REFUGEE LAW AND COMPARATIVE ASPECTS OF SOCIAL JUSTICE
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Unit 10: Protected Ground of Membership in a Particular Social Group

EXCERPTS from UNHCR Guidelines on International Protection: Membership of a particular social group.

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II. SUBSTANTIVE ANALYSIS

A. Summary of State Practice

5. Judicial decisions, regulations, policies, and practices have utilized varying interpretations of what constitutes a social group within the meaning of the 1951 Convention. Two approaches have dominated decision-making in common law jurisdictions.

6. The first, the "protected characteristics" approach (sometimes referred to as an "immutability" approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).

7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the "social perception" approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.

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9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class.

B. UNHCR's Definition

10. Given the varying approaches, and the protection gaps which can result, UNHCR

believes that the two approaches ought to be reconciled.

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13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

The role of persecution

14. As noted above, a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.4 To use an example from a widely cited decision, "[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being lefthanded would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group." 5

No requirement of cohesiveness

15. It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be "cohesive." The relevant inquiry is whether there is a common element that group members share. This is similar to the analysis adopted for the other Convention grounds, where there is no requirement that members of a religion or holders of a political opinion associate together, or belong to a "cohesive" group. Thus women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.

16. In addition, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution. Not all members of the group must be at risk of being persecuted

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Relevance of size

18. The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a particular society—perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

19. Cases in a number of jurisdictions have recognized "women" as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria.

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21. Normally, an applicant will allege that the person inflicting or threatening the harm is acting for one of the reasons identified in the Convention. So, if a non-State actor inflicts or threatens persecution based on a Convention ground and the State is unwilling or unable to protect the claimant, then the causal link has been established. That is, the harm is being visited upon the victim for reasons of a Convention ground.

22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State's unwillingness to protect her for reasons of a Convention ground.

23. This reasoning may be summarized as follows. The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.

19 I. & N. Dec. 211 (BIA), Interim Decision 2986, 1985 WL 56042

United States Department of Justice

Board of Immigration Appeals

MATTER OF ACOSTA

In Deportation Proceedings

A-24159781
Decided by Board March 1, 1985

CHARGE:
ORDER: Act of 1952—Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)]—Entered without inspection

ON BEHALF OF RESPONDENT:
Evangeline G. Abriel, Esquire
Catherine Lampard, Esquire
Ecumenical Immigration Services, Inc.
821 General Pershing Street
New Orleans, Louisiana 70115

ON BEHALF OF SERVICE:
William M. Darlington
District Counsel

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members.

In a decision dated December 22, 1983, the immigration judge found the respondent deportable pursuant to section 241(a)(2) of the *213 Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(1982), for entering the United States without inspection, denied the respondent's applications for a grant of asylum and for withholding of deportation to El Salvador, but granted the respondent the privilege of departing voluntarily in lieu of deportation. The respondent has appealed from that portion of the immigration judge's decision denying the applications for asylum and withholding of deportation. The appeal will be dismissed.

The respondent is a 36-year-old male native and citizen of El Salvador. In a deportation hearing held before an immigration judge over the course of 2 days in July and August 1983, the respondent conceded his deportability for entering the United States without inspection and accordingly was found deportable as charged. The respondent sought relief from deportation by applying for a discretionary grant of asylum pursuant to section 208 of the Act, 8 U.S.C. § 1158, and for mandatory withholding of deportation to El Salvador pursuant to section 243(h) of the Act, 8 U.S.C. § 1253(h).[1] In an oral decision, the immigration judge denied the respondent's applications for these two forms of relief finding that he had failed to meet his burden of proof for such relief. It is this finding that the respondent has challenged on appeal.

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**5 In order to prove the facts underlying his applications for asylum and withholding of deportation, the respondent testified, and attested in an affidavit attached to his asylum application, to the following facts. In 1976 he, along with several other taxi drivers, founded COTAXI, a cooperative organization of taxi drivers of about 150 members. COTAXI was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the city of San Salvador and one of many taxi cooperatives throughout the country of El Salvador. Between 1978 and 1981, the respondent held three management positions with COTAXI, the duties of which he described in detail, and his last position with the cooperative was that of general manager. He held that position from 1979 through February or March of 1981. During the time he was the general manager of COTAXI, the respondent continued on the weekends to work as a taxi driver.

Starting around 1978, COTAXI and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous but the respondent and the other members of COTAXI believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work stoppages, in hopes of damaging El Salvador's economy. COTAXI's board of directors refused to comply with the requests because its members wished to keep working, and as a result COTAXI received threats of retaliation. Over the course of several years, COTAXI was threatened about 15 times. The other taxi cooperatives in the city also received similar threats.

Beginning in about 1979, taxis were seized and burned, or used as barricades, and COTAXI drivers were assaulted or killed. Ultimately, five members of COTAXI were killed in their taxis by unknown persons. Three of the COTAXI drivers who were killed were friends of the respondent and, like him, had been founders and officers of COTAXI. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to avoid being *217 shot by his passengers, told his friends before he died that three men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him.

During January and February 1981, the respondent received three anonymous notes threatening his life. The first note, which was slipped through the window of his taxi and was addressed to the manager of COTAXI, stated: 'Your turn has come, because you are a traitor.' The second note, which was also put on the respondent's car, was directed to 'the driver of Taxi No. 95,' which was the car owned by the respondent, and warned: 'You are on the black list.' The third note was placed on the respondent's car in front of his home, was addressed to the manager of COTAXI, and stated: 'We are going to execute you as a traitor.' In February 1981, the respondent was beaten in his cab by three men who then warned him not to call the police and took his taxi. The respondent is of the opinion that the men who threatened his life and assaulted him were guerrillas who were seeking to disrupt transportation services in the city of San Salvador. He also has the impression, however, that COTAXI was not favored by some government officials because they viewed the cooperative as being too socialistic.

**6 After being assaulted and receiving the three threatening notes, the respondent left El Salvador because he feared for his life. He declared at the hearing that he would not work as a taxi driver if he returned to El Salvador because he understands that there is little work for taxi drivers now. He explained that the people are too poor to call taxis. Additionally, he stated that the terrorists are no longer active.

As evidence of the truth of his version of the facts, the respondent submitted a letter from the present manager of COTAXI, stating that the respondent was a member of that organization for 3 years. The respondent also submitted several articles reporting that leftist guerrillas had threatened to kill American advisors and personnel in El Salvador, had launched an offensive in three of the provinces in the country, and had engaged in a campaign designed to sabotage the transportation industry and the country's economy.

The Service did not submit any evidence refuting the respondent's testimony. As required by regulation, the Service did submit a written advisory opinion from the Bureau of Human Rights and Humanitarian Affairs in the Department of State pertaining to the respondent's Request for Asylum in the United States (Form I–589). See 8 C.F.R. §§ 208.7, 208.10(b). That

opinion states that the respondent does not appear to qualify for asylum because he failed to show a well-founded fear of persecution in El Salvador on account *218 of race, religion, nationality, membership in a particular social group, or political opinion.

The immigration judge found the respondent's testimony sufficient to prove that he was a founder and member of COTAXI but insufficient to prove that he had received several death threats and had been assaulted by guerrillas. The immigration judge did not make any finding that the respondent lacked credibility; rather, he rejected a substantial portion of the respondent's testimony solely because it was self-serving.

While the immigration judge's assessment of the evidence deserves deference, we disagree with his conclusion that the respondent's testimony should be rejected solely because it is self-serving. The respondent described in specific detail the circumstances surrounding the deaths of his three friends shortly after they received threatening notes, the threats he received, and the facts surrounding his assault. His testimony as to these matters was logically consistent with his testimony about the threats made to COTAXI and its members for failing to participate in guerrilla-sponsored work stoppages. Moreover, the respondent submitted objective evidence to establish his membership in COTAXI and to corroborate his testimony that the guerrillas sought to disrupt the public transportation system of El Salvador. Thus, absent an adverse credibility finding by the immigration judge, we find the respondent's testimony, which was corroborated by other objective evidence in the record, to be worthy of belief. It remains to be determined, however, whether the respondent's facts are sufficient to meet the statutory standards of eligibility for asylum and withholding of deportation.

THE STATUTORY STANDARD FOR ASYLUM

....

(3) The persecution feared must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'

The respondent has argued that the persecution he fears at the hands of the guerrillas is on account of his membership in a particular social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador and is also on account of his political opinion.

The requirement of persecution on account of 'membership in a particular social group' comes directly from the Protocol and the U.N. Convention. See supra p. 12. Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol. This ground was not included in the definition of a refugee proposed by the committee that drafted the U.N. Convention; rather it was added as an afterthought. 1 A. Grahl—Madsen, supra, at 219. International jurisprudence interpreting this ground of persecution is sparse. G. Goodwin-Gill, The Refugee in International Law 30 (1983). It has been suggested that the notion of a 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee. 1 A. Grahl—Madsen, supra, at 219. A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain relation, or *233 having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity. G. Goodwin-Gill, supra, at 31. The UNHCR has suggested that a 'particular social group' connotes persons of similar background, habits, or social status and that a claim to fear persecution on this ground may frequently overlap with persecution on other grounds such as race, religion, or nationality. Handbook, supra, at 19.

**17 We find the well-established doctrine of ejusdem generis, meaning literally, 'of the same kind,' to be most helpful in construing the phrase 'membership in a particular social group.' That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words. See, e.g., Cleveland v. United States, 329 U.S. 14 (1946); 2A C. Sands, supra, § 47.17. The other grounds of persecution in the Act and the Protocol listed in association with 'membership in a particular social group' are persecution on account of 'race,' 'religion,'

'nationality,' and 'political opinion.' Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. See 1 A. Grahl—Madsen, supra, at 217; G. Goodwin-Gill, supra, at 31. Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Applying the doctrine of ejusdem generis, we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something ***234** 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 be required to be changed. By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

In the respondent's case, the facts demonstrate that the guerrillas sought to harm the members of COTAXI, along with members of other taxi cooperatives in the city of San Salvador, because they refused to participate in work stoppages in that city. The characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice. See 1 A. Grahl—Madsen, supra, at 214. Therefore, because the respondent's membership in the group of taxi drivers was something he had the power to change, so that he was able by his own actions to avoid the persecution of the guerrillas, he has not shown that the conduct he feared was 'persecution on account of membership in a particular social group' within our construction of the Act.

****18** Moreover, the respondent did not demonstrate that the persecution he fears is 'on account of political opinion.' The fact that the respondent was threatened by the guerrillas as part of a campaign to destabilize the government demonstrates that the guerrillas' actions were undertaken to further their political goals in the civil controversy in El Salvador. However, conduct undertaken to further the goals of one faction in a political controversy does not necessarily constitute persecution 'on account of political opinion' so as to qualify an alien as a 'refugee' within the meaning of the Act.

As we have previously discussed, the term 'persecution' means the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome. It follows, therefore, that the requirement of 'persecution on account of political opinion' means that the particular belief or characteristic a persecutor seeks to overcome in an individual must be his political opinion. Thus, the requirement of ***235** 'persecution on account of political opinion' refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of the persecution. See 1 A. Grahl—Madsen, supra, at 212, 220; G. Goodwin-Gill, supra, at 31. This construction is consistent with the other grounds of persecution enumerated in the Act such as 'race,' 'religion,' 'nationality,' and 'membership in a particular social group,' each of which specifies a characteristic an individual possesses that causes him to be subject to persecution. Moreover, this construction is consistent with Congress' intention that not all harm with political implications, such as that which arises out of civil strife in a country, qualifies an alien as a 'refugee.' See discussion supra p. 18 & note 10.

In the respondent's case there are no facts showing that the guerrillas were aware of or sought to punish the respondent for his political opinion; nor was there any showing that the respondent's refusal to participate in the work stoppages was motivated by his political opinion. Absent such a showing, the respondent failed to demonstrate that the particular belief the guerrillas sought to overcome in him was his political opinion. Therefore he does not come within this ground of persecution.

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*237 For the foregoing reasons the respondent has not shown he is eligible either for asylum or withholding of deportation to El Salvador. Therefore, we shall dismiss his appeal.

ORDER: The appeal is dismissed.

Footnotes

1 Under the regulations of the Immigration and Naturalization Service, any asylum request made after the institution of deportation proceedings is also considered to be a request for withholding of deportation under section 243(h) of the Act. 8 C.F.R. § 208.3(b) (1984).

2 The Service's burden of proving an alien's deportability by clear, unequivocal, and convincing evidence is an exception to this general rule. See Woodby v. INS, 385 U.S. 276 (1966).

3 We note that in McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981), the Ninth Circuit held that a 'substantial evidence' standard of review applies in cases in which aliens seek withholding of deportation under section 243(h) of the Act. See also Carvajal—Munoz v. INS, supra, at 567. The standard of review employed by a court in reviewing our decision is a separate and distinct standard from that imposed upon a party to measure his burden of persuasion on issues of fact. Woodby v. INS, supra, at 282–83. Thus, the Ninth Circuit's decision in McMullen has no bearing on the issue of an alien's burden of persuasion in withholding or asylum cases.

4 While the language of section 101(a)(42)(A) excludes from the definition of a refugee any person who 'ordered, incited, assisted, or otherwise participated in the persecution of any person,' we do not construe this language as establishing a fifth statutory element an alien must initially prove before he qualifies as a refugee. This provision is one of exclusion, not one of inclusion, and thus requires an alien to prove he did not participate in persecution only if the evidence raises that issue.

5 Article 1.2 of the Protocol largely incorporated the definition of a refugee contained in Article 1A(2) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ('the U.N. Convention'), to which the United States was not a party.

6 Despite Congress' intention to conform our law to the Protocol, the actual definition of 'refugee' adopted in the Act differs in several significant respects from that in the Protocol and the U.N. Convention. First, the U.N. Convention excludes from all of its provisions several groups of persons: (1) those who have committed crimes against humanity; (2) those who have committed a serious non-political crime; and (3) those who are guilty of acts contrary to the principles of the United Nations. Article 1F of the U.N. Convention at 19 U.S.T. 6263–64. Thus, these groups are not eligible for refugee status under the U.N. Convention or the Protocol. The language in section 101(a)(42)(A) of the Act does not contain this exclusion.
Second, in a provision that does not pertain to grants of asylum, Congress provided that a person may qualify as a refugee even if he is still inside his country of nationality or of habitual residence so long as he has been specially designated by the President. Section 101(a)(42)(B) of the Act. Neither the Protocol nor the U.N. Convention definition of 'refugee' reaches persons still within the borders of their own countries. Martin, The Refugee Act of 1980: Its Past and Future, Transnat'l Legal Probs. of Refugees: 1982 Mich. Y.B. Int'l Legal Stud. 91, 101–03 (1982).

7 Specifically, former section 203(a)(7) allowed 17,400 persons each year to be conditionally admitted to the United States if they could demonstrate that: (1) they had fled from a Communist or Communist-dominated country or from any country in the Middle East, and (2) they had fled these countries because of persecution or fear of persecution. See former section 203(a)(7) of the Act.

8 The Handbook was issued in September 1979, whereas hearings on the Refugee Act were held in March and May 1979, and the Senate Judiciary Committee issued its report in July 1979. Thus, it is highly unlikely that Congress consulted the Handbook while

drafting the definition of a refugee in the Refugee Act of 1980. But see United States Refugee Program, Oversight Hearings before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary, 97th Cong., 1st Sess. 24, 26 (1981) (memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David W. Crosland, General Counsel, Immigration and Naturalization Service) (assuming Congress was aware of the criteria articulated in the Handbook at the time of passage of the Refugee Act in 1980, but nonetheless concluding the Handbook is only a guideline). In addition, the jurisdiction of the UNHCR has been expanded over the years and now encompasses large groups of persons displaced by civil strife or natural disasters who simply do not qualify under the Protocol's limited definition of a 'refugee.' Special Project, Displaced Persons: 'The New Refugees,' 13 Ga. J. Int'l and Comp. Law 755, 763–71 (1983) and authorities cited therein. Thus, it cannot be certain to what extent the position in the Handbook reflects concepts that are outside the strict definition of a 'refugee' under the Protocol. See infra p. 24.

9 The word 'persecution' appeared not only in former section 203(a)(7) but also in the predecessors to the present withholding of deportation provision in section 243(h) of the Act and in the regulatory provisions pertaining to grants of asylum. See INS v. Stevic, supra, at 2493 and nn.6–7; 8 C.F.R. § 108 (1980). Prior to 1980, it was construed by us and by the courts primarily in the latter two contexts.

