

Deadly Inertia: Needless Delay of “Particular Social Group” Regulations Puts Asylum Seekers at Risk

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On February 2, 2021, President Biden issued an executive order (“EO”) which directed executive branch agencies to review and then take action on numerous aspects of our shattered asylum system.¹ Of particular interest to the Center for Gender & Refugee Studies (CGRS), and many asylum seekers, legal experts, and allies, was a provision ordering the Departments of Justice and Homeland Security to conduct a comprehensive examination of whether U.S. treatment of asylum claims based on domestic or gang violence is **consistent with international standards**, and to propose a joint rule on the meaning of “particular social group,” as that term is **derived from international law** (emphasis added).²

The deadlines set by the President – August 1, 2021 for the examination of current law on domestic violence and gang claims, and October 30, 2021 for the proposed regulations on particular social group – have come and gone. We are concerned that the administration has offered no indication of its progress on what should be a simple task, given that international law and authoritative international standards on particular social group are clear.³

This reference guide explains why regulations on particular social group are important, why this legal issue has become so contentious, and why there is no good reason for the delay in proposing regulations. We point out that there is a clear path forward for the United States to realign its treatment of asylum claims with established international standards, which is precisely what the EO mandates.

Why are regulations on particular social group important?

While “particular social group” may sound like an arcane topic in the notoriously complex area of asylum law, there is a reason it merited the President’s attention in an EO signed just two weeks after he took office.⁴ Persecution on the basis of membership in a particular social group is one of only five grounds for refugee status in U.S. and international law and has become the most hotly contested asylum law issue in the United States.

Why has particular social group jurisprudence become so contentious in the United States?

First, the phrase “particular social group” is less intuitively clear than the other grounds for asylum of race, religion, nationality, and political opinion. This ground is understood to reflect a desire on the part of the treaty drafters – and U.S. legislators who incorporated the international refugee definition into our own immigration law – to protect those who don’t fit neatly into the other four categories, and to allow asylum protection to evolve in line with our understanding of human rights. Such refugees might include, for example, women fleeing domestic violence, or LGBTQ+ people persecuted because they do not conform to social norms regarding sexual orientation or gender identity. They might be people fleeing violent retaliation by criminal gangs because they

reported a crime or testified against a gang member. Or they might simply be related to someone who has defied a gang, and that alone makes them a target.

These people are clearly facing enormous harm, and equally clearly belong to a particular social group under a correct interpretation of the law.⁵ But merely belonging to a particular social group does not result in being granted asylum. Only if a person meets all the other elements of the refugee definition, including the heavy burden of showing their group membership is a central reason they will be targeted, will they obtain protection in the United States.

Second, some policymakers and adjudicators fear that if particular social group claims qualify for protection, the “floodgates” will open. The Department of Justice’s Board of Immigration Appeals (BIA) established the legal test for particular social group in 1985 in *Matter of Acosta* (see below).⁶ But beginning in 2006, the BIA altered the *Acosta* test by imposing additional requirements that are nearly impossible to meet.⁷ The result is that with only one exception, no new particular social groups from any country, no matter how defined, have been accepted in a published BIA decision since that time.

But there is no evidence to support the “floodgates” concern. Decades ago, when women who fled female genital cutting/mutilation were first recognized as a particular social group, some people argued that the United States would be inundated with such claims.⁸ Those fears never materialized. History shows, and the governments of both the United States and Canada acknowledged at the time, that acceptance of social group claims does not lead to a skyrocketing number of applicants.⁹

Third, asylum law, including the legal interpretation of particular social group, has been politicized. As part of an overtly anti-immigrant agenda, some politicians have seized upon the floodgates myth to promote increasingly restrictive policies and legal interpretations that depart from international standards. Politically oriented interference with asylum law reached new lows under the previous administration, most notably in 2018 when former Attorney General Sessions overruled his own BIA to issue his unconscionable decision in *Matter of A-B*.¹⁰

Matter of A-B was so widely reviled and justly condemned that all major Democratic candidates seeking their party’s presidential nomination in the last election promised to reverse the decision. Doing so was part of candidate Biden’s campaign platform.¹¹ As President he made good on this promise by including the legal questions of domestic violence, gang brutality, and particular social group in the February 2021 EO.

Furthermore, and very much to his credit, Attorney General Garland granted CGRS’s request as counsel to vacate *Matter of A-B* in June 2021.¹² The law now stands as it did before Sessions’ unlawful interference, with the key precedent case *Matter of A-R-C-G*¹³ recognizing a certain defined particular social group that may provide the basis for asylum for some domestic violence survivors.

