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The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'

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1. INTRODUCTION AND BACKGROUND*

One of the most complex aspects of establishing qualification for refugee status is the need to link a well-founded fear of being persecuted to a Convention ground, that is, to one's race, religion, nationality, political opinion or membership of a particular social group.[1] While each of the Convention grounds has been examined in case law across a very wide range of States Parties, none has been subject to the degree of rigorous scrutiny, debate and conflicting interpretative approaches as the most nebulous of the grounds: 'membership of a particular social group' ('MPSG').[2] Due to several factors, including its last minute insertion by the drafters devoid of any explanation as to their intended meaning,[3] its arguable lack of self-evident 'ordinary meaning', and its concomitant ability to encompass a wide range of evolving contemporary claims, it has proven to be a promising yet highly controversial element of the refugee definition.

While some early judicial forays into its interpretation were tempted to take an 'I know it when I see it' approach to identifying a 'particular social group',[4] most decision-makers and particularly senior appellate courts now recognize that a commitment to the rule of law requires principled and clear standards to guide decision-makers, particularly in the context of decisions that 'may

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[1] As the Summary Conclusions of the United Nations High Commissioner for Refugees ('UNHCR') Expert Roundtable on 'Membership of a Particular Social Group' noted in 2001, it is the 'Convention ground with the least clarity': E. Feller *et al.* (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 312 [1].

[2] As explained by Lord Bingham in *K v Secretary of State for the Home Department; Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 ('*Fornah*'), in contrast to the other four grounds, 'the meaning of "a particular social group", for all the apparent simplicity and intelligibility of that expression, has been the subject of much consideration and analysis': at 430.

[3] As is well known, the inclusion of 'particular social group' was made at the suggestion of the representative of Sweden, Mr Petrén, who noted that 'experience has shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included': United Nations General Assembly Conference of Plenipotentiaries on the Status of Refugees and Stateless persons, Summary Record of the Third Meeting held at Geneva, 3 July 1951, A/Conf 2/SR 3 at 14, cited in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 234 n 36 (Brennan J) ('*Applicant A*'). However as Brennan J noted in *Applicant A*, '[n]either the Swedish proposal nor any reported discussion illuminates the intended scope of the term'.

[4] See *Applicant A* (1997) 190 CLR 225. Kirby J stated that 'courts and agencies should turn away from attempts to formulate abstract definitions. Instead, they should recognise 'particular social groups' on a case by case basis. This approach (…) accepts that an element of intuition on the part of decision-makers is inescapable, based on the assumption that they will recognise persecuted social groups of particularity when they see them': at 307–308.

determine the fate of individuals',[5] as is the case in refugee law. Further, it is well-accepted that any such interpretation must be undertaken in light of the rules of treaty interpretation set by the Vienna Convention on the Law of Treaties[6] notwithstanding that interpretation is usually undertaken in a domestic law setting. As concluded by the UNHCR expert roundtable on Membership of a Particular Social Group in 2001, '[t]he ground must be given its proper meaning within the refugee definition, in line with the object and purpose of the Convention'.[7]

The challenge is in identifying the 'true autonomous and international meaning'[8] of 'particular social group' that conforms with the object and purpose of the Convention and is able to be applied in a consistent and clear manner by decision-makers across common law and civil law jurisdictions. In particular, it is necessary to adopt an interpretation that is not so wide as to effectively negate the 'for reasons of' clause,[9] or so narrow as to artificially limit the scope of that element of the definition that is most able to support an extension of protection to historically overlooked groups such as those based on gender, age and sexuality.

In light of the challenges and difficulties with this ground, the UNHCR selected 'membership of a particular social group' as a topic for examination as part of the 50th anniversary celebrations of the 1951 Convention in 2001 (the 'Global Consultations'), commissioning a background paper on the topic, and holding an expert roundtable meeting in San Remo in 2001. The background paper examined jurisprudence across a wide range of States Parties and noted that although there had once been many different approaches to interpreting the 'PSG' ground, many of these had been rejected such that two dominant approaches remained in the case law: 'protected characteristics' and 'social perception'. While the background paper recommended the 'social perception' test as the preferable approach,[10] the expert roundtable concluded that the *ejusdem generis* or protected characteristics approach is the one that will 'ordinarily' define a group,[11] yet also recommended that consideration 'could be given to the continued evolution' of the ground 'in particular by exploring the relevance of a 'social perception' test.[12] The UNHCR subsequently issued interpretative guidelines on this issue, namely 'Guidelines on International Protection: "Membership of a particular social group" within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' ('UNHCR Guidelines'), which will be considered further below.

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[5] *Applicant A* (1997) 190 CLR 225, 277 (Gummow J). Kirby J also later distanced himself from this approach: see M. Foster, 'Refugee Law' in I. Freckelton and H. Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (Sydney: Thomson Reuters, 2009), 691.

[6] (Entered into force 27 January 1980) 1155 UNTS 331 ('VCLT').

[7] In Feller *et al.* (eds), note 1 above, 313 [2].

[8] *R v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477, 517 (Lord Steyn).

[9] See *Ward v Canada (Attorney General)* [1993] 2 SCR 689, 731–732 ('*Ward*').

[10] T. A. Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group' in Feller *et al.* (eds), note 1 above, 310.

[11] Feller *et al*. (eds), note 1 above, 313 [5].

[12] *Ibid*. 313 [9].

The purpose of the present study is to assess jurisprudential developments in the case law in both common law and civil law jurisdictions over the past decade. In particular the study assesses and explores the degree to which courts have continued to invoke one or both of the dominant interpretative approaches, evaluates the extent to which new tests or elements of the tests have emerged, and undertakes a critical analysis of the state of jurisprudential interpretation of PSG today. In addition, the study examines the extent to which interpretation of the MPSG ground has evolved to meet the protection needs of emerging groups and those historically overlooked in refugee law analysis. In addition to relevant legislative developments, the study has drawn on jurisprudence at all levels (from tribunals through to superior courts) in the key common law jurisdictions of Australia, Canada, New Zealand, the UK and the US, and Ireland and South Africa where possible,[13] as well as case law at both the judicial and tribunal level in the key civil law jurisdictions of Austria, Belgium, France, Germany, Switzerland, and Spain.

The study is organized as follows. In Part 2, the emergence of the two dominant approaches is briefly outlined; each approach or test is explained, and each is examined for consistency with the rules of treaty interpretation governed by the VCLT. Part 3 then turns to consider the way in which these tests have been codified both in a non-binding and binding manner since 2002 in the development of the UNHCR Guidelines, the European Union's *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*,[14] as well as in individual state legislation. Part 4 then turns to consider jurisprudential interpretation, with the analysis divided into those jurisdictions that have taken a narrower approach by requiring the satisfaction of *both* tests, those that have continued to adopt a *single test*, and those that have adopted the wider approach recommended by the UNHCR Guidelines, namely, the satisfaction of *either* of the dominant tests. Part 5 then assesses the way in which the choice of a particular test dictates the outcome in particular contexts, including groups based on sex/gender, sexual orientation/gender identity, family, age, disability, former status (including gang members) and caste/class/occupation. Finally, Part 6 draws conclusions and makes recommendations for future UNHCR guidance in this area.

[13] South Africa is more accurately described as a hybrid system with both common law and civil law aspects.
[14] [2004] OJ L 304/12 ('Qualification Directive'). The revised Directive was published in the Official Journal of the EU on 20 December 2011: see [2011] OJ L 337/9.

2. THE EMERGENCE OF TWO DOMINANT APPROACHES: PROTECTED CHARACTERISTICS/ *EJUSDEM GENERIS* AND SOCIAL PERCEPTION

2.1 THE REJECTION OF EARLIER APPROACHES AND SOME POINTS OF CONSENSUS

While at an earlier time there were various tests adopted in different jurisdictions, some of these are now widely rejected. First, there is general agreement that there is no requirement to establish a 'voluntary, associational relationship' to constitute a PSG.[15] As Posner J of the US Court of Appeals for the Seventh Circuit noted in *Sepulveda*, '[t]he word "social" is obviously not intended to confine the category to bridge clubs and the like'.[16] On the contrary, many targeted groups such as women, children, lesbian, gay, bisexual, transgender or intersex (LGBTI) individuals have no such relationship, yet are often considered quintessential examples of PSGs in refugee law.

Second, there is no requirement that the group be homogenous or exhibit any degree of internal cohesion; rather, as the (then) Chief Justice of the High Court of Australia noted, 'cohesiveness may assist to define a group; but it is not an essential attribute of a group. Some particular social groups are notoriously lacking in cohesiveness.'[17]

Third, neither the fact that a group is small (for example a family) nor that it is potentially very large (e.g. women) will necessarily prevent it from falling within the rubric of PSG for Convention purposes.[18] The issue of size tends to arise more frequently in the context of very large PSGs given the implicit floodgates concerns which can underpin the determination of such claims; yet, as Gleeson CJ noted in *Khawar*, '[i]t is power, not number, that creates the conditions in which persecution may occur.'[19]

Fourth, it is well-established that a PSG cannot be defined merely on the basis of a shared fear of being persecuted because, as Dawson J of the High Court of Australia explained in *Applicant A*:

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[15] As the UNHCR Guidelines note, '[i]t 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': 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', 7 May 2002, HCR/GIP/02/02, [15], available online at: http://www.unhcr.org/3d58de2da.html (last accessed 2 March 2012). Even the US Court of Appeals for the Ninth Circuit, which was the key jurisdiction to rely on this notion, has rejected it as the sole criterion: see *Hernandez-Montiel v Immigration and Naturalization Service*, 225 F. 3d 1084 (9th Cir., 2000).

[16] *Sepulveda v Gonzales*, 464 F. 3d 770, 771 (7th Cir., 2006) ('*Sepulveda*').

[17] *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 14 [33] (Gleeson CJ) ('*Khawar*'). See also UNHCR Guidelines, note 15 above, [15].

[18] As Dawson J noted in *Applicant A*, 'I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group': (1997) 190 CLR 225, 241. See also UNHCR Guidelines, note 15 above, [18]–[19].

[19] (2002) 210 CLR 1, 13 [33]. See also UNHCR Guidelines, note 15 above, [18]. For recent acknowledgement of this in a civil law case, see the decision of the Tribunal Supremo of Spain in STS 6862/2011 (24 October 2011) 7: 'In fact, the group size is not an important criterion' [Adrienne Anderson trans].

> There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution.[20]

However, this is subject to the proviso that while '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', as explained by McHugh J in *Applicant A* in his well known and often cited 'left-handed men' example.[21]

Finally, it is well-accepted in principle that, just as is the case in respect of the other Convention grounds such as race and religion, it is not necessary for an applicant to establish that all members of a PSG are at risk in order to establish the existence of a PSG.[22] Having identified what is *not* required or determinative in interpreting the 'social group' ground, we now turn to the two dominant approaches.

2.2 PROTECTED CHARACTERISTICS/*EJUSDEM GENERIS*

The *ejusdem generis* or protected characteristics approach originated in the decision of the US Board of Immigration Appeals ('BIA') in *Re Acosta* in 1985,[23] but its influence has transcended the US context such that it now represents the dominant approach among common law countries.

In developing this approach, the BIA found

> 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.[24]

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[20] (1997) 190 CLR 225, 242. This has been widely adopted; see, e.g., *R v Immigration Appeal Tribunal; ex parte Shah* [1999] 2 AC 629, 629–640 (Lord Steyn), 656 (Lord Hope), 662 (Lord Millet, dissenting, but not relevantly) ('*Shah*'). See also UNHCR Guidelines, note 15 above, [14].

[21] (1997) 190 CLR 225, 264. McHugh J noted that

> [l]eft-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed 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.

[22] See *Fornah* [2007] 1 AC 412, 444 (Lord Hope), 456 (Lord Rodger), 467 (Baroness Hale); UNHCR Guidelines, note 15 above, [17]. For recent acknowledgement of this in a civil law case, see the decision of the Tribunal Supremo of Spain in STS 6862/2011 (24 October 2011) [Adrienne Anderson trans]:

> neither is it required that the applicant demonstrates that all members of a particular social group are recognized as a group, i.e. it is not necessary that the group is "united", nor is it required to prove that all members of a particular social group are at risk of persecution to establish its existence.

[23] 19 I. & N. Dec. 211 (BIA, 1985) ('*Acosta*').

[24] *Ibid.* 233 (Chairman Milholland, Board Members Maniatis, Dunne, Morris and Vacca).

Applying this principle of construction to the refugee definition, the BIA noted that each of the other 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.'[25] The BIA concluded that in applying the doctrine of *ejusdem generis*, MPSG should be 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 characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.[26]

This approach was adopted by the Supreme Court of Canada in *Ward v Canada*[27] although in *Ward* the distillation of the content of 'particular social group' was based more explicitly on finding 'inspiration in discrimination concepts.'[28] The Court explained that the *Acosta* approach is consistent with the object and purpose of the Convention as it takes into account the 'general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.'[29]

Drawing on the seminal decisions in *Acosta* and *Ward*, as well as subsequent authority applying and refining the protected characteristic approach, it is convenient to summarize this approach by reference to the following typology:

(i) groups defined by an innate or unchangeable characteristic;

(ii) groups defined by a characteristic that is fundamental to human dignity such that a person should not be forced to relinquish it; and

(iii) groups defined by a former status, unalterable due to its historical permanence.[30]

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[25] *Ibid*.

[26] *Ibid*.

[27] *Ward* [1993] 2 SCR 689. This was heavily influenced by the fact that James C. Hathaway adopted and clearly articulated the *ejusdem generis* approach in his seminal *Law of Refugee Status*, (Toronto: Butterworths, 1991) 160–161.

[28] *Ward* [1993] 2 SCR 689, 734 (La Forest J).

[29] *Ibid.* 739 (La Forest J). This has been repeated in other decisions: see, e.g., *Chan v the Minister of Employment and Immigration* [1995] 3 R.C.S. 593, 642; and in other jurisdictions, see, e.g., *Refugee Appeal No. 1312/93 Re GJ*; *Refugee Appeal 71427/99* [2000] NZAR 545, [93]–[102].

[30] This three part test was originally set out in *Ward*, but some of the language used in the original judgment in *Ward*, e.g. 'voluntarily associate' was later understood not to be accurate. This was clarified in *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593 where La Forest J (who had delivered the judgment of the Court in *Ward*) explained that his use of the phrase 'voluntary associate' in *Ward* was misleading because the true position is that a person falls within the second category when he or she is 'voluntarily associated with a particular status for reasons so fundamental to his human dignity that he should not be forced to forsake that association. The association or group exists by virtue of a common attempt made by its members to exercise a fundamental human right': at 644–646 (dissenting in this case, but his judgment has been widely understood to represent the correct position). Hence, in Canada the *Ward* analysis is understood to be modified by La Forest J's judgment in *Chan*: see, e.g., *Galvan v Canada (Minister of Citizenship and Immigration)* (2000) 193 FTR 161, [18]–[21]. See *Refugee Appeal 71427/99* [2000] NZAR 545, [93]–[102].

In providing further elucidation of these categories, the Canadian Supreme Court explained in *Ward* that:

> The first category [innate or unchangeable characteristic(s)] would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second [characteristic fundamental to human dignity] would encompass, for example, human rights activists. The third branch [former status] is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.[31]

A necessary consequence of the protected characteristics approach is that it has limits, as was made clear in *Ward*:

> What is excluded by this definition are "groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights".[32]

This approach is well entrenched in Canada,[33] and in New Zealand,[34] and has also been adopted in South Africa[35] and the UK. In *Shah*, the House of Lords adopted the *ejusdem generis* approach which Lord Steyn described as having been 'so cogently stated in Acosta's case'.[36] Lord Hoffmann affirmed the *Acosta* view that the 'Convention is concerned with discrimination on grounds inconsistent with principles of human rights',[37] and that in that case discrimination

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[31] *Ward* [1993] 2 SCR 689, 739 (La Forest J).

[32] *Ibid*. 737–738 (La Forest J).

[33] Contemporary Canadian jurisprudence continues consistently to apply the reasoning regarding protected characteristics set out in *Ward*; see note 210 below.

[34] *Refugee Appeal No. 1312/93 Re GJ*; *Refugee Appeal 71427/99* [2000] NZAR 545, [93]–[102]. The RSAA has now been discontinued and replaced with the Immigration and Protection Tribunal of New Zealand (NZIPT), but this new authority has made it clear that given that the RSAA 'had an established international reputation as an expert tribunal in the field of refugee law', its 'jurisprudence, while not binding on the tribunal, is therefore of high persuasive value': *AC (Syria)* [2011] NZIPT 800025 (27 May 2011) [97]. In the context of PSG, the IPT is clearly continuing to adopt the protected characteristic approach. As it explained in *AC (Egypt)* [2011] NZIPT 800015 (25 November 2011), the RSAA had previously 'rejected the "objective observer" approach to the interpretation of the Convention ground of "particular social group" by which the external perceptions of the society at large or the agents of persecution were determinative': at [100]. The IPT instead applied the well established test of protected characteristics: see at [111].

[35] There is very little judicial authority in South Africa concerning the refugee definition; however in *Jian-Qiang Fang v Refugee Appeal Board et al*, Case No. 40771/05, 15 November 2006, the High Court of South Africa set out the *Ward* categories and then stated: 'I associate myself with the categories of particular social groups as enumerated in the Canadian case of *Ward*': at 16. Since decisions of the Refugee Appeal Board are not made public, it is difficult to know whether this approach is routinely followed at the tribunal level. However, in one decision that was located, the protected characteristics test was clearly applied in the context of homosexuality: see Decision of the Refugee Appeal Board South Africa, 13 May 2002, 15–16 (unidentified file and appeal numbers), where the Board applied *Re Acosta* and *Islam v SSHD* (citing *In re GJ* [1998] 1 NLR 387) so as to find that the appellant 'belongs to a social group of homosexuals': at 15 (available at the University Michigan Refugee Caselaw website: http://www.refugeecaselaw.org/Home.aspx; last accessed 1 February 2012).

[36] [1999] 2 AC 629, 643. His Lordship (with whom Lord Hutton agreed) also described *Acosta* as 'seminal reasoning'.

[37] *Ibid*. 651.

against women 'is plainly in pari materiae with discrimination on grounds of race'.[38] Lord Hope explained that the 'genus' for the purposes of the *ejusdem generis* rule is 'to be found in the fact that the other Convention reasons are all grounds on which a person may be discriminated against by society'.[39] However Lord Hope's additional reference to the fact that in general terms a social group 'may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society'[40] suggests at least a degree of acceptance of the social perception approach.[41]

2.3 SOCIAL PERCEPTION/SOCIOLOGICAL APPROACH

The 'social perception' approach is often said to have originated in Australian jurisprudence, however it appears to have been the traditional approach in French jurisprudence as well.[42]

Turning first to the Australian approach, its origins can be traced to the decision of the High Court in *Applicant A*, in which the Court attempted to identify the ordinary meaning of the phrase, primarily by reference to an English dictionary. Dawson J explained:

> A "group" is a collection of persons (…) the word "social" is of wide import and may be defined to mean "pertaining, relating, or due to (…) society as a natural or ordinary condition of human life". "Social" may also be defined as "capable of being associated or united to others" or "associated, allied, combined". The adjoining of "social" to "group" suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word "particular" in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large.[43]

In McHugh J's concurring judgment, there is at least an implicit suggestion that evidence of societal perception would be necessary as he explained that the 'existence of such a group depends in most, perhaps all, cases on *external perceptions of the group*',[44] and that the group 'must be identifiable as a social unit.'[45] Further, his Honour refers to the perception of 'people in the

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[38] *Ibid*. 652.

[39] *Ibid*. 656. For subsequent clear application of the immutability test, see *L v Secretary of State for the Home Department* [2004] All ER (D) 43 (3 November 2004) [25]–[30].

[40] *Shah* [1999] 2 AC 629, 657. See also 660 (Lord Millett in dissent).

[41] This is also supported by subsequent application of the decision in *Shah*; see, e.g., *RG v Secretary of State for the Home Department* [2006] EWCA Civ 339 (English C.A. 2006). Some of these decisions in fact appear to require both the immutable characteristics and social perception tests.

[42] This approach is also clearly favoured in one of the leading academic texts: G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 3rd edn., 2007) 75–76, 85–86.

[43] (1997) 190 CLR 225, 241.

[44] (1997) 190 CLR 225, 264 (emphasis added).

[45] *Ibid*.

relevant country' as a highly relevant factor in PSG claims.[46] Even if 'the distinguishing features of the group do not have a public face', the group could be a PSG provided that the public was 'aware of the characteristics or attributes that (…) unite and identify the group.'[47]

The meaning of the 'social perception' approach was further considered by the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs*,[48] in which the Court explained that there were three steps in determining whether a group is a PSG for the purposes of the refugee definition, as follows:

> First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.[49]

Although the Court explained in *Applicant S* 'that there was no *requirement* that a society should recognize or perceive the existence of a particular social group before it would be found to exist',[50] it went on to explain that one way in which the abovementioned third requirement may be determined

> is by examining whether the society in question perceives there to be such a group. Thus, perceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of society.[51]

In other words, the test is whether the group is objectively cognisable,[52] or distinguished from the relevant society at large, with evidence of societal perception being highly relevant, indeed 'usually compelling',[53] in this inquiry.[54] Other factors might include 'the operation of cultural, social, religious and legal factors' which have a bearing upon the position of members of the

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[46] *Ibid*.
[47] *Ibid*. 265.
[48] (2004) 217 CLR 387 ('*Applicant S*').
[49] *Ibid*. 400 (Gleeson CJ, Gummow and Kirby JJ).
[50] *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 485, 493 [35] (Gleeson CJ, Gummow, Callinan and Heydon JJ) (emphasis added) ('*STCB*'). See *ibid*. 398 [27], 400 [34] (Gleeson CJ, Gummow and Kirby JJ).
[51] (2004) 217 CLR 387, 397–398 [27] (Gleeson CJ, Gummow and Kirby JJ), affd *STCB* (2006) 81 ALJR 485, 493 [35]–[36] (Gleeson CJ, Gummow, Callinan and Heydon JJ). McHugh J went so far in *Applicant S* as to say that in rare cases the society may not perceive individuals as a group, yet 'those living outside that society may easily recognise the individuals concerned as comprising a particular social group': (2004) 217 CLR 387, 410 [68].
[52] *Applicant S* (2004) 217 CLR 387, 410–411 [69] (McHugh J).
[53] *Applicant S* (2004) 217 CLR 387, 410 [67] (McHugh J).
[54] '[S]ubjective perceptions held by the community are also relevant': *ibid*. 400 [35] (Gleeson CJ, Gummow and Kirby JJ).

group in the relevant society and that would serve to distinguish the group from society at large.[55]

In terms of satisfying this test from an evidentiary perspective, the Court has said that '[t]here is no reason in principle why [such factors] cannot be ascertained objectively from a third-party perspective',[56] and that a decision-maker may 'draw conclusions as to whether the group is cognisable within the community from '"country information" gathered by international bodies and nations other than the applicant's nation of origin'[57] — in other words, the usual source of fact-finding in a refugee hearing.

The 'social perception' approach to interpreting 'social group' is also firmly entrenched in French jurisprudence, but this has developed quite independently from the Australian case law. In the important decision in *Ourbih* in 1997, the Conseil d'Etat established two criteria for defining a particular social group, the most relevant being 'the existence of characteristics common to all members of the group and *which define the group in the eyes of the authorities in the country and of society in general*.'[58] The Commission applied this reasoning to the leading case on sexual orientation, *Djellal*, in 1999, to the effect that Convention protection was reserved for '*personnes qui revendiquent leur homosexualité et entendent la manifester dans leur comportement extérieur*' ('persons who claim their homosexuality and manifest it in their external behaviour').[59] This, however, appears to require not only that the characteristics of the group be identifiable, and define the group in the eyes of the relevant society, but that those members of the group seeking protection manifest such attributes in their external behaviour.

This reading is supported by Jean-Yves Carlier's analysis of French PSG jurisprudence which leads him to conclude that it has come to require 'an affirmative stance of protest and social transgression on the part of the claimant, without which he/she will not be perceived as a member of a social group by society'.[60] Alland and Teitgen-Colly describe this as the 'exterior requirement', that is, that the group must be identifiable to society.[61]

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[55] *Khawar* (2002) 210 CLR 1, 28 [83] (McHugh and Gummow JJ), quoted in the joint judgment in *Applicant S* (2004) 217 CLR 387, 399 [30] (Gleeson CJ, Gummow and Kirby JJ).

[56] *Applicant S* (2004) 217 CLR 387, 400 [34] (Gleeson CJ, Gummow and Kirby JJ).

[57] *Ibid*. 400 [35].

[58] *Ourbih*, Conseil d'Etat [French Council of State], 171858, 23 June 1997, as cited in J. Freedman, Female Asylum-Seekers and Refugees in France, UNHCR Legal and Protection Policy Series, June 2009, PPLAS/2009/01, 30, emphasis added. The other criterion was said to be the fact that 'members of this group are exposed to persecution': *ibid*. See also V. Chetail, 'The Implementation of the Qualification Directive in France: One Step Forward and Two Steps Backwards' in K. Zwaan, (ed.) *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2007), 91–92.

[59] 12 May 1999 [Adrienne Anderson trans].

[60] J.-Y. Carlier, 'Droit d'Asile et des Réfugiés: de la Protection aux Droits' in *Recueil des Cours: Collected Courses of the Hague Academy of International Law* (Hague Academy of International Law, Martinus Nijhoff Publishers, Leiden, 2008) 213 [Adrienne Anderson trans]. See also R. Errera, 'Refugee Status — Ground of Persecution — Membership of a Particular Social Group' (2006) Public Law 168, 171, discussing French law requiring the relevant common characteristic to be 'seen by society at large'.

[61] D. Alland and C. Teitgen-Colly, *Traite du droit de l'asile* (Presses Universitaires de France, 2002) 427–428 [Adrienne Anderson trans].

There is not a great deal of guidance as to how one can establish such social perception in French jurisprudence, although it appears that persuasive factors are the existence of evidence of a climate of hostility facing the appellant from the population at large or a criminal law which identifies and penalizes a particular group. It is clear, however, that the social perception approach operates as a barrier to successful PSG claims, as will be further explored in Part 5 below.

While the various circuits in the US predominantly adopted the *ejusdem generis*/protected characteristics approach prior to 2002, there was occasional reference to an approach more akin to the Australian social perception/sociological test. Rules to amend the (then) Immigration and Naturalization Service regulations that govern asylum eligibility were drafted in 2000,[62] and proposed that factors that 'may be considered' but 'are not necessarily determinative'[63] in establishing a PSG include whether 'the group is recognised to be a societal faction or is otherwise a recognized segment of the population in the country in question,'[64] and whether '[t]he society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society'.[65] These were said to have been drawn from the BIA decision in *In re R-A*[66], but might also have found some resonance in a decision from the early 1990s in *Gomez*.[67] However, given the predominance of the protected characteristics approach in the traditional US case law on PSG, there is little guidance as to how this societal perception test was intended to operate in practice.

2.4 SOME THEORETICAL NOTES

Both the social perception and protected characteristics approaches could be said to represent the outcome of an application of the rules of treaty interpretation, specifically the primary rule in Art. 31 of the VCLT which requires that a treaty shall be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

The social perception test is focused on the 'ordinary meaning' of each individual word in the phrase 'membership in a particular social group', and could therefore be said to embody a more straightforward approach to interpretation due to its simplicity and lack of reference to any

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[62] Research confirms that the draft regulation, *Asylum and Withholding Definitions* (65 FR 76588) has not yet been passed or incorporated into the current regulations. Information from the Office of Information and Regulatory Affairs shows that as of 'Spring 2011', this regulation was still at the 'proposed rule stage', with the public comment period ending in 2012: see *RIN1615-AA41, Spring 2011.*

[63] Proposed 208.15 (c) (3) (65 FR 76588-01, 2000 WL 1783793 (F.R.))

[64] Proposed 208.15(c)(3)(iv)

[65] Proposed 208.15(c)(3)(vi).

[66] Department of Justice, Supplementary information, 65 FR 76588-01, 2000 WL 1783793.

