



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR

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18 March 2009

Dear Attorney General Holder:

Subject: *Matter of S-E-G-*, 24 I & N Dec. 579 (BIA 2008)

I write to provide the support of the Office of the United Nations High Commissioner for Refugees' ("UNHCR") for the request by Respondents, Silvia Eulalia Gonzales Mira and her brothers, Pablo Alejandro and Rene Mauricio Mira, for certification and review of the Board of Immigration Appeals' ("Board") decision in *Matter of S-E-G-*, 24 I & N Dec. 579 (BIA 2008).

UNHCR is concerned with the Board's ruling in *Matter of S-E-G-* that in order to find membership in a particular social group as the basis for an asylum claim, it is a requirement that the "group have particular and well-defined boundaries, and that it possess a recognized level of social visibility." 24 I&N Dec. at 582 (citations omitted). These requirements diverge from the *UNHCR Guidelines on International Protection*: "*Membership of a particular social group*," HCR/GIP/02/02 (May 7, 2002) ("UNHCR Social Group Guidelines" or "UNHCR Guidelines") and are inconsistent with the object and purpose of the 1951 Convention relating to the Status of Refugees ("1951 Convention").

The Honorable Eric Holder
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Office of the Attorney General, Room 5114
Washington, DC 20530

Since it first introduced the notion of “social visibility” as a factor in social group cases in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), the Board has cited with favor the UNHCR Social Group Guidelines. While we fully support and encourage the Board and other asylum adjudicators to rely on the expertise and guidance of UNHCR when interpreting and applying the refugee definition,¹ unfortunately, in this instance, the Board’s references to the UNHCR Social Group Guidelines have misconstrued their meaning.

Of the five grounds for refugee protection, the “membership in a particular social group” ground has posed the greatest definitional challenges. The 1951 Convention does not itself provide a definition of this category, nor does the drafting history clarify how it should be interpreted.² While there is no “closed list” of potential social group categories, and this ground has been increasingly invoked to advance the evolutionary nature of the refugee definition, the social group ground also cannot become a “catch all” classification that “render[s] the other four Convention grounds superfluous.” UNHCR Social Group Guidelines ¶ 2. *See also* *Castillo-Arias v. U.S. Atty Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) (“*Acosta* strikes an acceptable balance between (1) rendering ‘particular social group’ a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering ‘particular social group’ a nullity by making its requirements too stringent or too specific.”). At the same time, a proper interpretation of the social group ground must be consistent with the object and purpose of the 1951 Convention. UNHCR Social Group Guidelines ¶ 2.

The UNHCR 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 purpose of the Global Consultations was to take stock of the state of law and practice in several areas of refugee status adjudication, to consolidate the various positions taken and to develop concrete

¹ 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, HCR/IP/4/Eng/REV.1 (1992) is internationally recognized as the key source of interpretation of international refugee law. The UNHCR Handbook as well as UNHCR’s more recent 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 US 421, 439 n.22 (1987); *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); *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003) (citing UNHCR Guidelines on International Protection: Membership of a Particular Social Group); *In re 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).

² The term “membership of a particular social group” was added near the end of the deliberations on the draft Convention but the *travaux* do not guide its interpretation. All that is recorded 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, at 14, U.N. Doc. A/Conf.2/SR.3 (July 3, 1951).

recommendations to achieve more consistent understandings of these various interpretative issues.

In surveying the practice in common law jurisdictions, the Social Group Guidelines at ¶¶ 5-7 identified two dominant approaches to social group interpretation: “protected characteristics” and “social perception.” The “protected characteristics” approach, embodied by the Board’s seminal and highly influential *Acosta* decision, 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. *Id.* ¶ 6. The “social perception” 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.” *Id.* ¶ 7 (emphasis added).

The UNHCR Guidelines determined it appropriate to reconcile these two approaches—and the protection gaps that could result if they remained separate—by “adopt[ing] a single standard that incorporates both dominant approaches” stating:

[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.

