

## RECENT DEVELOPMENT

### *Rreshpja v. Gonzales*: The Sixth Circuit’s Failure To Consider Gender’s Place in Asylum Claims

I.	OVERVIEW .....	623
II.	BACKGROUND.....	624
	A. <i>Human Trafficking</i> .....	624
	B. <i>Asylum Law and Refugee Status</i> .....	625
	C. <i>Gender-Based Asylum Claims and Members of a         “Particular Social Group”</i> .....	626
III.	THE COURT’S DECISION .....	631
IV.	ANALYSIS .....	633
	A. <i>Contravention of Established BIA Definition</i> .....	633
	B. <i>Contradiction with Domestic and International         Precedent</i> .....	637
	C. <i>Unwarranted Fears of “Floodgate” Claims</i> .....	638
V.	CONCLUSION .....	640

#### I. OVERVIEW

Fearing forced prostitution, Albanian citizen Vitore Rreshpja sought safety in the United States in November of 2001.<sup>1</sup> Five months prior to her departure from Albania, a man unsuccessfully attempted to kidnap her as she walked home from school in June.<sup>2</sup> Rreshpja’s attacker called out after her that she “should not get too excited because she would end up on her back in Italy, like many other girls.”<sup>3</sup> Rreshpja feared this statement was a threat that she would be kidnapped and forced into prostitution in Italy.<sup>4</sup> Even though she reported the incident to the police, they did not pursue the unknown attacker because they had insufficient information to identify or arrest him.<sup>5</sup> As a result, her family made arrangements for Rreshpja to enter the United States as an F-1

---

1. *Rreshpja v. Gonzales*, 420 F.3d 551, 553 (6th Cir. 2005).  
2. *Id.*  
3. *Id.*  
4. *See id.*  
5. *See id.*

nonimmigrant visa holder so that she could stay with her older brother in Howell, Michigan, and remain safe from forced prostitution.<sup>6</sup>

In June 2002, the Immigration and Naturalization Service (INS)<sup>7</sup> initiated removal proceedings against her after Michigan State University denied her enrollment for use of fraudulent immigration documents.<sup>8</sup> At a hearing before an immigration judge (IJ) in Detroit, Michigan, Rreshpja conceded to using fraudulent immigration documents upon entering the United States; however, she submitted applications for asylum, withholding of removal, and protection under the Convention Against Torture (CAT) for fear of forced prostitution in Albania.<sup>9</sup> The IJ denied her application and the Board of Immigration Appeals (BIA) affirmed.<sup>10</sup> As a result, Rreshpja filed a petition for review with the United States Court of Appeals for the Sixth Circuit.<sup>11</sup> The Sixth Circuit *held* that an alien from Albania, who feared being kidnapped and forced into prostitution, was not a member of any social group other than that of young, attractive women, which did not qualify as a particular social group (PSG) for asylum purposes. *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Cir. 2005).<sup>12</sup>

## II. BACKGROUND

### A. *Human Trafficking*

"Slavery is not dead. Sex trafficking is a contemporary form of slavery that violates women's fundamental human rights."<sup>13</sup> An estimated

---

6. *See id.*

7. As of March 2003, the INS is now known as the United States Citizenship and Immigration Services (USCIS). It is within the Department of Homeland Security. Previously, the INS was part of the Department of Justice. Because these proceedings took place before this reorganization, this Article will refer to the government agency as the INS.

8. *Rreshpja*, 420 F.3d at 553-54.

9. *Id.* at 553. Asylum, withholding of removal, and the CAT are the three methods of relief for an alien facing deportation. The CAT is formally referred to as the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

10. *Rreshpja*, 420 F.3d at 554.

11. *See id.*

12. The Sixth Circuit also held that the police's inability to solve the attempted kidnapping, in addition to the continued problem of human trafficking in Albania, did not compel a finding that the Albanian government acquiesced in forcing Albanian women into prostitution. *Id.* at 557. For purposes of this Note, only the first holding will be discussed.

13. Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted To Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 318 (2005). For a complete definition of human trafficking, see the Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/383 (Nov. 15, 2000).

four million women were trafficked around the world in 2000.<sup>14</sup> Forced prostitution is one form of human trafficking, an exploitation so prevalent that the slave trade of women and children ranks as the third most profitable market in the world.<sup>15</sup> Forced prostitution generally has been regarded as a gender-based claim of persecution.<sup>16</sup> While the United Nations High Commissioner for Refugees (UNHCR) specifically considers trafficking for forced prostitution as a form of persecution for asylum purposes, asylum law varies by country and jurisdiction. Victims trafficked for prostitution are, thus, inconsistently granted asylum.<sup>17</sup>