[67] See T.A. Aleinikoff, note 10 above, 279, for criticism of this rule explaining that the 'thoughtful reader of the proposed rule might well think that the rule has produced more ambiguities than it has resolved'. Although in *Gomez*, the Court appeared to adopt something akin to a social perception test, in the more recent decision in *Koudriachova v Gonzales*, 490 F. 3d 255 (2nd Cir., 2007) the Court stated that 'we have recently clarified that the best reading of Gomez is one that is consistent with Acosta': at 262, citing *Gao v Gonzales*, 440 F. 3d 62, 69–70 (2nd Cir., 2006).

external standard such as anti-discrimination norms. Most importantly this approach retains significant scope for judicial discretion and is therefore thought more likely to accommodate a wider range of groups than is capable of being encompassed within the protected characteristics approach. Indeed, this is widely assumed, including by opponents of the social perception approach. For example, the New Zealand RSAA has criticized it on the basis that 'it enlarges the social group category to an almost meaningless degree' such that 'virtually any group of persons in a society perceived as a group could be said to be a particular social group'.[68] However, a lack of clarity as to precisely how the test is to be established is of concern as it may suggest that in practice it amounts to little more than a licence for subjective assessment of merit.[69]

The protected characteristics approach is based on the object and purpose of the 1951 Convention, and in particular on the notion that the underlying purpose of the Convention is that suggested in the Preamble, namely, that in line with the Universal Declaration of Human Rights 'human beings shall enjoy fundamental rights and freedoms without discrimination'.[70] It thus could be justified on the basis that it permits a principled evolution in an understanding of the phrase, and promotes consistency because it relies on clear external standards of reference which are of universal applicability. However, it has been criticized on the basis that it unnecessarily complicates the analysis and may result in the exclusion of some groups who do not meet the protected characteristics test.[71]

3. THE 'CODIFICATION' OF THE PSG GROUND

3.1 UNHCR GUIDELINES

As the background paper prepared in 2001 noted, the discussion of PSG in the 1977 UNHCR Handbook is 'general and rather brief',[72] stating most relevantly that it 'normally comprises persons of similar background, habits or social status'.[73] However, by 2001 the widespread reliance upon and dissection of the meaning of PSG required a more thorough treatment, which was reflected in the development of a set of Guidelines on International Protection in 2002 dedicated entirely to the interpretation of MPSG.[74]

The UNHCR Guidelines outline the two dominant approaches — protected characteristics and social perception — and describe the relationship between them as being one whereby the protected characteristics approach 'may be understood to identify a set of groups that constitute the core of the social perception analysis'. This indicates that in UNHCR's view the social

[68] GJ [1998] INLR 387 (NZRSAA, 30 August 1995).
[69] See J. Hathaway and M. Foster, 'Membership of a Particular Social Group' (2003) 15 *IJRL* 477, 484.
[70] See Preamble to the Refugee Convention, para. 1. See also Hathaway and Foster, note 69 above, 485–486.
[71] See, e.g., *Quijano v SSHD* [1997] Imm AR 227, 233.
[72] Aleinikoff, note 10 above, 266.
[73] UNHCR Handbook para. 77.
[74] UNHCR Guidelines, note 15 above. These guidelines 'are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field'.

perception analysis would likely result in the recognition of a wider range of groups than would reference to protected characteristics alone. Due to the concern that adoption of one test to the exclusion of the other may result in protection gaps, the Guidelines state 'that the two approaches ought to be reconciled'.[75]

Accordingly, the Guidelines concluded that 'it is appropriate to adopt a single standard that incorporates both dominant approaches' as follows:

> a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[76]

In case there is any ambiguity in this definition, the Guidelines make clear that where a group is not based on a characteristic deemed to be either unalterable or fundamental, 'further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.[77] This notion that the dominant approaches are seen as alternatives has been reiterated in subsequent UNHCR Guidelines on International Protection concerning 'Gender-Related Persecution',[78] 'Victims of Trafficking and persons at risk of being trafficked',[79] and 'Child Asylum Claims'.[80] In the most recent UNHCR Guidance Note on point, relating to 'Refugee Claims Relating to Victims of Organized Gangs',[81] it is explicitly stated that 'both approaches are legitimate' and that '[t]he group only needs to be identifiable through one of the approaches, not both.'[82]

One element of the UNHCR definition that might be thought unclear is the idea that a PSG is one whose members share a common characteristic other than their risk of being persecuted *or* who are perceived as group[83]. This seems to imply that where the group is based on social perception, it may indeed be defined by reference to the persecution feared. Yet it is well-accepted that

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[75] *Ibid.* [10].
[76] *Ibid.* [11].
[77] *Ibid.* [13].
[78] UNHCR, 'Guidelines on International Protection: Gender-Related Persecution 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/02/01, available online at: http://www.unhcr.org/refworld/docid/3d36f1c64.html (last accessed 10 February 2012) 7–8 [28]–[31].
[79] UNHCR, 'Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked', 7 April 2006, HCR/GIP/06/07, available online at: http://www.unhcr.org/refworld/docid/443679fa4.html (last accessed 10 February 2012) 13–14 [37]–[39] ('Trafficking Guidelines').
[80] UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', 22 December 2009, HCR/GIP/09/08, available online at: http://www.unhcr.org/refworld/docid/4b2f4f6d2.html (last accessed 10 February 2012) 18–20 [48]–[52].
[81] UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs', 31 March 2010, available online at: http://www.unhcr.org/refworld/docid/4bb21fa02.html (last accessed 10 February 2012) 12–16 [34]–[44].
[82] *Ibid.* 12 [34].
[83] This is repeated in later guidelines as well: see UNHCR, 'Trafficking Guidelines', note 79 above, 13 [37].

regardless of the test adopted, the PSG 'cannot be defined exclusively by the persecution that members of the group suffer.'[84] The explanation may be that persecutory action towards a group 'may be a relevant factor in determining the visibility of a group in a particular society'.[85] Another issue is that the common characteristic shared by a group of persons according to this definition 'will often be' but is not necessarily 'one which is innate, unchangeable, or which is otherwise fundamental to identity', which has led one scholar to question whether, if read literally, there is '*any* group that would not satisfy the UNHCR definition'?[86]

Another point of potential ambiguity lies in ascertaining precisely what is required by the 'social perception' test according to the UNHCR Guidelines. In one part the Guidelines describe the approach as referring to whether a group is 'a cognizable group' or 'set apart from society at large'[87] — which seems to invoke an objective inquiry consistent with the Australian High Court's clarification of the test in *Applicant S*. On the other hand, in the formal definition it is described as a test of whether a group is 'perceived as a group by society',[88] which may suggest a requirement to establish that members of a relevant society hold a subjective belief, view or perception of the group — a task potentially much more difficult for both asylum seekers and decision-makers than that demanded by a more objective standard. Further, while the Guidelines explain that 'human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them' in relation to the protected characteristics test,[89] there is no such explanation as to what sources should govern a determination of PSG based on the social perception test.

3.2 THE EUROPEAN COUNCIL'S QUALIFICATION DIRECTIVE

Two years after the UNHCR Guidelines on Social Group were issued, the European Union's Qualification Directive was agreed by Member States with the main objective being 'to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection'.[90] Importantly, the Qualification Directive is framed as embodying 'minimum standards' meaning that 'Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection', where 'such a request is understood to be on the grounds that the

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[84] UNHCR Guidelines, note 15 above, [14].
[85] *Ibid*. [14].
[86] S. H. Legomsky and C. M. Rodriguez, *Immigration and Refugee Law and Policy* (Foundation Press, 5th edn., 2009) 938. See also 939 where the authors ask whether, if 'the UNHCR definition of social group (…) is interpreted literally, so that every group (except a group defined solely by reference to the persecution itself) qualifies as a social group, would the UNHCR definition render the other four Convention grounds superfluous (…)?'
[87] UNHCR Guidelines, note 15 above, [7]. This is also supported by the rest of that paragraph in which it is stated that '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' — again invoking objective language.
[88] *Ibid*. [11]. See also [9] ('groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies'), [13] ('if in the society they are recognised as a group which sets them apart').
[89] *Ibid*. [6].
[90] [2004] OJ L 304/12, preamble para. 6.

person concerned' is, *inter alia*, a refugee within the Geneva Convention.[91] The Qualification Directive expressly states that consultation with the UNHCR may provide 'valuable guidance' when determining refugee status,[92] and the Court of Justice of the European Union (CJEU) has affirmed that interpretation of the Directive must be undertaken in light of the fact that it is intended to correctly implement and not detract from the 1951 Convention.[93]

Art. 10(1) of the Qualification Directive sets out the common criteria for determining 'reasons for persecution' relevantly as follows;

> (d) a group shall be considered to form a particular social group where in particular:
>
> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
>
> depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.[94]

There are a number of controversial issues in relation to this definition. First, the most immediate and striking point is the word 'and' which connects the immutable characteristics and social perception approaches, clearly suggesting that the two tests are not alternatives but rather are to be applied *cumulatively* — a position not consistent with the UNHCR Guidelines nor apparently with any established judicial approach whether common law or civil law.[95] There is some lack of certainty as to whether this is a correct interpretation of the text of the Qualification Directive given that, as pointed out by a major academic study into the Qualification Directive prepared for the European Commission in 2007, 'the various language versions of the Directive appear to diverge' in terms of whether the two tests are to be applied cumulatively or as alternatives.[96] It is

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[91] *Ibid*. preamble para. 8.

[92] *Ibid*. preamble para. 15.

[93] Note that in the ECJ decision *Aydin Salahadin Abdulla* (C-175/08), 2 March 2010, [52] the Court said that

> It is apparent from recitals 13, 16 and 17 in the preamble to the Directive that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.

See also *N.S. (C-411/10) v Secretary of State for the Home Department and ors*, 21 December 2011, Joined Cases C-411/10 and C-493/10, [75].

[94] For the background to this provision see K. Hailbronner (ed.), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (Beck: Hart, 2010) 1084–1090.

[95] But see the discussion of Belgian approach, notes 204–206 below.

[96] Academic Network for Legal Studies on Immigration and Asylum in Europe, Study on the Conformity Checking of the Transposition by Member Sates of 10 EC Directives in the Sector of Asylum and Immigration

also unclear what the significance of the opening words 'in particular' was intended to be: it might suggest that what follows is merely one possible approach to determining PSG, although this does not appear to be the predominant interpretation by States.[97]

In terms of domestic transposition of the Qualification Directive, while some jurisdictions have chosen to state the two tests as alternatives in their legislation,[98] at least some jurisdictions within the EU have adopted the cumulative approach in implementing Art. 10(1)(d) into domestic law.[99]

Done for DG JLS of the European Commission, 2007, 52–53. See also M. Ockelton, 'Problems in the Interpretation of the Qualification Directive' (2008) 39–40 *Dignitas* 105, 109–110 discussing the Czech language version.

[97] For example, a report by the Academic Network for Legal Studies on Immigration and Asylum in Europe on the Qualification Directive undertaken for the European Commission in 2007, note 96 above, relies on the use of the word 'in particular' throughout Art. 10 in stating that Art. 10 gives non-exhaustive 'interpretations of the Convention grounds': at 52 [3.2.6.2]. Similarly, the European Council on Refugees and Exiles (ECRE) recommends that the membership of a particular social group ground should 'be interpreted in a broad and inclusive way' and that 'Member States should use the flexibility afforded by the words "in particular" in article 10(1)(d) to grant protection based on *either* an innate characteristic *or* social perception, rather than requiring both, as the remainder of Art. 10(1)(d) appears to indicate': ECRE, The Impact of the EU Qualification Directive on International Protection, October 2008, available online at: http://www.ecre.org/topics/areas-of-work/protection-in-europe/150.html (last accessed 3 March 2012) 20 (emphasis in original).

[98] See for example Ireland where the *European Communities (Eligibility for Protection) Regulations* 2006 (S.I. No. 518 of 2006) provide in s. 10(1)(d) that

> a group shall be considered to form a particular social group where in particular: (i) members of that group share an innate characteristic, or a common background that can't be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society (…)'.

Similarly the Hungarian legislation (Act LXXX of 2007 on Asylum) provides in s. 64(1) that

> d) a group shall be considered to form a particular social group where in particular:
> da) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or
> db) that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society (…)"

(Legislation available through Office of Immigration and Nationality, http://www.bmbah.hu/jogszabalyok.php?id=51, last accessed 14 December 2011).

[99] It should be noted that some jurisdictions have chosen simply to refer to Art. 10 of the Qualification Directive in domestic legislation; rather than explicitly adopting the test: see, e.g., Art. 99 of the Bulgarian legislation which provides

> 5. "Race, religion, nationality, particular social group or political opinion or belief" are terms pursuant to the Convention on the status of refugees of 1951 and to Art. 10, par. 1 of the Directive 2004/83/EC of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Law for the Asylum and the Refugees, *Prom. SG. 54/31 May 2002, amend. SG. 31/8 Apr 2005, amend. SG. 30/11 Apr 2006, amend. SG. 52/29 Jun 2007*; available online at: http://www.unhcr-centraleurope.org/pdf/where-we-work/bulgaria/law-for-the-asylum-and-the-refugees-2007.html (last accessed 14 December 2011). This is also the approach in the new Austrian Asylum Act 2005, which applies only to applications lodged after 1 January 2006. In Art. 2, the Act defines 'reason for persecution' as 'any reason mentioned in Article 10 Qualification Directive': F. Newald and K. Winter, 'The Implementation of the EU Qualification Directive in Austria' (2008) 39–40 *Dignitas* 96, 96–97. Similarly, in the Netherlands, Art. 10 of the Qualification Directive is implemented in Art. 3.37 of the Aliens regulation (Voorschrift Vreemdelingen) which simply repeats Qualification Directive Art. 10, adopting the

For example, Belgium's Alien Legislation (*Loi du 15 Décembre 1980 sur L'accès au Territoire, le Séjour, L'établissement et L'éloignement des Étrangers*) reproduces Art. 10 of the EC Qualification Directive in requiring satisfaction of both the 'protected characteristics' and 'social perception' tests. Article 48/3 of the Legislation provides (relevantly) as follows:

> 4. When assessing the reasons for persecution, the following elements must be taken into consideration:
> (…)
> (d) a group must be considered to form a particular social group where in particular:
>
> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society (…).[100]

Even some non-EU member European States have clearly been influenced by the Qualification Directive in adopting the cumulative approach into domestic law. For example, the relevant Norwegian legislation provides:

> A particular social group shall in particular be considered to consist of a group of people who share a characteristic in addition to the risk of being persecuted, and who are perceived as a group by society. The common characteristic may be innate or for other reasons immutable, or otherwise consist of a manner or belief that is so fundamental to

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conjunctive 'and' (Dutch 'en'): information supplied by Martin den Heijer, Associate Professor of International Law, University of Amsterdam.

[100] [Sienna Merope trans]. See also the UK Regulations implementing the Qualification Directive: *The Refugee or Person in Need of International Protection (Qualification) Regulations 2006,* 2006 No. 2525, s. 6(1)(d) which also uses the conjunctive 'and', although interestingly uses the phrase 'for example' rather than 'in particular' before setting out the tests. See also the Finnish Aliens Act (301/2004, updated up to 1152/2010) which provides in s. 87b (323/200) (3):

> When assessing the reasons for persecution, a group can be considered to form a particular social group if:
> 1) the members of the group share a common background or an innate characteristic or belief that is so fundamental to identity or conscience that they cannot be forced to renounce it; and
> 2) the group is perceived as being different by the surrounding society.

[Ministry of the Interior (Finland) trans]. See also the Asylum Act of the Slovak Republic which provides in s. 19a(4)(e) that

> a group shall be considered to form a particular social group where in particular members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and it is perceived as being different by the surrounding society

Act as of 20 June 2002 on Asylum and Amendment of Some Acts (incl. Amendment 451/2008) [UNHCR trans], available online at: http://www.unhcr-centraleurope.org/pdf/where-we-work/slovakia/act-on-asylum-2008.html (last accessed 14 December 2011).

identity, conscience or the exercise of human rights that a person cannot b expected to renounce it.[101]

The fact that the Qualification Directive appears to require the satisfaction of both tests has been criticized,[102] including by the UNHCR[103] and ECRE,[104] as a distortion of the Convention meaning and UNHCR Guidelines, and has been an issue of contention in developing proposals for a revision of the Qualification Directive.[105] However this requirement has not been altered in the new iteration of the Qualification Directive, with the adopted proposal retaining the cumulative approach.[106]

Another important area of uncertainty in the text of the Qualification Directive is precisely what is required in order to establish membership of a social group according to this definition. The requirement that a group have 'a distinct identity in the relevant country' could be understood as consistent with the objective test propounded by the Australian High Court, but the added requirement that such distinctiveness be on the basis that the group 'is perceived as being different by the surrounding society' may require evidence of the views of members of a particular society — a more subjective test. As will be discussed below, case law interpreting

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[101] Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Act), Section 30 (d); official version available online at: http://www.regjeringen.no/en/doc/laws/Acts/immigration-act.html?id=585772 (last accessed 13 December 2011).

[102] The requirement of both has been criticised: see, e.g., J.-Y. Carlier, note 60 above, 213.

[103] See UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30 September 2009)*, 28 January 2005, available at http://www.unhcr.org/refworld/docid/4200d8354.html (last accessed 30 March 2012) 23.

[104] ECRE has 'expressed concern' about Art. 10 of the Qualification Directive 'as it can result in the denial of status to particular groups who are defined by an innate characteristic but which are not seen as set apart from society, or vice versa': ELENA Survey, October 2008, 20, citing ECRE, Information Note, 10; ECRE Green Paper Response, 18. See also ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Qualification Directive*, 12 March 2010, available at: http://www.unhcr.org/refworld/docid/4b9e39e12.html (last accessed 30 March 2012), 11 [2.5].

[105] See, e.g., UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM(2009)551, 21 October 2009) in which the UNHCR submits in relation to possible revisions to Art. 10(1)(d) that in order to 'avoid any protection gaps, UNHCR recommends that the Directive permit the alternative, rather than cumulative, application of the two [dominant PSG] concepts': at 8. It hence recommends 'amending Article 10(1)(d) to replace "and" at the end of the first subsection with "or". This will make clear that a person requires protection both in cases where he or she is a member of a particular group and in cases where he or she is perceived to be such': at 8. See also ECRE, note 104 above, 11 [2.5].

[106] See Council of the European Union, Note from Presidency to Permanent Representatives Committee, 6 July 2011, 12337/1/11 Rev 1, which annexes the text of the proposed revised Qualification Directive, approved by the Council and European Parliament; S. Peers, 'The revised directive on Refugee and Subsidiary Protection status', Statewatch Analysis, July 2011, available online at: http://www.statewatch.org/analyses/no-141-qualifications-directive.pdf (last accessed 15 December 2011) 1. The revised Directive has now been published in the EU Official Journal: see [2011] OJ L337/9 (20 December 2011) and is available online at: http://www.unhcr.org/refworld/docid/4f06fa5e2.html (last accessed 15 March 2012).

Art. 10 of the Qualification Directive has not grappled very effectively or explicitly with this issue.

Finally, while the inclusion of sexual orientation as potentially constituting a particular social group has been welcomed, and explicitly incorporated into some domestic legislation,[107] Art. 10's statement that '[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article' has been controversial,[108] and will be altered in the revised version of the Qualification Directive, which will add the following to Art. 10(1)(d): 'Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.'[109] In the meantime, however, the narrow approach to gender claims is reflected in some domestic legislation transposing Art. 10 of the original Qualification Directive.[110]

3.3 National Legislation and Guidelines

In addition to the legislative adoption of a general approach to interpreting the PSG ground, as discussed in relation to the Qualification Directive above, some jurisdictions have sought explicitly to include specified social groups in their domestic legislation, thus presumably circumventing or at least reducing judicial interpretation in the case of such groups. There are two key methods of such legislative implementation.

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[107] See for example in Hungary where the Act states in s. 64(2): 'A group where a common characteristic of its members is based on their sexual orientation or persuasion may, depending on the circumstances of the country of origin, also qualify as a particular social group' (see Act LXXX of 2007 on Asylum). In the Slovak Republic, the legislation provides that 'depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation' (s. 19a(4)(e)).

[108] In its proposal for a revision of the Directive, the Commission of the European Communities explained that 'women may form a particular social group in some societies' and the 'ambiguous wording of the last phrase of Article 10(1)(d) allows for protection gaps and for very divergent interpretations': Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, 21 October 2009, 2009/0164 (COD), available at: http://www.unhcr.org/refworld/docid/4ae95f222.html (last accessed 30 March 2012), 8.

[109] See Council of the European Union, *Note from Presidency to Permanent Representatives Committee*, 6 July 2011, 12337/1/11 Rev 1, which annexes the text of the proposed revised Qualification Directive, approved by the Council and European Parliament: at 40. The revised Directive has now been published in the EU Official Journal: see OJ L337/9 (20 December 2011).

[110] For example, the Finnish Aliens Act (301/2004, amendments up to 1152/2010) provides in s. 87b(323/200)(4) (dealing with social group) [Ministry of the Interior (Finland) trans]: 'A common characteristic of a social group may also be sexual orientation, which, when assessing reasons for persecution, cannot include acts considered to be criminal. Gender-related aspects do not themselves alone create a presumption of persecution'. In Ireland, the *European Communities (Eligibility for Protection) Regulations* 2006 (S.I. No. 518 of 2006) provide in s. 10(1)(d) that 'gender related aspects may be taken into account, without by themselves alone creating a presumption for the applicability of this Regulation'; however it is not clear how this would be interpreted in light of the provision in the Refugee Act which explicitly includes gender within social group: see note 114 below. Importantly, Ireland will not be bound by the revised Directive: see Steve Peers, note 106 above, 1.

In some jurisdictions, 'particular social group' is explicitly defined in legislation to include listed groups such as '[f]ormer victims of human trafficking',[111] 'gender, sexual orientation or other membership of a particular social group',[112] 'a group of persons of particular gender, sexual orientation, disability, class or caste',[113] 'membership of a trade union'[114] and 'membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation'.[115]

The alternative approach is to provide in domestic legislation that a person may be recognized as a refugee if he or she is at risk of persecution for a Convention ground or for an additional, listed ground such as gender or sexual orientation. This is the case in some European jurisdictions such as Spain[116] and the Czech Republic,[117] but is particularly dominant in Latin America where legislation in Costa Rica,[118] El Salvador,[119] Guatemala,[120] Mexico,[121] Nicaragua,[122] Paraguay,[123]

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[111] In Norway the Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Act), available online at: http://www.regjeringen.no/en/doc/laws/Acts/immigration-act.html?id=585772 (last accessed 13 December 2011), states in s. 30(d) that '[f]ormer victims of human trafficking shall be regarded as members of a particular social group.'

[112] Swedish Code of Statutes, Act amending the Aliens Act (2005:719), Chapter 4, s. 1: 'In this Act, 'refugee' means an alien who — is outside the country of the alien's nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief or on grounds of gender, sexual orientation or other membership of a particular social group': SFS 2009:1542, 30 December 2009, official version available online at: http://www.sweden.gov.se/sb/d/5805/a/66122 (last accessed 13 December 2011). See also German Residence Act (Aufenthaltsgesetz), s. 60 ('When a person's life-freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group'). [Anne Kallies trans, available online at: http://www.iuscomp.org/gla/statutes/AufenthG.htm (last accessed 15 March 2012)]. See also Asylum Act SR 142.31 (Switzerland) Art. 3(2) [Federal Authorities of the Swiss Confederation trans, available online at: http://www.admin.ch/ch/e/rs/142_31/a3.html (last accessed 13 December 2011)] which states that '[m]otives for seeking asylum specific to women must be taken into account'.

[113] Refugees Act 1998 (South Africa), Chapter 1, s. 1(xxi) which states: '"social group" includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste'.

[114] Refugee Act 1996 (Ireland), No 17/1996, s. 1, defining the phrase "membership of a particular social group".

[115] *Ibid*.

[116] Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria. B.O.E. Nº 263 del 31 de octubre de 2009, Art. 3, 'Refugee status recognizes a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, membership of a particular social group, gender or sexual orientation' [Adrienne Anderson trans].

[117] The Asylum Act provides in s. 12 that asylum shall be granted where it is established that an alien '(b) has a well-founded fear of being persecuted for reasons of race, sex, religion, nationality, membership of a particular social group or political opinion in the country in which he/she is a citizen': Act of 11 November 1999 on Asylum and Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act); available online at: http://www.unhcr-centraleurope.org/en/where-we-work/operations-in-central-europe/czech-republic.html (last accessed 14 December 2011).

[118] Ley Nº 8.764 de 19 de agosto de 2009 - Ley General de Migración y Extranjería (entered into force 1 March 2010) [Adrienne Anderson trans] s. 5. Article 106 provides:

> For the purposes of this Act, the term refugees will apply to every foreigner for whom the Directorate General recognizes such status. A refugee means a person who: 1) Due to well-founded fears of being persecuted for reasons of race, religion, nationality, gender, membership of a particular social group or political opinions, is outside their country of origin, and is unable, or owing to such fears, is unable to avail himself of the protection of that country'.

Uruguay[124] and Venezuela[125] lists either gender or sex as an independent ground for refugee status.

The difference between the two categories is that the examples in the first could be regarded as evidence of State practice in interpreting the phrase 'membership of a particular social group' since the legislation includes specified groups as properly falling within that phrase, whereas the

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[119] Decreto Ley N° 918, Ley para la determinación de la condición de personas refugiadas (Law for the determination of status of refugees), [Adrienne Anderson trans]. Article 4 relevantly provides:

> For the purposes of applying this Act, a refugee is:
>
> a) Every person who, due to well-founded fears of being persecuted for reasons of race, ethnicity, gender, religion or belief, nationality, membership of a particular social group or political opinions, are outside their country of origin, and are unable, or owing to such fears, are unable to avail themselves of the protection of that country.

[120] Acuerdo gubernativo N°383-2001 del 14 de septiembre de 2001, reglamento para la protección y determinación del estatuto de refugiado en el territorio del Estado de Guatemala, [Adrienne Anderson trans] Art. 11 provides:

> Those entitled to be granted refugee status in accordance with these rules:
>
> a) Every person, who due to well-founded fears of being persecuted for reasons of race, religion, nationality, gender, membership of a particular social group or political opinions, are outside their country of origin, and are unable, or owing to such fears, are unable to avail themselves of the protection of their country of nationality;
>
> d) suffers persecution through sexual violence or other forms of gender persecution based on violations of fundamental human rights in international instruments.

[121] Ley sobre Refugiados y Protección Complementaria, 2011 [Adrienne Anderson trans] Art. 13 provides:

> Refugee status will be granted to every foreigner within national territory, who meets one of the following conditions:
>
> 1. due to well-founded fears of being persecuted for reasons of race, religion, nationality, gender, membership of a particular social group or political opinions, is outside their country of origin, and is unable, or owing to such fears, is unable to avail himself of the protection of that country (…)

[122] Ley Nº 655 del 26 de junio de 2008. Ley de Protección a Refugiados [Adrienne Anderson trans] Art. 1 provides:

> For the purposes of this Act, a refugee is every person in respect of whom a competent authority recognizes such status, when one of the following circumstances exists:
>
> A) due to well-founded fears of being persecuted for reasons of race, religion, nationality, gender, membership of a particular social group or political opinions, is outside their country of origin, and are unable, or owing to such fears, are unable to avail himself of the protection of that country (…).

[123] Ley N° 1.938 — General sobre refugiados, 9 de julio de 2000 [Adrienne Anderson trans], ch. 1, Art. 1:

> For the purposes of this act, the term refugee will apply to every person that:
>
> a) is outside the country of their nationality, due to well-founded fears of being persecuted for reasons of race, sex, religion, nationality, membership of a particular social group or political opinions, and who, owing to these fears, is unable or unwilling to avail himself of the protection of that country (…).

[124] Ley Nº 18.076 — Estatuto del Refugiado (2006) [Adrienne Anderson trans] Art. 2:

> Every person will be recognised as a refugee who:
>
> A) due to well-founded fears of being persecuted for reasons of membership of a particular social or ethnic group, gender, race, religion, nationality or political opinions, is outside his country of origin, and are unable, or owing to such fears, are unable to avail himself of the protection of that country (…).

[125] Ley Orgánica sobre refugiados o refugiadas, asilados o asiladas. Publicada en la Gaceta Oficial N° 37.296 (3 October 2001) [Adrienne Anderson trans] Art. 5 provides:

> The Venezuelan State will consider as a refugee every person recognised as such by a competent authority, by virtue of having entered the national territory due to well-founded fears of being persecuted for reasons of race, sex, religion, nationality, membership of a particular social group or political opinions, and is outside his country of origin, and are unable, or owing to such fears, are unable to avail himself of the protection of that country (…).

second category appears to assume that gender, sex or sexual orientation are not automatically included and therefore need to be listed separately as independent grounds for refugee status. A close analysis of the background to each legislative amendment would, however, be necessary before definitively drawing any such conclusions as to State practice, particularly since the better view may be that most provisions were merely inserted for clarification purposes.[126] In any event, the most important point is that in all of these cases membership in one of the legislatively recognised groups qualifies one for refugee status, rather than merely an alternative and inferior status, as was once the case in some jurisdictions.[127]

Finally, many jurisdictions have not altered domestic legislation but have issued guidelines which encourage decision-makers to view specified groups as included within the PSG ground, particularly in the context of gender.[128]

Against this background, the remainder of the paper turns to consider judicial interpretation focusing particularly on developments over the past decade, and the extent to which codification has influenced jurisprudential developments and trends in the past ten years.

4. JUDICIAL INTERPRETATION SINCE 2002

Interpretation of the PSG ground has not only continued to be the subject of a great deal of examination in the major common law jurisdictions; notably, it has also been more frequently

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[126] For discussion of this very issue, see the recent decision of the Tribunal Supremo in Spain in STS 4013/2011 (15 June 2011).

[127] For example in Sweden, the previous position was that there was specific provision in the Aliens Act for individuals having a well-founded fear of being persecuted on account of gender or sexual orientation but this relegated its beneficiaries to subsidiary protection precluding the grant of Convention refugee status and its accompanying benefits: see generally G. Noll, 'The Qualification Directive and its Transposition into Swedish Law' in Zwaan, note 58 above.