Id. ¶ 11 (emphasis added). The UNHCR Guidelines then clarified that the first step in this analysis is to determine whether the social 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 (emphasis added). This second inquiry is an alternative to be considered if and only if a determination is made 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 in a particular social group has been established and there the inquiry ends as to this aspect of the refugee definition.

The goal of the UNHCR Guidelines was to give validity to both approaches and was by no means intended to create a further requirement nor to serve as a basis to exclude otherwise eligible refugees from protection.

Moreover, 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 from the society at large. “Social perception” does not require that the common attribute must be visible to the naked eye in a literal sense of the term or that it be one that is easily recognizable to the general public. Nor is “social perception” meant to suggest a sense of community or group identification as might exist for members of an organization or association; members of a social group may not be visibly recognizable even to each other. Rather, the determination rests on whether a group is “cognizable” or “set apart from society at large” in some way.

In *Acosta*, as modified slightly in *Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987), the Board established a test for determining whether a fear is well-founded in the context of a claim based on social group membership. The second prong of that test that “the persecutor is already aware or could become aware” that the asylum-seeker possesses the belief or characteristic sought to be overcome, is a clear indication that the Board understood that the trait that forms the basis of a social group is not something necessarily visible on sight but rather something that could be learned or come into the awareness of a persecutor or, by extension, a society.

The Board’s statement in *S-E-G-* that the UNHCR Social Group Guidelines “endorse an approach in which an important factor is whether the members of the group are ‘perceived as a group by society’” is inaccurate. 24 I&N Dec. at 586 (quoting *Matter of C-A-*, 23 I&N Dec. at 956). The UNHCR Guidelines do address “visibility” stating: “[P]ersecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society.” UNHCR Guidelines ¶ 14 (emphasis added). However, this language relates to the role of persecution in defining a particular social group and is meant to illustrate how being targeted can, under some circumstances, lead to the identification or even the existence of a social group by its members having been set apart in some way that has rendered them subject to persecution. It is not intended to modify or develop the “social perception” approach, nor to define this approach as meaning “visibility” rather than “perception,” nor to establish or support “social perception” or “social visibility” as a requirement that must be met in every case in order to demonstrate membership of a social group. It is, in short, an illustration of the potential relationship between persecution and social group and nothing more.

The Board’s ruling in *Acosta* has provided a well-formulated and widely accepted standard for determining particular social group claims.³ The Board in *Acosta* did not require either a “social perception” or “social visibility” test, and UNHCR would caution against adopting the rigid approach articulated in *S-E-G-*, which may disregard groups that the Convention is designed to protect. For instance, the groups recognized by the Board in the past would be unlikely to meet the social visibility requirement; the general population in Cuba would not automatically recognize homosexuals,⁴ nor would average Salvadorans necessarily recognize former members of the national police,⁵ nor would a typical Togolese tribal member inevitably be aware of young women who opposed female genital mutilation but had not been subjected to the practice.⁶

³ As T. Alexander Aleinikoff noted in his paper, *Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group,’* p. 275, prepared as part of UNHCR’s Global Consultations on International Protection, the BIA’s approach in *Acosta* has been highly influential. “It was cited with approval and largely followed in the Canadian Supreme Court’s decision in *Canada (Attorney-General) v. Ward* [1993] 2 S.C.R. 689 (Can.) and has been widely cited in cases arising in other jurisdictions as well.” See, e.g., *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah*, UK House of Lords, [1999] 2 W.L.F. 1015; [1999] I.N.L.R. 144; *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) and Fornah (Appellant) v. Secretary of State for the Home Department (Respondent)*, (2006) 2006 UKHL 46 (U.K.).

⁴ *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990).

⁵ *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988).

⁶ *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996).

To ensure that refugees are appropriately recognized and protected in the United States, we urge you to accept certification of *Matter of S-E-G-* and to adopt an approach to analyzing the particular social group ground that is consistent with the Board's ruling in *Matter of Acosta*, UNHCR's Social Group Guidelines, and the object and purpose of the 1951 Convention.

We remain at your disposal should you wish to discuss this issue further or any issue impacting refugees or asylum-seekers.

Yours sincerely,



Thomas Albrecht
Deputy Regional Representative