### B. *Asylum Law and Refugee Status*

Asylum law in the United States is rooted in the 1951 United Nations Convention Relating to the Status of Refugees (Refugees Convention) and the 1967 United Nations Protocol Relating to the Status of Refugees (Refugees Protocol).<sup>18</sup> In response to these international agreements, the United States amended the Immigration and Nationality Act (INA) in 1952 to enhance the protection of refugees.<sup>19</sup> Under the INA, if an alien faces removal proceedings and has a persecution claim in one's home country, that person may be able to assert a claim for asylum as a defense against deportation if qualifying as a refugee.<sup>20</sup> To

---

14. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, at 24, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) (prepared by Radhika Coomaraswamy). However, human trafficking data is relatively inconsistent due to the difficulty in gathering data. According to the United States Department of State, 600,000 to 800,000 people are trafficked each year, eighty percent being women. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7 (2005)*, available at <http://www.state.gov/documents/organization/47255.pdf> [hereinafter 2005 TIP REPORT].

15. Anna Marie Gallagher, *Triply Exploited: Female Victims of Trafficking Networks—Strategies for Pursuing Protection and Legal Status in Countries of Destination*, 19 GEO. IMMIGR. L.J. 99 (2004).

16. Gender-based persecution includes, but is not limited to, female trafficking for prostitution, sexual slavery, forced marriage, female genital mutilation, infanticide, bride burning, and rape. See Danette Gomez, *Last in Line—The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 959-60 (2004) (stating gender-based persecution includes “forms of violence suffered by women, simply because they are women”).

17. Gallagher, *supra* note 15, at 108; Gomez, *supra* note 16, at 959-60.

18. Convention Relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter Refugees Convention]; Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267 [hereinafter Refugees Protocol]. The United States aligned itself with these international guidelines when it signed the Protocol in 1968. See Gomez, *supra* note 16, at 961.

19. Gomez, *supra* note 16, at 961; Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1537, § 1101(a)(42) (2000). Although the United States has never been party to the 1951 Convention, it is a party to the Protocol, which incorporates the Convention's definition in relevant part. See 19 U.S.T. 6225, T.I.A.S. No. 6577 (1968).

20. 8 U.S.C. § 1158(b)(1) (2000). Refugee status does not entitle the alien to a grant of asylum since that is decided at the Attorney General's discretion. *INS v. Cardoza-Fonseca*, 480

qualify as a refugee, an alien must be outside one's country of origin and must be unable or unwilling to return to that country of origin due to either past persecution or a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion."<sup>21</sup> If an asylum applicant can establish past persecution based on one of the above enumerated grounds, that person is entitled to a presumption of a well-founded fear of persecution.<sup>22</sup> However, if an asylum applicant cannot show past persecution, that person must show a well founded fear of persecution that is "subjectively genuine and objectively reasonable."<sup>23</sup>

### C. *Gender-Based Asylum Claims and Members of a "Particular Social Group"*

The judiciary's treatment of gender-based asylum claims has been an ongoing problem internationally.<sup>24</sup> The narrow drafting of the Refugees Convention (and similarly the INA) results in many women being denied asylum because their gender-based persecution does not qualify as an enumerated ground for refugee status.<sup>25</sup> Recognizing the

U.S. 421, 428 n.5 (1987). An alien must file an asylum application within one year of one's arrival in the United States or the asylum claim will be barred. 8 U.S.C. § 1158(a)(2)(B). However, if an alien can show "extraordinary circumstances relating to the delay in filing," the time bar can be set aside. *Id.* § 1158(a)(2)(D); *id.* § 1101(a)(42).

21. *Id.* § 1101(a)(42)(A); *see also* Refugees Protocol, *supra* note 18, art. I(2) (incorporating by reference article 1(a)(2) of the Refugees Convention). One of the primary purposes Congress adopted this definition was "to bring United States Refugee law into conformance with the [Protocol]." *Cardoza-Fonseca*, 480 U.S. at 436.

22. *See Rreshpja v. Gonzales*, 420 F.3d 551, 554 (6th Cir. 2005) (quoting *Mikhailevitch v. INS*, 146 F.3d 384, 389 (6th Cir. 1998) (citing 8 C.F.R. § 1208.13(b)(1)(i))). However, the INS may rebut the presumption by establishing that the conditions of the alien's country have changed to such an extent that the alien no longer has a well-founded fear of persecution if she were to return. *Id.* at 555 (citing 8 C.F.R. § 1208.13(b)(1)(i)(A)).