[128] See for example in Canada, *Guideline 4 Concerning Women Refugee Claimants Fearing Gender-Related Persecution,* effective 13 November 1996 (Guideline 4), issued by the Chairperson of the Immigration and Refugee Board (IRB) pursuant to sub-s. 65(3) of the former *Immigration Act,* RSC 1985, c I-2, which provides that '[g]ender is an innate characteristic and it may form a particular social group. A subgroup of women may also form a particular social group. Women in these particular social groups have characteristics (possibly innate or unchangeable) additional to gender, which make them fear persecution': [2]. These guidelines are frequently relied upon by both the Refugee Protection Division (RPD) of the IRB and the Federal Court: for a recent example see *Romhaine v Minister of Citizenship and Immigration* (2011) FC 534, [18]. Indeed in *Zolotova v Minister of Citizenship and Immigration* (2011) FC 193, Justice Shore noted that in a case concerning gender, the reasons of the RPD 'must reflect the specific situation of an applicant, with particular attention to the Gender-related Guidelines': at [2]–[4]. In the UK, the UK Border Agency adopted an Asylum Instruction on *Gender Issues in the Asylum Claim* in 2004 which was last revised in September 2010. The Asylum Instruction is heavily drawn from the 1998 Refugee Women's Legal Group's *Gender Guidelines for the Determination of Asylum Claims in the UK*: see Asylum Aid, '"I feel like as a woman I'm not welcome": A gender analysis of UK asylum law, policy and practice', January 2012, [3.2.2]; available online at: http://www.asylumaid.org.uk/data/files/publications/178/Ifeelasawoman_REPORTv2.pdf (last accessed 30 January 2012). For a contemporary collection of gender guidelines in different countries, see http://cgrs.uchastings.edu/law/gender_guidelines.php (last accessed 30 January 2012).

relied upon in many civil law jurisdictions. In 2001 it was observed that in civil law jurisdictions, the PSG ground 'is less developed, with more focus placed on the interpretation of persecution and on the other four grounds'.[129] Yet since then in some civil law jurisdictions this appears to have changed dramatically with the introduction of the 2004 Qualification Directive. For example, in Germany in 2001 the case law was accurately described as 'sparse',[130] yet for the purposes of the present study 80 post-Qualification Directive German cases which turned on or considered in some depth the PSG ground were identified and analyzed.

The analysis below is divided thematically according to the impact of the above developments, that is, the UNHCR Guidelines and Qualification Directive, where applicable, on the jurisprudence of States Parties.

4.1 Jurisdictions that now Require Satisfaction of both Tests (Narrowing of PSG Analysis)

In two jurisdictions with significant refugee status determination caseloads — one common law jurisdiction and one civil law jurisdiction — the interpretation of the PSG ground has undergone significant changes over the past decade, so as to narrow the scope of the PSG ground by requiring the satisfaction of *both* the protected characteristics and social perception tests.

4.1.1 Germany

As noted above, prior to the introduction of the Qualification Directive, the MPSG ground did not play a significant role in German jurisprudence; rather, the courts usually avoided its examination by focusing on alternative grounds.[131] Where a case did rely on this ground, the jurisprudence usually concentrated on the 'unchangeable characteristic.'[132]

Section 60 of the German *Aufenthaltsgesetz* (Residence Act) states that:

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[129] See Summary Conclusions in Feller *et al*. (eds), note 1 above, 312 [1]; UNHCR Guidelines, note 15 above, [8].

[130] The Aleinikoff study described the jurisprudence as 'very sparse': note 10 above, 283. See also A. Klug, 'Harmonization of Asylum in the European Union — Emergence of an EU Refugee System?' (2004) 47 *German Yearbook of International Law* 594, 609–610 noting that the PSG ground is 'seldom used in some Member States', citing Germany: at n. 61.

[131] C. Hruschka and T. Löhr, 'Das Konventionsmerkmal "Zugehörigkeit zu einer bestimmten sozialen Gruppe" und seine Anwendung in Deutschland' ['The Convention Ground "Membership of a particular social group" and its Application in Germany', Anne Kallies trans] (2009) 28(4) *Neue Zeitschrift Für Verwaltungsrecht* 205, 208, n. 61.

[132] See also E. Hollmann, 'Die Qualifikationsrichtline' (presentation 25 November 2005), 15, claiming that German jurisprudence usually concentrated on the term of the 'unchangeable characteristic' [Anne Kallies trans]. Although for an earlier description of the case law see M. Fullerton. 'A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group,' (1993) 26 *Cornell Int'l L.J.* 505.

> (1) In application of the Convention of 28 July 1951 relating to the Status of Refugees (Federal Law Gazette 1953 II, p. 559), a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions (…).[133]

In addition, it now adds that:

> Article 4(4) and Articles 7 to 10 of Council directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise require international protection and the content of the protection granted (Official EU Journal no. L 304, p.12) shall additionally be applied in establishing whether a case of persecution pursuant to sentence 1 applies.[134]

Relying on the reference to Art. 10 of the Qualification Directive, German courts now undoubtedly apply a cumulative approach.[135] The application instructions, published by the Federal Ministry of the Interior,[136] require a cumulative approach, expressly demanding that apart from the definition contained in Art. 10(1)(d) there is a need to establish 'always a distinct identity within the society of the country of origin. This is for example the case where a group gets discriminated by the surrounding society'.[137]

This is supported in the German case law: of the 80 decisions analyzed for the present study, the majority interpreted Art. 10(1)(d) as requiring *both* a shared fundamental characteristic and a perception by society that the group is different to the rest of the society.[138] Although at least one court has noted that the use of the word 'in particular' in the Qualification Directive may suggest

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[133] Section 3 of the German Asylum Procedures Act (Asylverfahrensgesetz) allows for refugee status to be granted, and defines a refugee by reference to section 60 of the German Residence Act (Aufenthaltsgesetz) [Anne Kallies trans].

[134] Anne Kallies trans.

[135] See, e.g., Hessischer Verwaltungsgerichthof (VGH) [Hessen Higher Administrative Court], 21 February 2008 [Anne Kallies trans]; Hessischer Verwaltungsgerichtshof (VGH) [Hessen Higher Administrative Court Hessen], 3UE 455/06.A, 10 April 2008 [Anne Kallies trans]; Verwaltungsgericht (VG) München [Munich Administrative Court], M 24 K 07.50603, 6 November 2007 [Anne Kallies trans]; Verwaltungsgericht (VG) Schleswig-Holstein [Schleswig-Holstien Administrative Court], 4 A 244/05, 20 November 2006 [Anne Kallies trans].

[136] Hinweise des Bundesinnenministeriums zur Anwendung der Richtlinie 2004/83/EG des Rates über Mindestnormen für die Anerkennung von Flüchtlingen und den Inhalt des zu gewährenden Schutzes (13 October 2006).

[137] *Ibid*.

[138] In addition to those noted above, see, e.g., Verwaltungsgericht (VG) Frankfurt (Oder) [Frankfurt (Oder) Administrative Court], VG4K 772/10.A, 11 November 2010 [Adrienne Anderson trans]; Verwaltungsgericht (VG) Regensburg [Regensburg Administrative Court], RN 8 K 08.30020, 15 September 2008 [Adrienne Anderson trans]; Verwaltungsgericht (VG) Neustadt an der Weinstraße [Neustadt an der Weinstraße Administrative Court], 3 K 753/07.NW , 8 September 2008 [Adrienne Anderson trans]. For earlier authority which adopted legal reasoning 'very much akin to the common law-based "protected characteristics" approach', see A. Zimmermann (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP, 2011) 392. But later authority supports the cumulative approach: at 394 (n. 810).

the availability of other alternative approaches; it went on to find that where the explicitly stated tests (protected characteristics and social perception) are relied upon, they must *both* be satisfied:

> Hereby the court assumes that both alternatives of Article 10(1)(d) have to be present cumulatively. Article 10 of the directive 2004/83/EC does not exclude the possibility that different configurations allow the acceptance as a social group. This can especially be deducted from the use of the term 'in particular'. These different configurations, however, would, in the opinion of the court, need to express a similar intensity of description as the requirements on Art. 10 of the directive 2004/83/EC. This would not be the case if alternatively the presence of only one of the two requirements of Art. 10(1)(d) of the directive 2004/83/EC would be accepted as sufficient.[139]

While most cases rely on Art. 10(1)(d) of the Qualification Directive in support of the cumulative approach, in at least one decision the Court relied also on the UNHCR Guidelines in support of this approach. In a decision of the Higher Administrative Court of Schleswig-Holstein, concerning the application of an Iraqi man at risk from a personal vendetta who claimed that he was part of a PSG based on his family membership, the Court stated:

> A definition of the term "social group" cannot be taken from either the law or the underlying legislative materials. From the so-called state practice, different approaches to the determination of a "social group" within the meaning of Article 1A(2) of the Geneva Convention on Refugees are reported. From that, it is considered whether the group shares an inalienable and immutable characteristic or whether individuals have one common characteristic, which makes them a recognizable group, distinguishable from the community. The group members must be perceived by the respective community as a different group (see UNHCR Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention or the Protocol of 1967 relating to the Status of Refugees -HCR/GIP/02/02-, II A (overview of State practice), see also Art. 10(1)(d) of Directive 2004/83EG) (…) Based on this — applicable to both the Geneva Refugee Convention as well as § 60(1) of the Residence Act — the criteria of a family or an "association" of relatives ("Clan") will generally not be regarded as a "social group" within the meaning of refugee protection. Although it can be assumed that all the family members in a family are joined by an immutable characteristic (see Marx, Residence Act Commentary, § 60 para. 155, 158). But *a family is not as clearly distinguishable from the rest of society with their own group ("Group" -) perceived identity*. It is conceivable, such, for others actually visible in the identification of belonging to a larger tribe, if (for example) of belonging to a regional tribal group has a special significance and acts as identification. In the case of the plaintiff there are not such considerations. He is threatened

[139] Verwaltungsgericht (VG) Wiesbaden [Wiesbaden Administrative Court], 3 K 1465/09.WI.A, 14 March 2011 [Anne Kallies trans].

> by the relatives of two slain farmers alone, as a member of the family of the "perpetrators", *and he will be perceived only by them, not by other citizens, in this sense as "distinctive" in Iraq*. The distinction, which arises — due to the presumably true (see above) — vendetta, arises therefore only through the act of persecution. Such a case is not within the scope of § 60(1) of the Residence Act's protected legal interests.[140]

The reaction in German literature has been mixed: while some have criticized the cumulative approach as incompatible with international law,[141] and recommended the adoption of the alternative test along the lines of the UNHCR Guidelines,[142] at least one scholar views it as unproblematic, since it is said that it is hard to imagine a case 'where not both, the internal and external expression of the group membership, were present'.[143] However, the latter view is not borne out by an analysis of the jurisprudence; rather, as the above decision relating to family suggests, it is clear that the cumulative approach has a restrictive effect. This will be further explored in Part 5 below, particularly in the categories of women/gender, LGBTI applicants, and family as PSGs.

4.1.2 The United States

As explained above in Part 2.2, the protected characteristics approach originated in the US jurisprudence, in particular, in the decision of the Board of Immigration Appeals' decision in *Re Acosta.*[144] While rare references could be found to an approach akin to social perception, the protected characteristics interpretation was well-entrenched for over two decades.[145] In 2006, however, in a decision concerning the refugee claim by a family who defined themselves as part of a group of 'former noncriminal drug informants working against the Cali drug cartel', the BIA adopted a new approach to determining PSG claims.[146]

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[140] Oberverwaltungsgericht (OVG) Schleswig-Holstein [Schleswig-Holstein Higher Administrative Court], 1 L B 22/05, 27 January 2006, emphasis added [Adrienne Anderson trans].

[141] See, e.g., Hruschka and Loehr, note 131 above, 210; R. Bank and F Foltz, 'Flüchtlingsrecht auf dem Prüfstand: Die Qualifikationsrichtlinie im deutschen Recht' (Beilage zum ASYLMAGAZIN 10/2008) [Anne Kallies trans].

[142] T. Löhr, Die kinderspezifische Auslegung des völkerrechtlichem Flüchtlingsbegriffs (2009) 141 [Anne Kallies trans].

[143] R. Marx, 'Furcht vor der Verfolgung wegen Zugehörigkeit zu einer bestimmten sozialen Gruppe (Article 10 I Bst.d RL 2004/83/EG)' (2005) 25(6) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 177, 180/181 [Anne Kallies trans].

[144] (1985) 19 I. & N. Dec. 211.

[145] This was made clear in UNHCR Submissions as amicus in *Rivera-Barrientos* where it stated that the *Acosta* standard 'served to guide decisions by Immigration Judges, the Board, the Circuit Courts and many international courts for over 20 years': Brief of the UNHCR as Amicus Curiae in Support of Petitioner, 18 August 2010, 19. In *Valdiviezo-Galdamez, v Attorney General*, 663 F. 3d 582 (3rdCir., 2011) ('*Valdiviezo-Galdamez*'), Hardiman J stated in his concurring judgment that the *Acosta* test 'for over twenty years — from 1985 until 2006 — provided the most widely-adopted definition of "particular social group"': at 613.

[146] Although the BIA claimed that it was not a new approach, this has been strongly disputed: see, e.g., *Valdiviezo-Galdamez*, 663 F. 3d 582 (3rd Cir., 2011) where the Third Circuit surveyed the history of PSG claims in US

In *Re C-A-*,[147] the BIA noted that the 'starting point' in defining the phrase PSG is that set forth in *Acosta*, which they noted had by then been adopted in many of the Circuit Courts of Appeal.[148] They also made reference to the 1991 decision from the Second Circuit in *Gomez* which had suggested that the PSG must be 'recognizable and discrete',[149] and continued:

> The United Nations High Commissioner for Refugees ("UNHCR") has recently adopted guidelines that combine elements of the Acosta immutable or fundamental characteristic approach, as well as the Second Circuit's "social perception" approach.[150]

While continuing to 'adhere to the *Acosta* formulation', the BIA 'considered as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group'.[151] Although acknowledging that a past experience, such as the historical fact of having informed on the Cali cartel 'is, by its very nature, immutable as it has already occurred and cannot be undone',[152] the BIA took the view that this was not sufficient to establish a PSG because (*inter alia*) the 'recent *Guidelines* issued by the United Nations confirm that "visibility" is an important element in identifying the existence of a particular social group.'[153] Considering the social visibility issue in this case, the BIA noted that the very nature of the conduct at issue is such that it is 'generally out of the public view' and hence an informant would normally 'remain unknown and undiscovered' such that '[r]ecognizability and visibility

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jurisprudence in considerable depth and concluded that the concepts of 'social visibility' and 'particularity' arose from *In re C-A* and *In re A-M-E & J-G-U* decided in 2006: at 602. In particular, the Third Circuit explained that it was 'hard-pressed' to understand the BIA's claim that 'social visibility' although not expressly required had always been present in earlier decisions applying *ejusdem generis*: at 604. The Court stated that if a member of any of the groups previously recognised as falling within the definition by virtue of the PSG ground applied for asylum today, 'the BIA's "social visibility" requirement would pose an unsurmountable obstacle to refugee status, even though the BIA has already held that membership in any of these groups qualifies for refugee status'. Hardiman J concurred, explaining that 'social visibility' and 'particularity' in practice 'have become stringent requirements that can be outcome-determinative': at 614. For further background to recent US developments, see D. Anker, *Law of Asylum in the United States* (West, 2011) 344–348.

[147] 23 I. & N. Dec. 951 (BIA, 2006) interim decision #3535.

[148] *Ibid*. 955–956.

[149] *Ibid*. 956.

[150] *Ibid*. 956, citing UNHCR Guidelines, note 15 above.

[151] *Re C- A-*, 23 I. & N. Dec. 951, 956–957 (BIA, 2006).

[152] *Ibid*. 958.

[153] *Ibid*. 960. In *Castillo-Arias v U.S. Attorney General*, 446 F. 3d 1190 (11th Cir., 2006), the Eleventh Circuit affirmed this decision, noting that 'the UNHCR takes the Second Circuit's approach, in that the external perception of the group can be considered as an additional factor': at 21, citing with approval from *Castellano-Chacon v INS*, 341 F. 3d 533, 546 (6th Cir., 2003). While the UNHCR has been highly critical of the BIA's reliance on its Guidelines to introduce the additional hurdle of social visibility (see various interventions) at least one commentator has described the introduction of this criterion as 'on more solid ground' on the basis that the BIA can draw support from 'recent UNHCR guidelines on the criteria for defining "particular social group"': D. A. Martin, 'Major Developments in Asylum law over the Past year', (2006) 83(34) *Interpreter Releases* 1889, 6. The BIA also attempted to support its new approach by explaining that its decisions involving social groups were generally ones that were 'easily recognizable and understood by others to constitute social groups': at 959. This has been criticised as historical revisionism in the literature: F. E. Marouf, 'The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender' (2008) 27 *Yale Law & Policy Review* 47.

is limited',[154] resulting in the rejection of this claim. It is notable that in this decision, the test of whether a group is distinguishable from society (whether by social perception or otherwise) morphed effortlessly into the quite distinct test of social *visibility*. The interchangeable use of 'social perception' and 'social visibility' in later decisions confirms this reading of the case.

This decision has clearly marked a new era in PSG jurisprudence in the US, having been reiterated and applied in several subsequent decisions of the BIA. In *Re A-M-E & J-G-U*, the BIA again relied on 'the 2002 guidelines of the [UNHCR] which endorse an approach in which an important factor is whether the members of the group are 'perceived as a group by society'.[155] In that case, while the BIA considered that the group based on wealth would have met the immutable characteristic test,[156] it 'fail[ed] the "social visibility" test', and hence the claim was rejected.[157]

In *Re A-T*, decided in 2007, the BIA applied the new test to the context of gender claims, observing that 'we are doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them',[158] and in *Re E-A-G*, the BIA found that the group of 'persons resistant to gang membership' lacked 'the social visibility that would allow others to identify its members as part of such a group.[159]

The precise meaning of 'social visibility' has been subject to debate in the jurisprudence of various Circuit Courts of Appeal. In the only Circuit categorically to have rejected the BIA's new test of social visibility — the Seventh Circuit — Posner J has explained that often 'it is unclear whether the Board is using the term "social visibility" in the literal sense or in the "external criterion" sense, or even whether it understands the difference'.[160] To the extent that it has used

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[154] *Re C- A-*, 23 I. & N. Dec. 951, 960 (BIA, 2006).

[155] 24 I. & N. Dec. 69, 74 (BIA, 2007) interim decision #3550.

[156] *Ibid*. 74.

[157] *Ibid*. 75.

[158] 24 I. & N. Dec. 296, 302 (BIA, 2007). Note that this was later vacated by the Attorney General and remanded for reconsideration, and in April 2011, the IJ granted the respondent withholding of removal: see 'The IJ's Decision on Remand of Matter of A-T-', (2011) 88(31) *Interpreter Releases* 1937.

[159] 24 I. & N. Dec. 591, 594 (BIA, 2008). See also *Matter of S-E-G-, et al, Respondents*, 24 I. & N. Dec. 579 (BIA, 2008) ('*Re S-E-G-*').

[160] *Ramos v Holder*, 589 F. 3d 426, 430 (7th Cir., 2009). In some Circuits, it appears to mean both. For example, in *Pierre v U.S. Attorney General*, 432 Fed. Appx. 845 (11th Cir., 2011) the Eleventh Circuit explained that '[t]he social visibility requirement asks whether the shared characteristic of the group is generally recognized by others in the community and whether the members of the group are perceived as such by society': at 847. In *Valdiviezo-Galdamez*, the Third Circuit explained that the government had contended that 'social visibility' does not mean 'on-sight visibility' but rather that it 'is a means to discern the necessary element of group perceptibility, i.e. the existence of a unifying characteristic that makes the members understood by others in society to constitute a social group or recognized as a discrete group in society': 663 F. 3d 582, 607 (3rd Cir., 2011). The Court rejected this however, explaining that the government was merely attempting to 'spackle over the cracks in the way the BIA has approached social group cases': at 607–608. Hence the Third Circuit joined 'the Seventh Circuit in wondering "even whether [the BIA] understands the difference"': *ibid*. See also Circuit Judge Hardiman

the test to disqualify those who are able to be discreet or hide their relevant attributes, as clearly suggested in *Re C-A-* above, Posner J correctly explained that this may be relevant to 'the likelihood of persecution, but is irrelevant to whether if there is persecution it will be on the ground of group membership.'[161] In a strongly worded judgment in which he exclaimed that the test 'makes no sense',[162] his Honour explained that

> Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population."[163]

The Court of Appeals for the Third Circuit has recently concurred with this view,[164] finding that the adoption of the 'social visibility' test is not entitled to the usual administrative (*Chevron*) deference given that its adoption is inconsistent with previous authority, [165] and is unreasonable,[166] and unprincipled.[167]

Concurrent with the development of the new 'social visibility' test has been a new-found focus on the word 'particular' in 'particular social group' in the US case law; such that 'particularity' now forms an additional hurdle, namely, that the proposed group must be capable of being 'accurately (…) described in a manner sufficiently distinct that the group would be recognized,

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concurring in *Valdiviezo-Galdamez*, where he also noted that it is unclear whether 'social visibility' 'means that the group's shared characteristic must be visible to the naked eye (i.e. pass the "eyeball test") or just that the applicant's society must understand individuals with the shared characteristic (visible or invisible) to be members of a group': at 616–617.

[161] *Ramos v Holder*, 589 F. 3d 426 (7th Cir., 2009).

[162] *Gatimi v Holder*, 578 F. 3d 611 (7th Cir., 2009) ('*Gatimi*'). He explained: 'nor has the Board attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility': at 3. See also the decision of the Fourth Circuit in *Crespin-Valladares v Holder*, 632 F. 3d 117, 126 (4th Cir., 2011) ('*Crespin*') where the Circuit Court of Appeals for the Fourth Circuit noted that 'we need not decide whether that criterion [social visibility] comports with the INA'.

[163] *Gatimi*, 578 F. 3d 611, 3 (Posner J) (7th Cir., 2009). The UNHCR has made a similar point in several of its amicus interventions in cases at the appellate level in the US: see for example Brief of the UNHCR as Amicus Curiae in Support of Petitioner, Rivera-Barrientos, No 10-9527, 18 August 2010, 13–14.

[164] See *Valdiviezo-Galdamez v Attorney General*, 663 F. 3d 582, 585 (3rd Cir., 2011), where the Third Circuit cited this passage and concluded '[w]e agree'. Although the Court was very critical of the 'social visibility' and 'particularity' tests, it did not categorically reject them but rather refused to accord these tests Chevron deference since it held that these tests were inconsistent with previous BIA authority and also that the BIA had not provided 'principled reasons' for its adoption of these tests: see at 605. It remanded the case to the BIA, explaining that the BIA is free to adopt new tests but that any new test must be principled and based on a permissible construction of the statute: at 609 n 19.

[165] *Ibid.* 609.

[166] *Ibid.*

[167] *Ibid*.

in the society in question, as a discrete class of persons'.[168] Further, it is said that 'the size of the proposed group may be an important factor in determining whether the group' meets the particularity requirement; the 'key question is whether the proposed description (…) is "too amorphous"'.[169] This latter development is an apparent repudiation of the wide acceptance that group size is irrelevant,[170] and that the group need not be homogenous or cohesive.[171]

The social visibility and particularity tests have now been adopted as essential elements in establishing membership of a PSG in most Circuit Courts of Appeal; including the First,[172] Second,[173] Fourth,[174] Sixth,[175] Eighth,[176] Ninth,[177] Tenth[178] and Eleventh Circuits.[179] The most recent Circuit to have done so — the Circuit Court of Appeals for the Tenth Circuit in September 2011 — adopted the social visibility and 'particularity' tests notwithstanding the UNHCR's

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[168] *Re S-E-G-*, 24 I. & N. Dec. 579, 584 (BIA, 2008).

[169] *Ibid*. 584.

[170] The fact that particularity is linked to the size of the group is clear in those cases which have described it as being linked to 'numerosity concerns': see *Portillo v U.S. Attorney General*, 2011 U.S. App. LEXIS 15169, 5 (11th Cir., 2011), citing *Castillo-Arias*, 446 F. 3d 1190, 1194–1197 (11th Cir., 2006). There the Court rejected the proposed social group in part because it would 'serve as a catch-all for every former military member who did not fall within one of the five protected groups, creating numerosity concerns': at 5. This also seems to erroneously assume that every person in the proposed group would necessarily be at risk. See also *Malonga v Mulasey*, 546 F. 3d 546 (8th Cir., 2008) where the Eighth Circuit overturned the BIA's rejection of the relevant PSG on the basis that the BIA had erroneously concluded that 'the Lari ethnic group of Kongo tribe is not a particular social group for purposes of withholding removal because it is a "substantial minority" of the population of Congo': at 553.

[171] See the concurring opinion of Circuit Judges Bea and Ripple in *Henriquez-Rivas v Holder*, 2011 U.S. App. LEXIS 18661 (9th Cir., 2011) where they explain that the particularity requirement conflicts with the BIA's previous interpretation that PSGs 'need not share kinship ties or origin, or have identical interests, lifestyles, or political leanings': at 10. See also *Valdiviezo-Galdamez*, 663 F. 3d 582 (3rd Cir., 2011), where the Court explained that it was 'hard-pressed to discern any difference between the requirement of "particularity" and the discredited requirement of "social visibility"': at 605.

[172] *Scatambuli v Holder*, 558 F. 3d 53, 59–60 (1st Cir., 2009). See also the recent decision *Diaz Ruano v Holder*, 430 Fed. Appx. 19 (1st Cir., 2011), citing previous decisions of the First Circuit which have pronounced social visibility 'an acceptable gloss on the statutory language': at 21.

[173] *Ucelo-Gomez v Mukasey*, 509 F. 3d 70, 74 (2nd Cir., 2007).

[174] *Lizama v Holder*, 629 F. 3d 440 (4th Cir., 2011).

[175] *Al-Ghorbani v Holder*, 585 F. 3d 980, 994 (6th Cir., 2009); *Kante v Holder*, 2011 U.S. App. LEXIS 743 (6th Cir., 2011).

[176] *Davila-Mejia v Mukasey*, 531 F. 3d 624, 629 (8th Cir., 2008); *Malonga v Mukasey*, 546 F. 3d 546, 553–554 (8th Cir., 2008).

[177] *Arteaga v Mukasey*, 511 F. 3d 940, 945 (9th Cir., 2007); *Santos-Lemus v Mukasey*, 542 F. 3d 738, 746 (9th Cir., 2008). Although see more recent case law in which the Court has described 'social visibility' and 'particularity' as 'factor[s] to consider': *Perdomo v Holder*, 611 F. 3d 662 (9th Cir., 2010).

[178] *Rivera-Barrientos v Holder*, 2011 U.S. App. LEXIS 18567 (10th Cir., 2011).

[179] In *Castillo-Arias v U.S. Attorney General*, 446 F. 3d 1190, 1196 (11th Cir., 2006), a panel of the Court held that the BIA's definition 'strikes an acceptable balance between (1) rendering "particular social group" a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering "particular social group" a nullity by making its requirements too stringent or too specific': at 1197. Although the Circuit has recently been invited to discontinue adherence to the BIA's new requirements, it held in *Pierre v U.S. Attorney General*, 432 Fed. Appx. 845 (11th Cir., 2011) that it is 'bound to apply the [*Castillo-Arias*] precedent: at 847.

intervention as *amicus curiae* through which it argued in this case, as in other interventions,[180] that in adopting the 'social visibility' and 'particularity' requirements, the BIA had 'erroneously relied upon the UNHCR Guidelines',[181] and that the BIA's interpretation of the UNHCR Guidelines 'is incorrect'.[182] Further, the UNHCR argued that these requirements are 'not in accordance with the text, context or object and purpose of the 1951 Convention', and that the BIAs imposition of such tests 'may result in refugees being erroneously denied international protection and subjected to *refoulement*'.[183] The UNHCR focused on the fact that its Guidelines had always intended for the protected characteristics and social perception tests to act as alternative rather than cumulative requirements,[184] and the notion that in any event social perception had never been intended to require social visibility.[185]

Notwithstanding these persuasive submissions, the Tenth Circuit rejected the UNHCR's arguments, finding that the 'particularity' requirement is demanded by the text of the definition (the word 'particular'),[186] while 'social visibility' is neither 'inconsistent or illogical'.[187] It is ironic that while the UNHCR Guidelines were clearly heavily relied upon by the BIA in developing this new additional hurdle for applicants to overcome, the UNHCR's clear explanation to the Tenth Circuit as to the manner in which these Guidelines have been misunderstood was discounted on the basis that while UNHCR Guidelines 'may be a useful interpretative aid', they are 'not binding on the Attorney General, the BIA, or US courts', hence any variation from the Guidelines 'does not in itself establish that the BIA's interpretation is unreasonable'.[188]

One of the difficulties with the 'social perception/visibility' approach developed in the US is that it is not clear how an applicant could successfully establish this essential element. Although the Australian High Court reassured decision-makers (and applicants) in *Applicant S* that '[t]here is

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[180] See, e.g., amicus curiae briefs filed in *Granados Gaitan v Holder*, (No 10-1724) (8th Cir., 2010); *Gonzalez-Zamayoa v Holder*, (No 09-3514) (2nd Cir.); *Orellana-Monson v Holder*, (No. 08-60394) (5th Cir., 2009); *Valdiviezo-Galdamez v Holder*, (No. 08-45640) (3rd Cir., 2009); *Doe v Holder*, (No. 09-2852) (7th Cir., 2009); *Bueso-Avila v Holder*, (No 09-2878) (7th Cir., 2010).