10 The Senate bill contained a definition of 'refugee' that included 'displaced persons' and referred, in part, to 'any person who has been displaced by military or civil disturbance or uprooted because of arbitrary detention' who is unable to return to 'his usual place of abode.' See S. 643, 96th Cong., 1st Sess. § 201(a) (1979); S. Rep. No. 256, supra, at 4. The House bill did not contain such a provision. See H.R. 2816, 96th Cong., 1st Sess. § 201(a) (1979). The conference committee adopted the House version, thereby rejecting a definition of 'refugee' that included 'displaced persons.' See H.R. Rep. No. 781, supra, at 19; see also section 101(a)(42)(A) of the Act.

11 The committee that drafted the phrase, 'a well-founded fear of persecution,' in the U.N. Convention defined the phrase to mean that a person actually must have been a victim of persecution or be able to show 'good reason' why he fears persecution. Matter of Dunar, supra, at 319. That committee considered various proposals defining refugee status in terms of being unwilling to return to one's country of origin because of 'serious apprehension based on reasonable grounds of . . . persecution,' or a 'justifiable fear of persecution,' or a 'fear of persecution,' before selecting the term 'well-founded' to describe the nature of the fear that qualified one as a refugee. U.N. Docs. E/AC.32/L.2, E/AC.32/L.3, E/AC.32/L.4 and Add. 1 (Jan. 17, 1950). In addition, the committee was guided by prior international agreements pertaining to refugees, one of which was the Constitution of the International Refugee Organization ('IRO'). See Report of the Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/1618 at 37 (Feb. 17, 1950). The IRO Constitution provided that refugees and displaced persons became the concern of the IRO if, inter alia, they had valid objections to returning to their countries of origin, such as 'persecution or fear, based on reasonable grounds of persecution.' Constitution of the IRO, ratified Dec. 16, 1946, Part I, §§ A, B, C.1(a)(1), 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3 (effective Aug. 30, 1948), reprinted in 1948 U.S. Code Cong. Service 2042, 2051–52. Thus, we conclude that in using the phrase 'well-founded fear of persecution,' the drafters of the U.N. Convention were attempting to create an objective measure of the fear of persecution.

12 Prior to the Refugee Act of 1980, a request for asylum filed after completion of deportation proceedings was considered to be a request for section 243(h) withholding of deportation and for, inter alia, the benefits of Article 33 of the Protocol and the U.N. Convention which prohibit the expulsion of a refugee to a place where his 'life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.' INS v. Stevic, supra, at 2494, 2496 n.13; see also 8 C.F.R. § 108.3(a) (1980). An applicant for asylum had the burden of proving that he 'would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.' 8 C.F.R. § 108.3(c) (1980). Similarly, withholding of deportation under section 243(h) of the Act was construed to be comparable to the benefit afforded by Article 33 of the Protocol and the U.N. Convention. See Matter of Dunar, supra, at 319–20. An alien seeking withholding of deportation, like an alien seeking asylum, was required to show he 'would be subject to persecution on account of race, religion, or political opinion.' 8 C.F.R. § 242.17(c) (1980); see also INS v. Stevic, supra, at 2493 nn.6 & 7, 2496 n.13.

13 The Senate bill required that in order to be eligible for asylum an alien must meet the well-founded-fear definition of a refugee and must show that his deportation or return was prohibited by the section 243(h) withholding of deportation provision. S. 643, supra, § 203(e); S. Rep. No. 256, supra, at 16. The Senate assumed that this did not change the then-existing substantive standard for asylum. S. Rep. No. 256, supra, at 9. The House bill contained an asylum provision that made no express reference to withholding of deportation. See H.R. 2816, supra, § 203(e). However, the House Judiciary Committee perceived asylum and withholding of deportation to be related forms of relief accomplishing the same end, namely that of conforming United States law to the obligation of Article 33 of the Protocol and the U.N. Convention. H.R. Rep. No. 608, supra, at 17–18. The conference committee adopted the

House version of the asylum provision and thus in the language of the statute did not link asylum to withholding of deportation. See H.R. Rep. No. 781, supra, at 5. Nevertheless, in its report the committee perceived asylum and withholding of deportation to be interchangeable and did not distinguish them as separate forms of relief. Id. at 20. We think these facts show that Congress understood the functions of asylum and withholding of deportation to be closely related and the standards of eligibility for these forms of relief to be essentially comparable. But see Carvajal—Munoz v. INS, supra, at 574–75 n.15.

14 It is unfortunate when persons may be obliged to give up their jobs and leave their homes as a result of fear. But that is not the issue here. The issue is, once that decision is made, does an individual have the right to come to the United States rather than to move elsewhere in his home country.

19 I. & N. Dec. 211 (BIA), Interim Decision 2986, 1985 WL 56042

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784 F.3d 944
United States Court of Appeals,
Fourth Circuit.

Maydai HERNANDEZ–AVALOS, Petitioner,
v.
Loretta E. LYNCH, Attorney General, Respondent.

No. 14–1331.|
|
Decided: April 30, 2015.

SHEDD, Circuit Judge:

Maydai Hernandez–Avalos, a native and citizen of El Salvador, petitions for review of a final order of removal entered by the Board of Immigration Appeals (BIA). For the reasons that follow, we grant Hernandez's petition for review, vacate the BIA's order, and remand for further proceedings.

I.

In June 2008, Hernandez and her son, Kevin Avalos–Rojas, entered the United States near Eagle Pass, Texas, without inspection and without valid entry documents. The following month, the Government initiated deportation proceedings against them.[1] Hernandez admitted the *947 factual allegations in her Notice to Appear and conceded her removability, but sought relief from removal in the form of asylum and withholding of removal under the Immigration and Naturalization Act (INA).[2] She had a hearing before an Immigration Judge (IJ) in February 2012, during which she related certain threats she had received in El Salvador from members of the gang Mara 18.[3] The IJ, considering both her live and written testimony, found her to be a "generally credible witness," A.R. 47, and her testimony is summarized below.

In 2007, members of the gang Mara 18 killed Augustin, the cousin of Hernandez's husband, because he refused to join their ranks. Hernandez did not herself witness Augustin's murder, but she later identified his body at the medical forensic lab in her town and took it home to prepare it for burial. Following Augustin's burial, heavily armed gang members came to her house and threatened to kill her if she identified the gang members to the authorities as the men responsible for Augustin's murder.

Although the exact date is unclear from the record, within a few months Hernandez was threatened with death a second time. Five Mara 18 members came to her home and told her that because her son Kevin was getting older, "he was getting ready to join the maras." A.R. 115. Kevin was twelve years old at the time. When Hernandez responded that her son was not going to join the gang, the gang members put a gun to her head and told her that if she opposed her son's joining them, "[she] was the one who was going to die." A.R. 116. One of the men who threatened her on this occasion was later prosecuted and sentenced to 25 years in prison by the Salvadoran government for killings unrelated to any interaction between Mara 18 and Hernandez's family. Hernandez was not involved in that prosecution, and we have no further information about these killings.

In May 2008, Mara 18 members threatened to kill Hernandez for the third time. They came to her home, put a gun to her head, and told her that her son was ready to join the gang. She responded that her son was not going to join and that she was not going to allow the gang members to get any closer to him. The Mara 18 members then aimed the gun at her and told her that they were going to force her son to join. When Hernandez responded that she did not want her son to be like them, but instead wanted him to study and to be a good person, the Mara 18 members told her that she had one day to turn her son over to the gang or she would be killed.

Before dawn the following day, Hernandez and her son left El Salvador for the United States with the help of a smuggler. Hernandez stated that reporting these incidents to the Salvadoran police was not an option for her because "[t]he police routinely arrested gang members and within days they were released. Many times the gang members learned who reported them to the police and retaliated against that *948 person. I was afraid that would happen to me." A.R. at 147–48. Hernandez also stated that she does not believe that she can go back to El Salvador because the gangs would kill her.

Despite finding her testimony credible, the IJ found that Hernandez had not established her eligibility for asylum because she had not demonstrated that she was likely to suffer future persecution on account of a protected ground, nor had she demonstrated that she was threatened

by persons that the Salvadoran government was unwilling or unable to control. The IJ therefore denied her petition for relief and ordered her removed to El Salvador. Hernandez appealed to the BIA, which affirmed the IJ's decision. She timely filed a petition for review of the BIA's decision in this court, challenging the BIA's denial of her claim for eligibility for asylum and its failure to consider her request for withholding of removal.

***

III.

Under 8 U.S.C. § 1101(a)(42)(A), to establish her eligibility for asylum, Hernandez *949 must prove that she (1) has a well-founded fear of persecution; (2) on account of a protected ground; (3) by an organization that the Salvadoran government is unable or unwilling to control. *Lopez–Soto v. Ashcroft,* 383 F.3d 228, 234 (4th Cir.2004) (vacated pending reh'g en banc on other grounds).

A.

[5] As to the first requirement, we have expressly held that "the threat of death qualifies as persecution." *Crespin–Valladares v. Holder,* 632 F.3d 117, 126 (4th Cir.2011) (*citing Li v. Gonzales,* 405 F.3d 171, 177 (4th Cir.2005)). Further, "[a]pplicants who demonstrate past persecution are presumed to have a well-founded fear of future persecution." *Naizgi,* 455 F.3d at 486 (*citing* 8 C.F.R. § 1208.13(b)(1)). Because Hernandez credibly testified that she received death threats from Mara 18, she has proven that she has a well-founded fear of future persecution were she to return to El Salvador.[6] She has thus satisfied the first prong of eligibility for asylum.

B.

[6] [7] Next, Hernandez must show that the persecution she suffered was on account of a protected ground. "Persecution occurs 'on account of' a protected ground if that ground serves as 'at least one central reason for' the feared persecution." *Crespin–Valladares,* 632 F.3d at 127 (*quoting* 8 U.S.C. § 1158(b)(1)(B)(i)). Among the protected grounds listed in the asylum statute is "membership in a particular social group." 8 U.S.C. § 1158(b)(1)(B)(i). Hernandez claims, and the government correctly acknowledges, that membership in a nuclear family qualifies as a protected ground for asylum purposes. *See Crespin–Valladares,* 632 F.3d at 125 ("[T]he family provides a prototypical example of a particular social group.") (internal quotation marks and citations omitted).

[8] The government argues, however, that the BIA was correct in holding that Hernandez's persecution was not "on account of" her family ties. To prove that persecution took place on account of family ties, an asylum applicant "need not show that his family ties provide '*the* central reason or even a dominant central reason' for his persecution, [but] he must demonstrate that these ties are more than 'an incidental, tangential, superficial, or subordinate reason' for his persecution." *Id.* at 127 (*quoting Quinteros–Mendoza v. Holder,* 556 F.3d 159, 164 (4th Cir.2009)) (emphasis in original).

The BIA concluded that the threats to kill Hernandez unless she allowed her son to join the gang were not made on account of Hernandez's membership in her nuclear family. It reasoned that "[s]he was not threatened because of her relationship to her son (i.e. family), but rather because she would not consent to her son engaging in a criminal activity." A.R. 4. The government argues that the BIA did not err in concluding that gang recruitment was the central motivation for these threats. Further, it argues that the fact that the person blocking the gang members' recruitment effort was their membership target's mother was merely incidental to the recruitment aim.

[9] We believe that this is an excessively narrow reading of the requirement that persecution be undertaken "on account of membership in a nuclear family." *950 Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities. The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not *at least one* central reason for her persecution.

Indeed, we recently rejected a similar government argument in *Cordova v. Holder,* 759 F.3d 332 (4th Cir.2014), a case that also dealt with a Salvadoran citizen who was the target of gang violence. There, MS–13 gang members repeatedly threatened and attacked petitioner Aquino, at first with the stated goal of inducing him to join the gang, and later because they believed his cousin and uncle were members of a rival gang. *Id.* at 33435. The BIA held that Aquino's kinship ties to his cousin and

uncle were not a central reason for the gang's threats, reasoning that Aquino had not shown that MS–13 had uniquely targeted his family and that MS–13 had first targeted Aquino as an incident of recruitment. *Id.* at 339. We found this reasoning insufficient because the BIA had not properly considered Aquino's evidence that the later threats he received were motivated by retaliation for his cousin and uncle's membership in a rival gang. *Id.* We therefore concluded that the recruitment motivation underlying Aquino's persecution did not preclude the existence of another central reason—family ties—for that same persecution.

Similarly, in this case, Mara 18 threatened Hernandez in order to recruit her son into their ranks, but they also threatened *Hernandez,* rather than another person, because of her family connection to her son. Thus, under *Cordova,* the government's argument that recruitment was Mara 18's primary motivation is unavailing, because there were multiple central reasons for the threats Hernandez received.[7]

Because any reasonable adjudicator would be compelled to conclude that Hernandez's maternal relationship to her son is at least one central reason for two of the threats she received, we hold that the BIA's conclusion that these threats were not made "on account of" her membership in her nuclear family is manifestly contrary to law and an abuse of discretion. Accordingly, Hernandez has met the second asylum eligibility requirement.

C.

Finally, Hernandez must show that the Salvadoran government is either unwilling or unable to control the gang members who threatened her. The BIA found that Hernandez had "not shown any clear error in the Immigration Judge's factual finding" that the government of El Salvador would not be unwilling or unable to protect her from the gang. A.R. 4. As a result, we ***951** must also examine the IJ's factual finding on this issue.

The IJ acknowledged that the gang problem in El Salvador is "quite serious" and that Hernandez had perhaps failed to report the threats she received to the Salvadoran authorities because the Mara 18 members had threatened to harm her if she did so. A.R. 50. Despite these observations, however, the IJ concluded that Hernandez had not shown that El Salvador is unwilling or unable to protect her because she had not attempted to obtain protection from the Salvadoran authorities. *Id.* In support of this rationale, the IJ stated that Hernandez had testified that one of the gang members responsible for Augustin's murder had been imprisoned and sentenced to 25 years. *Id.* Moreover, the IJ stated that the government of El Salvador, "with significant support from the United States Government, has taken a variety of law enforcement and social measures to address gang criminality." *Id.* The BIA found no clear error in this determination and added only its reiteration that "the respondent testified that one of the gang members responsible for Augustin's murder was arrested, convicted and imprisoned. He was sentenced to 25 years." A.R. 4.

[10] There are several errors in the BIA's conclusion that Hernandez has not shown that El Salvador is unwilling or unable to protect her. The IJ and the BIA misstated Hernandez's testimony and drew unjustified conclusions from it. Next, the BIA failed to consider relevant evidence of country conditions in El Salvador. Finally, the IJ relied on his unsupported personal knowledge of conditions in El Salvador.

1.

[11] [12] [13] " 'Whether a government is "unable or unwilling to control" private actors ... is a factual question that must be resolved based on the record in each case.' " *Crespin–Valladares,* 632 F.3d at 128 (*quoting Menjivar v. Gonzales,* 416 F.3d 918, 921 (8th Cir.2005)). Despite the "extremely deferential standard" under which we review an IJ's factual findings, *Menghesha v. Gonzales,* 450 F.3d 142, 147 (4th Cir.2006), an IJ is not entitled to ignore an asylum applicant's testimony in making those factual findings. *See Cordova,* 759 F.3d at 340. *** The BIA abuses its discretion if it "fail[s] to offer a reasoned explanation for its decision, or if it distort[s] or disregard [s] important aspects of the applicant's claim." *Id.*

***

To the contrary, Hernandez, whom the IJ found to be a credible witness, provided abundant evidence that the authorities would not have been responsive to such a report. Hernandez's affidavit, in combination with the other evidence presented in this case, suggests that the police in her neighborhood may be subject to gang influence. *See* A.R. 147–48 ("Reporting these incidents to the police was not an option for me. The police routinely arrested gang members and within days they were released. Many times the gang members learned who reported them to the police and retaliated against that

person. I was afraid that would happen to me."). Further, even if the authorities in her neighborhood were willing to protect her against the gangs, Hernandez testified that they would be unable to do so. *See* A.R. 146–47 ("Of course, I was fearful and knew the authorities could not provide me with any degree of protection. For that reason, I did not turn them in."). Thus, the BIA relied on a misstatement of the record, misinterpreted its significance, and ignored Hernandez's contrary credible testimony in reaching its finding.

2.

