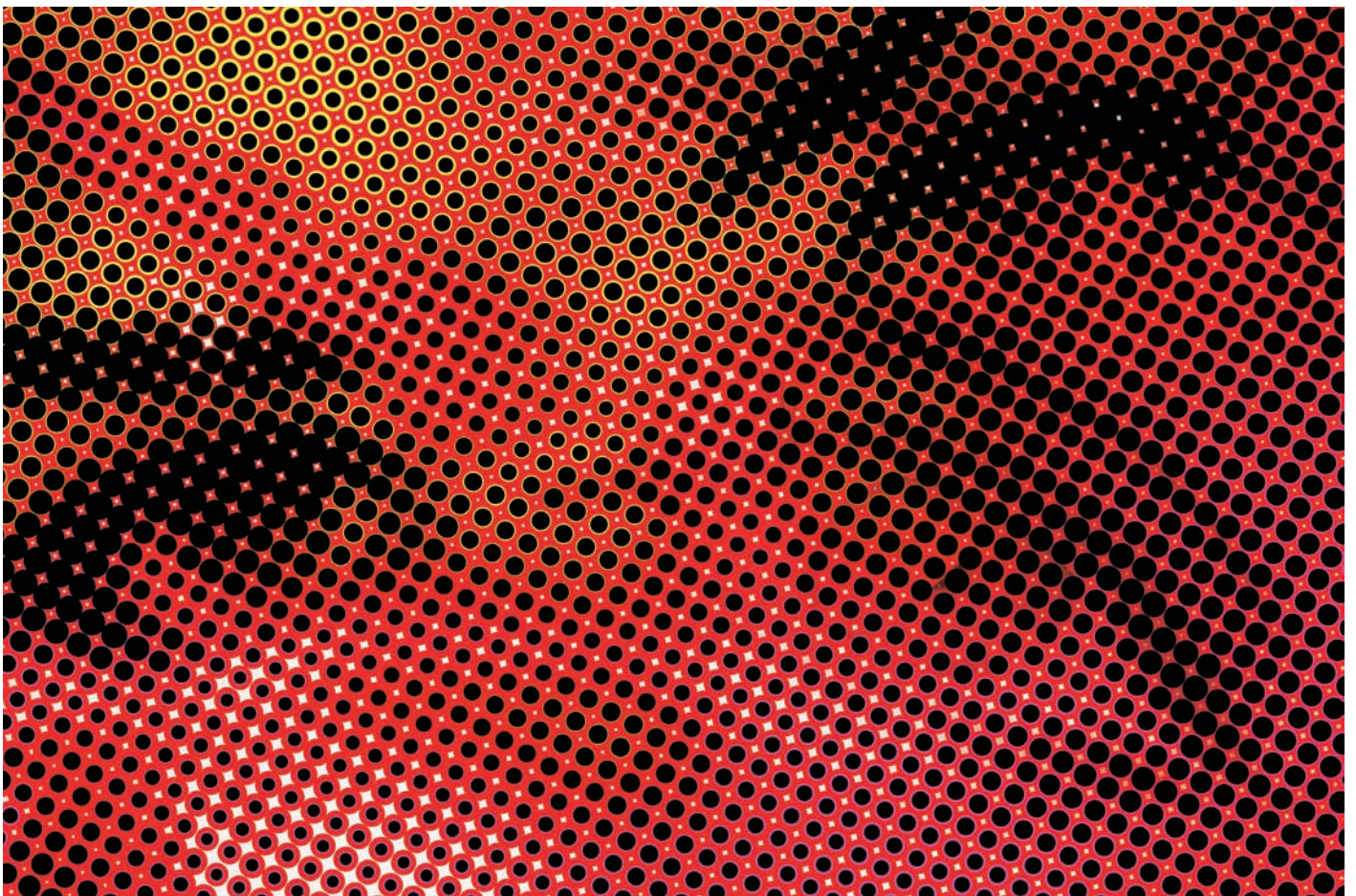


# Vanishing Visibility: How Particular Social Group Requirements Have Changed in the Third Circuit's Asylum Cases

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BY HON. DOROTHY A. HARBECK, AMELIA WILSON, RANA KASHLAN, AND HON. AMIENA A. KHAN

In reviewing an asylum denial based on fear of gang recruitment, the Third Circuit Court of Appeals takes the Board of Immigration Appeals to task over adding requirements to what constitutes a particular social group. The Third Circuit held that the addition of the requirements of “social visibility” and “particularity” were inconsistent with prior administrative and federal decisions. In this article, the authors detail this landmark ruling and the state of the law it impacts.