However, as explained above, the problem goes beyond Sessions’ decision in *Matter of A-B* and stretches back at least as far as 2006, when the BIA began to encumber particular social group claims with additional legal hurdles. As correctly noted in the EO, it is necessary to assess whether U.S. law concerning not only domestic and gang violence claims, but all claims based on particular

social group, is consistent with international law. Fortunately there is ample international guidance, which is itself largely based on *Acosta*, on this exact question.

So why the delay in proposing new regulations?

We can think of no good reason for the agencies' delay in proposing new regulations on particular social group. From the perspective of both binding international law and authoritative international standards, each of which are named as the framework for particular social group regulations in the EO, the legal analysis is not at all complicated.

To begin with, this is not a new area of the law. The Convention Relating to the Status of Refugees, the source of the refugee definition in which the phrase appears, was drafted in 1951. Our domestic law followed suit in the 1980 Refugee Act. As noted above, the key BIA precedent case interpreting particular social group, *Matter of Acosta*, was decided in 1985.¹⁴ The UN Refugee Agency's (UNHCR) guidelines on particular social group, which adopt *Matter of Acosta*, were issued 20 years ago, in 2002.¹⁵

Making the job of proposing regulations even simpler, international guidance is clear. It is critical to note that as an inter-governmental organization, UNHCR routinely takes the concerns of governments, including the United States, into account in crafting its legal advice. UNHCR's guidelines on particular social group were drafted only after a thorough review of State practice, including U.S. law, and an extensive process of external expert consultations with government officials and judges in their personal capacities, academics, and practitioners.¹⁶ The consultations process began with a discussion paper on particular social group drafted by a leading U.S. scholar who had previously served as Immigration and Naturalization Service General Counsel.¹⁷

How should the United States interpret particular social group to be consistent with international law?

The United States should adopt the "immutability" standard that the BIA set forth in *Matter of Acosta*, with an alternative – not additional – test of "social perception" which was initially developed by courts in Australia.¹⁸ The *Acosta* test rests on the existence of immutable or fundamental characteristics such as gender to determine whether there is a particular social group. What must be discarded are the BIA's extraneous requirements of "particularity" and "social distinction." They have no basis in international law, are not consistent with international standards, are not compelled by the text of the statute, and are not coherent or internally logical. They have themselves spawned an enormous number of confused and confusing cases, including at the federal courts of appeals level, as judges attempt to apply them to real world cases.¹⁹

Key Democratic members of Congress with deep knowledge on refugee issues have taken this position, which is consistent with UNHCR's views. The Refugee Protection Act of 2019, for example, reflects international guidance in its clarification of particular social group.²⁰ Then-Senator Kamala Harris was one of the bill's original cosponsors.

Additionally, in response to the EO, U.S. and international legal experts have explained that *Matter of Acosta* provided a workable test, that the BIA's additional requirements distorted U.S. law in violation

of international standards, and that a return to *Acosta* would be consistent with international standards and offer an interpretation most faithful to the statutory text.²¹

Why does it matter?

Lives hang in the balance. Women who have survived domestic violence, and all other asylum applicants who must rely on the particular social group ground, are stuck on a deeply unfair playing field. Existing law, even with the vacatur of *Matter of A-B-*, gives far too much leeway for judges to say no to valid claims. For people wrongly denied protection, deportation can be a death sentence.²²

We are concerned that the delay in proposing particular social group regulations reflects an unwillingness on the part of some key actors within the administration to accept that the United States is bound by international law and should realign itself with international standards. The EO explicitly expresses a mandate to analyze existing law on domestic and gang violence, and to draft new particular social group regulations, in a manner consistent with international standards. Yet it is possible that the administration, out of a flawed political calculus, will backtrack on this commitment as it has on others, notably the promise to restore asylum processing at the border.

To be clear, if this is the case, it is not because there is a principled legal argument against the relevance of international law. It is because a certain political outcome is desired, and the law will be bent to achieve that result. Administration officials should know that advocates will fight relentlessly if the proposed regulations do not in fact follow the EO's directive to align U.S. law with authoritative international standards.

¹ *Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, Feb. 2, 2021, 86 Fed. Reg. 8267 (Feb. 5, 2021).

² EO, Sec. 4(c) Asylum Eligibility. The Attorney General and the Secretary of Homeland Security shall:

(i) within 180 days of the date of this order, conduct a comprehensive examination of current rules, regulations, precedential decisions, and internal guidelines governing the adjudication of asylum claims and determinations of refugee status to evaluate whether the United States provides protection for those fleeing domestic or gang violence in a manner consistent with international standards; and

(ii) within 270 days of the date of this order, promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a "particular social group," as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

³ Instead, on the one-year anniversary of the EO, USCIS Director Ur Jaddou held a virtual briefing on USCIS's progress on this and three other immigration-related EOs, but provided no substantive details.

