What the United States Can Learn from Other Common Law Countries About Refugee Claims Based on Membership in a Particular Social Group

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I. Introduction

This article explores the meaning and scope of the term membership of a particular social group [PSG] as used in the definition of refugee found in the 1951 Convention Relating to the Status of Refugees [Convention], and 1967 Protocol Relating to the Status of Refugees [Protocol]. To do so, this article will examine the jurisprudence emanating from United States [US], Canada, Australia, New Zealand [NZ] and the United Kingdom [UK]. These five States receive a significant influx of refugees, share the common law system, and provide case law particularly instructive pertaining to the term PSG. After a condensed summary of the key PSG-related jurisprudence of the US, UK, NZ, Canada, and Australia, this article will outline select social group problems that the US has been struggling to resolve and will examine whether jurisprudence from the other common law States might assist the US in settling these perplexing issues.

The Convention defined the term 'refugee' as 'any person who …[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, due to such fear, is unwilling to avail himself of the protection of that country . . .'. Thus the

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4 According to UNHCR’s statistical ranking of the top receiving countries, the US, Canada, UK, NZ and Australia ranked 1, 3, 4, 12, and 16, respectively, for the year 2009, <http://www.unhcr.org/4ba7341a9.html> accessed 5 February 2011.
5 Convention (n 1) art. 1(A)(2).
Convention narrowly defined the term 'refugee' to persons who were: (1) outside their country of origin and unwilling to return owing to, (2) events occurring before January 1, 1951, and past persecution or a well-founded fear of future persecution, (3) on account of, (4) race, religion, nationality, membership in a particular social group [PSG], or political opinion. This definition requires a causal link or nexus between the persecution and one of the five protected grounds.

The Preamble to the Convention reflects the intention of the treaty parties to furnish a safe haven for persecution victims where they can enjoy fundamental human rights and freedoms without discrimination. During the formulation of the Convention, however, the drafters expressed concerns about writing a 'blank cheque' that might saddle States with extensive future obligations. In limiting the term refugee to persons who fear persecution based on one of the five grounds, the Convention reduced its humanitarian scope by excluding persons displaced due to armed conflict, environmental disaster or economic impoverishment. Further restricting eligibility for refugee protection, the Convention barred applicants who had committed war crimes, crimes against humanity, and other serious crimes.\(^6\) These exclusions from eligibility insured that criminals could not flee their country of origin to avoid prosecution and defeat extradition efforts by gaining refugee status, as well as encouraged States to ratify the Convention knowing the prohibition of refoulement did not encompass particularly unsavory persons.

\(^6\) Id. art. 1(F), 33(2).
By the 1960’s, groups of persecution victims who had fled their homeland due to events occurring after 1951, and therefore outside the temporal definition of refugee in the Convention, began to emerge. To extend refugee protection to these post-1951 groups, the United Nations High Commissioner for Refugees [UNHCR] drafted the Protocol using the original definition of refugee less the dateline proviso. Within a few months and with little debate, the Protocol entered into force.

Neither the Convention nor the Protocol defines membership of a PSG. The *travaux préparatoires* provides little guidance to interpreting the term PSG. Towards the end of deliberations concerning the draft Convention, the Swedish delegate recommended the inclusion of PSG as one of the protected grounds because historically ‘certain refugees had been persecuted because they belonged to particular social groups [and a provision] designed to cover them should accordingly be included.’7 Neither the Swedish nor any other delegate elaborated on the particular groups the term was to encompass.

Of the five Convention grounds, membership in a PSG is the most ambiguous and fluid. Consequently, an increasing number of refugees seek to use the PSG category for a growing variety of claims that do not fit within one of the other four grounds. Read literally, a PSG could refer to a sizeable group of persons united by a trivial association or

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insignificant trait. Accordingly, courts and tribunals struggle to identify legally sound principles to ensure that the PSG category does not encompass all persons who face persecution for any reason, render the other four categories superfluous, or impose an unintended obligation on States. Yet, in setting parameters to limit cognizable social groups, jurists strive to resolve fairly the pending case as well as to establish precedential guidelines for future cases. In interpreting the term PSG, there are two dominant approaches, generally referred to as the 'protected characteristics' approach' and the 'social perception' approach.

In general, the protected characteristics approach is more exclusive and the social perception approach is more inclusive of cognizable groups. Whereas the protected characteristics approach focuses on the internal aspects of the members’ shared trait, the social perception approach focuses on the external aspects of a trait. The protected characteristics approach considers whether the members of the group are united by a characteristic either that cannot be changed or that should not be required to change because it is fundamental to human dignity. Although the protected characteristics approach furnishes a limiting principle consistent with a human rights perspective, it may exclude from refugee protection certain social groups that are distinctly set apart within a particular culture and could be targeted for persecution. For example, the protected

characteristics approach might reject groups consisting of the homeless, students, entertainers, athletes or business owners.\(^9\)

Under the social perception approach, the members of a PSG must share a common, uniting attribute that distinguishes them from society at large and the members must be perceived as a social group within their culture. Typically, the social perception approach will encompass social groups recognized under the protected characteristics approach since persons who are persecuted on account of an immutable characteristic or fundamental trait are often viewed as members of discrete social groups.\(^10\) Social groups cognizable under the social perception analysis could share an attribute that is neither immutable nor fundamental and thus not qualify under the protected characteristics approach. Although the social perception approach readily covers a social group comprised of persons whose lifestyle or values conflict with the cultural mores or conservative religious practices of their country (such as women who attend school, work or refuse to conform to a dress code), the protected characteristics approach might reject such group for want of a trait that is immutable or fundamental.\(^11\) The social perception approach’s lack of a conceptional filter restricting the common trait could result in recognition of inconsequential associations or unsavory factions, or encourage a precarious floodgate of refugee claims.

The UNHCR would reconcile the differences between the two approaches by adopting a single standard that incorporates both as alternative requirements, either of

\(^9\) Id. 295.
\(^10\) Id. 297.
\(^11\) Id. 298.
which can establish a social group: '[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'.\textsuperscript{12} In contrast, as a minimum standard, the European Union Council Qualification Directive [EUCQD] incorporates both approaches as dual requirements for a PSG to satisfy:

a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.\textsuperscript{13}

The US, Canada, NZ and the UK each adhere to a variation of the protected characteristics approach, whereas Australia embraces the social perception approach. Recently, the UK and the US show signs of moving towards the EUCQD standard, as the UK has incorporated the EUCQD into its domestic law and the US increasingly focuses on whether the group possesses a sufficient degree of social visibility.

Despite different approaches in assessing the existence of a PSG, these common law States agree on certain salient points. In discerning the scope and meaning of the term


\textsuperscript{13} Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12, art. 10.1(d).
PSG, the underlying humanitarian objective and purpose of the Convention must be considered. Designed to provide surrogate or substitute protection, the refugee protection under the Convention is triggered only when national protection fails to secure the enjoyment of ‘fundamental rights and freedoms without discrimination’. Accordingly, an interpretation of PSG within a human right framework must consider the concepts of counteracting discrimination and defending basic human rights as provided by the main human rights treaties. These common law States further agree that a social group cannot be defined by the persecution, that not all members of the group must face persecution, and that cohesiveness within the group is not required. The persecution that the members suffer or fear cannot be the sole defining common characteristic, although the persecutory actions targeted against a group may serve to identify or even cause the creation of a PSG. Not all members of the targeted social group must be persecuted, as some members may avoid persecution due to fortuitous circumstances or strong protector. The members of social group need not be cohesive, organized or interdependent for a PSG to exist.