In a decision dated Nov. 8, 2011, the Third Circuit Court of Appeals significantly altered the field of asylum law for individuals seeking protection as members of a “particular social group” (PSG). In *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011) (*Valdiviezo-Galdamez II*), the court found that the addition of “social visibility” and “particularity” to the Board of Immigration Appeals’ (BIA) definition of “particular social group” is not entitled to *Chevron* deference. In reasoning that these requirements are inconsistent with prior administrative and federal decisions, the court effectively eliminated them until such time that the BIA either reconciles the incongruous decisions or gives a principled reason for adding new requirements. This ruling has changed the analysis that immigration courts must apply when reviewing categories of asylum seekers within the Third Circuit’s jurisdiction. It is significant to note, however, that several other circuits have afforded *Chevron* deference to the BIA’s “social visibility” and “particularity” requirements, as discussed herein. Also of importance is that, three weeks after the *Valdiviezo-Galdamez II* ruling was handed down, the Third Circuit applied its PSG standard in a Nov. 28, 2011 decision (*Garcia v. Att’y Gen.*, No. 10-1311, 2011 WL 5903780 (3d Cir. Nov. 28, 2011)), which may be instructional to courts in deciding how to rule in asylum cases based on the individual’s claim of membership in a particular social group.

### **Background of Asylum Law as Applied to Members of a Particular Social Group**

Immigration law falls exclusively within the federal domain. The term “immigration” is mentioned in the U.S. Constitution only as the idea relates to Congress’ authority to establish a uniform rule for naturalization. The U.S. Supreme Court held that the authority to either admit non-U.S. citizens into the United States or to exclude them is a fundamentally sovereign act.<sup>1</sup> The statutory and regulatory schemes governing immigration law are found at the federal level exclusively. The federal statute, the Immigration and Nationality Act (INA), and the corresponding regulatory sections under the Code of Federal Regulations govern all immigration actions. The INA refers to various criminal codes and provisions contained in the U.S. Code. The INA stands alone as its own body of law, but it is codified in the U.S. Code.

Section 208 of the INA gives the attorney general the power to grant discretionary protection to removable non-U.S. citizens (aliens) who fear persecution in their country of origin.<sup>2</sup> That protection is uniquely extended to those individuals who establish that they qualify as “refugees,” defined as a person who is outside his or her country of nationality or last habitual residence and is unable or unwilling to return because of persecution in that country or because of a well-founded fear of future persecution. The fear of persecution must be on account of an individual’s race, religion, nationality, political opinion, or membership in a PSG.<sup>3</sup> In the case of Withholding of Removal under INA § 241(b)(3), it is the alien’s burden to establish that the persecution will occur with “clear probability,”<sup>4</sup> is “more likely than not” to occur<sup>5</sup> (although the specific nuances of

the two forms of relief are not the subject of this article).

Specifically addressing the category of PSG, an alien must (1) clearly identify the social group, (2) establish his or her membership in that group, and (3) demonstrate a nexus between membership in that PSG and the persecution that is likely to occur.<sup>6</sup>

Because the INA does not define the term “particular social group” and because the legislative intent is unclear, courts have interpreted the term and developed their own definitions over time. In *Fatin v. INS*, the Third Circuit adopted the Board of Immigration Appeals’ *Acosta* definition of a PSG as “a group of persons all of whom share a common, immutable characteristic.”<sup>7</sup> The shared characteristic may be innate—such as gender, color, or kinship ties—or it may be a shared past experience. The Third Circuit held that “whatever the common characteristic that defines the group, it 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.” The alien has the burden to define the social group,<sup>8</sup> and the definition the alien provides should include an exact delineation of the social group to which he or she belongs.<sup>9</sup>