That the BIA accepted the IJ's decision to disregard Hernandez's testimony is even more surprising because her testimony is completely consistent with the 2011 State Department Human Rights Report for El Salvador.[9] This report notes the *953 existence of widespread gang influence and corruption within the Salvadoran prisons and judicial system, and, considered in conjunction with Hernandez's testimony regarding conditions in her neighborhood, negates the IJ's finding that the Salvadoran government is not unwilling or unable to protect Hernandez from the Mara 18 members who threatened her.

3.

Finally, the IJ's reliance on his own, unsubstantiated knowledge of conditions in El Salvador to conclude that the government was not unwilling or unable to protect her was error. If the IJ relies on his own knowledge of country conditions as a basis for a finding, the IJ must support that knowledge with evidence in the record. *See Tassi,* 660 F.3d at 719. *** "[W]e recognize that over time, Immigration Judges will accumulate significant knowledge from their experience involving the conditions in numerous countries. However, any evidence relied upon by the Immigration Judge must be included in the record so that the Board can meaningfully review any challenge to the Immigration Judge's decision on appeal." *In re S–M–J–*, 21 I. & N. Dec. 722, Interim Decision 3303 (BIA 1997). The IJ's reliance on his unsupported personal knowledge of conditions in El Salvador to discredit Hernandez's testimony was thus error.

***

*954 IV.

For the foregoing reasons, we grant Hernandez's petition for review and remand the case to the BIA for further proceedings consistent with this opinion.[11]

PETITION FOR REVIEW GRANTED; REMANDED FOR FURTHER PROCEEDINGS

End of Document

21 I. & N. Dec. 357 (BIA), Interim Decision 3278, 1996 WL 379826

United States Department of Justice

Board of Immigration Appeals

IN RE FAUZIYA KASINGA, APPLICANT

File A73 476 695-Elizabeth
Decided June 13, 1996

Before: Board En Banc: SCHMIDT, Chairman; DUNNE, Vice Chairman; HOLMES, HURWITZ, VILLAGELIU, COLE, MATHON, and GUENDELSBERGER, Board Members. Concurring Opinions: FILPPU, Board Member, joined by HEILMAN, Board Member; ROSENBERG, Board Member. Dissenting Opinion: VACCA, Board Member.

SCHMIDT, Chairman:

This is a timely appeal by the applicant from a decision of an Immigration Judge dated August 25, 1995. The Immigration Judge found the applicant excludable as an intending immigrant, denied her applications for asylum and withholding of deportation, and ordered her excluded and deported from the United States. Upon reviewing the appellate record anew ("de novo review"), we will sustain the applicant's appeal, grant asylum, and order her admitted to the United States as an asylee.

*358 A fundamental issue before us is whether the practice of female genital mutilation ("FGM") can be the basis for a grant of asylum under section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158 (1994). On appeal, the parties agree that FGM can be the basis for a grant of asylum. We find that FGM can be a basis for asylum.

Nevertheless, the parties disagree about 1) the parameters of FGM as a ground for asylum in future cases, and 2) whether the applicant is entitled to asylum on the basis of the record before us. In deciding this case, we decline to speculate on, or establish rules for, cases that are not before us.

We make seven major findings in the applicant's case. Those findings are summarized below.

First, the record before us reflects that the applicant is a credible witness. Second, FGM, as practiced by the Tchamba-Kunsuntu Tribe of Togo and documented in the record, constitutes persecution. Third, the applicant is a member of a social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. Fourth, the applicant has a well-founded fear of persecution. Fifth, the persecution the applicant fears is "on account of" her social group. Sixth, the applicant's fear of persecution is country-wide. Seventh, and finally, the applicant is eligible for and should be granted asylum in the exercise of discretion. Each finding is explained below.

I. CREDIBILITY

A. The Applicant's Testimony

**2 The applicant is a 19-year-old native and citizen of Togo. She attended 2 years of high school. She is a member of the Tchamba-Kunsuntu Tribe of northern Togo. She testified that young women of her tribe normally undergo FGM at age 15. However, she did not because she initially was protected from FGM by her influential, but now deceased, father.

The applicant stated that upon her father's death in 1993, under tribal custom her aunt, her father's sister, became the primary authority figure in the family. The applicant's mother was driven from the family home, left Togo, and went to live with her family in Benin. The applicant testified that she does not currently know her mother's exact whereabouts.

The applicant further testified that her aunt forced her into a polygamous marriage in October 1994, when she was 17. The husband selected by her aunt was 45 years old and had three other wives at the time of marriage. The applicant testified that, under tribal custom, her aunt and her husband planned to force her to submit to FGM before the marriage was consummated.

The applicant testified that she feared imminent mutilation. With the help of her older sister, she fled Togo for Ghana. However, she was afraid that her *359 aunt and her husband would locate her there. Consequently, using money from her mother, the applicant embarked for Germany by airplane.

Upon arrival in Germany, the applicant testified that she was somewhat disoriented and spent several hours wandering around the airport looking for fellow Africans who might help her. Finally, she struck up a conversation, in English, with a German woman.

After hearing the applicant's story, the woman offered to give the applicant temporary shelter in her home until the applicant decided what to do next. For the next 2 months, the applicant slept in the woman's living room, while performing cooking and cleaning duties.

The applicant further stated that in December 1994, while on her way to a shopping center, she met a young Nigerian man. He was the first person from Africa she had spoken to since arriving in Germany. They struck up a conversation, during which the applicant told the man about her situation. He offered to sell the applicant his sister's British passport so that she could seek asylum in the United States, where she has an aunt, an uncle, and a cousin. The applicant followed the man's suggestion, purchasing the passport and the ticket with money given to her by her sister.

The applicant did not attempt a fraudulent entry into the United States. Rather, upon arrival at Newark International Airport on December 17, 1994, she immediately requested asylum. She remained in detention by the Immigration and Naturalization Service ("INS") until April 1996.

The applicant testified that the Togolese police and the Government of Togo were aware of FGM and would take no steps to protect her from the practice. She further testified that her aunt had reported her to the Togolese police. Upon return, she would be taken back to her husband by the police and forced to undergo FGM. She testified at several points that there would be nobody to protect her from FGM in Togo.

**3 In her testimony, the applicant referred to letters in the record from her mother (Exh. 3). Those letters confirmed that the Togolese police were looking for the applicant and that the applicant's father's family wanted her to undergo FGM.

The applicant testified that she could not find protection anywhere in Togo. She stated that Togo is a very small country and her husband and aunt, with the help of the police, could locate her anywhere she went. She also stated that her husband is well known in Togo and is a friend of the police. On cross-examination she stated that it would not be possible for her to live with another tribe in Togo.

The applicant also testified that the Togolese police could locate her in Ghana. She indicated that she did not seek asylum in Germany because she could not speak German and therefore could not continue her education there. She stated that she did not have relatives in Germany as she does in the United States.

*360 B. Background Information

1. The Asylum Application

The applicant's written asylum application was filed on April 18, 1995, while she was in INS detention (Exh. 3). That application is consistent with the above testimony in all material respects.

....

4. Description of FGM

According to the applicant's testimony, the FGM practiced by her tribe, the Tchamba-Kunsuntu, is of an extreme type involving cutting the genitalia with knives, extensive bleeding, and a 40-day recovery period (Tr. 30-31, 41). The background materials confirm that the FGM practiced in some African countries, such as Togo, is of an extreme nature causing permanent damage, and not just a minor form of genital ritual. See, e.g., Nahid Toubia, Female Genital Mutilation: A Call for Global Action 9, 24-25 (Gloria Jacobs ed., Women Ink. 1993).

The record material establishes that FGM in its extreme forms is a practice in which portions of the female genitalia are cut away. In some cases, the vagina is sutured partially closed. This practice clearly inflicts harm or suffering upon the girl or woman who undergoes it.

FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions. See generally Toubia, supra; INS Resource Information Center, Alert Series-Women-Female Genital Mutilation, Ref. No. AL/NGA/94.001 (July 1994) [hereinafter FGM Alert].

The FGM Alert, compiled and distributed by the INS Resource Information Center, notes that "few African countries have officially condemned female genital mutilation and still fewer have enacted legislation against the practice." FGM Alert, supra, at 6. Further, according to the FGM Alert, even in those few African countries where legislative efforts have been made, they are usually ineffective to protect women against FGM. The FGM Alert notes that "it remains practically true that [African] women have little legal recourse and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional *362 practice or attempting to protect their female children." Id. at 6-7. Togo is not listed in the FGM Alert as among the African countries that have made even minimal efforts to protect women from FGM.

**5 The record also contains a May 26, 1995, memorandum from Phyllis Coven, Office of International Affairs, INS, which is addressed to all INS Asylum Officers and sets forth guidelines for adjudicating women's asylum claims. Coven, U.S. Dep't of Justice, Considerations For Asylum Officers Adjudicating Claims From Women (1995). Those guidelines state that "rape ..., sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds." Coven, supra, at 4.

....

C. INS Cross-Examination and Request for Remand

During the hearing before the Immigration Judge, the INS had an opportunity to cross-examine the applicant and to offer documentary evidence of its *363 own having a bearing on the case. The INS submitted no documentary evidence.

As discussed below, the INS general attorney's cross-examination of the applicant revealed no meaningful inconsistencies in her testimony. The INS does not claim that the applicant is incredible, nor does the INS argue that the Immigration Judge's adverse credibility determination was correct. Rather, the INS requests that the record be remanded for further examination of the applicant's credibility. The INS cites four specific matters in support of its request.

....

For the foregoing reasons, a remand is not necessary. This is particularly true in light of the length of time the applicant's asylum application has been pending.

D. The Applicant's Credibility

We have conducted an independent review of the applicant's credibility. We note that the Immigration Judge's adverse credibility determination was based on a perceived lack of "rationality," "persuasiveness," and "consistency." The Immigration Judge did not rely on the applicant's demeanor. We, like the Immigration Judge, can determine from the record whether the applicant's testimony is "rational, plausible, and consistent."

We find that the applicant's testimony in support of her asylum application is plausible, detailed, and internally consistent. See Matter of B-, supra. It is consistent with her asylum application and with the substantial background information in the record. The latter includes information from the Department of State and the INS Resource Information Center.

The applicant is a 19-year-old woman, who was a 17-year-old high school student at the time the events in question occurred. The applicant's father had died, she was separated from her mother, and she was under the control of an unsympathetic aunt. Her arrival in the United States followed flight from her homeland and a lonely journey of thousands of miles that took her through a strange country. Her testimony followed more than 8 months of continuous INS detention, in several facilities, one of which was closed by a riot.

We specifically reject the Immigration Judge's findings that the applicant's failure to know the present whereabouts of her mother; her claim to have avoided FGM through her father's efforts; the incident involving the German woman; or the incident with the Nigerian man were irrational, unpersuasive, or inconsistent. Each of those matters was adequately and reasonably explained by the applicant during her testimony and each of them reasonably could have happened to a teenage girl in the applicant's situation. Her testimony on these points was not impeached by the INS through cross-examination.

*365 For the foregoing reasons, on the basis of the record before us, we find the applicant to be a credible witness.

II. FGM AS PERSECUTION

For the purposes of this case, we adopt the description of FGM drawn from the record and summarized in Part I.B.4. of this opinion. We agree with the parties that this level of harm can constitute "persecution" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A) (1994).

While a number of descriptions of persecution have been formulated in our past decisions, we have recognized that persecution can consist of the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim. See Matter of Acosta, 19 I & N Dec. 211, 222-23 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987). The "seeking to overcome" formulation has its antecedents in concepts of persecution that predate the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. See, e.g., Matter of Diaz, 10 I & N Dec. 199, 204 (BIA 1963).

**8 As observed by the INS, many of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective "punitive" or "malignant" intent is not required for harm to constitute persecution. See Matter of Kulle, 19 I & N Dec. 318 (BIA 1985); Matter of Acosta, supra%u.

Our characterization of FGM as persecution is consistent with our past definitions of that term. We therefore reach the conclusion that FGM can be persecution without passing on the INS's proposed "shocks the conscience" test. We also agree with the parties that this case is not controlled by Matter of Chang, 20 I & N Dec. 38 (BIA 1989) (holding that China's

population control policy is not persecution).

III. SOCIAL GROUP

To be a basis for a grant of asylum, persecution must relate to one of five categories described in section 101(a)(42)(A) of the Act. The parties agree that the relevant category in this case is "particular social group." Each party has advanced several formulations of the "particular social group" at issue in this case. However, each party urges the Board to adopt only that definition of social group necessary to decide this individual case.

In the context of this case, we find the particular social group to be the following: young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. This is very similar to the formulations suggested by the parties.

The defined social group meets the test we set forth in Matter of Acosta, supra, at 233. See also Matter of H-, Interim Decision 3276 (BIA 1996) (finding that identifiable shared ties of kinship warrant characterization as a social *366 group). It also is consistent with the law of the United States Court of Appeals for the Third Circuit, where this case arose. Fatin v. INS, 12 F.3d 1233, 1241 (3d Cir.1993) (stating that Iranian women who refuse to conform to the Iranian Government's gender-specific laws and social norms may well satisfy the Acosta definition).

In accordance with Acosta, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchamba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.

IV. WELL-FOUNDED FEAR

The burden of proof is upon an applicant for asylum to establish that a "reasonable person" in her circumstances would fear persecution upon return to Togo. Matter of Mogharrabi, 19 I & N Dec. 439, 445 (BIA 1987). The applicant has met this burden through a combination of her credible testimony and the introduction of documentary evidence and background information that supports her claim. See Matter of B-, supra; Matter of Dass, 20 I & N Dec. 120 (BIA 1989).

V. "ON ACCOUNT OF"

**9 To be eligible for asylum, the applicant must establish that her well-founded fear of persecution is "on account of" one of the five grounds specified in the Act, here, her membership in a "particular social group." See, e.g., Matter of H-, supra (holding that harm or abuse because of clan membership constitutes persecution on account of social group).

Both parties have advanced, and the background materials support, the proposition that there is no legitimate reason for FGM. Group Exhibit 4 contains materials showing that the practice has been condemned by such groups as the United Nations, the International Federation of Gynecology and Obstetrics, the Council on Scientific Affairs, the World Health Organization, the International Medical Association, and the American Medical Association.

Record materials state that FGM "has been used to control woman's sexuality," FGM Alert, supra, at 4. It also is characterized as a form of "sexual oppression" that is "based on the manipulation of women's sexuality in order to assure male dominance and exploitation." Toubia, supra, at 42 (quoting Raqiya Haji Dualeh Abdalla, Somali Women's Democratic Organization). During oral argument before us, the INS General Counsel agreed with the latter characterization. (O.A. at 41). He also stated that the practice is a *367 "severe bodily invasion" that should be regarded as meeting the asylum standard even if done with "subjectively benign intent" (O.A. at 42).

We agree with the parties that, as described and documented in this record, FGM is practiced, at least in some significant

part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to FGM. We therefore find that the persecution the applicant fears in Togo is "on account of" her status as a member of the defined social group.

VI. COUNTRY-WIDE PERSECUTION

The INS suggests, in its brief and at oral argument, that a remand is necessary because the applicant has not established that she would be unable to avoid FGM by moving to some other part of Togo. As we found in Part I of our opinion, the applicant presented credible testimony that her husband is a well-known individual who is a friend of the police in Togo. She testified that her aunt and her husband were looking for her and that there could be no refuge for her because Togo is a small country and the police would not protect her (Tr. at 59, 61, 65, 73, 74, 78, 86, 87).

The applicant's testimony is consistent with the background information in the record. That information confirms that 1) FGM is widely practiced in Togo; 2) acts of violence and abuse against women in Togo are tolerated by the police; 3) the Government of Togo has a poor human rights record; and 4) most African women can expect little governmental protection from FGM. See 1993 Country Reports, supra; Profile, supra; FGM Alert, supra, at 6-7. We also take notice that Togo is a small country of approximately 22,000 square miles, slightly smaller than West Virginia.

**10 Neither in its briefs nor at oral argument did the INS raise any claim of "new evidence" that might show changed country conditions. We assume that if the INS had any new documentation showing that the applicant could find safety from FGM elsewhere in Togo, it would have offered that evidence in support of its motion to remand.

For the foregoing reasons, we find that this record adequately supports the applicant's claim that she has a country-wide fear of persecution in Togo.

VII. DISCRETION

We have determined that the applicant is eligible for asylum because she has a well-founded fear of persecution on account of her membership in a particular social group in Togo. A grant of asylum to an eligible applicant is discretionary. The final issue is whether the applicant merits a favorable exercise of discretion. The danger of persecution will outweigh all but the most egregious adverse factors. Matter of Pula, 19 I & N Dec. 467, 474 (BIA 1987). The type of persecution feared by the applicant is very severe.