23. *Id.* at 555. The United States Supreme Court has determined that a "well founded fear" can exist if there is a one-in-ten chance that the feared event will happen. *Cardoza-Fonseca*, 480 U.S. at 431. The INA does not define "persecution." For a discussion on what constitutes persecution, see Dep't of Justice, *Proposed Rules: Asylum and Withholding Definition*, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) [hereinafter *Department of Justice Proposed Rules*]. Additionally, the United States published framework regulations for gender-based asylum claims, the main purpose considering gender as a ground for membership in a particular social group. The regulations, however, were suspended upon President George W. Bush's entrance into office. *See Gomez*, *supra* note 16, at 963.

24. *See generally Gomez*, *supra* note 16 (discussing the history of gender-based asylum claims).

25. *See supra* note 16 and accompanying text. According to the UNHCR, while men and boys are also often victims of sexual violence, "statistics confirm that the majority of victims/survivors are women and girls." *See* U.N. HIGH COMM'R FOR REFUGEES, SEXUAL AND GENDER BASED VIOLENCE AGAINST REFUGEES, RETURNEES, AND INTERNALLY DISPLACED

problematic nature of the Refugees Convention and the Refugees Protocol, the UNHCR attempted to remedy the exclusion of gender from the refugee definition by issuing a report in 1985 regarding the unique problems facing refugee women.<sup>26</sup> Specifically, the Committee recognized that women refugees who are persecuted on account of their opposition to social traditions need protection and therefore should qualify as members of a PSG.<sup>27</sup> This protection was extended in 1991 by the UNHCR Guidelines on the Protection of Refugee Women, which proposed measures that could be used to recognize evolving problems facing women refugees.<sup>28</sup>

Following the United Nations effort, the United States attempted to deal with the specific problems facing women refugees by adopting the Considerations for Asylum Officers Adjudicating Asylum Claims from Women (INS Gender Guidelines) in 1995.<sup>29</sup> While not binding on IJs, the BIA, or federal courts, asylum officers are required to read the INS Gender Guidelines.<sup>30</sup> The purpose of the guidelines is to provide suggestions on how to handle gender based claims.<sup>31</sup> The INS Gender Guidelines consider gender to be an immutable trait that can qualify as a particular social group characteristic.<sup>32</sup>

Ultimately, the UNHCR realized that controversies surrounding gender-based asylum claims stemmed from the confusion over whether gender can qualify an alien as a member of a PSG under the refugee definition.<sup>33</sup> The UNHCR therefore published guidelines for the

---

PERSONS, GUIDELINES FOR PREVENTION AND RESPONSE 6 (2003) [hereinafter SEXUAL & GENDER BASED VIOLENCE].

26. See Gomez, *supra* note 16, at 962 (citing U.N. HIGH COMM'R FOR REFUGEES EXECUTIVE COMM., REFUGEE WOMEN AND INTERNATIONAL PROTECTION (1985)).

27. See *id.* Since gender is not one of the protected enumerated grounds under the refugee definition, gender-based asylum claims are most frequently argued to be grounds for membership in a particular social group. See Lori A. Nessel, "Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 102 (2004).

28. See Gomez, *supra* note 16, at 962-63 (citing U.N. HIGH COMM'R FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (1991)). Protection for women refugees was further developed by the United Nations in 2003, when the UNHCR created guidelines for sexual and gender-based violence against refugees, SEXUAL & GENDER BASED VIOLENCE, *supra* note 25.

29. See Memorandum from Phyllis Coven, Office of Int'l Affairs, Dep't of Justice, *Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (May 26, 1995) [hereinafter *INS Gender Guidelines*].

30. See Nessel, *supra* note 27, at 101.

31. *Id.*; see also sources cited *supra* note 23.

32. *INS Gender Guidelines*, *supra* note 29, at 4.

33. The United States is not alone with regard to this issue. Courts in Canada, the United Kingdom, and Australia have been divided on whether women qualify for asylum as a member of

definition of a particular social group (UNHCR Group Guidelines) in 2002 and suggestively defined a PSG 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, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>34</sup>

The UNHCR has stressed that membership in a PSG "should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."<sup>35</sup>

The Supreme Court of the United States, however, concluded that UNHCR guidelines are not binding on U.S. courts.<sup>36</sup> Although the Court recognized that the UNHCR's analysis "provides *significant* guidance in construing the Protocol[']s definition of 'refugee'", to which Congress sought to conform.<sup>37</sup> The federal circuit courts generally have followed suit when deciding difficult questions of asylum or refugee law.<sup>38</sup> Yet, courts have had difficulty establishing a consistent definition of "particular social group."<sup>39</sup> Thus, asylum relief requests based on gender have been accorded different, and often contravening, treatment in different circuits, which has resulted in contradictory decisions.<sup>40</sup>

---

a particular social group. *See generally* Gomez, *supra* note 16 (discussing asylum law in Canada, the United Kingdom, and Australia in comparison to U.S. law).

34. U.N. Refugee Agency, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d58de2da> [hereinafter *UNHCR Group Guidelines*].

