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## Invisible Refugee: Examining the Board of Immigration Appeals' Social Visibility Doctrine, The

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## LAW SUMMARY

# The Invisible Refugee: Examining the Board of Immigration Appeals' "Social Visibility" Doctrine

MELISSA J. HERNANDEZ PIMENTEL\*

### I. INTRODUCTION

In 2009, over 39,000 people filed asylum claims with the United States immigration court system, seeking refuge from persecution in their native countries.<sup>1</sup> Of those claims, immigration courts alone granted asylum to over 10,000 applicants, granted withholding of removal to 1,959 applicants, and denied both forms of relief to another 9,620 applicants.<sup>2</sup> Overall, fifty-six percent of asylum or withholding of removal applications adjudicated by immigration judges were granted,<sup>3</sup> though the grant rate varied significantly in individual immigration courts.<sup>4</sup> According to U.S. Department of Justice statistics, New York, Los Angeles, San Francisco, Miami, and Atlanta received fifty-four percent of all asylum and withholding of removal applications filed with the courts.<sup>5</sup> While New York's immigration court granted seventy-three percent of asylum and withholding of removal applications, Atlanta's immigration court granted only twenty-five percent.<sup>6</sup> And while Miami's immigration court granted only twenty-six percent of its applications, San Francisco's court granted forty-seven percent.<sup>7</sup> Although there are numerous factors that contribute to this broad range of results, the conflicting interpretations of the phrase "membership in a particular social group"<sup>8</sup> uti-

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\* B.A., University of Colorado, 2007; J.D. Candidate, University of Missouri School of Law, 2012; Note & Comment Editor, *Missouri Law Review*, 2011-12. I am grateful to Professor William B. Fisch for his valuable advice on approaching this topic, and to my parents Dan and Marla Pinkston and my sister Amy for their constant love, support, and encouragement.

1. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK II (2010), available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.

2. *Id.* at K5.

3. *Id.*

4. *Id.* at K6.

5. *Id.* at A1, I2-13.

6. *Id.* at K6.

7. *Id.*

8. See *infra* note 60 and accompanying text.

lized by the Board of Immigration Appeals (BIA) and the circuit courts of appeals likely have an effect as well.

To qualify for asylum or withholding of removal, an applicant must qualify as a refugee as defined by the U.S. Immigration and Nationality Act (INA).<sup>9</sup> Under the INA, a refugee is a “person who . . . is unable or unwilling to avail himself or herself of the protection of[] [his or her native country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>10</sup> Of the five bases of persecution, membership in a particular social group is the second most frequently invoked in the United States, and yet it remains one of the least understood.<sup>11</sup> The term is subject to various interpretations and U.S. courts have struggled to apply it with any homogeneity.<sup>12</sup>

The BIA’s “social visibility” doctrine is arguably the most controversial interpretation of the term particular social group. Although the social visibility doctrine is not precisely defined, it essentially requires that individual members of a particular social group have characteristics that are recognizable by others in the members’ native country.<sup>13</sup> The doctrine has been criticized by commentators as being inconsistent with past jurisprudential interpretations of particular social group.<sup>14</sup> In *Gatimi v. Holder*, the U.S. Court of Appeals for the Seventh Circuit became the first circuit to soundly reject the

9. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006).

10. *Id.*

11. Anna Marie Gallagher & Shane Dizon, *Refugees and Asylees; Temporary Protected Status (TPS): Proving Well-Founded Fear of Persecution: Membership in Social Group*, 2 IMMIGR. L. SERV. 2D (West) § 10:138 (2011). “Political opinion” is the most widely used grounds for asylum and withholding claims. *Id.*

12. *See infra* Part II.B.

13. Current courts of appeals cases illustrate the imprecise definition of the BIA’s “social visibility” doctrine. *See Contreras-Martinez v. Holder*, 346 F. App’x 956, 958 (4th Cir. 2009) (per curiam) (“[T]he Board requires that a particular social group have . . . social visibility, meaning that members possess characteristics . . . visible and recognizable by others in the native country . . . .” (emphasis added) (quoting *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009))). *But see Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (“[T]he Board cited cases which hold that a group must have ‘social visibility’ to be a ‘particular social group,’ meaning that ‘members of a society perceive those with the characteristic in question as members of a social group.’”) (emphasis added).

14. *See Fatma 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*, 27 YALE L. & POL’Y REV. 47 (2008). In her article, Marouf urges adjudicators to reject the social visibility doctrine because it is contrary to past interpretations of particular social group and “cannot be applied in a consistent way.” *Id.* at 51.

BIA's social visibility doctrine, criticizing its inconsistent application within the BIA.<sup>15</sup>

This Law Summary first focuses on the development of the various approaches by the U.S. immigration court system in defining the term particular social group.<sup>16</sup> Second, it discusses the cryptic evolution of the social visibility doctrine.<sup>17</sup> Finally, it will explore how the conflicting applications of the social visibility doctrine among the U.S. courts of appeals have resulted in potentially unpredictable outcomes for those seeking protection in the United States,<sup>18</sup> and it will suggest that a clarification of the social visibility doctrine by either the BIA or Supreme Court would alleviate the conflict.<sup>19</sup>

## II. LEGAL BACKGROUND

### A. *Asylum and Withholding of Removal Procedures and Standards*

A noncitizen present in the U.S. may request relief from being returned to his or her native country in three ways. The noncitizen may apply for (1) asylum,<sup>20</sup> (2) withholding of removal,<sup>21</sup> or (3) protection under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment (CAT).<sup>22</sup> In order for an applicant to qualify for asylum or withholding of removal, the noncitizen must show that he or she is a "refugee" as defined by the INA.<sup>23</sup>

Although asylum claims and withholding of removal claims are closely related, they involve different forms of relief,<sup>24</sup> procedures,<sup>25</sup> and burdens of

15. 578 F.3d at 615-16.

16. *See infra* Part II.B.

17. *See infra* Part II.C.

18. *See infra* Part III.

19. *See infra* Part IV.

20. 8 U.S.C. § 1158(a)(1) (2006).

21. *Id.* § 1231(b)(3)(A) ("[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

22. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=49e479d10&query=Convention+Against+Torture>. In 1998, Congress implemented article 3 of CAT by passing the Foreign Affairs Reform and Restructuring Act of 1998. Pub. L. No. 105-277, 112 Stat. 2681, 822-23 (codified at 8 U.S.C. § 1231).

23. *See* 8 U.S.C. § 1101(a)(42); *see also* Charles Gordon et al., *Immigrants: Refugees, Asylum, Withholding of Restriction on Removal, and Convention Against Torture Relief*, 3-33 IMMIGR. L. & PROC. § 33.05(3)(b) (2010).