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17 Shah (n 13) 557.
Ideally, the meaning attributed to PSG should be the same for all the signatories to the Convention. The practice that jurists in Australia, Canada, UK and NZ make of considering foreign jurisprudence when assessing whether a group constitutes a PSG promotes uniformity and builds consensus. The notable exception to this open and frequent exchange of jurisprudential analysis is the US, with its advocates and courts relying almost exclusively on its domestic law. Although decisions of one party to the Convention do not bind other state parties, the interpretations can provide thoughtful and persuasive analysis. The following chapters explore the jurisprudence of these five common law countries and consider what the US might learn from the other four.

Chapter II. Common Law States' Approaches to Particular Social Group Claims

A. United States

Neither the Immigration and Nationality Act [INA] nor the pertinent regulations define the term PSG. In 2000, the US Department of Justice proposed regulations defining membership in a PSG, but these remain pending. There is no controlling US Supreme Court decision defining a PSG. However, the Board of Immigration Appeals' [BIA] interpretation of ambiguous statutory terms within the INA, including the term PSG found in section 101(a)(42), is binding on federal courts provided it is a permissible construction.

The BIA’s interpretation of a PSG requires that the members share either an immutable characteristic or a trait fundamental to identity or conscience.\(^{22}\) This shared characteristic must be other than the fact that the members are targeted for persecution.\(^{23}\) Moreover, the BIA has rejected certain groups whose commonality rests in criminal conduct or otherwise reprehensible activity.\(^{24}\) Additionally, the BIA mandates that cognizable social groups possess a measure of social visibility that distinguishes and identifies them within the relevant community.\(^{25}\) The BIA further instructs that the group must be described with particularity and clarity, but eschews an artificial construction tailored for litigation purposes or crafted from statistical or demographic similarities.\(^{26}\)

The seminal case interpreting the term PSG is the BIA’s decision in *Matter of Acosta*,\(^{27}\) and it has been cited approvingly in decisions issued in Canada, the UK and NZ. In *Acosta*, the BIA reasoned that the PSG ground must be construed consistently with the other four Convention grounds (race, religion, nationality, and political opinion) employing the doctrine of *ejusdem generis*. The BIA concluded that each of the other four grounds of persecution describe an immutable characteristic that a person either cannot change or should not be required to change because it is fundamental to the individual’s identity. Consequently, for the PSG ground to be comparable to the other four grounds,


\(^{27}\) *Acosta* (n 21).
the individual members must share a characteristic 'that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed'.\textsuperscript{28} As practical guidance, the BIA instructed that the immutable/fundamental trait could refer either to an innate characteristic 'such as sex, color, or kinship ties', or 'in some circumstances' it might refer to a 'shared past experience such as former military leadership or landownership'.\textsuperscript{29} The BIA stressed that whether a claimed group qualified as a PSG is to be determined on a case-by-case basis.\textsuperscript{30} Applying this approach, the BIA in Acosta rejected the claim that members of a Salvadoran taxi-driver cooperative comprised a PSG. The BIA reasoned that the applicant could change jobs, as working in a job of one’s choice is not a fundamental characteristic.

Subsequent to Acosta, numerous administrative and federal court cases have further clarified (or muddled) the meaning of the phrase PSG. In Matter of C-A-, the BIA emphasized that an immutable/fundamental characteristic is merely a 'starting point' and, for the first time, announced that an important element in finding a PSG is 'social visibility'.\textsuperscript{31} In adopting social visibility as a requirement, the BIA cited to the UNHCR standard, which clearly treats social visibility as an alternative test for a PSG, rather than an additional hurdle.\textsuperscript{32} Ultimately, the BIA in C-A- concluded that former noncriminal government informants working against a drug cartel in Columbia did not constitute a

\textsuperscript{28} Id. 233-34.
\textsuperscript{29} Id.
\textsuperscript{30} Id. 233.
\textsuperscript{31} C-A- (n 22) 959.
\textsuperscript{32} Id. 955, 960.
cognizable social group for lack of social visibility either from the vantage point of society at large in Columbia (as informants generally remain unknown to the public) or of the drug cartel (which targets for harm anyone who opposes or impedes its operations).

The BIA further restricted the PSG category by refusing to recognize groups where to do so would conflict with the purpose and design of the Convention. In *Matter of E-A-G*, the BIA acknowledged that the proposed social group – 'young persons who are perceived to be affiliated with gangs' – had social visibility since Honduran society viewed gang affiliation with hostility and rival gangs recognized each other as a distinct group. Nevertheless, the BIA rejected this PSG as it would confer refugee protection to persons perceived to be affiliated with a criminal organization, which is inconsistent with the principles underlying the bars to asylum based on criminal behavior.

Despite the federal courts’ duty to give deference to the BIA’s interpretation of the INA, the interpretation of PSG varies by federal circuit among the US Courts of Appeal. All of the circuits adhere to *Acosta*’s immutable/fundamental characteristic approach. The majority of circuits also accept *C-A*’s social visibility requirement. Although not all circuits have ruled on the social visibility requirement, the Seventh

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33 *E-A-G*- (n 23).

34 *Castillo-Arias* (n 22) 1196; *Ucelo-Gomez v Mukasey*, 509 F.3d 70 (2d Cir 2007); *Nkwonta v Mukasey*, 295 Fed Appx 279 (10th Cir 2008); *Al-Ghorbani v Holder*, 585 F.3d 980 (6th Cir 2009); *Mendoza-Marquez v Holder*, 345 Fed Appx 31 (5th Cir 2009); *Mendez-Barrera v Holder*, 602 F.3d 21 (1st Cir 2010); *Perdomo v Holder*, 611 F.3d 662 (9th Cir 2010); *Zavaleta-Lopez v Attorney General*, 360 Fed Appx 331 (3d Cir 2010).

35 *Crespin-Valladares v Holder*, 623 F.3d 426, 429-30 (4th Cir. 2011).
Circuit rejects it outright, criticising it as mandating a shared externally discernable trait or as disqualifying targeted groups that operate secretly or discreetly.\textsuperscript{36}

Although the Second, Eighth and Ninth Circuits accept Acosta’s immutable or fundamental characteristic, these courts have also adopted an alternative requirement.\textsuperscript{37}

The Second Circuit’s alternative approach somewhat resembles Australia’s social perception approach discussed below. In \textit{Gomez v INS}, the Second Circuit defined a PSG as a group whose members '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'.\textsuperscript{38} Whereas, the Ninth Circuit in \textit{Hernandez-Montiel v INS} developed a two-pronged approach, ruling that a PSG requires either (1) 'a voluntary associational relationship' among members 'which imparts some common characteristic that is fundamental to their identity as a member of that discrete group’, or (2) members who share a common immutable, fundamental trait.\textsuperscript{39} \textit{Hernandez-Montiel} held that Mexican 'gay men with female sexual identities' constituted a PSG (irrespective of the fact there was

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\item \textit{Benitez Ramos v Holder}, 589 F.3d 426, 429-30 (7th Cir 2009); \textit{Gatimi v Holder}, 578 F.3d 611, 615 (7th Cir 2009). Statistically, the Seventh Circuit remands a higher percentage of asylum cases to the BIA than any other federal circuit. Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, \textit{Refugee Roulette: Disparities in Asylum Adjudication}, 60 Stan. L. Rev. 295 (2007).
\item \textit{Gomez v INS}, 947 F.3d 660 (2d Cir 1991)(Salvadoran women who have been battered and raped by guerillas do not form a PSG); \textit{Safaie v INS}, 25 F.3d 636, 640 (8th Cir 1994)(Iranian women who advocate women’s rights could be a PSG); \textit{Davila-Mejia v Mukasey}, 531 F.3d 624 (8th Cir 2008)(Guatemalan business owners lack social visibility).
\item \textit{Gomez} (n 37) 664.
\item 225 F.3d 1084, 1093 (9th Cir 2000). The voluntary association prong was first developed in \textit{Sanchez-Trujillo v INS}, 801 F.3d 1571, 1576 (9th Cir 1986), which rejected a social group comprised of young, urban, working class males of military age in El Salvador.
\end{itemize}
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no voluntary association) because these individuals shared a common immutable or fundamental trait.

