

Justice AmeriCorps (jAC) Training: Advanced Topics in Asylum



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About the Tahirih Justice Center

- Tahirih Justice Center is a national non-profit that has served nearly 17,000 courageous individuals fleeing violence since 1997.
- Through direct services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where women and girls enjoy equality and live in safety and dignity.

About the National Immigrant Justice Center

- Chicago-based nongovernmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers through a unique combination of direct services, policy reform, impact litigation and public education.
- Serves more than 10,000 immigrants annually with the support of a professional legal staff and a network of nearly 1,500 *pro bono* attorneys.

Outline: what we will cover today

- Asylum Definition and Protected Grounds
- Particular Social Group
 - *Acosta* definition + history of social visibility and particularity
- How to Present Common Asylum Claims of Central American Children
 - Gender
 - Domestic violence/child abuse
 - Opposition to gangs/criminal organizations
 - Witness to gang/criminal activity

Asylum Definition

- An individual is eligible for asylum if she meets the definition of a refugee. Immigration & Nationality Act (INA) § 208(b)(1)(A).
- A refugee is “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A)
 - Definition based on international law: UN Protocol Relating to the Status of Refugees, Art I(2)

Asylum Elements

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
 - Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group

Remember to keep each element separate!

Membership in a Particular Social Group

An Attorney's Role in a Particular Social Group Case

- Carefully craft the particular social group(s).
- Develop a strong record in anticipation of a possible appeal (briefing, evidence, and testimony)
- Be prepared to educate the adjudicator on the state of particular social group case law in your circuit.

A particular social group is a group of people who share a common immutable characteristic –

a trait 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.”

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

Definition is based on the other protected grounds:

- **Race and Nationality**: characteristics that cannot be changed
- **Religion and Political Opinion**: characteristics that one should not be required to change

Examples of immutable characteristics provided by *Acosta*

- Sex,
- Kinship,
- Shared past experience (land ownership)

Protected PSGs after *Acosta*

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996)

- “Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice”

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990)

- Recognizing homosexuals in Cuba as a particular social group

Matter of S-E-G and Matter of E-A-G- (BIA 2008)

Imposed “social visibility” and “particularity” as additional *requirements* to the immutable characteristics test:

- “membership in a [PSG] *requires* that the group have particular and well-defined boundaries, and that it possesses a recognized level of social visibility”
- Introduces a “*social visibility test*”: Social visibility requires a showing that the “attributes of a particular social group. . . [are] recognizable and discrete.” 24 I&N Dec. 579, 586 (BIA 2008)

Problems with *SEG* and *EAG*

- Circular reasoning that conflated social visibility, particularity, and nexus
- Results-driven (Central American gang cases)
- Literal or figurative visibility (must a group member wear a sign on her back?)
- Misinterpretation of the UNHCR test
- No explanation about how previously accepted groups remain viable
- 7th Circuit and 3rd Circuit reject; 9th Circuit rejects in part.

Matter of M-E-V-G and Matter of W-G-R- (BIA 2014)

- *Matter of M-E-V-G-* = Valdiviezo – the third circuit case in which the third circuit rejected SEG/EAG.
- Same fact pattern as SEG/EAG
 - MEVG: gang resisters (like SEG)
 - WGR: former gang member (like EAD – imputed gang membership)

Matter of M-E-V-G

- “Social distinction” instead of literal visibility
- Defines social distinction= “set apart” “distinct” from others “in some significant way”
- External perception component
- Under social distinction, society’s perspective (not the persecutor’s) is relevant. Under nexus, the persecutor’s perspective is relevant.
- Particularity= group’s “boundaries” or “outer limits” (but no new or clarified definition)
- Particular social groups **MUST** be analyzed on a case-by-case basis

Matter of W-G-R

- Requires social distinction rather than “ocular” visibility
- Troubling dicta related to former gang members not being sufficiently particular to form cognizable PSGs
- Particularity precludes common parlance labels

Problems with *M-E-V-G/W-G-R-*

- Results-driven
- Post-hoc rationalization is disingenuous and inaccurate
- One test can only be met at the expense of the other test: defining a group in a sufficiently particular way will make the group fail the social distinction test
- Requires experts - precludes pro se applicants and applicants with limited resources from obtaining asylum
- Calls on adjudicators to act outside their expertise
- Conflicts with the basis on which *Acosta* defined PSG
- BIA did not invoke *Brand X* or *Chevron* principles or explicitly overrule other circuits' law.

