

Pamela Goldberg, Esq.
Kaitlin Kalna Darwal, Esq.
United Nations High Commissioner for Refugees
Regional Office for the United States and the Caribbean
1775 K St. NW Suite 300
Washington DC 20006

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

In the Matter of:)	
)	
GATIMI, Francis)	File No.: A 96 495 092
)	
In removal proceedings)	

**BRIEF *AMICUS CURIAE* OF
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
IN SUPPORT OF RESPONDENT FRANCIS GATIMI**

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INTEREST OF AMICUS CURIAE

The United Nations High Commissioner for Refugees (UNHCR) has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees. *Statute of the Office of the UNHCR*, U.N. Doc. A/RES/428(v), ¶ 1; Annex, ¶¶ 8 (Dec. 14, 1950).

Paragraph 8 of UNHCR's Statute entrusts UNHCR with the responsibilities of supervising international conventions for the protection of refugees, whereas the 1951 *Convention Relating to the Status of Refugees*, July 28, 1951, 19 U.S.T. 6259 ("1951 *Convention*") and its 1967 *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 606 U.N.T.S. 267 ("1967 *Protocol*") oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 *Convention* and 1967 *Protocol*, 1951 *Convention* art. 35, ¶ 1; 1967 *Protocol* art. II, ¶ 1.

The views of UNHCR are informed by almost 60 years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides international protection and direct assistance to refugees throughout the world and has staff in over 110 countries. For its work on behalf of refugees, UNHCR has twice received the Nobel Peace Prize, in 1954 and 1981. UNHCR's interpretation of the provisions of the 1951 *Convention* and its 1967 *Protocol* are both authoritative and integral to promoting consistency in the global regime for the protection of refugees. In 1968, the United States acceded to the 1967 *Protocol*, which incorporates by reference all the substantive provisions of the 1951 *Convention*.

Article VI of the United States Constitution states that treaties the United States has acceded to “shall be the supreme law of the land.” As such, the courts are bound by United States treaty obligations and have a responsibility to construe federal statutes in a manner consistent with those international obligations to the fullest extent possible. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); *Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”). See also *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (“[O]ne of Congress’ primary purposes’ in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968.” (citation omitted) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987))).

This case involves the interpretation of the refugee definition in the 1951 *Convention* and its 1967 *Protocol* as implemented in United States law at section 101(a)(42) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101(a)(42). As such, it presents questions involving the essential interests of refugees within the mandate of the High Commissioner for Refugees.¹ Moreover, UNHCR anticipates that the decision in this case may influence the manner in which the authorities of other countries apply the refugee definition. The issue presented is one of national significance and has

¹ UNHCR submits this brief *amicus curiae* in order to provide guidance to the Board on the relevant international standards and not to offer an opinion on the merits of the applicant’s claim.

been the subject of a number of high-profile immigration appeals. UNHCR has submitted briefs *Amicus Curiae* in five such cases: *Orellana-Monson v. Holder* (No. 08-60394) in the Fifth Circuit, *Valdiviezo-Galdamez v. Holder* (No. 08-4564); *S.E. T.-E. v. Holder* (No. 09-2161) in the Third Circuit; *Gonzalez-Zamayoa v. Holder* (No. 09-3514) in the Second Circuit and *Doe v. Holder* (No. 09-2852) in the Seventh Circuit.

SUMMARY OF THE ARGUMENT

In the original decision of the Board of Immigration Appeals (“Board”) in this case, this Board concluded that the applicant failed to establish membership in a particular social group, relying on its recent line of cases requiring “social visibility.” (Board Decision August 4, 2008 at 2) (“*Gatimi Decision 2008*”). This requirement is inconsistent with the purpose and intent of the 1951 *Convention* and the 1967 *Protocol* and misconstrues the *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*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (“*Social Group Guidelines*” or “*Guidelines*”). In *Matter of C-A-*, 23 I. & N. Dec. 951 (BIA 2006) and its progeny, this Board inaccurately cites the *Social Group Guidelines* in support of its recently pronounced “social visibility” requirement. *See, e.g., Matter of S-E-G-*, 24 I&N Dec. 582 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). The Board’s interpretation of the *Guidelines* is incorrect.