The US courts have sanctioned as a PSG persons who shared a trait diversely based on sexual orientation, mental illness, HIV/AIDS, transgender, widowhood, clan membership, forced marriage, gender, and child soldiers.\(^{40}\) Some of the groups considered not to constitute a PSG include friends of Roma, business owners, street children, and current police or military.\(^{41}\)

B. Canada

The Supreme Court of Canada's landmark decision *A-G of Canada v Ward*,\(^{42}\) provides a comprehensive interpretation of PSG. Compared to the US, Canada interprets the PSG category more broadly and, concomitantly, more generously recognizes social-group-based refugee claims. *Ward* dealt with an asylum application by a member of the Irish National Liberation Army [INLA], a terrorist organization. While on duty guarding two innocent hostages, Ward enabled them to escape after learning that the INLA planned to execute them. As punishment, the INLA tortured, court-martialed, and sentenced Ward to death. After escaping the INLA, Ward turned himself in to the police and pleaded guilty for his part in confining the hostages. Upon release from jail, Ward fled to Canada and applied for asylum. He claimed that the INLA would persecute him if deported to Northern Ireland based on his former membership. Risk of persecution by a non-state actor did not


\(^{41}\) Id. 491.

\(^{42}\) *Ward* (n 17).
defeat the claim as the Court ruled that a viable refugee claim did not necessitate state complicity in the persecution. The Court discerned the meaning of the term PSG by reference to the principles of defence of human rights and anti-discrimination. Accordingly, the court identified three categories of PSGs:

1) groups defined by an innate or unchangeable characteristic;
2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3) groups associated by a former voluntary status, unalterable due to its historical permanence.

Providing guidance as to the ambit of these groups, the Court pointed to the traits gender, linguistics and sexual orientation as exemplifying the first group; human rights activists as typifying the second group; and persons who used to belong to a since disbanded association as falling within the third group. The Court rejected an interpretation that would treat the social group ground as a safety net and clarified that not all groups of persons who are targeted for persecution will fit within the refugee definition. Rather, the international community’s commitment to protecting PSGs is limited by anti-discrimination notions designed to protect fundamental human rights and freedoms. However, Ward also rejected a narrower interpretation of PSG that would create a blanket exclusion of terrorists and criminals based on the definition of refugee in the Immigration Act (which expressly precluded persons who fell within Article 1, section F of the Convention) while other provisions of the Immigration Act rendered other criminals, 

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43 Id. 726.
44 Id. 739, 744.
terrorists, and groups inadmissible. Ward observed that an interpretation of Article 1, section F of the Convention as applying to criminal fugitives would establish congruence between the Convention and extradition laws. Since Ward had served his sentence and was not a fugitive, he was not per se barred from being a refugee.

Ultimately, the court concluded that Ward was not a member of a PSG. The court explained that the INLA members do not share an innate or unalterable characteristic and therefore do not fit within the first recognized category. Nor did the second category apply since INLA is a voluntary association committed to achieving political goals by violence, and this objective is not fundamental to the human dignity of its members. Finally, the third prong did not apply to Ward, since the INLA is presently actively affiliated. The third prong only applies to defunct groups and therefore ‘this branch of the definition will only come into play when the identity of the persecutor does not coincide with that of the social group’. Additionally, the Court concluded that Ward’s fear was not based on his membership in the INLA, but because he feared retribution for freeing the hostages.

Distinguishing between what a claimant is as opposed to what a claimant does, the court ruled that the persecution must be on account of membership in the social group and not the individual activities of the claimant. Thus, the Court denied Ward’s refugee claim both for want of a PSG and lack of nexus.

45 Id. 744.
46 Id. 738-39.
In *Chan v Canada (MEI)*, the Court found that forced sterilization was a form of persecution but denied protection for lack of any evidence that the government authorities carried out sterilization on males in that area. Although the majority did not address the PSG issue, the dissenting opinion by Justice La Forest concluded that persons who faced forced sterilization because they violated China’s one-child policy qualified as members of a PSG. Justice La Forest’s dissent is important because it proposes an expansion of the voluntary-association category introduced in *Ward* to groups who share a protected characteristic regardless of whether the members voluntarily associate, know each other, or are otherwise cohesive. According to Justice La Forest, a person does not need to affirmatively join a social group as behaviour alone can place a person with the group provided such behaviour was motivated by reasons fundamental to human dignity, such as the right of couples to decide freely the number of their children.

Canadian jurisprudence has recognized PSGs related to sexual orientation, family, trade unions, poverty, domestic abuse, forced marriage, compulsory female circumcision, children of police officers who are anti-terrorist supporters, educated women, and mental illness. Putative social groups that Canada declined to recognize as PSGs include taxi drivers in Mexico City who collaborate to protect each other from criminals, victims of

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47 [1995] 3 SCR 593.
48 Id. 600, 646.
49 Id. 644-46.
51 *Galvan v Canada (MCI)*, [2000] FCJ No 442.
crimes or vendettas, and minor children whom smugglers illegally removed from China and placed abroad into servitude.

C. United Kingdom

In the pivotal decision *R v IAT ex p Shah*, the House of Lords adopted key principles that continue to govern current PSG jurisprudence within the UK and influence foreign jurisdictions. *Shah* dealt with refugee claims presented by two Pakistani women whose husbands subjected them to extreme physical abuse and ordered them to leave home. Both women feared that their vindictive husbands would falsely accuse them of adultery, that criminal charges for sexual immorality would ensue, and that unfairly conducted trials would culminate in harsh sentences (flogging or stoning to death). Both women further claimed that the Pakistani government was either unable or unwilling to protect them. In constructing the composition of the PSG, the applicants’ counsel combined three pertinent traits that set the women apart from the rest of Pakistani society: gender, suspected of transgressing social standards by committing adultery, and unprotected status. Although a majority of the lordships relied upon the protected characteristics approach, Lord Hope (majority) and Lord Millett (dissent) employed language and analysis closer to the social perception approach to determine whether a

52 Addendum #1 (n 49) ch 4.7.
53 *Canada (MCI) v Li*, [2001] FCT 374.
54 *Shah* (n 13).
55 Id. 556.
cognizable social group existed. Three of the lords in the majority concluded that women in Pakistan comprised the relevant PSG. Pakistani law and social conditions discriminated against women in matters involving fundamental human rights, including the right to protection against violence. Elaborating, Lord Steyn pointed out that, ‘Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of their membership of a social group but because of the hostility of their husbands is unrealistic’. Lord Millett dissented based on lack of nexus; he concluded that even assuming Pakistani women constituted a PSG, the persecution resulted because the women were ‘thought to have transgressed social norms’, which is not a Convention reason.

Prior to the UK Supreme Court’s decision in *HJ v SSHD*, lower court decisions relating to social groups based on sexual orientation had been criticised for inconsistency and a high denial rate. On July 7, 2010, the Supreme Court unanimously ruled that an individual is not expected to conceal his sexual orientation to avoid persecution:

No-one would proceed on the basis that a straight man or woman would find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution... Such an assumption about gay men and lesbian women is equally unacceptable [and] inconsistent with the underlying purpose of the Convention since it involves the applicant...