24. Asylum is usually preferred over withholding of removal because a noncitizen may apply for permanent residency in the United States one year after being granted asylum. 8 U.S.C. § 1159(a). If granted withholding of removal, a noncitizen

proof placed on the applicant.<sup>26</sup> The federal government has discretion to grant or deny asylum and may deny an applicant asylum even if the applicant has satisfactorily shown that he or she is a refugee.<sup>27</sup> It may also deny asylum if there has been a change in the circumstances such that the applicant no longer has a reason to fear persecution if removed from the U.S.<sup>28</sup>

Whereas the grant of asylum is discretionary, withholding of removal is mandated under the INA if the applicant meets all the statutory requirements to qualify as a refugee.<sup>29</sup> However, unlike an asylum applicant who needs only to show a “well-founded fear of persecution,” withholding of removal is granted only if there is a “clear probability of persecution” if the applicant returned to his or her native country.<sup>30</sup> Because the “clear probability” standard is more difficult for an applicant to meet than the standard for asylum, those who are denied asylum ordinarily do not qualify for withholding of removal unless asylum is barred on discretionary, procedural, or technical grounds.<sup>31</sup>

The Executive Office for Immigration Review (EOIR) adjudicates immigration cases.<sup>32</sup> In 1983, the Attorney General established the EOIR as part of the U.S. Department of Justice (DOJ).<sup>33</sup> The EOIR is headed by a director and is responsible for supervising immigration judges and the Board of Immigration Appeals (BIA).<sup>34</sup> The DOJ and EOIR are completely separate from the Department of Homeland Security; the Department of Homeland Security appears on behalf of the government before the immigration courts.<sup>35</sup>

may only remain in the United States until the threat of persecution is no longer present. See 8 C.F.R. § 208.24 (2010).

25. An applicant must claim asylum within one year of arrival in the United States, absent significantly changed circumstances, whereas an applicant for withholding of removal faces no time restriction. Compare 8 C.F.R. § 1208.4 (claiming asylum), with *id.* § 208.16 (applying for withholding of removal).

26. See 8 U.S.C. § 1158(b)(1)(B) (burden of proof requirement for asylum status); *id.* § 1231(b)(3)(C) (burden of proof requirement for withholding of removal); see also *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984).

27. 8 U.S.C. § 1158(b)(1)(A) (“The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum . . . .”) (emphasis added).

28. 8 C.F.R. § 208.13.

29. 8 U.S.C. § 1231(b)(3)(A).

30. *INS v. Stevic*, 467 U.S. 407, 430 (1984).

31. See *Gordon et al.*, *supra* note 23, § 33.06(1).

32. U.S. Department of Justice, About the Office, <http://www.justice.gov/eoir/orginfo.htm> (last visited Mar. 3, 2011).

33. *Id.*

34. 8 C.F.R. § 1003.0(b)(1) (2010).

35. U.S. DEP’T OF JUSTICE, PRACTICE MANUAL: THE BOARD OF IMMIGRATION APPEALS § 1.2(d) (2004), available at <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf>.

An asylum applicant may request relief “affirmatively” by submitting an asylum application to the United States Citizenship & Immigration Services (USCIS), usually upon entering the country.<sup>36</sup> In the alternative, an applicant may request asylum from an immigration judge “defensively,” in response to expedited or regular removal proceedings.<sup>37</sup> When a noncitizen applies for asylum as a defensive claim, the adjudicator will also automatically consider the application as also seeking withholding of removal.<sup>38</sup>

Asylum and withholding of removal claims are considered by an immigration judge in the first instance.<sup>39</sup> An immigration judge’s final decision on the asylum application may be appealed to the BIA.<sup>40</sup> The BIA may reverse the immigration judge’s factual findings only if they are clearly erroneous but “may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.”<sup>41</sup> An adverse BIA decision may be challenged by judicial review in the U.S. courts of appeals.<sup>42</sup>

The courts of appeals may reverse the BIA’s or immigration judge’s factual findings only if “any reasonable adjudicator would be compelled to conclude to the contrary.”<sup>43</sup> As a result of the U.S. Supreme Court decision of *INS v. Aguirre-Aguirre* in 1999, questions of law are reviewed *de novo*, but the court is required to apply “*Chevron* deference” to the BIA’s interpretation of statutes.<sup>44</sup> In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court developed a two-step test to determine whether a reviewing court should give deference to an agency’s interpretation of a statute under its administration.<sup>45</sup> First, if the reviewing court finds that “Congress has directly spoken to the precise question at issue,” then no deference is given to the agency’s interpretation of the statute, and the court “employ[s] traditional tools of statutory construction.”<sup>46</sup> However, if the court finds that the “statute is silent or ambiguous with respect to the specific issue,” then the court must defer to any “permissible construction” made by the agency.<sup>47</sup>

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36. U.S. Citizenship & Immigration Services, Obtaining Asylum in the United States, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=dab9f067e3183210VgnVCM100000082ca60aRCRD&vgnnextchanel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited Mar. 3, 2011).

37. *Id.*

38. 8 C.F.R. §§ 208.3(b), 1208.3(b).

39. *Id.* § 208.14(a).

40. *Id.* § 1240.15.

41. *Id.* § 1003.1(d)(3)(i)-(ii).

42. 8 U.S.C. § 1252(b)(2) (2006).

43. *Id.* § 1252(b)(4)(B).

44. 526 U.S. 415, 424 (1999).

45. 467 U.S. 837, 842-43 (1984).

46. *Id.*

47. *Id.* at 843.

Finally, if the BIA or immigration judge exercised discretion in denying an asylum application, then the court may only reverse the decision by finding an abuse of discretion.<sup>48</sup>

### B. Defining “Refugee” and “Particular Social Group”

In the wake of World War II, the United Nations (UN) found an increasing need to revise and consolidate previous international agreements regarding refugee matters and to develop a “general definition of who was to be considered a refugee.”<sup>49</sup> In 1951, a conference of United Nations representatives adopted the “Convention and Protocol Relating to the Status of Refugees” (UN Convention).<sup>50</sup> The UN Convention defines a “refugee” as any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>51</sup>

“Membership in a particular social group” is not defined by the UN Convention,<sup>52</sup> though it has been suggested that the term was added in order to create a broader application of refugee status and to prevent “a possible gap in the coverage of the U.N. Convention.”<sup>53</sup> Nonetheless, the Office of the UN High Commissioner for Refugees (UNHCR)<sup>54</sup> cautions that the term

48. *INS v. Doherty*, 502 U.S. 314, 333 (1992) (citing *INS v. Abudu*, 485 U.S. 94, 106 (1988)).

49. U.N. High Comm’r for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 5, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992), available at <http://www.unhcr.org/3d58e13b4.html> [hereinafter *Handbook on Procedures and Criteria for Determining Refugee Status*].

50. UNHCR, *Convention and Protocol Relating to the Status of Refugees* intro., July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, available at <http://www.unhcr.org/3b66c2aa10.html>; see also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 49, ¶ 5.

