "social perception" approach is an *alternate* means by which a PSG may be established rather than as an added criterion.⁷⁶ In countries that have adopted the protected characteristics approach according to the UNHCR, application of the social perception approach should only occur after the claimed PSG has not been established pursuant to the protected characteristics approach,⁷⁷ to ensure that those for whom

⁷³ *Raskane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2010); *Karouni v. Gonzales*, 399 F.3d 1163, 1172-73 (9th Cir. 2005); *Pozos v. Gonzales*, 141 Fed. Appx. 629, 632 n. 2 (9th Cir. 2005); *Antipova v. Attorney Gen.*, 392 F.3d 1259, 1263-65 (11th Cir. 2004); *Muhur v. Ashcroft*, 355 F.3d 958, 960-61 (7th Cir. 2004); *Zhang v. Ashcroft*, 388 F.3d 713, 719-20 (9th Cir. 2004).

⁷⁴ U.N. High Comm'r Human Rights, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) ¶ 31 ("That an applicant may be able to avoid persecution by concealing or by being 'discreet' about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.")

⁷⁵ C-A-, 23 I. & N. Dec. at 956.

⁷⁶ UNHCR Guidelines, *supra* note 58, at 3-4; The United Nations High Commissioner for Refugees' Amicus Curiae Brief in Support of Respondent at 12, *In re Valdiviezo-Galdamez*, 26 I. & N. Dec. 227 (BIA 2012) (No. A097447286), <http://www.refworld.org/docid/503653562.html> [https://perma.cc/WLV2-L3LU] [hereinafter *UNHCR Valdiviezo-Galdamez*]; Brief Amicus Curiae of the United Nations High Commissioner for Refugees in Support of Respondent Francis Gatimi at 7-12, *In re Gatimi*, (BIA 2010) (No. A 69495092), <http://www.refworld.org/docid/4bb0698e2.html> [https://perma.cc/B6R5-CKZV] [hereinafter *UNHCR Gatimi*].

⁷⁷ See UNHCR Guidelines, *supra* note 58, at 3-4.

there is an international obligation to protect are protected. Second, social perception is just that, “perception” of a society and does not require that the group be “ocularly visible.”⁷⁸ Not only does reference to the UNHCR’s Social Group Guidelines⁷⁹ make this clear, but the UNHCR has in numerous amicus curiae briefs⁸⁰ emphatically rejected their support for the Board’s social visibility test.⁸¹

In a decision following closely upon the heels of *In re C-A*,⁸² the Board elevated social visibility from a factor to be considered in determining the existence of a PSG to a requirement.⁸³ While the Board at one point in the judgment referred to social visibility as a factor, it shortly thereafter referred to it as a “requirement.”⁸⁴ The result was that subsequent Circuit Court decisions referring to *In re A-M-E*⁸⁵ disclaimed the existence of PSGs on the basis that while meeting the *Acosta* protected characteristics approach, the group’s lack of social visibility was fatal.⁸⁶ Despite the earlier assertion of

⁷⁸ The United Nations High Commissioner for Refugees’ Amicus Curiae Brief in Support of Petitioner at 6–7, *Henriquez-Rivas v. Holder*, 707 F.3d 1082 (2013) (No. 09-71571 (A098-660-718)), <http://www.refworld.org/docid/4f4c97c52.html> [<https://perma.cc/3KAG-T288>] [*UNHCR Henriquez-Rivas*].

⁷⁹ “[A] particular social group is a 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, *supra* note 58, at 3–4.

⁸⁰ See *UNHCR Gatimi*, *supra* note 76, at 7–10, 9–12; *UNHCR Valdiviezo-Galdamez*, *supra* note 76, at 11.

⁸¹ See, e.g., *UNHCR Henriquez-Rivas*, *supra* note 78, at 6–7 (stressing that the protected characteristics and social perception approaches are two separate tests and that “[r]equiring applicants to meet both approaches is fundamentally inconsistent with the *Social Group Guidelines*”).

⁸² 23 I. & N. Dec. 951 (BIA 2006).

⁸³ See *In re A-M-E*, 24 I. & N. Dec. 69, 73–75 (BIA 2007), *aff’d*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007) (“whether a proposed group has a shared characteristic with the requisite “social visibility” must be considered in the context of the country of concern and the persecution feared”).

⁸⁴ *Id.* at 74.

⁸⁵ *Id.* at 73–75.

⁸⁶ See e.g., *Scatambuli v. Holder*, 558 F.3d 53, 60 (1st Cir. 2009) (“[T]hose who knew of the petitioners’ identity as informants was quite small; the petitioners were not particularly visible.”); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 746 (9th Cir. 2008) (“The harassment appears to have been part of general criminality and civil unrest; Santos-Lemus’s ‘group’ was not particularly socially visible to the gang”); *In re A-T*, 24 I. & N. Dec. 296, 303 (BIA, 2007) (“[W]e are doubtful that young Bambara women who oppose arranged marriage have the kind of so-

the Board in *In re R-A-* that the additional criterion of social perception and visibility within a society “are not prerequisites”⁸⁷ to establishing the existence of a PSG, it was now to become the case.

Particularity was clearly labeled as a requirement in the case of *In re C-A-*.⁸⁸ Despite so doing, there was a lack of explanation of how the particularity requirement should be established by applicants and evaluated by adjudicators. The Board’s dicta that the claimed social group of “noncriminal informants” “. . . is too loosely defined to meet the requirement of particularity”⁸⁹ and that it could “potentially include persons who passed along information concerning any of the numerous guerrilla factions or narco-trafficking cartels currently active in Colombia to the Government or to a competing faction or cartel”⁹⁰ provided little guidance. Subsequent jurisprudence equated particularity with the ability of the claimed group to 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.”⁹¹ How this is different from the requirement of social visibility was unclear.⁹² As the case law developed, a correlation between discreteness and the size of the claimed social group became apparent.⁹³ The greater the size of the group, the less likely it could be considered sufficiently particular. The imposition of a size requirement upon the PSG invoked much criticism.⁹⁴ It belied consistency with the other protected

cial visibility that would make them readily identifiable to those who would be inclined to persecute them.”).

⁸⁷ 22 I. & N. Dec. 906, 919 (BIA 2001).

⁸⁸ 23 I. & N. Dec. 951, 957 (BIA 2006).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008).

⁹² *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582, 605 (3d Cir. 2011).

⁹³ *Portillo v. U.S. Attorney Gen.*, 435 Fed. App’x 844, 847 (11th Cir. 2011) (rejecting a proposed social group for being overly broad because it “would serve as a catch-all for every former military member who did not fall within one of the five protected groups, creating numerosity concerns”); *S-E-G-*, 24 I. & N. Dec. at 584 (in which the Board noted that “the size of the proposed group may be an important factor in determining whether the group can be . . . recognized . . .”); *In re A-M-E*, 24 I. & N. Dec. 69, 76 (BIA 2007) (“Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.”). *See also* *Malonga v. Mulasey*, 546 F. 3d 546, 553 (8th Cir. 2008) (emphasizing the importance of a group’s social visibility).

⁹⁴ *See* ANKER, *supra* note 24, at 348; FOSTER, *supra* note 6, at 31–32 (“it is not

grounds; no size limitation has been imposed upon the grounds of race, religion, nationality, or political opinion.⁹⁵ As such, the United States' particularity requirement has been perceived as antithetical to the spirit of the Refugee Convention and a repudiation by the United States of its international obligations under the treaty.⁹⁶

The Board of Immigration Appeal's new requirements ultimately led to a circuit split. The Third and Seventh Circuit's rejected the social visibility and particularity requirements, returning to the *Acosta* protected characteristics approach.⁹⁷ They determined

clear how an applicant could successfully establish this essential element"); Brief of Amicus Curiae The National Immigrant Justice Center in Support of Petitioner at 10-13, *Santos v. Holder* (3d Cir. 2014) (No. 14-1050), <http://www.immigrantjustice.org/sites/default/files/Santos%20Amicus%20Brief.pdf> [<https://perma.cc/EM7R-3EDQ>] (discussing the restrictions of the added requirements); Brief for the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner at 4, *Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012) (No. 10-9527), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4c6cdb512&skip=0&query=petitioner%20rivera-barrientos> [<https://perma.cc/38FJ-P7J4>] ("the Board's imposition of the requirements of "social visibility" and "particularly" may result in refugees being erroneously denied international protection") [hereinafter *UNHCR Rivera-Barrientos*].