*368 To the extent that the Immigration Judge suggested that the applicant had a legal obligation to seek refuge in Ghana or Germany, the record does not support such a conclusion. The applicant offered credible reasons for not seeking refuge in either of those countries in her particular circumstances.

The applicant purchased someone else's passport and used it to come to the United States. However, upon arrival, she did not attempt to use the false passport to enter. She told the immigration inspector the truth. See Matter of Y-G-, 20 I & N Dec. 794 (BIA 1994).

We have weighed the favorable and adverse factors and are satisfied that discretion should be exercised in favor of the applicant. Therefore, we will grant asylum to the applicant.

....

IX. SUMMARY AND CONCLUSION

The applicant has a well-founded fear of persecution in the form of FGM if returned to Togo. The persecution she fears is on account of her membership in a particular social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice. Her fear of persecution is country-wide. We exercise our discretion in her favor, and we grant her asylum.

Therefore, we sustain the applicant's appeal, grant her asylum, and order her admitted to the United States. The following orders are entered.

ORDER: The applicant's appeal is sustained. The applicant is granted asylum and admitted to the United States as an asylee.

**11 FURTHER ORDER: The INS's motion to remand is denied.

CONCURRING OPINION: Lauri Steven Filppu, Board Member, joined by Michael J. Heilman, Board Member, joined.

I respectfully concur. I write separately in part to respond more completely to several arguments advanced by the Immigration and Naturalization Service.

....

III. THE SERVICE'S FRAMEWORK

Despite the absence of any major dispute between the parties in this case, the Service requests that we adopt its broad "framework of analysis" for claims of this type. Its suggestion candidly is aimed at addressing issues it sees arising in relation to claims that may be made by women from other "parts of the world where FGM is practiced" and by those "who have been subjected to it in the past." (Brief at 15).

The Board engages in case adjudication. It decides those issues that lead to the resolution of the cases before it. Our published rulings act as precedent under the regulations, 8 C.F.R. § 3.1(g) (1995), and can affect many related cases. But the Board is not well positioned, in the context of a single disposition of a novel issue, to establish comprehensive rules or guidelines for the adjudication of all cases presenting variations on the case at hand. Yet, it is the cases that are not before us that seem to draw much of the Service's attention in its brief.

The Service points out that it is "estimated that over eighty million females have been subjected to FGM." (Brief at 13). It further notes that there is "no indication" that "Congress considered application of [the asylum laws] to broad cultural practices of the type involved here." (Brief at 14). The Service proceeds to argue that "the underlying purposes of the asylum system ... are unavoidably in tension" in both providing protection for those seriously in jeopardy and in maintaining broad overall governmental control over *371 immigration (Brief at 14-15). The Service further argues that "the Board's interpretation in this case must assure protection for those most at risk of the harms covered by the statute, but it cannot simply grant asylum to all who might be subjected to a practice deemed objectionable or a violation of a person's human rights." (Brief at 15). It is from these underpinnings that the Service argues that the class of FGM victims who may be eligible for asylum "does not consist of all women who come from the parts of the world where FGM is practiced, nor of all who have been subjected to it in the past." (Brief at 15).

**13 The Service then offers its "framework of analysis." That framework includes a new "shocks the conscience" test for persecution. The advantages seen by the Service of this test evidently include: 1) the ability to define FGM as "persecution" notwithstanding any lack of intent to "punish" FGM victims on the part of the victims' parents or tribe members who may well "believe that they are simply performing an important cultural rite that bonds the individual to the society"; 2) the ability to exclude other cultural practices, such as "body scarring," from the definition of persecution as these do not shock the conscience; and 3) the ability to exclude past victims of FGM from asylum eligibility if "they consented" to it or "at least acquiesced," as in the case of a woman who experienced FGM as "a small child," since FGM would not shock the conscience unless inflicted on "an unconsenting or resisting individual." (Brief at 16-18).

With respect to the past persecution question, the Service references 8 C.F.R. § 208.13(b)(1) (1995), and notes "that a woman once circumcised cannot ordinarily be subjected to FGM a second time." (Brief at 18 n.3). The regulation cited by the Service provides in part for a presumption of future persecution that arises from past persecution, and allows only one way of

overcoming the presumption, namely, a change in country conditions. As conditions in countries where FGM is practiced may not have changed, it may be anomalous to have a binding presumption of future persecution where the act of persecution will never again take place for the individual past victim.[2]

The Service's broad framework of analysis also seems to have led it to offer a social group definition that in one respect fits the test set forth in Matter of Acosta, 19 I & N Dec. 211 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987), yet is also defined largely by the harm sought to be included in the concept of persecution (Brief at 19-21). For example, we simply do not know from this record whether the similar social groups proposed by the parties are recognized as groupings for *372 any other purposes within Togolese society aside from the serious personal harm at issue here. The record does not disclose whether this group is seen as a distinct body within Togo or within the tribe both before and after the infliction of FGM on its members, or whether it is a group that exists exclusively in relation to the particular offensive practice at issue here. Because the social group definition has not been a real source of dispute between the parties, we are also not well informed as to the degree of affiliation between or the homogeneity among its members. See Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir.1986).[3]

The Service does not offer its new framework of analysis for our consideration as part of an effort to harmonize a line of past rulings, or otherwise to put some order into a series of decisions that have addressed FGM questions in a variety of contexts. Instead, the Service offers its new analysis in the context of a case of first impression for the Board. It sets out what appear to be a variety of policy considerations and potential areas of concern that might arise in related but nevertheless different cases. It then tries to develop a unifying theory or approach that would support grants of asylum to persons who may prospectively face FGM, but would not routinely make asylum available to persons who have simply previously suffered FGM.

**14 It may be that the Board will end up with an analysis along the lines proposed by the Service as it confronts various issues involving asylum and FGM in the future. Then again the Board may settle upon a different view, which may be better or worse from the perspective of particular parties. But I am fully in agreement with the majority's decision not to attempt to set forth a comprehensive analytical framework in the context of this one case.

The Board certainly is not oblivious to immigration policy considerations in the disposition of cases falling within our jurisdiction. But we are not fundamentally a policy-making body. There may be some unsettling or unsatisfying aspects to the slower and less predictable development of legal guidelines that inures in the Board's case adjudication system. But there are alternatives if resort to the Board's issuance of precedent is not satisfactory in a particular context. The Service can seek to have the Attorney General issue regulations that comprehensively address competing concerns, or it can work within the Administration for appropriate legislative action by Congress.[4] The Service should not, however, expect the Board to endorse a significant *373 new framework for assessing asylum claims in the context of a single novel case, especially when that framework seems intended primarily to address cases that are not in fact before the Board yet.

....

Footnotes

1 This is not to say we are bound absolutely by the parties' arguments. But we face here an issue of first impression, in relation to FGM claims, and we lack the benefit of either amicus briefing or supplemental briefing on questions we might pose. In the absence of any dispute of consequence between the parties, there is no need to resolve this particular question in order to decide the case.

2 It might also be anomalous if persons facing death in their homelands because of religious or political persecution were denied protection for having "assisted, or otherwise participated in the persecution" of their children simply by virtue of being parents of FGM victims and having followed tribal custom. See section 243(h)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2)(A) (1994); 8 C.F.R. § 208.13(c).

3 But for the concession of the Service on this point, I would be inclined to remand this case for further development on the "social group" question. The meaning of the phrase "membership in a particular social group" has not been completely explained by our

case law. Nevertheless, it is questionable whether the statute was meant to encompass groups that are defined principally in relation to the harm feared by the asylum applicant. See Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir.1992); Gomez v. INS, 947 F.2d 660, 663-64 (2d Cir.1991). The record here sheds little light on this question.

4 Indeed, appropriate new legislation might prove to be the better answer if principles of asylum law in fact end up creating the types of anomalies identified by the Service.

21 I. & N. Dec. 357 (BIA), Interim Decision 3278, 1996 WL 379826

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26 I. & N. Dec. 388 (BIA), Interim Decision 3811, 2014 WL 4259462

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

MATTER OF A-R-C-G- ET AL., RESPONDENTS

Decided August 26, 2014

BEFORE: Board Panel: ADKINS-BLANCH, Vice-Chairman; MILLER and GREER, Board Members.
ADKINS-BLANCH, Vice Chairman:

In a decision dated October 14, 2009, an Immigration Judge found the respondents removable and denied their applications for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3) (2006). The respondents have appealed from that decision, contesting only the denial of their applications for relief from removal. We find that the lead respondent, a victim of domestic violence in her native country, is a *389 member of a particular social group composed of "married women in Guatemala who are unable to leave their relationship." The record will be remanded to the Immigration Judge for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

The lead respondent is the mother of the three minor respondents.[7] The respondents are natives and citizens of Guatemala who entered the United States without inspection on December 25, 2005. The respondent filed a timely application for asylum and withholding of removal under the Act.[8]

The Immigration Judge found the respondent to be a credible witness, which is not contested on appeal. It is undisputed that the respondent, who married at age 17, suffered repugnant abuse by her husband. This abuse included weekly beatings after the respondent had their first child.[9] On one occasion, the respondent's husband broke her nose. Another time, he threw paint thinner on her, which burned her breast. He raped her.

**2 The respondent contacted the police several times but was told that they would not interfere in a marital relationship. On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested. Subsequently, he threatened the respondent with death if she called the police again. The respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him. Once she went to Guatemala City for about 3 months, but he followed her and convinced her to come home with promises that he would discontinue the abuse. The abuse continued when she returned. The respondent left Guatemala in December 2005, and she believes her husband will harm her if she returns.

The Immigration Judge found that the respondent did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." The Immigration Judge determined that there was inadequate evidence that the respondent's spouse abused her "in order to overcome" the fact that she *390 was a "married woman in Guatemala who was unable to leave the relationship." He found that the respondent's abuse was the result of "criminal acts, not persecution," which were perpetrated "arbitrarily" and "without reason." He accordingly found that the respondent did not meet her burden of demonstrating eligibility for asylum or withholding of removal under the Act.

On appeal, the respondent asserts that she has established eligibility for asylum as a victim of domestic violence. The Department of Homeland Security ("DHS") initially responded that the Immigration Judge's decision should be upheld. We

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subsequently requested supplemental briefing from both parties and amici curiae to address the issue whether domestic violence can, in some instances, form the basis for a claim of asylum or withholding of removal under sections 208(a) and 241(b)(3) of the Act.[10] *See Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (en banc), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008).

In response to our request for supplemental briefing, the DHS now concedes the respondent established that she suffered past harm rising to the level of persecution and that the persecution was on account of a particular social group comprised of "married women in Guatemala who are unable to leave their relationship." However, the DHS seeks remand, arguing that "further factual development of the record and related findings by the Immigration Judge are necessary on several issues" before the asylum claim can be properly resolved. The respondent opposes remand and maintains that she has met her burden of proof regarding all aspects of her asylum claim. We accept the parties' position on the existence of harm rising to the level of past persecution, the existence of a valid particular social group, and the issue of nexus under the particular facts of this case. We will remand the record for further proceedings.

II. ANALYSIS

A. Particular Social Group

**3 The question whether a group is a "particular social group" within the meaning of the Act is a question of law that we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii) (2014); *see* *391 *Malonga v. Mukasey*, 546 F.3d 546, 553 (8th Cir. 2008). The question whether a person is a member of a particular social group is a finding of fact that we review for clear error. 8 C.F.R. § 1003.1(d)(3)(i).

We initially considered whether victims of domestic violence can establish membership in a particular social group in *Matter of R-A-*, 22 I&N Dec. at 907. We reversed an Immigration Judge's finding that the respondent in that case was eligible for asylum on account of her membership in a particular social group consisting of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." *Id.* at 911. The majority opinion reasoned that the proffered social group was "defined principally, if not exclusively, for purposes of the asylum case and that it was unclear whether "anyone in Guatemala perceives this group to exist in any form whatsoever," including spousal abuse victims themselves or their male oppressors. *Id.* at 918. We further reasoned that even if the proffered social group was cognizable, the respondent did not establish that her husband harmed her on account of her membership in the group. *Id.* at 920-23.

The Acting Commissioner of the former Immigration and Naturalization Service ("INS") referred the decision to the Attorney General for review.[11] In 2001, Attorney General Janet Reno vacated our decision in *Matter of R-A-*, 22 I&N Dec. 906. She remanded the case for the Board's reconsideration following final publication of proposed regulations that addressed the meaning of various terms in asylum law, including "persecution," "membership in a particular social group," and "on account of a protected characteristic. *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,597-98 (proposed Dec. 7, 2000).

On February 21, 2003, Attorney General John Ashcroft certified *Matter of R-A-*for review and provided an opportunity for additional briefing. He remanded the case to the Board in 2005, directing us to reconsider our decision "in light of the final rule." *Matter of R-A-*, 23 I&N Dec. 694. The proposed regulations were not finalized. On September 25, 2008, Attorney General Michael Mukasey certified the case for his review and issued a decision ordering us to reconsider it, removing the requirement that we await the issuance of the final regulations. *Matter of R-A-*, 24 I&N Dec. 629. *Matter of R-A-* is no longer pending.[12]

*392 B. Respondent's Claim

**4 The DHS has conceded that the respondent established harm rising to the level of past persecution on account of a particular social group comprised of ""married women in Guatemala who are unable to leave their relationship." The DHS's

position regarding the existence of such a particular social group in Guatemala under the facts presented in this case comports with our recent precedents clarifying the meaning of the term "particular social group." *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). In this regard, we point out that any claim regarding the existence of a particular social group in a country must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question.

In *Matter of W-G-R-* and *Matter of M-E-V-G-*, we held that an applicant seeking asylum based on his or her membership in a "particular social group" must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.[13] The "common immutable characteristic" requirement incorporates the standard set forth in *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985). The "particularity" requirement addresses "the question of delineation." *Matter of W-G-R-*, 26 I&N Dec. at 214. That is, it clarifies the point that "not every 'immutable characteristic' is sufficiently precise to define a particular social group." *Matter of M-E-V-G-*, 26 I&N Dec. at 239. The "social distinction" requirement renames the former concept of "social visibility" and clarifies "the importance of "perception' or 'recognition' to the concept of the particular social group." *Matter of W-G-R-*, 26 I&N Dec. at 216.

In this case, the group is composed of members who share the common immutable characteristic of gender. *See Matter of Acosta*, 19 I&N Dec. at 233 (finding that sex is an immutable characteristic); *see also Matter of W-G-R-*, 26 I&N Dec. at 213 ("The critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members should not be required to change in order to avoid persecution."). Moreover, marital status can be an immutable ***393** characteristic where the individual is unable to leave the relationship. A determination of this issue will be dependent upon the particular facts and evidence in a case. A range of factors could be relevant, including whether dissolution of a marriage could be contrary to religious or other deeply held moral beliefs or if dissolution is possible when viewed in light of religious, cultural, or legal constraints. In evaluating such a claim, adjudicators must consider a respondent's own experiences, as well as more objective evidence, such as background country information.

****5** The DHS concedes that the group in this case is defined with particularity. The terms used to describe the group--"married," "women," and ""unable to leave the relationship"--have commonly accepted definitions within Guatemalan society based on the facts in this case, including the respondent's experience with the police. *See Matter of M-E-V-G-*, 26 I&N Dec. at 239; *Matter of W-G-R-*, 26 I&N Dec. at 214. In some circumstances, the terms can combine to create a group with discrete and definable boundaries. We point out that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation. *See Matter of W-G-R-*, 26 I&N Dec. at 214 (observing that in evaluating a group's particularity, it may be necessary to take into account the social and cultural context of the alien's country of citizenship or nationality); Committees on Foreign Relations and Foreign Affairs, 111th Cong., 2d Sess., *Country Reports on Human Rights Practices for 2008* 2598 (Joint Comm. Print 2010), *available at* http:// www.gpo.gov/fdsys/pkg/CPRT-111JPRT62931/pdf/CPRT-111JPRT62931.pdf ("*Country Reports*") (discussing sexual offenses against women as a serious societal problem in Guatemala); Bureau of Human Rights, Democracy, and Labor, U.S. Dep't of State, *Guatemala Country Reports on Human Rights Practices-2008* (Feb. 25, 2009), http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119161.htm.[14] In this case, it is significant that the respondent sought protection from her spouse's abuse and that the police refused to assist her because they would not interfere in a marital relationship.