Matter of A-R-C-G- (BIA 2014)

- DV-based asylum claim
- Recognized the group of “married women in Guatemala who are unable to leave their relationship”
- Finds that the group is sufficiently particular even though it would seem to suffer from the same flaws as W-G-R- (could include persons of any age or background or length of marriage)
 - Indicates policy basis for BIA decisions
- Concerns about the evidentiary burden described in the decision and the focus on a “married” relationship

**Identifying and Articulating
Successful
Particular Social Group Claims**

Where to begin?

1. Ask why the persecutor targeted your client in the past and why the persecutor will target your client in the future.
2. Identify elements of a PSG that will work:
 - a) Start with Acosta immutability and then address social distinction and particularity
 - b) Are there other grounds that can be included?
3. Distinguishing Nexus from Persecution:
 - a) Avoiding circular formulations that confuse nexus with persecution
 - b) Remember that the persecutor usually did not target your client because she was a “victim” – i.e., a PSG of “Guatemalan children who are victims of child abuse” generally will fail.

Interviewing your client to determine the PSG

Ask

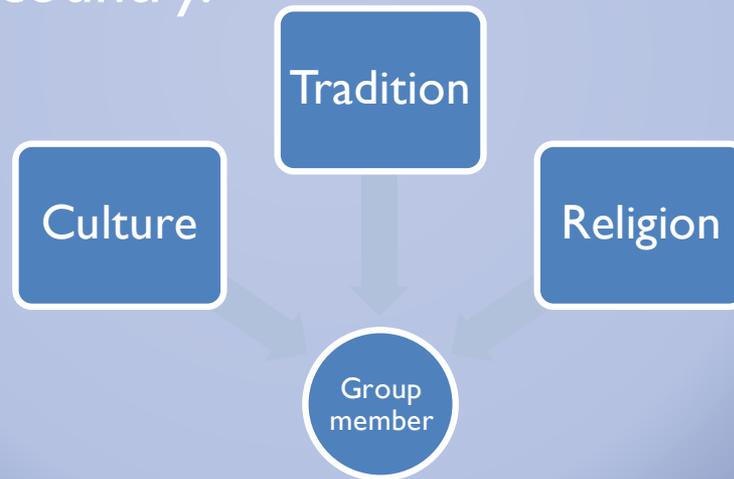
- “What did X say while hitting/beating/threatening you.”
- Do you know anyone else who X harmed/threatened?
- Do the police help people who are beaten/harmed/threatened by X? Do the police help people who are beaten/harmed/threatened by others (in other contexts)

Ways to Address Social Distinction

- Point out prior instances of persecution or harm others in the PSG have suffered to show govt/police failure to protect that PSG – which make it a socially distinct group.
- Highlight social distinction v. literal visibility
- Use country conditions: failure of govt protection reflects a social distinction between members of a society who receive protection and members who do not.
- Country conditions experts

Ways to Address Particularity

- Compare PSGs that did not work to yours – analogize and distinguish.
- Particularity depends on context – i.e. show how the cultural context means that your group is particular within that country.



TIP: Focus on societal/cultural/traditional “roles.”

Gender-Related Asylum Claims

Example

Yesenia is a young woman from Honduras. When she was 16 years old, she began dating Wilmer and soon moved in with him. Once they were living together, Wilmer became controlling and regularly beat and raped Yesenia. Yesenia remained in the relationship out of fear that Wilmer would kill her if she left him. She never reported the abuse to the police because she thought they couldn't help her since they had never observed the abuse and she feared Wilmer would beat her if he found out. Yesenia finally fled to the United States in 2014 as an unaccompanied child.

**Step one: what do we need to know to
develop the PSG?**

- Why did Yesenia believe Wilmer would kill her if she left him?
- What did he say to her to make her fear him? What did he do to make her believe he could kill her?
- Does she know if the police protect women from DV in her community?
 - Does she know anyone who has ever reported DV to the police and if so what was the result?
- What does the country condition evidence say about relationship status in the client's country?
- How does her community typically treat people in non-marital relationships like hers?
 - Would they have treated her any differently if she had a marriage license?
 - What role is a woman expected to play in a relationship?