In earlier reported decisions, the Third Circuit rejected a generalized, sweeping classification for purposes of PSG. Initially, the Third Circuit in *Lukwago v. Ashcroft* followed the Second Circuit’s 1991 decision in *Gomez v. INS*. Specifically, the *Lukwago* court cited the *Gomez* ruling, stating, “[P]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.”<sup>10</sup> Second, in rejecting “homeless Honduran street children” as a PSG, the court in *Escobar v. Gonzales* reasoned that “poverty, homelessness and youth are far too vague and all encompassing to be characteristics that set the perimeters for a protected ground.”<sup>11</sup> Therefore, the mere existence of shared descriptive characteristic is insufficient to qualify the individuals who have the common characteristic as members of a PSG.<sup>12</sup> The PSG “[m]ust exist independently of the persecution suffered by the applicant for asylum.”<sup>13</sup>

Historically, the Third Circuit has declined to include a “visibility” component in its discussions of particular social groups. Put another way, the Third Circuit had not required that an individual be outwardly apparent or identifiable to society at large as a member of a proposed PSG in order to qualify for asylum. In *Lukwago*, the court held that a former child soldier who had escaped captivity by a guerrilla group was indeed a member of a PSG (but denied his appeal on other grounds).<sup>14</sup> In *Gomez-Zuluago v. Att’y Gen.*, the Third Circuit held that Colombian women who escaped involuntary servitude after being abducted and confined by a guerrilla group qualified as a PSG.<sup>15</sup> In *Gomez-Zuluago*, the court noted that the guerrillas’ desire to “fill their ranks” did not put the alien into a PSG; however, her status as a person who escaped involuntary servitude was based on a past experience and therefore was an immutable characteristic that was “narrow and distinctive.” The *Gomez-Zuluago* court did not discuss the applicant’s potential identification as a “FARC [Fuerzas Armadas Revolucionarias de Colom-

bia/Revolutionary Armed Forces of Colombia] escapee” by society in general, but only by her persecutors: “It is precisely Petitioner’s escapee status that is likely to motivate the FARC to seek her and persecute her in the future.” The *Gomez-Zuluaga* decision preceded the issuance of the two subsequent BIA rulings that formally mandated the criteria of “social visibility” and “particularity” in all PSG analyses, as discussed below.

### “Social Visibility” and “Particularity” Emerge as Requirements in Establishing a Particular Social Group and Give Rise to Subsequent Challenges

In 2006, the BIA decided *Matter of C-A-*, which included a level of “social visibility” as an important factor in identifying a PSG.<sup>16</sup> The board stated the following:

Given the voluntary nature of the decision to serve as a government informant, *the lack of social visibility of the members of the purported social group*, and the indications in the record that the Cali cartel retaliates against anyone perceived to have interfered with its operations, we find that the respondent has not demonstrated that noncriminal drug informants working against the Cali drug cartel constitute a “particular social group” as that term is used in the definition of a “refugee” in section 101(a)(42)(A) of the Act. (emphasis added)

In its decision, the board also referred to the “particularity” of a defined social group.

“Social visibility” and “particularity” evolved into requirements of the BIA’s analysis of the components of a PSG. In *Matter of S-E-G-*, which was decided in 2008,<sup>17</sup> the proposed social group was Salvadoran youth who repudiated the MS-13 gang’s recruitment efforts based on “personal, moral, and religious opposition to the gang’s values and activities.” In its ruling, the board cited its decision in *Matter of C-A-* as precedent for its holding that the proposed social group lacked social recognition: “There is little in the background evidence of record to indicate that Salvadoran youth who are recruited by gangs but refuse to join ... *would be perceived as a group by society*, or that these individuals suffer from a higher incidence of crime than the rest of the population.” (emphasis added) The BIA also found that the proposed group was too amorphous and included too many potential members to be sufficiently “particular” to qualify as a PSG.