51. *Convention and Protocol Relating to the Status of Refugees*, *supra* note 50, at art. I(A)(2).

52. See *Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) (citing 1 ATLE GRAHLMADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* (1966)), *overruled on other grounds* by *Mogharrabi*, 19 I. & N. Dec. 439, 441 (1987)).

53. *Id.*

54. *Convention and Protocol Relating to the Status of Refugees*, *supra* note 50, at art. 35, ¶ 1 (“The Contracting States undertake to co-operate with the Office of the . . . High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”).

should not serve as a “‘catch-all’ that applies to all persons fearing persecution.”<sup>55</sup>

In 1967, due to “the passage of time and the emergence of new refugee situations,” the UN adopted the “Protocol Relating to the Status of Refugees” (Protocol).<sup>56</sup> The Protocol also calls for nations “to apply the substantive provisions of the 1951 [UN] Convention to refugees as defined in the Convention.”<sup>57</sup> As a result of the U.S. accession to the Protocol, Congress adopted the Refugee Act of 1980 (Refugee Act),<sup>58</sup> which implemented an organized procedure for the admission of refugees into the United States.<sup>59</sup> Under the Refugee Act, the definition of a refugee is similar to that of the UN Convention:

The term “refugee” means . . . any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>60</sup>

Like the UN when it adopted the UN Convention, Congress did not define “membership in a particular social group.”<sup>61</sup> As a result, the term has been subject to conflicting interpretations by U.S. adjudicators and has become increasingly difficult to understand.<sup>62</sup>

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55. 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* ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/3d58de2da.html> [hereinafter *Guidelines on International Protection: “Membership of a Particular Social Group”*].

56. *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 49, ¶ 8.

57. *Id.* ¶ 9.

58. See S. REP. NO. 96-256 (1979); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

59. Gordon et al., *supra* note 23, § 33.01.

60. 8 U.S.C. § 1101(a)(42)(A) (2006).

61. See Gallagher & Dizon, *supra* note 11, § 10:138.

62. See *id.*



## 1. The Protected Characteristic Approach

In 1985, the BIA developed the protected characteristic approach in *In re Acosta*,<sup>63</sup> which has become the seminal case in “particular social group” interpretation.<sup>64</sup> In that case, the applicant, Acosta, contended that he feared persecution by guerillas in his native El Salvador based on his membership in a cooperative organization of taxi drivers called COTAXI.<sup>65</sup> Before Acosta left for the United States, “anti-government guerillas” demanded that members of COTAXI halt operations in an effort to damage the national economy.<sup>66</sup> When the drivers refused, the guerillas damaged taxis and assaulted or even killed the drivers.<sup>67</sup> The immigration judge denied Acosta’s application for relief, “finding that he had failed to meet his burden of proof for such relief.”<sup>68</sup> Acosta appealed to the BIA.<sup>69</sup>

The BIA dismissed Acosta’s appeal, holding that being a member of COTAXI did not qualify as membership in a particular social group within the Refugee Act’s definition of refugee.<sup>70</sup> In construing the term particular social group, the BIA employed the doctrine of *ejusdem generis*, or “of the same kind.”<sup>71</sup> The doctrine dictates “that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”<sup>72</sup> The BIA noted the use of the specific words “race,” “religion,” “nationality,” and “political opinion” in the Refugee Act definition all relate to persecution because of some unchangeable characteristic.<sup>73</sup> Applying the *ejusdem generis* doctrine led the BIA to define a member of a particular social group as “an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”<sup>74</sup> An “immutable characteristic,” according to the BIA, is one that “members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>75</sup> Two types of characteristics qualify: the characteristic may be “an innate one such as sex, color, or kinship

63. 19 I. & N. Dec. 211, 232-33 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439, 441 (1987).

64. *Vumi v. Gonzales*, 502 F.3d 150, 154 (2d Cir. 2007); *see also* Gordon et al., *supra* note 23, § 33.04(4)(c)(1).

65. *Acosta*, 19 I. & N. Dec. at 216.

66. *Id.*

67. *Id.*

68. *Id.* at 213.

69. *Id.*

70. *Id.* at 236-37.

71. *Id.* at 233.

72. *Id.*

73. *Id.*; *see also* 8 U.S.C. §1101(a)(42)(A) (2006) (defining “refugee” in the Refugee Act of 1980).

74. *Acosta*, 19 I. & N. Dec. at 233.

75. *Id.*

ties” or in some cases may be “a shared past experience such as former military leadership or land ownership.”<sup>76</sup> In Acosta’s case, membership in COTAXI was not immutable because he could avoid the guerillas’ threats simply by changing jobs or participating in the requested work stoppages.<sup>77</sup>

## 2. The Voluntary Associational Relationship Standard

Most circuits adopted some form of the protected characteristic approach of *Acosta*, including the First, Third, and Seventh Circuits.<sup>78</sup> However, in the 1986 case of *Sanchez-Trujillo v. INS*, the Ninth Circuit developed its own interpretation of membership in a particular social group, known as the “voluntary associational relationship” standard.<sup>79</sup> The court found that “young, working class, urban males of military age” who had never served in the military in El Salvador did not qualify as a particular social group.<sup>80</sup> Meticulously parsing the statutory language, the Ninth Circuit determined that the words “particular” and “social” implied “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”<sup>81</sup> The court went on to say that the primary characteristic of a cognizable social group is the “existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to [the individual members’] identity [within] that discrete social group.”<sup>82</sup> In other words, under the voluntary associational relationship standard, the applicant must show that persecutors will target the group because its members affiliate with one another (i.e. the group is cohesive). The Ninth Circuit reasoned that the term particular social group was intended to apply only to “cohesive, homogeneous group[s]” in order to prevent the extension of “refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.”<sup>83</sup>

In the 2000 case of *Hernandez-Montiel v. INS*, the Ninth Circuit acknowledged its obligation to give *Chevron* deference to the BIA’s interpretation and thus developed an explicit “two-pronged” approach, pursuant to which an applicant could establish membership in a particular social group by

76. *Id.*

77. *Id.* at 234.

78. See Gallagher & Dizon, *supra* note 11, § 10:138.

79. 801 F.2d 1571, 1576 & n.7, 1578-79 (9th Cir. 1986). Recall that circuit courts were not required to apply *Chevron* deference at this time. It was not until *INS v. Aguirre-Aguirre* that courts applied such deference. 526 U.S. 415, 424 (1999) (holding that “*Chevron* deference” applies to legal interpretations made by the BIA). Thus, the Ninth Circuit did not reject the *Acosta* formulation but rather applied a new standard altogether.

80. *Sanchez-Trujillo*, 801 F.2d at 1576.