⁹⁵ See U.N. HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS, ¶ 35 (2010), <http://www.refworld.org/pdfid/4bb21fa02.pdf> [<https://perma.cc/2GFH-ERSW>] ("As with other types of claims, the size of the group is also not relevant."); UNHCR Guidelines, *supra* note 58, at 5 ("The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2)").

⁹⁶ *UNHCR Rivera-Barrientos*, *supra* note 94, at 4 (offering examples of the standard's restrictions). See e.g., *UNHCR Henriquez-Rivas*, *supra* note 78, at 5 ("the 'particularity' requirement seems to be a reiteration of the 'social visibility' test and in any event is likewise inconsistent with the *Social Group Guidelines*, the 1951 *Convention* and the 1967 *Protocol*").

⁹⁷ See *Valdiviezo-Galdamez v. Attorney Gen. of the U.S.*, 663 F.3d 582, 594 (3d Cir. 2011) ("The BIA's requirements of "social visibility" and "particularity" are not entitled to *Chevron* deference."); *Ramos v. Holder*, 589 F.3d 426, 430-31 (7th Cir. 2009) ("We join our sister circuits that have held that there is no on-sight visibility requirement for a particular social group to be cognizable under the INA"); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) ("We just don't see what work 'social visibility' does"). See also *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) ("[Y]oung Albanian women who live alone" constitute a cognizable social group as the members of the group are "united by the common and immutable characteristic of being (1) young, (2) Albanian, (3) women, (4) living alone."); *Escobar v. Holder*, 657 F.3d 537, 545-47 (7th Cir. 2011) (finding that "former truckers who resisted FARC and collaborated with authorities" could be considered a particular social group based upon their immutable past experience – it was also considered important that the resistance of the group was based upon their politi-

social visibility, as a concept, to be illogical,⁹⁸ unclear,⁹⁹ and inconsistent with past precedent.¹⁰⁰ Other circuits joined the Third and Seventh Circuits as far as rejecting an interpretation of social visibility that required the applicant's group status be visible to the "naked eye."¹⁰¹ Particularity in the view of the Third Circuit was simply a reiteration of social visibility,¹⁰² and the Ninth Circuit, while not explicitly rejecting the notion of particularity, stressed that broad groupings could still constitute a particular social group and that size was irrelevant to the existence of a PSG.¹⁰³

cal support of the government, something that they should not be required to change).

⁹⁸ *Gatimi*, 578 F.2d at 615 (stating that it "makes no sense"). See also *Sarhan v. Holder*, 658 F.3d 649, 655 (7th Cir. 2011) (citing *Gatimi* when describing that the concept "makes no sense").

⁹⁹ See *Gatimi*, 578 F.2d at 615 (noting the inconsistency of the Board's opinions on the topic); *Benitez-Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (showing how it is often unclear whether the Board is using the term "social visibility" in the literal sense or in the "external criterion" sense, or even-whether it understands the difference).

¹⁰⁰ For example, the Seventh Circuit pointed to the fact that women who were yet to be subjected to FGM did not look different to other women in the tribe, obviously directing this comment to application of social visibility as requiring ocular observance of the social group trait. *Gatimi*, 578 F.2d at 615. See also *Valdiviezo-Galdamez*, 663 F.3d at 604 ("it is unclear whether this means that the group's shared characteristic must be visible to the naked eye"); *Sarhan*, 658 F.3d at 644 (in which the Seventh Circuit found it irrelevant that women faced with honor killings do not look different from other women in their society).

¹⁰¹ This includes the Fourth, Sixth, Ninth, and Tenth Circuits. *Temu v. Holder*, 740 F.3d 887, 892-93 (4th Cir. 2014); *Umana-Ramos v. Holder*, 724 F.3d 667, 669 (6th Cir. 2013); *Henriquez-Rivas v. Holder*, 707 F.3d 1082, 1087-88 (9th Cir. 2013); *Rivera-Barrimentos v. Holder*, 666 F.3d 641, 652 (10th Cir. 2012).

¹⁰² *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 663 F.3d 582, 608 (3d Cir. 2011) ("In the government's view, 'particularity' serves a different function from 'social visibility' in determining whether the asylum applicant has described a cognizable social group.").

¹⁰³ The Seventh Circuit pointed out that: "Many of the groups recognized by the Board and courts are indeed quite broad. These include: women in tribes that practice female genital mutilation; *Matter of Kasinga*, 21 I. & N. Dec. at 365, *Agbor*, 487 F.3d at 502 (7th Cir. 2007); persons who are opposed to involuntary sterilization, 8 U.S.C. § 1101(a)(42)(B); *Chen v. Holder*, 604 F.3d 324, 332 (7th Cir. 2010); members of the Darood clan and Marehan subclan in Somalia, *In re H-*, 21 I. & N. Dec. at 340, 343 (1% of the population of Somalia are members of the Marehan subclan); homosexuals in Cuba, *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (BIA 1990); Filipinos of Chinese ancestry living in the Philippines, *Matter of V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997) (approximately 1.5% of the Philippines population has an identifiable Chinese background). . . . The ethnic Tutsis of Rwanda numbered close to 700,000 before the genocide of 1994, and yet a Tutsi singled out for murder who managed to escape to the United States could surely

While the remainder of the Circuits gave due deference to the Board's new requirements, their interpretation and application of the requirements differed. Dependent upon the circuit, for a PSG to be socially visible requires an applicant to establish the existence of a common characteristic setting them apart from others in the society;¹⁰⁴ that the alleged PSG must be perceived as a cohesive group by society;¹⁰⁵ that the individual is readily identifiable by the characteristic;¹⁰⁶ or that the group must be perceived by society as being at greater risk of persecution.¹⁰⁷ In addition, there was inconsistency as to whom the group must be visible to: the applicant's society,¹⁰⁸ the applicant's country,¹⁰⁹ the persecutor,¹¹⁰ or visibility to both the country and the applicant's community.¹¹¹

qualify for asylum in this country. And undoubtedly any of the six million Jews ultimately killed in concentration camps in Nazi-controlled Europe could have made valid claims for asylum" *Cece v. Holder*, 733 F.3d 662, 674-75 (7th Cir. 2012) (internal citations included).

¹⁰⁴ *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) ("[T]his Court's reasoning [is] that a 'particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.'"). See also *Barrientos v. Holder*, 658 F.3d 1222, 1232 (10th Cir. 2011) (describing that social visibility requires citizens sharing a trait to "constitute a distinct social group").

¹⁰⁵ See *Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011) ("a social group requires sufficient particularity and visibility such that the group is perceived as a cohesive group by society").

¹⁰⁶ See *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) ("discussing concrete traits that would readily identify a person as possessing those characteristics").

¹⁰⁷ See *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (discussing individuals that "were recognized as a group that is at a greater risk of crime in general or of extortion, robbery, or threats in particular").

¹⁰⁸ The First Circuit requires that the claimed PSG be visible to the applicant's society and rejects that social visibility can be established by claiming the PSG is visible to the applicant's persecutor. *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010); *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008). See also *Umana-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013) (describing that social visibility "requires 'that the shared characteristic of the group should generally be recognizable by others in the community'"); *Constanza*, 647 F.3d at 753 ("the group is perceived as a cohesive group by society").

¹⁰⁹ See *Barrientos*, 658 F.3d at 1232 (determining whether "citizens of the applicant's country would consider individuals with the pertinent trait to constitute a distinct social group").

¹¹⁰ The Second and Fifth Circuits permitted either social visibility of the group to society or to the persecutor. *Orellana-Monson v. Holder*, 685 F.3d 511, 522 (5th Cir. 2012); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007).

¹¹¹ *Barrientos v. Holder*, 658 F.3d 1222, 1232 (10th Cir. 2011) (requiring that

Similarly the circuits diverged upon the parameters of the particularity requirement upon such issues as whether the size of the group was too large;¹¹² the broadness of the proposed PSG;¹¹³ whether the society identified the applicant as belonging to the asserted PSG;¹¹⁴ or a combination of these factors.¹¹⁵

3.3. 2014–Present—Solidification of “Social Distinction” and “Particularity”

In the wake of the controversy and calls for clarity by a number of the Federal Circuits,¹¹⁶ on February 7, 2014 the BIA elucidated its legal position on when a PSG will qualify as deserving of protection for asylum in two cases: *In re W-G-R*¹¹⁷ and *In re M-E-V-G*.¹¹⁸ The result was the firm endorsement of a tripartite test for establishing a “particular social group”; that an applicant is required to prove that their claimed PSG shares an immutable characteristic, that the group is socially distinct, and that the group is sufficiently particular.¹¹⁹ The Board firmly endorsed the obligatory nature of all three elements, while elaborating upon and arguably refining the requirements in a bid to provide greater clarity.