35. *Id.* at 2.

36. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). The Supreme Court considered UNHCR guidelines in its determination that the showing required to establish a well-founded fear differs from establishing a clear probability of persecution for purposes of withholding of deportation. *See id.* at 439.

37. *Id.* (emphasis added).

38. *See generally* Castellano-Chacon v. INS, 341 F.3d 533, 547-48 (6th Cir. 2003) (discussing the UNHCR Group Guidelines and how other circuits have applied the refugee definition); Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005) (using the UNHCR Group Guidelines as support for its finding that Somalian women may constitute a particular social group); Niang v. Gonzales, 422 F.3d 1187, 1198 (10th Cir. 2005) (mentioning the UNHCR definition of a particular social group in finding a mother and daughter from Senegal qualified as refugees).

39. *See Castellano-Chacon*, 341 F.3d at 546-49 (discussing the definition).

40. *See generally id.* (describing the different definitions among the circuits).

The most commonly accepted definition of a PSG was developed by the BIA in 1985 in *In re Acosta*.<sup>41</sup> The BIA defined a PSG to mean “a group of persons all of whom share a common, immutable characteristic.”<sup>42</sup> This definition is accepted generally by the United States Courts of Appeal for the First, Third, Sixth, Seventh, and Tenth Circuits.<sup>43</sup> The United States Court of Appeals for the Ninth Circuit has expanded this definition to include “one united by a voluntary association, including a former 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>44</sup> The United States Court of Appeals for the Second Circuit adopted the Ninth Circuit’s definition but additionally noted that the attributes of a social group “must be recognizable and discrete.”<sup>45</sup> The Second Circuit also has expanded its definition to include external factors, similar to the UNHCR’s approach.<sup>46</sup> The BIA followed suit in 1999 in *In re R.-A.*<sup>47</sup> Expanding upon the definition of “particular social group” established in *In re Acosta*, the BIA recognized consideration of the external

---

41. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987)). *In re Acosta* did not directly deal with a gender-based claim, but it considered gender to be an immutable characteristic covered under the less restrictive category of a particular social group. *Id.* at 232-33.

42. *Id.* at 233. In explaining what constituted a “common, immutable characteristic,” the BIA further stated that “[t]he 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. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be 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 . . . something that is either beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.” *Id.* at 233-34.

43. *Castellano-Chacon*, 341 F.3d at 546 (citing *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990); *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998)); *Niang*, 422 F.3d at 1199. The Supreme Court has established that the BIA be accorded *Chevron* deference for difficult issues of asylum law. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

44. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 n.6 (9th Cir. 2000).

45. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991). In this case, the Second Circuit did not cite to the BIA’s definition in *In re Acosta*. See generally *id.*

46. *Id.*

47. *In re R.-A.*, 22 I. & N. Dec. 906, 919 (BIA 1999), *vacated by* the Attorney General on January 19, 2001, in light of the Department of Justice Proposed Rules, which has since been withdrawn. This case was criticized by the Department of Justice for finding a woman who suffered domestic violence was not a member of a particular social group because there was no evidence that her husband would also harm other abused women. See *Department of Justice Proposed Rules*, *supra* note 23, at 76,592-93. The definition established by the BIA in *In re R.-A.* is still relevant. See *Castellano-Chacon*, 341 F.3d at 548. For a discussion of the history behind *In re R.-A.*, see Nessel, *supra* note 27, at 104-10.

perceptions of a group in the alien's society as a relevant factor when determining whether the group meets the definition of a PSG.<sup>48</sup> In *Castellano-Chacon*, the Sixth Circuit accepted the BIA's definition established in *In re Acosta* and *In re R-A*.<sup>49</sup>

The varied application of the BIA's definition of a PSG has resulted in divided decisions concerning gender-based claims among the federal circuit courts.<sup>50</sup> Some decisions have denied asylum because the group was too large to be considered a particular social group.<sup>51</sup> Many of these decisions relating to gender-based claims have been criticized by commentators.<sup>52</sup> Commentators argue that courts disregard gender as an enumerated factor qualifying an alien for refugee status based on a fear that granting gender-based asylum claims will trigger "an unwanted influx of women seeking asylum."<sup>53</sup> Such findings are contrary to the Refugees Protocol and the INA because qualifying persecuted refugees are denied asylum by a court if the PSG happens to be too large or is contrary to domestic political concerns.<sup>54</sup> If an entire population qualifies for asylum, individual claims should not be disqualified based on its sheer number.<sup>55</sup> Furthermore, the classic fear of triggering an unwanted influx of asylum claims has not prohibited recognition of large social groups on the grounds of race, religion, and nationality—groups that necessarily encompass huge populations.<sup>56</sup>

Increasingly, federal courts have become more accepting of gender-based asylum claims.<sup>57</sup> In 1993, the Third Circuit in *Fatin v. INS* declined

48. *In re R.-A.-*, 22 I. & N. Dec. at 919. The external factors must be considered but are not required to establish a social group. *Id.*

49. *Castellano-Chacon*, 341 F.3d at 546-48.