As articulated in the *Guidelines*, there are two separate, alternative tests for defining a particular social group: the “protected characteristics” approach and the “social perception” approach. The “protected characteristics” approach reflects the Board’s longstanding test first articulated in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I. & N. Dec. 439, 447 (BIA

1987), and examines whether the social group members share a common characteristic that is either immutable or so fundamental to their identity, conscience or the exercise of their human rights that they should not be required to change it. *Guidelines* ¶ 11. The “social perception” analysis is an alternative approach to be applied *only if a determination is made that the group does not possess any immutable or fundamental characteristics* and examines whether the social group is “nonetheless perceived as a cognizable group” in the society in question. *Guidelines* ¶ 13. Neither approach requires that members of a particular social group be “socially visible” or, in other words, visible to society at large.

Significantly, the Board’s imposition of the requirement of “social visibility” may result in refugees being erroneously denied international protection and subjected to *refoulement*—return to a country where their “life or freedom would be threatened”—in violation of United States’ obligations under Article 33 (1) of the 1951 *Convention*.²

ARGUMENT

I. THE BOARD’S “SOCIAL VISIBILITY” REQUIREMENT IS INCONSISTENT WITH THE OBJECT AND PURPOSE OF THE 1951 CONVENTION AND 1967 PROTOCOL AND THE UNHCR SOCIAL GROUP GUIDELINES.

In its original decision in this case, the Board relied on its recent line of decisions requiring “social visibility” and ruled that the applicant’s group “lacks the requisite social visibility to establish that he is a member of a ‘particular social group.’” (*Gatimi Decision 2008* at 2) (citing *Matter of C-A- 23 I. & N. Dec. 951*). According to UNHCR, the requirement of “social visibility” to identify a social group is not in accordance with

² The United States’ obligations under Article 33 (1) derive from Article I (1) of the 1967 *Protocol*, which incorporates by reference Articles 2 through 34 of the 1951 *Convention*.

the text, context or object and purpose of the 1951 *Convention* and its 1967 *Protocol*, as outlined in the *Social Group Guidelines*.

Beginning with its decision that first introduced the notion of “social visibility” as a factor of “particular importance” in cases based on membership in a particular social group, this Board has cited with favor the *Social Group Guidelines*. *Matter of C-A-*, at 959; *see also Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74 (BIA 2007), *aff’d*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *Matter of S-E-G-*, 24 I. & N. Dec. at 586. While UNHCR fully supports and encourages the Board and other asylum adjudicators to rely on the expertise and guidance of UNHCR when interpreting and applying the refugee definition,³ in this instance, the Board’s references to the *Guidelines* have misconstrued their meaning.

Of the five grounds for refugee protection, that pertaining to “membership of a particular social group” has posed the greatest challenges with regard to its interpretation.

³ In analyzing claims to refugee status, UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV.1 (January 1992) (“*Handbook*”) is internationally recognized as the key source of interpretation of international refugee law. The UNHCR *Handbook* as well as UNHCR’s more recent series of *Guidelines on International Protection* are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary in interpreting the terms of the refugee treaties. The U.S. Supreme Court, federal circuit courts, and the Board have recognized the *Handbook* and the *Guidelines* as providing guidance in construing the 1967 *Protocol*. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 439 n.22 (“the *Handbook* provides significant guidance in construing the *Protocol*”); *Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (noting the BIA “is bound . . . to consider the principles [for implementing the *Protocol*] established by” UNHCR); *Zhang v. Ashcroft*, 388 F.3d 713, 720 (9th Cir. 2004) (citing *UNHCR’s Guidelines on International Protection: Religion-based Refugee Claims Under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/0406 (April 28, 2004)); *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003) (citing *Guidelines*); *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the BIA must be mindful of “the fundamental humanitarian concerns of asylum law,” and referencing the UNHCR *Handbook*).