In support of its holding, the BIA makes explicit reference to guidelines provided by the United Nations High Commissioner for Refugees (UNHCR), which conclude that “social visibility” is crucial in any analysis of particular social group: “In addition, we referred [in *Matter of C-A-*] to the 2002 guidelines of the United Nations High Commissioner for Refugees, which endorse an approach in which an important factor is whether the members of the group are ‘perceived as a group by society.’” *Matter of C-A-*, *supra*, at 956 (quoting 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, ¶ 11 (May 7, 2002)).

Ironically, however, UNHCR argues in its amicus brief in support of a pending challenge to *Matter of S-E-G-* in the Eighth Circuit that the “social visibility” test relied upon in *Matter of S-E-G-* was an alternative analysis not a mandatory one: “As articulated in the UNHCR Guidelines, there are two separate, alternative tests for defining a PSG: 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* [sic], 19 I. & N. Dec. 211, 233 (BIA 1985).” Nevertheless, the UNHCR does concur that the “social visibility” approach should be applied when there is an absence of a clear “immutable or fundamental characteristic.”

In *Matter of E-A-G-*,<sup>18</sup> also decided in 2008, the Board of Immigration Appeals again analyzed “social visibility” in the context of what constituted a particular social group: “[W]e find that the particular social group identified by the Immigration Judge as ‘persons resistant to gang membership’ lacks the social visibility that would allow others to identify its members as part of such a group.” Analogous to *Matter of S-E-G-*, the applicant in *Matter of E-A-G-* defined his PSG as persons resistant to gang membership. The BIA also found there was a lack of “particularity,” holding that individuals who resist gangs do not constitute “a segment of the population in any meaningful respect.”

Subsequent to *Matter of S-E-G-* and *Matter of E-A-G-*, several circuits have reviewed the evolution of the BIA’s case law defining PSG. Significantly, the First, Second, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have all afforded *Chevron* deference to the “social visibility” requirement.<sup>19</sup> The Second, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have also implicitly approved of or explicitly given deference to the “particularity” requirement.<sup>20</sup>

However, in a strongly worded decision handed down in *Benitez Ramos v. Holder*, the Seventh Circuit Court of Appeals rejected the BIA’s “social visibility” requirement.<sup>21</sup> The court held that “‘visibility’ in the literal sense in which the Board has sometimes used the term might be relevant to the likelihood of persecution, but it is irrelevant to whether if there is persecution it will be on the ground of group membership. Often it is unclear whether the Board is using the term ‘social visibility’ in the literal sense or in the ‘external criterion’ sense, or even whether it understands the difference.”

The Fourth Circuit Court of Appeals, meanwhile, rebuffed the BIA’s assessment that “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” lacked “social visibility” but otherwise did not reach the point where the question of whether “visibility” analysis is appropriate.<sup>22</sup>

### In *Valdiviezo-Galdamez II*, the Third Circuit Rejects Recent Board Decisions Regarding “Social Visibility” and “Particularity,” Relying on the Doctrine of *Chevron* Deference

*Valdiviezo-Galdamez I* was originally remanded to the Board of Immigration Appeals in 2007 so that the board

could consider whether resistance to gang recruitment constituted a PSG.<sup>23</sup> In this case, the petitioner was a native of Honduras who allegedly had been the victim of attempted forced gang recruitment and who had faced retributive action by the gang on account of his resistance. However, subsequent to the remand, the BIA issued *Matter of S-E-G-* and *Matter of E-A-G-* (discussed above). Therefore, on remand, the board held that, pursuant to the “closely analogous” precedent of *Matter of S-E-G-* and *Matter of E-A-G-*, the board was compelled to find that the petitioner had failed to meet his burden of proof. *Valdiviezo-Galdamez II* was orally argued before the Third Circuit on Feb. 3, 2010 and decided on Nov. 8, 2011.