81. *Id.*

82. *Id.*

83. *Id.* at 1577.

satisfying either the voluntary associational relationship standard of *Sanchez-Trujillo* or the protected characteristic approach of *Acosta*.<sup>84</sup>

Some circuits adopted a combination of the BIA's protected characteristic formulation laid out in *Acosta* and the Ninth Circuit's voluntary associational relationship standard laid out in *Sanchez-Trujillo*. For example, in the 1994 case of *Safaie v. INS*, the Eighth Circuit followed the Ninth Circuit approach in that it defined a particular social group as a group of people who are voluntarily associated with one another based on a common characteristic.<sup>85</sup> However, the court also adopted the *Acosta* formulation by requiring the unifying characteristic to be "so fundamental to the individual's identity or conscience that he or she ought not to be required to change."<sup>86</sup> The applicant, Azar Safaie, argued that Iranian women qualified as a particular social group because they are subject to "harsh restrictions," including being forced to wear Iranian traditional clothing.<sup>87</sup> In its application of this standard, the court found that Safaie's proposed group did not constitute a particular social group because it was overbroad and incohesive, despite a shared immutable characteristic (i.e. gender).<sup>88</sup> The interpretation of particular social group in *Safaie* has not yet been overruled by the Eighth Circuit.<sup>89</sup>

### 3. The Social Perception Approach

In *Gomez v. INS*, the Second Circuit held that the perceptions of the group by others is just as important as the group's immutability and voluntary association in determining membership in a particular social group.<sup>90</sup> By focusing on the perception of the group by others, the court adopted what is known as the "social perception" approach.<sup>91</sup> Carmen Gomez was born in El

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84. 225 F.3d 1084, 1091-93 (9th Cir. 2000) (holding that Mexican gay men are a particular social group), *overruled on other grounds* by *Thomas v. Gonzales* 409 F.3d 1177, 1187 (9th Cir. 2005). This decision to incorporate the *Acosta* formulation was most likely a result of the Supreme Court ruling in *Aguirre-Aguirre* requiring courts to give *Chevron* deference to the BIA. See *Aguirre-Aguirre*, 526 U.S. at 416.

85. 25 F.3d 636, 640 (8th Cir. 1994) (citing *Sanchez-Trujillo*, 801 F.2d at 1576), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, *as recognized* by *Rife v. Ashcroft*, 374 F.3d 606, 614-15 (8th Cir. 2004).

86. *Id.* (citing *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985); *Acosta*, 19 I. & N. Dec. 211, 233-34 (B.I.A. 1985), *overruled on other grounds* by *Mogharrabi*, 19 I. & N. Dec. 439, 441 (1987)).

87. *Safaie*, 25 F.3d at 638, 640.

88. *See id.*

89. *See, e.g., Malonga v. Mukasey*, 546 F.3d 546 (8th Cir. 2008).

90. 947 F.2d 660, 664 (2d Cir. 1991).

91. *See Applicant S v. Minister for Immigration and Multicultural Affairs* (2004) 217 C.L.R. 387 (Austl.). The High Court of Australia said the general principle of the social perception approach "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 the

Salvador and lived there until she was eighteen.<sup>92</sup> When Gomez was five years old, her mother died, leaving Gomez orphaned.<sup>93</sup> When she was between twelve and fourteen years old, she was raped and beaten on numerous occasions by Salvadoran guerilla forces.<sup>94</sup> In 1979, Gomez fled El Salvador and illegally entered the United States.<sup>95</sup>

Gomez argued that because of these attacks “she became a member of a social group, i.e., women who have been previously battered and raped by Salvadoran guerillas.”<sup>96</sup> The court found that a particular social group must be “comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general.”<sup>97</sup> In other words, a cognizable particular social group must be one that is identifiable to the society in which it exists. The court held that “women who have been previously battered and raped by Salvadoran guerillas” are not a particular social group because the applicant failed to show that the group could be identified by potential persecutors.<sup>98</sup> By 2006, in *Gao v. Gonzales*, the Second Circuit continued to use its social perception approach but firmly rejected the voluntary associational relationship standard, finding that the approach set out by the Ninth Circuit was inconsistent with BIA and other circuit precedent.<sup>99</sup>

### C. The Development of the Social Visibility Doctrine

In response to these developments, the UNHCR adopted guidelines in 2002 that incorporated the protected characteristic approach and the social perception approach in its definition of particular social group.<sup>100</sup> UNHCR guidelines define a particular social group as:

[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, un-

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society.” *Id.* The court also emphasized that social perception is important in determining a social group but is not a requirement. *Id.*

92. *Gomez*, 947 F.2d at 662.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 663.

97. *Id.* at 664 (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)).

98. *Id.* at 663-64.

99. 440 F.3d 62, 68-69 & n.4 (2d Cir. 2006), *vacated sub nom.* *Keisler v. Gao*, 552 U.S. 801 (2007).

100. *Guidelines on International Protection: “Membership of a Particular Social Group”*, *supra* note 55, ¶¶ 10-11.

changeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>101</sup>

Although the BIA and the circuit courts have considered international interpretations of the Protocol and guidelines in developing their own meaning of particular social group, they have never found such interpretations to be binding, particularly as to the construction of the Refugee Act.<sup>102</sup> Nonetheless, the 2002 UNHCR definition was heavily relied upon in the development of the BIA's social visibility doctrine.<sup>103</sup>

By 2006, courts of appeals were becoming increasingly reluctant to further define particular social group and increasingly reliant upon BIA interpretations.<sup>104</sup> The catalyst for this movement was the decision handed down by the Supreme Court in *Gonzales v. Thomas*, which found that federal courts were required to give the BIA the first opportunity to decide what qualifies as a particular social group.<sup>105</sup> The Thomases argued that they feared persecution because they were white South Africans related to "Boss Ronnie."<sup>106</sup> "Boss Ronnie" was a racist, the Thomases claimed, who "mistreated black workers at the company at which he [worked]."<sup>107</sup> The immigration judge focused only on whether the Thomases qualified for asylum because of their political opinions and their race (white South Africans), and not whether the Thomases were subject to persecution because of their relation to "Boss Ronnie."<sup>108</sup> The BIA summarily affirmed the immigration judge's decision.<sup>109</sup> On appeal, the Ninth Circuit held that the BIA did not sufficiently consider whether the Thomases qualified for asylum based on kinship.<sup>110</sup> The matter was taken en banc, and the Ninth Circuit overruled "what it considered aberrant contrary Circuit precedent," finding that "a family may constitute a social group."<sup>111</sup>

The Supreme Court unanimously held that the Ninth Circuit "erred in holding, in the first instance and without prior resolution of the question by the relevant . . . agency, that members of a family can and do constitute a

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101. *Id.* ¶ 11.

102. *See* Acosta, 19 I. & N. Dec. 211, 220 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439, 441 (1987).

103. C-A-, 23 I. & N. Dec. 951, 956 (B.I.A. 2006).

104. *See* Gordon et al., *supra* note 23, § 33.04.

105. 547 U.S. 183, 185-86 (2006) (*per curiam*).