[181] Brief of the UNHCR as amicus curiae in Support of Petitioner, Rivera-Barrientos, 18 August 2010, 3; available online at: http://www.unhcr.org/refworld/country,,,AMICUS,SLV,,4c6cdb512,0.html (last accessed 16 March 2012).

[182] *Ibid*. 4.

[183] *Ibid*. 4. See also 19–20 for more particular examples of groups that would meet the protected characteristic approach but probably not the social visibility approach.

[184] *Ibid.* 12–13. In one concurring opinion in the Circuit Court of Appeals for the Third Circuit, it has been recognized that the UNHCR Guidelines treat '"social visibility" as an alternative to *Acosta* (…) not a requirement in addition to *Acosta*;' however this insight is rare: See *Valdiviezo-Galdamez*, 663 F. 3d 582, 618 (3rd Cir., 2011) (Hardiman J). Hardiman J went on to ask 'Why, then, has the BIA decided to turn the [UNHCR Social group] Guidelines' disjunctive into a conjunctive, essentially creating an "Acosta-plus" test, rather then adopt the "Acosta-or" test endorsed by the UNHCR?'.

[185] *Ibid*. 4–5; 13–14.

[186] *Ibid*. 13–16.

[187] *Ibid*. 25.

[188] *Rivera-Barrientos v Holder*, 2011 U.S. App. LEXIS 18567, 19 (particularity), 28 (social visibility) (10th Cir., 2011).

no reason in principle' why the social perception test 'cannot be ascertained objectively from a third-party perspective',[189] and that a decision-maker may 'draw conclusions as to whether the group is cognisable within the community' from '"country information" gathered by international bodies and nations other than the applicant's nation of origin',[190] this is not borne out in the US decisions on point. In many cases, this element is dismissed on the basis of conclusory reasoning such as that '[t]here is little in the background evidence of record to indicate that' the relevant group is 'perceived as a group' by society.[191]

The onus is squarely placed on the applicant as is made clear in the decision of the Circuit Court of Appeals for the First Circuit in *Mendez-Barrera* where the claim was dismissed in part because the applicant had 'failed to provide even a scintilla of evidence' to satisfy the social visibility criterion.[192] However, given how often claims are now being dismissed on this basis, it appears questionable whether it is possible to establish this element based on the usual sources of country information ordinarily available to an applicant in the refugee status determination context,[193] particularly when the BIA has provided no guidance whatsoever as to the kinds of evidence that would assist in resolving such claims.[194] While there are rare examples of a Circuit Court of Appeal remanding a BIA decision where 'the BIA's finding that the purported group lacked the requisite social visibility or particularity is not supported by any explanation or analysis,'[195] most are simply affirmed notwithstanding the lack of clarity concerning the basis for the finding regarding (lack of) social visibility.

The inherent subjectivity in the application of these new obstacles for refugee applicants, in particular the requirement of 'social visibility', has been heavily criticized in the Seventh Circuit, as well as by a concurring judgment in a recent decision of the US Court of Appeals for the Ninth Circuit. In *Henriquez-Rivas v Holder*,[196] Circuit Judges Bea and Ripple explained that neither the 'social visibility' nor 'particularity' requirements have clarified the analysis; rather, the

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[189] *Applicant S* (2004) 217 CLR 387, 400 [34] (Gleeson CJ, Gummow and Kirby JJ).
[190] *Ibid.* 400 [35].
[191] See *Re S-E-G-*, 24 I. & N. Dec. 579, 587 (BIA, 2008). 'Persons who resist joining gangs have not been shown to be part of a socially visible group within Honduran society': *Re E-A-G-, Respondent*, 24 I. & N. Dec. 591, 594 (BIA, 2008).
[192] *Mendez-Barrera v Holder*, 602 F. 3d 21, 27 (1st Cir., 2010). See also *Diaz Ruano v Holder*, 430 Fed. Appx. 19 (1st Cir., 2011), where the First Circuit stated that '[t]o cinch matters, the petitioner has not demonstrated that his putative social group has the requisite social visibility': at 21; *Pierre v U.S. Attorney General*, 432 Fed. Appx. 845 (11th Cir., 2011) where the Circuit Court of Appeals for the Eleventh Circuit explained that, '[b]ecause Pierre failed to present evidence or testimony establishing that his alleged group was socially visible, the agency's finding that Pierre was not entitled to asylum relief as a member of a particular social group was supported by substantial evidence in the record': at 848.
[193] Marouf, note 153 above, 75–78.
[194] In *Diaz Ruano*, 430 Fed. Appx. 19 (1st Cir., 2011), the First Circuit merely stated that '[i]n order to satisfy the requirements for a social group, an alien must show that the relevant community (here, Guatemala) views the described group as a discrete class': at 21.
[195] *Arias-De Alvarado v Holder*, 420 Fed. Appx. 83, 2 (2nd Cir., 2011).
[196] 2011 U.S. App. LEXIS 18661 (9th Cir., 2011).

introduction of these elements 'has only compounded the confusion'.[197] They went on to note that while the judgments of the Ninth Circuit have noted that 'social visibility requires that the 'shared characteristic of the group should generally be recognizable by others in the community'

> we have not specified the relevant community for this analysis (Petitioner's social circle? Petitioner's native country as a whole? The United States? The global community?). Nor have we specified whether 'social visibility' requires that the immutable characteristic particular to the group be readily identifiable to a stranger on the street, or must simply be 'recognizable' in some more general sense to the community-at-large.[198]

The judges concluded that in light of the 'current confusion' in US case law on PSG, 'there is no discernible basis for these divergent outcomes — other than, perhaps, a given panel's sympathy for the characteristics of the group at issue'.[199] In their Honours' view, a refugee claimant 'deserves a legal system governed not by the vagaries and policy preferences of a given panel, but by well-defined and consistently-applied rules'.[200]

It seems that this is a more widespread problem with the social perception test, a test which is inherently less precise and more open to subjectivity than the more objective protected characteristics approach. This will be explored further below in Part 5.

4.1.3 Others

In some European jurisdictions, such as Austria, Belgium, and Spain, while there does appear to be an assumption that the Qualification Directive, discussed above, requires the satisfaction of both tests, it is not clear that this has or will result in a more restrictive approach in practice.[201]

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[197] *Ibid*. 4.

[198] *Ibid*. 7.

[199] *Ibid*. 13.

[200] *Ibid*. 13. As Anker eloquently summarises the position: 'Both social visibility and particularity threaten the Acosta framework and its statutory and logical integrity': note 146 above, 348. Indeed, in a recent proposal to introduce a new Refugee Protection Act in the US, it is proposed that, '[a]ny group whose members share a characteristic that is either immutable or fundamental to identity, conscience, or the exercise of the person's human rights such that the person should not be required to change it, shall be deemed a particular social group, without any additional requirement': *Leahy-Levin-Akaka-Durbin Draft Refugee Protection Act of 2011*, H.R. 2185, s. 5. In the accompanying Sectional Analysis of the Draft Act, it is noted that the '*Acosta* precedent has been clouded in recent years by BIA opinions that require asylum applicants to prove additional factors, some of which are unnecessary or contrary to the spirit of domestic law and the Refugee Convention. Most damaging is a requirement that the social group in question be "socially visible"', available online at: http://www.leahy.senate.gov/imo/media/doc/SectionBySection-RefugeeProtectionAct.pdf (last accessed 16 March 2012).

[201] In Spain, for example, in a very recent decision the Tribunal Supremo in STS 6862/2011 (24 October 2011) explored the PSG ground in some depth, referring both to the UNHCR Guidelines and the Qualification Directive. It first discussed the UNHCR Guidelines, clearly understanding that they pose the two tests as alternatives, but it then moved to consider the Qualification Directive, concluding that 'all of the necessary

For example, while the Austrian Administrative Court has paraphrased Art. 10 of the Qualification Directive so as to suggest that the tests are cumulative,[202] there is little case law to date expanding or elaborating upon this in practice. Indeed, two members of the Austrian Federal Asylum Review Board have stated that the concept of PSG is 'not as broad as it used to be' following transposition of the Qualification Directive into the new Asylum Act 2005, but have also predicted that 'in practice there will not be much difference' at least in relation to well established PSGs such as family and gender.[203]

Similarly, in Belgium, it appears that the Qualification Directive simply affirmed what has always been understood to be the correct interpretation, namely, that establishment of a PSG requires a cumulative assessment of both innate characteristics and perception as a distinct group in society.[204] However, an analysis of cases since 2007 decided in the *Conseil du Contentieux*

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elements to identify persecution for membership of a particular social group' were present in that case, namely that the applicant was at risk due to an 'innate and immutable characteristic' which was 'irrenunciable', and '[i]n addition, the group formed (…) is perceived as a group known to the society that distinguishes them' [Adrienne Anderson trans]. However the social perception aspect appeared to be satisfied in a straightforward manner and cases on gender appear to be more progressive in recent decisions, hence suggesting that a combined approach may not pose difficulties for PSG claims.

[202] See *2007/01/0479 v Independent Federal Asylum Board* [Adrienne Anderson trans] which refers to Art. 10 of the Qualification Directive, but does not really expand on any reasoning. It does consider it to be cumulative as per the wording of Art. 10 as follows:

> According to prevailing opinion, a social group can not be defined solely by the fact that he or she is the target of persecution (see, for instance, the UNHCR Guidelines, note 15 above; 2; Feßl and Holzschuster, AslyG 2005, 107, Hathaway and Foster, note 69 above; G. S. Goodwin-Gill and J. McAdam, note 42 above, 79f).
>
> Article 10(1)(d) of [the Qualification Directive] describes a particular group then as a particular social group if the members of this group share an innate characteristic, or a background that can not be changed, or have in common or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and the group in the country has a distinct identity, because it is perceived by the society around them as different.

[203] Newald and Winter, note 99 above, 100–101. I note that the Independent Federal Asylum Board was replaced in 2008 by the Asylum Court (see http://www.asylgh.gv.at/site/4859/Default.aspx).

[204] The Qualification Directive was transposed into Belgian law approved on 15 September 2006 modifying the 1980 legislation and the CPRR has affirmed that it continues previous practice in this area. The case which confirmed the continuation of usual practice is *CPRR*, 06-0817/F2548 (14 December 2006). For an example of a pre–Qualification Directive decision embodying this approach, see *02-2230/F1623* (25 March 2004) [Adrienne Anderson trans]. This is a case from the Commission Permanente de Recours des Réfugiés [Belgian Permanent Refugee Appeals Commission], which was at the time the second level of appeal in Belgium (it having been replaced in 2007 by the Belgian Conseil du Contentieux des Etrangers):

> The Commission also believes that in certain societies, persons of the same sex, or certain categories of persons of the same sex can be considered as forming a social group, namely a group of persons sharing one or more common characteristics that differentiate them from the rest of society *and who are perceived as such by the rest of the population or by the authorities;*
>
> In the present case, the applicant was subjected to violence and fearing suffering it because she is a young woman; it is clear, that without these involuntary characteristics, that is, that if she were a man or even an older woman, that she would not have run the risk of being the victim of the facts she presented; that this does not mean that all the young women in Russia would have reason to fear being persecuted for the simple fact of being young women, but that in circumstances such as these, certain of them could have such a fear and they would not have that reason to fear if they did not possess the essential characteristics of being female and young (…).

des Etrangers (Belgian Council for Aliens Law Litigation) suggests that the cumulative approach does not operate as a stringent test or obstacle for applicants; rather, the Council exhibits quite a flexible approach, with no discussion of the perception of a particular group in society.[205] The wording of the legislation actually states that the group has its own identity in that country because it is perceived as being different by broader society, and yet the later case law does not seem to consider this explicitly, resulting in an effective implementation of the protected characteristics test with the social perception test merely assumed to have been met rather than presenting an additional hurdle for applicants to satisfy.[206]

4.2 JURISDICTIONS THAT RETAIN THEIR PREVIOUS (SINGLE) APPROACH

A number of jurisdictions appear not to have altered their practice at all in the past decade, including the two that have always adopted the social perception approach alone (Australia and France), as well as two of those most clearly linked with the protected characteristics approach (Canada[207] and New Zealand[208]). In neither New Zealand nor Canada does there appear to be any controversy regarding the relevant principles to be applied, nor does there appear to be any discussion of the UNHCR Guidelines and certainly there is no suggestion that these Guidelines should alter the well-established position on interpretation of the PSG ground. The US is clearly the common law country whose jurisprudence has undergone the most dramatic transformation in the past decade, as explained in depth above.

Similarly, in those jurisdictions which have traditionally applied the social perception test, there does not appear to be any discussion, based on either the UNHCR Guidelines (Australia or France) or the EC Qualification Directive (France) of the possibility of expanding PSG analysis to include the protected characteristics approach.

The Commission held that the applicant had a well-founded fear of being persecuted for reason of her membership in a particular social group, and that because the state was unable to protect her, she could be recognised as a refugee.

[205] See for example the following decisions of the Belgian Conseil du Contentieux des Etrangers (CCE): 979-1239 (25 July 2007); 13.874 (9 July 2008) [Adrienne Anderson trans]. I note that the Belgian CCE replaced the Permanent Refugee Appeals Commission in 2007.

[206] Further, the CCE has noted that the wording in Art. 48(3)(d) of the legislation (which states that 'a group must be considered to form a particular social group where *in particular* (…)') clearly showed an intention not to establish an exhaustive concept of particular social group, and that moreover the legislation should be interpreted expansively and in line with the *Refugee Convention*: see *CCE No 49 821* (20 October 2010); *CCE No 45 742* (30 June 2010). This again suggests that the Belgian flexible and inclusive approach is likely to continue post–Qualification Directive.

[207] The protected characteristics approach is routinely applied at all levels of decision-making in Canada, in most cases following recitation of the Supreme Court's decision in *Ward* (as modified in *Chan*) and has led to the recognition of a wide range of PSGs: see, e.g., (in addition to the cases cited below at notes 243–246, 287, 328, 341, 370–371) *Asghar v Canada (Minister of Citizenship & Immigration)* (2005) FC 768, [14]. In addition to those discussed below, decisions have recognised as PSGs Falun Gong practitioners (*Yang v Canada (Minister of Citizenship & Immigration)* (2001) FCT 1052; 219 F.T.R. 169) on the basis that Falun Gong practitioners associate 'for reasons so fundamental to their human dignity that they should not be forced to forsake the association': at [24].

[208] See note 34 above.

An analysis of recent Australian case law, particularly at the Tribunal level,[209] does however reveal a continuing lack of clarity concerning precisely what the social perception test requires and how the social perception test is to be met. Although it appears well-accepted in principle that it is not necessary that a social group be subjectively identified or recognized in the relevant society,[210] there are at times still subtle suggestions that a group must be actually perceived as a group, rather than merely objectively cognisable, in order to constitute a PSG.[211] Further, this need for societal perception appears in some cases to resemble the problematic social visibility test recently introduced in US jurisprudence. For example, in one recent decision the RRT refused to recognize Ethiopian failed asylum seekers as a PSG partly on the basis that 'their history as failed asylum seekers *is not evident* to society at large'.[212] Conversely, in the same decision the Tribunal found that Ethiopians who have been living in a Western country could constitute a PSG because they could 'possess common characteristics *which would be apparent*'.[213] In another case the RRT appeared to suggest that Filipinos who have 'witnessed violent crimes' are a PSG because such crimes are reported in the media, *thus giving witnesses a social profile*.[214]

In terms of how an applicant is to meet the social perception/cognizability test, it is clear that in Australia, as in the US, it is necessary that 'the evidence in fact supports the existence of the group' in question.[215] Yet it is questionable whether the ordinary sources of country information are in fact adequate to provide insight into this issue, and claims are routinely rejected where country information does not support the argument that the relevant group is cognisable.[216]

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[209] Although recent decisions at all levels of the Australian federal judicial hierarchy (from Federal Magistrate's Court to High Court) were also considered, there is rarely qualitative analysis of the social perception test at the judicial level because the courts are restricted to reviewing for jurisdictional error and it is clear that an 'error of fact by the Tribunal in coming to a conclusion on [PSG] would not establish a jurisdictional error': *SZJDW v MIAC* [2007] FCA 1121.

[210] Often by reference to *Applicant S* (2004) 217 CLR 387, 397–398 [27] (Gleeson CJ, Gummow and Kirby JJ). See note 51 above.

[211] See, e.g., *10114325* [2011] RRTA 227 where the Tribunal found that homosexual and bisexual men in Kenya were a PSG, reasoning that this was because 'they are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole': at [122]. This is also apparent at the judicial level. For example, in *SZJDW v Minister for Immigration and Citizenship* [2007] FCA 1121 (1 August 2007) the Federal Court of Australia criticised the RRT decision in that case on the basis that, *inter alia*, '[n]o consideration appears to have been given either to societal perceptions in India or to "legal, social, cultural and religious norms prevalent in [Indian] society"': at [9] (Finn J).

[212] *1002664* [2010] RRTA 1075, [169] (emphasis added).

[213] *Ibid*. [173] (emphasis added).

[214] *0807544* [2009] RRTA 267, [55] (emphasis added).

[215] *0807028* [2009] RRTA 720, [113].

[216] Inconsistency is also particularly striking in the area of 'failed asylum seekers'. For example, in *09029857* [2009] RRTA 930, the Tribunal accepted without question that 'high profile failed asylum seekers' were a PSG in Rwanda, while in *0903113* [2009] RRTA 1193; *0903114* [2010] RRTA 2 (7 January 2010) and *0903098* [2009] RRTA 1137 (14 December 2009), on almost identical facts, the Tribunal concluded that Rwanda high profile asylum seekers were not a PSG because they were not 'set apart' from society. This is an area where the subjectivity inherent in relying on country information to determine whether a group is 'objectively identifiable' or 'cognisable' within a given society (and therefore a PSG) becomes very clear. Note also that in *0808262* [2010] RRTA 223, the Tribunal accepted that based on country evidence, failed asylum seekers are a PSG in Cameroon.

Indeed, as is the case in much of the recent US jurisprudence requiring 'social visibility', where the country information does not address this issue, the claim automatically fails. In a particularly stark example of this phenomenon, the Australian RRT explained:

> With regard to whether or not 'young, Hazara Shi'a Moslem males' constitute a particular social group, the Tribunal notes that despite its efforts to find such information, the Tribunal has not found any country information to indicate that since the fall of the Taliban Government in Afghanistan, 'young, Hazara Shi'a Moslem males' constitute a particular social group. The Tribunal has looked for such information from sources including Department of Foreign Affairs and Trade (DFAT), the US Government, Amnesty International or Human Rights Watch. The Tribunal does not accept that they constitute a particular social group.[217]

Inconsistency in decision-making in this area also suggests that there is considerable subjectivity involved in assessing this approach to defining a PSG, as has also been revealed in the analysis above of recent US jurisprudence.

Indeed, the various difficulties in analyzing the MPSG ground in Australia were recognized by the Federal Court in *MZMDQ* in which it opined that, '[w]hile it is vital to accurately identify the "particular social group", it is often quite difficult to do so. These difficulties have lead applicants and tribunals into error.'[218] It might legitimately be questioned whether an approach to interpretation that routinely leads to error can continue to be relied upon in such an important area of administrative decision-making in which fundamental human rights are at stake.

4.3 Jurisdictions that Require Either of the Tests to be Satisfied (Widening of PSG Analysis)

The jurisdiction that has most accurately adopted the UNHCR Guidelines on Social Group, at least in terms of judicial interpretation at the highest level, is the UK. As explained above, the traditional position of the House of Lords as developed in *Shah* was one in which the protected characteristics approach predominated, but which also left some room for ambiguity as to the role of an additional social discrimination or social perception test.[219]

In *Fornah* the House of Lords again squarely considered the meaning of the MPSG ground in the context of two separate claims based on gender and family respectively. Lord Bingham extracted

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In *1002664* [2010] RRTA 1075, the RRT held that failed asylum seekers were not a PSG in Ethiopia, not merely because country information did not support the argument that the group was not cognisable, but because 'failed asylum seekers' did not have a common binding element outside a shared fear of persecution.

[217] See *STQB v MIMIA* [2004] FCA 882, in which the Federal Court of Australia recited the tribunal's reasoning, concluding that there was no jurisdictional error disclosed in this reasoning: at [9]–[10], [13]–[14].

[218] *MZXDQ v Minister for Immigration and Multicultural Affairs* [2006] FCA 1632 (28 November 2006) [23].

[219] See cases discussed in footnote below in gender section. See in particular, discussion in SG [2008] UKAIT 00002, [41]–[53].

the UNHCR Guidelines at length and concluded that the Guidelines, being 'clearly based on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect.'[220] Contrasting the UNHCR Guidelines with Art. 10(1)(d) of the Qualification Directive, Lord Bingham went on to note that:

> If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority.[221]

While the role of social perception, discrimination and cognizability of the group was still prominent in the articulation of the PSG ground in some of the other judgments in *Fornah*,[222] the general approval of the UNHCR Guidelines and the emphatic rejection (at least on the part of Lords Bingham and Brown) of any requirement that both tests be satisfied, suggests that in the UK it is sufficient to fulfil *either* of the two dominant tests in order to establish a claim based on PSG. Decisions of the Upper Tribunal (Immigration and Asylum Chamber) which suggest that in fact *both* tests are required are difficult to reconcile with the explicit rejection of this approach by the House of Lords, and thus would seem unlikely to be sustainable interpretations of the MPSG ground in that jurisdiction.[223]

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[220] [2007] 1 AC 412, 432. See also Baroness Hale who quotes extensively from the UNHCR Social Group and Gender Guidelines and concludes that 'each of the guidelines quoted above is consistent with, and in some cases directly derived from, the decision of this House in *IAT v Immigration Appeal Tribunal, Ex p Shah*': at 464.

[221] *Ibid.* 433, citing in support the UNHCR Comments on the Directive, January 2005. See also the judgment of Lord Brown, who made it clear that any regulations made under the Directive would need to be interpreted consistently with the UNHCR's approach: at 468. This refers to the fact that the *Refugee or Person in Need of International Protection (Qualification) Regulations 2006* (UK) set out Art. 10(1)(d) precisely: see s. 6(1)(d).

[222] See, e.g., [2007] 1 AC 412, 450 (Lord Hope), 455 (Lord Rodger). See also G. Clayton, *Textbook on Immigration and Asylum Law* (Oxford University Press, 3rd edn., 2008) 486–488.

[223] *See AZ (Trafficked women) Thailand CG* [2010] UKIT 118 (IAC) [133]–[138]; *SB (PSG — Protection Regulations — Reg 6)* [2008] UKAIT 00002. See also *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) [165]. But see the more recent decision in *SA (Divorced woman — illegitimate child) Bangladesh CG* [2011] UKUT 00254 (IAC) (11 July 2011) in which the Upper Tribunal (Immigration and Asylum Chamber) quoted at some length from Lord Bingham's judgment in *Fornah*, particularly his Lordship's approval of the UNHCR Guidelines, and clearly paraphrased the UNHCR Guidelines correctly as requiring only *one* of the protected characteristics or social perception tests to be satisfied: see at [73]. I note that the former Asylum and Immigration Tribunal (AIT) was superseded by the implementation of the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC)) in February 2010.

5. THE APPLICATION OF DIFFERENT TESTS TO PARTICULAR GROUPS

It has been observed that while the selection of one test over another will in many cases make no difference to the outcome of an individual refugee status determination, it is assumed that there are some situations where the choice of test will be determinative. In particular, as set out in the UNHCR Guidelines, the clear implication is that 'social perception' is more likely to lead to recognition of refugee status than the protected characteristics approach.[224] For example, the UNHCR Guidelines explain that the social perception standard 'might recognise as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity such as, perhaps, occupation or social class'.[225] In the background paper prepared prior to the introduction of these guidelines, Aleinikoff argued that the protected characteristics approach would appear to 'deny protection to members of groups who may well be targets of persecution based on their associations that are widely recognised in society', including 'students, union members, professionals, refugee camp workers, or street children'.[226]

The aim of this Part of the study is to identify some of the current challenges in adjudicating those particular social groups most prominent in refugee adjudication today,[227] with a particular (although not exclusive) emphasis on how the different tests are applied in practice in the context of some of the most commonly asserted particular social groups. The key findings of this Part, in connection with Part 4 above, inform the Conclusions and Recommendations set out in Part 6.

5.1 WOMEN/GENDER/SEX AS A PSG

Many of the leading superior court decisions on social group, particularly in the common law world, have involved gender-related persecution and hence have directly raised the question of whether women can constitute a PSG for the purposes of the refugee definition.[228] Both jurisdictions applying the social perception test and those which have relied predominantly on

[224] See also *Fornah* [2007] 1 AC 412, 463 (Baroness Hale).
[225] UNHCR Guidelines, note 15 above, [9]. See also at [13].
[226] Aleinikoff, note 10 above, 295.
[227] The research undertaken for this study suggests that gender, sexuality and family are the predominant PSGs raised in the case law, although in the US and Canada gang criminal related cases have become much more prominent in recent years. In a recent study of UK cases dealing with social group it was noted that gender and sexuality constitute by far the majority of cases: B. Kelly, 'What is a "Particular Social Group"? A Review of the Development of the Refugee Convention in England' (2010) 24(1) *Journal of Immigration, Asylum and Nationality Law* 9.
[228] See, e.g., *Shah* [1999] 2 AC 629; *Khawar* (2002) 210 CLR 1; *K v Secretary of State for the Home Department* [2007] 1 AC 412. While men could of course constitute a PSG on either test, such cases are rare.

the protected characteristics approach have acknowledged that women can constitute a PSG.[229] Further, as noted above, many jurisdictions have explicitly included gender or sex as a ground for refugee status in domestic legislation, including in some European jurisdictions notwithstanding the Qualification Directive's statement that, '[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.'[230] While in some jurisdictions, for example the Netherlands, the Qualification Directive's restrictive approach to gender as a PSG has resulted in the position that '[w]omen in general do not form a social group',[231] decision-makers in other jurisdictions including Spain,[232] Germany,[233] Austria,[234] Belgium,[235] and Switzerland,[236] have nonetheless recognized women or gender (or a

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[229] *Khawar* (2002) 210 CLR 1; *Shah* [1999] 2 AC 629; *K v Secretary of State for the Home Department* [2007] 1 AC 412.

[230] Art. 10(1)(d).

[231] Article 10 is implemented in Art. 3.37 of the Aliens Regulation (Voorschrift Vreemdelingen), which simply repeats Qualification Directive Art. 10. In the Dutch policy guidelines [para. C2/2.10 Aliens circular, Vreemdelingencirculaire] it is stated that

> 2) women cannot, without more, be defined as social group ('Vrouwen in het algemeen vormen niet een bepaalde sociale groep, omdat zij als sociale groep te divers van samenstelling zijn' ['Women in general do not form a social group, because they are, as social group, too diverse in composition', Maarten den Heijer trans]). If there is persecution specifically targeted at women, there has to be a link with another persecution ground.

[232] In Spain in several decisions involving FGM and forced marriage, gender has been recognised as a particular social group by the Tribunal Supremo (Supreme Court). See, e.g., *2781/2009* (11 May 2009); *5931/2006*; *735/2003*; *1836/2002*; *3428/2002*; and *3930/2002.* In *STS 5931/2006* (6 October 2006) the Tribunal Supremo stated that 'persecution based on sex definitely amounts to social persecution', citing SSTS (31 May 2005) dec. no. 1836/2002; (9 September 2005) rec. no. 3428/2002- and (10 November 2005) dec. no. 3930/2002 [Adrienne Anderson trans]. Further, although in earlier decisions the Supreme Court appeared to reject claims based on domestic violence, hence taking a different approach to PSG depending on the nature of the claim (see, e.g., RC *3603/2004* (25 May 2004)), more recently in STS 4013/2011 (15 June 2011) the Tribunal Supremo discussed the legislative change in 2007 which introduced gender as a ground for refuge status and applied it to grant refugee status in the context of a case concerning domestic violence. The Court cited from various UN sources including the UNHCR Guide for the Protection of Refugee Women, adopted in 1991, noting that this document 'argues that women who fear persecution or discrimination because of their sex should be considered as a member of a social group for purposes of determining the status of the person': STS 4013/2011 [Adrienne Anderson trans].

[233] See, e.g., Verwaltungsgericht (VG) Trier [Trier Administrative Court], 5 K 1181/10.TR, 23 March 2011; Verwaltungsgericht (VG) Stuttgart [Stuttgart Administrative Court], A 11 K 553/10, 14 March 2011; Verwaltungsgericht (VG) Trier [Trier Administrative Court], 5 K 402/10 TR, 3 November 2010; Verwaltungsgericht (VG) Aachen [Aachen Administrative Court], 2 K 562/07, 10 May 2010; Verwaltungsgericht (VG) Münster [Münster Administrative Court], 11 K 413/09.A, 15 March 2010; Verwaltungsgericht (VG) Hannover [Hanover Administrative Court], 1 A 3954/06, 13 January 2010; Verwaltungsgericht (VG) Düsseldorf [Düsseldorf Administrative Court], 22 K 4844/08.A, 25 August 2009; Verwaltungsgericht (VG) Kassel [Kassel Administrative Court], 3 K 1530/08.KS.A, 21 April 2009; Verwaltungsgericht (VG) Darmstadt [Darmstadt Administrative Court], 8 E 1047/06.A (1), 17 October 2007; Verwaltungsgericht (VG) Göttingen [Göttingen Administrative Court], 2 A 56/06, 17 July 2007.