### **Facts and Procedural History**

At his removal hearing, the petitioner admitted removability but submitted an asylum application as a defense to deportation on the grounds that he would face persecution by the MS-13 gang, which had already threatened, robbed, shot at, kidnapped, and beat him because of his resistance to their recruitment efforts. He filed five police reports but claimed that police did not respond or offer protection of any kind.

The immigration judge denied the petitioner’s applications for relief on the basis that he did not establish the following claims:

- The Honduran government refused to protect him and the refusal was “on account of” one of the five enumerated grounds under asylum law.
- There was a strong enough nexus to the articulated social group.
- The petitioner could not relocate within Honduras to find safety.

In his appeal to the Board of Immigration Appeals, the petitioner argued that he belonged to the PSG of “Honduran youth who have been actively recruited by gangs but have refused to join because they oppose the gangs.” The board affirmed the judge’s decision to deny the petitioner’s application.

On appeal to the Third Circuit, the court vacated the BIA’s ruling and remanded the case for further proceedings, finding that the substantial evidence submitted in the case did not support the immigration judge’s finding that the petitioner had failed to establish a nexus and country-wide fear. The Third Circuit also instructed the BIA to determine whether young Honduran men constituted a PSG; whether the injuries to the petitioner rose to the level of persecution; and whether, in light of the Third Circuit’s decision in *Silva-Rengifo*,<sup>24</sup> the government “acquiesced to torture” and made the petitioner eligible for relief under the Convention Against Torture. On remand, the Board of Immigration Appeals again rejected the petitioner’s proposed social group, this time relying on its holdings in *Matter of S-E-G-* and *Matter of E-A-G-*, which had been decided in the interim, finding a lack of “particularity” and “social visibility.”<sup>25</sup>

When the petitioner appeared before the Third Circuit

yet again, he now argued that the BIA’s decision was erroneous for several reasons, including, but not limited to the following:

- The Board of Immigration Appeals had erred by applying a new standard to determine membership in a PSG.
- The board’s requirements of “social visibility” and “particularity” were contrary to the intent of the statute.
- The board’s requirements of “social visibility” and “particularity” are not entitled to *Chevron* deference,<sup>26</sup> because the imposition of a “social visibility” requirement effectively revoked previously acknowledged groups.

The Third Circuit agreed with aspects of the petitioner’s argument in several field-altering ways.

### **Third Circuit’s Majority Holding and Rationale**

The Third Circuit rejected several arguments, however. The court held that the board had not applied a new standard to determine membership in a PSG. The court explained that, although *Matter of S-E-G-* and *Matter of E-A-G-* were decided after the petitioner’s deadline to file a brief, the concepts of “social visibility” and “particularity” did not originate in those cases; rather, the concepts arose earlier in *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006) and *Matter of A-M-E & J-G-U*, 24 I&N Dec. 69 (BIA 2007). The court also rejected the petitioner’s argument that the BIA’s interpretation was contrary to the intent of the statute, reasoning that the INA’s statutory language, legislative history, and negotiations during the international agreement are not very instructive as to the meaning of PSG.

The court, however, held that the “social visibility” requirement was inconsistent with past BIA decisions and that the board had not announced a principled reason for its adoption of this inconsistent requirement; therefore, proving “social visibility” was an unreasonable additional requirement. The court discussed the board’s previous recognition of a number of groups as PSG even when the group was not socially visible or recognizable but, instead, possessed an internal characteristic—for example, women who are opposed to female genital mutilation (*Matter of Kasinga*), homosexuals required to register in Cuba (*Matter of Toboso-Alfonso*), and former members of El Salvador’s national police force (*Matter of Fuentes*). The court found that “[i]f members of any of these groups applied for asylum today, the Board’s ‘social visibility’ requirement would pose an insurmountable obstacle” in prevailing on the merits of those claims. The court concluded that such a situation meant that the agency was adjudicating “claims of social group status inconsistently, or irrationally” and, therefore, found that the “social visibility” requirement is an “unreasonable addition” to the definition of PSG.