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56 Id. 568 (Lord Hope) (a PSG exists ‘when a group of people with a particular characteristic is recognized as a distinct group by society’), 572 (Lord Millett).
57 Id. 556-57 (Lord Steyn), 564 (Lord Hoffmann), 569 (Lord Hope).
58 Id. 558.
59 Id. 574 (Lord Millett).
denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution.\textsuperscript{61}

The Court remitted both cases to a fresh tribunal to apply the correct test, which requires the applicant to establish that gay people who lived openly would be subject to persecution.

In 2008, the Asylum and Immigration Tribunal [AIT] considered a refugee application by a Moldovan woman who claimed fear of persecution based on membership of a PSG comprised of ‘former victims of trafficking for sexual exploitation’.\textsuperscript{62} The UK had recently adopted domestic regulations that transposed the EUCQD into its domestic law and applied to the current case. In particular, regulation 6(1)(d) provides that a group is a PSG when:

\begin{enumerate}
\item[(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
\item[(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.\textsuperscript{63}
\end{enumerate}

The AIT interpreted this regulation to mean that a PSG must satisfy both criteria, i.e. members must share an innate trait or a common background that cannot be changed, and the group must have a distinct identity in the relevant country. The adjunctive 'and' used in

\textsuperscript{61} Id. [76].
\textsuperscript{62} \textit{SB v SSHD} [2008] UKAIT 2.
\textsuperscript{63} The Refugee or Person in Need of International Protection (Qualification) Regulations, SI 2006/2525. However, \textit{K v SSHD} [2006] UKHL 46, [2007] 1 AC 412 [16], discusses this directive and, in obiter dictum, Lord Bingham opined that it was not necessary to meet the criteria in both of subparagraphs (i) and (ii).
regulation 6(1)(d) was accorded its plain and natural meaning. Therefore, in order for former victims of trafficking for sexual exploitation to qualify as members of a PSG, the group must also have a distinct identity in the relevant country. Based on the background evidence relating to Moldova, the AIT concluded that a woman who has been trafficked for the purposes of sexual exploitation is a member of a PSG within the definition provided in regulation 6(1)(d).

**D. New Zealand**

NZ jurisprudence relating to PSG adheres to the protected characteristics approach and embraces ‘the principle that refugee law ought to concern itself with actions which deny human dignity in any key way’.64 The NZ Refugee Status Appeals Authority [NZRSAA] expressly rejected the external social perception approach concluding that it enlarges the PSG category to an almost meaningless degree.65 In determining the ambit of the PSG category, the NZRSAA carefully dissected the phrase 'membership of a particular social group' and gave each word its plain meaning in the context of the object and purpose of the Convention.66 The refugee scheme provides substitute protection of core human rights absent national protection, and the anti-discrimination principles inherent in these human rights limit the PSG category.67 In addition to persecution committed directly by the State, NZ recognizes refugee claims based on serious harm inflicted by non-state agents when combined with the State’s failure to protect due to condonation, toleration, or

65 Id. at 420.
66 Id.
67 Refugee Appeal No 71427/99 (n 17) [94], [96].
inability. The standard for adequate State protection is judged by whether the risk of serious harm is reduced below the level of a real chance of serious harm. NZ expressly adopted the formula in Shah for finding persecution: ‘Persecution = Serious Harm + The Failure of State Protection’.

Accordingly, the NZRSAA has recognized PSGs composed of: male homosexuals in Iran, women of a minority clan in Mogadishu, unaccompanied female infants without family support or government protection in Somalia, immediate family members of a police officer who received significant publicity and media attention for combating the Sendero Luminoso terrorist organization in Peru, and women subjected to domestic abuse by their respective ex-spouse when Iran discriminatorily withheld protection based on gender. In contrast, the NZRSAA concluded that stateless Bedouins who were born in Kuwait (but lack citizenship, the right of return, and other political rights) do not constitute a PSG. Although Kuwait denies Bedouins citizenship, this is because Kuwaiti citizenship law is based on the principle of jus sanguinis and not the result of malicious discrimination. Moreover, there were serious reasons to believe that the applicant had committed a crime against humanity by encouraging torture of detainees.

E. Australia

68 Id. at [56], [60].
69 Id. at [66].
70 Id. at [73], [112].
71 Re GJ (n 63).
72 Refugee Appeal No 75233, NZRSAA, 1 February 2005.
73 Refugee Appeal No 76251, NZRSAA, 1 December 2008.
75 Refugee Appeal No 71427/99 (n 17).
76 Refugee Appeal No 72635/01, NZRSAA, 6 September 2002.
In construing the term PSG, Australia emphasizes the need for the group to share a common unifying trait, activity, belief, interest, or goal that sets the group apart from the rest of society as a distinct social group. This unifying attribute need not be immutable, innate, or voluntarily acquired. Although the High Court of Australia has no objection to a very large social group, it nevertheless rejects the notion that the PSG category was designed to serve as a safety net or catch-all to fill any gaps left by the other four protected categories. For instance, Australian courts would not extend the PSG category to cover groups formulated based on statistics or shared demographic factors but neither consider themselves as a group nor are perceived as a social group within their culture. As a further limitation, the social group may not be defined solely by the persecution inflicted and must have an independent unifying trait. Nor may fear of persecution be due to an act that a person has done; rather, the primary focus is upon who a person is (i.e. a member of a PSG). 77 The overall approach focuses on external factors that differentiate the group and render it cognizable either by the relevant society or from the perspective of an objective observer. As compared with the US courts, the Australian courts are more proactively engaged in reviewing the evidence and designing a possible social group for the Refugee Review Tribunal [RRT] to consider rather than leaving the job to the litigants themselves.

Although the Australia judiciary has developed progressive jurisprudence on PSG issues, the 2001 Migration Legislation Amendment Act (No 6) [MLAA] provided a restrictive definition for persecution, tightened the nexus requirement by requiring that a

77 Morato (n 17).
Convention ground must be the essential and significant reason for the persecution, and mandated that certain harm or fear of harm must be disregarded in family-based social group claims. In enacting the MLAA, the Parliament intended to legislatively overturn or restrain judicial rulings that expanded the definition of refugee beyond the scope originally envisaged under the Convention.

Decisions by the High Court of Australia have provided well-reasoned, clear guidance on the meaning of PSG. In the landmark case Applicant A v MIEA, a narrow majority of the High Court of Australia rejected as a PSG a collection of parents with more than one child who reside in the People's Republic of China and who are faced with forced sterilization by local officials. The Court rejected this collective group as a PSG because the asserted group was a ‘disparate collection’ of persons throughout China who objected to a general social policy, but with ‘no social attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a PSG’. Rather, the group is united solely by the fact that its members fear forced sterilization. The High Court in Applicant A carefully outlined three requisites for recognition of a PSG as used in the Convention. First, the members of the group must be united by a common characteristic or

80 Applicant A (n 15). The US treats involuntary sterilization or forced abortion as persecution on account of political opinion pursuant to INA §101(a)(42), 8 U.S.C. §1101(a)(42).
81 Id. 270 (McHugh J).
attribute apart from the fear of persecution. Second, the common trait must distinguish the members as a social group separate from the rest of the community. Third, there must be recognition within the community that the collective members constitute a social group that is distinct from the rest of the community.\footnote{Id. 241 (Dawson J).}

