U.S. Citizenship and Immigration Services

Membership in a Particular Social Group

Once an applicant has established that the harm he or she has suffered or fears is "on account of" the characteristic asserted, the applicant must establish that the characteristic qualifies as race, religion, nationality, membership in a particular social group, or political opinion. Membership in a particular social group is perhaps the most complex and difficult to understand of these five grounds. There is relatively little precedent about the meaning of "a particular social group," and that which e xists has at times been subject to conflicting interpretations. This rule sets out the requirements for determining what qualifies as "a particular social group," clarifies the relevance of past experience, and provides a list of non-determinative factors to be considered.

The key Board decision on the meaning of "a particular social group" requires that members of the group share a "common, immutable" trait. Matter of Acosta , 19 I. & N. Dec. at 233. This rule codifies this basic approach at § 208.15(C)(1), by providing that "[a] particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it."The crucial aspect of this definition is that, to be immutable, the common trait must be unchangeable or truly fundamental to an applicant's identity. Gender is clearly such an immutable trait, is listed as such in Matter of Acosta , and is incorporated in this rule. Further, there may be circumstances in which an applicant's marital status could be considered immutable. This would be the case, for example, if a woman could not reasonably be expected to divorce because of religious, cultural, or legal constraints. Any intimate relationship, including marriage, could also be immutable if the evidence indicates that the relationship is one that the victim could not reasonably be expected to leave. Thus, this rule further provides in § 2 08.15(C)(1) that "[i]n determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and country conditions information about the applicant's society."

This rule also includes the principle that the particular social group in which an applicant claims membership cannot be defined by the harm which the applicant claims as persecution. It is well-established in the case law that this type of circular reasoning does not suffice to articulate a particular social group. See Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (rejecting the applicant's claim to membership in a particular social group of women who have been previously battered and raped by Salvadoran guerrillas). It is also supported by Convention-based understandings of the definition of membership in a particular social group. See, e.g., Islam v. Secretary of State for the Home Department, 2 App. Cas. 629 (H.L. 1999) (United Kingdom) ("It is common ground that there is a general principle that there can only be a `particular social group' if the group exists independently of the persecution") (Lord Steyn).

Proposed § 208.15(c)(2) provides that, "[w]hen past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed

or was so fundamental to his or her identity or conscience that he or she should not have been required to change it." This is consistent with current case law that recognizes that past experiences can be the basis for membership in a particular social group. See Matter of Fuentes , 19 I. & N. Dec. 658, 662 (BIA 1988). The regulatory language preserves the key requirement from Matter of Acosta, supra , that the trait defining a particular social group must be a fundamental one, which an individual should not be required to change. In reality, of course, no past experience can be changed, as it has already occurred. But not all past experiences should qualify as traits which, if shared by others, can define a particular social group for asylum and withholding purposes. The experience of joining a violent gang in the past, for example, cannot be changed. At that point in the past, however, that experience could have been avoided or changed. In other words, the individual could have refrained from joining the group. Certainly, it is reasonable for any society to require its members to refrain from certain forms of illegal activity. Thus, for example, under this language, persons who share the past experience of having joined a gang would not constitute a particular social group on the basis of a past experience.

The requirement in § 208.15(C)(1) that the persecution exist independently of the harm is equally applicable to claims of membership in a particular social group based on past experience. At least in theory, a shared past experience that defines a social group could be harm suffered by the applicant and other group members in the past. In such a claim however, the past harm that defines the social group cannot be the same harm that the applicant claims as persecution. Rather, in order for persecution to be "on account of" membership in such a group, the past experience must exist independently of the persecution. In fact, the past experience must be the reason the persecutor inflicted or is inclined to inflict the persecution on the applicant.

Finally, the proposed language in § 208.15(C)(3) provides a non-exclusive list of additional factors that may be considered in determining whether a particular social group exists. These factors are drawn from existing administrative and judicial precedent on the meaning of the "particular social group" ground. These precedents have been subject to conflicting interpretations, however, and this provision resolves those ambiguities by providing that, while these factors may be relevant in some cases, they ar e not requirements for the existence of a particular social group.