Step two: what PSGs seem feasible and do we need more than one? What about other protected grounds?

Possible PSGs: **Sixteen year old females from Honduras who are unable to leave a relationship.**

- Immutable characteristic: age; nationality; gender; relationship status
- Social distinction and particularity:
 - Consider non-amorphous characteristics (e.g., specific age or age range rather than “young” which can have different meanings to different individuals)
 - provide evidence on how her community views/treats women in relationships like Yesnia’s;
 - Point out any laws that provide disparate (positive or negative) treatment of her group characteristics to show the social distinction: (i.e. **Article 142, Honduran Penal Code**. States that the rape of a person over fourteen and under eighteen will be penalized by imprisonment for between six to eight years, if the offender took advantage of a position of trust, authority or hierarchy in order to commit the act. = law recognizing her age group as particularly vulnerable or susceptible to being taken advantage of by persons of trust/authority).
 - Look at the culture and context

Honduran sixteen year old females who are viewed as property by virtue of their status within in a relationship.

Same immutable characteristics, social distinction and particularity as above but might be more easily understood in demonstrating nexus (i.e. motivation=her status)

- What about political opinion?
- Any other protected grounds – religion? Race/nationality?

Step Three: Examine PSG case law

- Generally stick to your circuit's case law. Use other circuit case law only as additional back-up
- *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014) decided August 26th “married women in Guatemala who are unable to leave their relationship”
- Asylum claims are very fact-specific – don't attempt to find case law that mirrors your client's case.
 - Instead, look for analogies and similarities in other asylum claims – even if they are from entirely different countries and involve completely different protected grounds

Example

Jennifer is a 15-year-old girl from El Salvador who lived in a neighborhood controlled by the mara 18 gang. When she turned 14, mara 18 gang members began demanding that she and her cousin become a girlfriend of the gang members. Jennifer ignored them, but they became increasingly threatening and as a result, her cousin decided to start dating a gang member. At the same time, MS-13 gang members who controlled the neighborhood where Jennifer went to school began accusing Jennifer of supporting mara 18 and threatening her. Jennifer fled to the United States as an unaccompanied child in 2014.

**Step one: what do we need to know to
develop the PSG?**

- What characteristics do Jennifer and her cousin share (could clue us into motivation to target them initially)?
- Does Jennifer have any fear of Mara 18? Does she think they would try to harm her and if so, why?
- What did the Mara 13 members say or do to her to make her fearful of them?
- What does the country conditions evidence say about society's treatment of perceived gang members in Jennifer's country?
- How does her community typically treat people in her age/gender group?

Step two: what PSGs seem feasible and do we need more than one? What about other protected grounds?

Possible PSGs: For MS 18 as persecutors: Salvadoran females between the ages of 14 and 15 who live in gang controlled neighborhoods* and refuse to date gang members.

- Immutable characteristic: age; nationality; gender, shared experience (refusal to date)
- Social distinction and particularity:
 - Consider non-amorphous characteristics like who live in [*insert name of neighborhood] rather than using “gang controlled” which might be too amorphous)
 - provide evidence of how community views/treats girls that are Jennifer’s age;
 - Look at the culture and context

Possible PSGs: For MS 13 as persecutors: Salvadoran females between the ages of 14 and 15 who attend school in gang controlled areas* and are viewed as property of opposing gangs. *Substitute in school name.

Same immutable characteristics (substitute shared experience of refusing to date for being perceived as a gang-members girlfriend), social distinction and particularity as above but might be more easily understood in demonstrating nexus (i.e. motivation=her status as gang property due to belief that she is a girlfriend of the gang)

- What about imputed political opinion?

Step Three: Examine PSG case law

- Generally stick to your circuit's case law. Use other circuit case law only as additional back-up
- Asylum claims are very fact-specific – don't attempt to find case law that mirrors your client's case.
 - Instead, look for analogies and similarities in other asylum claims – even if they are from entirely different countries and involve completely different protected grounds
 - Some ideas to draw analogies from:
 - resistance to gang recruitment cases;
 - Property status from DV case law

Example

Miriam is a 15-year-old girl from El Salvador. When she was 13 years old, boys at her school began to sexually harass her and attempted to molest her. Hoping to obtain protection against their abuse, she began dating a 19-year-old gang member. Eventually, Miriam decided she no longer wanted to date the gang member because he had become controlling. However, he told her that he had done nothing wrong and there was no reason to break up. When Miriam was 14, he told her he wanted to have sex with her. Miriam said she wasn't ready, but he told her that this was her job as his girlfriend and raped her, although at the time, Miriam did not understand that she had been raped. He continued to rape her several times over the next few months until Miriam discovered she was pregnant. When her boyfriend told her she had to get rid of the pregnancy and that he would do everything he could to prevent the pregnancy, Miriam fled to the United States.