“the applicant’s country would consider individuals with the pertinent trait to constitute a distinct social group” and “the applicant’s community is capable of identifying an individual as belonging to a group”).

¹¹² See *id.* at 1230 (“the described group is ‘a potentially large and diffuse segment of society’”).

¹¹³ *Gaitan v. Holder*, 671 F.3d 678, 682 (8th Cir. 2012) (“we agree with the BIA that Gaitan’s articulated social group is not sufficiently narrowed to cover a discrete class of persons”); *Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012) (“I reach this conclusion not because the members of the proposed group lack kinship ties, but rather because the characteristics of the group are, in my view, broader and more amorphous . . .”).

¹¹⁴ *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (holding that the group was not socially visible).

¹¹⁵ See *Gashi v. Holder*, 702 F.3d 130, 137 (2d Cir. 2012) (requiring that the group be finite and its membership be verifiable).

¹¹⁶ See *Rojas-Perez v. Holder*, 699 F.3d 74, 81 (1st Cir. 2012) (noting that it is particularly unclear how courts are to square the BIA’s more recent statements regarding the social visibility requirement with its former decisions).

¹¹⁷ 26 I. & N. Dec. 208 (BIA 2014).

¹¹⁸ 26 I. & N. Dec. 227 (BIA 2014).

¹¹⁹ See *id.* at 237 (“Membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”).

The first element, the time honored “Protected Characteristics” Doctrine, continues to require that an applicant establish that the members of the PSG:

share a common, immutable characteristic. The shared characteristic might be 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 . . . However, whatever the common characteristic that defines the group, it 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.¹²⁰

The Board’s decisions since 2005 have not altered the interpretation of this doctrine; the one difference is that it is only the first step in a three-part assessment.

The second requirement, “Social Distinction,” according to the Board is *simply* a retitling and not a reformulation of the social visibility requirement;¹²¹ the retitling of “social visibility” to “social distinction” would bring greater clarity to the meaning and application of the requirement.¹²² The Board unequivocally stated that it never intended social distinction to require that members of the claimed PSG be “socially visible” in the sense of recognizable on sight;¹²³ “social visibility does not mean ‘ocular’ visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be ‘ocularly’ visible to others in society.”¹²⁴ Rather the requirement demands “society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.”¹²⁵

¹²⁰ W-G-R-, 26 I. & N. Dec. at 212 (citing to *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

¹²¹ See M-E-V-G-, 26 I. & N. Dec. at 240 (referencing “social distinction”); W-G-R-, 26 I. & N. Dec. at 216 (referencing “social distinction”).

¹²² See M-E-V-G-, 26 I. & N. Dec. at 240 (“The renamed requirement ‘social distinction’ clarifies that social visibility does not mean ‘ocular’ visibility—either of the group as a whole or of individuals within the group—any more than a person holding a protected religious or political belief must be ‘ocularly’ visible to others in society.”).

¹²³ *Id.* at 235–36. See also W-G-R-, 26 I. & N. Dec. at 211 (discussing social visibility).

¹²⁴ M-E-V-G-, 26 I. & N. Dec. at 236, 240.

¹²⁵ W-G-R-, 26 I. & N. Dec. at 217.

Importantly, the relevant society to perceive, consider, or recognize the grouping is that of the “citizens of the applicant’s country”¹²⁶ or “the applicant’s community.”¹²⁷ Whether it is the “citizens of the applicant’s country” or the “applicant’s community” which is the relevant society will depend upon a case-by-case analysis.¹²⁸ As the Board indicates, persecution in a remote region of a country or in a small subset of the country’s society may require that the relevant society is that of the individual’s immediate community rather than citizens of the applicant’s country.¹²⁹ This, at least in theory, neutralizes the suggestion that the asylum applicant must, in all cases, be able to establish that the claimed PSG exists as distinct in both their immediate community and to citizens at large.

In assessing whether or not the claimed PSG is socially distinct, the perception of the persecutor *alone* cannot be determinative.¹³⁰ While the persecutor’s perceptions may be useful as evidence to assist in establishing the society in question recognizes the claimed PSG,¹³¹ “the persecutors’ perception is not itself enough to make a group socially distinct.”¹³² The reason is that the PSG must exist separately as a group that society views as distinct, as “persecutory conduct alone cannot define the group.”¹³³ Importantly, the Board recognizes that persecution can ultimately lead to the creation of a group which is distinct in the eyes of the relevant society.¹³⁴ It may be “the catalyst that causes the society to distinguish the [group] in a meaningful way and consider them a distinct group”¹³⁵ Some confusion does arise, as the Board’s explanation includes reference to the members of the PSG who also consider themselves to

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 212 (citing *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

¹²⁹ *See M-E-V-G-*, 26 I. & N. Dec. at 243 (discussing narrowing the analysis to a social group within a tribe).

¹³⁰ *See id.* at 242 (indicating that “the persecutors’ perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group”).

¹³¹ *Id.*

¹³² *Id.* (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007)).

¹³³ *M-E-V-G-*, 26 I. & N. Dec. at 242.

¹³⁴ *Id.* at 231.

¹³⁵ *Id.* at 243.

be a separate group.¹³⁶ Only time will tell whether this will metamorphose into an additional sub-rule of the social distinction element or whether it was simply an example that was not to be taken literally.

Particularity, the final element, is aimed at determining who does and who does not fall within the group. For the claimed social group to be sufficiently particular, the Board requires it to be narrowly defined: "it must not be amorphous, overbroad, diffuse, or subjective."¹³⁷ This would mean that the circle is large and diffuse, rather than a socially distinct group which has a tight-fitting circumference. To clarify the object behind particularity, the BIA endorsed the Ninth Circuit's approach that "major segments of the population will rarely, if ever, constitute a distinct social group."¹³⁸ The PSG must be discrete, and to be discrete it must have well defined boundaries.

The notion behind particularity is to draw a close-fitting circle around the group in the sense of providing "a clear benchmark for determining who falls within the group"¹³⁹ and who does not.¹⁴⁰ Therefore, amorphous groups based upon general, wide, all-encompassing features, such as poverty, youth, and homelessness will not meet the delineation required by the Board's particularity element.¹⁴¹ The limits of the group can be tested by cross-referencing the suggested PSG with the element of social distinction and asking whether, given the cultural and social context of the applicant's country (and one would assume if necessary community), the society in question regards the group as discrete, rather than as generally characteristic of any society that exists.¹⁴² In

¹³⁶ *Id.* at 242-43.

¹³⁷ *In re W-G-R-*, 26 I. & N. Dec. 208, 214 (BIA 2004) (citing *Ochoa v. Gonzalez*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

¹³⁸ *Ochoa v. Gonzalez*, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (citing *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1577) (9th Cir. 1986)).

¹³⁹ *W-G-R-*, 26 I. & N. Dec. at 214 (citing *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007)).

¹⁴⁰ *See W-G-R-*, 26 I. & N. Dec. at 213 (citing with approval *Escobar v. Gonzales*, 417 F.3d 363, 367-68 (3d Cir. 2005) and stating that there is a need to set perimeters for a protected group).

¹⁴¹ *See W-G-R-*, 26 I. & N. Dec. at 213 (citing with approval *Escobar*, 417 F.3d at 367-68).

¹⁴² *See W-G-R-*, 26 I. & N. Dec. at 213 (stating that "the definition of a particular social group is not addressed in isolation but in context of the society out of which the claim for asylum arises").

most cases, it is implicit that the smaller the group the more likely it is to be acceptable. This is subject, of course, to it being socially distinct and its members sharing an immutable characteristic. The exercise must not be undertaken devoid of the cross-referencing to social distinction, as the applicant's society can change the width of the group.¹⁴³

4. THE EVOLUTIONARY IMPACT—SURVIVAL OF ONLY THE FITTEST PSGS?

According to the United Nations High Commissioner for Refugees, “the Board’s . . . interpretation of the *Social Group Guidelines* may result in refugees being erroneously denied international protection . . . in violation of the United States’ fundamental obligations under the *1951 Convention* and the *1967 Protocol*”¹⁴⁴ It must be acknowledged though that the protected characteristics approach has never been the sole approach to determining the PSG issue and other state parties have and do apply similar standards to those of social distinction and particularity when assessing PSG claims. The effect of the Board’s tripartite test may therefore not be as great as the concerns that have been expressed by the UNHCR and others.