50. *See Gomez*, *supra* note 16, at 965-74.

51. In *Gomez*, the Second Circuit found that a Salvadorian woman who had been beaten and raped did not qualify as a member of a particular social group. 947 F.2d at 663-64; *see also* *Abay v. Ashcroft*, 368 F.3d 634, 643 (6th Cir. 2004) (Sutton, J., concurring) (fearing the majority's decision allows women never to be deported to female genital mutilation countries); *Lukwago v. Ashcroft*, 329 F.3d 157, 171-72 (3d Cir. 2003) (finding children are too large and diverse a group to qualify); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (concluding that the category "Iranian Woman" was too broad).

52. *See generally* Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches To Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281 (2002); *Gomez*, *supra* note 16, at 960; *Nessel*, *supra* note 27, at 102 n.124.

53. *See Gomez*, *supra* note 16, at 964.

54. *Nessel*, *supra* note 27, at 86-87.

55. *See id.* at 976; *see also* *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) (discussing that females in general can constitute a particular social group under some circumstances).

56. *See Randall*, *supra* note 52, at 299.

57. This pattern is also reflected in IJ and BIA decisions. The BIA "sent a strong message that gender-based claims fell squarely within the parameters of the Refugee Convention"



to find a woman's feminist views as qualifying immutable characteristics for a PSG.<sup>58</sup> The court reasoned it was because she found Iranian law "offensive" instead of "abhorrent."<sup>59</sup> However, the court did note that persecution based on gender *could* constitute membership in a particular social group.<sup>60</sup> Likewise, in the 2005 *Mohammed v. Gonzales* decision, the Ninth Circuit held that Somalian females *could* qualify as a PSG because ninety-eight percent of them face female genital mutilation and, thus, should be protected.<sup>61</sup> Also in 2005, the Tenth Circuit agreed with the Ninth Circuit in finding a female member of the Tukulor Fulani tribe constituted a member of a PSG based on both her gender and kinship ties.<sup>62</sup> Cases such as these indicate a progressive trend continues to develop in the acceptance of gender-based asylum claims in the United States, although, at a slow, often incremental pace.<sup>63</sup>

### III. THE COURT'S DECISION

In the noted case, the Sixth Circuit relied exclusively on two points in finding that Rreshpja, the alien from Albania who feared being kidnapped and forced into prostitution, was not a member of a PSG.<sup>64</sup> First, the court relied on the holding in *Gomez*, and found that Rreshpja's characterization as a "young (or [one] who appear[s] to be young), attractive Albanian [woman]" was merely a demographic classification. Therefore, the court found Rreshpja was not a member of a PSG because

---

in *In re Kasinga*. Nessel, *supra* note 27, at 102; see *In re Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (finding "young women of the Tchamba-Kunsunto Tribe who have not yet had [female genital mutilation], as practiced by that tribe and who oppose the practice" constitute a particular social group); see also *In re A.-N.-*, No. A73-603-840 (EOIR Immigr. Ct. Dec. 22, 2000) (finding that a Jordanian woman was a member of a particular social group of "married, educated, career-oriented" women), *quoted in* 78 Interpreter Releases 409 (2001); *In re A.-& Z.-*, Nos. A72-190-893/ A72-793-219 (EOIR Immigr. Ct. Dec. 20, 1994) (finding the social group to "consist[] of those women who espouse Western values and who are unwilling to live their lives at the mercy of their husbands, their society, their government," *quoted in* 72 Interpreter Releases 521 (1995)). For a further discussion on IJ decisions, see Gallagher, *supra* note 15, at 114-15 (discussing an IJ decision granting an Albanian female asylum based on her membership in the particular social group of Albanian women threatened with being trafficked to Italy for prostitution) (citing Case Summary 330 on the Web site of the Center for Gender and Refugee Studies, *available at* <http://cgrs.uchastings.edu>).

58. 12 F.3d 1233, 1240-41 (3d Cir. 1993).

59. *Id.*

60. *Id.* at 1240.

61. 400 F.3d 785, 796-97 (9th Cir. 2005).

62. See Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005).

63. See Gomez, *supra* note 16, at 964-65; see also *Pitcherskaia v. INS*, 118 F.3d 641, 646 (9th Cir. 1997) (holding that subjecting lesbians to shock therapy was persecution); *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) (finding a particular social group could include people closely related to one another even if only by a common interest).