106. *Id.* at 184.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* (citing *Thomas v. Ashcroft*, 359 F.3d 1169, 1177 (9th Cir. 2004)).

111. *Id.* (emphasis omitted) (internal quotation marks omitted) (quoting *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005)).

particular social group within the meaning of the [Immigration and Naturalization] Act.”<sup>112</sup>

Soon after the *Gonzales* decision, the BIA had the opportunity to clarify its interpretation of particular social group.<sup>113</sup> In *In re C-A-*, an asylum applicant was part of a group of confidential informants who provided information about drug cartels and whose identities were later revealed.<sup>114</sup> The applicant claimed that these informants were a particular social group.<sup>115</sup> The BIA adhered to the protected characteristic approach set out in *Acosta*, but also adopted a new social visibility doctrine, which it seemingly derived from the social perception approach.<sup>116</sup> Whereas the social perception approach focuses on whether the group is perceived as a group by society, the social visibility doctrine focuses on whether the member of the group is visible to society as part of the group.<sup>117</sup> In *C-A-*, the BIA rejected the Ninth Circuit’s “voluntary associational relationship” standard, stating that the BIA does “not require a ‘voluntary associational relationship’ among group members.”<sup>118</sup> However, in language reminiscent of the UNHCR definition<sup>119</sup> and Second Circuit decisions,<sup>120</sup> the BIA held that the extent to which members of the group are perceived or visible by society is a “relevant factor” in determining whether an applicant is a *member* of a particular social group within the meaning of the Refugee Act.<sup>121</sup>

The BIA found that the proposed social group, drug informants, was defined in part by an immutable characteristic (past experiences), but members of that group did not necessarily qualify for refugee status because they were aware of the risks involved in becoming informants.<sup>122</sup> The BIA then turned to visibility and reiterated the importance of the social group being recognizable by society.<sup>123</sup> The BIA concluded that unlike other social groups such as “young women of a particular tribe who were opposed to female genital mutilation”<sup>124</sup> or “persons listed by the government as having the status of a homosexual,”<sup>125</sup> confidential drug informants were not socially visible.<sup>126</sup> The

112. *Id.* at 185 (internal quotation marks omitted) (citing the Solicitor General’s petition for certiorari).

113. *Gonzales* was decided on April 17, 2006, and *C-A-* was published on June 15, 2006. *Gonzales*, 547 U.S. 183; *C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006).

114. 23 I. & N. Dec. at 952.

115. *Id.* at 953.

116. *Id.* at 956-57.

117. *See id.*

118. *Id.* at 956.

119. Convention and Protocol Relating to the Status of Refugees, *supra* note 50.

120. *See Gao v. Gonzales*, 440 F.3d 62, 68 (2d Cir. 2006), *vacated sub nom. Keisler v. Gao*, 552 U.S. 801 (2007); *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

121. *C-A-*, 23 I. & N. Dec. at 957.

122. *Id.* at 958.

123. *Id.* at 959.

124. *Id.* at 960 (citing *Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)).

125. *Id.* (citing *Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990)).

BIA explained that “the very nature of the conduct at issue is such that it is generally out of the public view” and that an informant “intends to remain unknown and undiscovered”; only those groups of “informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members” are considered to be socially visible.<sup>127</sup>

In her article entitled *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*, Fatma E. Marouf notes that unlike the social perception approach, the BIA analysis in *C-A-* focused on the visibility of the individual as part of the group, as opposed to the social visibility of the group itself.<sup>128</sup> Marouf further suggests that “the BIA’s ‘social visibility’ test depart[ed] from the ‘social perception’ approach” and the UNHCR Guidelines because the BIA “focus[ed] on the visibility of group members and examin[ed] only the subjective perceptions of the relevant society to determine whether a group is recognizable.”<sup>129</sup>

One year later, in *In re A-M-E & J-G-U-*, the BIA was unclear as to whether social visibility was a “factor” in determining the existence of a particular social group or a requirement to establish one.<sup>130</sup> In *A-M-E*, the BIA maintained that it had “recently reaffirmed the importance of social visibility as a *factor*.”<sup>131</sup> However, the BIA confused the issue when in the very next sentence it “reaffirm[ed] the *requirement* that the shared characteristic of the group should generally be recognizable by others in the community.”<sup>132</sup> In applying its social visibility doctrine, the BIA found that “wealthy Guatemalans” were not a socially recognizable group.<sup>133</sup> In her article, Marouf argues that although *A-M-E* seems inconsistent with itself, it “strongly suggests that the BIA is now applying the traditional ‘protected characteristic’ test *and* its new ‘social visibility’ test . . . as dual requirements instead of alternative tests.”<sup>134</sup>

In the 2008 decision of *In re S-E-G-*, the BIA held that “Salvadoran youth who ha[d] been subjected to recruitment efforts by [the gang] MS-13 and who ha[d] rejected or resisted membership in the gang” did not constitute a particular social group.<sup>135</sup> In deciding the issue, the BIA referred to its “recent decisions holding that membership in a purported social group *requires* that the group have particular and well-defined boundaries, and that it possess

126. *Id.*

127. *Id.*

128. Marouf, *supra* note 14, at 63-64.

129. *Id.* at 64.

130. 24 I. & N. Dec. 69, 74-75 (B.I.A. 2007) (citing *C-A-*, 23 I. & N. Dec. at 957); *see also* Marouf *supra* note 14, at 65-69.

131. *A-M-E & J-G-U-*, 24 I. & N. Dec. at 74 (emphasis added).

132. *Id.* (emphasis added).

133. *Id.* at 75.

134. *See* Marouf, *supra* note 14, at 67.

135. 24 I. & N. Dec. 579, 581, 583 (B.I.A. 2008).

a recognized level of social visibility.”<sup>136</sup> However, the BIA also noted that social visibility accorded greater specificity to the “protected characteristic” approach, otherwise referred to as the *Acosta* formulation, continuing to make it unclear whether social visibility is a factor or a requirement.<sup>137</sup>

### III. RECENT DEVELOPMENTS

The BIA decisions in *C-A-*, *A-M-E*, and *S-E-G-* have led to a split in the circuit courts with regard to the social visibility doctrine. Most circuit courts have adopted the social visibility doctrine in some form, either as a requirement of, or as a factor in, establishing membership in a particular social group. The Seventh Circuit thus far stands alone in completely rejecting the social visibility doctrine, but its position is supported by the UNHCR.