4.1. *Social Distinction v. Social Perception*

If social distinction, as articulated in the 2014 tripartite test, is synonymous with the “social perception” approach of other countries,¹⁴⁵ it may have little meaningful effect upon those claiming

¹⁴³ See *id.* at 217 (indicating that “[t]o have the ‘social distinction’ necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group”).

¹⁴⁴ UNHCR *Henriquez-Rivas*, *supra* note 78, at 7.

¹⁴⁵ Australia applies the social perception approach as the exclusive criterion for establishing a PSG. See *S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 409–10 (Austl.). The United Kingdom applies social perception as an alternative approach to the protected characteristics approach in establishing a PSG. See *K v. Sec’y of State for the Home Dep’t and Fornah v. Sec’y of State for the Home Dep’t*, [2007] 1 A.C. 412, 419 (U.K.). The UNHCR endorses the use of social perception as adopted in Australia and the United Kingdom but as

protection under the PSG ground. This is principled upon the belief that all groups that fulfill the protected characteristics test are socially distinct. Alexander Aleinikoff, former United Nations Deputy High Commissioner for Refugees, has asserted in his work, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group,'* that groups that meet the *Acosta* protected characteristics analysis are inexorably perceived by society to be a group; that as members of the group are unable to hide the characteristic that defines their group or are unwilling to forsake their characteristic because of its fundamental nature they fail to avoid persecutory treatment and consequently are perceived to be groups within their society.¹⁴⁶ Consequently, any social group established under the protected characteristics approach necessarily meets the social perception approach.¹⁴⁷ As the UNHCR explains, the protected characteristics approach can be “understood to identify a set of groups that constitute the core of the social perception analysis.”¹⁴⁸

Given that the protected characteristics approach forms only the core of the social perception approach, the necessary implication is that the latter is in fact a wider test.¹⁴⁹ If applied as the sole test for determining a PSG, it permits the recognition of more PSGs than the protected characteristics approach.¹⁵⁰ There are many

an alternative to the fundamental characteristics approach. See UNHCR Guidelines, *supra* note 58, at 3–4.

¹⁴⁶ See Aleinikoff, *supra* note 6, at 297 (providing an example of this by describing that persons are likely to preserve deeply held religious and political convictions even if they face harm in doing so because they may view such convictions as core to their identities).

¹⁴⁷ See *id.* at 297–98 (providing a detailed discussion on social perception analysis). This also appears to be the understanding of the UNHCR. See also UNHCR Guidelines, *supra* note 58, ¶¶ 9, 11 (outlining guidelines on social group status).

¹⁴⁸ See *id.* ¶ 11 (“[A] particular social group is a 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.”).

¹⁴⁹ See Aleinikoff, *supra* note 6, at 272 (providing examples of overlap and disparity between the tests). See also FOSTER, *supra* note 6, at 13, 74–75 (discussing changes in PSG approach beginning in 1977 and stating social perception is “likely to accommodate a wider range of groups than is capable of being encompassed within the protected characteristics approach”).

¹⁵⁰ See Aleinikoff, *supra* note 6, at 272 (outlining an example case). See also Refugee Appeal No. 1312/93, at 60 (N.Z.) (“The difficulty with the ‘objective ob-

groups that society perceives to exist that share a characteristic of distinction and thereby meet the social perception test but fail to meet the protected characteristics requirement; the characteristic of distinction is so fundamental that they should not be required to forsake it.¹⁵¹ If this is indeed the case, social perception as an added criterion should have little meaningful effect upon the groups that will be recognized as PSGs.

By way of illustration, Aleinikoff refers to the United Kingdom decision of *Montoya*,¹⁵² in which the asylum applicant alleged persecution by a Marxist Opposition group—the EPL—because of his PSG: “the status of being an owner of land that is worked for profit.”¹⁵³ The EPL had demanded money from Montoya and threatened to kill him if he refused to pay. His uncle had been killed under similar circumstances. Whilst the UK Immigration Appeal Tribunal recognized that “the status of being an owner of land that is worked for profit is an ostensible and significant social identifier with historical overtones” in Colombia,¹⁵⁴ ultimately “landownership” could not be recognized as it was not a fundamental characteristic that the applicant could not change nor should not be re-

server’ approach [i.e. social perception approach] is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group.”); FOSTER, *supra* note 6, at 14 (“In case there is any ambiguity in this definition, the Guidelines make clear that where a group is not based on a characteristic deemed to be either unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.”); James Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 INT’L J. REFUGEE L. 477, 484 (2003) (“the test is overly broad, and need not affect any meaningful delimitation of the beneficiary class.”).

¹⁵¹ See *A v Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 236 (Austl.) (“I see no ground for holding that a characteristic must be ‘innate or unchangeable’ before it can distinguish a social group. If a characteristic distinguishes a social group from society at large and attracts persecution to the members of the group that is so distinguished, I see no reason why a well-founded fear of that persecution might not support an application for refugee status”). See also Aleinikoff, *supra* note 6 at 272, 295, 297–98 (describing that while a protected characteristics approach would likely encompass all those covered by a social perception analysis, the reverse may not be true).

¹⁵² See *Sec’y of State for the Home Dep’t v. Montoya*, Appeal No. CC/15806/2000, 13–15 (27 Apr. 2001) (IAT) (Eng.). The case was subsequently upheld on appeal to the U.K. Court of Appeals. *Montoya v. Sec’y of State for the Home Dep’t*, [2002] I.N.L.R. 399 (U.K.).

¹⁵³ Aleinikoff, *supra* note 6, at 295.

¹⁵⁴ *Id.*

quired to change.¹⁵⁵ In comparison, an application of the social perception approach would have qualified the PSG for protection given that Colombian society perceived landowners to be a social group.¹⁵⁶

The concern of adopting the social distinction test would therefore appear to be misplaced as those groups that would always have met the protected characteristics approach would necessarily meet the social distinction approach. This supposition would be correct if the BIA's social distinction analysis is indeed synonymous with the social perception approach endorsed by the UNHCR and as applied by countries such as Australia and, more recently, the United Kingdom. However, this is highly questionable. While there is commonality between the two approaches, they are not equivalent.

Social distinction as a construct may well yield a narrower band of protected groups than the social perception approach because, simply put, its scope is more limited. For a PSG to satisfy the social distinction approach requires that the relevant society "perceives, considers, or recognizes persons sharing the particular characteristic to be a group."¹⁵⁷ In comparison, the social perception test does "not [require] that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society."¹⁵⁸ One way of establishing that the group is distinguished from the rest of the society "is by examining whether the society in question perceives there to be such a group."¹⁵⁹ This is where the two tests correspond. Where they diverge is that social perception, unlike social distinction, rec-

¹⁵⁵ *Id.*

¹⁵⁶ Although the IAT determined that "prosperous landowners in Columbia" were perceived as a group by Colombian Society, asylum was ultimately refused as UK law at that time required assessment of a PSG based solely upon the *Acosta* protected characteristics approach. *Sec'y of State for the Home Dep't v. Montoya*, Appeal No. CC/15806/2000 12 (27 Apr. 2001) (IAT) (Eng.) (interpreting *Islam v. Sec'y of State for the Home Dep't* and *Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah* [1999] 2 A.C. 629 (HL) (appeal taken from Eng.)) and determining that the group's characteristic "must be one that is immutable or, put summarily, is beyond the power of the individual to change except at the cost of renunciation of fundamental human rights."). The IAT also referred with approval to *Acosta* in providing this guidance.

¹⁵⁷ *In re W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014).

¹⁵⁸ *S v Minister for Immigration and Multicultural Affairs*, (2004) 217 CLR 387, 398 (Austl.).