64. Rreshpja v. Gonzales, 420 F.3d 551, 553-56 (6th Cir. 2005).

“almost all of the pertinent decisions have rejected generalized, sweeping classifications for purposes of asylum.”<sup>65</sup> The court did not consider Rreshpja’s gender or nationality to be enough to qualify her as a member of a PSG.<sup>66</sup>

In support of her case, Rreshpja cited *Mohammed* and argued that a social group may be broadly defined.<sup>67</sup> The Sixth Circuit disagreed.<sup>68</sup> The court explained that it opposed the Ninth Circuit’s determination “that virtually all of the women in Somalia are entitled to asylum in the United States.”<sup>69</sup> The court also distinguished Rreshpja’s case from the facts at issue in *Mohammed*, claiming that Rreshpja did not introduce any evidence demonstrating the practice of forcing young women into prostitution in Albania was as prevalent as female genital mutilation is in Somalia.<sup>70</sup> Thus, the court therefore concluded that young, attractive, Albanian women was too broad a group to qualify as a PSG.<sup>71</sup>

Second, the Sixth Circuit relied on *Castellano-Chacon* and deduced that Rreshpja could not claim membership in a social group that is circularly defined by the fact that it suffers persecution.<sup>72</sup> The court argued that Rreshpja’s social group—young, attractive Albanian women who fear forced prostitution—is not a group that shares a narrowing characteristic other than the collective risk of being persecuted by forced prostitution.<sup>73</sup> The court argued that even if Rreshpja sought asylum in a noncircularly defined group, “i.e., simply as young, attractive Albanian women—then virtually any young Albanian woman who possesses the subjective criterion of being ‘attractive’ would be eligible for asylum in the United States.”<sup>74</sup> The court, therefore, concluded that Rreshpja could neither claim refugee status as a member of a group defined by her fear of forced prostitution, nor could she qualify as a member of a group defined by only her gender, attractiveness, age, or nationality.<sup>75</sup>

---

65. *Id.* at 555 (citing *Gomez v. INS*, 947 F.2d 660, 663-64) (2d Cir. 1991). The Sixth Circuit also relied on *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003), which found that mentally ill female Jamaicans did not qualify as a particular social group. *Rreshpja*, 420 F.3d at 555.

66. *See Rreshpja*, 420 F.3d at 555.

67. *Id.* (citing *Mohammed*, 400 F.3d at 796-97).

68. *See id.*

69. *Id.* at 555-56.

70. *Id.*

71. *See id.*

72. *Id.* at 556 (citing *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003)).

73. *Id.*

74. *Id.*

75. *See id.* at 555-56.

In addition, the court concluded that while Rreshpja had established a subjective fear of future persecution, she had not shown either past persecution or an objective well-founded fear of future persecution, such that she would be forced into prostitution if she returned to Albania.<sup>76</sup> In sum, the Sixth Circuit denied Rreshpja's asylum claim on the grounds that she lacked membership in a PSG that could qualify for refugee status and had not established a well-founded fear of future persecution.<sup>77</sup>

#### IV. ANALYSIS

When considering refugee status for asylum, courts should find young, Albanian women qualify as a valid particular social group.<sup>78</sup> The Sixth Circuit concluded differently, and by so doing, established inconsistent precedent that restricts the definition of what constitutes a PSG. First, the court did not fully analyze Rreshpja's group under the BIA definition. Second, the court did not adequately consider its sister circuits' decisions, nor the reasons expressed by other authorities in regard to gender-based asylum issues. Third, the court's concern with broadly defined PSGs was unjustified. Thus, the Sixth Circuit erred in its analysis and reasoning in deciding whether young, Albanian females qualified as a PSG.<sup>79</sup>

##### A. *Contravention of Established BIA Definition*

First, the Sixth Circuit's analysis of Rreshpja's group under the BIA's definition was flawed because it adopted an inappropriately narrow definition of a PSG. In defining a particular social group, the Sixth Circuit relied on its 2003 decision in *Castellano-Chacon*, which accepted the BIA's definition articulated in *In re Acosta*.<sup>80</sup> However, the court did not fully analyze Rreshpja's group pursuant to the BIA's definition. Likewise, the Sixth Circuit ignored the Supreme Court's instructions that the BIA be accorded *Chevron* deference for ambiguous terms in asylum

---

76. *See id.* at 556-57.

77. *Id.* The court also denied Rreshpja's "humanitarian grant" of asylum; withholding of removal; and protection under CAT. *See id.* at 556-58.

78. Although Rreshpja suggested that her particular social group was young, *attractive*, Albanian women, the Sixth Circuit considered attractiveness to be a subjective criterion. *Id.* at 555-56. The author of this Note agrees, thus, for purposes of this Note, Rreshpja's particular social group is argued to be young, Albanian women.