⁴ The EO otherwise encompasses the enormous operational, logistical, foreign policy, development, and other challenges required to create a comprehensive regional framework to address root causes, manage migration throughout North and Central America, and provide safe and orderly processing of asylum seekers at the U.S. border.

⁵ For example, when Harold Koh, a senior State Department advisor, resigned in October 2021 in protest over the expulsion of Haitian and other asylum seekers, he wrote: "Persons targeted by Haitian gangs could easily have asylum claims as persons with well-founded fears of persecution because of their membership in a 'particular social group' for purposes of the Refugee Convention and its implementing statute. Indeed, this is precisely the issue that faces the interagency group on joint DOJ/DHS rulemaking pursuant to President Biden's February 2, 2021 Executive Order, which directed examination of whether

the United States is providing appropriate asylum protection for those fleeing domestic or gang violence in a manner consistent with international standards.” See <https://www.politico.com/f/?id=0000017c-4c4a-dddc-a77e-4ddb3ae0000>.

⁶ 19 I&N Dec. 211 (BIA 1985).

⁷ Stephen Legomsky and Karen Musalo, *Asylum and the Three Little Words that Can Spell Life or Death*, Just Security, May 28, 2021, available at: <https://www.justsecurity.org/76671/asylum-and-the-three-little-words-that-can-spell-life-or-death/>.

⁸ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

⁹ Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 Va. J. Soc. Pol’y & L. 119, 132-133 (2007), available at: https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1560&context=faculty_scholarship.

¹⁰ 27 I&N Dec. 316 (A.G. 2018). The applicant was a domestic violence survivor whose asylum claim based on particular social group had been granted by the BIA.

¹¹ “The Trump Administration has ... drastically restrict[ed] access to asylum in the U.S., including ... attempting to prevent victims of gang and domestic violence from receiving asylum [...] Biden will end these policies [...]” See <https://joebiden.com/immigration/>.

¹² 28 I&N Dec. 307 (A.G. 2021). He also vacated other problematic decisions that touched on particular social group and gender claims. See *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021); *Matter of A-C-A-A-*, 28 I&N Dec. 351 (A.G. 2021).

¹³ 26 I&N Dec. 388 (BIA 2014).

¹⁴ 19 I&N Dec. 211 (BIA 1985).

¹⁵ UNHCR, *Guidelines on International Protection No. 2: “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*, 7 May 2002, HCR/GIP/02/02, available at: <https://www.refworld.org/docid/3d36f23f4.html>.

¹⁶ UNHCR, *Global Consultations on International Protection*, Update Oct. 2001, available at: <https://www.unhcr.org/3b83c8e74.pdf>.

¹⁷ T. Alexander Aleinikoff, “Protected Characteristics and Social Perceptions: An Analysis of the Meaning of ‘Membership of a Particular Social Group’”, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Feller, Türk and Nicholson, eds., 2003), available at: <https://www.refworld.org/docid/470a33b30.html>.

¹⁸ This is the approach recommended by UNHCR, n.15 above.

¹⁹ Legomsky and Musalo, *Asylum and the Three Little Words that Can Spell Life or Death*, n. 7 above, available at: <https://www.justsecurity.org/76671/asylum-and-the-three-little-words-that-can-spell-life-or-death/>. See also, Sabrineh Ardalani and Deborah Anker, *Re-Setting Gender-Based Asylum Law*, Harvard Law Review Blog, Dec. 30, 2021, available at: <https://blog.harvardlawreview.org/re-setting-gender-based-asylum-law/>.

²⁰ The Refugee Protection Act of 2019, Sec. 101(a)(C)(iii) reads: “the term ‘particular social group’ means, without any additional requirement not listed below, any group whose members—

(I) share—

(aa) a characteristic that is immutable or fundamental to identity, conscience, or the exercise of human rights; or

(bb) a past experience or voluntary association that, due to its historical nature, cannot be changed; or

(II) are perceived as a group by society.”

See <https://www.congress.gov/bill/116th-congress/senate-bill/2936/text?r=4&s=1#toc-idA272A477BC814410AB2FF0E6C99E522F>.

²¹ Scholars letter to Attorney General Garland and DHS Secretary Mayorkas, June 16, 2021, available at: https://cgrs.uchastings.edu/sites/default/files/2021.06.16_PSG%20Scholars%20Letter.pdf. See also, letter to Attorney General Garland and DHS Secretary Mayorkas, May 27, 2021, signed by 100 legal scholars discussing the “state protection” element of the proposed regulations, available at: <https://cgrs.uchastings.edu/sites/default/files/Law%20Scholars%20State%20Protection%20Letter%205.27.21%20%28FINAL%29.pdf>.

²² *When Deportation Is a Death Sentence*, Sarah Stillman, The New Yorker, January 8, 2018, available at: <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.