¹⁵⁹ *Id.* at 397-98.

ognizes that a group can be cognizable as a result of cultural, social, religious, and legal factors that exist in the given society even if it is the case that the PSG is not perceived by the society in question to exist.¹⁶⁰ The Australian High Court elucidated when a group will be “distinguished” from society rather than “perceived” by reference to the case of *Khawar*¹⁶¹ and the claimed PSG of “Married Pakistani Women.”¹⁶² The Court was of the opinion that it could not be proven that “Married Pakistani Women” were consciously perceived to be a particular social group by Pakistani Society.¹⁶³ Despite this, the Court concluded that the PSG nevertheless existed: “the operation of cultural, social, religious and legal factors, rather than any perceptions held by the community, . . . determin[ed] that married Pakistani women were a group that was distinguished or set apart from the rest of the community.”¹⁶⁴ The social perception analysis, therefore, permits the establishment of a PSG either by virtue of societal perceptions or by reference to cultural, social, religious, or legal factors, which have differentiated the group, and thereby made it a cognizable group within the society in question. This approach recognizes that PSGs can exist even where societies refuse to acknowledge their existence¹⁶⁵ or where

¹⁶⁰ *Id.* at 399, 400, 404, 413. See also *id.* at 408 (according to McHugh J: “To qualify as ‘a particular social group,’ the group must be a cognisable group within the relevant society, but it is not necessary that it be recognized as a group that is set apart from the rest of that society.”).

¹⁶¹ *Minister for Immigration and Multicultural Affairs v Khawar*, (2002) 210 CLR 1 (Austl.).

¹⁶² S, 217 CLR at 398.

¹⁶³ *Id.*

¹⁶⁴ *Id.* Such an approach overcomes the need to artificially create a group which for example the United States has struggled with in its recognition of women within given societies constituting a PSG. See, e.g., *HongYing Gao v. Gonzales*, 440 F.3d 62, 70 (2d Cir. 2006) (“women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable”); *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005) (rejecting “young (or those who appear to be young), attractive Albanian women who are forced into prostitution” as a PSG); *In re Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996) (“young women of the Tchama-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, who oppose the practice”). *Gao* was accepted as to the PSG but vacated on other grounds. *Keisler v. Gao*, 552 U.S. 801, 801 (2007).

¹⁶⁵ See *S v Minister for Immigration and Multicultural Affairs*, (2004) 217 CLR 387, 410 (Austl.) (referring to the consolidated cases of *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* and *Appellant S396/2002 v Minister for Immigration and Multicultural Affairs*, (2003) 216 CLR 473 (Austl.) in which the evidence was that Bangladeshi society denied the existence of homo-

societies do not consciously regard the group as one within their society,¹⁶⁶ but nevertheless the cultural, social, religious, or legal factors have in reality led to a group of persons being set apart from the rest of society.

It cannot, therefore, be asserted that every group that meets the protected characteristics test will necessarily satisfy the BIA's social distinction test. It would appear that immigration advocates are correct to be concerned about the impact that the new test of social distinction will have upon the ability of their clients to be granted asylum based upon their PSG. The upside is, as the Australian High Court has asserted, that it will only be in the rare case that a particular social group is distinguished by society and not at the same time perceived to exist.¹⁶⁷

More problematic are the practical hurdles that an applicant will now face. Proving the perception of a society half a world away is likely to present a significant evidentiary challenge for most asylum seekers. An applicant is now required to prove by a preponderance of the evidence that either their country or the smaller section of the society from which they fled perceives the existence of the claimed social group.¹⁶⁸ Objective evidence, including "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like,"¹⁶⁹ the BIA has stated, will provide the necessary evidence. It is this type of evidence that is also commonly used to support the social perception approach, but this has not proven to be without difficulties.¹⁷⁰

sexuals, but nevertheless "police, hustlers and others in that society singled homosexuals out for . . . persecution [It was determined that] [o]bjectively, homosexuals in Bangladeshi society comprise 'a particular social group,' whether or not that society recognizes them as such.").

¹⁶⁶ See S, 217 CLR at 410-11 ("The Taliban practised ad hoc, random, forcible recruitment of young men, where the only apparent criterion for recruitment was that the young men be able-bodied.").

¹⁶⁷ See *id.* at 410 ("No doubt such cases are likely to be rare.").

¹⁶⁸ See *In re M-E-V-G-*, 26 I. & N. Dec. 227, 244 (BIA 2014) ("when an applicant makes a claim of persecution based on political opinion or religion, he or she is required to provide evidence that the claimed political or religious group exists and is recognized as such in the relevant society").

¹⁶⁹ *Id.*

¹⁷⁰ See S, 217 CLR at 400 (stating that adjudicators can "draw conclusions as to whether the group is cognizable within the community from 'country information' gathered by international bodies and nations other than the applicant's nation of origin").

The challenge is that these types of reports are unlikely to reference with specificity the existence or recognition of many social groups. It is implausible that country condition reports would state, for example, that Guatemalan society perceives “married women in Guatemala who are unable to leave their relationship”¹⁷¹ to be a particular social group. In the wake of *In re W-G-R*¹⁷² this challenge is now a stark reality. An applicant’s failure to provide sufficient proof of social distinctiveness is now almost a routine procedure for rejection of PSG claims.¹⁷³

Applicants and their attorneys need to think outside the box and look to sources that are not as routinely utilized as country condition reports, such as sociological, anthropological, and historical literature, press reports, and testimonial evidence of academics and others who are experts on the particular country in question as well as the testimonial evidence of the applicant’s fellow country men and women. Additional support may be found arguably through an examination of cases of other State Parties to the Refugee Convention, particularly those that have adopted the social perception approach, at least to assist applicants in unearthing the necessary documentary evidence to support their case. An inherent danger that is associated with the use of this type of evidence is that it may be alien to many asylum adjudicators who typically place great weight upon State Department Country Condition Reports in assessing asylum claims. The credence that adjudicators may be prepared to give to these additional types of evidence is as yet unknown.

¹⁷¹ *In re A-R-C-G-*, 26 I. & N. Dec. 388, 389 (BIA 2014).

¹⁷² 26 I. & N. Dec. 208 (BIA 2014).

¹⁷³ See, e.g., *Vega-Ayala v. Lynch*, 833 F.3d 34, 39 (1st Cir. 2016) (“There was no evidence that Salvadoran society regards her proposed group as distinct.”); *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1229 (9th Cir. 2016) (“[W]e hold that the proposed group of ‘imputed wealthy Americans’ is not a discrete class of persons recognized by society as a particular social group.”); *Cano v. Lynch*, 809 F.3d 1056, 1059 (8th Cir. 2016) (“[T]his evidence alone is insufficient to support a conclusion that Mexican child laborers who have escaped their captors are ‘perceived as a cohesive group by society.’”); *Castro-Escobar v. Lynch*, 639 Fed. Appx. 22, 25 (2d Cir. 2016) (upholding that such a group “is too loosely defined to meet the requirement of particularity, inasmuch as the group would likely encompass a large portion of the Guatemalan society, and does not have the requisite social visibility”); *Rodas-Orellana v. Holder* 780 F.3d 982, 992 (10th Cir. 2015) (“Although MS-13 threatened and assaulted him for resisting recruitment, Mr. Rodas-Orellana has failed to establish that his membership in a particular social group was a central reason for MS-13’s actions.”).

As challenging as the evidentiary burden placed upon applicants is the ability of asylum adjudicators to objectively assess whether a foreign society half a world away recognizes or perceives that a particular group of persons is socially distinct. Objectively analyzing the evidence to determine the existence of a PSG has proven to be problematic in those countries that have for decades applied the social perception approach, and “[i]nconsistency in decision-making . . . suggest[s] that there is considerable subjectivity involved in assessing . . . [the social perception] approach to defining a PSG.”¹⁷⁴ Adjudicators presented with the same claimed grouping in the same country and presented with very similar evidence have come to opposing decisions as to the society’s perception of the claimed PSG.¹⁷⁵ “[T]he subjectivity inherent in relying on country information to determine whether a group is “objectively identifiable” or “cognisable” within a given society . . . [is] very clear.”¹⁷⁶ The Australian Federal Court has expressed concern with the difficulties encountered in accurately identifying the “particular social group” based upon the social perception approach and the consequential erroneous decisions that have resulted.¹⁷⁷ These errors, the Court asserts, arise from not only the actions of the adjudicators in evaluating the evidence but also from the point of view of the applicant in knowing what and how to establish the claimed PSG.¹⁷⁸

The United States’ own jurisprudence is indicative of the dangers and difficulties associated with the subjective assessment of objective evidence. As previously discussed, the Board’s former social visibility test had led to some circuits recognizing, and others rejecting, the existence of PSGs in respect to similarly situated claims. Arguably the clarity brought by the Board’s 2014 decisions should overcome these difficulties. However, this is yet to be

¹⁷⁴ FOSTER, *supra* note 6, at 37, n. 216.