The 1951 *Convention* itself does not provide a definition for this category nor does the drafting history clarify the exact meaning of the phrase.⁴ A proper interpretation of the term “membership of a particular social group” must be consistent with the text, context, object and purpose of the 1951 *Convention* and 1967 *Protocol*. This ground refers to a broad spectrum of groups for which no specific list exists, and it may change over time or even differ from one society to another. *Guidelines* ¶ 3. The “membership of a particular social group” ground should be read in an evolutionary manner without rendering the other elements of the refugee definition superfluous. *Id.* ¶¶ 2, 3.

A. Under the *Guidelines*, the “protected characteristics” and “social perception” approaches to defining social group membership are alternate approaches rather than dual requirements.

The *Social Group Guidelines* were issued in order to provide guidance to States on interpreting the social group ground and were a product of the Global Consultations on the International Protection of Refugees launched by UNHCR in 2000. This consultative process enjoyed broad participation by governments, including representatives of the United States government, the International Association of Refugee Law Judges, other legal practitioners, non-governmental organizations and academia. The purposes of the Global Consultations were to take stock of the state of law and practice in several areas of refugee status adjudication, consolidate the various positions

⁴ The term “membership of a particular social group” was added near the end of the deliberations on the draft *Convention* and all that the drafting records reveal is the Swedish delegate’s observation: “[E]xperience 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.” *Summary Record of the Third Meeting, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A/Conf.2/SR.3, 14 (July 3, 1951).

taken and develop concrete recommendations to achieve more consistent understandings of these interpretative issues.

According to UNHCR, and based on a survey of the practice in common law jurisdictions, there are two dominant approaches to defining a social group: “protected characteristics” and “social perception.” *Guidelines* ¶¶ 6-7. The “protected characteristics” approach, embodied by the Board’s seminal and highly influential *Acosta* decision,⁵ involves assessing whether the common attribute of a group is either: (1) innate and thus unchangeable, (2) based on a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) so fundamental to human dignity that group members should not be compelled to forsake it. *Guidelines* ¶ 6. The “social perception” approach, established in *Applicant A and Another v. Minister for Immigration and Ethnic Affairs*, 190 C.L.R. 225 (1997), by the High Court of Australia, which is the only common law country to emphasize this approach, “examines whether or not a group shares a common characteristic which makes them a *cognizable* group or sets them apart from society at large.” *Guidelines* ¶ 7 (emphasis added). In civil law jurisdictions, the social group ground is generally less well developed, but both the

⁵ As T. Alexander Aleinikoff has noted: “The BIA’s approach in *Acosta* has been highly influential. It was cited with approval and largely followed in the Canadian Supreme Court’s *Ward* decision [*Canada v. Ward* [1993] 2 S.C.R. 689 (Can.)] and has been widely cited in cases arising in other jurisdictions as well.” *Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group*, reprinted in ERIKA FELLER, VOLKER TÜRK & FRANCES NICHOLSON, eds, *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS IN INTERNATIONAL PROTECTION* 275 (2003). See, e.g., *Islam v. Secretary of State for the Home Department and Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah*, [1999] 2 A.C. 629; *Secretary of State for the Home Department v. K (FC) and Fornah (FC) v. Secretary of State for the Home Department* [2006] 1 A.C. 412.

protected characteristics and the social perception approaches have received mention. *Id.* ¶ 8.

The *Guidelines* give validity to both approaches, which may often overlap. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as social groups in their societies. The Department of Homeland Security (“DHS”) has recognized the overlap in the two approaches in the past stating that, while social perceptions may provide evidence of immutability or the fundamental nature of a protected characteristic, heightened social perception is merely an “indicator” of the social group’s existence rather than an additional factor that must be established. *Department of Homeland Security’s Position on Respondent’s Eligibility for Relief*, 25 (Feb. 19, 2004) available at http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf, submitted in *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005) (“*DHS Position in R-A-*”).⁶ Given the varying approaches and the protection gaps that can result, UNHCR concluded that the two dominant approaches needed to be reconciled and has adopted a standard definition which incorporates both:

[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.