[234] This appears to be well established in Austrian jurisprudence. For example, in *E1-248.714/2008 v Federal Asylum Authority*, 31 January 2011) [Adrienne Anderson trans] the High Court for Asylum held that:

> Generally, a social group is constituted by characteristics, of which the person's disposition is derived, such as sex. Women for example represent a "particular social group" within the meaning of the Geneva Refugee Convention, (cf. Köfner / Nicolaus, Principles of asylum law in the Federal Republic of Germany, II, 456). In any case, the complainant presented the risk of persecution because of her

subset thereof) as a social group in cases involving various forms of persecution including female genital mutilation (FGM), sexual violence, forced marriage and domestic violence.

However, there are still several obstacles to successful recognition of gender-based claims based on the PSG ground. First, one of the most prevalent difficulties is the overwhelming reluctance of both advocates and decision-makers to frame the relevant PSG as simply 'women'; yet according

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> membership in a particular social group (the group of elderly single women without any social support in Iraq).

See also *DZ v Federal Asylum Authority*, (12 January 2009) in which the High Court for Asylum held that the claim had been made, *inter alia*, based on 'gender-specific persecution, which is also included in the concept of "particular social group"' [Adrienne Anderson trans]. This approach has been affirmed by the Constitutional Court: *U431/08 v High Court for Asylum*, Constitutional Court, 30 November 2009, citing *2007/01/0284 v Independent Federal Asylum Board* (Administrative Court, 23 September 2009).

[235] In cases involving gender-specific claims by women, the general approach in Belgium appears to be either to simply assert membership of a particular social group of "women", or to recite the jurisprudential evolution of the category of particular social group with reference to *Ward* and *Shah* as well as the Qualification Directive, hold that it is therefore recognised that sex can form the basis of a particular social group, and then find the claimant at risk due to her membership of the group "women". Note that while, in some decisions, the CCE has defined the relevant social group as "young Cameroonian women" (*CPRR No 01—0668/F1356* (8 March 2001)), "women who are victims of human trafficking" (*CPRR No 03-0582/F1611* (5 February 2004)), or "divorced Iranian women" (*CCE No 35 751* (Dec. 11, 2009)), the most common approach especially in recent cases is to define the group broadly simply as "women of country X". Indeed, in *CCE No 47 053* (5 August 2010) the CCE specified that a young Chechen woman who had been forcibly married was at risk because of her membership of the social group of "women", with her age and arranged marriage being factors that heightened her vulnerability to gender based persecution, rather than defining the social group more narrowly. [Sienna Merope trans].

[236] ARK/CRA, *W.H.,* Äthiopien (9 October 2006) (Schweizerische Asylrekurskommission/Commission Suisse de recours en matière d'asile [Swiss Asylum Appeal Commission, Adrienne Anderson trans]) involved a refugee claim by an Ethiopian woman who had been forced to marry an older man who was a high-ranking army officer. Her husband beat and raped her. Her brother had tried to complain to the authorities, but the claimant had not dared to proceed with it. She was denied refugee status at first instance because there was no state involvement in the acts of violence. This is listed on the Commission's website as a leading decision for its recognition that persecution solely based solely on gender can be relevant according to Swiss Asylum Law Art. 3, para. 1. In explaining the Commission's approach, the Commission noted that Art. 3 had been revised to add the statement 'Motives for seeking asylum specific to women must be taken into account', and it was intended by the legislature that the refugee definition be considered with a gender perspective, as has developed in international law. Hence:

> The determining factor must therefore be whether the persecution has taken place or is threatened because of internal or external features, which are inseparable from the person or personality of the victim, and whether this feature can be found in constitutional and international prohibitions of discrimination (for example Article 8(2) BV, Article 2 of the UDHR, Article 14 of the ECHR and Article 2(1) of the ICCPR). The issue of discrimination is within the concept of persecution on which the Refugee Convention and the Swiss legislation is based; the difference between discrimination and persecution lies in the intensity of the violations (…) Persecution within the meaning of the Asylum Act and the Refugee Convention is always because of 'being', not because of 'doing'; although the persecutor can also target a person's conduct; the interference by the persecutor is important to refugee status, but only if the character and disposition of the relevant person is behind their course of action.

In the more recent decision of the Swiss Federal Administrative Court, *D-1622/2008 et D-1572/2008* (Swiss Federal Administrative Court, 17 November 2011) [Adrienne Anderson trans] the claim was rejected on the basis that 'the applicant is wrong in claiming that "men and women living in adultery" constitutes a particular social group (…) and that she is one of them, because, in particular, this characteristic is not inseparable from the person involved', presumably an application of the immutability/protected characteristics approach. It is not clear why the PSG 'women' was not considered.

to leading case law this is theoretically possible regardless of which test is adopted.[237] In the leading decision of the Australian High Court in *Khawar*, Gleeson CJ explained that the PSG in that case could be characterized simply as 'women' on the basis that '[w]omen in any society are a distinct and recognisable group (…) their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments.'[238]

Similarly, from its inception the *ejusdem generis* test has been explicitly stated to include sex or gender.[239] As explained by Lord Steyn in *Shah*, the idea that 'women in Pakistan' constitutes a PSG is 'neither novel nor heterodox. It is simply a logical application of the seminal reasoning in Acosta's case'.[240] Indeed, in Canada and New Zealand, the jurisdictions which have most consistently and exclusively relied on the protected characteristics test, and more recently in Belgium,[241] the notion that women can constitute a PSG has become very well-established and accepted. As mentioned above, the Canadian Supreme Court in *Ward* cited gender as an obvious example of an innate characteristic,[242] and this is routinely applied by the IRB (Refugee Protection Division) and the Federal Court such that groups described as 'women',[243] 'Haitian women,'[244] 'women in the DRC [Democratic Republic of the Congo],'[245] and 'single and or widowed women in Pakistan',[246] have been accepted as PSGs, often by adopting the statement in the IRB Gender Guidelines that '[g]ender is an innate characteristic and it may form a particular social group'.[247] In New Zealand,[248] as well as the US Circuit Courts of Appeal applying the immutability test,[249] groups based on gender have been recognized in a straightforward manner.

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[237] In many cases it is the applicant who describes the PSG in an overly restrictive fashion, and in some cases, at 'each stage of the proceedings, the particular social group contended for on behalf of the appellant has been redefined': *Liu v Secretary of State for the Home Department* [2005] All ER (D) 304 (Mar) (17 March 2005) [12]. This was criticised by Maurice Kay LJ on the basis that the need to establish a PSG 'should not become an obstacle course in which the postulated group undergoes constant redefinition'. His Honour also acknowledged that 'it is not essential that all members of it [the PSG] suffer persecution'.

[238] (2002) 210 CLR 1, 14 [35] (Gleeson CJ).

[239] In *Acosta*, the BIA noted that '[t]he shared characteristic might be an innate one such as sex': 19 I. & N. Dec. 211, 233 (BIA, 1985). As Alice Edwards has succinctly explained, '[g]ender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination': A. Edwards, 'Age and Gender Dimensions in International Refugee Law' in Feller *et al*. (eds), note 1 above, 46–48. However, in refugee status determination these terms are generally used interchangeably.

[240] *Shah* [1999] 2 AC 629, 644. See also UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', note 78 above.

[241] See note 235 above.

[242] [1992] 2 SCR 689, 739.

[243] See, e.g., Immigration and Refugee Board, Refugee Protection Division, RPD File # VA3-01886/01887/01888/01889; 5 February 2004, 3; *Gutierrez v Minister of Citizenship and Immigration* (2011) FC 1055 [37]–[39].

[244] *Josile v Minister for Citizenship and Immigration* (2011) FC 39, [10], [28]–[30]. See also *Dezameau v Minister of Citizenship & Immigration* (2010) FC 559, [18]–[19].

[245] *Nyota, Nonda & Nonda v Minister of Citizenship & Immigration* (2011) FC 675, [30].

[246] *Begum v Minister of Citizenship and Immigration* [2011] FC 10, [53].

[247] Guideline 4, [2], cited in, for example, *Romhaine v Minister of Citizenship & Immigration* (2011) FC 534, [18].

Yet notwithstanding this clear authority, decision-makers in other jurisdictions still often struggle to assess gender claims in this uncomplicated manner, frequently requiring instead a much narrower formulation of the relevant PSG. Indeed, in *Khawar* itself, other judges on the High Court formulated the group not merely as 'women' but respectively as 'married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household',[250] and 'a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands' families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law.'[251] Similarly, in *Fornah* the applicant had presented her PSG claim (based on a fear of FGM) to the Court of Appeal as 'young single women in Sierra Leone who are at risk of circumcision'.[252]

In part this perceived need for a more narrow formulation appears to be based on an implicit floodgates concern: if the group is defined too widely it may suggest that all persons in such a group are at risk.[253] Hence, the group is narrowed, often by reference to issues that truly belong to a different element of the refugee definition such as well-founded fear (women who 'are at risk'), persecution ('risk of circumcision', 'subjected to, or threatened by, stove burnings')[254]

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[248] See, e.g., NZ RSAA Refugee Appeal No 71427 (16 August 2000); *AV (Iran)* [2011] NZIPT 800150 (22 November 2011), [47].

[249] In the US INS (as it was then named) Immigration Officer Academy, Asylum Officer Basic Training Course, 'Female Asylum Applicants and Gender-related Claims' (5 December 2002) it is noted that '[g]ender is an immutable trait and has been recognised as such by the BIA': at 26 (on file with author).

[250] (2002) 210 CLR 1, 27 [81] (McHugh and Gummow JJ).

[251] *Ibid*. 43–44 [129] (Kirby J). For an example in German jurisprudence, see the decision of the Verwaltungsgericht (VG) Hannover [Hanover Administrative Court], A 4835/05, 30 January 2008, which found that the relevant PSG was 'young women from a family whose self-image and archaic patriarchal ideas require them to choose a husband and marry them against their will, without the woman having a say in the choice of a spouse' [Adrienne Anderson trans].

[252] *Fornah* [2007] 1 AC 412, 439 (Lord Bingham).

[253] This is particularly noticeable in some jurisdictions in the US. For example, in *Rreshpja v Gonzales*, 420 F. 3d 551 (6th Cir., 2005), the US Court of Appeals for the Sixth Circuit stated that it did not necessarily agree with the Ninth Circuit's decision in *Mohammed* that 'an entire gender can constitute a social group under the INA': at 555 (in Mohammed the group was 'Somalian females'). However this was on the erroneous basis that '[w]e do not necessarily agree with the Ninth Circuit's determination that virtually all the women in Somalia are entitled to asylum in the United States': at 555. The Court is clearly confusing the definition of social group with other elements of the definition, such as likelihood of future persecution and ability of the state to protect: at 555–556.

[254] This conflation of aspects relevant to persecution with PSG is prevalent in some of the pre-*Fornah* UK case law, and seems to be particularly connected to confusion about the correct PSG test, specifically an assumption that a PSG must be identifiable based on discrimination. For example, in *SK ("honour killings" — Article 3; YK 2002 CG distinguished) Turkey* [2006] (9 March 2006), the Asylum and Immigration Tribunal rejected the notion that women in Turkey constituted a PSG because 'insofar as concerns their legal rights, that discrimination cannot be said to reach the threshold envisaged by the court and the tribunal/AIT I order to create the conditions necessary to the existence of a particular social group': at [92] — a clear conflation of persecution and PSG. For a particularly confused judgment on this issue, see *RG (Ethiopia) v Secretary of State for the Home Department* [2006] EWCA 339 (4 April 2006) [23]–[39]. See *also SB (PSG — Protection regulations — reg 6) Moldova CG* [2008] UKAIT 00002 [53] which suggests that the confusion surrounding the role of discrimination in PSG analysis has continued in the UK, even post-*Fornah*.

and/or failure of state protection ('incapable of securing effective protection from the police').[255] The difficulty with this strategy is that often the group is defined so narrowly as to effectively fall foul of the widely established principle that 'it is impermissible to define the group solely by reference to the threat of the persecution.'[256] This phenomenon was referred to as 'a peculiarly cruel version of Catch 22' by Baroness Hale in *Fornah* in that 'if not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone.'[257]

Yet as her Ladyship explained, this reasoning is 'fallacious at a number of levels', most obviously since there is 'no need to reduce the group to those at risk' because it 'is well settled that not all members of the group need be at risk'[258] — a principle which is true regardless of the Convention ground at issue. Hence the group could be described as simply 'all Sierra Leonean women'[259] or 'Sierra Leonean women belonging to those ethnic groups where FGM is practised.'[260] In subsequent authority, *Fornah* has been applied by the Upper Tribunal so as to find that 'women',[261] 'women in Bangladesh',[262] and 'women in the Ivory Coast'[263] can constitute PSGs

[255] As Deborah Anker has eloquently explained, '[p]ractitioners have often presented convoluted and circular PSGs (…) and adjudicators have engrafted elements from other grounds onto the PSG definition': note 146 above, 340.

[256] *Fornah* [2007] 1 AC 412, 440 (Lord Bingham), reciting the reasons of Auld LJ in the Court of Appeal for rejecting the claimed PSG. A good example of this is provided in the recent decision in *Kante v Holder*, 2011 U.S. App. LEXIS 743 (6th Cir., 2011) in which the Sixth Circuit rejected the claim based on the PSG of 'women subjected to rape as a method of government control', on the basis that 'the group posited by Kante is circularly defined by the fact that it suffers persecution, and the group does not share any narrowing characteristic other than the risk of being persecuted': at 26–27. Failure to recognise the group simply as women appears at least partly connected to the 'social visibility' requirement in that the Court stated that Kante did not show that 'Guinean society viewed females as a group specifically targeted for mistreatment': at 27.

[257] *Fornah* [2007] 1 AC 412, 466. For an excellent illustration of this Catch 22, see *Escobar-Batres v Holder*, 2010 U.S. App. LEXIS (6th Cir., 2010), and for example in *0904298* [2010] RRTA 149, the Tribunal refused to recognise 'Indian women who have suffered domestic and sexual violence and against who the husband's family have made a claim in the nature of a dowry claim' as a PSG on the basis that it simply described the applicant's personal circumstances.

[258] *Fornah* [2007] 1 AC 412, 466–467.

[259] *Ibid*. 441 (Lord Bingham), 448 (Lord Hope).

[260] *Ibid*. 467.

[261] In *SA (Divorced woman — illegitimate child) Bangladesh CG* [2011] UKUT 00254 (IAC) (11 July 2011) the Upper Tribunal (Immigration and Asylum Chamber) found that it was possible for a Bangladeshi woman to establish that she would fear persecution on return 'by reason of the fact that she was a woman': at [74].

[262] In *SA*, the tribunal also described the PSG as 'women in Bangladesh': *ibid.* [74]. Significantly in a pre-*Fornah* decision (*RA and others (Particular Social Group — Women) Bangladesh* [2005] UKIAT 00070) the tribunal had rejected the argument that 'women in Bangladesh' were a particular social group: *ibid.* [54].

[263] *MD (Women) Ivory Coast CG* [2010] UKUT 215 (IAC) [282].

with no need for further refining attributes,[264] although a recent study of post-2007 decisions reveals continuing difficulty in applying the PSG ground in gender claims in the UK.[265]

The second difficulty prevalent in claims based on gender/women as a PSG appears directly connected to the social perception test, and relates to the challenge in establishing that women or a particular subset of women in a particular context can be said to be perceived to be set apart from society at large. For example, in Australian case law, despite straightforward acceptance in some cases that women, or a broad subgroup of women, can comprise a PSG because they *clearly* share readily identifiable characteristics,[266] the RRT has at other times been reluctant, if not averse, to recognising that a PSG as broadly defined as 'women' can exist.[267] This often manifests in an (apparently) arbitrary finding that being a woman, even in a society where gender discrimination persists, is not '*sufficiently distinguishing*',[268] or that a category such as 'young single women' may not be 'united by a common characteristic', or 'singled out' from society.[269] Some negative Tribunal decisions also reflect a concern about the size of a gender-based social group: for example, the Tribunal has rejected the existence of PSGs described respectively as 'Tanzanian women'[270] and 'Thai women'[271] on the basis that such categories are overly broad.

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[264] Although I note that the role of discrimination still appears to be confused and unclear in relation to gender claims in a way that is not present in other PSG claims in the UK: see note 297 below.

[265] See Asylum Aid, '*Unsustainable: The quality of initial decision-making in women's asylum claims*', January 2011, available online at: http://www.asylumaid.org.uk/data/files/publications/151/UnsustainableWEB.pdf (last accessed 16 March 2012), 48 where the study found that 'at the initial decision stage where the sole reason for persecution was gender-related, the Convention was never held to be engaged and that gender-related persecution was never the sole basis on which an applicant could be recognised as a refugee': at [5.1.3]. See also Asylum Aid, note 128 above, [3.4.1]; available online at: http://www.asylumaid.org.uk/data/files/publications/178/Ifeelasawoman_REPORTv2.pdf (last accessed 30 January 2012).

[266] See, e.g., *RRT Reference: V02/13868* (6 September 2002) and *0904298* [2010] RRTA 149, where the RRT accepted that 'Indian women' were a PSG. See *also SVTB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 104 (3 June 2005) [5] where the RRT had accepted that the appellant was a member of the PSG 'single women in Albania without the protection of male relatives'.

[267] In *SZBFQ v Minister for Immigration & Multicultural Affairs* [2005] FMCA 197 (Unreported, Driver FM, 10 June 2005) [18], the Federal Magistrates' Court granted relief to the applicant (a young ethnic Russian woman in Azerbaijan), having found that the RRT Member had made a jurisdictional error by saying as a statement of principle, rather than a finding of fact, that he considered that being a woman in itself is not within the PSG ground in the Convention. Even more recently, in *RRT Reference 1003699* [2010] RRTA 719, the Tribunal rejected 'Zimbabwean women' as a PSG, referring to Callinan J's dissent in *Khawar*, in which his Honour expressed doubt as to whether 'women' are a particular enough group to constitute a PSG.

[268] See, e.g., *RRT Reference: N98/24000*, (13 January 2000) (Colombia), see also *V00/1100329* (September 2003) (Bosnia & Herzegovina).

[269] *1003699* [2010] RRTA 719, [77].

[270] *1008739* [2010] RRTA 1177.

[271] *071949558* [2008] RRTA 163.

In the US jurisprudence, despite some straightforward cases which view women as a PSG,[272] recent decisions which adopt the new 'social visibility' requirement have rejected claims on the basis that it is not clear that the relevant group has 'the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them'.[273] In *Disi v Holder* for example, the BIA 'relied on social visibility to decide against Disi's proposed group',[274] namely, 'all Jordanian women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and, as a consequence, face the prospect of being killed without any protection from the Jordanian government'.[275] As this case arose in the Seventh Circuit — the only Circuit to have explicitly rejected the 'social visibility' requirement — this element was rejected on appeal as 'inconsistent with the Board's and our own past cases', such that the PSG was recognized in this case.[276] However, given the current predominance of the social visibility test in US jurisprudence, there is cause for concern as to the limiting impact of this development in relation to gender claims.

These concerns are buttressed by reference to decisions in other jurisdictions which explicitly adopt the social perception test. For example, in German case law interpreting the Qualification Directive, it appears that the social perception requirement has the effect that claims will often only be successful where there are specific subgroups of women or where the claimant has done something to transgress the norms of society and in this way made herself visible to society. For example, in one case an Iranian woman satisfied the Court that she belonged to a group whose members share characteristics that are so fundamental to identity that they should not be forced to renounce it, and that that group in Iran has a distinct identity because it is perceived by the surrounding society as being different.[277] Yet in others, courts have declined to accept the relevant formulation based on the lack of distinctiveness of the group in the relevant society. For example, the formulation 'women in Haiti' was rejected in one case on the basis that, in accordance with the Qualification Directive, the group must have a distinct identity in society. The Court stated that 'there is no evidence that indicates that this is case for women from Haiti. In addition, almost all women are indiscriminately affected and threatened with substantial

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[272] See *Mohammed v Gonzales*, 400 F. 3d 785, 796–797 (9th Cir., 2005) where the Ninth Circuit held that FGM constitutes persecution on account of membership of a particular social group and that 'the agency could define the social group as that of Somalian females'. In *Hassan v Gonzales*, 484 F. 3d 513, 518 (8th Cir., 2007) the Eighth Circuit found that 'Somali females' were a particular social group.

[273] *Re AT*, 24 I. & N. Dec. 296 (BIA, 2007), vacated and remanded on other grounds; *Re A-T-*, 24 I. & N. Dec. 617 (A.G., 2008).

[274] 658 F. 3d 649, 654 (7th Cir, 2011).

[275] *Ibid.* 8 explains the manner in which the PSG was framed by applicant. The Seventh Circuit ultimately accepted the PSG as 'women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing': at 14.

[276] *Ibid*.

[277] Verwaltungsgericht (VG) Neustadt an der Weinstraße [Neustadt an der Weinstraße Administrative Court] 3 K 753/07.NW, 8 September 2008. The court referred to the Qualification Directive in discussing these points.

probability.'[278] In another decision an application was rejected on the basis that Turkish society does not perceive prostitutes to be a group with its own group identity.[279]

Similarly, in French jurisprudence, Carlier explains that in several decisions relating to forced marriage and homosexuality, membership of a particular social group has not been applied on the grounds that it has not been established that the 'behaviour of the claimant has been perceived by society as transgressing the social order'.[280] Hence his conclusion that the French jurisprudence has 'come to require an affirmative stance of protest and social transgression on the part of the claimant, without which he or she will not be perceived as a member of a social group by society'.[281]

This difficulty with all of these cases that have rejected a purported PSG on the basis of its lack of distinction, identification or visibility in the relevant society is that it is difficult to understand the precise nature of the reasoning, or the evidential basis on which such a finding is made. Not only does this make it difficult to challenge individual decisions on appeal, but the decisions provide little guidance for future applicants with similar claims.

In sum, while it is now very well accepted across common law and civil law jurisdictions alike that women or gender-based groups can constitute a PSG, difficulties remain in application. Regardless of the theoretical approach to MPSG adopted, decision-makers continue to have difficulty in resisting the importation of other elements of the definition into the formulation of the relevant group- an issue that appears largely unique to gender claims. Further, these difficulties are compounded by a lack of clarity concerning the method of establishing MPSG based on the social perception approach.

5.2 Claims Based on Sexual Orientation and Gender Identity

Claims based on membership of a particular social group defined by sexuality or gender identity constitute another very prominent source of PSG jurisprudence across a wide range of jurisdictions. In addition, as mentioned above, in some jurisdictions sexual orientation has been explicitly included in domestic legislation either as an example of a PSG,[282] or as an independent

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[278] Decision of the Bundesamt, Decision No. *5244504-346*, 21 September 2007 [Adrienne Anderson trans].
[279] Verwaltungsgericht (VG) München [Munich Administrative Court], M 24 K 0750603, 6 November 2007.
[280] See note 60 above, 213. For example, see *Mlle M*, Commission des Recours des Réfugiés (CRR) [French Refugees Appeal Board], 531968, 29 September 2005 (Congo, forced marriage).
[281] *Ibid*. [Adrienne Anderson trans]. For further evidence of this position, see *Mlle T*, Commission des Recours des Réfugiés (CRR) [French Refugees Appeal Board], 519803, 29 May 2005, in which the CRR noted that there would be a PSG (in that case, women refusing an imposed marriage) 'where that attitude is regarded by all or part of society as transgressive of customs and laws in force' [Adrienne Anderson trans]. See also *Mme B*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 620881, 5 December 2008; *Mlle N*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 574495, 2 April 2008; *Mme D*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 638891, 12 March 2009.
[282] See notes 111–115 above.

ground for refugee status,[283] in some cases as a result of the transposition of Art. 10(1)(d) of the Qualification Directive which provides that, 'depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation'.[284]

In jurisdictions that have applied the protected characteristics approach in this context, there appears little difficulty in accepting that homosexuality or sexual identity meet this criterion, given that in the seminal *Ward* decision, the Canadian Supreme Court recognized that '[t]he first category [innate or unchangeable characteristics] would embrace individuals fearing persecution on such bases as gender, linguistic background and *sexual orientation*'.[285] Whether it is said to fall within the first or second of the immutability categories,[286] there is clear judicial authority, for instance, in Canada,[287] Germany,[288] New Zealand,[289] Belgium,[290] the UK,[291] the United States,[292]

[283] See notes 116–125 above.

[284] For an overview of these issues in Europe, see Mathew Schultzer, Status of Asylum Law in EU Member Sates, ILGA-Europe (on file with author); Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender identity in Europe,* September 2011, and Petter Hojem, *Fleeing for love: asylum seekers and sexual orientation in Scandinavia*, New Issues in Refugee Research Paper No. 181. December 2009.

[285] See note 31 above (emphasis added). Indeed, in *HJ and HT v Secretary of State for the Home Department* [2010] 3 WLR 386 ('*HJ and HT*'), Lord Rodger noted that '[a]t one time there would have been debate as to whether homosexuals constitute a "particular social group" for the purposes of the Convention. But, in more recent years, it has come to be accepted that, at least in societies which discriminate against homosexuals, they are indeed to be regarded as a particular social group': at 405–406 [42]. He went on to note that the UK regulation implementing the Qualification Directive 'really puts the point beyond doubt by providing that, subject to an exception which is not relevant for present purposes, "a particular social group might include a group based on a common characteristic of sexual orientation"': at 406 [42].

[286] As the New Zealand RSAA noted in *In re GJ* [1998] INLR 387, 420, 'sexual orientation is *either* an innate or unchangeable characteristic *or* a characteristic so fundamental to identity or human dignity that it ought not be required to be changed' (emphasis in original), adopted by UK Supreme Court in *HJ and HT* [2010] 3 WLR 386, 418 [76] (Lord Rodger).

[287] Canada appears to be one of the earliest jurisdictions to have recognised homosexuality as the basis of a PSG based on the immutability test: see, e.g., *Jorge Alberto Inaudi*, Immigration and Refugee Board T91-04459 (9 April 1992); *IRB Decision M91-12609* (2 June 1992); *V. (O.Z.)* (1993) CRDD 164 (10 June 1993). For a recent Federal Court decision affirming this, see *Norbert Okoli v Minister of Citizenship and Immigration* (2009) FC 332 (31 March 2009) [36].

[288] For early German authority, see Hathaway, note 27 above, 163. More recently, in Verwaltungsgericht (VG) Frankfurt (Oder) [Frankfurt (Oder) Administrative Court], 4K 772/10.A, 11 November 2010, the Court found that as a result of the Qualification Directive homosexuality is now seen as a characteristic that cannot be changed, but went on to state that the claimant would be a member of a PSG '*if* homosexuality is formative of identity for the claimant and that homosexuals in Cameroon would be a group with a distinct identity, considered by the society around them as different' [Adrienne Anderson trans]. In this case, the court found that homosexuals are considered in Cameroon by the surrounding majority society as different and therefore they are a group with distinct identity. The majority of society is not ready to see their emotion and affection, nor openly homosexual persons as equal citizens, but distinguishes them as 'foreign' and 'different'. See also Oberverwaltungsgericht (OVG) Nordrhein-Westfalen [North Rhine-Westphalia Higher Administrative Court], 13 A 1013/09.A, 23 November 2010; Verwaltungsgericht (VG) Sigmaringen [Sigmaringen Administrative Court], A 1 K 1911/09, 26 April 2010; Verwaltungsgericht (VG) Düsseldorf [Düsseldorf Administrative Court], 5 K 1875/08.A, 11 March

and South Africa,[293] that homosexuality is a protected characteristic that can give rise to refugee status, presuming all other elements of the definition are met. As explained by the UK's Supreme Court in *HJ and HT*, '[t]he group is defined by the immutable characteristic of its members' sexual orientation or sexuality'.[294] In particular, in these jurisdictions there appears little difficulty in accepting, in a straightforward manner, that a widely defined group such as 'homosexuals' or 'homosexuals in [country]' constitute the PSG. Hence, in contrast to gender claims, decision-makers do not appear concerned to define the group in more closely circumscribed terms nor do they display a tendency to import other elements of the definition into the PSG inquiry. This tends to suggest that there may well be an implicit floodgates concern in relation to the PSGs defined by gender alone.[295]

2009; Verwaltungsgericht (VG) Regensburg [Regensburg Administrative Court], RN 8 K 08.30020, 15 September 2008. [Adrienne Anderson trans].

[289] *Re GJ* [1998] INLR 387 (cited with approval by the House of Lords in *Shah*); *Refugee Appeal No 74665/03* (7 July 2004).

[290] In cases based on sexuality, the general approach of the CCE appears to be to simply state that the claimant is a member of a particular social group of homosexuals in the country in question. In this regard see *CCE 35 247* (Dec. 2, 2009), *CCE No 36 527* (Dec. 22, 2009) and *CCE No 37 316* (21 January 2010). No question appears to be raised of whether the claimant could live 'discreetly' even if they had done so in the past.