The group is also socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. at 240 ("To be socially distinct, a group need not be seen by society; rather it must be perceived as a group by society."). To have ""social distinction," there must be "evidence showing that society ***394** in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I&N Dec. at 217. The group's recognition is "determined by the perception of the society in question, rather than by the perception of the persecutor."[15] *Matter of M-E-V-G-*, 26 I&N Dec. at 242; *see also Matter of W-G-R-*, 26 I&N Dec. at 214 (noting that there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

****6** When evaluating the issue of social distinction, we look to the evidence to determine whether a society, such as

Guatemalan society in this case, makes meaningful distinctions based on the common immutable characteristics of being a married woman in a domestic relationship that she cannot leave. Such evidence would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors. *Cf. Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (finding that competing family business owners are not a particular social group because they are not perceived as a group by society).

Supporting the existence of social distinction, and in accord with the DHS's concession that a particular social group exists, the record in this case includes unrebutted evidence that Guatemala has a culture of "machismo and family violence." *See Guatemala Failing Its Murdered Women: Report*, Canadian Broad. Corp. (July 18, 2006), http://www.cbc.ca/news/world/guatemala-failing-its-murdered-women-report-1.627240. Sexual offenses, including spousal rape, remain a serious problem. *See Country Reports, supra*, at 2608. Further, although the record reflects that Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police "often failed to respond to requests for assistance related to domestic violence." *Id.* at 2609.

We point out that cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each ***395** individual case, including documented country conditions; law enforcement statistics and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information.[16]

C. Remaining Issues

The DHS stipulates that the respondent suffered mistreatment rising to the level of past persecution. The DHS also concedes in this case that the mistreatment was, for at least one central reason, on account of her membership in a cognizable particular social group. We note that in cases where concessions are not made and accepted as binding, these issues will be decided based on the particular facts and evidence on a case-by-case basis as addressed by the Immigration Judge in the first instance. *See generally Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011); *Matter of J-B-N& S-M-*, 24 I&N Dec. 208 (BIA 2007). In particular, the issue of nexus will depend on the facts and circumstances of an individual claim.

****7** We will remand the record for the Immigration Judge to address the respondent's statutory eligibility for asylum in light of this decision. Under controlling circuit law, in order for the respondent to prevail on an asylum claim based on past persecution, she must demonstrate that the Guatemalan Government was unwilling or unable to control the "private" actor. *See Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732-33 (8th Cir. 2013); *Menjivar v. Gonzales*, 416 F.3d 918, 920-22 (8th Cir. 2005).

If the respondent succeeds in establishing that the Government was unwilling or unable to control her husband, the burden shifts to the DHS to demonstrate that there has been a fundamental change in circumstances such that the respondent no longer has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1)(i)(A), (ii) (2014). Alternatively, the DHS would bear the burden of showing that internal relocation is possible and is not unreasonable. 8 C.F.R. § 1208.13(b)(1)(i)(B), (ii); *see also Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012).[17] The Immigration Judge may also consider, if appropriate, whether the respondent is eligible for humanitarian asylum. *See* 8 C.F.R. § 1208.13(b)(1)(iii).

***396** III. CONCLUSION

For the foregoing reasons, we will remand the record to the Immigration Judge for further proceedings and for the entry of a new decision. On remand, the Immigration Judge should afford the parties the opportunity to update the evidentiary record.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Excerpts from UNHCR First Guidelines on Refugee Women (1991)

Possible problems/needs

The grounds for establishing refugee status do not include gender

54. The 1951 Convention Relating to the Status of Refugees defines a refugee as a person who is outside of his or her country of origin and is unable or unwilling to return owing to a wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, Article I.A.(2). The claim to refugee status by women fearing harsh or inhumane treatment because of having transgressed their society's laws or customs regarding the role of women presents difficulties under this definition. As a UNHCR legal adviser has noted, "transgressing social mores is not reflected in the universal refugee definition." Yet, examples can be found of violence against women who are accused of violating social mores in a number of countries. The offence can range from adultery to wearing of lipstick. The penalty can be death. The Executive Committee of UNHCR has encouraged States to consider women so persecuted as a "social group" to ensure their coverage, but it is left to the discretion of countries to follow this recommendation.

55. Women may also flee their country because of severe sexual discrimination either by official bodies or in local communities. Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution under certain circumstances, the dividing line between discrimination and persecution is not a clear one.

56. Women who are attacked by military personnel may find difficulty in showing that they are victims of persecution rather than random violence. Even victims of rape by military forces face difficulties in obtaining refugee status when the adjudicators of their refugee claim view such attacks as a "normal" part of warfare. Women victimized because of the political activities of a male relative have particular difficulty demonstrating their claim to refugee status. Yet, in many conflicts, attacks on women relatives are a planned part of a terror campaign.

Access to a hearing

57. Sometimes, women who arrive as part of a family unit are not interviewed or are cursorily interviewed about their experiences, even when it is possible that they, rather than their husband, have been the targets of persecution. Their male relatives may not raise the relevant issues because they are unaware of the details or ashamed to report them.

Refugee determination interviews

58. Women face special problems in making their case to the authorities, particularly when they have had experiences which are difficult and painful to describe.

59. Persecution of women often takes the form of sexual assault. The methods of torture can

consist of rape, the use of electric currents upon the sexual organs; mechanical stimulation of the erogenous zones; manual stimulation of the erogenous zones; the insertion of objects into the body-openings (with objects made of metal or other materials to which an electrical current is later connected); the forced witnessing of 'unnatural' sexual relations; forced masturbation or to be masturbated by others; fellatio and oral coitus; and finally, a general atmosphere of sexual aggression and threats of the loss of the ability to reproduce and enjoyment of sexual relations in the future.

60. The female victim of such sexual torture obviously may be reluctant or find it very difficult to speak about it, particularly to a male interviewer. Rape, even in the context of torture, is seen in some cultures as a failure on the part of the woman to preserve her virginity or marital dignity. She may be shunned by her family and isolated from other members of the community. Discussing her experience becomes a further source of alienation.

61. A second problem arises when women are interviewed about the claims to refugee status made by male relatives. A wife may be interviewed primarily to corroborate the stories told by her husband; if she is unaware of the details of her husband's experiences (for example, the number of her husband's military unit), the entire testimony may be discounted as lacking in credibility. Yet, in many cultures, husbands do not share many details about military or political activities with their wives.

225 F.3d 1084
United States Court of Appeals,
Ninth Circuit.

Geovanni HERNANDEZ–MONTIEL, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Filed Aug. 24, 2000.

Before: BRUNETTI and TASHIMA, Circuit Judges, and SCHWARZER,*District Judge.

Opinion by Judge TASHIMA; Concurrence by Judge BRUNETTI.

TASHIMA, Circuit Judge:

Geovanni Hernandez–Montiel ("Geovanni"),[1] a native and citizen of Mexico, seeks review of a decision of the Board of Immigration Appeals ("BIA"), denying his application for both asylum and withholding of deportation. The BIA dismissed Geovanni's appeal because it agreed with the immigration judge ("IJ") that Geovanni failed to show that he was persecuted, or that he had a well-founded fear of future persecution, on account of his membership in a particular social group.

The primary issue we must decide is whether gay men with female sexual identities in Mexico constitute a protected "particular social group" under the asylum statute. We conclude as a matter of law that gay men with female sexual identities in Mexico constitute a "particular social group" and that Geovanni is a member of that group. His female sexual identity is immutable because it is inherent in his identity; in any event, he should not be required to change it. Because the evidence compels the conclusion that Geovanni suffered past persecution and has a well-founded fear of future persecution if he were forced to return to Mexico, we conclude that the record compels a finding that he is entitled to asylum and withholding of deportation.

I. FACTUAL BACKGROUND

Geovanni testified that, at the age of eight, he "realized that [he] was attracted to people of [his] same sex." At the age of 12, Geovanni began dressing and behaving as a woman.

*1088 He faced numerous reprimands from family and school officials because of his sexual orientation. His mother registered him in a state-run Mexican school and informed the school authorities about what she deemed to be his "problem," referring to his sexual orientation. School authorities directed Geovanni to stop socializing with two gay friends. The father of a schoolmate grabbed Geovanni by the arm and threatened to kill him for "perverting" his son. He was even prevented from attending a school dance because of the way he was dressed. Shortly after the dance, the school asked Geovanni's mother to consent to his expulsion because he was not acting appropriately. He could not enroll in another school because the school refused to transfer his paperwork until he agreed to change his sexual orientation. Geovanni's parents threw him out of their home the day after his expulsion.

Beyond his school and family, Geovanni also suffered harassment and persecution at the hands of Mexican police officers. On numerous occasions, the Mexican police detained and even strip-searched Geovanni because he was walking down the street or socializing with other boys also perceived to be gay. In 1992, the Mexican police twice arrested Geovanni and a friend. The police told them that it was illegal for homosexuals to walk down the street and for men to dress like women. The police, however, never charged Geovanni with any crime.

Police officers sexually assaulted Geovanni on two separate occasions. In November 1992, when Geovanni was 14 years old, a police officer grabbed him as he was walking down the street, threw him into the police car, and drove to an uninhabited area. The officer demanded that Geovanni take off his clothes. Threatening him with imprisonment if he did not comply, the officer forced Geovanni to perform oral sex on him. The officer also threatened to beat and imprison Geovanni if he ever told anyone about the incident.

Approximately two weeks later, when Geovanni was at a

bus stop with a gay friend one evening, the same officer pulled up in a car, accompanied by a second officer. The officers forced both boys into their car and drove them to a remote area, where they forced the boys to strip naked and then separated them. One of the officers grabbed Geovanni by the hair and threatened to kill him. Holding a gun to his temple, the officer anally raped Geovanni. Geovanni believes that his friend was also raped, although his friend refused to talk about the incident. Even before the boys could get dressed, the police officers threatened to shoot if they did not start running. The boys were left stranded in an abandoned area.

A few months after the second assault, in February 1993, Geovanni was attacked with a knife by a group of young men who called him names relating to his sexual orientation. He was hospitalized for a week while recovering from the attack.

Geovanni fled to the United States in October 1993, when he was 15 years old. He was arrested within a few days of his October 1993 entry.[2] When Geovanni returned to Mexico to live with his sister, she enrolled him in a counseling program, which ostensibly attempted to "cure" his sexual orientation by altering his female appearance. The program staff cut his hair and nails, and forced him to stop taking female hormones. Geovanni remained in the program from late January to late March 1994. Because his sister saw no changes in him, she brought Geovanni home to live with her. Soon thereafter, however, she forced Geovanni out of her house because he was not "cured" of his gay sexual orientation, despite his *1089 change in appearance. He again sought refuge in the United States.

II. PROCEDURAL BACKGROUND

After a number of attempts to re-enter the United States, Geovanni last entered on or around October 12, 1994, without inspection. He filed an application for asylum and withholding of deportation on February 22, 1995.

At his asylum hearing, Geovanni presented the testimony of Thomas M. Davies, Jr., a professor at San Diego State University and an expert in Latin American history and culture. Professor Davies, who has lived for extended periods of time in Mexico and elsewhere in Latin America, testified that certain homosexuals in Latin America are subjected to greater abuse than others. Professor Davies testified that it is "accepted" that "in most of Latin America a male before he marries may engage in homosexual acts as long as he performs the role of the male." A male, however, who is perceived to assume the stereotypical "female," *i.e.*, passive, role in these sexual relationships is "ostracized from the very beginning and is subject to persecution, gay bashing as we would call it, and certainly police abuse." Professor Davies testified that these gay men with "female" sexual identities in Mexico are "heavily persecuted by the police and other groups within the society.... [They are] a separate social entity within Latin American society and in this case within the nation of Mexico." According to Professor Davies, it is commonplace for police to "hit the gay street ... and not only brutalize but actually rape with batons ... homosexual males that are dressed or acting out the feminine role."

Professor Davies testified that gay men with female sexual identities are likely to become scapegoats for Mexico's present economic and political problems, especially since the recent collapse of the Mexican economy. Professor Davies specifically noted that Geovanni is "a homosexual who has taken on a primarily 'female' sexual role." Based on his expert knowledge, review of Geovanni's case, and interaction with Geovanni, Professor Davies opined that Geovanni would face persecution if he were forced to return to Mexico.

The IJ denied Geovanni asylum on both statutory and discretionary grounds. The IJ determined that Geovanni's testimony was "credible," "sincere," "forthright," "rational," and "coherent." The IJ found, however, that Geovanni had failed to demonstrate persecution "on account of a particular social group," classifying his social group as "homosexual males who wish to dress as a woman [sic.]." The IJ noted that Geovannni "has altered certain outward physical attributes and his manner of dress to resemble a woman." The IJ found Geovanni's female gender identity not to be immutable, explaining:

> If he wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity. The record reflects that respondent's decision to dress as a women [sic] is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that

> respondent himself may not view his dress as being so fundamental to his identity that he should not have to change it.

The IJ further found that Geovanni was not entitled to discretionary eligibility and denied voluntary departure in the exercise of discretion.

The BIA dismissed Geovanni's appeal from the IJ's decision. The BIA agreed that Geovanni gave credible testimony, but found that he failed to establish his statutory eligibility for asylum. The BIA found that Geovanni did not meet his burden of "establishing that the abuse he suffered was because of his membership in a particular social group," which the BIA classified as "homosexual males who dress as females." Concluding that the "tenor of the respondent's claim is that he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual," the BIA found that Geovanni ***1090** failed to show that "his decision to dress as a female was an immutable characteristic." The BIA did not reach the alternative decision of whether Geovanni established his eligibility for asylum in the exercise of discretion, and it denied Geovanni's request for voluntary departure in the exercise of discretion.

....

IV. DISCUSSION

....

B. *General Framework*

[4] The Attorney General may, in her discretion, grant asylum to an applicant determined to be a refugee, within the meaning of § 101(a)(42)(A) of the INA, 8 U.S.C. § 1101(a)(42)(A). An alien establishes refugee status if he is unable or unwilling to return to his country of nationality either because: (1) he was persecuted in the past; or (2) he has a well-founded fear of future persecution "on account of race, religion, nationality, membership in a *particular social group,* or political opinion." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (emphasis added); *see also INS v. Cardoza–Fonseca,* 480 U.S. 421, 423, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *Korablina v. INS,* 158 F.3d 1038, 1043 (9th Cir.1998). The Attorney General must withhold deportation of any asylum applicant who establishes a "clear probability of persecution," which is a stricter standard than the "well-founded fear" standard for asylum. *INS v. Stevic,* 467 U.S. 407, 430, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984).

[5] [6] The applicant has the burden of proving his eligibility with "credible, direct, and specific evidence." *Prasad v. I.N.S.,* 47 F.3d 336, 338 (9th Cir.1995) (citation omitted). We have held that where "the IJ expressly finds certain testimony to be credible, and where the BIA makes no contrary finding, we accept as indisputed the testimony given at the hearing before the IJ." *Velarde v. INS,* 140 F.3d 1305, 1309 (9th Cir.1998) (internal quotation marks and citations omitted). Here, the IJ found Geovanni's testimony to be "credible," "sincere," "forthright," "rational," and "coherent." The BIA agreed that "the respondent testified credibly regarding the events that occurred in his life." Thus, we also accept Geovanni's testimony.

C. *Membership in a "Particular Social Group"*

[7] This case turns on the legal question of whether Geovanni was persecuted on account of his membership in a "particular social group." *See Fatin v. INS,* 12 F.3d 1233, 1239–42 (3d Cir.1993) (reviewing de novo legal question of what constitutes a "particular social group"). Whether Geovanni is a member of a particular group is a question of fact, to which we apply the substantial evidence test. *See Prasad,* 101 F.3d at 616–17. We first conclude that, as a matter of law, the appropriate "particular social group" is that group in Mexico made up of gay men with female sexual identities. Second, we conclude that the evidence compels the conclusion that Geovanni is a member of that group and was persecuted on account of his membership in that "particular social group."

1. *Defining "Particular Social Group"*

There is no definition of "particular social group" in the INA. The BIA, however, has recognized that the language comes directly from the United Nations Protocol Relating to the Status of Refugees ("Protocol"). *See Matter of Acosta,* 19 I. & N. Dec. 211, 232, 1985 WL 56042 (BIA 1985). When Congress ratified the Protocol on October 4, 1968, it did not shed any further light on the definition of "particular social group." *See Sanchez–Trujillo v. INS,* 801 F.2d 1571, 1576 (9th Cir.1986).