79. This Note does not disagree with the Sixth Circuit's ultimate holding denying Rreshpja asylum. Rather, this Note disagrees with the court's analysis and reasoning concerning gender-based claims.

80. *Rreshpja*, 420 F.3d at 555; *see supra* note 42 and accompanying text for this definition.

law.<sup>81</sup> In concluding that young, Albanian women are a “generalized, sweeping classification,” and thus not members of a PSG,<sup>82</sup> the court disregarded the BIA, which defines a shared immutable characteristic of a PSG to include “an innate one such as *sex*.”<sup>83</sup> The BIA indicated that courts should determine what constitutes an immutable characteristic solely on a case-by-case basis; “[h]owever, 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.”<sup>84</sup> In addition, the executive branch considered gender to be an immutable trait under the Justice Department’s proposed rules.<sup>85</sup> Yet, the Sixth Circuit did not analyze *why* young, Albanian women would not qualify. Ostensibly, such a social group possesses “innate” characteristics “such as sex,” and female gender and Albanian nationality are “common characteristic[s] that define[] the group.”<sup>86</sup> The court did not address that gender and nationality are characteristics that are “beyond [her] power . . . to change” and are “fundamental to [her] identity or conscience.”<sup>87</sup>

Confusingly, in support of its decision, the Sixth Circuit reasoned that the BIA had not previously held an entire gender to constitute a social group, and thus deduced gender could not qualify as a PSG.<sup>88</sup> Such an interpretation directly contradicts the express language of *In re Acosta*.<sup>89</sup> Merely because the BIA or another court has “not previously expressly recognized females as a social group [should not preclude] the

---

81. See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999) (claiming the BIA’s interpretations of ambiguous language in the INA are entitled to respect under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), if the BIA’s interpretations are reasonable).

82. *Rreshpja*, 420 F.3d at 555.

83. *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (emphasis added).

84. *Id.* at 233-34.

85. *Department of Justice Proposed Rules*, *supra* note 23, at 76,593.

86. *In re Acosta*, 19 I. & N. Dec. at 233-34; see also *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005).

87. *In re Acosta*, 19 I. & N. Dec. at 233-34; *Niang*, 422 F.3d at 1199 (finding “applying the *Acosta* definition of *social group*, the female members of a tribe would be a social group. Both gender and tribal membership are immutable characteristics”).

88. *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005); see also Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 591 (2000). Regarding the BIA’s decision in *In re Kasinga*, Kelly argues that “[t]here seems to be no acceptable explanation for the BIA’s failure to simply define Kasinga’s social group as ‘women’ . . . . To require her to show an opposition to the practice within the social group criteria was unnecessary.” See also Gallagher, *supra* note 15, at 105-07. The Tenth Circuit in *Niang* also considered *Kasinga* and found that the BIA did not require more than gender or tribal membership to qualify a group for refugee status. 422 F.3d at 1200.

89. See *supra* notes 83-87 and accompanying text.

recognition that girls or women of a particular . . . nationality (or even in some circumstances females in general) may constitute a social group.”<sup>90</sup> Arguably, such a determination “is simply a logical application of our law.”<sup>91</sup> The court’s decision not to consider this issue resulted in selective application of the BIA definition, and created confusion since “[f]ew would argue that sex or gender, combined with . . . nationality, is not an ‘innate characteristic,’ ‘fundamental to individual identity.’”<sup>92</sup>

Second, the court declined to consider how Rreshpja’s group’s characteristics are “understood in the alien’s society,” a factor deemed relevant by the BIA in *In re R-A*.<sup>93</sup> The Sixth Circuit agreed with the BIA in *Castellano-Chacon*, concluding that “society’s reaction to a ‘group’ may provide evidence in a specific case that a particular group exists.”<sup>94</sup> While the court recognized that prostitution and “human trafficking continues to be a *serious* problem in Albania,” the court neglected to consider how young, Albanian women are externally perceived by Albanian society in light of this “serious problem.”<sup>95</sup> Moreover, the Sixth Circuit spurned the opinion of the Department of State that “Albania is a source country for women and children trafficked for the purposes of sexual exploitation and forced labor, largely to Greece and Italy.”<sup>96</sup> The court apparently dismissed the fact that the overwhelming majority of victims trafficked for prostitution are young women from poor, war-torn, or transitory countries and are particularly susceptible to sexual exploitation.<sup>97</sup> This is problematic because, according to the Department of State, “where prostitution flourishes, so does an environment that fuels trafficking in persons.”<sup>98</sup>

---

90. Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005).

91. *Id.*

92. *Id.*

93. *In re R.-A.-*, 22 I. & N. 906, 919 (BIA 1999).