[291] The immutability approach was clearly applied by the UK Supreme Court in *HJ and HT*. Indeed, there does not appear to be any controversy surrounding this issue in the UK and it appears that the Secretary of State routinely accepts groups identified by sexuality as a PSG: see, e.g., *HJ and HT* and the earlier decision in *HS (Homosexuals: Minors, Risk on Return) Iran* [2005] UKAIT 00120 [146]: 'No issue has been raised as to the Appellant's claim that he is a member of a particular social group, namely homosexuals in Iran. We find that his homosexuality is a either an innate and unchangeable characteristic, or it is a characteristic that is so fundamental that he should not be required to change it': at [146]. See also *SB (Uganda) v Secretary of State for the Home Department* [2010] EWHC 338 (24 February 2010) [2] ('homosexuals in Uganda form a particular social group').

[292] For an extremely comprehensive discussion of homosexuality as a PSG in US case law, see *Karouni v Gonzales*, 399 F. 3d 1163 (9th Cir., 2005) in which the Ninth Circuit traced the history of such recognition, dating back to a BIA decision in 1990 (*Matter of Toboso-Alfonso*) which was later adopted by the Attorney General as precedent and also recognised by INS General Counsel culminating in the INS (as it then was) formally adopting the position 'that homosexuals do constitute a particular social group': at 1171. After recording the history of judicial case law, the Court concluded that '*all* alien homosexuals are members of a "particular social group"': at 1171. See *Amanfi v Ashcroft*, 328 F. 3d 719, 727–730 (3rd Cir., 2003) (extending protection to those who have had the PSG homosexual imputed to them); *Boer-Sedano v Gonzales*, 418 F. 3d 1082, 1088 (9th Cir., 2005)

[293] However, in one decision that was located, the protected characteristics test was clearly applied in the context of homosexuality: see Decision of the Refugee Appeal Board South Africa, 13 May 2002, 15–16 (unidentified file and appeal numbers), where the Board applied *Acosta* and *Islam* (citing *In re GJ* [1998] 1 NLR 387) so as to find that the appellant 'belongs to a social group of homosexuals': at 15 (available at Michigan Caselaw website: http://www.refugeecaselaw.org/Home.aspx). In addition, the relevant legislation defines PSG to include sexual orientation.

[294] *HJ and HT,* [2010] 3 WLR 386, 394 [11]. He went on to state that, 'unlike a person's religion or political opinion, it is incapable of being changed': at [11].

[295] Some support for this proposition can be found in UK decisions where for instance the need for some additional proof of discrimination against women is often said to be necessary in order to establish a PSG based on gender; whereas the same is not necessary in relation to other groups. See, e.g., *SB (PSG — Protection Regulations — reg 6) Moldova CG* [2008] UKAIT 00002, where the AIT explicitly held that 'discrimination' is not necessary in relation to family as a PSG, nor in the context of PSGs defined by reference to former status, but is essential in the case of gender: at [53]–[54]. In addition the Tribunal also stated that 'some degree of state

Much of the case law concerns claims by homosexual men, but it is clear that the PSG ground of sexual orientation or sexual identity applies to a wider range of contexts, including claims by lesbian,[296] bisexual,[297] and intersex applicants,[298] as well as transgender persons,[299] and 'gay men with female sexual identities'.[300] As Lord Rodger of Earlsferry noted in *HJ and HT*, 'the Convention offers protection to gay and lesbian people — and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour— because they are entitled to have the same freedom from fear of persecution as their straight counterparts.'[301]

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involvement' and that there must be 'an absence of adequate protection' in such cases: at [53]. Again these are examples of other elements of the definition being imported into PSG analysis based on gender.

[296] See, e.g., *Smith v Minister of Citizenship and Immigration (Canada),* 2009 FC 1194 (20 November 2009) in which the Federal Court of Canada noted that the Board in that case has ruled 'on the basis of two decisions of this Court (*Sadeghi-Pari, Fariba v Canada (Minister of Citizenship and Immigration*), 2004 FC 282 and *Dosmakova, Sofya v Canada (Minister of Citizenship & Immigration),* 2007 FC 1357) that a lesbian belongs to a particular social group (…) and referred to a guidance note prepared by the [UNHCR] on sexual orientation and gender identity': at [15]. See also *HJ and HT* in which the UK Supreme Court noted that '[t]here is no doubt that gay men and women may be considered to be a particular social group': [2010] 3 WLR 386, 393 [10]. For recent German cases, see Verwaltungsgericht (VG) Neustadt an der Weinstraße [Neustadt an der Weinstraße Administrative Court], 3 K 753/07.NW, 8 September 2008, recognising a claim by an Iranian (lesbian) woman on the basis that as a lesbian woman: 'The applicant has adduced evidence that she belongs to a group whose members share characteristics that are so fundamental to identity, that they should not be forced to renounce it, and that the group in Iran has a distinct identity, because it is perceived by the surrounding society as being different' [Adrienne Anderson trans]. See also Verwaltungsgericht (VG) Stuttgart [Stuttgart Administrative Court], A 11 K 10841/04, 29 June 2006. For a recent French decision, see *Mlle S*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 473648, 16 December 2008. See also UNHCR, 'Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity', 21 November 2008, available online at: http://www.unhcr.org/refworld/docid/48abd5660.html (last accessed 9 March 2012) [32].

[297] For a recent Australian decision recognising a claim from a bisexual man from Kenya, see *1011325* [2011] RRTA 227 (10 March 2011). See also UNHCR Guidance Note, note 296 above, [32]. LaViolette notes that other studies have identified some specific problems for bisexual applicants, but these do not appear to be directly related to the definition of PSG: Nicole LaViolette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender identity': a Critical Commentary (2010) 22(2) *International Journal of Refugee Law* 173, 190.

[298] See Nicole LaViolette, note 297 above, 190, criticising the UNHCR Guidance Note for failing to mention intersex claimants as falling within the PSG ground.

[299] For a recent Canadian decision involving a claim by a transgender person, see *RPD File MA8-045150* (23 June 2011) in which the Panel accepted that 'there is a serious possibility that the claimant would be a victim of persecution by reason of her membership in a particular social group, that of transgender persons, if she had to return to México': at [53]. For a French decision recognising a claim by an Algerian transsexual, see *M B*, Commission des Recours des Réfugiés (CRR) [French Refugees Appeal Board], 496775, 15 February 2005. See also UNHCR Guidance Note, note 296 above.

[300] *Hernandez Montiel v INS*, 225 F. 3d 1084, 1091 (9th Cir., 2000). The Court explained that, '[s]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them': at 1093. See also UNHCR, 'Guidelines on International protection: gender-related persecution', note 78 above, [16] where it is explained that '[r]efugee claims based on differing sexual orientation contain a gender element (…) the most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination'.

[301] *HJ and HT* [2010] 3 WLR 386, 418 [76]. For subsequent application of this principle in the context of lesbian women, see *MK (Lesbians) Albania CG* [2009] UKAIT 00036, [350].

Although there are difficulties in refugee claims founded on sexual orientation and identity, in particular the pervasive question of when (if at all) 'discretion' can ever legitimately be required of an applicant, such issues do not pertain to the composition or delineation of the PSG.[302] The key remaining area of difficulty relating directly to PSG claims in this context, rather, relates again to continuing problems in the application of the social perception approach. In Australia, there is ample authority that sexual orientation or identity can constitute a PSG,[303] but in France application of the 'social perception' test has proved more problematic in this context, with 'homosexuals' not being recognized as a particular social group unless 'the behaviour of the claimant has been perceived by society as transgressing the social order'.[304] This has resulted in the rejection of claims where the applicant did not seek to 'express openly her homosexuality through her behaviour' so that 'she does not belong to a group of persons sufficiently circumscribed and identifiable to constitute a social group',[305] whereas 'persons who assert their homosexuality and manifest it in their exterior behaviour' are more likely to be accepted as falling within the PSG ground.[306] In what has been described as the 'discretion requirement in reverse',[307] the French interpretation of 'social perception' means that as long as 'a person hides her or his sexual orientation or gender identity from others no one can perceive it.'[308]

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[302] For recent case law rejecting the 'discretion requirement, see *Norbert Okoli v Minister of Citizenship and Immigration* (2009) FC 332 (31 March 2009) [36]: 'The Federal Court has repeatedly found such findings perverse as they require an individual to repress an immutable characteristic' (citing *Sadeghi-Pari v Canada (M.C.I.)* 2004 FC 282, [29]). See also *HJ and HT* as this was the key issue in that case. See also the emphatic rejection of the discretion requirement in *Karouni v Gonzales*, 399 F. 3d 1163, 1173 (9th Cir., 2005).

[303] In *Singh v Minister for Immigration and Multicultural Affairs* [2000] FCA 1704; 178 A.L.R. 742, Justice Mansfield of the Federal Court of Australia noted that the tribunal below had 'accepted that the applicant's homosexuality meant that he was member of particular social group within the meaning of Article 1A(2) of the Convention', and that this 'has been accepted by the court on a number of occasions': at 744 [9]. See also Appellant *S395/2002 v MIMA* (2003) 216 CLR 473, 494 [55] (McHugh and Kirby JJ).

[304] Carlier, note 60 above, 209–214 citing *Mme AGB*, 498570 (12 September 2005). This stems from the 1997 decision of the Conseil d'Etat in Decision No. 171858. This appears to require in most cases that the relevant law of the home country prohibit homosexual conduct. For example, in *D*, Decision No. 328310 (12 May 1999) the Conseil d'Etat found that the homosexual Algerian national was a member of a PSG because he showed in his external behaviour that he was homosexual and because there was a law prohibiting homosexual conduct in Algeria [Adrienne Anderson trans].

[305] *Mlle F*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 513547, 25 March 2005 [Adrienne Anderson trans]. See also *H*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 605398, 7 May 2008 where the homosexual applicant from Kosovo was found not to be the target of disapproval of Kosovar society, but only of his immediate circle of acquaintances; hence he 'cannot be regarded as belonging to a circumscribed group of people sufficiently identifiable to constitute a PSG' [Adrienne Anderson trans].

[306] *K*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 571904, 1 July 2008 [Adrienne Anderson trans]. See also *G*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 571886 (11 April 2008) in which the CNDA relied on the fact that the applicant displayed his homosexuality through his job (folk dancing) and his choice of clothes to establish he requisite 'external behaviour'.

[307] S. Jansen and T. Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender identity in Europe*, September 2011, 36.

[308] *Ibid*.

This is precisely the outcome which Posner J opined would 'make[] no sense', if the newly developed 'social visibility' test in US jurisprudence were to be applied to cases involving groups defined by their sexual orientation and identity which, until now, have been recognized in a very uncomplicated manner to constitute PSGs.[309] It is worth repeating the words of Posner J in this context:

> A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population."[310]

In Germany, where the introduction of the Qualification Directive means that *both* the protected characteristics and social perception tests are required in order to establish a PSG, many decision-makers have been satisfied of the existence of the relevant societal perception on the basis that (for example): '[h]omosexuals are also considered in Cameroon by the surrounding majority society as different and therefore they are a group with distinct identity.'[311] However at least one case, concerning a bisexual applicant from Iran, has been rejected on the basis that social group could not be established since 'homosexuality here is not identity defining enough'.[312] Further and of particular concern is the fact that one court recently referred to the CJEU the question of whether homosexuality is capable of constituting a PSG. Although the case primarily appeared to raise the discretion issue, and the referral was ultimately withdrawn, the fact that the first question was framed as follows raises cause for concern:

> 1. Is homosexuality to be considered a sexual orientation within the meaning of the second sentence of Article 10(1)(d) of Directive 2004/83/EC (1) and can it be an adequate reason for persecution?[313]

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[309] For an excellent analysis of the potential problems for such applicants, see Marouf, note 153 above, 79–87; see also *Gatimi*, 578 F. 3d 611, 615 (Posner J) (7th Cir., 2009).

[310] *Gatimi*, 578 F. 3d 611, 615 (Posner J) (7th Cir., 2009). I note that the UNHCR has not addressed the issue of 'social perception' in this context. In its Guidance Note (see note 296 above) it simply states at [32] that:

> It has furthermore been well established that sexual orientation can be viewed as either an innate and unchangeable characteristic, or as a characteristic that is so fundamental to human dignity that the person should not be compelled to forsake it. Requiring a person to conceal his or her sexual orientation and thereby to give up those characteristics, contradicts the very notion of "particular social group" as one of the protected grounds in the 1951 Convention.

[311] See, e.g., Verwaltungsgericht (VG) Frankfurt (Oder) [Frankfurt (Oder) Administrative Court], VG4K 772/10.A, 11 November 2010 [Adrienne Anderson trans], although in most positive cases decision-makers have needed to be satisfied of this element.

[312] Verwaltungsgericht (VG) Ansbach [Ansbach Administrative Court], AN 18 K 08.30201, 21 August 2008 [Adrienne Anderson trans].

[313] Oberverwaltungsgericht (OVG) Nordrhein-Westfalen [North Rhine-Westphalia Higher Administrative Court], 13 A 1013/09.A, 23 November 2010.

In sum, while difficulties remain for LGBTI applicants in establishing qualification for refugee status, they are generally not connected with establishing MPSG, at least where analysis is anchored in the protected characteristics approach. However there is cause for concern that reliance on the social perception approach, particularly as an additional factor in establishing MPSG, may exclude many claims that should fall comfortably within well established principle and long standing practice.

5.3 FAMILY AS A PSG

It has long been recognized in refugee jurisprudence that the family can constitute a particular social group, whether by reference to the protected characteristics or social perception tests. In the decision which introduced the *ejusdem generis* approach, *Acosta*, the BIA cited 'kinship ties' as an obvious application of a characteristic that is innate or immutable, and this is now well-established in jurisdictions that apply this approach.[314] In US jurisprudence it has been said that 'kinship ties' are 'paradigmatically immutable' as 'family bonds are innate and unchangeable'.[315] Indeed it is said that the family provides 'a prototypical example of a particular social group'.[316]

Similarly, in the Australian decision in *Sarrazola*, it was accepted that family could constitute a particular social group for the purposes of the Convention,[317] and in Australian case law there appears to be little difficulty in establishing that a family is perceived by the relevant society or sufficiently distinguished from society so as to satisfy the 'social perception' test of particular social group.[318]

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[314] See cases cited in M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007) 336. For recent New Zealand authority, see New Zealand RSAA, Refugee Appeal No. 76485 (19 June 2010) [79]; *AB (Rwanda)* [2011] NZIPT 800019 (24 August 2011) [65]. In Canada, see *Tomov v Canada (Minister of Citizenship & Immigration)* 2005 FC 1527 [10]; *Granada v Canada (Minister of Citizenship & Immigration)* 2004 FC 1766 [15]–[16]; *Macias v Canada (Minister of Citizenship & Immigration)* 2004 FC 1749 [10]–[12]; *Santos v Minister of Citizenship and Immigration* 2011 FC 644 [23].

[315] *Crespin*, 632 F. 3d 117, 124 (4th Cir., 2011).

[316] *Sanchez-Trujillo v INS*, 801 F. 2d 1571, 1576 (9th Cir., 1986) ('*Trujillo*'), cited in *Crespin*, 632 F. 3d 117, 125 (4th Cir., 2011). Although *Trujillo* is based on unfortunate and now abandoned reasoning, the basic point concerning family as a PSG is still well-accepted: see *Crespin* at 125 for list of US cases that have applied the *Acosta* standard in this context.

[317] *Minister for Immigration and Multicultural Affairs v Sarrazola (No 4)* (2001) 107 FCR 184, 192–194 (Merkel J); see also *Fornah* [2007] 1 AC 412, 434 (Lord Bingham).

[318] See *Giraldo v MIMA [2001] FCA 113; 1004652* [2011] RRTA 751 (Aug. 24, 2011); but see *071722819* [2008] RRTA 181. See also the recent decision of the Spanish Supreme Tribunal STS 6862/2011 (24 October 2011) [Adrienne Anderson trans] which found that 'all of the necessary elements to identify persecution for membership of a particular social group constituted by relatives of someone accused and convicted in an unfair trial' were satisfied in that case:

> 1. First, the fact of being a relative of a person who was convicted after an unfair trial by state agents is an innate and immutable characteristic and is irrenunciable.
> 2. In addition, the group formed by families of people who have been charged and convicted is perceived as a group known to the society that distinguishes them, becoming military targets to be

In Belgium, which purports to apply both tests, decision-makers have frequently adopted the following statement from the UNHCR's 'Position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud'[319]:

> [18] (…) a family unit represents a classic example of a "particular social group". A family is a socially cognizable group in society and individuals are perceived by society on the basis of their family membership. Members of a family, whether through blood ties or through marriage and attendant kinship ties, meet the requirements of the definition by sharing a common characteristic which is innate and unchangeable, as well as fundamental and protected (…). In addition, the family is widely perceived as a cognisable unit, the members of which are readily distinguishable from society at large.[320]

However, in some other jurisdictions that consider social perception as an element in assessing PSG the case law is not so straightforward. For example, while some German courts have accepted family membership as the basis for PSGs,[321] the Higher Administrative Court of Schleswig-Holstein has found that family cannot be a social group because it is usually missing the necessary external characteristics.[322] In particular, while the Court 'assumed that family membership is an immutable characteristic (…) a family is not as clearly distinguishable from the rest of society with their own group perceived identity.'[323] Similarly, since the introduction of the 'social visibility' test in US jurisprudence, the BIA has held that 'not every family will have the distinct, recognizable identity in society that is necessary to be a particular social group', though it acknowledged that 'some families certainly will'.[324]

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exterminated.

[319] UNHCR, 'Position on Claims for Refugee Status under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud, 17 March 2006, available online at: http://www.unhcr.org/refworld/docid/44201a574.html (last accessed 9 March 2012).

[320] See, e.g., the CCE decisions in *CCE No 41 270* (31 March 2000); *CCE No 18 419* (6 November 2008); *CCE No 36 565* (23 December 2009).

[321] Verwaltungsgericht (VG) Darmstadt [Darmstadt Administrative Court], 8E 1047/06.A, 17 October 2007 [Anne Kallies trans].

[322] Oberverwaltungsgericht (OVG) Schleswig-Holstein [Schleswig-Holstein Higher Administrative Court], 1 LB 22/05, 27 January 2006 [Anne Kallies trans].

[323] *Ibid*. [Adrienne Anderson trans].

[324] *Thomas*, No. A75-597-0331-034/035/-036 (BIA Dec 27, 2007) as cited in Marouf, note 153 above, 93. In that case, the family did have the requisite visibility, but in others the BIA has found that it does not: see, e.g., *Crespin*, 632 F. 3d 117 (4th Cir., 2011), remanding BIA decision. See the worrying decision in *Re S-E-G-*, 24 I. & N. Dec. 579, 587 (BIA, 2008) where the BIA said that family in that case was too amorphous to satisfy the 'particularity' requirement. For a recent decision, see *Perkeci v U.S. Attorney General*, 2011 U.S App. LEXIS 22648 (11th Cir., 2011) in which the Eleventh Circuit upheld the BIA's decision that 'the Perkeci family did not constitute a particular social group because no evidence indicated that any segment of Albanian society other than the Ndrecca family viewed the Perkeci family as visible or cohesive or sought to harm its members': at 2, 7. For an example of a family claim that was accepted, even based on the social visibility test, see *Al-Ghorbani v Holder*, 585 F. 3d 980

A category of case that has given rise to particular concern, but which is independent of the protected characteristics vs. social perception debate, is where a person is at risk of harm for a non-Convention reason (for example because he or she is the target of extortion or similar criminal activity), but the attention of the persecutors then turns to the original victim's family members who may in turn be said to be at risk for reasons of their family membership. Although such a claim was held to fall within the refugee definition in Australian case law,[325] the position has now been reversed by domestic legislation which categorically excludes such claims from the purview of the Convention.[326] Further, in at least one German decision it has been said that in this 'personal vendetta' context, family cannot constitute the relevant PSG ground,[327] and in Canada it has been held that while 'the family' has been recognized as a particular social group in certain cases, for this to apply, it must be found that the originally persecuted person was targeted for a Convention reason.[328] Moreover, in the US, while some circuits have held that a person who fears harm based on family affiliation is a refugee, even where the original family member's fear was not connected to a Convention ground,[329] the Fifth Circuit has 'created a circuit conflict' by removing retaliation against family members as a basis of refugee status — a conflict which may well ultimately be resolved in the US Supreme Court.[330]

Yet it is difficult to reconcile such reasoning with the 1951 Convention and courts in Austria,[331] New Zealand[332] and the UK have taken the contrary approach. As eloquently explained by the House of Lords in *K v Secretary of State for the Home Department*,[333] international human rights law

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(6th Cir., 2009), where the relevant family 'shares the common, immutable characteristics of kinship, regional background, and class': at 995.

[325] *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184.

[326] See *Migration Act 1958* (Cth) s. 91S. The background to and effect of this provision is discussed by the High Court in *STCB v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 81 ALJR 485, 490–491 [16]–[19] (Gleeson CJ, Gummow, Callinan and Heydon JJ) in the context of 'blood feuds'.

[327] Bundesverwaltungsgericht (BVerwG) [German Federal Administrative Court], 1 B 131.06, 5 January 2007 [Adrienne Anderson trans].

[328] *Diaz v Minister of Citizenship and Immigration*, 2011 FC 707, [7]–[8]; *Santos Mancia, Veronica Margarita v Minister of Citizenship and Immigration*, 2011 FC 949, [11]–[13]; *Williams Ramirez Aburto et al v Minister of Citizenship and Immigration,* 2011 FC 1049, [16]–[18]. For earlier authority, see *Zaidi v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1080, [4]; but see *De Leon v Minister of Citizenship and Immigration,* 2007 FC 127 which appears to take a different position.

[329] See, e.g., *Thomas v Attorney General,* 409 F. 3d 1177 (9th Cir., 2005) and *Crespin*, 632 F. 3d 117 (4th Cir., 2011). See also cases cited in *Rudina Demiraj and Rediol Demiraj v Holder*, on a petition for a writ of certiorari to the US Court of Appeals for the Fifth Circuit, Brief of Amicus Curiae Immigration Law Scholars in Support of Petitioners, dated 25 July 2011, 10–14, on file with author.

[330] See *Rudina Demiraj and Rediol Demiraj v Holder*, on a petition for a writ of certiorari to the US Court of Appeals for the Fifth Circuit, Brief of Amicus Curiae Immigration Law Scholars in Support of Petitioners, dated 25 July 2011 (on file with author). See also Anker, note 146 above, 350–352.

[331] *2007/20/1490 v Independent Federal Asylum Board*, [Adrienne Anderson trans]. This case does suggest that family can constitute a PSG, and it relates to a woman who feared harm as the result of her husband's criminal activities. There is however no reasoning; the Court simply says that family is capable of forming a particular social group and that it does not turn on whether or not the husband was being persecuted for Convention reasons.

[332] New Zealand RSAA, Refugee Appeal No. 76485 (19 June 2010) [80]–[83], adopting the House of Lords position in *K v Secretary of State for the Home Department* [2007] 1 AC 412.

[333] [2007] 1 AC 412 (this was joined with *Fornah*, see note 2 above).

recognizes that family 'is the natural and fundamental group unit of society and is entitled to protection by society and the State',[334] and that persecution of a person 'simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race and religion.'[335] As such 'the family falls naturally into the category of cases to which the Refugee Convention extends its protection'.[336] Hence, it is irrelevant to identifying the PSG that other members of the group 'are not under the same threat';[337] to hold otherwise would be to require 'more of an asylum seeker who claims that the particular social group of which he or she is a member is the family than is required of those who claim that the persecution of which they have a well-founded fear is for reasons of race, religion, nationality or political opinion.'[338] In light of this compelling analysis, it is difficult to sustain the contrary view; hence family is properly understood as constituting a particular social group for Convention purposes, regardless of the particular context to the claim.

5.4 CLAIMS BASED ON AGE

Refugee claims involving children have become much more prominent in recent years, both in the context of claims by separated and unaccompanied children and those who arrive with family members but have an independent and in some cases distinct claim for refugee status. The *Convention on the Rights of the Child* defines a child as being every human being below the age of eighteen years,[339] yet refugee decision-makers should not be overly categorical in this regard given that it is often the fact of being young and vulnerable (even if that is at 19 rather than 17) which makes a person susceptible to being persecuted. As recently recognized by Lord Lloyd of the UK Court of Appeal, '[i]t is not easy to see that risks of the relevant kind to a person who is a child would continue until the eve of that [18th] birthday, and cease at once the next day.'[340]

While there is not an extensive range of appellate jurisprudence considering PSGs defined by age or youth, it is well-accepted in some jurisdictions, particularly in those adopting the protected characteristics approach such as Canada, that children can constitute a PSG. In Canada the relevant Tribunal has long recognized children as a PSG: as early as 1994 the Convention Refugee Determination Division (as it then was) recognized that, '[f]ollowing *Ward*, the panel

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[334] *Ibid.* 445 [45] (Lord Hope), quoting International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 23.
[335] *Ibid.*
[336] *Ibid.* Indeed Baroness Hale stated that the answer in each case 'is so blindingly obvious that it must be a mystery to some why either of them had to reach this House': at 458 [83].
[337] *Ibid.* 446 [47] (Lord Hope).
[338] *Ibid.* See also UNHCR, 'Position on Claims for Refugee Status under the 1951 Convention relating to the Status of Refugees Based on a Fear of Persecution Due to an Individual's Membership of a Family or Clan Engaged in a Blood Feud, 17 March 2006, available online at: http://www.unhcr.org/refworld/docid/44201a574.html (last accessed 9 March 2012), [16]–[20]; UNHCR, 'Guidance Note on Refugee Claims Relating to Victims of Organized Gangs', note 81 above, [40].
[339] (Entered into force 2 September 1990) 1577 UNTS 3, Art. 1.
[340] *DS (Afghanistan)* [2011] EWCA Civ 305, [54].

finds that the minor male claimant is a member of a particular social group, namely, minors, based on the "innate or unchangeable characteristic" of being under the age of majority for the foreseeable future.'[341] As recognized more recently by the UK Asylum and Immigration Tribunal, '[a]ge is an immutable characteristic',[342] hence groups such as 'children from Afghanistan' can constitute a PSG.[343]

The reference to the fact that a person's age is not changeable at least in the 'foreseeable future' is important, in light of the arguably perverse finding in some US Circuit Courts of Appeal that 'unlike innate characteristics such as sex or color, age changes over time'.[344] As the UNHCR Guidelines on Child Asylum Claims sensibly explain:

> Although age, in strict terms, is neither innate nor permanent as it changes continuously, being a child is in effect an immutable characteristic at any given point in time. A child is clearly unable to disassociate him/herself from his/her age in order to avoid the persecution feared. The fact that the child eventually will grow older is irrelevant to the identification of a particular social group, as this is based on the facts as presented in the asylum claim.[345]

While a change in age may of course legitimately underpin subsequent reliance on the cessation clause to terminate a person's refugee status, the fact that a person may at some stage no longer fall within a particular social group cannot justify a rejection of the refugee claim.

In addition to the recognition of the broadly defined PSG 'children', various subgroups have been recognized including 'impoverished children',[346] 'orphans',[347] 'illegitimate child[ren]',[348]

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[341] *Re B(PV)* [1994] CRDD No. 12 (10 May 1994) 7; see also *Canada (Minister of Citizenship & Immigration) v Lin* (2001) FCA 306, 17 Imm L.R. (3d) 133, [21], which assumed that children could constitute a PSG but found that the claim was not made out in this case.

[342] See *LQ (Age: Immutable characteristic) Afghanistan* [2008] UKAIT 0005, [6]; *ZK (Afghanistan) v Secretary of State for the Home Department* [2010] EWCA Civ 749, [2]. The Court in *ZK* noted the same finding in that case, but did not need to comment on it since the appeal involved other issues. See also *DS (Afghanistan) v Secretary of State for the Home Department* [2011] All ER (D) 248 (Mar); [2011] EWCA Civ 305.

[343] *LQ (Age: Immutable characteristic) Afghanistan* [2008] UKAIT 0005.

[344] *Lukwago v Ashcroft*, 329 F. 3d 157, (3rd Cir., 2003). See also *Re S-E-G-*, 24 I. & N. Dec. 579, 583 (BIA, 2008): 'We agree with the Immigration Judge that "youth" is not an entirely immutable characteristic but is, instead, by its very nature, a temporary state that changes over time'.

[345] UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', note 80 above, [49].

[346] CRDD Canada A95-00633b [1998] CRDD No. 12, cited in S. Baglay and M. Jones, *Refugee Law* (Toronto: Irwin Law, 2007) n. 157.

[347] V98-00787 [1999] CRDD No 119, cited in Baglay and Jones, note 346 above, n. 157.

[348] *B*, Commission des Recours des Réfugiés (CRR) [French Refugees Appeal Board], 592688, 11 May 2007. In Germany, see Verwaltungsgericht (VG) Darmstadt [Darmstadt Administrative Court], 5 E 30444/98.A (3), 16 February 2004.

'black child[ren]'[349] or 'hei haizi' (children ineligible for registration in China due to violation of the one child policy),[350] 'child victims of spousal or parental abuse',[351] and 'young displaced Tamil males from Jaffna'.[352] This is consistent with the UNHCR's view that:

> A range of child groupings, thus, can be the basis of a claim to refugee status under the "membership of a particular social group" ground. Just as "women" have been recognized as a particular social group in several jurisdictions, "children" or a smaller subset of children may also constitute a particular social group. Age and other characteristics may give rise to groups such as "abandoned children", "children with disabilities", "orphans", or children born outside coercive family planning policies or of unauthorized marriages, also referred to as "black children". The applicant's family may also constitute a relevant social group.[353]

It is important, however, that decision-makers do not define age-based PSGs in an overly elaborate or convoluted manner, importing other elements of the refugee definition into the definition, as has been the tendency in gender claims as discussed above.