Subsequently, in \textit{Applicant S v MIMA}, the High Court clarified the requirement that members of a social group possess a common characteristic that distinguishes the group from society at large.\footnote{(2004) 217 CLR 387.} In \textit{Applicant S}, an Afghan man sought asylum based upon his fear of forced conscription into the Afghanistan army by the Taliban government on account of his membership in a PSG comprised of young able-bodied males. The lower court had rejected this asylum claim because the evidence failed to establish that Afghan society subjectively perceived young able-bodied male Afghans as a PSG. On review, the High Court ruled that the correct legal issue was whether due to 'legal, social, cultural and religious norms prevalent in Afghan society, young able-bodied men comprised a social group that could be distinguished from the rest of Afghan society'.\footnote{Id. [50].} Although evidence of Afghan society's \textit{subjective} perceptions would be relevant to the question of whether there was a PSG, such evidence was not an absolute requirement. Rather, a court can ascertain \textit{objectively} from a third-party perspective whether a collection of people sharing a common trait constitutes a PSG distinguishable from the rest of the community based on its cultural, social, religious, and legal norms. Moreover, a community might deny that a PSG exists

\footnote{Id. 241 (Dawson J).} \footnote{(2004) 217 CLR 387.} \footnote{Id. [50].}
because the shared attribute offends religious or cultural beliefs of the community.

Although in such instances the community does not perceive or acknowledge the existence of the particular social group, 'it cannot be said that the PSG does not exist'.85 The High Court remitted the case to the RRT for redetermination.

Other groups Australia courts have recognized as PSGs are children born in contravention of China’s one-child policy (so called 'black children’),86 women in Pakistan,87 and homosexuals in Bangladesh.88 Conversely, Australia has rejected as PSGs ex-criminals in Italy,89 sailors aboard Russian ships travelling to Japan to purchase used cars for resale in Russia,90 wealthy Punjabis returning from abroad,91 and individuals who 'turned Queen’s evidence' by assisting the police in a criminal matter.92

Chapter III. US Should Favorably Consider Foreign Jurisprudence Interpreting PSG.

A. Claims Based on Gender

The US struggles with gender-based refugee claims because these claims raise thorny legal issues, such as defining the PSG with particularity and without reference to the persecution, finding social visibility when the victimization occurs privately, linking the persecution to the PSG, and implicating state involvement in harm perpetrated by a

85 Id. [34].
86 Chen Shi Hai v MIMA (2000) 201 CLR 293.
89 Decision No V96/04762 [1996] RRTA 2374 (Unreported, 15 August 1996)
92 Morato (n 17).
private actor. Although Matter of Acosta recognized gender as an immutable characteristic, a PSG encompassing 50% of a given State’s population would seem to lack particularity. By the same token, however, persons persecuted on account of their race, religion, nationality, or political opinion might also represent a large percentage of the populace. Although a large social group creates the spectre of floodgates, this concern overlooks the fact that a successful refugee claim requires more than membership in a PSG. The applicant must also establish a well-founded fear of persecution on account of such membership and an inability or unwillingness on the part of the State-of-origin to control the persecutor.

Typical categories of gender-related refugee claims pertain to issues such as involuntary marriage, stringent dress codes, prostitution, and female genital mutilation. The most challenging of the gender-related refugee claims for the US are those based on domestic violence. The US promulgated gender guidelines in 1995 recognizing that domestic violence may evidence 'past persecution on account of one or more of the five grounds'. Nonetheless, in the highly controversial and divisive case Matter of R-A-, the BIA rejected a refugee claim of a battered wife who claimed persecution on account of membership in a social group formulated as 'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under

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93 Gao v Gonzales, 440 F.3d 62 (2d Cir 2006)(forced marriage in China); Matter of S-A-, 22 I. & N. Dec. 1328 (BIA 2000)(Orthodox Muslim father persecuted his daughter on account of her liberal Muslim beliefs, as manifested in her views on the appropriate role, dress and conduct of women in Moroccan society); Matter of Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996)(PSG composed of young ‘intact’ women who opposed female genital mutilation as practiced by her tribe in Northern Togo).

male domination’. In assessing whether a viable social group existed, the BIA considered how ‘Guatemalans might identify subdivisions within their own society’ or ‘perceive individuals either to possess or to lack an important characteristic or trait’. Because the evidence failed to establish that the proposed social group was considered a societal faction within Guatemala, the BIA concluded that the group lacked social visibility. Moreover, the BIA ruled there was no nexus between the persecution and a Convention ground since the applicant-wife failed to establish that her husband beat her on account of her membership in a PSG as opposed to personal animosity within the marital relationship. Regarding state protection, the BIA found that Guatemala fails to provide battered women protection but does not affirmatively promote a policy of domestic violence.

Following the BIA’s decision in R-A-, the case remained unsettled for more than a decade during which regulations defining PSG were proposed (but never finalized). In succession, three US Attorneys General certified, vacated, and remanded R-A- back to the BIA for a new decision. Finally, the government conceded that R-A- met all the requirements for asylum maintaining that her marital status was immutable under the facts of the case (religious, cultural and legal constraints made divorce infeasible) and that R-A- belonged to a PSG comprised of ‘married women in Guatemala who are unable to leave

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96 Id. 918.
97 Id. 924.
the relationship’. On December 10, 2009, an Immigration Judge [IJ] granted asylum. Still, the US jurisprudence struggles to frame a PSG that particularly describes the vulnerable group and avoids defining the group by reference to the harm feared. Additionally, since a non-state agent inflicts the harm, there is the analytical difficulty in establishing a nexus between the persecution and the PSG. At times, US decisions have upheld gender-based claims by finding a nexus between the persecution and one of the other Convention grounds, such as political opinion or religion.

The other four common law countries take a broader perspective and find persecution on account of gender where the private act of violence arises in a country that fails to protect the victim because of her gender. Depending on the country conditions and context, these cases may or may not find it necessary to define the PSG into sub-categories of women in the relevant country using additional descriptors such as race, class, or perceived cultural transgression. The analysis bifurcates persecution into two parts: serious harm and a failure of state protection. The causal link between persecution and PSG is established either when the non-state actor persecutes the victim on account of membership in the PSG or when the State fails to offer protection to the victim on account of membership in the PSG, regardless of the non-state actor’s motive. Thus, in the case of

101 S.A- (n 93).
domestic violence when the husband beats his wife because of personal animosity, nexus is satisfied upon proof that the State’s refusal to control the husband and protect the wife is gender-discriminatory. This approach is illustrated by the UK Shah case. Similarly, NZ, Australia and Canada have all recognized domestic violence combined with lack of State protection as a basis for refugee protection.

Shortly after the House of Lords decision in Shah, the NZRSAA decided a similar gender-based claim that involved an Iranian woman who feared continued serious violence from her ex-husband and a discriminatory withholding of State protection. The NZRSAA concluded that the alleged persecution by her ex-husband was not for a Convention reason, but the State’s failure to protect her from that harm was for the qualifying ground of membership of a PSG.102 After considering the cumulative effect of Iran’s legislated gender discrimination against women, NZRSAA Chairman Haines found that Iran 'condones, if not actively encourages, non-state actors such as husbands' to seriously abuse women.103 Following this approach in subsequent decisions, the NZRSAA has granted asylum to a Saudi Arabian woman stripped of meaningful control over essential aspects of her life by her abusive husband and brother,104 a Turkish woman threatened with an honor killing by her family and her ex-husband’s family,105 and a Russian woman at risk of serious physical injury by her brutal ex-husband.106

102 Refugee Appeal No 71427/99 (n 17).
103 Id. at [118].
104 Refugee Appeal No 76250, 76251, NZRSAA, 1 December 2008.
In addressing the standard of adequate state protection, the NZRSAA ruled that state protection is sufficient when the risk of serious harm falls 'below the level of well-foundedness, or … below the level of a real chance of serious harm'.\footnote{Refugee Appeal No 76044 NZRSAA, 11 September 2008 at [66].} The NZRSAA rejected\footnote{Id. at [62].} the lower British standard established in \textit{Horvath v SSHD}.\footnote{[2000] UKHL 37, [2001] 1 AC 489, 500.} The UK standard only requires that the State-of-origin operates a system of domestic protection against persecution, demonstrates a reasonable willingness to enforce this system through its law enforcement machinery, and affords the applicant access to the State protection that exists.