The first three factors in this section are drawn from the Ninth Circuit's decision in Sanchez-Trujillo v. INS , 801 F.2d 1571 (9th Cir. 1986). In that case, the Ninth Circuit stated that "the phrase `particular social group' implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest," id . at 1576, and that "[o]f central concern is the existence of a voluntary associational relationship among the purported members," id . These factors have often been interpreted as prerequisites for the existence of a particular social group in the Ninth Circuit. The Ninth Circuit clarified the significance of these factors in the recent case of Hernandez-Montiel v. INS , 225 F.3d 1084 (9th Cir. 2000). The court held that its decision in Sanchez-Trujillo should be interpreted as consistent with the Board's decision in Matter of Acosta and that the voluntary associational test is an alternative basis for establishing membership in a particular social group. See 225

F.3d at 1093 n.6. Other circuits have not applied this factor, and, instead have simply relied on the Board's determination that the group must share a "common, immutable" characteristic. See , e.g., Fatin v. INS , 12 F.3d 1233, 1239 (3d Cir. 1993) (quoting Matter of Acosta , 19 I. & N. Dec. at 233). In cases arising outside the Ninth Circuit, the Board has decided that a particular social group may exist without reference to these factors. See , e.g., Matter of Toboso-Alfonso , 20 I. & N. Dec. 819, 820-21 (BIA 1990) (Cuban homosexuals are a particular social group); Matter of Kasinga , 21 I. & N. Dec. at 365 (young women who belong to a specific Togolese tribe and who oppose FGM are a particular social group). To ensure uniform and fair administrative adjudications of particular social group asylum claims, this rule clarifies that the Department views the Sanchez-Trujillo factors as considerations that may be relevant in some cases, but not as requirements for a particular social group.

Similarly, the next three factors in this proposed section are drawn from the Board's decision in In re R-A- . In

that case, the Board found it highly significant for "particular social group" analysis that the applicant had not shown that the group she asserted "is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala," or that "the victims of spouse abuse view themselves as members of this group." Id . at 15. The Board also focused on whether "it is more likely that distinctions will be drawn within the society between those who share and those who do not share the characteristic" at issue. Id . at 16. This, of course, could be an important inquiry in asylum and withholding cases. The Board did not characterize these elements as requirements, however. This rule incorporates them as factors, but confirms that they are considerations, which, while they may be relevant in some cases, are not determinative of the question of whether a particular social group exists.

In applying the factor at § 208.15(c)(3)(vi)--whether members of a given group are distinguished for different treatment--it would be relevant to consider any evidence about societal attitudes toward group members or about harm to group members, including whether the institutions of the society at hand offer fewer protections or benefits to members of the group than to other members of society. In In re R-A- , for example, evidence presented that would be relevant to this inquiry included the applicant's testimony that the police did not respond to her calls for help, and that, when she appeared before a judge, he told her that he would not interfere in domestic disputes. Further, the Board's conclusion that documentary country conditions evidence indicates that "Guatemalan society still tends to view domestic violence as a family problem" would also be relevant. This type of evidence may be considered in deter mining whether, because the applicant possesses a particular characteristic, harm inflicted on the applicant may be tolerated by society while it would not be tolerated if inflicted on members of the society at large.

The Department has elected at this point to propose that the relationship of In re R-A- and domestic violence claims to the definition of "refugee" be addressed by articulating broadly applicable principles to guide adjudicators in applying the refugee definition and other statutory and regulatory provisions generally. The Department has tentatively concluded that this approach would be more useful than simply announcing a categorical rule that a victim of domestic violence is or can be a refugee on account of that experience or fear, or that persons presenting such claims may be found eligib le for relief or granted relief as a matter of discretion in certain specified circumstances. The current proposal of the Department would encourage development of the law in the area of domestic violence as well as in other new claims that may arise. Asylum and withholding cases are typically highly fact specific. A case-by-case approach would reflect that reality, and would also leave the refinement of applicable principles open to further development. The Department is nonetheless seeking comments on the relative merits of this approach, and other possible approaches, to providing for consideration of domestic violence claims as a basis for asylum and withholding of removal.

This rule does not modify the definition of "firm resettlement." The rule merely changes its placement to § 208.15(d) of the regulations.

Burden of Proof

Under U.S. law, a showing of past persecution qualifies an applicant for refugee status. Section 101(a)(42) of the Act, (8 U.S.C. 1101(a)(42)). A showing of past persecution is also strongly indicative of the possibility of future harm. Under the current regulations as modified by the final rule on asylum procedures published in conjunction with this rule, a presumption of well-founded fear applies to applicants who qualify as refugees based on past persecution. The presumption places the burden on the U.S. government to show by a preponderance of the evidence that a refugee no longer has a well-founded fear of future persecution. The Department believes that this allocation of the burden generally is appropriate in light of the applicant's refugee status.