¹⁷⁵ See *id.* (referring, for example, to decisions of the Australian Refugee Review Tribunal in 2009 that accepted without question that “high profile failed asylum seekers” were a PSG in Rwanda and later that same year rejected the existence of the group on almost identical facts).

¹⁷⁶ *Id.*

¹⁷⁷ MZXDQ v Minister for Immigration and Multicultural Affairs, [2006] FCA 1632, ¶ 23 (Fed. Ct. of Austrl.). See also FOSTER, *supra* note 6, at 38 (referring to the same case).

¹⁷⁸ MZXDQ, [2006] FCA. at ¶ 23.

proven, and in fact, several post *In re W-G-R*¹⁷⁹ decisions have been remanded due to the Board's failure to adhere to its new precedent and objectively assess the social distinction requirement.

The Ninth Circuit remanded the case of *Pirir Boc v. Holder* to the BIA to consider the evidence submitted by the applicant in support of the existence of the group within Guatemalan society.¹⁸⁰ The Board's conclusion that the claimed PSG, "persons taking concrete steps to oppose gang membership and gang authority,"¹⁸¹ lacked social distinction and particularity was based upon their prior conclusions in similar cases and without any evaluation of the evidence the applicant had submitted to support that in Guatemalan society this group is distinct.¹⁸² The Board in *In re W-G-R* had concluded that while the ultimate determination that a PSG did or did not exist in a given case was a question of law, "the analysis of a particular social group claim is based on the evidence presented and is often a fact-specific inquiry."¹⁸³ Three days after rendering the decision in *In re W-G-R* the Board had failed to carry out this inquiry.¹⁸⁴

*Oliva v. Lynch*¹⁸⁵ similarly demonstrates a failure by the BIA to objectively assess the evidence. The BIA concluded that Oliva had failed to provide any evidence other than one example from his

¹⁷⁹ 26 I. & N. Dec. 208 (BIA 2014).

¹⁸⁰ *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2009) (holding that the Board failed to consider State "Department Country Reports on Guatemala, a Congressional Research Service Report for Congress on Gangs in Central America . . . and background documents including news articles and Amnesty International Reports on Guatemala" and assess how Guatemalan society viewed the claimed group).

¹⁸¹ *Id.* at 1080.

¹⁸² *Id.* at 1084. The immigration judge who had assessed the evidence had, in comparison, concluded that Guatemalan society understood that there were those who were making a concerted effort to combat gang activity and *Pirir-Boc*, through his actions, would be perceived as associated with this group.

¹⁸³ 26 I. & N. Dec. at 209-10.

¹⁸⁴ See also *Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 401, 405 (11th Cir. 2016) (recently upholding the BIA's decision that "former members of the Mara-18 gang from Honduras" were not a PSG based upon its prior precedential decisions in *In re W-G-R* and *In re E-A-G*). The Eleventh Circuit gave deference to the BIA's decision because it was based upon two prior BIA precedential decisions. *Id.* at 405. Given that the evidence of the existence of a group may well change over time, become more distinct, or that more viable evidence may come to light, finding that a claimed PSG does not exist based upon a prior decision is a dangerous precedent to follow.

¹⁸⁵ *Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015).

own testimony that former gang members were socially distinct.¹⁸⁶ This conclusion was reached without reference to reports submitted by the applicant which “evidence[d] . . . government- and community-driven programs to help former gang members rehabilitate themselves and an affidavit from a community organizer who stated that former gang members who leave the gang for religious reasons become seriously and visibly involved in churches.”¹⁸⁷

Most recently the Second Circuit remanded a decision of the Board; this time the error occurred when the Board failed to evaluate the PSG as articulated by the applicant.¹⁸⁸ The applicant claimed that he faced persecution because of his membership in the “Association of Cattlemen and Farmers of Chanmagua.”¹⁸⁹ The Board diluted the potential distinctiveness of the claimed PSG by generalizing it and asserting the applicant did not “sufficiently demonstrate that the business people associated with farmers and ranchers, who also provide support for the poor, are perceived, considered, or recognized by Guatemalan society to be a distinct social group.”¹⁹⁰

Despite these erroneous attempts, the BIA has demonstrated that objective analysis of the social distinction requirement is possible in *In re A-R-C-G-*, involving a claim based upon the PSG of “married women in Guatemala who are unable to leave their relationship.”¹⁹¹ The Board was willing to rely upon a Canadian Broadcasting Corporation Report that demonstrated a culture of “machismo and family violence” in Guatemala and Country Condition Reports that evidenced sexual offenses against women, including spousal rape, were a serious problem and that the laws in place to prosecute domestic violence were not enforced.¹⁹² From

¹⁸⁶ *Id.*

¹⁸⁷ “[T]he BIA failed to address any of the other evidence that Oliva put forth, including evidence of government-and community-driven programs to help former gang members rehabilitate themselves and an affidavit from a community organizer who stated that former gang members who leave the gang for religious reasons become seriously and visibly involved in churches.” *Id.*

¹⁸⁸ *Morales-Espania v. Lynch*, 651 Fed. Appx. 40, 44 (2d Cir. 2016).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 26 I. & N. Dec. 388, 389 (BIA 2014). This decision was handed down by the Board after its decision in *Oliva v. Lynch* and 15 months before the Fourth Circuit’s decision.

¹⁹² *Id.* at 394.

this evidence, the Board was prepared to conclude that Guatemalan society “makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave.”¹⁹³ There was no requirement that the evidence submitted by the asylum applicant expressly state that married women who cannot leave their domestic relationship was a recognized social group. Rather, the BIA was prepared to evaluate the evidence submitted and draw the logical inference that Guatemalan society recognized “married women in a domestic relationship that they cannot leave” as a distinct social group.

In re A-R-C-G- does indeed demonstrate the ability and the willingness of the BIA to fulfill its obligation of objective decision making.¹⁹⁴ In comparison, the Board’s errors in *Pirir-Boc*,¹⁹⁵ *Oli-va*,¹⁹⁶ and *Morales-Espani*¹⁹⁷ almost demonstrate an ignorance of this obligation; the question is why the paradox?

One answer is that the Board may be experiencing the same issues associated with social distinctiveness that other countries have—difficulties associated with the limited evidence that applicants submit, how to best evaluate this evidence, and what logical inferences can be drawn concerning whether a foreign culture perceives a claimed PSG to exist. The evidence in *In re A-R-C-G-* may simply have been more well developed and easier to understand and the cultural norms more explicit, allowing objective decision making to more readily transpire.

Alternatively, it could be argued that the Board’s methodology in the three remanded cases was contrived for the specific purpose of non-recognition of the applicants’ claimed PSGs. Each of these cases involved applicants who were either former gang members or had opposed gang activities. Applicants that pose a danger in one way or another to U.S. society; and consequently their undesirability primed the Board to undertake subjective rather than objective decision making. In comparison *In re A-R-C-G-* did not pose such a threat, victims of domestic violence now being viewed by

¹⁹³ *Id.*

¹⁹⁴ *See generally In re A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014).

¹⁹⁵ 750 F.3d 1077 (9th Cir. 2014).

¹⁹⁶ 807 F.3d 53 (4th Cir. 2015).

¹⁹⁷ 651 Fed. Appx. 40 (2d Cir. 2016).

the U.S. as worthy of a grant of asylum.¹⁹⁸

At this point it is still conjecture as to which of the two proffered explanations is correct. Only with further development of social distinction jurisprudence will the true rationale become apparent. What is known at this point though is that the potential does exist to use the social distinctiveness requirement to surreptitiously screen out groups that are considered unpalatable.

4.2. Particularity v. Cognizability

According to the UNHCR, particularity has the effect of excluding social groups that would otherwise qualify for protection and is therefore inconsistent with the tenor of the Refugee Convention and Protocol.¹⁹⁹ The United States is not the only country, however, to measure the particularity of an asserted group. Other parties to the Convention, including Australia, the United Kingdom, and New Zealand, require the claimed social group meet the requirement of “particularity,” or as these countries term it, “cognizability.”²⁰⁰

Like particularity, cognizability requires that the claimed PSG is capable of recognition within the society in question and not simply a sweeping demographic:

The group must in fact be . . . a *particular* social group. It is not enough that its members form a demographic division of the relevant society, such as people aged thirty-three or those earning above or below a certain amount per annum.