Guidelines ¶ 11 (emphasis added).

⁶ In an unreported decision in 2009, the respondent in *R-A-* was granted asylum by an immigration judge and no appeal was taken by either party. *Matter of R-A-*, A# 073753922 (EOIR San Francisco, CA Dec. 14, 2009).

By reconciling the approaches used in various jurisdictions for the interpretation of the particular social group ground, the *Guidelines* are intended to provide guidance to adjudicators with the task of identifying and discerning social groups that exist in a particular society.

In UNHCR’s view, and as articulated in the *Guidelines*, the first step in any social group analysis is to determine whether the group in question is based on an immutable or fundamental characteristic. If, at the end of this assessment, the group is found *not* to share a characteristic that can be defined as either innate or fundamental, “further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.” *Id.* ¶ 13. This second inquiry is an alternative to be considered only if it is determined that the group characteristic is neither immutable nor fundamental. In other words, if the defining characteristic of a social group is determined to be either innate or fundamental to an individual’s identity, conscience, or human rights, membership of a particular social group has been established.

B. The “social perception” approach does not require that members of a particular social group be visibly identifiable to society at large.

Under the “social perception” analysis, the focus is on whether the members share a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large. *Guidelines* ¶ 7. “Social perception” neither requires that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable by the general public. Further, “social perception” does not mean to suggest a sense of community or group identification as might exist for members of an organization or association. Thus, members of a social group may not be recognizable even to each other. Rather, the determination of “social

perception” rests on whether a group is “cognizable” or “set apart from society” in some way. *Id.*

The Board’s use of the term “social visibility” to mean a group or characteristic that could be visually identified may reinforce a finding that an applicant belongs to a particular social group; however, in UNHCR’s view, it is not a pre-condition for recognition of the group. On the contrary, a group of individuals may seek to avoid visibility in society precisely to avoid attracting persecution.⁷

The “social perception” approach is applicable only if a determination is made that the social group is not based on an immutable or fundamental characteristic and looks not to visibility but to whether, in the absence of such characteristic, the group members “might nonetheless constitute a particular social group” because they are recognized or perceived in the society as a group that is set apart based on the attribute they share. *Id.* ¶ 13.

C. The Board’s characterization of the *UNHCR Social Group Guidelines* as supporting a “social visibility” requirement is inaccurate.

The Board has cited the *Social Group Guidelines* as authority for its social visibility requirement and characterized them as “confirm[ing] that ‘visibility’ is an important element in identifying the existence of a particular social group.” *Matter of C-A-*, at 960. In UNHCR’s view, this characterization is inaccurate. The Board correctly

⁷ In its decision remanding the Board’s 2008 decision in this case, the Seventh Circuit Court of Appeals explicitly made this observation, stating that the social visibility criterion “makes no sense 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.’” *Gatimi v. Holder*, 578 F.3d 611 at 615 (7th Cir. 2009). This is consistent with the *Social Group Guidelines* and with UNHCR’s view that “social visibility” is not a requirement for establishing membership in a particular social group.

notes that the *Guidelines* do address “visibility,” stating that: “[P]ersecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society.” *Id.* (quoting *Social Group Guidelines* ¶ 14) (emphasis added by the Board). However, this language relates to the role of persecution in defining a particular social group and is meant to illustrate that, although a “social group cannot be defined exclusively by the persecution that members of the group suffer,” being targeted can, under some circumstances, lead to the identification or even the creation of a social group by its members being set apart in a way that renders them subject to persecution. *Guidelines* ¶ 14.⁸ This brief illustration of the potential role of persecution in the “visibility” of a particular social group in a society is neither intended to modify or develop the “social perception” approach nor to require “visibility” rather than “perception.” Further, it is not intended to establish or support “social perception” or “social visibility” as a decisive requirement that must be met in every case in order to demonstrate membership of a social group. In short, nothing in the *Guidelines* or the 1951 *Convention* or 1967 *Protocol* supports the imposition or use of a “visibility” test to make a social group determination.