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[8] The case law regarding the definition of "particular social group" is not wholly consistent. In *Acosta,* 19 I. & N. Dec. at 233, 1985 WL 56042 the BIA interpreted "persecution on account of membership in a particular social group" to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." The BIA explained that:

> The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as ***1092** former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Id. The BIA held that a group of taxi drivers did not meet the immutable characteristic requirement because an occupation can change; thus, driving a taxi is not fundamental to a person's identity. The BIA's interpretation is entitled to some deference. *See Arrieta v. INS,* 117 F.3d 429, 430 (9th Cir.1997) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

The First, Third, and Seventh Circuits have adopted *Acosta* 's immutability analysis. *See Ananeh–Firempong v. INS,* 766 F.2d 621, 626 (1st Cir.1985) (recognizing *Acosta* in determining that family relations can be the basis of a "particular social group"); *Fatin,* 12 F.3d at 1239–41 (noting that the subgroup of Iranian feminists who refuse to conform to the government's gender-specific laws and social norms could satisfy the statutory concept of "particular social group") (internal quotation marks omitted); *Lwin v. INS,* 144 F.3d 505, 511–12 (7th Cir.1998) (recognizing parents of Burmese student dissidents as part of a social group because they share a "common, immutable characteristic").

In *Sanchez–Trujillo,* 801 F.2d at 1576, we acknowledged that the social group category "is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion." We stated that:

> "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.

Id. (footnote omitted).

The *Sanchez–Trujillo* court held that the class of working class, urban males of military age who maintained political neutrality in El Salvador did not constitute a "particular social group" for which the immigration laws provide protection from persecution. *See id.* at 1576–77 (indicating that cognizable groups cannot "encompass every broadly defined segment of a population" but should be a "small, readily identifiable group") (citations omitted).

We are the only circuit to suggest a "voluntary associational relationship" requirement. *Id.* at 1576. The Seventh Circuit has noted that this requirement "read literally, conflicts with *Acosta* 's immutability requirement." *Lwin,* 144 F.3d at 512. Moreover, in *Sanchez–Trujillo,* we recognized a group of family members as a "prototypical example" of a "particular social group."[4] 801 F.2d at 1576. Yet, biological family relationships are far from "voluntary." We cannot, therefore, interpret *Sanchez–Trujillo* 's "central concern" of a voluntary associational relationship strictly as applying to every qualifying "particular social group." For, as *Sanchez–Trujillo* itself recognizes, in some particular social groups, members of the group are not voluntarily associated by choice.[5]

***1093** [9] We thus hold that a "particular social group" is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so

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fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.[6]

2. *Sexual Identity as Basis for "Particular Social Group"*

Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them. Many social and behavioral scientists "generally believe that sexual orientation is set in place at an early age." Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men,* 26 Cornell Int'l L.J. 605, 614 n. 56 (1993). The American Psychological Association has condemned as unethical the attempted "conversion" of gays and lesbians. *See id.* Further, the American Psychiatric Association and the American Psychological Association have removed "homosexuality" from their lists of mental disorders. *See Boy Scouts of America v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 2478, 147 L.Ed.2d 554 (2000) (Stevens, J. dissenting).

Sexual identity is inherent to one's very identity as a person. *See* Alfred Kinsey, et al., "Sexual Behavior in the Human Male," in *Cases and Materials on Sexual Orientation and the Law* 1, 7 (William B. Rubenstein ed., 2d ed., 1997) ("Even psychiatrists discuss 'the homosexual personality' and many of them believe that preferences for sexual partners of a particular sex are merely secondary manifestations of something that lies much deeper in the totality of that intangible which they call the personality."); *cf. Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 35 (D.C.1987) (observing that "homosexuality encompasses far more than people's sexual proclivities. Too often homosexuals have been viewed simply with reference to their sexual interests and activity. Usually the social context and psychological correlates of homosexual experience are largely ignored ... ") (internal quotation marks and citations omitted). Sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance. *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays,* 96 Colum. L.Rev. 1753, 1775 n. 3 (1996) (defining gay identity as "the shared experience of having a sexual attachment to persons of the same sex and the oppression experienced because of that attachment"); Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts,* 10 Berkeley Women's L.J. 98, 100–03 (1995) (discussing the relationship of identity and conduct in arguing that "[s]eparating the way we speak of sexual acts and sexual identities is crucial" and arguing that the traditional binary system of heterosexuals and homosexuals is too restrictive); *see also* Gilbert Herdt, *Same Sex, Different Cultures: Exploring Gay and Lesbian Lives* 20 (1997).

In *Gay Rights Coalition of Georgetown Univ. Law Ctr.,* the District of Columbia Court of Appeals noted that:

> [H]omosexuality is as deeply ingrained as heterosexuality.... [E]xclusive homosexuality probably is so deeply ingrained that one should not attempt or ***1094** expect to change it. Rather, it would probably make far more sense simply to recognize it as a basic component of a person's core identity.

Gay Rights Coalition of Georgetown Univ. Law Ctr., 536 A.2d at 34–35 (quoting A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference—Its Development in Men and Women 190, 211 (1981)).

Under the BIA's decision in *Toboso–Alfonso,* 20 I. & N. Dec. 819, 820–23, 1990 WL 547189 (BIA 1990), sexual orientation can be the basis for establishing a "particular social group" for asylum purposes. In *Toboso–Alfonso,* the Cuban government had registered and tracked homosexual men for investigation over many years. *See id.* at 820–21. The INS did not contest that homosexuality is an immutable characteristic, and the BIA held that sexual orientation establishes membership in a "particular social group." *See id.* at 822–23. The Attorney General has designated the decision in *Toboso–Alfonso* to be "precedent in all proceedings involving the same issue or issues." Attorney General Order No. 1895 (June 19, 1994).

[10] In determining that sexual orientation and sexual identity can be the basis for establishing a "particular social group," we also find persuasive the reasoning in *Matter of Tenorio,* No. A72–093–558 (IJ July 26, 1993). In *Tenorio,* the IJ granted asylum to a Brazilian gay man who had been beaten and stabbed by a group of people in Rio de Janeiro, who repeatedly used anti-gay epithets. The IJ found that Tenorio had a well-founded fear of future persecution due to his membership in a "particular

social group" based on his sexual orientation. *See id.* at 11. The BIA adopted the IJ's reasoning and dismissed the INS' appeal. *See Matter of Tenorio,* No. A72–093–558 (BIA 1999) (per curiam). The BIA held that the IJ's decision "correctly concludes that the respondent has established persecution or a well-founded fear of future persecution on account of one of the five grounds enumerated" in the INA. *Id.*

3. *Particular Social Group of Gay Men with Female Sexual Identities in Mexico*

[11] Based on the reasoning of the authorities discussed above, we conclude that the appropriate "particular social group" in this case is composed of gay men with female sexual identities in Mexico. Although not necessary to establish the "particular social group," the testimony of Professor Davies is helpful to our analysis. Professor Davies testified that gay men with female sexual identities in Mexico are "heavily persecuted by the police and other groups within the society.... [T]hey are a separate social entity within Latin American society and in this case within the nation of Mexico." Professor Davies expressly noted that as a subset of the gay male population, men with female sexual identities, are "ostracized from the beginning and [ ] subject to persecution, gay bashing as we would call it, and certainly police abuse."

We thus conclude that the BIA erred in defining the "particular social group" as "homosexual males who dress as females." Professor Davies did not testify that homosexual males are persecuted simply because they may dress as females or because they engage in homosexual acts. Rather, gay men with female sexual identities are singled out for persecution because they are perceived to assume the stereotypical "female," *i.e.,* passive, role in gay relationships. Gay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails.

Gay men with female sexual identities in Mexico are a "small, readily identifiable group." *Sanchez–Trujillo,* 801 F.2d at 1576 (citation omitted). Their female sexual identities unite this group of gay men, and their sexual identities are so fundamental to their human identities that they should not be required to change them. We therefore conclude as a matter of law that the "particular social group" in this ***1095** case is comprised of gay men with female sexual identities in Mexico.

4. *Geovanni's Membership*

[12] We find that the evidence compels the conclusion that Geovanni is a member of the "particular social group" of gay men in Mexico with female sexual identities. Professor Davies specifically classified Geovanni as "a homosexual who has taken on a primarily 'female' sexual role."[7] Geovanni has known that he was gay from the age of eight and began dressing as a woman when he was 12. He socialized with other gay boys in school, which led to his eventual expulsion. The BIA found that the police "temporarily detained [him] for walking the street and socializing with other young homosexual men." He was sexually assaulted twice by the police. After placing him in a therapy program to "convert" his sexuality, his sister eventually "realized that I was the same and the only thing that had changed was the fact that they had cut my hair and cut my nails." Geovanni's female sexual identity must be fundamental, or he would not have suffered this persecution and would have changed years ago. *See Fatin,* 12 F.3d at 1241 (noting that "if a woman's opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as 'so fundamental to [her] identity or conscience that [they] ought not be required to change it' ") (quoting *Acosta,* 19 I. & N. Dec. at 234, 1985 WL 56042).

Geovanni should not be required to change his sexual orientation or identity. *See Acosta,* 19 I. & N. Dec. at 234, 1985 WL 56042; *Tenorio,* No. A72–093–558 (IJ) at 14 ("Sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change."). Because we conclude that Geovanni should not be required to change his sexual orientation or identity, we need not address whether Geovanni could change them. Geovanni's credible and uncontradicted testimony about the inherent and immutable nature of his sexual identity compels the conclusion that Geovanni was a member of the particular social group of gay men in Mexico with female sexual identities.

The BIA erroneously concluded that "tenor of [Geovanni's] claim is that he was mistreated because of the way he dressed (as a male prostitute) and not because he is a homosexual." This statement is not supported by substantial evidence; in fact, it is wholly unsupported by any evidence in the record. There is no evidence that Geovanni was a male prostitute, and we do not venture to guess the non-record basis of the BIA's assumption of how a male prostitute dresses.[8]

The BIA stressed that Geovanni could not remember how he was dressed on one occasion when he was arrested crossing the border between the United States and Mexico. The BIA, therefore, agreed with the IJ that "the decision to dress as a female was a volitional act, not an immutable trait." Geovanni did testify that he ***1096** dresses as a man when he is going to a place where an effeminate style of dress would not be appropriate. That Geovanni could not remember how he was dressed on one occasion several years before does not support the BIA's conclusion that, because Geovanni can change his clothes, he can change his identity as quickly as the taxi drivers in *Acosta* can change jobs.

This case is about sexual identity, not fashion. Geovanni is not simply a transvestite "who dresses in clothing of the opposite sex for psychological reasons." *American Heritage Dictionary* 1289 (2d Coll. Ed.) (1985). Rather, Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women.

D. *"On Account Of"*

[13] Geovanni must show that he was persecuted "on account of" his "membership in the particular social group." INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A). In satisfying the "on account of" requirement, the evidence compels a finding that Geovanni's sexual identity was a significant motivation for the violence and abuse he endured. *See Lopez–Galarza v. INS,* 99 F.3d 954, 959 (9th Cir.1996) (holding that the petitioner must present "some evidence, direct or circumstantial, of the persecutor's motive, since 8 U.S.C. § 1101 requires 'persecution on account of' various characteristics"); *see also INS v. Elias–Zacarias,* 502 U.S. 478, 483, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992); *Pitcherskaia v. INS,* 118 F.3d 641, 647 (9th Cir.1997). The BIA explicitly noted that Geovanni was "stopped on numerous occasions ... and temporarily detained for walking the street and socializing with other young homosexual men." The police were not going after people with long hair and nails, or everyone dressed in female clothing. Geovanni was sexually assaulted because of his outward manifestations of his sexual orientation.

The government's legal reasoning is unpersuasive when it argues that "the evidence does not compel the conclusion that the mistreatment [Geovanni] suffered by Mexican authorities was solely on account of his homosexual status." Geovanni is not required to prove that his persecutors were motivated by his sexual orientation to the exclusion of all other possible motivations. *See Briones v. INS,* 175 F.3d 727, 729 (9th Cir.1999) (en banc); *Borja v. INS,* 175 F.3d 732, 735 (9th Cir.1999) (en banc). We have recognized that "persecutory conduct may have more than one motive, and so long as one motive is of one of the statutorily enumerated grounds, the requirements [for asylum] have been satisfied." *Singh v. Ilchert,* 63 F.3d 1501, 1509–10 (9th Cir.1995); *see Osorio v. INS,* 18 F.3d 1017, 1028 (2d Cir.1994) ("The plain meaning of the phrase 'persecution on account of the victim's political opinion,' does not mean persecution *solely* on account of the victim's political opinion.") (emphasis in original).

Professor Davies' testimony and the accompanying evidence highlight that the persecution Geovanni suffered was "on account of" his membership in the "particular social group" of men with female sexual identities in Mexico. *Cf. Ramirez Rivas v. INS,* 899 F.2d 864, 873 (9th Cir.1990) (relying on "highly persuasive" expert testimony to find a clear probability of future persecution for withholding of deportation), *vacated on other grounds,* 502 U.S. 1025, 112 S.Ct. 858, 116 L.Ed.2d 766 (1992). Professor Davies testified that gay men with female sexual identities are recognized in Mexico as a distinct and readily identifiable group and are persecuted for their membership in that group. He testified that the police attack and even rape men with female sexual identities.

Attached to Professor Davies's declaration are numerous articles and reports documenting the violence against gay men in Mexico and throughout Latin America. A co-founder and general coordinator of a Mexican human rights organization stated: "The government has said it will not protect transvestites unless they are dressed like men, insinuating that it is okay to kill homosexuals if they are visible." *Anti–* ***1097** *Queer Violence Continues in Mexico,* S.F. Bay Times, Feb. 25, 1993. There was also a *New York Times* article, documenting the granting of asylum to a gay man from Mexico. *See Gay Man Who Cited Abuse in Mexico is Granted Asylum,* N.Y. Times, March 26, 1994 at A5. The man had been arrested in Mexico for going to certain neighborhoods, attending certain parties and patronizing certain bars. The police falsely accused him of crimes, extorted him, and on one occasion, raped him. *See id.*

Also in evidence was an advisory opinion about Geovanni's case by the Office of Asylum Affairs of the United States Department of State, claiming that: "[o]ur

Embassy in Mexico advises us that it has no evidence of the systematic persecution of homosexuals there although *random violence against homosexuals has occurred.*" (emphasis added). This evidence along with Geovanni's testimony compels the conclusion that Geovanni was persecuted "on account of" his membership in the "particular social group." The evidence is susceptible of no other conclusion.

E. *Persecution*

[14] The BIA legally erred in finding that Geovanni failed to establish both past persecution and a well-founded fear of future persecution upon return to Mexico. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *see also Pitcherskaia,* 118 F.3d at 646 (reviewing de novo the legal question of the meaning of persecution). We have held that persecution involves "the infliction of suffering or harm upon those who differ ... in a way regarded as offensive." *Desir v. Ilchert,* 840 F.2d 723, 726–27 (9th Cir.1988) (internal quotation mark and citation omitted); *see Hernandez–Ortiz v. INS,* 777 F.2d 509, 516 (9th Cir.1985) (stating that persecution is "oppression ... inflicted on groups or individuals because of a difference that the persecutor will not tolerate").

[15] Geovanni must show that the persecution he suffered was "inflicted either by the government or by persons or organizations which the government is unable or unwilling to control." *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir.1997). The BIA was misguided when it concluded that Geovanni was not persecuted "even if the Mexican authorities give low priority to protection of gays." In this case, it was the police who actually perpetrated the violence. During the first sexual attack, Geovanni was abducted, ordered to remove his clothes, and forced to perform oral sex on the officer. The officer then told Geovanni that he would go to jail if he told anyone about the rape. During the second assault, Geovanni and a friend were abducted by two officers, driven to a secluded area, and ordered to remove their clothing. One officer sodomized Geovanni as he held a gun to his temple. Given these past assaults, Geovanni "is at risk of persecution at the hand of the very agency which purports to protect him by law...." *In re Inaudi,* No. T91–04459 (Immigration and Refugee Board of Canada Apr. 9, 1992).