One challenge to the recognition of PSGs based on age relates to the introduction of the 'social visibility' and 'particularity' tests in the US, described above. Although, as the UNHCR has cogently explained, children should be capable of being considered a PSG according to the social perception test as well as the protected characteristics approach,[354] it appears that the US application of social perception in the form of social visibility is not so accommodating. In *Re S-E-G-*, the Board of Immigration Appeals rejected the claim notwithstanding evidence that the persecutors in that case (members of the MS-13 gang) target young males, with the average age of recruitment being 12.[355] Relying on its newly articulated 'social visibility' test, the BIA

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[349] *Chen Shi Hai* (2000) 201 CLR 293. In *Cheung v Canada (Minister of Employment and Immigration)* [1993] 2 FC 314, where the Canadian Federal Court of Appeal held that the applicant was 'poignantly described as a "black market person", denied the ordinary rights of Chinese children. As such, she is a member of a particular social group, that is, second children': at 323.

[350] *Chen v Holder*, 604 F. 3d 324, 333–334 (7th Cir., 2010).

[351] RPD File VA3-01886 (5 February 2004) 3. Such cases should however more appropriately be considered under the rubric of 'family': see Foster, note 314 above, 336–338.

[352] *Paramananthan v Minister for Immigration* (1998) 94 FCR 28. See also Foster, note 314 above, 333–336. See also *Applicant S* (2004) 217 CLR 387, ('young able bodied men').

[353] See UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', note 80 above, [50].

[354] See *ibid.* [49]: 'Being a child is directly relevant to one's identity, both in the eyes of society and from the perspective of the individual child (…) In most societies, children are set apart from adults as they are understood to require special attention or care, and they are referred to by a range of descriptors used to identify or label them, such as "young", "infant", "child", "boy", "girl" or "adolescent".'

[355] 24 I. & N. Dec. 579, 580 (BIA, 2008). The evidence in this case was consistent with research described by the UNHCR where it notes that 'recent studies have found that the recruitment practices of Central American gangs frequently target young people': UNHCR, 'Guidance Note on Refugee Claims Relating to Victims of Organized Gangs', note 81 above, [36]. This Guidance Note goes on to say that 'an age-based identification of a particular

explained that, '[t]here is little in the background evidence of record to 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'.[356] In addition, the group failed the 'particularity' test due to its being 'too amorphous a category'.[357] This decision vividly displays the contradictory nature of these tests: an applicant is encouraged to define a group narrowly so as to ensure that the group has 'particular and well defined boundaries',[358] yet by so doing tends to undermine the possibility that a decision-maker will be satisfied as to the group's visibility or recognition in society since the more specific the group, the less likely society recognizes it as a distinct and visible group.[359]

Applying similar reasoning, the US Court of Appeals for the First Circuit has held that the proposed group 'young males' was not capable of constituting a PSG in light of the fact that 'the age parameters ("young males") are similarly lacking in precision'.[360] This was said to be on the basis that '[o]ne who is "young" in the eyes of one observer may not be "young" in the eyes of another observer'.[361] In addition, the applicant had failed to establish that his group was 'a group of people publicly recognized as such in the relevant community'.[362] In contrast, in Canada where the immutability approach is well-entrenched, the Canadian Federal Court recently found that the Board erred in failing to consider whether the applicant was a member of a PSG as a 'young, male Salvadoran living in San Salvador, or as a youth who refused to join a gang'.[363]

In the US cases there is also a marked reluctance to consider gender-specific aspects of the case, particularly where there is evidence that girls or young women are at a particular risk of harm

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social group, combined with social status, could be relevant concerning applicants who have refused to join gangs. The immutable character of "age" or "youth" is in effect, unchangeable at any given point in time'.

[356] *Re S-E-G-*, 24 I. & N. Dec. 579, 587 (BIA, 2008).

[357] *Ibid*. 584–585.

[358] *Ibid*. 582.

[359] This also appears to be an issue in Australia, which adopts the social perception approach. For example, in a recent decision of the RRT in *1005461* [2010] RRTA 1103 (8 December 2010), the RRT rejected the PSG 'eldest male children' on the basis that 'family types could be so disparate in India that it was difficult to conceive of a particular social group of "eldest male children in India" being united by their common characteristics, or being an identifiable group with a social presence in India, set apart from other members of the society': at [145]. The RRT went on to say that it 'becomes the conundrum that the group becomes so narrowly defined as not to be a group (…) or so broad as to fail to have a uniting element'.

[360] *Diaz Ruano v Holder*, 420 Fed. Appx. 19, 21 (1st Cir., 2011).

[361] *Ibid*.

[362] *Ibid*. See also *Re E-A-G-, Respondent*, 24 I. & N. Dec. 591 (BIA, 2008) in which the BIA overturned the Immigration Judge's decision which had recognised a PSG based on 'youth and affiliation or perceived affiliation with gangs': at 592–593. The BIA applied similar reasoning to that in *Re S-E-G-*: see at 594–595. *Ramos-Lopez v Holder*, 563 F. 3d 855 (9th Cir., 2009) rejected the PSG 'young Honduran men who have been recruited by the MS-13' on the basis of both the particularity and social visibility requirements, at 862.

[363] *Gomez et al v Minister of Citizenship & Immigration (Canada)* (2011) FC 1093, [29]. See also *Musakanda v Canada (Minister of Citizenship & Immigration)* (2007) FC 1300, [12]. However in other cases, the Court has rejected the claim on the basis that the evidentiary record suggests that applicant is not at any particular risk which is different to the population at large: see *Lainez v Minister of Citizenship & Immigration* (2011) FC 707, [20]–[21]. Clearly the evidence available to establish differentiated risk from the general population is crucial in such cases.

from gangs or similar entities in the form of gender-based sexual violence.[364] Decision-makers in the US, fixated on social visibility and particularity, have routinely characterized the relevant group as 'persons who resist recruitment',[365] whereas the Canadian Federal Court has, on numerous occasions, remitted the tribunal decision on the basis that it overlooked the specific gendered nature of the risk to which a (female) applicant is at risk.[366]

In short, as in other areas of PSG analysis, the importation of additional barriers, based on a clear misunderstanding of the UNCHR Guidelines, is resulting in an unduly narrow approach to age-based claims in some jurisdictions.

5.5 PERSONS WITH DISABILITIES

Although it does not appear to be a heavily litigated issue, there is authority both at the tribunal and judicial levels, predominantly in common law jurisdictions, recognising disability as capable of constituting the basis for a PSG for the purposes of refugee law. In addition, in South Africa, 'particular social group' is defined in the Refugees Act 1998 to explicitly include 'a group of persons of particular gender, sexual orientation, disability, class or caste'.[367] The Convention on the Rights of Persons with Disabilities recognizes that 'persons with disabilities' include 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis

[364] See for example, Michael Bolton, *Living in a World of Violence: An Introduction to the Gang Phenomenon*, July 2011, UNHCR Legal and Protection Policy Research Series, PPLA/2011/07, available online at: http://www.unhcr.org/refworld/docid/4e3260a32.html (last accessed 16 March 2012).

[365] As in the case of *Re S-E-G-*, 24 I. & N. Dec. 579 (BIA, 2008) which involved, in addition to the two 16-year-old boys, their sister who was 19 years old at the time of the hearing and who put her claim on an independent basis: at 585. An even more explicit example of this problem is evidenced in *Mendez-Barrera v Holder*, 602 F. 3d 21, 23 (1st Cir., 2010) in which the Salvadoran applicant submitted that she was at risk of sexual abuse for failing to join a gang, yet the gender-specific nature of her claim was not grappled with at any level; rather, the claim was rejected on the basis that a ground based on recruitment by gang members lacked the requisite visibility and particularity. The Court concluded that '[g]iven her loose description of the group, it is virtually impossible to identify who is or is not a member. There are, for example, questions about who may be considered "young", the type of conduct that may be considered "recruit[ment]", and the degree to which a person must display "resist[ance]": at 27–28.

[366] See, e.g., *Spencer v Minister of Citizenship and Immigration* (2011) FC 397, [6]; *Gutierrez v Minister of Citizenship and Immigration* (2011) FC 1055, [37]–[42]. In *Josile v Minister of Citizenship & Immigration* (2011) FC 39, the Federal Court rejected the notion 'that rape can be merely motivated by common criminal intent or desire, without regard to gender or the status of females in a society': at [24]. Hence while 'women are targeted for kidnapping just like men, they are raped because they are women': at [34]. The importance of analyzing the gender specific aspects of a claim is also highlighted in UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs', note 81 above, [12], [19], [36].

[367] *Refugees Act 1998* (South Africa), ch. 1, s. 1(xxi) which states in full: '"social group" includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste'.

with others',[368] suggesting the appropriateness of an inclusive approach to identifying those persons who might fall within the PSG ground on this basis.

In those jurisdictions which have most explicitly adopted the protected characteristics approach, decision-makers have accepted, in a straightforward manner, the logic of its application to physical and mental disability. For example, in a recent decision of the Immigration and Protection Tribunal of New Zealand, it was held that

> [a]lbinism is an immutable characteristic which is beyond the power of the appellant to change. It is an internal defining characteristic which serves to define the group independently of the persecution. Albinos are properly considered a particular social group in Egypt.[369]

Similarly in Canada, PSGs based on physical[370] and mental illness[371] have been easily recognized. For example, in *Liaqat v Canada*, the Federal Court of Canada accepted the applicant's submission that his 'mental illness is an innate and unchangeable characteristic', and that 'even though its severity may fluctuate with treatment, the psychotic depression is a fundamental underlying feature of the Applicant's psychological condition'.[372]

In those US Circuit Courts of Appeal which adopt the protected characteristics approach, a similarly straightforward application is evident. For example, in *Tchoukhrova v Gonzales*, the Ninth Circuit noted that, '[w]hile not all disabilities are "innate" or "inherent" (…) they are usually, unfortunately, "immutable"'. Accordingly, the Court held that persons whose disabilities 'are serious and long-lasting or permanent in nature' — in that case disabled children in Russia — are within the PSG ground.[373] Similarly, in *Kholyavskiy v Mukasey*, the Seventh Circuit accepted that the applicant's mental illness was an immutable characteristic and hence

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[368] (Entered into force 3 May 2008), UNGA Res A/RES/61/106, 13 December 2006, Art. 1.

[369] *AC (Egypt)* [2011] NZIPT 800015 (25 November 2011), [111]. It is acknowledged that albinism is not necessarily a disability. The key point however is that it is treated as such in some countries, giving rise to a well-founded fear of being persecuted. See for example: S. Larson, 'Magic, Mutilation, and Murder: A Case for Granting Asylum to Tanzanian Nationals with Albinism', Pace International Law Review Online Companion, vol. 2, no. 8 (March 2011), available online at: http://digitalcommons.pace.edu/pilronline/24/ (last accessed 16 March 2012).

[370] See cases cited in Foster, note 314 above, 318–320, in which the RPD has recognised that physical disabilities including visual impairment, congenital deafness and HIV can constitute the basis of PSGs. See also *Ampong v Canada (Minister of Citizenship and Immigration)* 2010 FC 35, 87 Imm LR (3d) 279, [43], as cited by the NZIPT in *AC (Egypt)*, note 369 above, [107].

[371] See, e.g., Immigration and Refugee Board (Refugee Protection Division), TA5-11242, 9 March 2007, 8, 11.

[372] *Liaqat v Canada (Minister of Citizenship and Immigration)* 2005 FC 893, [14], where the Court was paraphrasing the applicant's submissions and then later stated that (on this issue) '[t]he Respondent appears to concede that the Applicant is a member of a particular social group because of his mental illness and I am in agreement with the Respondent': at [29].

[373] *Tchoukhrova v Gonzales*, 404 F. 3d 1181, 1189 (9th Cir., 2005). See Foster, note 314 above, 322. See also Anker, note 146 above, 403–407.

capable of constituting a PSG.[374] Further, the INS (as it then was) has recognized that '[i]n certain circumstances (…) persons with HIV or AIDS may constitute a particular social group under refugee law',[375] and such claims have been successful at the Departmental and IJ level, as they have in other jurisdictions.[376]

Indeed, in light of the entry into force of the *Convention on the Rights of Persons with Disabilities*,[377] in which States Parties (*inter alia*) 'undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability',[378] there can be no doubt that disability is a protected status at international law, and hence clearly within the protected characteristics approach to defining PSG.[379]

In the US Eighth Circuit there is still some lingering uncertainty as to whether a disability-based group is 'too large and diverse a group to qualify',[380] however this appears to be based on discredited reasoning in PSG analysis. It remains to be seen whether the new 'social visibility' test will alter the mainstream US position in relation to persons with disabilities. The fact that the 'social perception' test applied in Australia[381] and France[382] has resulted in the recognition of various disability-based PSGs might suggest that 'social visibility' should not pose a problem in this context.

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[374] 540 F. 3d 555, 573 (7th Cir., 2008), finding that the immigration judge's holding that 'his illness is not immutable' was not supported by the record.

[375] Reported in *Karouni*, 399 F. 3d 1163, 1171 (9th Cir., 2005).

[376] See Foster, note 314 above, 322–323. Of course claims based on HIV positive status can be rejected for other reasons, such as failure to establish a risk of being persecuted or the availability of adequate state protection, however social group is rarely an issue. For an explanation of HIV as a disability, see UNAIDS, WHO and OHCHR Policy Brief, Disability and HIV, April 2009, available online at: http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf (last accessed 16 March 2012).

[377] On 3 May 2008, in accordance with Art. 45(1): UNGA Res A/RES/61/106, 13 December 2006.

[378] *Ibid*. Art. 4(1).

[379] It should also be noted that disability has been recognised as a protected status pursuant to the widely ratified international human rights treaties such as the ICCPR, ICECSR and CRC: see Foster, note 314 above, 319-20.

[380] See *Raffington v INS*, 340 F. 3d 720, 722 (8th Cir., 2003). The Court in that case also states that the proposed group was not 'a collection of people closely affiliated with each other, who are actuated by some common impulse or interest'. In the more recent decision of *Makatengkeng v Gonzales*, 495 F. 3d 876 (8th Cir., 2007), the Eighth Circuit questioned the immigration judge's finding below that albinism was a PSG because of its immutability, citing *Raffington*: at 881–882.

[381] See discussion in Foster, note 314 above, 321–322. For more recent authority, see *0807028* [2009] RRTA 720 (11 August 2009), where the RRT considered that those with a mental illness share a common characteristic, being the condition of psychological illness, and that this characteristic is capable of distinguishing the group form society at large, thus persons with psychological illness may comprise a PSG. The RRT found however that the applicant's fears on the basis of his membership of this PSG were not well-founded. Disability was unproblematically accepted as the basis of a PSG in Tonga: *1001704* [2010] RRTA 407 (19 May 2010).

[382] In France little authority was located, however in the decision in *T*, Commission des Recours des Réfugiés (CRR) [French Refugees Appeal Board], 514926, 10 June 2005, an albino in Mali was considered a member of a PSG on the basis that Albinos are seen to possess evil powers and are thus rejected and ostracised by society. See also *K*, Cour Nationale du Droit d'Asile (CNDA) [French National Court of Asylum], 629447, 28 April 2009 in which the same finding was made in relation to the Democratic Republic of the Congo.

5.6 FORMER STATUS/ASSOCIATION (INCLUDING GANG MEMBERSHIP)

The third category of claim, derived from both *Acosta* and *Ward*, which is said to fall logically within the protected characteristics approach to defining a PSG is that of 'groups defined by a former status, unalterable due to its historical permanence'.[383] Based on the logic that a former status is essentially an immutable characteristic, claims have been recognized where a person is at risk because of his or her status as a former victim of trafficking,[384] as a former child soldier,[385] as one of a number of 'civilian witnesses who have the "shared past experience" of assisting law enforcement against violent gangs',[386] as a 'person[] who [has] refused to join a gang',[387] as a

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[383] See *Re Acosta*, 19 I. & N. Dec. 211, 233 (BIA, 1985): 'a shared past experience such as former military leadership or land ownership'. In *Ward*, La Forest J explained that the Cold War context in which the Convention definition was drafted suggests that 'past status' should be embraced by the MSG ground: [1993] 2 SCR 689, 729.

[384] *SB (PSG — Protection Regulations — Reg 6) Moldova CG* [2008] UKAIT 00002 (26 April 2007), [54]–[56]: 'former victims of trafficking and former victims of trafficking for sexual exploitation are capable of being members of a particular social group because of their shared common background or past experience of having been trafficked'. See also *AM and MB (Trafficked woman) Albania CG* [2010] UKAT 80 (IAC), [164]–[166]. In Germany, see Verwaltungsgericht (VG) Wiesbaden [Wiesbaden Administrative Court], 3 K 1465/09 WI.A, 14 March 2011 which found that 'women returning to Nigeria who are victims of trafficking and who have been freed from this and have testified against their traffickers' could constitute a PSG [Adrienne Anderson trans]. In Norway, the Act of 15 May 2008 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (Immigration Act), available online at http://www.regjeringen.no/en/doc/laws/Acts/immigration-act.html?id=585772 (last accessed 9 March 2012), states in s. 30(d) that '[f]ormer victims of human trafficking shall be regarded as members of a particular social group'.

[385] *Lukwago v Ashcroft*, 329 F. 3d 157 (3rd Cir., 2003) which granted refugee status on the basis of a PSG defined as 'children from Northern Uganda who have escaped from involuntary servitude after being abducted and enslaved' by the Lord's Resistance Army: at 174. See also *Gomez-Zuluaga v AG of the United States*, 527 F. 3d 330, 345–348 (3rd Cir., 2008).

[386] *Garcia v Attorney General*, 665 F. 3d 496, 504 (3rd Cir., 2011). The Court went on to explain that this is 'a characteristic that members cannot change because it is based on past conduct that cannot be undone': *ibid*. See also *Escobar v Holder*, 657 F. 3d 537, 544 (7th Cir., 2011) (PSG of 'former trucker who resisted FARC and helped the government'). See also *Turton v Minister of Citizenship & Immigration (Canada)* (2011) FC 1244, [100]–[102]. In Australia, see *Dranichnikov v Minster for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 in which the High Court found that the RRT had been in error in failing to consider whether the applicant fell within the PSG 'entrepreneurs and businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals': at 1092–1093 [27] (Gummow and Callinan JJ). See also 1099–1100 (Kirby J), 1102 (Hayne J). However, the question whether informants and witnesses can constitute a PSG is a controversial one and many cases are rejected on the basis that such persons are not part of a PSG: see, e.g., *Morato v Minister for Immigration Local Government and Ethnic Affairs* (Australia) (1992) 39 FCR 401; *WAKS v Minister for Immigration & Multicultural & Indigenous Affairs (Australia)* [2006] FCAFC 32, [22]. In Canada, see *Zhu v Canada (Minister of Citizenship & Immigration)* [2002] 1 FC 379, [6]–[11]; *Suvorova v Minister of Citizenship & Immigration* (2009) FC 373, [59]; *Victor Lozano Navarro et al v Minister of Citizenship and Immigration* (Canada) (2011) FC 768, [25]–[28]. In some cases the issue is better analyzed as one of political opinion: see, e.g., *Klinko v Canada (Minister of Citizenship and Immigration)* [2000] 3 FC 327, [35], but this has been rejected in the US: see *Amilcar-Orellana v Mukasey*, 551 F. 3d 86, 90–91 (1st Cir., 2008).

[387] See UNHCR, 'Guidance Note on Refugee Claims Relating to Victims of Organized Gangs', note 81 above, [37]: '[p]ast actions of experiences, such as refusal to join a gang, may be considered irreversible and thus immutable'. In addition, this Guidance Note states that resisting involvement in crime 'may be considered a characteristic that is fundamental to one's conscience and the exercise of one's human rights': at [38]. For an excellent overview of US jurisprudence, see Anker, note 146 above, 385–388. However, there is considerable contrary authority in the

'former gang member[]',[388] as being one of 'a group of former employees of a particular institution',[389] and in some cases as a failed asylum seeker.[390] However, in jurisdictions in which the social perception or social visibility tests are applied, such claims are far less likely to be accepted.[391]

US, based primarily on the social visibility criterion: see, e.g., *Mejilla-Romero v Holder*, 600 F. 3d 63, 72–73 (1st Cir., 2010). In addition, persons who refuse to co-operate with other criminal organisations or groups, such as drug trafficking cartels and groups, often find it difficult to establish the requisite nexus. For example, in Canada there is 'Federal Court jurisprudence stating that victims of crime, corruption or vendettas generally fail to establish a nexus between their fear of persecution and a Convention ground': *Orlando Rangel Lezama et al v Minister of Citizenship and Immigration* (2011) FC 986, [7]; *Rajo v Minister of Citizenship & Immigration (Canada)* (2011) FC 1058; *Palomo v Minister of Citizenship & Immigration (Canada)* (2011) FC 1163, [6]. In rare cases, it might be possible to argue that 'victims of extortion may establish nexus to the definition when the motivation for the extortion may be political': *Victor Lozano Navarro et al v Minister of Citizenship & Immigration* (2011) FC 768, [24], citing *Gomez v Canada (Minster of Citizenship and Immigration)* 2001 FCT 647.

[388] *Ramos v Holder*, 589 F. 3d 426 (7th Cir., 2009) (discussed further below); *Gatimi*, 578 F. 3d 611, 614 (7th Cir., 2009) (former member of a violent criminal Kenyan faction called the Mungiki recognised as a PSG). See also 'defectors from the Mungiki' as a PSG in *1102001* [2011] RRTA 523 (21 June 2011). See also *Urbina-Mejia v Holder*, 597 F. 3d 360 (6th Cir., 2009) in which the Sixth Circuit recognised that a former gang member falls clearly within the immutable characteristic of former status: at 366–367.

[389] *Sepulveda*, 464 F. 3d 770, 772–773 (7th Cir., 2006). See also *Re Fuentes*, 19 I. & N. Dec. 658, 662 (BIA, 1988). In *Koudriachova v Gonzales*, 490 F. 3d 255, 262–263 (2nd Cir., 2007), the Second Circuit accepted that a KGB defector could be considered a member of a PSG on the basis of former status. See also the list of authorities cited in *Ramos v Holder*, 589 F. 3d 426, 429–430 (7th Cir., 2009) which includes *Cruz-Navarro v INS*, 232 F. 3d 1024, 1028–1029 (former members of the police or military); *Velarde v INS*, 140 F. 3d 1305, 1311–1313 (9th Cir., 1998) (former bodyguards of the daughters of the president); *Chanco v INS*, 82 F. 3d 298, 302–303 (9th Cir., 1996) (former military officers).

[390] For a comprehensive consideration of this issue, *see FV v Refugee Appeals Tribunal, Minister of Justice, Equality and Law Reform (Ireland)* [2009] IEHC 268, [33]–[37]. In *Fessehaye v Attorney-General*, 414 F. 3d 746, 757 (7th Cir., 2005), the Court was willing to assume that the applicant's 'status as a former asylum seeker qualifies her for "membership in a particular social group"', but the claim was unsuccessful on other grounds.

[391] See, e.g., recent RRT decisions concerning former/failed asylum seekers: note 216 above. See also *SZDNO v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 443. In Germany, the PSG 'former student in Iraq' was rejected by the Verwaltungsgericht (VG) des Saarlandes [Saarland Administrative Court], 2 K 262/08, 24 April 2009 on the basis that it was 'not a sufficiently distinct group' [Adrienne Anderson trans]. See also *Vam v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 125 (10 May 2002) in which the Full Federal Court affirmed the decision below which rejected the claim that the applicant, a Malaysian former police officer, could satisfy the MPSG ground on the basis that 'there was no evidence before the tribunal that such a group was recognised within Malaysian society as "a group set apart from the rest of the community"': at [12]. In terms of the informant issue, this has become a prominent issue in recent US case law. For example, the BIA has rejected the group 'noncriminal informants' finding that this group lacked the 'particularity' and 'social visibility' required under its new test: see *Re CA*, 23 I. & N. Dec. 951, 957, 959–961 (BIA, 2006), affirmed in *Castillo-Arias v US Attorney General*, 446 F. 3d 1190, 1196 (11th Cir., 2006); see also the similar analysis in *Scatambuli v Holder*, 558 F. 3d 53 (1st Cir., 2009); *Soriano v Holder*, 569 F. 3d 1162, 1165–1167 (9th Cir., 2009); *Velasco-Cervantes v Holder*, 593 F. 3d 975, 978–979 (9th Cir., 2010). In *Garcia v Attorney General*, 665 F. 3d 496 (3rd Cir., 2011), the US Court of Appeals for the Third Circuit distinguished *Re CA* on the basis that it 'involved confidential informants whose aid to law enforcement was not public' where in *Garcia* the applicant's identity 'is, and always has been, known to her alleged persecutors': at 504 n. 5. In addition, it was critical of the importation of these new restrictive tests by the BIA. In *Portillo v US Attorney General*, 435 Fed. Appx. 844 (11th Cir., 2011), the Eleventh Circuit rejected a PSG composed of 'former Salvadoran military members' on the basis that it was 'too broad' and would create 'numerosity concerns': at 847. See also *Henriquez-Rivas v Holder*, 2011 U.S. App. LEXIS 18661 (9th Cir., 2011) where

One category of claim that has caused particular consternation to decision-makers in recent years concerns former membership of a group with criminal motives or activities as a core function, such as gangs. Although such claims could fall logically within the immutability approach on the basis that former membership cannot be altered, and indeed where the person was *forced* into the relevant activity this is readily accepted,[392] some decision-makers have railed against a finding that a PSG could be defined by a 'shared past experience' which 'includes violent criminal activity'[393] where the person was a voluntary member of such an organisation.[394]

The difficulty with this policy-based analysis is that it is highly subjective in that a PSG, although otherwise falling within established principle, is excluded on the basis that the decision-maker does not view the claim as deserving. Leaving aside the inconsistent outcomes that will inevitably ensue once such a degree of subjectivity is permitted to enter the analysis, there are serious concerns about the appropriateness of such an interpretation of the 1951 Convention.[395] The Convention itself defines exhaustively the grounds on which a person may be denied refugee status when they are 'undeserving', and one of those bases ('there are serious reasons for considering that (…) he has committed a serious non-political crime outside the country of refuge'[396]) is particularly apt in such cases.[397] Indeed, so much was recognized in *Ward* where the Canadian Supreme Court rejected the argument that the relevant PSG could be limited because of the applicant's past criminal activity, explaining that that was the role of Art. 1F of the Convention.[398] As La Forest J explained (delivering the judgment of the Court), restricting the

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the Court rejected the group 'individuals who testified against gang members in court' based on 'particularity' concerns: at 2. But see the powerful concurring judgment by Bea and Ripple JJ.

[392] Even in the UNHCR Guidance Note it is stated that '[p]ast association with a gang may be a relevant immutable characteristic in the case of individuals who have been forcibly recruited': UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs', note 81 above, [37].

[393] *Arteaga v Mukasey*, 511 F. 3d 940, 945 (9th Cir., 2007).

[394] As the Ninth Circuit said in *Arteaga*, '[w]e cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft': *ibid.* 945–946. See also *Elien v Ashcroft*, 364 F. 3d 392 (1st Cir., 2004) in which the First Circuit upheld the BIA's rejection of the claim on the basis of policy reasons, namely, that 'it would be unsound policy to recognise [Haitians who commit crimes in the US] as a "social group"': at 397. At present there is a conflict between Circuit Courts of Appeal in the US, as is made clear in a Memorandum issued to all Asylum Officers by the Chief of the Asylum Division following the decision in *Ramos v Holder*, 589 F. 3d 426 (7th Cir., 2009): see J. E. Langlois, HQRAIO 120/16b, 2 March 2010, available online at: http://www.globallawcenters.com/pdfs/32011.pdf (last accessed 17 January 2012).

[395] It should be noted that the UNHCR's position is that 'voluntary membership in organized gangs normally does not constitute membership of a particular social group (…) Because of the criminal nature of such groups, it would be inconsistent with human rights and other underlying humanitarian principles of the 1951 Convention to consider such affiliation as a protected characteristic': UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs', note 81 above, [43]. However, it also states that it 'will also be necessary to consider whether any of the exclusion clauses apply': at [44]. See also [57]–[61].

[396] Convention relating to the Status of Refugees (entered into force 22 April 1954) 189 UNTS 137 (1951 Convention), Art. 1F(b).

[397] *Ibid*. Art. 33(2) may also be relevant if 'there are reasonable grounds for regarding [a refugee] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

[398] [1993] 2 SCR 689.

scope of 'particular social group' by reference to such policy considerations 'renders redundant the explicit exclusionary provisions'.[399]

Accordingly, the better approach to claims based on former status is to consider separately the distinct issues of the existence of a PSG on the one hand, and any possible grounds of exclusion on the other, rather than conflating the two issues into one subjective assessment of moral worth.

5.7 GROUPS BASED ON CLASS/WEALTH/OCCUPATION

The final category of PSG claim to be considered involves a range of smaller subsets relating to a person's position and standing within his/her community, from rigid classifications such as caste and clan to more voluntary associations connected with occupation.