The final rule on asylum procedures published in conjunction with this rule broadens the evidence with which the government can rebut the presumption of well-founded fear. The presumption can be rebutted by evidence of a fundamental change in circumstances, including country conditions information, or a showing

of a reasonable internal relocation alternative. The Department recognizes that some cases involving past persecution by non-government persecutors may present questions about whether the presumption of a well-founded fear of future persecution is appropriate. For example, to some commenters, the presumption of internal relocation may seem less warranted in cases involving non-government actors, or especially in those cases involving individual non-government actors, for which there may be more reason to believe that the victim could relocate. Some commenters may believe that certain types of individual non-government actor cases warrant a presumption more than others and should therefore be treated di fferently.

The Violence Against Women Office of the Department of Justice has offered the following observations about domestic violence, based on its experience in the U.S. as well as with foreign governments and non-governmental organizations:

It is our experience that domestic violence manifests similar characteristics across all racial, ethnic and socioeconomic groups, and that many cultures have a variety of ways in which they condone and perpetuate domestic violence. See, e.g., Lori J. Heise, Violence Against Women: The Hidden Health Burden (World Bank Discussion Papers 1994); Ending Violence Against Women, 27 Population Reports 5 (Johns Hopkins School of Public Health, Dec. 1999) (summarizing surveys from many countries discussing domestic violence). See generally H.R. Rep. 103-395, at 25-28 (1993) (congressional findings of fact about domestic violence). First, in relationships involving domestic violence, past behavior is a strong predictor of future behavior by the abuser. See, e.g., United States Department of Justice, Understanding Domestic Violence: A handbook for Victims and Professionals. Victims report patterns of abuse--rather than single, isolated incidents--that tend to include the repeated use of physical, sexual and emotional abuse, threats, intimidation, isolation and economic coercion. See, e.g., Anne L. Ganley, “Understanding Domestic Violence,” in Improving The Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers 15 (Debbie Lee et al . eds., 1996). Second, both domestically and internationally, domestic violence centers on power and control over the victim. See, e.g., Violence against Women in the International Community, 7 Cardozo J. Int’l & Comp. L. 205-318 (multiple authors discussing violence against women internationally). See generally Violence Against Women: An International and Interdisciplinary Journal (multiple volumes). Consequently, when victims attempt to flee the abusive relationship, or otherwise assert their independence, abusers often pursue them and escalate the violence to regain or reassert control. See, e.g., United States Department of Justice, Stalking and Domestic Violence: The Third Annual Report to Congress under the Violence Against Women Act (1998); see also Barbara J. Hart, “The Legal Road to Freedom,” in Battering and Family Therapy: A Feminist Perspective 13 (Marsali Hansen & Michele Harway eds., 1993) (citing a variety of studies on separation violence). The risk of lethality to the victim is typically greatest when she attempts to escape the abuse and, in contrast to other persecution cases where the persecutor’s desire to harm the victim may wane if the victim leaves, the victim’s attempt to leave typically increases the abuser’s motivation to locate and harm her. See, e.g., Kerry Healey et al. , Batterer Intervention: Program Approaches and Criminal Justice Strategies (United States Department of Justice, National Institute of Justice, Feb. 1998); 27 Population Reports 7 (discussing this issue in foreign countries); Evan Stark & Anne Flintcraft, “Violence Among Intimates: An Epidemiological Review,” in Handbook of Family Violence 293 (Vincent B. Van Hasselt et al. eds., 1988); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issues of Separation, 90 Mich. L. Rev. 1, 64-65 (1991). Third, because of the abuser’s intimate relationship with the victim, he is likely to possess important information about where the victim could go or to whom she would turn for assistance.

These observations seem to support retaining the presumption of well-founded fear of future persecution for those applicants who have established past persecution by an individual non-state actor in the domestic violence context. The Department recognizes however, that this rule does not address other types of individual, non-state actor cases that may arise in the future. Therefore, the Department solicits suggestions as to whether it should continue to maintain the presumption of well-founded fear of futu re persecution, including the presumption of internal relocation, in cases involving persecutors who are non-state actors. The Department welcomes the views of the public on the merits of the approach proposed in this rule and will carefully weigh all comments in articulating the final rule.