The Third Circuit also cited to the Seventh Circuit’s decisions in *Gatimi v. Holder* and *Benitez Ramos v. Holder* (discussed above), in which the Seventh Circuit criticized the “social visibility” requirement, stating that it “makes no

sense.” The Seventh Circuit noted that, in the case of un-circumcised women or homosexuals, members of those groups deliberately conceal their membership in an effort to avoid persecution. The Third Circuit remarked that, in the *Valdiviezo-Galdamez II* case, the government’s distinction between “the existence of a unifying characteristic that makes the members understood by others in society to constitute a social group or recognized as a discrete group in society” and “on-sight visibility” as not actually being a distinction at all. The court also held that the “particularity” requirement imposed by the BIA was also not entitled to *Chevron* deference. The government had argued that “particularity” was distinct from “social visibility” because “‘social visibility’ assesses whether the applicant has identified a group with a unifying characteristic that is perceived as discrete or set apart by the society, while ‘particularity’ examines whether the proposed unifying characteristic for the proposed group is definable, as opposed to being too diffuse or subjective.”

The Third Circuit Court was not persuaded by this distinction, writing that

We are hard pressed to discern any difference between the requirement of “particularity” and the discredited requirement of “social visibility.” Indeed, they appear to be different articulations of the same concept and the government’s attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating. ... We therefore hold that adopting a “particularity” requirement is unreasonable because it is inconsistent with many of the Board’s prior decisions.

The court reasoned that, because “social visibility” and “particularity” were indistinct, they both “suffer[ed] from the same infirmity.”

In its remand, the court directed the Board of Immigration Appeals to either explicitly choose between the new analytical approach and the old one or reconcile the two competing interpretations in a coherent way. The court noted that the BIA was permitted to reconfigure its definition of PSG, provided that its reformulation comports with prior precedent, or that it proposes a “principled reason” based on a permissible construction of the statute for the change. If the BIA chooses to adopt “particularity” and “social visibility” as requirements for a PSG, it must also remand the case to the immigration judge for further factual development.

### Third Circuit Applies *Valdiviezo-Galdamez II* Standard

In the weeks following the *Valdiviezo-Galdamez II* decision, many immigration law practitioners and analysts debated about the impact the court’s finding and the BIA’s subsequent determination would have on future PSG-related asylum hearings before immigration courts. Recently, the Third Circuit decided *Garcia v. Att’y Gen.*, which sets forth criteria to be used in applying the standard. In *Garcia v. Att’y Gen.*, No. 10-1311, 2011 WL 5903780 (3d Cir. Nov. 28, 2011), the court reiterated that *Acosta* governs the

standard for determining what constitutes a PSG. Under *Acosta*,<sup>27</sup> a PSG is defined as—

a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. ... [T]he common characteristic that defines the group, it 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.

In its finding in *Garcia*, the Third Circuit unequivocally adopted the *Acosta* formulation of a PSG. The court specifically held that a witness for a criminal prosecution in Guatemala “shares a ‘common, immutable characteristic’ with other civilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Central America. It is a characteristic that members cannot change because it is based on past conduct that cannot be undone. To the extent that members can recant their testimony, they ‘should not be required to’ do so.”

### Conclusion

The *Garcia* decision, issued three weeks after the *Valdiviezo-Galdamez II* ruling was handed down, is indicative of the Third Circuit’s intent not to rely on “social visibility” and “particularity.” However, the Board of Immigration Appeals still has the opportunity to provide a principled reason for its reformulation of a PSG. The *Garcia* court stated that, “[u]ntil the [Board of Immigration Appeals] provides an analysis that adequately supports its deviation from *Acosta*, we remain bound by the well-established definition of ‘particular social group’ found in *Fatin*.”<sup>28</sup> The Third Circuit’s recent decisions will force the agency to revisit the issue and will have an impact on many categories of asylum seekers. The decisions also create a sharp split among the circuits and could increase the viability of any new certiorari petitions before the U.S. Supreme Court, where the issue may ultimately have to be decided. **TFL**