5.7.1 Clan/Caste/Tribe

One of the most straightforward sub-categories relates to membership of a group that is clearly immutable such as caste, tribe, or clan. Such categories tend to represent classifications into which a person is born and in relation to which he or she has little or no control, hence easily satisfying the immutability/protected characteristics approach.[400] In addition, in societies that are organized around such classifications it would appear an uncomplicated matter to recognize that the social perception test is also met in such cases.[401]

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[399] *Ibid*. 740, discussing both the relevant Canadian statutory provisions as well as the 1951 Convention's exclusion clauses. See also *Ramos v Holder*, 589 F. 3d 426 (7th Cir. 2009) in which the Court of Appeals for the Seventh Circuit overturned the BIA's decision which had rejected the claim of a former (voluntary) gang member. As Posner J explained, the BIA 'has never given a reasoned explanation for why the statutory bars to which we have just referred [which are modelled on the exclusion clauses] should be extended by administrative interpretation to former members of gangs': at 430. Hence rather than artificially narrowing the PSG ground in such a case, this issue was said to be properly considered in light of the 'bar for aliens who commit a serious non-political crime': at 432. In *Urbina-Mejia v Holder*, 597 F. 3d 360, 369–370 (6th Cir., 2009), the US Court of Appeals for the Sixth Circuit applied this analysis exactly: finding that former gang membership did constitute a PSG but rejecting the claim based on the commission of serious non-political crimes. See also *C5-267.300/2008 v Federal Asylum Authority*, Verwaltungsgerichtshof [Austrian Administrative Court], 30 December 2010. See *also SBZD v Minister for Immigration & Citizenship (Australia)* [2008] FCA 1236 (14 August 2008) in which the RRT had accepted that the applicant 'has some public profile as a child sex offender or paedophile in the United Kingdom' and that if returned to the UK 'there was a real chance that he would face serious harm from various individuals and groups because of his membership of a particular social group': at 312 [5]–[6]. This is arguably the correct approach, regardless of how unsavoury a decision-maker may consider the facts of the case.

[400] For a thorough consideration of relevant common law cases dealing with caste, see Foster, note 314 above, 304–305. Interestingly, the *Refugees Act 1998* (South Africa), Ch 1, s. 1(xxi) provides that '"social group" includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste'.

[401] For example, in Germany, which appears to require the satisfaction of both the protected characteristics and social perception tests, the category 'clan' has been recognised in many cases in recent years, see, e.g., Verwaltungsgericht (VG) München [Munich Administrative Court], M 11 K 09.50585, 22 January 2010 ('Abgal Clan'); Verwaltungsgericht (VG) München [Munich Administrative Court], M 11 K 08.50201, 13 August 2008 ('Ogaden clan'); Verwaltungsgericht (VG) München [Munich Administrative Court], M 11 K 06.51033, 5 April

5.7.2 Economic Class/Wealth

This category tends to be more complex as there is greater scope for debate as to whether a person can and indeed should be required to alter their status. In the case of a person who falls within a particular social class which is effectively impossible to alter, claims are far more likely to be successful. For example, recognition of the 'educated, landowning class of cattle farmers targeted by Colombian rebels',[402] is principled given that a person's education and associated status cannot be altered. As the US Court of Appeals for the Seventh Circuit noted in *Tapiero de Orejuela*:

> A particular characteristic that defines a social group within a society such as education, manner of speech, or profession may be more mutable that one's race, ethnicity, or religion, but these traits are nevertheless distinguishing markers within a given society that are not easily changed or hidden.[403]

Similarly, being a member of a subordinated economic class such as the 'Haitian poor'[404] is clearly capable of constituting a PSG given that poverty is effectively immutable since the ability to disassociate must be logically a present option, not one that is merely possible on an abstract or theoretical level.[405] In addition a PSG may be defined by an intersection of immutable factors including socio-economic status combined with gender, age, race, or social status, hence the recognition of PSGs such as poor children or street children,[406] 'campesinos',[407] 'undesirables',[408] and 'disposables'.[409]

2007 ('clan membership Somalia'); Verwaltungsgericht (VG) Wiesbaden [Wiesbaden Administrative Court], 788/09 WI.A, 17 November 2009 ('Shaanshi clan'); Verwaltungsgericht (VG) Braunschweig [Brunswick Administrative Court], 7 A 172/06, 24 June 2008 ('Midgan clan'). Even in those US circuits which adopt the 'social visibility' test for determining PSG, it has been recognised that members of a particular tribe are likely to 'share a common dialect and accent, which is recognizable to others': *Malonga v Mukasey*, 546 F. 3d 546, 554 (8th Cir., 2008) ('*Malonga*') (in this case dealing with the Lari ethnic group of the Kongo tribe). In that case the Court noted that previous decisions of the Eighth Circuit and of the BIA had recognised that 'members of certain Somali ethnic clans' constitute a PSG: see *Brima Bah v Gonzales*, 448 F. 3d 1019, 1024 (8th Cir., 2006); *Awale v Ashcroft*, 384 F. 3d 527, 529 (8th Cir., 2004); *Hagi-Salad v Ashcroft*, 359 F. 3d 1044, 1046 (8th Cir., 2004); *Re H-* 21 I. & N. Dec. 337, 342–343 (BIA, 1996), cited in *Malonga*, 546 F. 3d 546, 554 (8th Cir., 2008). But see *Gatimi*, 578 F. 3d 611 (7th Cir., 2009) where the Seventh Circuit overturned the BIA's decision which had held that a defector from the Kikuyu tribe in Kenya was not a member of a PSG based on social visibility.

[402] *Tapiero de Orejuela v Gonzales*, 423 F. 3d 666, 672 (7th Cir., 2005), see also *Sepulveda*, 464 F. 3d 770, 771 (7th Cir., 2006). For a similar analysis by the Spanish Supreme Court, see STS 7889/2006 (14 December 2006).

[403] *Tapiero de Orejuela v Gonzales*, 423 F. 3d 666, 672 (7th Cir., 2005). The Court went on to find that 'even if the family were to give up its land, its cattle farming and even its educational opportunities, there is no reason to believe that they would escape persecution'.

[404] See *Sinora v Canada* [1993] FCJ 725, [2]; see also *Orelien v Canada* [1991] FCJ 1158.

[405] See discussion of this issue in Foster, note 314 above, 306–309.

[406] UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', note 80 above, [52].

[407] Foster, note 314 above, 306.

[408] *Ibid*.

[409] *Ibid*. 312.

Membership of a class-based organization which is predicated on the exercise of human rights,[410] as is the case regarding membership of a trade union or agricultural co-operative, is also appropriately encompassed within the MPSG ground,[411] as well as potentially founding a claim of persecution for reasons of political opinion.[412] This also applies to other groups founded on the common pursuit of fundamental human rights with which persons are associated such as students,[413] human rights activists and workers,[414] and religious organisations.[415]

The far more controversial category of case relates to a PSG defined predominantly or solely on the basis of wealth, business interests or land ownership, all of which tend to be considered less likely to fall within the protected characteristics approach on the basis of their lack of immutability,[416] providing that there are no 'entirely rigid lines of social stratification such as would make it practically impossible for a person to change from being a land-owner to some other status or position'.[417] Hence, groups based on wealth or private land ownership represent an area where the social perception test may produce a wider approach,[418] although the adoption of the 'social visibility' and 'particularity' tests in recent US jurisprudence has largely resulted in

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[410] For example, freedom of association (ICCPR Art. 22 and ICESCR Art. 8); and freedom of expression (ICCPR Art. 19).

[411] Hathaway, note 27 above, 169; Foster, note 314 above, 312–313. *Refugee Act 1996* (Ireland), No. 17/1996, s. 1, defines the phrase "membership of a particular social group" to include 'membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation'.

[412] See, e.g., *Osorio v INS*, 18 F. 3d 1017, 1028–1030 (2nd Cir., 1994).

[413] The right to education is protected in ICECSR Arts 13 and 14. See Hathaway, note 27 above, 168.

[414] Cf. Aleinikoff's assumption that such groups are not included: note 10 above, 295. The reality is that such claims are ordinarily dealt with under the ground 'political opinion'.

[415] Although of course such claims will be dealt with under the Convention ground 'religion'.

[416] In jurisdictions which clearly apply the protected characteristics approach, such as Canada and New Zealand, such claims are hence routinely rejected: see Foster, note 314 above, 305 n. 59; see also *Kang v Canada (Minister of Citizenship & Immigration)* (2005) FC 1128, [9]–[10]; *Etienne v Canada (Minister of Citizenship & Immigration)* (2007) FC 64, [15]–[16]: '[t]he Board was justified in concluding that gaining wealth or winning a lottery does not constitute membership in a particular social group'; *Palacios v Minister of Citizenship & Immigration (Canada)* (2011) FC 950. Although interestingly in the US while in some cases wealth and land ownership have been said not to fall within the immutability approach (see, e.g., *Vasquez-Ramirez v Attorney General*, 315 Fed. Appx. 381, 385–386 (3rd Cir., 2009), citing the BIA decision below), it has also been suggested that such a claim would be considered to fall within the immutability concept: see *Re A-M-E- & J-G-U-, Respondents*, 24 I. & N. Dec. 69 (BIA, 2007) where the BIA stated that 'we would not expect divesture when considering wealth as a characteristic on which a social group might be based': at 73–74, applying the immutability test. However the BIA went on to apply its newly formulated social visibility and particularity tests to reject the claim.

[417] *Montoya v Secretary of State for the Home Department* [2002] EWCA Civ 620, [8] where Schiemann LJ (for the Court) cited from the Tribunal's decision below.

[418] This is particularly the case in Australia: see cases cited in Foster, note 314 above, 305 n. 59. For more recent cases, see *SZLWB v Minister for Immigration and Citizenship* [2009] FCA 1067 (23 September 2009), [11]; *BRGAE of 2008 v Minister for Immigration and Citizenship* [2009] FCA 543 (26 May 2009); *SZLAN v Minister for Immigration and Citizenship* (2008) 171 FCR 145. However, these PSGs are not routinely accepted; for example, see the decision of the Bayerische Verwaltungsgerichtshof (VGH) [Bavarian Higher Administrative Court], 15 ZB 07.30176, 14 August 2008, rejecting the PSG 'businessmen or entrepreneurs' in Colombia on the basis that the group was not 'externally perceptible' because of the 'variety and heterogeneity of traders and entrepreneurs within the Colombian society' [Adrienne Anderson trans].

the rejection of such claims.[419] It is important to note however that, regardless of jurisdiction, there are few claims that have turned precisely on this question given that in most claims involving persecution on the basis of wealth, the case is ultimately resolved on the basis of a lack of nexus, rather than on the discrete issue of PSG analysis.[420]

Interestingly, it is sometimes suggested that the increased openness (at least in theory) of the social perception test to such claims indicates that it is more in line with the intentions of the Convention's drafters on the basis that groups such as the 'capitalist class' and 'independent businessman' 'are probably what the Swedes [who suggested the insertion of the MPSG ground] had in mind.'[421] However given the absence of any relevant debate by the drafters, such assumptions are subject to dispute; indeed, LaForest J in *Ward* warned against 'exaggerat[ing] the implications of the intentions of the framers', since the Cold war context indicates that persecution 'was imposed upon the capitalists not because of their contemporaneous activities but because of their *past status as ascribed to them by the Communist leaders*'[422] — a category that comfortably falls within the protected characteristic approach as explained above.[423] Further, where a person is a member of an economic class that has social significance beyond mere monetary considerations, such as '[a]ristocrats during the French Terror, Kulaks in pre-war Soviet Russia, the intelligentsia and professional classes in Cambodia',[424] such a claim falls clearly within the ambit of the protected characteristics approach on the basis both of immutability and on the basis that international human rights law protects against

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[419] See, e.g., *Re A-M-E- & J-G-U-, Respondents*, 24 I. & N. Dec. 69 (BIA, 2007) where the BIA rejected the claim based on the PSG 'affluent Guatemalans' on the basis that it 'fails the "social visibility" test' (at 75) and 'also fails the particularity requirement of the refugee definition' (at 76). See also *Ucelo-Gomez v Mukasey*, 509 F. 3d 70, 74 (2nd Cir., 2007) upholding this decision. In *Davila-Mejia v Mukasey*, 531 F. 3d 624 (8th Cir., 2008), the Court held that 'petitioners failed to establish that their status as "competing family business owners" gave them sufficient social visibility to be perceived as a group by society': at 629.

[420] It should also be noted that in a great many of these cases the claim truly fails because of a lack of nexus; that is, the decision-maker finds that there was no evidence that the wealthy individual was at any particular risk from criminals or others who seek to extort: see, e.g., *Vasquez-Ramirez v Attorney General*, 315 Fed. Appx. 381, 388 (3rd Cir., 2009); *Vanchurina and Radisavlevic v Holder*, 619 F. 3d 95, 99 (1st Cir., 2010); *Davila-Mejia v Mukasey*, 531 F. 3d 624, 629 (8th Cir., 2008); *Montoya v Secretary of State for the Home Department* [2002] EWCA Civ 620, [27]–[33] (Court of Appeal affirming the tribunal's decision below that the claim failed on the basis of lack of causation); *Ventura v Minister of Citizenship and Immigration (Canada)* (2011) FC 1107, [14].

[421] D. Compton, 'Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar — *Sanzhez-Trujillo v INS*, 801 F. 2d 1571 (9th Cir., 1986)', (1987) 62 *Wash. L. Rev*. 913, 925–926, cited in *Ward* [1993] 2 SCR 689, 729 (La Forest J); see also *Dranichnikov v Minster for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, 1098 [66] (Kirby J). See also Goodwin-Gill and McAdam, note 42 above, 74: 'The lack of substantive debate on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the 'restructuring' of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families'. See also Aleinikoff, note 10 above.

[422] [1993] 2 SCR 689, 729 (emphasis added).

[423] In *Acosta*, the BIA cited as an example of 'shared past experience', 'land ownership': 19 I. & N. Dec. 211, 233 (BIA, 1985).

[424] *Shah* [1999] 2 AC 629, 660 (Lord Millett, in dissent but not relevantly).

discrimination on the grounds 'national or social origin, property, birth or other status'.[425] However, leaving aside claims that are truly based on an economic and/or social class which is effectively impossible to alter, or a claim apparently based upon economic class which is truly linked to another Convention ground,[426] it is difficult to devise a principled reason for finding that persons targeted because of actual or perceived wealth should be protected by the 1951 Convention.[427]

5.7.3 Occupation

As is the case with respect to some other areas of PSG analysis, in some cases there is considerable overlap between membership of a PSG based on occupation and other Convention grounds such as political opinion.[428] This is particularly so in the context of claims by persons who are government employees,[429] including military or police officers, especially where there is an ongoing political struggle with insurgents or other groups hostile to the government. Hence in some cases such claims are resolved on the basis that the persecution feared was on account of an 'actual or imputed political opinion (…) as demonstrated by his activities and status as a military officer'.[430]

However, leaving aside such claims, whether a person can found a successful refugee claim based on the risk that accrues by virtue of their chosen profession or occupation has proven a troubling one for decision-makers, particularly those adopting the protected characteristics

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[425] ICCPR Art. 2(1).

[426] This is often the case with land ownership, as these cases can be distinguishable from those merely based on the extortion of wealthy people in that land ownership can often be linked to a person's occupation (see below) and also political opinion.

[427] As Hathaway eloquently explained, 'members of a privileged social class who resist renunciation of economic privilege are not protected': note 27 above, 166.

[428] See, e.g., the decision of the Verwaltungsgericht (VG) Arnsberg [Arnsberg Administrative Court], 13 K 618/08.A, 22 September 2008 in which the Court recognised 'professionals' as a PSG on the basis that '[p]articulalry at risk were people (…) who are a potential carrier of a new democratic order, so some academics, such as doctors, teachers, journalists, professors, engineers and jurists' [Adrienne Anderson trans].

[429] See, e.g., Verwaltungsgericht (VG) Frankfurt (Oder) [Frankfurt (Oder) Administrative Court], 7 K 1517/00.A, 2 March 2004 [Adrienne Anderson trans], in which the PSG 'high level representatives of government and their close relatives' in Afghanistan was recognised. The case was also considered to fall within the Convention based on political opinion.

[430] *Abaya v INS*, 2 Fed. Appx. 850, 851 (9th Cir., 2001); see also *Diaz-Marroquin v INS*, 3 Fed. Appx. 601, 605 (9th Cir., 2000); *Martinez-Buendia v Holder*, 616 F. 3d 711 (7th Cir., 2010). Cf. *Velasquez-Velasquez v INS*, 53 Fed. Appx. 359, 365 (6th Cir., 2002); *Estrada-Escobar v Ashcroft*, 376 F. 3d 1042 (10th Cir., 2004). For support in other jurisdictions for the link between occupation and political opinion, see *Noune v Secretary of State for the Home Department*, United Kingdom Court of Appeal (Civil Division), C 2000/2699, 6 December 2000, [26]; *Nouredine v Minister for Immigration and Multicultural Affairs* (1999) 91 FCR 138, 143–4 where Burchett J of the Australian Federal Court provided a list of examples of occupations that would be protected including for example 'ballet dancers or other persons who followed occupations identified with Western culture in China during the Cultural revolution', a category that would clearly fall within political opinion (actual or perceived). Another example is persons employed by a religious order who would clear fall within the ground 'religion'.

approach. This is perhaps unsurprising given that in *Acosta* — the jurisprudential foundation of the protected characteristics approach — the BIA held that a Salvadoran taxi co-operative did not constitute a particular social group on the basis that the 'concept of a refugee simply does not guarantee an individual a right to work in the job of his choice'.[431] Applying this analysis, courts in various jurisdictions have rejected claims where a person is at risk because of his or her occupation on the basis that a person can legitimately be required to 'change her employment' in order to avoid persecution.[432] In some cases this appears to be a questionable factual finding, for example, where a person is relatively unskilled and would be returned to 'difficult living conditions in [their country] and the chronic unemployment that continues to plague that country'.[433] While such claims may be (although are not always) more likely to be accepted using the 'social perception' test,[434] claims based on occupation as PSG are likely to fail the 'social visibility' test in the US.[435]

Assuming that it is possible for a person to change his or her job, occupation or profession, the question remains whether this is an appropriate and principled interpretation of the Convention. The difficulty in these cases appears to relate to a failure to appreciate that while international human rights law does not provide the right to a particular occupation of one's choosing,[436] the right to work combined with the prohibition on discrimination at international law means that a person at a minimum has a right not to be arbitrarily deprived of work.[437] As the UNHCR has succinctly explained in the context of PSG analysis, '[r]equiring an applicant to abandon his or

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[431] 19 I. & N. Dec. 211, 234 (BIA, 1985). In *Ward* La Forest J noted this and agreed, rejecting taxi drivers as a PSG, explaining that '[a]ssuming no issues of political opinion or the right to earn some basic living are involved, the claimant was targeted for what he was doing and not for what he was in an immutable of fundamental way': [1993] 2 SCR 689, 738, although note that this is based on an (arguably) simplistic distinction between what a person does and what he or she is.

[432] In the US, see *Mwembie v Gonzales*, 443 F. 3d 405, 415 (5th Cir., 2006), although the Court ultimately disposed of the case on the basis of lack of nexus; *Cedeno Pinedo v U.S. Attorney General*, 396 Fed. Appx. 597, 602–603 (11th Cir., 2010). In New Zealand, see *K v Refugee Status Appeals Authority* [2005] NZAR 441, [24]–[25], although this decision did not explicitly frame its rejection on basis of protected characteristics approach. In Canada, see *Galvan v Canada (Minister of Citizenship and Immigration)* (2000) 193 F.T.R. 161, [26]–[35]; *Sanchez v Canada (Minister of Citizenship and Immigration)* 2007 FCA 99, [20]; *Romero v Minister of Citizenship and Immigration* (2011) FC 772, [9], although it appears the case was ultimately decided on nexus grounds; *Menendez v Minister of Citizenship and Immigration* (2010) FC 221, [26].

[433] *Orphee v Minister of Citizenship and Immigration* (2011) FC 966, [20], rejecting the claim despite these findings.

[434] Although there is some authority in Australia which recognises a PSG based on occupation, other cases have been rejected as failing to meet the social perception test: see Foster, note 314 above, 315–316. See also *NALZ v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 140 FCR 270.

[435] In *Castro-Paz v Holder*, 375 Fed. Appx. 586, 590 (6th Cir., 2010), the Court found that in addition to the fact that the applicant 'could change jobs', the occupational based group also 'lacks the requisite "social visibility"'.

[436] The better reading of the ICESCR Art. 6 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' is that it was designed to prohibit forced labour, not that a State guarantees to provide a person with the work of their own choosing: see Foster, note 314 above, 313.

[437] This is the view of the Economic Committee. In its General Comment on the right to work it notes that the right 'implies the right not to be unfairly deprived of employment': Committee on Economic, Social and Cultural Rights, 'The Right to Work', 24 November 2005, General Comment No. 18, E/C.12/GC/18, [6].

her occupation in order to avoid persecution amounts to a violation of the right not to be arbitrarily deprived of the right to work'.[438] In addition, some occupations are directly based on the exercise of human rights, for example the right to free speech in the case of journalists.[439]

A correct application of the protected characteristics approach would therefore result in the protection of those persons who hold a well-founded fear of being persecuted for reasons of occupation, profession or job, regardless of whether it is likely that they could find a new position or profession upon return.[440]

In sum, while claims based on an applicant's caste, clan, tribe or immutable social status are well accepted, those based on a well founded fear of being persecuted due to the applicant's wealth, land ownership or job/occupation tend to be more controversial. In particular this is an area in which the social perception approach tends to be more inclusive in practice than reliance on the protected characteristics approach. On the other hand, the analysis above has suggested that a correct application of the protected characteristics approach, namely, one based on anti-discrimination principles in international human rights law, would in fact encompass PSGs based on social status and occupation/job/profession but would (arguably appropriately) exclude claims based solely on the risk that accrues due to wealth.

6. CONCLUSIONS AND RECOMMENDATIONS

The analysis of legislative and jurisprudential developments across a wide range of States Parties to the 1951 Convention undertaken in this study reveals that notwithstanding decades of close examination and dissection, 'membership of a particular social group' indeed remains the Convention ground with the least clarity. While the proliferation of interpretative tests which flourished in early jurisprudence has now effectively been reduced to two major conceptual approaches — protected characteristics and social perception — this analysis has suggested that the UNHCR's attempt to reconcile the two dominant approaches has not been successful. Rather than having been extensively relied upon to clarify PSG analysis and close protection gaps — as originally intended — the UNHCR Guidelines on Social Group have been misinterpreted and perceived, at least in some jurisdictions, as requiring the satisfaction of both tests. In combination with the Qualification Directive's imposition of a cumulative approach, it appears that PSG

[438] See UNHCR, 'Guidance Note on Refugee Claims relating to Victims of Organized Gangs', note 81 above, [39].
[439] *Ibid*. See also *NAPU v Minister for Immigration & Multicultural & Indigenous Affairs (Australia)* [2004] FCAFC 193 (5 August 2004), [39]–[45] for discussion of the connection between persecution on the basis of journalism and political opinion.
[440] It should be noted that this analysis is confined to occupation/job/profession as a PSG, rather than whether deprivation of employment can constitute persecution: see generally Foster, note 314, 94–103.

analysis over the past decade has largely become more stringent and presents a greater hurdle for applicants wishing to rely on the PSG ground alone.

There are two key questions posed by this finding. The first is what is in principle the correct approach to interpreting the MPSG ground? The second is how best to ensure that domestic interpretation reflects the correct interpretative approach?

There is no principled basis for requiring the satisfaction of both tests; in particular, there is no basis for adopting this approach by applying the rules of treaty interpretation as set out in the VCLT. Hence, the first major conclusion of this study is that the cumulative approach must be abandoned in order to maintain fidelity to the text, object and purpose of the 1951 Convention.

However it does not necessarily follow that an approach based on the two dominant paradigms as alternatives is correct. As explained in Part 2.4, each of the dominant approaches purports to emerge from an application of the rules of treaty interpretation as set by the VCLT. The question is whether each of the approaches can continue to be justified in practice.

The protected characteristics approach, which originated in the US and resulted from an application of the *ejusdem generis* principle of statutory construction, is best understood in its initial incarnation as an interpretation of the phrase MPSG *in context*.[441] However it was later articulated as falling within the anti-discrimination *object and purpose* of the 1951 Convention, and hence more clearly justified by the primary rule of treaty interpretation set by Art. 31 of the VCLT. This approach assumes that there are limits to the types of claims which can fall within the Convention — as dictated by the very existence of the nexus clause — but purports to provide decision-makers with a principled basis on which to ascertain whether a claim is properly encompassed within the refugee definition. The principled basis proffered by this approach is reference to well accepted principles of human rights law, which are objectively identifiable and comprehensible, and hence provide a transparent and consistent basis on which to decide a MPSG claim. However reference to this external standard can also prove difficult, and in fact has sometimes been applied incorrectly — most notably in the context of MPSGs based on occupation/job/profession. On the other hand, its straightforward application in relation to the most common PSGs such as women, those based on sexuality or gender identity, children and family, represent important strengths of this approach.

The social perception approach appears to be based on the ordinary meaning of the phrase MPSG, and represents a less structured and more fluid approach to its application. Given the

[441] That is, in line with Art. 31 of the VCLT which requires treaties to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'', the *ejusdem generis* approach relies on the context in which the phrase MPSG is found — that is, as part of a a list of other Convention grounds, and hence seeks to obtain guidance from those other grounds.

lack of external constraints, it is capable in theory of a wider application than the protected characteristics approach, and indeed this has been revealed in practice in the context of PSGs based on occupation, wealth or social status. However as the example of cases based on wealth suggests, there is a question as to whether it is appropriate to adopt a test that appears not to be anchored in, or able to delineate, objective and principled parameters.

Paradoxically however it is not so much the lack of principled limits that has proven problematic in MPSG analysis based on the social perception approach, but rather the lack of clarity inherent in this test which has in turn led to its being applied so as to limit (rather than widen) the range and types of claims which can fall within the MPSG ground. As revealed in the case law from those jurisdictions which adopt, either alone or in combination, the social perception test, there is much uncertainty surrounding what the test precisely entails, including: whether it is based on subjective or objective perceptions, how such a test can be satisfied on an evidentiary basis, and whether, given its apparent subjectivity, its application can appropriately be subject to appellate review. In addition, its conflation in some jurisdictions with social visibility, has led to a further narrowing of claims, including those based on otherwise well accepted PSGs.

In part the difficulties with the social perception test may be explained on the basis that while it is tempting to eschew an apparently rigid test in favour of a more 'common sense' approach, it must be remembered that, as eloquently explained by Gina Clayton, the PSG category 'is a legal construct in the hands of the decision-maker in the refugee claim, not a naturally arising phenomenon'.[442] Further, as Roger Errera has explained, courts 'are not engaged here in an exercise of theoretical sociology or anthropology, interesting or valuable as it might be, but in legal reasoning, that is, in defining the contents of a legal category to which legal consequences are attached'.[443] In other words, there is arguably no 'common sense' or 'ordinary meaning' approach which can provide appropriate guidance in identifying which groups fall within the MPSG ground and which do not.

Hence if the social perception test is to continue to be relied upon, there needs to be greater clarification of precisely what the test entails. In particular, clarification is required as to whether the test involves an objective assessment of whether a group is distinguished or set apart, or whether it is more focused on the subjective perceptions of those in the relevant society. The role (if any) of 'social visibilty' clearly needs to be resolved, as does the method by which social perception can be established. While it is assumed that ordinary 'country information' is sufficient for such purposes, this is an issue which requires further examination given the ongoing difficulty that applicants encounter in providing an evidentiary basis for their MPSG claims using this approach.

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[442] Clayton, note 222 above, 488.

[443] R. Errera, 'The Concept of Membership of a Particular Social Group' in P. Dupuy et al (eds), *Common Values in International law: Essays in Honour of Christian Tomuschat*, 133, 135.

In light of the misinterpretation of the UNHCR Guidelines which has occurrred in several jurisdictions, and the confusion and uncertainty which continues to surround this topic, it is an appropriate time to consider the formulation of further UNHCR guidance in this area. This could be achieved either by issuing an addendum or supplement to the original Guidelines, or by issuing a new set of Guidelines. Issuing a new set of Guidelines would provide the opportunity to revise and rectify some of the ambiguities in the existing Guidelines, as well as provide the opportunity for close examination of the key unresolved questions identified in this study.

In revising the Guidelines, consideration should also be given to making recommendations to States Parties as to how to rectify their own artificially narrow approaches, most obviously where the requirement to satisfy both tests for establishing MPSG has been adopted. The varying ability to influence judicial interpretation either in the form of Guidelines or amicus interventions would suggest that legislative amendment could be pursued as an alternative method of achieving conformity with the 1951 Convention in this regard; hence consideration might also be given to incorporating a model legislative provision in any revisions to the Guidelines which could be adopted by States so as to ensure translation of international protection norms into concrete domestic protection for refugee applicants across all jurisdictions.

The recent ministerial level affirmation by 155 UN members that the 1951 Convention (and 1967 Protocol) 'are the foundation of the international refugee protection regime and have enduring value and relevance in the twenty-first century',[444] emphasises the urgent need for States Parties to eschew an interpretation that artificially and narrowly limits application of the Convention's terms and adopt instead a principled approach which facilitates the ability of the Convention to evolve so as to ensure its contemporary relevance.

[444] HCR/MINCOMMS/2011/6, 8 December 2011, [2].