**Step one: what do we need to know to
develop the PSG?**

- Is Miriam still afraid of the boys who molested and sexually harassed her? If so, why did they target her?
- How did people in Miriam's community treat her after she began her relationship with the 19 year old gang member?
 - Was there a gender specific role expected of her?
- What does the country conditions evidence say about society's treatment of perceived gang members' girlfriends in Miriam's country?
- How does her community typically treat people in her age/gender group?

Possible PSGs: For gang member boyfriend as persecutor: **Fifteen year old females from El Salvador who are unable to leave a relationship.**
(Alternative: **Fifteen year old females from El Salvador who are viewed as property by virtue of their status in a relationship).**

- Immutable characteristic: age; nationality; gender, relationship status
- Social distinction and particularity:
 - provide evidence of how community views/treats girls that are Jennifer's age;
 - Look at the culture and context

Possible PSGs: For future fear based on prior molestation: **Fifteen year old females from El Salvador who have been sexually molested.**

Immutable characteristics: age, nationality; gender; shared past experience

Social distinction and particularity: how does community view/treat child molestation survivors

TIP: Avoid circularity-this can only cover future fear and not the past persecution (i.e. original molestation).

Step two: what PSGs seem feasible and do we need more than one? What about other protected grounds?

Step Three: Examine PSG case law

- *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014) decided August 26th “married women in Guatemala who are unable to leave their relationship”
- *Cece v. Holder*, 7th Circuit No. 11–1989. Decided: August 9, 2013

Child Abuse-Related Asylum Claims

Example

Mauricio is a 16-year-old boy from El Salvador. His mother came to the United States when he was four and left him in the care of his aunts and uncles. His aunts regularly beat him, forced him to do manual labor on their farm, and refused to let him eat with the rest of the family. Sometimes they forced him to sleep outside. His uncles often tried to get him to drink or use drugs and one time, they shot a bb gun at Mauricio's feet. One day, Mauricio ran away from the house and eventually made his way to the United States, where he reunited with his mother.

**Step one: what do we need to know to
develop the PSG?**

- Who is Mauricio afraid of? His uncles, and aunts?
 - How did Mauricio's aunts treat the other (similarly situated) family members?
 - How did Mauricio's uncles treat the other (similarly situated) family members?
- Did Mauricio ever try to seek help from the authorities? If not, why not?
- What does the country conditions evidence say about society's treatment of children in Mauricio's country?
- How does her community typically treat people in her age/gender group?

Step two: what PSGs seem feasible and do we need more than one? What about other protected grounds?

Possible PSGs Salvadoran boys from Mauricio's Family.

- Immutable characteristic: age; nationality; gender, family/kinship ties
- Social distinction and particularity:
 - provide evidence of how community views/treats child victims of abuse;
 - Look at the culture and context

Step Three: Examine PSG case law

- Generally stick to your circuit's case law. Use other circuit case law only as additional back-up
- *E.g. Acosta; Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) “In fact, we can conceive of few groups more readily identifiable than the family. See [Sanchez-Trujillo](#), 801 F.2d at 1576.

**Asylum Claims
Based on Gang
Resistance/Opposition**

Example:

Edwin is a 15-year-old boy from Honduras. Edwin was walking home from school one day when two gang members approached him. One of the men told Edwin that he had to join the MS-13 gang and collect money from certain community members or they would kill him. One of the men put a gun to Edwin's head while he spoke. They gave him three weeks to decide if he would join and continued to threaten him throughout this time. Before the three week period expired, Edwin fled to the United States.