¹⁹⁸ It has been ventured that post-2004 there had been a growing consensus among immigration judges to recognize PSGs based upon domestic violence, provided the applicant victim was able to demonstrate that domestic violence was endemic in their country, there was lack of protection by their own state and they were unable to leave the relationship. *Matter of A-R-C-G, Board of Immigration Appeals Holds That Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement*, Recent Adjudication: 26 I. & N. Dec. 388 (BIA 2014), 128 HARV. L. REV. 2090, 2094 (2015).

¹⁹⁹ UNHCR *Rivera-Barrientos*, *supra* note 94.

²⁰⁰ *K v. Sec’y of State for the Home Dep’t and Fornah v. Sec’y of State for the Home Dep’t*, [2007] 1 A.C. 412, 431–32 (U.K); *A v Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 305 (Austl.); *Refugee Appeal No. 1312/93*, at 56 (N.Z.).

. . . [T]he words “particular” and “social” indicate that the term “a particular social group” “is not apt to encompass every broadly defined segment of those sharing a particular country of nationality.” A demographic division of persons may constitute a group because, for statistical or recording purposes, those persons may be properly classified or considered together. Nevertheless, such a group of persons is not necessarily “a particular social group” within the meaning of Art 1A(2) of the Convention.²⁰¹

This explanation of cognizability by the Australian High Court is arguably equivalent to particularity and the Board’s explanation that to meet the particularity requirement the PSG “must not be amorphous, overbroad, diffuse, or subjective”²⁰² and that “major segments of the population will rarely, if ever, constitute a distinct social group.”²⁰³ Upon closer examination, the two approaches are not synonymous, although there is definite commonality.

Cognizability requires that the group have a characteristic which sets it apart from the rest of society. This is what makes the group particular.²⁰⁴ This is where the two approaches overlap: the BIA has asserted that in applying the test of particularity “it may be necessary to take into account the social and cultural context of the alien’s country of citizenship or nationality” to determine whether it is a discrete group recognizable within that society.²⁰⁵

Where the two approaches vary is that the size of the group is

²⁰¹ *S v Minister for Immigration and Multicultural Affairs*, (2004) 217 CLR 387, 409 (Austl.). *See also* *A*, 190 CLR at 241 (echoing a similar definition of “particular”).

²⁰² *In re M-E-V-G-*, 26 I. & N. Dec. 227, 239 (BIA 2014).

²⁰³ *See id.* at 239 (citing with approval *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005)).

²⁰⁴ *See A*, 190 CLR at 241 (“The word ‘particular’ in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a *cognisable group within their society*.”). *See also* *K v. Sec’y of State for the Home Dep’t and Fornah v. Secretary of State for the Home Department*, [2007] 1 A.C. 412, 419 (U.K.) (noting similar comments made by the House of Lords).

²⁰⁵ *In re W-G-R-*, 26 I. & N. Dec. 208, 214 (BIA 2004).

an important indicator of particularity but not cognizability. The Board and several of the Federal Circuit Courts have rejected PSGs because of numerosity concerns, asserting that the PSG was too amorphous.²⁰⁶ While these cases occurred prior to clarification of the tripartite test, the Board's 2014 elucidation of particularity without a doubt endorsed the relevancy of size. This is demonstrated by the rationalization that particularity is necessary to put outer limits²⁰⁷ on the PSG definition and the Board's citation with approval to the Ninth Circuit's dicta that "major segments of the population will rarely, if ever, constitute a distinct social group."²⁰⁸

Particularity is satisfied, therefore, by providing a sufficiently discrete label for the claimed PSG, a descriptor that is not considered "amorphous, overbroad, diffuse, or subjective."²⁰⁹ While applicants and their counsel can, and do, craft narrowly articulated descriptors for their PSG, the downside is the difficulty in being able to prove that the group is socially distinct given that it has been artificially contrived for the purposes of obviating numerosity concerns. It places the applicant in a Catch 22 situation: if the applicant articulates the group as it is perceived in their society, it is likely to be regarded as too large; but if the PSG is constructed narrowly, then it is unlikely the applicant will be able to prove that the PSG is recognized by their society.²¹⁰

In comparison, size is not a relevant consideration in the application of cognizability.²¹¹ A sweeping demographic is not the same

²⁰⁶ See *Portillo v. U.S. Attorney Gen.*, 435 Fed. App'x 844, 847 (11th Cir. 2011) (arguing that the PSG "serve[s] as a catch-all for every former military member who did not fall within one of the five protected groups, creating numerosity concerns"); *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA 2008) (concerning the Board's noting that "the size of the proposed group may be an important factor in determining whether the group can be . . . recognized . . ."); *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76 (BIA 2007) ("Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more"). See also *Malonga v. Mulasey*, 546 F. 3d 546, 553 (8th Cir. 2008) (discussing when a social group is too broad to qualify for asylum).

²⁰⁷ *W-G-R-*, 26 I. & N. Dec. at 214.

²⁰⁸ *M-E-V-G-*, 26 I. & N. Dec. at 239 (citing with approval *Ochoa v. Gonzales*, 406 F.3d at 1166, 1170-71).

²⁰⁹ *M-E-V-G-*, 26 I. & N. Dec. at 239.

²¹⁰ Nicholas Bednar, *Social Group Semantics: The Evidentiary Requirements of "Particularity" and "Social Distinction" in Pro Se Asylum Adjudications*, 100 MINN. L. REV. 355, 383 (2015).

²¹¹ See Spain Tribunal Supremo of Spain in STS 6862/2011, at 7 (Oct. 24, 2011) (Adrienne Anderson trans., cited in FOSTER, *supra* note 6) ("In fact, the group size is not an important criterion"); *Montoya v. Sec'y of State for the Home Dep't*,

as a large social group. While the group in question may appear at first glance to be a demographic because it possesses characteristics that apply to populations generally, such as being male, female, married, unmarried, youth, adult, urban, or landowner, the number of persons within a population that share these attributes is not what determines if the group is or is not a “particular” social group. What determines if the group is cognizable is whether persons who share the common characteristic or characteristics are set apart from the society in general.²¹² If they are, then they are part of a “particular social group” no matter the size of the group or how generally the words describing the group may appear on their face. This is recognized by countries that apply either the protected characteristics approach or the social perception approach.²¹³

[2002] I.N.L.R. 399, 409 (U.K.) (“there is nothing in principle to prevent the size of the PSG being large (e.g. women), but if the claim relies on some refinement or sub-category of a larger group, care must be taken over whether the resultant group is still definable independently of their persecution”); Refugee Appeal No. 71427/99, [2000] NZAR 545, ¶ 109 (N.Z.) (“[t]he size of the group cannot be a limiting factor given the breadth of application of the other four Convention categories.”); *A v Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 241 (Austl.) (per. Dawson J: “I can see no reason to confine a particular social group to small groups or large ones; a family or a group of millions may each be a particular social group”). See also *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, IMMIGR. & REFUGEE BOARD OF CAN. (Nov. 13, 1996) <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx#AllI> [<https://perma.cc/4R3K-ZDE6>] (“The fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant -- race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.”). See *K v. Sec’y of State for the Home Dep’t and Fornah v. Sec’y of State for the Home Dep’t*, [2007] 1 A.C. 412, 464 (U.K.) (noting that the use of size as a determining factor has “no basis in fact or reason”); IMMIGRATION APPELLATE AUTHORITY, *ASYLUM GENDER GUIDELINES* ¶ 3.45 (2000) (“The fact that the particular social group consists of large number of the female population in the country concerned is *irrelevant* - race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.”). Similar comments have been made by the UNHCR: “The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2).” UNHCR Guidelines, *supra* note 58, at 5.

²¹² *Islam v. Sec’y of State for the Home Dep’t and Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, [1999] 2 A.C. 629, 657, 660 (HL) (appeal taken from Eng.); *A v Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 241 (Austl.); Refugee Appeal No. 1312/93, at 30, 33–34, 62 (N.Z.).