In \textit{MIMA v Khawar},\footnote{(2002) 210 CLR 1.} the High Court of Australia ruled that a victim of serious and repeated domestic violence by her husband and in-laws could qualify for refugee protection where the police and other Pakistani authorities refused to enforce the criminal laws or otherwise shield her from this abuse. The High Court acknowledged that a PSG cannot be defined solely by reference to the persecutory act. However, 'the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships' distinguishes them from the rest of the community without reliance upon their persecutory treatment.\footnote{Id (McHugh & Gummow, JJ) 28 [83].} Chief Justice Gleeson concluded that 'women in Pakistan' could constitute a PSG despite the large size of the group and lack of cohesiveness, which is not an essential
factor although it may serve to define a group. Chief Justice Gleeson also ruled that the State’s failure to protect against domestic violence and its condonation of this serious harm amounted to discrimination against woman and constituted persecution within the Convention. Similarly, Justices McHugh and Gummow concluded that persecution based on the PSG resulted from the selective and discriminatory treatment by State authorities in failing to enforce the criminal law against those who inflict domestic violence and denying a fundamental right of access to law enforcement authorities afforded to other Pakistani nationals.

In *Mayers v Canada (MEI)*, the Federal Court of Canada approved a social group defined as 'Trinidadian women subject to wife abuse'. After enduring fifteen years trapped in a physically and emotionally abusive marriage, the wife escaped to Canada and applied for asylum. The wife claimed that the Trinidadian police failed to assist, arriving hours after she called for help and departing upon her husband’s assurance that the matter amounted to a domestic squabble. *Mayers* ruled that the evidence would support a finding that Trinidadian women subject to domestic abuse comprised a social group and in combination with the authorities’ indifference constituted persecution.

Rather than artificially construct a PSG (such as women who are unable to leave a relationship) to cover a sympathetic refugee claim based on domestic violence, the US

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112 Id. 14 [33].
113 Id. 13 [30], [31].
114 Id. 29 [85].
116 Id. 740.
should consider adopting the reasoning advanced by the other common law countries. Accepting the proposition that a State’s failure to protect its nationals from private harm constitutes persecution under circumstances involving gender discrimination and serious harm would not require the US to abandon its jurisprudence requiring an immutable characteristic, social visibility, and nexus.

Although the US generally considers whether a group has social visibility from the vantage point of the persecutor or the general public within the State, the Australian case Applicant S explained that an objective determination might be necessary when the relevant society denies the existence of the PSG. When State X pervasively discriminates against women and targets only women to deny protection from domestic abuse as a matter of policy, then the PSG has social visibility from the perspective of an objective observer, regardless of the subjective view of the particular society. An oppressive society may publicly deny the existence of sexual ‘deviates’ while simultaneously persecuting suspected deviates. For example, Iranian President Mahmoud Ahmedinejad claimed in a public speech that there are no homosexuals in Iran; yet Iran has executed more than 4000 homosexuals since 1979. Thus, in such an instance, the court can make an objective determination from a third-party perspective relying on sources such as the US Department of State Country Reports. Furthermore, if the US adopted Australia’s dual subjective-objective consideration of whether a PSG exists, concerns

117 Applicant S (n 83).
118 Marouf (n 100) 80-81.
regarding the impact of the social visibility requirement within the US would be alleviated.\textsuperscript{119}

Moreover, the US can recognize refugee claims based on a State’s failure to protect a gender-defined PSG and still avoid the possibility of opening floodgates by imposing other limitations. Because the US currently lacks a clear standard by which to gauge the sufficiency of the protection provided by the State-of-origin, the US could adopt the conservative UK standard established in \textit{Horvath}.\textsuperscript{120} The US could presume that the State-of-origin would protect the applicant from the non-state agent of persecution unless the applicant offered proof that the State does not maintain a system of protection that it is reasonably willing to enforce in good faith with respect to the applicant. This standard would afford refugee protection to those victims of domestic violence who have the least adequate state protection and whose country discriminates most perversely against women (or other gender-based PSG), while maintaining a reasonable degree of control over the number of persons who are permitted to immigrate outside the otherwise applicable immigration requirements and restrictions.

\textsuperscript{119}Id. 94 (‘Given the invisibility of domestic violence as a phenomenon’, the social visibility requirement will make referring claims based on domestic violence more difficult).

Additionally, the US could limit the recognition of refugee claims based on harm by abusive husbands (or other private actors) to those that involve a level of State and societal discrimination against women (or other victims) sufficient to infer ‘State-sanctioned or State-tolerated oppression’ rather than mere inability to protect. This limitation would also ensure a nexus between the persecution and the PSG. The State’s discriminatory withholding of protection to a seriously abused victim is a denial of a fundamental human right for a discriminatory reason. The same would be true if a State failed to respond to a crime victim based on the victim’s race or religion.

Finally, US law should treat the abuser as having committed a particularly serious non-political crime to guard against the possibility that the victim would later petition for her abuser’s admission into the US whether by pre-conceived design or by naively misplaced trust in his claimed repentance. This measure would protect the victim and prevent rewarding the abuser, and bar admission of an undesirable immigrant.

B. Claims Based on Kinship

The US courts agree that family membership can define a PSG. Agreement splinters, however, on the issue of whether the persecutor must target a family member to punish the characteristic of family membership or whether it suffices that the persecutor targets a secondary family member to punish the primary family member. If the

121 Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law (3rd edn, OUP 2007) 82.
122 Gebremichael v INS, 10 F.3d 28 (1st Cir 1993); Thomas v Gonzales, 409 F.3d 1177 (9th Cir 2005)(en banc), vacated and remanded 547 US 183 (2006); Bhasin v Gonzales, 423 F.3d 977 (9th Cir 2005); Konan v Att’y Gen, 432 F.3d 497 (3d Cir 2005); Vumi v Gonzales, 502 F.3d 150 (2d Cir 2007); Torres v Mukasey, 551
persecutor seeks to harm the applicant to punish the primary target, then the question arises of whether the reason underlying the motive to punish the primary family member is on account of a Convention ground.

In *Demiraj v Holder*, the Fifth Circuit concluded that the Albanian applicants (mother and son) did not fear persecution on account of family membership. The applicants were the wife and son of a potential material witness (Mr. Demiraj) against a human smuggler (Bedini). Mr. Demiraj never testified against Bedini, because Bedini fled home to Albania to avoid criminal prosecution in the US. Consequently, the US deported Mr. Demiraj to Albania, whereupon Bedini seized his opportunity to retaliate by shooting Mr. Demiraj and by sexually trafficking Demiraj’s nieces. The court considered Bedini’s criminal activity as part of the interfamilial blood feud culture in Albania. The Fifth Circuit denied the applicants’ asylum claim because Bedini targeted them not on account of their membership in a PSG comprised of the Demiraj family, but to take vengeance upon Mr. Demiraj. The dissenting judge reasoned differently; although Bedini’s grudge was solely against Mr. Demiraj, nonetheless, Bedini attacked the applicants due to their membership in the PSG of family members.