The sexual assaults Geovanni suffered at the hands of police officers undoubtedly constitute persecution. We have held that "rape or sexual assault ... may constitute persecution." *Lopez–Galarza,* 99 F.3d at 959; *see Lazo–Majano v. INS,* 813 F.2d 1432, 1434 (9th Cir.1987) (finding persecution of a woman who was raped by a military sergeant whose clothing she was paid to wash), *overruled on other grounds, Fisher v. INS,* 79 F.3d 955, 961 (9th Cir.1996) (en banc). In *Lopez–Galarza,* we took note of:

> the numerous studies revealing the physical and psychological harms rape causes. A recent article in the *Journal of the American Medical Association* summarized several studies of the effects of rape, and concluded:
>
> > Rape commonly results in severe and long-lasting psychological sequelae that are complex and shaped by the particular social and cultural context in which the rape occurs.... Commonly reported feelings at the time of ***1098** the rape include shock, a fear of injury or death that can be paralyzing, and a sense of profound loss of control over one's life. Longer-term effects can include persistent fears, avoidance of situations that trigger memories of the violation, profound feelings of shame, difficulty remembering events, intrusive thoughts of the abuse, decreased ability to respond to life generally, and difficulty reestablishing intimate relationships.

Lopez–Galarza, 99 F.3d at 962 (citation omitted). There is no reason to believe that the trauma for male victims of rape is any less severe than for female victims.[9]

The BIA gave the convoluted, inapposite, and irrelevant reasoning that "[w]hile *Toboso–Alfonso, supra,* provides a basis for finding that homosexuality is a basis for asylum, anti-sodomy laws are not persecution. *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)." Geovanni did not argue, however, that he was being persecuted because of the prohibition of any anti-sodomy laws. Instead, he was raped twice by police officers who forced him to engage in sodomy. *Bowers* has no relevance to this case, and the BIA's reliance on that case is completely misplaced.

Further, the BIA erroneously reasoned that "the respondent's mistreatment arose from his conduct ... thus the rape by the policemen, and the attack by a mob of gay bashers are not necessarily persecution...." We are uncertain whether by "conduct" the BIA was referring to some alleged criminal conduct or to Geovanni's appearance and style of dress. Either way, substantial

evidence compels a contrary result. *See Prasad,* 101 F.3d at 616–17.

There is absolutely no evidence in the record that Geovanni's "mistreatment arose from his conduct," if conduct refers to criminal activity. There is no evidence in the record of any past convictions. In fact, the IJ explicitly noted that, despite police harassment in Mexico, Geovanni had "never been formally charged or convicted of any offense."

Perhaps, then, by "conduct," the BIA was referring to Geovanni's effeminate dress or his sexual orientation as a gay man, as a justification for the police officers' raping him. The "you asked for it" excuse for rape is offensive to this court and has been discounted by courts and commentators alike. *See e.g., Timm v. Delong,* 59 F.Supp.2d 944, 959–60 (D.Neb.1998) (stating that Congress found that almost one quarter of state judges erroneously believe that rape victims precipitate their sexual assaults because of what they wear or their actions preceding the incidents); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law,* 110 Harv. L.Rev. 563, 622 (1997) (constructing new ways to evaluate rape cases that will not blame the victim); Judith M. Billing & Brenda Murray, *Introduction to the Ninth Circuit Gender Bias Task Force Report: The Effects of Gender,* 67 S. Cal. L.Rev. 739, 741 (1994) (stating that blaming women for bringing domestic violence on themselves is a common example of gender bias in the courts).

[16] Further, the BIA had no basis for concluding that Geovanni's failure to respond to questions regarding his arrests in the United States "casts further doubt on his claim of persecution." It is true that "[t]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak." *INS v. Lopez–Mendoza,* 468 U.S. 1032, 1043, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984) (citing ***1099** *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 153–54, 44 S.Ct. 54, 68 L.Ed. 221 (1923) (Brandeis, J.)). Any inference to be drawn, however, must be reasonable. There simply is no logical connection between Geovanni's failure to answer questions regarding arrests in the United States and the rapes by police officers in Mexico.

[17] Because Geovanni has established past persecution, there is a presumption that he has a well-founded fear of future persecution, which the INS must overcome by a preponderance of the evidence that country conditions have changed. *See* 8 C.F.R. § 208.13(b)(1)(i); *Singh,* 63 F.3d at 1510–11. The INS presented no evidence that Mexico has taken effective steps to curb sexual orientation-based violence, including that perpetrated by the police. To the contrary, Professor Davies testified that the situation for gay men in Mexico has worsened because of the decline of the economy. Thus, the presumption must be given its full force.

F. *Withholding of Deportation*

[18] Our analysis of past persecution also triggers a presumption that Geovanni has shown a "clear probability" of future persecution with respect to his withholding claim—a presumption that the INS may also rebut by an individualized showing of changed country conditions. *See* 8 C.F.R. § 208.16(b)(1); *Vallecillo–Castillo v. INS,* 121 F.3d 1237, 1240 (9th Cir.1996). Again, there is nothing in the record to rebut that presumption. Accordingly, we conclude that Geovanni is also entitled to withholding of deportation.[10]

V. CONCLUSION

We hold that the BIA's decision denying Geovanni asylum on statutory grounds is fatally flawed as a matter of law and is not supported by substantial evidence. Through police harassment and rape, Geovanni suffered past persecution in Mexico on account of his sexual orientation for being a gay man with a female sexual identity. Because that showing is unrebutted, we must presume that he has a well-founded fear of persecution if he returns. He is entitled to asylum and withholding of deportation. We therefore grant the petition for review and remand the case to the BIA with instructions to grant his application for withholding of deportation and to present this case to the Attorney General for the exercise of her discretion to grant asylum.

PETITION FOR REVIEW GRANTED and REMANDED with instructions.

BRUNETTI, Circuit Judge, specially concurring:

The majority's conclusion that Geovanni Hernandez–

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Montiel is entitled to asylum and withholding of deportation is correct. I do not agree, however, with the broad reasoning and rationale used by the majority in reaching its conclusion. I therefore must concur only in the result reached by the majority.

The evidence presented by Professor Davies supports the legal conclusion that in Mexico, gay men who have female sexual identities constitute a particular social group for asylum purposes. Hernandez–Montiel's uncontradicted testimony regarding his physical and mental state is sufficient to establish that he is a member of this particular social group. Professor Davies testified that gay men with female sexual identities are persecuted in Mexico. Hernandez–Montiel's testimony before the Immigration Judge that he suffered persecution on account of his membership in this social group was found credible by *1100 both the Immigration Judge and the Board of Immigration Appeals. Hernandez–Montiel is therefore entitled to asylum and withholding of deportation based on his well-founded fear of persecution should he be returned to Mexico.

All Citations

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U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

MATTER OF M-E-V-G-, RESPONDENT

Decided February 7, 2014

BEFORE: Board Panel: ADKINS-BLANCH, Vice Chairman; GUENDELSBERGER and GREER, Board Members.
GUENDELSBERGER, Board Member:

....

I. FACTUAL AND PROCEDURAL HISTORY

**2 Prior decisions of the Board and Third Circuit have set forth the underlying facts of this case in detail. In short, the respondent claims that he suffered past persecution and has a well-founded fear of future persecution in his native Honduras because members of the Mara Salvatrucha gang beat him, kidnaped and assaulted him and his family while they were traveling in Guatemala, and threatened to kill him if he did not join the gang. In addition, the respondent testified that the gang members would shoot at him and throw rocks and spears at him about two to three times per week. The respondent asserts that he was persecuted "on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs."

....

The case is now before us following a second remand from the Third Circuit. *Valdiviezo-Galdamez v. Att'y Gen. of U.S.* ("*Valdiviezo-Galdamez II*"), 663 F.3d 582 (3d Cir. 2011). The court found that our requirement that a particular social group must possess the elements of "particularity" and "social visibility" is inconsistent with prior Board decisions, that we have not announced a "principled reason" for our adoption of that inconsistent requirement, and that our interpretation is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Valdiviezo-Galdamez II*, 663 F.3d at 608. Nevertheless, the court advised that "an agency can change or adopt its policies" and recognized that the Board may add new requirements to, or even change, its definition of a ""particular social group." *Id.* (quoting *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002)) (internal quotation marks omitted).

II. ISSUE

**3 The question before us is whether the respondent qualifies as a ""refugee" as a result of his past mistreatment, and his fear of future persecution, at the hands of gangs in Honduras. Specifically, we address whether the respondent has established an asylum claim based on his membership in a particular social group.

III. PARTICULAR SOCIAL GROUP

A. Origins

An applicant for asylum has the burden of establishing that he or she is a refugee within the meaning of section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2012). This requires the applicant to demonstrate that he or she suffered past persecution or has a well-founded fear of future persecution on account of "race, religion, *230 nationality, membership in a particular social group, or political opinion." *Id.; see also INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987)....

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The phrase "membership in a particular social group," which is not defined in the Act, the Convention, or the Protocol, is ambiguous and difficult to define. *Matter of Acosta*, 19 I&N Dec. 211, 232-33 (BIA 1985); *see also, e.g., Valdiviezo-Galdamez II*, 663 F.3d at 594 ("The concept is even more elusive because there is no clear evidence of legislative intent."); *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) ("Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group."D').

Congress has assigned the Attorney General the primary responsibility of construing ambiguous provisions in the immigration laws, and this responsibility has been delegated to the Board. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *see also* section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The Board's reasonable construction of an ambiguous term in the Act, such as ""membership in a particular social group," is entitled to deference. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 844.

**4 We first interpreted the phrase "membership in a particular social group" in *Matter of Acosta*. We found the doctrine of "ejusdem generis" helpful in defining the phrase, which we held should be interpreted on the same order as the other grounds of persecution in the Act. *Matter of Acosta*, 19 I&N Dec. at 233-34. *See generally CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1113 (2011) (stating that the canon "ejusdem generis" literally means "of the same kind"). The phrase "persecution on account of membership in a particular social group" was interpreted to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable *231 characteristic." *Matter of Acosta*, 19 I&N Dec. at 233. The common characteristic that defines the group must be one "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.*

B. Evolution of the Board's Analysis of Social Group Claims

Matter of Acosta was decided based on whether a common immutable characteristic existed. *Matter of Acosta*, 19 I&N Dec. at 233. We rejected the applicant's claim that a Salvadoran cooperative organization of taxi drivers was a particular social group, because members could change jobs and working in their job of choice was not a "fundamental" characteristic. *Id.* at 234 ("[T]he internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice."). Because there was no common immutable characteristic in *Matter of Acosta*, we did not reach the question whether there should be additional requirements on group composition.

At the time we issued *Matter of Acosta*, only 5 years after enactment of the Refugee Act of 1980, relatively few particular social group claims had been presented to the Board. Given the ambiguity and the potential breadth of the phrase "particular social group," we favored a case-by-case determination of the particular kind of group characteristics that would qualify under the Act. *Id.* at 233. This flexible approach enabled courts to apply the particular social group definition within a wide array of fact-specific asylum claims.

**5 Now, close to three decades after *Acosta*, claims based on social group membership are numerous and varied. The generality permitted by the *Acosta* standard provided flexibility in the adjudication of asylum claims. However, it also led to confusion and a lack of consistency as adjudicators struggled with various possible social groups, some of which appeared to be created exclusively for asylum purposes. *See, e.g., Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) ("A social group has to have sufficient homogeneity to be a plausible target for persecution. But under *Acosta* this is not a demanding requirement . . . ."). In *Matter of R-A-*, 22 I&N Dec. 906, 919 (BIA 1999; A.G. 2001), we cautioned that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."[7]

*232 Over the years there were calls for the Board to state with more clarity its framework for analyzing social group claims. *E.g., Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); *Rojas-Perez v. Holder*, 699 F.3d 74, 81 (1st Cir. 2012); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575 n.6 (9th Cir. 1986) (noting that there is "a dearth of judicial authority

construing the meaning of 'particular social group"D'). To provide clarification and address the evolving nature of the claims presented by asylum applicants, we refined the particular social group interpretation first discussed in *Matter of Acosta* to provide the additional analysis required once an applicant demonstrated membership based on a common immutable characteristic.

In a series of cases, we applied the concepts of "social visibility" and ""particularity" as important considerations in the particular social group analysis, and we ultimately deemed them to be requirements. *See Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) ("[C]ase by case adjudication is permissible and . . . such adjudication does not necessarily follow a straight path. The BIA may make adjustments to its definition of "particular social group' and often does so in response to the changing claims of applicants."). Although we expanded the particular social group analysis beyond the *Acosta* test, the common immutable characteristic requirement set forth there has been, and continues to be, an essential component of the analysis.

**6 In *Matter of C-A-*, we recognized "particularity" as a requirement in the particular social group analysis and held that the "social visibility" of the members of a claimed social group is "an important element in identifying the existence of a particular social group." *Matter of C-A-*, 23 I&N Dec. 951, 957, 959-61 (BIA 2006) (holding that "noncriminal informants working against the Cali drug cartel" in Colombia were not a particular social group), *aff'd sub nom. Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007). We subsequently determined that a "particular social group" cannot be defined exclusively by the claimed persecution, that it must be "recognizable" as a discrete group by others in the society, and that it must have well-defined boundaries. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007) (holding that "wealthy" Guatemalans were not shown to be a particular social group within the meaning of the "refugee" description), *aff'd sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007).

Finally, in 2008, we issued *Matter of S-E-G-* and *Matter of E-A-G-*, in which we held that--in addition to the common immutable characteristic requirement set forth in *Acosta*--the previously introduced concepts of "particularity" and ""social visibility" were distinct requirements for the "membership in a particular social group" ground of persecution. In *233 *Matter of S-E-G-*, 24 I&N Dec. at 582, we stated that we were seeking to provide "greater specificity to the definition of a social group" outlined in *Acosta* by requiring an applicant to establish "particularity" and "social visibility," consistent with our prior decisions. In *Matter of E-A-G-*, we noted that "we have issued a line of cases reaffirming the particular social group formula set forth in *Matter of Acosta* . . . and providing further clarification regarding its proper application." *Matter of E-A-G-*, 24 I&N Dec. at 594 (reaffirming the requirements of *Acosta* and the additional requirements of ""particularity" and "social visibility").

Our articulation of these requirements has been met with approval in the clear majority of the Federal courts of appeals. *See Umana-Ramos v. Holder*, 724 F.3d 667, 671 (6th Cir. 2013); *Henriquez-Rivas v. Holder*, 707 F.3d at 1087-91 (clarifying the criteria while reserving assessment of their validity); *Orellana-Monson v. Holder*, 685 F.3d at 521; *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012); *Zelaya v. Holder*, 668 F.3d 159, 165-66 & n.4 (4th Cir. 2012) (deferring to our particularity requirement); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649-53 (10th Cir. 2012); *Scatambuli v. Holder*, 558 F.3d 53, 59-61 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d at 74; *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d at 1196-99. However, it has not been universally accepted. *See Valdiviezo-Galdamez II*, 663 F.3d at 603-09; *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting the social visibility requirement); *see also Cece v. Holder*, 733 F.3d 662, 668-69 & n.1 (7th Cir. 2013) (en banc).

C. Positions of the Parties

**7 On appeal, the respondent and amici curiae argue that the Board should disavow the requirements of "social visibility" and "particularity" and should restore *Matter of Acosta* as the sole standard for determining a particular social group.[8] The Department of Homeland Security ("DHS") argues that ""social visibility" and "particularity" are valid refinements to the particular social group interpretation but that the two concepts should be clarified and streamlined into a single requirement.

*234 IV. ANALYSIS

We take this opportunity to clarify our interpretation of the phrase ""membership in a particular social group." In doing so, we adhere to the social group requirements announced in *Matter of S-E-G-* and *Matter of E-A-G-*, as further explained here and in *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), a decision published as a companion to this case.[9] We believe that these requirements provide guidance to courts and those seeking asylum based on "membership in a particular social group," are necessary to address the evolving nature of claims asserted on this ground of persecution, and are essential to ensuring the consistent nationwide adjudication of asylum claims. .... In this regard, we clarify that the "social visibility" test was never intended to, and does not require, literal or "ocular" visibility.

A. Protection Within the Refugee Context

The interpretation of the phrase "membership in a particular social group" does not occur in a contextual vacuum. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (stating that although analysis of a statute begins with its text, interpretation of the statutory language does not occur in a contextual vacuum). Consistent with the interpretive canon "ejusdem generis," the proper interpretation of the phrase can only be achieved when it is compared with the other enumerated grounds of persecution (race, religion, nationality, and political opinion), and when it is considered within the overall framework of refugee protection.[10]

The Act and the Protocol do not extend protection to all individuals who are victims of persecution. They identify "refugees" as only those who face persecution on account of "race, religion, nationality, membership in a *235 particular social group, or political opinion." Section 101(a)(42) of the Act; Protocol, *supra*, art. 1.