⁸ The example discussed in the *Guidelines* is being left-handed, which, in itself, would not constitute a particular social group. If, however, left-handed people were targeted for persecution because of their left-handedness, this would create a public perception that left-handed people are members of a particular social group. This social awareness would stem from the fact that left-handed people were being persecuted. The common characteristic of that group would not, however, be the fact that they are being persecuted but rather the shared attribute of being left-handed. *Id.* (citation omitted).

II. THE BOARD’S LONG-STANDING AND WELL-RESPECTED APPROACH TO SOCIAL GROUP UNDER *ACOSTA* IS CONSISTENT WITH THE 1951 *CONVENTION* AND THE SOCIAL GROUP GUIDELINES AND SHOULD BE MAINTAINED

In 1985 this Board set forth a definition of membership in a particular social group that has become the standard-bearer in the United States as well as internationally. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). That definition provides that membership in a particular social group refers to “a group of persons all of whom share a common, immutable characteristic [that] . . . might be an innate one such as sex, color, or kinship ties, or . . . a shared past experience such as former military leadership or land ownership. . . . The [characteristic] must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Matter of Acosta*. at 433. The analysis in *Acosta* has provided a well-formulated and widely accepted standard for determining particular social group claims.

Under the *Acosta* standard, there is no requirement of establishing “social visibility” or “social perception,” yet it served to guide decisions by the Board, the Circuit Courts and many international courts for over 20 years. Significantly, the *Acosta* standard is consistent with the 1951 *Convention* and 1967 *Protocol* as well as the *Social Group Guidelines*. UNHCR would urge the Board to follow the *Acosta* approach rather than the rigid approach adopted in this and other recent Board decisions. Significantly, this new approach may disregard members of groups the *Convention* and *Protocol* are designed to protect. In fact, many social groups previously recognized by the Board under the *Acosta* analysis would be unlikely to establish the factors subsumed under the label of “social visibility.” For instance, the general population in Cuba would not

automatically recognize homosexuals, *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990), and average Salvadorans may not recognize former members of the national police, *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988), nor would a typical Togolese tribal member necessarily be aware of young women who opposed female genital mutilation but had not been subjected to the practice, *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996).

In UNHCR's view, the only requirements to establish a "particular social group" are those in the "protected characteristics" approach or, in the event these are not met, those in the "social perception" approach. To require more is likely to lead to erroneous decisions and a failure to protect refugees in contravention of the 1951 *Convention* and its 1967 *Protocol*.

CONCLUSION

UNHCR respectfully urges the Board to consider the relevant international standards and the views of UNHCR in establishing an interpretative framework for claims based on membership of a particular social group to ensure that the object and purpose of the 1951 *Convention* and its 1967 *Protocol* to protect refugees are satisfied and to return to the social group standard articulated in its seminal *Acosta* decision.

Respectfully submitted,

Pamela Goldberg
Protection Officer
UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES

Kaitlin Kalna Darwal, Esq.
UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES

1775 K Street NW, Suite 300
Washington, DC 20006
202-243-7621
202-296-5660 (Facsimile)

AMICUS CURIAE IN SUPPORT OF RESPONDENT

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CERTIFICATE OF SERVICE

I certify that on 25 March 2010, a true and correct copy of the foregoing Brief *Amicus Curiae* of the United Nations High Commissioner for Refugees in Support of Respondent was served in paper by regular mail and in electronic form on the following counsel:

Jennifer A. May
Office of Chief Counsel
U.S. Department of Homeland Security
United States Citizenship and
Immigration Services
2345 Grand Blvd., Suite 500
Kansas City, MO 64108
816-391-7213
Counsel for DHS

Matt Hoppock
McCrummen Immigration Law Group, LLC
P.O. Box 34663
North Kansas City, MO 64116
816-221-5444
Counsel for the Respondent

March 25, 2010

Pamela Goldberg