The Ninth Circuit in *Thomas v Gonzales* took a position in conflict with the Fifth Circuit. The Thomas family claimed persecution on account of their kinship to ‘Boss Ronnie’ who was a much despised, racist foreman at Strongshare Construction in South

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123 631 F.3d 194 (5th Cir 2011).
124 *Thomas* (n 122) 1180.
Africa. The Ninth Circuit ruled that a nuclear family could be a particular social. Furthermore, the court ruled that the original reason for the animosity that led to the harm to the family is not relevant; what is critical is that the harm suffered by the [applicants] was on account of their membership in a protected group. On review, the Supreme Court summarily reversed on a procedural matter, ruling that the Ninth Circuit should have remanded the case to the BIA to consider the issue of whether a nuclear family can constitute a PSG.

On remand, the BIA found that Boss Ronnie’s family comprised a PSG but concluded that the evidence failed to establish that the harm and threats experienced in South Africa were on account of membership in that group. There was insufficient proof that the perpetrators actually knew that the respondents were members of the Boss Ronnie family. Additionally, there was inadequate proof that the perpetrators’ motive was a ‘desire to punish or overcome the family relationship to Boss Ronnie’ rather than simply a desire for revenge against Boss Ronnie. The BIA explained that ‘acts motivated solely by criminal intent, personal vendettas, or personal desires for revenge’ do not ‘establish the required nexus’. Furthermore, the respondents failed to prove that the government was unwilling or unable to control these non-state perpetrators.

Family-based asylum claims have been approached in a variety of ways by other common law jurisdictions. Although inconsistent, these rulings provide analytical insights

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125 Id.
126 Re Thomas, A0750597-033 (BIA 2007).
127 Id. 8.
128 Id.
that could influence and untangle the growing patchwork of US decisions on this issue.\textsuperscript{129} The key UK case on point is \textit{K v SSHD}.\textsuperscript{130} The Iranian appellant (K) sought asylum claiming she had a well-founded fear of persecution on account of her membership in a PSG comprised of her husband’s family. Iran had incarcerated K’s husband without charges and for unknown reasons. The IAT denied asylum because K failed to show that her husband was persecuted for a Convention reason. According to the IAT, only when the primary family member is persecuted for a protected ground can secondary members such as K be considered persecuted on account of membership in the primary person’s family.\textsuperscript{131} The Lords unanimously rejected the IAT’s reasoning as based on a false premise. According to Lord Bingham, the AIT’s argument accords too much importance to the persecutor’s motive, which may be for a non-Convention reason such as harming his nemesis by attacking a secondary family member; the persecutor's motive is irrelevant 'when it comes to the question whether the family are persecuted by reason of their membership of a particular social group—the family'.\textsuperscript{132} Ultimately, the Lords allowed K’s appeal and reinstated the original grant of asylum by the adjudicator.

Prior to the passage of the MLAA, Australia jurisprudence was in accord with the UK view that being targeted as a family member of the primary target was sufficient to establish nexus without requiring that the primary family member be targeted for a

\textsuperscript{129} The NZ cases are vague regarding family-based social groups and provide little guidance worth noting. Refugee Appeal No 75656, NZRSAA, 10 November 2006 (family loyal to Saddam Hussein); \textit{JSG & GPSL}, (n 73)(family of police officer famous for arresting high-profile members of the \textit{Sendero Luminoso}).

\textsuperscript{130} \textit{K} (n 62).

\textsuperscript{131} Id. [104].

\textsuperscript{132} Id. [20].
Convention ground or that the family itself be targeted for a Convention ground. In *STCB v MIMI*, the High Court of Australia had its first opportunity to interpret and apply section 91S of the MLAA to a family-based PSG claim. The Albanian applicant STCB applied for asylum, claiming persecution on account of membership in his grandfather’s family. In 1944 or 1945, the applicant’s grandfather killed a member of the Paja family, thereby instigating a multigenerational feud and triggering an old customary law of Albania referred to as the *Kanun*, which entitled the Paja family to kill a male member of the grandfather’s family. Consequently, the applicant feared that the Paja family would target him for death if he returned to Albania and that the police would be unable to prevent this retribution. The High Court, by a 4-1 majority, rejected STCB’s claim, holding that section 91S of the MLAA was fatal to STCB’s claim of persecution due to family membership. In determining whether an applicant has a well-founded fear of persecution based on membership of a PSG comprised of the applicant’s family, section 91S mandates disregarding any fear of persecution or actual persecution that: (1) any member (or former member) of the applicant’s family has experienced where the reason for the persecution, or fear of persecution, was not for a Convention reason; and (2) the applicant (or any other family member) has experienced ‘where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or

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133 *MIMA v Sarrazola (No 2)* (2001) 107 FCR 184. In *Sarrazola*, the same thugs that killed the brother over an illegal drug debt demanded that the decedent’s sister repay the debt. The court ruled that the sister belonged to a PSG composed of members of the brother’s family and that the sister was persecuted on account of her membership in that group.
135 Id. [20].
persecution’ referred to in (1) had never existed. STCB concluded that section 91S does not preclude a family from being a PSG. According to section 91S, however, the original threat to the family must be due to a Convention ground or disregarded. Applying section 91S to the case before it, the High Court concluded that the grandfather’s fear of persecution was due to revenge for the murder he committed, which was not a Convention ground. Therefore, the grandfather’s fear must be disregarded. Likewise, the applicant’s fear of persecution must be disregarded since its origin traced to his grandfather’s fear. A person who is attacked because he is a relative of a person who is targeted for a non-protected ground will not have a viable refugee claim.

Canada recognizes that a nuclear family can be a PSG. However, the Federal Court has concluded that persecutory acts motivated by vendettas, blood feuds, or criminal acts are not for Convention grounds. If the persecutor selected the victim based on family relationship to a primary target, such persecution is not on account of a Convention ground if the motive for harming the principal target is not for a Convention ground. Victims of such family-related criminal acts are not refugees. According to the Federal Court of Canada, this rule avoids anomalous results, such as finding that the principal victim of persecution lacks a valid refugee claim (since persecuted for a non-Convention reason) but the secondary family members of the primary victim are eligible to secure refugee status.

136 MLAA (n 77) s 91S.
Considering other common law States’ reasoning, the US should reject PSG group claims based on family feuds, vendettas, and personal disputes in line with Australia and Canada. Whereas Australia and Canada emphasize the persecutor’s motive, the UK jurisprudence discounts the persecutor’s motive when secondary family members are targeted for persecution based on a personal dispute involving the primary member. By statute and case law, the persecutor’s motive is critical and determinative in the US.\textsuperscript{139} To preserve the prominence of motive under US law and avoid elevating criminal reprisal directed against secondary family members to international refugee protection, the US should only recognize refugee claims based on membership in a family-defined PSG when the primary family member is persecuted on account of a protected ground or the persecutor has targeted a \textit{particular} family within the relevant society due to its status, reputation, or notoriety.

\textbf{C. Claims Based on Former Unsavory Associations}

The US has struggled with limiting the social group category when the putative group consists of former membership in a criminal gang, terrorist organization, or other unsavory group. The criminal and violent nature of such groups conflicts with human rights and humanitarian principles of the Convention.\textsuperscript{140} The applicant can, and should be expected to, refuse to join such groups as contrary to human dignity. Because persons who belong to criminal gangs do not constitute a PSG and persons who resist recruitment


\textsuperscript{140} UNHCR ‘Guidance Note on Refugee Claims Relating to Victims of Organized Gangs’ (March 2010) [43].
efforts into such gangs do not constitute a PSG,\(^{141}\) it seems logical that former members of such gangs do not constitute a PSG. In spite of this logic, however, there are conflicting rulings in the US whether to recognize a PSG when the common trait is prior criminal gang affiliation.