²¹³ See Refugee Appeal No. 71427/99, [2000] NZAR 545, ¶ 109 (N.Z.) (recognizing that while the PSG of “Women in Iran” may seem large, “[t]he size of the group cannot be a limiting factor given the breadth of application of the other four Convention categories.”). See also *Fornah*, [2007] 1 A.C. at 464 (accepting that ei-

Consequently, such groups as “Women in Iran,”²¹⁴ “Homosexual men in Bangladesh,”²¹⁵ and “Children from Afghanistan [without parents],”²¹⁶ have been recognized as particular social groups. These PSGs would, on their face, appear to be sweeping demographics and groups that are amorphous, overbroad, and too diffuse according to the Board of Immigration Appeals, but as the English Court of Appeal observed, this fails to take into account “that a ‘particular social group’ cannot be identified in the abstract. It is necessary to identify the society of which it forms part in order to identify whether” the PSG is set apart from society in general.²¹⁷ If it is set apart from society, then it is a “particular social group.” Cognizability in these countries is, therefore, assessed as an implicit component of the social perception approach or of the fundamental characteristics approach and not a separate criterion that applicants must prove and without doubt, size is not a relevant indicator.

While some may argue that the recent decision of *In re A-R-C-G*-²¹⁸ signals a willingness of the Board to step away from the size concern of earlier decisions, it is unlikely that this will be the case.²¹⁹ If size was not an issue, then the Board would have been

ther uninitiated indigenous females in Sierra Leone or women in Sierra Leone were acceptable as particular social groups and citing with approval to the UNHCR guidelines that the size of the group is irrelevant). See Montoya, [2002] I.N.L.R. at 409 (“there is nothing in principle to prevent the size of the PSG being large.”); IMMIGRATION AND REFUGEE BOARD OF CANADA, MEMBERSHIP OF A PARTICULAR SOCIAL GROUP AS A BASIS FOR A WELL-FOUNDED FEAR OF PERSECUTION - FRAMEWORK OF ANALYSIS ¶ 3 (1991), <http://www.refworld.org/docid/3ae6b32510.html> [<https://perma.cc/9KP8-U43T>] (noting that “[g]roup size is irrelevant”).

²¹⁴ Refugee Appeal No. 71427/99, [2000] NZAR ¶ 9 (N.Z.).

²¹⁵ Appellant S395/2002 v Minister for Immigration and Multicultural Affairs and Appellant S396/2002 v Minister for Immigration and Multicultural Affairs, (2003) 216 CLR 473, ¶ 81 (Austl.).

²¹⁶ LQ (Age: Immutable Characteristic) Afghanistan [2008] U.K.A.I.T. 00005, ¶ 6 [U.K.]. But see HK (Afghanistan) v. Sec’y of State for the Home Dep’t, [2012] E.W.C.A. Civ. 315, ¶¶ 7-9 (U.K.) (strongly suggesting that the group was more limited than all children in Afghanistan and should be limited to those who had no parents to provide protection).

²¹⁷ Fornah v. Sec’y of State for the Home Dep’t, [2005] 1 W.L.R. Imm. 3773, 3778 (U.K. Ct. of App.).

²¹⁸ 26 I. & N. Dec. 388 (BIA 2014).

²¹⁹ Decisions post *A-R-C-G*- are indicative that “particularity” will continue to act as a control on large social groups. See, e.g., *Castro-Escobar v. Lynch*, 639 Fed. Appx. 22, 26 (2d Cir. 2016) (supporting the Board’s decision rejecting “Castro-Escobar’s putative particular social group made up of Guatemalans opposed

prepared to determine, as submitted by the American Immigration Lawyers Association, the United Nations High Commissioner for Refugees, and the Center for Gender & Refugee Studies, “that gender alone should be enough to constitute a particular social group in this matter.”²²⁰ The issue was sidestepped as unnecessary given that the proffered PSG of “married women in Guatemala who are unable to leave their relationship” had been recognized.²²¹ If the Board had accepted that gender can constitute a particular social group, it would have run the inherent danger of impliedly supporting the recognition of other generally labeled groups such as “homeless youth within Country X” or “young women living in gang territory,”²²² groups that the Board has clearly sought to exclude from Convention protection.

Ultimately, the Board’s construct of particularity is like social distinction, a fertile area for subjective decision-making. Stating that the group is too amorphous or overbroad to constitute a particular social group arms decision-makers with the latitude to discount groups under the guise of demographics and size. It permits adjudicators to manipulate the outcome of a PSG claim and limit asylum to those groups considered to be desirable and not apt to arrive at the border in great numbers.

to gangs and gang violence . . . [because] such a group ‘is too loosely defined to meet the requirement of particularity, inasmuch as the group would likely encompass a large portion of the Guatemalan society.’”); *Aguilon-Lopez v. Lynch*, No. 15-2570, 2016 WL 7210071, 3 (1st Cir. Dec. 12, 2016) (confirming that the claimed PSG, “residents of Guatemala who have been threatened with gang violence and recruitment to a gang, and have refused,” lacked particularity; it was “comprised of people from an impermissibly broad variety of ages and backgrounds,” lacked specificity as to the “type of conduct that may be considered ‘recruit[ment]’ and the degree to which a person must display ‘resist[ance],’” and lacked “accurate separation of members from nonmembers”); *Lopez-Diaz v. Lynch*, No. 15-2722, 2016 WL 5799264, 2 (2d Cir. Oct. 4, 2016) (agreeing that “the boundaries of Lopez-Diaz’s proposed group are overbroad and narrowed only by subjectively defined factors that do not “provide a clear benchmark for determining who falls within the group,” *i.e.*, what constitutes abuse by family members or vulnerability to abuse).

²²⁰ A-R-C-G-, 26 I. & N. Dec. at 395, n. 16.

²²¹ *Id.*

²²² This is subject to the applicant being able to prove through the provision of objective evidence establishing that the society in question views the group as distinct.

5. CONCLUSION

The Board of Immigration Appeals' new PSG test is here to stay, at least for the foreseeable future. For 10 years, the addition of the social visibility/social distinction and particularity requirements has lauded criticism and challenge from the UNHCR, asylum advocates, applicants, academics, and certain sections of the bench. Despite the turbulent evolution of the tripartite test, the Board has stood steadfast in its resolve that to establish a PSG, an applicant must prove that the group possesses an immutable or fundamental characteristic, is socially distinct, and has discrete boundaries. The clear purpose of the new test is to limit the potential types and size of groups that can find protection within the United States. It is an attempt to close the borders to large and seemingly undesirable sections of the world's refugee population. In doing so, the Board is, as the UNHCR has alleged, failing to uphold its obligations under the Refugee Convention and Protocol.

The turbulent road though is still to be travelled not only for applicants and their counsel but also the Board. It is incumbent upon advocates to use the tripartite test to their advantage—to provide the objective evidence necessary to prove that their client's group not only has an immutable or fundamental characteristic but also is recognized within their country of origin and that the group is one that, because of such recognition, is not amorphous but has boundaries which make it particular. A sound understanding of the requirements of social distinction and particularity will enable asylum advocates to provide the necessary objective evidence and roadmap the existence of the PSG. Difficult as the task may be, in most cases it will not be insurmountable.

The greatest danger posed to any PSG claim by the new tripartite test, arguably, is the ability of adjudicators to manipulate the outcome through subjective decision-making. Any unfavorable conclusion reached that is not substantiated by logical reasoning as to why the objective evidence does not support the existence of the claimed PSG must be challenged. Banal conclusions that the group is too amorphous or that the applicant has provided little in the way of evidence without more is a strong indication of subjective decision-making. Both the Fourth and the Ninth Circuits have indicated that the Board will be held accountable and required to provide sound reasons for the conclusions that they reach in respect to both social distinction and particularity, providing an ap-

plicant has submitted objective evidence in support of their PSG.

It must be kept in mind that the continual challenge to the concept of social visibility resulted in its conversion into a requirement of social distinction and a lowering therefore of the threshold for establishing a PSG. Advocates need to continue to contest the premise that particularity equates to size and that social distinction is an additional requirement to establishing a PSG rather than an alternative means. Continuing to highlight and draw upon the evolution of these factors from the jurisprudence of other parties to the Refugee Convention, particularly other common law countries, can only serve to assist in this endeavor.

The Refugee Convention and Protocol are international human rights instruments to which the United States has agreed to be bound. An asylum adjudicator's duty, therefore, extends not to only interpreting and applying the asylum laws of the United States but upholding the international human rights obligations of the United States. The result of a decision to recognize or not to recognize a PSG can be one of life or death, consequently it is prudent that adjudicators bear in mind that in administering these laws,

“[a]djudication is not a conventional lawyer's exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political, and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.”²²²

²²² R v. Immigration Appeal Tribunal and Ex Parte Shah, [1997] Imm. A.R. 145, 153 (U.K. High Ct.).