#### A. Social Visibility Applied

In *Malonga v. Mukasey*, a withholding of removal case, the Eighth Circuit did not overrule its adoption of the voluntary associational relationship approach and the *Acosta* formulation; rather, it included social visibility as a factor in determining whether an applicant is a member in a particular social group.<sup>138</sup> Noel Malonga, a native of the Democratic Republic of the Congo, claimed that he was “a member of the Lari ethnic group of the Kongo tribe” and would be subject to persecution if he were not granted withholding of removal.<sup>139</sup> The immigration judge held that this group was not a particular social group because “the Kongo ethnic group comprises a substantial minority, 48% of the population in Congo. Simply being a member of that group does not place the respondent in any greater risk than any members of the rest of the group which comprise almost half of the population.”<sup>140</sup> With little comment, the BIA upheld the denial of withholding of removal.<sup>141</sup>

The Eighth Circuit found that the immigration judge’s reasoning conflicted with the *Acosta* formulation.<sup>142</sup> The court reaffirmed its own understanding that “the more likely that the society at large recognizes the alleged group . . . , the more likely that the group is a particular social group for purposes of withholding of removal.”<sup>143</sup> According to the court, the immigration judge “myopically focus[ed] on size” of the group and “failed to consider the other relevant factors” for determining the existence of a particular social

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136. *Id.* at 582 (emphasis added).

137. *Id.* at 582, 589.

138. 546 F.3d 546, 554 (8th Cir. 2008).

139. *Id.* at 549-50.

140. *Id.* at 553 (citing the immigration judge’s opinion).

141. *Id.*

142. *Id.* (citing *Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds* by *Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)).

143. *Id.* (citing *C-A-*, 23 I. & N. Dec. 951, 959-61 (B.I.A. 2006)).



group.<sup>144</sup> The Eighth Circuit found that “the Lari ethnic group of the Kongo tribe” was a particular social group, rejecting the immigration judge’s holding that the group was not socially visible, because the group was defined by other socially recognizable characteristics, such as common dialect and accent as well as common surnames.<sup>145</sup> The court ultimately vacated the BIA’s denial of relief for withholding of removal.<sup>146</sup>

In the 2010 case of *Perdomo v. Holder*, the Ninth Circuit seemed to have arrived at a view of social visibility similar to that of the Eighth Circuit.<sup>147</sup> As mentioned above,<sup>148</sup> the Ninth Circuit generally employs a “two-pronged” approach, which holds that a particular social group is either “one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”<sup>149</sup> The court maintains that its approach is consistent with the BIA’s interpretation “that social visibility and particularity are factors to consider in determining whether a group constitutes a particular social group.”<sup>150</sup>

In an unpublished case, *Contreras-Martinez v. Holder*, the Fourth Circuit held that social visibility is a requirement in defining a particular social group.<sup>151</sup> The court gave deference to the BIA’s rule that “in addition to immutability, . . . a particular social group [is required to] have . . . social visibility, meaning that members possess characteristics . . . visible and recognizable by others in the native country.”<sup>152</sup> The Fourth Circuit determined that “adolescents in El Salvador who refuse to join the gangs of that country” did not qualify as a social group and denied the petition for review.<sup>153</sup> The Fourth Circuit Court of Appeals is one of eight circuits to uphold the BIA’s social visibility doctrine.<sup>154</sup> The petitioner urged the U.S. Supreme Court to

144. *Id.* at 554.

145. *Id.*

146. *Id.* at 556.

147. 611 F.3d 662, 666-67 (9th Cir. 2010).

148. *See supra* Part II.B.2.

149. *Perdomo*, 611 F.3d at 666 (internal quotation marks omitted) (quoting *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000)).

150. *Id.* at 667 (internal quotation marks omitted); *see also* *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (giving deference to the BIA interpretation of “particular social group”).

151. 346 F. App’x 956, 958 (4th Cir. 2009) (per curiam).

152. *Id.* at 958 (last alteration in original) (internal quotation marks omitted) (quoting *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009)).

153. *Id.*

154. *See, e.g.*, *Rodriguez-Tevez v. Att’y Gen.*, 380 F. App’x 240, 243 (3d Cir. 2010) (per curiam); *Guevara-Acosta v. Att’y Gen.*, 372 F. App’x 52, 53-54 (11th Cir. 2010) (per curiam); *Urbina-Mejia v. Holder*, 597 F.3d 360, 366-67 & n.3 (6th Cir. 2010); *Castro v. Holder*, 597 F.3d 93, 107 n.5 (2d Cir. 2010); *Scatambuli*, 558 F.3d at 59. All the cited circuit courts of appeals, along with the Eighth and Ninth Circuits discussed above, have adopted some form of the social visibility doctrine. The Fifth

resolve the circuit split, but on May 17, 2010, the U.S. Supreme Court denied certiorari.<sup>155</sup>

### B. Rejection of the Social Visibility Doctrine

In *Gatimi v. Holder*, the Seventh Circuit firmly rejected the BIA's requirement that to qualify as a particular social group, the group must be socially visible.<sup>156</sup> Francis Gatimi, a Kenyan native, was a member of the Mungiki group, which "is much given to violence" and "also compels women, including wives of members and defectors, to undergo clitoridectomy and excision."<sup>157</sup> Four years after joining the group, Gatimi defected from the Mungiki, after which a gang of Mungiki broke into his house, killed his servant, and searched for his wife, whom they wanted to circumcise.<sup>158</sup> The Mungiki also killed family pets, burned vehicles, and "threatened to gouge out Gatimi's eyes."<sup>159</sup> Gatimi and his wife fled to the United States, but shortly thereafter, Gatimi returned to Kenya, mistakenly believing that the danger had subsided.<sup>160</sup> Upon his return to Kenya, Gatimi was kidnapped and tortured, but then released upon the condition that he produce his wife for the circumcision.<sup>161</sup> Gatimi left Kenya to join his wife and applied for asylum in the United States.<sup>162</sup>

The immigration judge denied Gatimi's application for asylum, finding that the crimes against Gatimi by the Mungiki "were not persecution, but merely 'mistreatment.'"<sup>163</sup> The BIA affirmed the immigration judge's decision on the basis that the social group claimed by Gatimi was not socially visible.<sup>164</sup> Judge Posner, writing for the Seventh Circuit, harshly criticized the immigration judge's decision as "absurd" and stated that "[w]ith regard to Mrs. Gatimi's claim . . . of female genital mutilation, a recognized ground of asylum, the immigration judge lapsed into incoherence."<sup>165</sup>

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and Tenth Circuits have not taken a definite position on the social visibility test. See Petition for a Writ of Certiorari at 13, *Contreras-Martinez v. Holder*, 130 S. Ct. 3274 (2010) (No. 09-830), 2010 WL 128010.

155. *Contreras-Martinez*, 130 S. Ct. 3274.

156. 578 F.3d 611, 616 (7th Cir. 2009); see also Gerald Seipp, *A Year in Review: Social Visibility Doctrine Still Alive, but Questioned*, 87 No. 27 INTERPRETER RELEASES 1417, 1420-23 (2010).

157. *Gatimi*, 578 F.3d at 613.

158. *Id.* at 614.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 614-15.

165. *Id.* at 614.