The BIA, Ninth Circuit, First Circuit, and Tenth Circuit would reject former gang members as a PSG inferring that Congress would not have intended to provide refugee protection based on current or past criminal behavior.\(^{142}\) In *Arteaga v Mukasey*, the Ninth Circuit described criminal gangs as an ‘antisocial group’ rather than a social group.\(^{143}\) Moreover, *Arteaga* pointed out that disassociation from a criminal gang ‘does not automatically put one in another group’ within the meaning of the Convention.\(^{144}\) A collection of ‘non-associated or disaffiliated persons in this context is far too unspecific and amorphous to be called a social group’.\(^{145}\)

Creating a conflict in US jurisprudence, the Sixth and Seventh Circuits have held that former criminal gang membership can potentially constitute a PSG. In *Urbina-Mejia v Holder*, the Sixth Circuit reasoned that upon leaving a gang, one is forever a former

\(^{141}\) *Ramos-Lopez v Holder*, 563 F3d 855 (9th Cir 2009); *Marroquin-Ochoma v Holder*, 574 F3d 574 (8th Cir 2009); *Larios v Holder*, 608 F3d 105 (1st Cir 2010); *E-A-G* (n 23); *S-E-G* (n 24).
\(^{142}\) 511 F3d 940 (9th Cir 2007); *Elien v Ashcroft*, 364 F3d 392 (1st Cir 2004); *Nkwonta v Mukasey*, 295 Fed Appx 279 (10th Cir 2008)(court rejected as PSG former member of a violent student fraternity in Nigeria as being based on criminal activity); *E-A-G* (n 23). See also 65 Fed Reg 76588, 76598 (n 18)(Section 208.15(c)(2) of the proposed immigration regulations provide that when the putative group is based on a common past experience, ‘the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it’.).
\(^{143}\) *Arteaga* (n 137) 946.
\(^{144}\) Ibid.
\(^{145}\) Ibid.
member of that gang and that a former gang member would be readily identifiable by rival
gangs and his own former gang. The Sixth Circuit ultimately found the applicant
ineligible for asylum because the evidence showed that he had committed serious
nonpolitical offenses, including extortion and physical assault. In the Seventh Circuit case
Benitez Ramos, the court found that a former gang membership is a characteristic
impossible to change (except by rejoining) and that a group defined as former members of
a specific, notorious gang met the particularity requirement for a PSG. Additionally, the
Seventh Circuit concluded that Congress did not intend to bar former gang members from
seeking asylum since the INA expressly barred persecutors and persons who have
committed a serious nonpolitical crime, but was silent regarding former gang members.
The court remanded the case to the BIA to determine whether or not the applicant had
committed a serious nonpolitical crime while a gang member. Thus, the Sixth and
Seventh Circuits consider former gang membership an immutable characteristic since no
one can alter the past. Neither Circuit would preclude a PSG simply because the group’s
objective is contrary to the Convention. Additionally, absent some evidence of individual
responsibility while a gang member, neither Circuit would hold the member accountable
for the gang’s criminal activities.

The Canada Ward case sheds light on PSGs based on former associations that
might help the US resolve the US circuit court split. According to Ward, the PSG category

\[\text{146} \text{ Urbina-Mejia v Holder, 597 F3d 360 (6th Cir 2010).}\]
\[\text{147} \text{ Benitez Ramos (n 35).}\]
does not implicitly bar groups based on moral or criminal concerns. In this respect, the Sixth and Seventh Circuit approach is consistent. Nevertheless, under Ward, former members of a criminal gang would not qualify as a PSG for the same reason that current or former members of the INLA did not qualify as a PSG. Ward would find that the gang members are not characterized by an innate characteristic, that the association is not fundamental to human dignity, and that membership is not unchangeable since the criminal gang is still active. Thus, Ward indicates that the US interprets immutable characteristic too broadly.

Additionally, the is/does distinction in determining whether there is nexus between the persecution and the protected ground adopted by Canada and Australia is helpful in determining whether a former gang member is targeted for persecution based on who he is (former gang member) or based on what he did (acts while a member or after resigning). In Ward, the INLA targeted Ward because he had helped hostages escape, not because he was a former member. Consequently, there was no link between the persecution and former membership.

In the Australia case Morato v MIE, a drug trafficker from Bolivia had provided evidence against his powerful co-offenders. Denying his refugee claim, the Federal Court concluded that persons who assisted police and provided evidence did not constitute a PSG. Morato cautioned against defining a PSG solely by a particular act that brings about a risk of persecution. This would essentially define a social group by the

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148 Morato (n 17).
persecution. Without anything more in common than a particular act, Morato reasons that any resulting persecution is most likely due to retaliation for the commission of the act rather than due to membership of a PSG. Morato emphasizes that the word social connotes a ‘cognisable or recognisable group within a society, a group that has some real common element’, and not simply an aggregation of persons who have done an act of a particular character that puts them at risk of persecution.\textsuperscript{149} The court observed that that ‘people throughout the world’ have served as police informers for a wide variety of reasons, but this common experience does make them an identifiable social group.\textsuperscript{150} Persons who only share an act in common typically do not form a PSG that would be cognizable in any society.

In light of Ward and Morato, the US should not per se bar former members of criminal gangs from refugee status absent sufficient evidence that the applicant is statutorily barred. Nevertheless, even without this bar, it is unlikely that former criminal gang members will constitute a PSG. Ward would conclude that former members of criminal gangs do not fit within any of the three PSG categories and that US courts interpret immutable characteristic too broadly. Ward and Morato support the proposition that a social group should be interpreted in context of the human rights objective of the Convention. US courts should carefully consider whether the former gang member is targeted because of his prior activities as a gang member (or future act of providing

\textsuperscript{149} ibid 416.
\textsuperscript{150} ibid 417.
evidence) or whether he is targeted because of his former membership status. Consequently, lack of nexus between the membership in a PSG and the persecution serves as an additional reason for denying refugee status to a former gang member. Both Ward and Morato would find a lack of nexus when the persecution results from what a person does rather than for what a person is. Former members of a particular gang share nothing more than a past affiliation with a gang and risk of persecution. Neither present nor past gang membership should comprise a cognizable PSG.

IV. Conclusion

A universally recognized interpretation of PSG would better implement the Convention, equalize the burden of settling refugees within the receiving countries, diminish incentive for forum shopping, and result in decisions based on legal merit rather than geographic location of the forum. The practice of considering foreign jurisprudence promotes the goal of uniformity. Moreover, crossing international boundaries for case law stimulates and promotes discussion, analysis, and refinement of the principles and practices of protecting victims of PSG based persecution.

By exploring how decision makers in other asylum-receiving common law countries deal with common problems, the US can garner and assess approaches that might better address certain issues, calibrate the appropriate place to draw legal lines, or develop analytical theories on delimiting or expanding social groups. Foreign decisions yield points of comparison, contrast, illustration, and analysis. Even where foreign sources
diverge as to outcome, the various perspectives will enable the US courts to clarify and refine the rationale and standards applied with respect to PSG.

Where other countries have reached contrary rulings to the US, the US may want to re-examine or refine its decisions. This is particularly true with respect to issues that divide the US courts domestically, such as with refugee claims based upon social groups defined by gender, kinship and former associations.
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