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*Khan, and Rana Kasblan are writing in their personal capacities; their views expressed herein do not necessarily represent nor reflect the viewpoints of the U.S. Department of Justice, the Executive Office for Immigration Review, the Board of Immigration Appeals, the Office of the Chief Immigration Judge, or the Immigration Courts. Note: The preceding disclaimer must accompany the article if reprinted. The authors thank Immigration Judge Mirlande Tadal and Department of Homeland Security Assistant Chief Counsel Lisa Golub-Gonzalez for their helpful comments. © 2012 Hon. Dorothy A. Harbeck, Amelia Wilson, Rana Kasblan, and Hon. Amiena A. Khan. All rights reserved.*

## Endnotes

<sup>1</sup>*Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); *Knauff v. Shaughnessy*, 388 U.S. 537 (1950).

<sup>2</sup>INA § 208(b)(1).

<sup>3</sup>INA § 101(a)(42)(A).

<sup>4</sup>*INS v. Stevic*, 467 U.S. 407 (1984); INA § 241(b)(3).

<sup>5</sup>See *Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *Lin v. INS*, 238 F.3d 239, 244 (3d Cir. 2001); *Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997).

<sup>6</sup>*Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996).

<sup>7</sup>*Fatin v. INS*, 12 F.3d at 1239 (quoting *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)).

<sup>8</sup>8 C.F.R. § 1208.16 (b); see also *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).

<sup>9</sup>*Matter of A-T-*, 25 I&N Dec. 4 (BIA 2009).

<sup>10</sup>*Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (quoting *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991)).

<sup>11</sup>*Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005).

<sup>12</sup>*Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999).

<sup>13</sup>*Lukwago*, 329 F.3d at 172.

<sup>14</sup>*Lukwago*, 329 F.3d at 180 (“Based on the record, we conclude that substantial evidence does not support the BIA’s determination that the group of escaped child soldiers is in no greater danger from the Lord’s Resistance Army (LRA) than other members of the Ugandan population. Even if the group of former child soldiers were not in markedly more danger from the LRA, Lukwago’s fear that

he personally will suffer future persecution by the LRA if returned to Uganda may be well founded.”).

<sup>15</sup>*Gomez-Zuluaga v. Att’y Gen.*, 527 F.3d 330 (3d Cir. 2008).

<sup>16</sup>*Matter of C-A-*, 23 I&N Dec. 951, 960 (BIA 2006).

<sup>17</sup>*Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); Brief of Amici Curiae UNHCR at 4, *Granados-Gaitan v. Holder*, No. 10-1724 (brief filed on July 13, 2010).

<sup>18</sup>*Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008).

<sup>19</sup>See *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007); *Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008); and *Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006).

<sup>20</sup>See *Ucelo-Gomez*, 509 F.3d at 73–74; *Davila-Mejia*, 531 F.3d at 628–29; *Santos-Lemus*, 542 F.3d at 745–46; *Castillo-Arias*, 446 F.3d at 1198–9.

<sup>21</sup>*Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

<sup>22</sup>*Crespin Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).

<sup>23</sup>*Valdiviezo-Galdamez v. Att’y Gen.*, 502 F.3d 285 (3d Cir. 2007); *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582 (3d Cir. 2011).

<sup>24</sup>*Silva-Rengifo v. Atty. Gen.*, 473 F.3d 58 (3d Cir. 2007).

<sup>25</sup>The Board of Immigration Appeals also found that the petitioner’s claim of persecution on account of political opinion was foreclosed by *Elias-Zacarias*, 502 U.S. 478 (1992), and that the petitioner had failed to show political motive in resisting gang recruitment. Lastly, the board again rejected the petitioner’s convention against torture claim, holding that the petitioner had failed to show conduct rising to the level of torture, and that even assuming, arguendo, that future persecution is more likely than not, the petitioner had not established that the government acquiesced to the torture.

<sup>26</sup>*Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

<sup>27</sup>*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

<sup>28</sup>*Garcia*, \_\_ F.3d \_\_, No.10-1311, 2011 WL 5903780, at \*6, n.5.

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