**Step one: what do we need to know to
develop the PSG?**

- What did the gang members say when they threatened him?
- What did he say to the gang members?
- Does he know whether the gang has attempted to recruit others in his community?
 - Who?
 - Did they agree?
 - If not, what happened to them?
- Did he report the threats to the police?
 - If no, why not?
- What does the country condition evidence say about gang recruitment in the client's country?

Step two: what PSGs seem feasible and do we need more than one? What about other protected grounds?

Possible PSGs: young men from Honduras who have resisted recruitment by the “X” gang; young Honduran men

- Immutable characteristic: age; nationality; past act
- Social distinction and particularity:
 - Consider narrowing characteristics (e.g., hometown) BUT don't make the PSG overly complex
 - provide evidence on how his community views/treats gang resisters; whether the police provide them with protection; differentiate between the treatment of youth who resist gang recruitment and others who resist the gang for other reasons
 - Look at the culture and context
- What about political opinion?
- Any other protected grounds – religion? Race/nationality?

Step Three: Examine PSG case law

- Generally stick to your circuit's case law. Use other circuit case law only as additional back-up
- Asylum claims are very fact-specific – don't attempt to find case law that mirrors your client's case.
 - Instead, look for analogies and similarities in other asylum claims – even if they are from entirely different countries and involve completely different protected grounds
 - E.g., look to *Matter of Kasinga* and cases with PSGs based on opposition or resistance. (See, e.g., *Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011))

Step Four: Defend Your PSG in Court or at the Asylum Office

- Differentiate from MEVG/WGR
 - Remember that MEVG requires a case-by-case determination – just because the BIA rejected the PSG in that case does not mean the same PSG can't be found valid in another case.
 - Different evidence
 - Different applicant
 - Compare to other accepted PSGs
 - Utilize ARCG

Remember to manage your client's expectations

Example

Manuel and his mother Ana live in El Salvador. Ana's father lives in the United States and occasionally sends them money, which has allowed them to open a small store to support themselves in El Salvador.

One day, a gang member came to the store and demanded she pay him "rent" to continue to operate her store. He told her he knew she had money because she had family in the United States. When Ana didn't pay, men beat up Manuel as he was walking home and a few days later, three men came to their house and demanded to be paid, or else they would kill Ana and Manuel. Ana and Manuel fled to the United States soon afterwards.

- Step One: What do we need to know to develop the PSG
- Step Two: What PSGs seem feasible and do we need more than one? What about other protected grounds?
- Step Three: Examine PSG case law
- Step Four: Defend Your PSG in Court or at the Asylum Office

**Asylum Claims Based on
Witnessing
Gang/Criminal Activity**

Example

Luis is a 14-year-old boy from Guatemala. One day, gang members approached him and his friends and told them they had to join the gang. When one of Luis's friends laughed at the gang members, the gang members threatened to kill him. Two weeks later, Luis was walking to meet his friend outside a store when he saw the gang members shoot his friend in the head. Luis hid in the store, but the gang members saw him. The next day, a police detective came to Luis's house and he told him what he had seen. During the next few weeks, gang member regularly stood outside Luis's house and neighbors told him that the gang had threatened to kill Luis for talking to the police. Luis and his mother moved in with family in a nearby town for their safety, but within a week, men from the same gang appeared in the town, asking for Luis. Fearing for his life, Luis fled to the United States, where his father already lived.

- Step One: What do we need to know to develop the PSG
- Step Two: What PSGs seem feasible and do we need more than one? What about other protected grounds?
- Step Three: Examine PSG case law
- Step Four: Defend Your PSG in Court or at the Asylum Office

Resources for Particular Social Group Claims

- US Dept. of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women*, Phyllis Coven memo, Office of International Affairs, 26 May 1995. 72 Interpreter Releases 771 (June 1995).
- Asylum Office Basic Training Courses: <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs>
- NIJC Particular Social Group Practice Advisory: Applying for Asylum After *Matter of M-E-V-G-* and *Matter of W-G-R-*, available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20PSG%20practice%20advisory%20package-updated%204.6.15.pdf>
- Additional NIJC resources for PSG and gender-based asylum: <http://immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers>
- DHS 2004 R-A- brief & DHS 2009 L-R- brief; available at cgrs.uchastings.edu
- World Organization for Human Rights 2011 Guide to Establishing the Asylum Eligibility of Victims of Human Trafficking and Forced Marriage

For Further Questions on Asylum Law:

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