**8 The limited nature of the protection offered by refugee law is highlighted by the fact that it does not cover those fleeing from natural or economic disaster, civil strife, or war. *See Matter of Sosa Ventura*, 25 I&N Dec. 391, 394 (BIA 2010) (explaining that Congress created the alternative relief of Temporary Protected Status because individuals fleeing from life-threatening natural disasters or a generalized state of violence within a country are not entitled to asylum). Similarly, asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions. *See Konan v. Att'y Gen. of U.S.*, 432 F.3d 497, 506 (3d Cir. 2005); *Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001) ("[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum."); *Singh v. INS*, 134 F.3d 962, 967 (3d Cir. 1998) ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum . . . .").

....

The "membership in a particular social group" ground of persecution was not initially included in the refugee definition proposed by the committee that drafted the U.N. Convention; it was added later without discussion. *Matter of Acosta*, 19 I&N Dec. at 232. The guidelines to the Protocol issued by the United Nations High Commissioner for Refugees ("UNHCR") clearly state that the particular social group category was not meant to be "a 'catch all' that applies to all persons fearing persecution." UNHCR, Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, at 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html ("UNHCR Guidelines").

**9 Societies use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion. The distinctions may be *236 based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible. Some distinctions are based on beliefs and characteristics that are largely internal, such as religious or political beliefs. Individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual. The members of these factions generally understand their own affiliation with the grouping, and other people in the particular society understand that such a distinct group exists.

Therefore these enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or "ocular" visibility. Considering the refugee context in which they arise, we find that the enumerated grounds all describe persecution aimed at an immutable characteristic that separates various factions within a particular society.

B. Particular Social Group

....

The primary source of disagreement with, or confusion about, our prior interpretation of the term "particular social group" relates to the social visibility requirement. *See Umana-Ramos v. Holder*, 724 F.3d at 672-73; *Henriquez-Rivas v. Holder*, 707 F.3d at 1087; *Valdiviezo-Galdamez II*, 663 F.3d at 603-09. Contrary to our intent, the term "social visibility" has led some to believe that literal, that is, "ocular" or "on-sight," visibility is required to make a particular social group cognizable under the Act. *See Valdiviezo-Galdamez II*, 663 F.3d at 606-07. Because of that misconception, we now rename the "social visibility" requirement as "social distinction."[11] This new name more accurately describes the function of the requirement.

***237** Thus, we clarify that an applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is

(1) composed of members who share a common immutable characteristic,

(2) defined with particularity, and

(3) socially distinct within the society in question.

1. Overview of Criteria

The criteria of particularity and social distinction are consistent with both the language of the Act and our earlier precedents. By defining these concepts in *Matter of C-A-* and the cases that followed it, we did not depart from or abrogate the definition of a particular social group that was set forth in *Matter of Acosta*; nor did we adopt a new approach to defining particular social groups under the Act. *See Henriquez-Rivas v. Holder*, 707 F.3d at 1084 (describing our refinement of the definition of a particular social group). Instead, we clarified the definition of the term to give it more ""concrete meaning through a process of case-by-case adjudication." *INS v. Aguirre-Aguirre*, 526 U.S. at 425 (quoting *INS v. Cardoza Fonseca*, 480 U.S. at 448)....

The "particularity" requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put "outer limits" on the definition of a "particular social group." *See Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003); *Sanchez-Trujillo v. INS*, 801 F.2d at 1576. The particular social group analysis does not occur in isolation, but rather in the context of the society out of which the claim for asylum arises. Thus, the ""social distinction" requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.[12]

****11** Literal or "ocular" visibility is not, and never has been, a prerequisite for a viable particular social group. *See, e.g., Umana-Ramos v. Holder*, 724 F.3d at 672 (interpreting social visibility "to refer to the social salience of the group in a society, or in other words, whether the set of individuals with the shared characteristic would be perceived as a group by society"); *cf. Valdiviezo-Galdamez II*, 663 F.3d at 604; *Gatimi v. Holder*, 578 F.3d at 615. An immutable characteristic may be visible to the naked eye, and it is possible that a particular social group could be set apart within a given society based on

such visible characteristics. However, our use of the term "social visibility" was not intended to limit relief solely to those with outwardly observable characteristics. Such a literal interpretation would be inconsistent with the principles of refugee protection underlying the Act and the Protocol.

In fact, we have recognized particular social groups that are clearly not ocularly visible. *See, e.g., Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996) (determining that young tribal women who are opposed to female genital mutilation ("FGM") constitute a particular social group); ***239** *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (holding that homosexuals in Cuba were shown to be a particular social group); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (holding that former national police members could be a particular social group in certain circumstances). Our precedents have collectively focused on the extent to which the group is understood to exist as a recognized component of the society in question. *See Matter of E-A-G-*, 24 I&N Dec. at 594 (describing social visibility as "the extent to which members of a society perceive those with the characteristic in question as members of a social group").

2. "Particularity"

While we addressed the immutability requirement in *Acosta*, the term ""particularity" is included in the plain language of the Act and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.[13] The Tenth Circuit recently noted that ""the particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a '*particular* social group."D' *Rivera-Barrientos v. Holder*, 666 F.3d at 649.

****12** A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 76 (holding that wealthy Guatemalans lack the requisite particularity to be a particular social group). It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part. *Id.* (observing that the concept of wealth is too subjective to provide an adequate benchmark for defining a particular social group).

The group must also be discrete and have definable boundaries--it must not be amorphous, overbroad, diffuse, or subjective. *See Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (stating that a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group). The particularity requirement clarifies the point, at least implicit in earlier case law, that not every ""immutable characteristic" is sufficiently precise to define a particular social group. *See, e.g., Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (finding the characteristics of poverty, ***240** homelessness, and youth to be "too vague and all encompassing" to set perimeters for a protected group within the scope of the Act).

3. "Social Distinction"

Our definition of "social visibility" has emphasized the importance of ""perception" or "recognition" in the concept of "particular social group." *See Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996) (stating that in Somali society, clan membership is a "highly recognizable" characteristic that is ""inextricably linked to family ties"). The term was never meant to be read literally. .... Social distinction refers to social recognition, taking as its basis the plain language of the Act--in this case, the word "social." To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. *Matter of C-A-*, 23 I&N Dec. at 956-57 (citing UNHCR Guidelines, *supra*). Society can consider persons to comprise a group without being able to identify the group's members on sight.

****13** The examples in *Matter of Kasinga, Matter of Toboso-Alfonso*, and *Matter of Fuentes*, illustrate this point. It may not be easy or possible to identify who is opposed to FGM, who is homosexual, or who is a former member of the national police. These immutable characteristics are certainly not ocularly visible. Nonetheless, a society could still perceive young women who oppose the practice of FGM, homosexuals, or former members of the national police to comprise a particular social group for a host of reasons, such as sociopolitical or cultural conditions in the country. For this reason, the fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not

deprive the group of its protected status as a particular social group. *See Rivera-Barrientos v. Holder*, 666 F.3d at 652 (stating that the social distinction requirement "does not exclude groups whose members might have some measure of success in hiding their status in an attempt to escape persecution").

....

4. Society's Perception

The Ninth Circuit has recently observed that neither it nor the Board "has clearly specified whose perspectives are most indicative of society's perception of a particular social group." *Henriquez-Rivas v. Holder*, 707 F.3d at 1089 (suggesting that "the perception of the persecutors may matter the most" in determining a society's perception of a particular social group); *see also Rivera-Barrientos v. Holder*, 666 F.3d at 650-51 ***242** (referencing the relevant society as both "citizens of the applicant's country" and "the applicant's community"). Interpreting "membership in a particular social group" consistently with the other statutory grounds within the context of refugee protection, we clarify that a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.

Defining a social group based on the perception of the persecutor is problematic for two significant reasons. First, it is important to distinguish between the inquiry into whether a group is a "particular social group" and the question whether a person is persecuted "on account of" membership in a particular social group. In other words, we must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus. The structure of the Act supports preserving this distinction, which should not be blurred by defining a social group based solely on the perception of the persecutor.

Second, defining a particular social group from the perspective of the persecutor is in conflict with our prior holding that "a social group cannot be defined exclusively by the fact that its members have been subjected to harm." *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 74. The perception of the applicant's persecutors may be relevant, because it can be indicative of whether society views the group as distinct. However, the persecutors' perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group. *Id.*; *see also, e.g., Henriquez-Rivas v. Holder*, 707 F.3d at 1102 (Kozinski, C.J., dissenting) ("Defining a social group in terms of the perception of the persecutor risks finding that a group exists consisting of a persecutor's enemies list."); *Mendez-Barrera v. Holder*, 602 F.3d at 27 ("The relevant inquiry is whether the social group is visible in the society, not whether the alien herself is visible to the alleged persecutors.").

....

The persecutor's actions or perceptions may also be relevant in cases involving persecution on account of "imputed" grounds, such as where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a particular social group. *See, e.g., Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996); *Matter of A-G-*, 19 I&N Dec. 502, 507 (BIA 1987). For example, an individual may present a valid asylum claim if he is incorrectly identified as a homosexual by a government that registers and maintains files on homosexuals--in a society that considers homosexuals a distinct group united by a common immutable characteristic. In such a case, the social group exists independent of the persecution, and the perception of the persecutor is relevant to the issue of nexus (whether the persecution was or would be on account of the applicant's imputed homosexuality).

****16** Persecution limited to a remote region of a country may invite an inquiry into a more limited subset of the country's society, such as in *Matter of Kasinga*, 21 I&N Dec. at 366, where we considered a particular social group within a tribe. *Cf. Henriquez-Rivas v. Holder*, 707 F.3d at 1089 ("Society in general may also not be aware of a particular religious sect in a remote region."). However, the refugee analysis must still consider whether government protection is available, internal relocation is possible, and persecution extends countrywide. Section 101(a)(42) of the Act; *Gambashidze v. Ashcroft*, 381 F.3d 187, 192-94 (3d Cir. 2004); *Abdille v. Ashcroft*, 242 F.3d at 496; *Matter of C-A-L-*, 21 I&N Dec. 754, 757-58 (BIA 1997). Only when the inquiry involves the perception of the society in question will the "membership in a particular social group" ground of persecution be equivalent to the other enumerated grounds of persecution.

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E. International Interpretations

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We recognize that our interpretation of the ambiguous phrase "particular social group" differs from the approach set forth in the UNHCR's social group guidelines, which sought to reconcile two international interpretations that had developed over the years. UNHCR Guidelines, *supra*, at 2-3; *see also Valdiviezo-Galdamez II*, 663 F.3d at 615 n.4 (Hardiman, J., concurring). The UNHCR advocates an alternative approach, which permits an individual to establish a particular social group based on "protected characteristics" or ""social perception" but does not require both. UNHCR Guidelines, *supra*, at 2-3. However, the European Union adopted a "particular social group" definition that departs from the UNHCR Guidelines by requiring a social group to have both an immutable/fundamental characteristic and social perception.[15]

While the views of the UNHCR are a useful interpretative aid, they are "not binding on the Attorney General, the BIA, or United States courts." *INS v. Aguirre-Aguirre*, 526 U.S. at 427. Indeed, the UNHCR has disclaimed that its views have such force and has taken the position that the determination of ""refugee" status is left to each contracting State. *Id.* at 428 (citing Office of the UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* para. II, at 1 (Geneva, 1979)); *see also INS v. Cardoza-Fonseca*, 480 U.S. at 439 n.22.

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V. APPLICATION TO THE RESPONDENT

In our prior decision in this case, we rejected the respondent's gang-related claim based on the reasoning set forth in *Matter of S-E-G-* and *Matter of E-A-G-*. In *Matter of S-E-G-*, 24 I&N Dec. at 582, we denied a gang-related asylum claim asserting a proposed social group of "Salvadoran youths who have resisted gang recruitment, or family members of such Salvadoran youth." The applicant's membership in a particular social group was not established because he did not show that the proposed group was sufficiently particular or socially distinct, that is, recognized in the society in question as a discrete class of persons. *Id.* at 584-87. His fear was based on his individual response to the gang's efforts to increase its ranks, not on persecution aimed at his membership in a group. *See INS v. Elias-Zacarias*, 502 U.S. at 483 (rejecting a guerrilla recruitment claim where the applicant failed to establish that the persecutor had a motive other than increasing the size of its forces). Similarly, the applicant in *Matter of E-A-G-* did not establish that the proposed group, ""persons resistant to gang membership," was a particular social group. *Matter of E-A-G-*, 24 I&N Dec. at 594-95 ("The focus is not with statistical or actuarial groups, or with artificial group definitions. Rather, the focus is on the existence and visibility of the group in the society in question and on the importance of the pertinent group characteristic to the members of the group.").[16]

21 While there is no universal definition of a "gang," it is generally understood to be "a criminal enterprise having an organizational structure, acting as a continuing criminal conspiracy, which employs violence ***250 and any other criminal activity to sustain the enterprise." UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 1 n.3 (Mar. 31, 2010), *available at* http://www.unhcr.org/refworld/docid/4bb21fa02.html (quoting the Federal Bureau of Investigation's definition of a gang).

....
Against the backdrop of widespread gang violence affecting vast segments of the country's population, the applicant in *Matter of S-E-G-* could not establish that he had been targeted on a protected basis. *See Al-Fara v. Gonzales*, 404 F.3d at 740; *Abdille v. Ashcroft*, 242 F.3d at 494-95; *Matter of N-M-A-*, 22 I&N Dec. at 323, 326. Although he was subjected to one of the many different criminal activities that the gang used to sustain its criminal enterprise, he did not demonstrate that he was more likely to be persecuted by the gang on account of a protected ground than was any other member of the society. *Matter of S-E-G-*, 24 I&N Dec. at 587 ("[G]angs have directed harm against anyone and everyone perceived to have interfered with,

or who might present a threat to, their criminal enterprises and territorial power.").

**22 The prevalence of gang violence in many countries is a large societal problem. The gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes. Although certain segments of a population may be more susceptible to one type of criminal activity than *251 another, the residents all generally suffer from the gang's criminal efforts to sustain its enterprise in the area. A national community may struggle with significant societal problems resulting from gangs, but not all societal problems are bases for asylum. *See Konan v. Att'y Gen. of U.S.*, 432 F.3d at 506; *Al Fara v. Gonzales*, 404 F.3d at 740; *Abdille v. Ashcroft*, 242 F.3d at 494-95; *see also Matter of Sosa Ventura*, 25 I&N Dec. at 394 (discussing the history of Temporary Protected Status and the fact that individuals fleeing life-threatening natural disasters or a generalized state of violence were not entitled to either asylum or withholding of removal). Congress may choose to provide relief to those suffering from difficult situations not covered by asylum and withholding of removal. *See, e.g.*, section 244(a)(1) of the Act, 8 U.S.C. § 1254a(a)(1) (2012); Ruth Ellen Wasem & Karma Ester, Cong. Research Serv., RS 20844, *Temporary Protected Status: Current Immigration Policy and Issues* 2 (2010), *available at* http:// fpc.state.gov/documents/organization/137267.pdf.

Nevertheless, we emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs. *Matter of S-E-G-*, 24 I&N Dec. at 587 (recognizing that the evidence of record did not "indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society, or that these individuals suffer from a higher incidence of crime than the rest of the population"). Social group determinations are made on a case-by-case basis. *Matter of Acosta*, 19 I&N Dec. at 233. For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground. *See Konan v. Att'y Gen. of U.S.*, 432 F.3d at 506; *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990); *see also, e.g., Ochave v. INS*, 254 F.3d 859, 865 (9th Cir. 2001) ("Asylum generally is not available to victims of civil strife, unless they are singled out on account of a protected ground.").

VI. CONCLUSION

**23 We interpret the "particular social group" ground of persecution in a manner consistent with the other enumerated grounds of persecution in the Act and clarify that our interpretation of the phrase "membership in a particular social group" requires an applicant for asylum or withholding of removal to establish that the group is (1) composed of members who share *252 a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. Not every "immutable characteristic" is sufficiently precise to define a particular social group. The additional requirements of "particularity" and "social distinction" are necessary to ensure that the proposed social group is perceived as a distinct and discrete group by society. We further clarify that a particular social group does not require literal or "ocular" visibility.

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[Remanded to Immigration Judge for additional fact-finding and application of new principles to issues of membership in particular social group and respondent's possible relocation within Honduras.]

26 I. & N. Dec. 227 (BIA), Interim Decision 3795, 2014 WL 524499

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