Judge Posner also criticized the BIA's social visibility doctrine as "mak[ing] no sense; nor has the [BIA] attempted . . . to explain the reasoning behind the criterion of social visibility."<sup>166</sup> According to Judge Posner, the social visibility doctrine is illogical because in many instances a member of a group who is targeted for persecution "will take pains to *avoid* being socially visible."<sup>167</sup> While mindful of *Chevron* deference, the court nonetheless found that the doctrine was applied inconsistently, declaring that it would not "condone arbitrariness."<sup>168</sup> It held, contrary to the BIA decision, that Gatimi was indeed a member of a particular social group subject to persecution and that the Kenyan government was incapable of providing or unwilling to offer protection.<sup>169</sup>

In *Benitez Ramos v. Holder*, also written by Judge Posner, the Seventh Circuit rejected the BIA's finding that former members of the gang Mara Salvatrucha in El Salvador were not a particular social group.<sup>170</sup> The court held that being a former member of a gang is an immutable characteristic based on past experiences which are "impossible to change."<sup>171</sup> Judge Posner also rejected the government's argument that the proposed group lacked the requisite social visibility.<sup>172</sup> He referred to the social visibility doctrine as a "misunderstanding of the use of 'external' criteria to identify a social group."<sup>173</sup> Judge Posner argued that the BIA has sometimes used the term to require that an applicant's group literally be physically visible to others as opposed to perceived as a group by society.<sup>174</sup> The court remarked that "[o]ften it is unclear whether the [BIA] is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even – whether it understands the difference."<sup>175</sup>

The Sixth Circuit recently relied on *Gatimi* and *Benitez Ramos* to support its holding in *Urbina-Mejia v. Holder*.<sup>176</sup> In *Urbina-Mejia*, the Sixth

166. *Id.* at 615.

167. *Id.* (emphasis added).

168. *Id.* at 616.

169. *Id.* at 617.

170. 589 F.3d 426, 429 (7th Cir. 2009).

171. *Id.*

172. *Id.* at 431.

173. *Id.* at 430.

174. *Id.*

If society recognizes a set of people having certain common characteristics as a group, this is an indication that being in the set might expose one to special treatment, whether friendly or unfriendly. In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be.

*Id.*

175. *Id.*

176. 597 F.3d 360, 366 (6th Cir. 2010). *But see* *Castro-Paz v. Holder*, 375 F. App'x 586, 590 (6th Cir. 2010) (giving deference to the BIA's social visibility doctrine).

Circuit found that the BIA was incorrect in concluding that a former member of a street gang in Honduras did not qualify as a member of a particular social group.<sup>177</sup> Similar to *Benitez Ramos*, the Sixth Circuit found that being a former gang member is a past experience that is “impossible to change, except perhaps by rejoining the group,” and is therefore an immutable characteristic.<sup>178</sup> *Urbina-Mejia* did not directly address the social visibility doctrine, but the opinion indicates approval of the Seventh Circuit’s analysis.<sup>179</sup>

Although the Seventh Circuit stands alone in the U.S. courts of appeals in its firm rejection of the social visibility doctrine, it does have one supporter – the UNHCR. In an amicus curiae brief to the BIA in *In re Thomas*, the UNHCR argued that “the members of a group need not be easily recognizable to the general public in order for the group as a whole to be perceived by society as a particular social group.”<sup>180</sup> The UNHCR further argued that the doctrine contradicts international asylum standards and cautioned that the rigid application of the social visibility doctrine may “disregard groups that the [UN] Convention is designed to protect.”<sup>181</sup> The UNHCR explained that under its guidelines, “groups whose members are targets based on a common immutable . . . characteristic” very often are recognized in their societies.<sup>182</sup> However, some groups of persons with common immutable characteristics (e.g. homosexuals) may not be socially visible as a group because the members of that group have an interest in concealing their membership in the group in order to avoid persecution.<sup>183</sup> In other words, the strict use of the social visibility doctrine would deny protection to some people who are members of groups linked by immutable characteristics.

#### IV. DISCUSSION

The BIA and the circuit courts generally concur that inclusion of the particular social group requirement was intended to assist those who may not qualify for relief under the other enumerated criteria that define a refugee, and yet that the term was not intended to be a catch-all.<sup>184</sup> The courts and the BIA also generally seem to agree that one clearly established principle of asylum law is to protect individuals who are persecuted because of some cha-

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177. *Urbina-Mejia*, 597 F.3d at 362.

178. *Id.* at 366 (quoting *Benitez Ramos*, 589 F.3d at 429).

179. *See id.*; *see also* Seipp, *supra* note 156, at 1421-22.

180. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae at 8, Thomas, No. A75-597-033/-034/-035/-036 (2007), available at <http://www.unhcr.org/refworld/publisher,UNHCR,,ZAF,45c34c244,0.html>.

181. *Id.* at 10.

182. *Id.* at 8.

183. *Id.*

184. *See Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *Acosta*, 19 I. & N. Dec. 211, 232 (B.I.A. 1985), *overruled on other grounds by* *Mogharrabi*, 19 I. & N. Dec. 439, 441 (1987).

racteristic which they cannot change, such as race, or should not have to change, such as religion or political opinion.<sup>185</sup> Nonetheless, the term is so ill-defined that courts and the BIA have reached conflicting interpretations, resulting in an inconsistent application of federal immigration law. The BIA's *Acosta* formulation,<sup>186</sup> coupled with the social visibility doctrine, attempts to harmonize the meaning of particular social group. However, the social visibility doctrine's ambiguities are causing courts to apply it unpredictably and even to reject it altogether.

There are two primary ambiguities of the social visibility doctrine that have led to its inconsistent application by the courts. First, it is not clear whether the BIA intended to diverge from the social perception approach. Under the social perception approach, a particular social group has a common attribute, and the *group* is perceived by society as standing apart from other members of society.<sup>187</sup> Although in *C-A-* the BIA claimed to support the social perception approach,<sup>188</sup> as defined by the Second Circuit and by the UNHCR Guidelines, its application of the approach seems to suggest otherwise. In cases like *C-A-* and *A-M-E*, the BIA indicated that under the social visibility approach, members of the group must be visible to society at large as members of the group.<sup>189</sup>

A requirement that the members of a group be visible to society as group members, as opposed to a requirement that the group itself be visible, is at odds with the BIA's actual decisions over the years.<sup>190</sup> Family membership is "a classic example" of what the BIA and circuit courts have consistently considered a particular social group.<sup>191</sup> However, status as a member of a family that is subject to persecution may not necessarily be visible to society. In addition, prior to its holding in *C-A-*, the BIA found that "young women of a tribe that practices female genital mutilation but who have not been subjected to it,"<sup>192</sup> "former member[s] of the national police,"<sup>193</sup> and homosexuals<sup>194</sup> were particular social groups. The very nature of these groups suggests that members may intend to avoid being visible to society because of the danger of persecution. As Judge Posner pointed out in *Gatimi*,

185. See *supra* Part II.B.1.

186. See *Acosta*, 19 I. & N. Dec. 211.

187. See *supra* Part II.B.2.

188. *C-A-*, 23 I. & N. Dec. 951, 956-57 (B.I.A. 2006).