In all cases of past persecution the government may rebut the presumption of well-founded fear of future persecution. The Department recognizes that, especially if the general rule concerning burden of proof is retained for cases involving individual non-state actors, some of the new types of claims based on persecution by individuals may present a question of production of evidence useful to rebuttal that may be uniquely in the hands of the applicant claiming persecution. Moreover, whether or not the burde n of proof is retained in this context, the Department has concluded that it would be appropriate to codify long-standing principles of law relating to the applicant's burden of production in asylum and withholding cases. For example, in the domestic violence context, an applicant's claim will rest on direct evidence regarding her experiences with the persecutor that are not addressed in general country conditions information. Circumstantial evidence, such as general country conditions information also may support such a claim. Under current case law, evidence relating to the applicant's personal experiences or personal knowledge of the likelihood of future harm should be provided by the applicant if reasonably available, or an explanation should be given as to why such information was not presented. This is well-established in the case law. See Matter of S-M-J- , 21 I. & N. Dec. 722, 724 (BIA 1997)(en banc). Furthermore, "where there are significant, meaningful evidentiary gaps, applications will ordinarily have to be denied for failure of proof." Matter of Dass , 20 I. & N. Dec. 120, 124 (BIA 1989) (citing 8 CFR 208.5, 242.17(c)(1988)).

Being accorded the presumption of well-founded fear does not relieve the applicant of the burden of producing testimony or documentation reasonably available, especially evidence within the knowledge of the applicant. Failure to do so can be considered in (1) making a factual determination that the presumption has been rebutted, (2) in credibility determinations, and (3) in the exercise of discretion in granting asylum. The inquiry of an immigration judge or asylum officer considering evidence relevant to a discretionary grant of asylum or a grant of withholding will normally include factors relating to future persecution even in cases where past persecution has been shown. For example, the adjudicator should make inquiries into factors such as whether there has been a fundamental change in circumstances, the ability of the applicant to relocate, the location and status of the persecutor if known, and any evidence of a pattern of pursuit by the persecutor. This is consistent with the adjudicator's ability to consider all facts he or she deems relevant to an asylum or withholding claim.

Finally, this proposed rule adds language to §§ 208.13(b)(1)(ii) and 208.16(b)(1)(ii) clarifying the procedural handling of asylum and withholding claims in cases where the government has the burden of rebutting a presumption of well-founded fear of persecution or likelihood of future threat to life or freedom. The final regulations on asylum procedures published in conjunction with this proposed rule provide that, when an applicant for asylum establishes that he or she suffered past persecution, the applic ant will be presumed also to have a well-founded fear of persecution, unless a preponderance of the evidence establishes that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or the applicant could reasonably avoid future persecution by relocating to another part of the applicant's country or, if stateless, the applicant's country of last habitual residence. See 8 CFR 208.13(b)(1)(i). A similar presumption applies to applicants for withholding of removal. See 8 CFR 208.16(b)(1) (upon showing of past persecution, presumption arises that it is more likely than not that applicant will face future persecution, unless a preponderance of the evidence demonstrates fundamental change of circumstances or that it would be reasonable for the applicant to relocate within the country of persecution).

Confusion has arisen concerning the proper disposition of cases in which a finding of no past persecution is reversed on appeal. This rule will codify a principle that, when an immigration judge or the Board finds that the applicant has failed to establish past persecution, the question of fundamental changed circumstances and reasonable internal relocation shall be deemed reserved, and the Service shall not be required to present evidence on fundamental changed circumstances or reasonable internal relocati on to preserve the issues. Accordingly, if the immigration judge's or Board's finding of no past persecution is set aside, the Service will remain free on remand to present evidence and argument on the question of changes in country conditions or internal relocation.

This rule is consistent with established rules governing judicial review of agency action and of civil procedure. When a federal court reviews final agency action such as a decision of the Board:

[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power & Light Co. v. Lorion , 470 U.S. 729, 744 (1985). Similarly, in ordinary civil litigation, absent a contrary order in the particular case, if a party moves for, or a district court grants, summary judgment for a party on one of a number of potentially dispositive grounds, that ruling does not mean that the party is abandoning or the court is addressing sub silentio possible alternative grounds of decision. And, if that narrow grant of summary judgment is reversed on appeal, the court of appeals does not proceed to enter summary judgment for the opposing party on a ground that was not addressed by the district court's ruling. Rather, the case is remanded for further proceedings.

We have concluded that a similar approach should be made explicit in the context of immigration judge or Board decisions finding an absence of past persecution--the immigration judge's or Board's silence on the question of fundamental changed circumstances or reasonable internal relocation should not be considered an implicit resolution of the question, and the case should be remanded for the presentation of evidence and a decision by the Board or immigration judge in the first instance. The contrary practi ce is not only inconsistent with ordinary practice, but encourages the Board, immigration judges, and the Service to engage in potentially wasteful expenditures of resources litigating and deciding issues that may not ever need to be resolved in the proceeding if the initial finding of no past persecution is sustained.

This rule, once final, will apply to all cases currently pending before the asylum office, the immigration courts and the Board of Immigration Appeals.

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