189. See *Marouf*, *supra* note 14, at 63-64.

190. See *id.* at 64; see also Elyse Wilkinson, Comment, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387 (2010).

191. See Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae, *supra* note 180, at 10.

192. *Gatimi v. Holder*, 578 F.3d 611, 615 (citing *Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996)).

193. *Fuentes*, 19 I. & N. Dec. 658, 662 (B.I.A. 1988).

194. *Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

the BIA is “refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases.”<sup>195</sup> These contradictions between the social visibility doctrine and BIA precedent have caused the Seventh Circuit to reject the doctrine altogether.<sup>196</sup>

The Seventh Circuit’s rejection of the social visibility doctrine has resulted in an unequal application of the law to asylum-seekers. In March 2010, the asylum division chief of the USCIS issued a memorandum to all asylum officers addressing the Seventh Circuit’s holding in *Benitez Ramos v. Holder* that former gang members were a social group.<sup>197</sup> The memorandum informed the asylum officers that the holding is only “binding on those asylum cases arising within the jurisdiction of the Seventh Circuit.”<sup>198</sup> The consequence of this ruling is that those former gang members who are fortunate enough to be within the Seventh Circuit’s jurisdiction may obtain asylum, while similarly situated applicants in other circuits will be denied relief.

Second, even when the social visibility doctrine is upheld by the courts, it remains unclear whether social visibility is a requirement of, or simply a factor in, determining whether an applicant is a member of a particular social group. In some instances the courts mimic the BIA’s inconsistencies. For example, at least one court seemingly requires social visibility, but later in the same opinion declares it to be only a factor.<sup>199</sup> Others consider social visibility a factor among others to be considered in determining a particular social group.<sup>200</sup> In *C-A-*, the BIA relied heavily on the UNHCR Guidelines, which defined a particular social group as one that has members with an “immutable characteristic” or “who are perceived as a group by society.”<sup>201</sup> However, the BIA seemed to diverge from that interpretation by placing significant weight on whether the proposed group is socially visible.<sup>202</sup> In its 2007 amicus brief to the BIA, the UNHCR said “[i]t is not clear to us that the [BIA] meant to adopt such a [dual] requirement, particularly given that the [BIA] in [*In re*] *C-A-* referenced the definition set forth in the UNHCR Guidelines.”<sup>203</sup> The confusion on this issue was exacerbated in *A-M-E* when the BIA stated that

195. *Gatimi*, 578 F.3d at 616.

196. *Id.*

197. Memorandum from Joseph E. Langlois, Chief, Asylum Div. to All Asylum Office Staff (Mar. 2, 2010), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf>.

198. *Id.* at 3.

199. *E.g.*, *Contreras-Martinez v. Holder*, 346 F. App’x 956, 958-59 (4th Cir. 2009) (first stating social visibility as a requirement and later characterizing it as a criterion to consider).

200. *E.g.*, *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) (citing *A-M-E* & *J-G-U-*, 24 I. & N. Dec. 69, 74 (B.I.A. 2007)).

201. 23 I. & N. Dec. 951, 956, 960 (B.I.A. 2006) (citing *Guidelines on International Protection: “Membership of a Particular Social Group”*, *supra* note 55).

202. *See supra* notes 187-89 and accompanying text.

203. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae, *supra* note 180, at 6.

social visibility is “a factor in the particular social group determination” but also “reaffirm[ed] the requirement that the shared characteristic of the group should generally be recognizable by others in the community.”<sup>204</sup>

Because the BIA has failed to expand on this issue, the courts have taken positions on whether social visibility is a requirement or merely a factor to be considered when determining if a refugee is a member of a particular social group. Even within the BIA, it seems that judges decide when to apply social visibility and when to simply ignore it. For example, in *In re E-A-G-*, the BIA reaffirmed the “particular importance” of the social visibility doctrine in determining whether “young persons who are perceived to be affiliated with gangs” qualify as members of a particular social group.<sup>205</sup> Even though the BIA found that this proposed group did not qualify as a particular social group, it did concede that gang membership does “entail some social visibility” since members are “viewed with hostility by society at large.”<sup>206</sup> Only two years later, in *Urbina-Mejia*, the Sixth Circuit noted that “neither the immigration judge nor the [BIA] applied the social visibility test” to determine whether the applicant’s former gang membership in Honduras could be a particular social group.<sup>207</sup>

These cases illustrate the ultimate problem with the BIA’s social visibility doctrine: it is inconsistently applied by the BIA itself and by the circuit courts of appeals. Asylum and withholding of removal applicants are always proposing variations of particular social groups, and the ambiguities of the social visibility doctrine are making it increasingly difficult for the applicant to predict whether he or she will qualify as a refugee and obtain asylum or withholding of removal.

## V. CONCLUSION

In *Gatimi*, Judge Posner summarized the *Acosta* formulation as a two-part approach. First, he said, “if the ‘members’ have no common characteristics they can’t constitute a group,” and second, “if [the members] can change those characteristics . . . without [much] hardship, they should be required to do so rather than be allowed to resettle in America.”<sup>208</sup> If those members are targeted because of that characteristic, then they are very often perceived as a group in their societies, which would make the social visibility requirement superfluous.<sup>209</sup> So then, Judge Posner asked, how does social visibility assist

204. A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

205. 24 I. & N. Dec. 591, 594-95 (B.I.A. 2008) (internal quotation marks omitted).

206. *Id.* (internal quotation marks omitted).

207. *Urbina-Mejia v. Holder*, 597 F.3d 360, 367 n.3 (6th Cir. 2010).

208. *Gatimi v. Holder*, 578 F.3d 611, 614 (7th Cir. 2009).

209. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae, *supra* note 180, at 8.

in determining a particular social group?<sup>210</sup> Perhaps the concept of social visibility may be most relevant in determining the individual applicant's likelihood of persecution rather than in defining the group itself.<sup>211</sup> Meanwhile, in the midst of attempting to understand the doctrine and its objectives, courts could lose sight of the overall purpose of asylum law and overlook those individuals who need protection from persecution the most.

One of the most established public policy concerns of federal law is its uniform application to all individuals.<sup>212</sup> The social visibility doctrine is in its infancy, but its ambiguities have caused a rift between the circuit courts. As a result, the ability of persons to successfully seek asylum or withholding of removal is affected in large measure by the fortuity of the circuit in which the applicant's case is heard. The continuing discrepancies of the social visibility doctrine will only lead to a greater divide until the BIA clarifies the social visibility doctrine or until the Supreme Court ultimately decides the doctrine's fate.

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210. *Gatimi*, 578 F.3d at 616.

211. *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

212. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1614-15 (2008).