94. Castellano-Chacon v. INS, 341 F.3d 533, 548 (6th Cir. 2003).

95. Rreshpja v. Gonzales, 420 F.3d 551, 557 (6th Cir. 2005) (emphasis added). The Sixth Circuit discussed human trafficking in Albania in consideration of whether the Albanian government acquiesced in forcing women into prostitution, but neglected any reference to the problem when considering Rreshpja’s social group. *Id.*

96. 2005 TIP REPORT, *supra* note 14, at 52. The 2005 TIP Report gives an account of a young Albanian girl trafficked to Italy for prostitution. *See id.* at 9.

97. *See* Crystal Y. Twitty, *Pretty Pennies for Pretty Faces: Trafficking of Women for the International Sex Trade*, 2 REGENT J. INT’L L. 115, 122-24 (2003-2004). According to research conducted by the Department of State, people trafficked for prostitution suffer great harm: sixty to seventy-five percent of women have been raped, seventy to ninety-five percent of women have been physically assaulted, and sixty-eight percent suffer posttraumatic stress disorder. *See* 2005 TIP REPORT, *supra* note 14, at 9.

98. 2005 TIP REPORT, *supra* note 14, at 8.

Third, as a result of the court's incomplete application of the BIA definition, the Sixth Circuit's contention that Rreshpja's group is defined by a circular argument is unnecessary and irrelevant.<sup>99</sup> The court incorrectly dismissed Rreshpja's group because the court concluded that the group members did not share "a narrowing characteristic other than their risk of being persecuted."<sup>100</sup> The court found that the only narrowing characteristic of Rreshpja's group was a threat and fear of prostitution, and therefore it denied her refugee status because the group was circularly defined by its persecution.<sup>101</sup> In contrast, the Department of State recognizes that "women used in prostitution . . . share a common bond"<sup>102</sup> and the group comprised of young, Albanian females is one that exists independently of the threat of prostitution.<sup>103</sup> Thus, by combining both, a sufficiently narrow social group may be formulated.

Furthermore, the Supreme Court held in *INS v. Elias-Zacarias* that existing evidence must show that the persecutor seeks to harm the victim on account of the victim's possession of the protected characteristic.<sup>104</sup> The shared characteristic common to Rreshpja's group's persecution is not the shared threat or fear of prostitution, but rather the shared traits of being a young, female Albanian in a culture that considers these to be the traits of female prostitutes.<sup>105</sup> In other words, young, Albanian female characteristics are not incidental to the persecutor's motivation, but are "central" components of the persecutor's decision to harm this group.<sup>106</sup> "For, if it is their status as women which renders them vulnerable to [harm] . . . then gender itself is the basis for membership in a particular social group. Gender is the characteristic which delimits the social group."<sup>107</sup>

---

99. This argument would be irrelevant had the court correctly analyzed Rreshpja's group under the BIA definition (and, thus, would have found young, Albanian women fit the definition of a particular social group). See *supra* notes 73-98 and accompanying text (analyzing how Rreshpja's social group fits the BIA's definition of a particular social group).

100. *Rreshpja*, 420 F.3d at 556. In *Castellano-Chacon*, the court made this statement while discussing external perceptions of a group as being a relevant factor to consider, "as long as the reaction by persecutors to members of a particular social group is not the touchstone defining the group." *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003).

101. *Rreshpja*, 420 F.3d at 556.

102. 2005 TIP REPORT, *supra* note 14, at 9.

103. See *Department of Justice Proposed Rules*, *supra* note 23, at 76594.

104. 502 U.S. 478, 482 (1992).

105. See sources cited *supra* note 52; see also *Mohammed v. Gonzales*, 400 F.3d 785, 797 n.16 (9th Cir. 2005) (discussing the shared fact that victims are women in a culture that mutilates the genitalia of its females).

106. *Department of Justice Proposed Rules*, *supra* note 23, at 76,592.

107. See *Randall*, *supra* note 56, at 292.

*B. Contradiction with Domestic and International Precedent*

The Sixth Circuit's incomplete application of the BIA's definition creates conflicts with other jurisdictions and the United Nations. Yet, the court did not address the discrepancies it created. Initially, the Sixth Circuit dismissed the *Mohammed* decision but neglected to explain why it found the Ninth Circuit's reasoning—based on the UNHCR Group Guidelines—faulty.<sup>108</sup> In *Mohammed*, the Ninth Circuit referred to the UNHCR Group Guidelines' claim that "women may constitute a particular social group under certain circumstances based on the common characteristic of sex."<sup>109</sup>

Although the Supreme Court in *Cardoza-Fonseca*, and the Sixth Circuit in *Chastellano-Chacon*, point out that UNHCR guidelines are not binding, the Supreme Court has established precedent that the UNHCR's "analysis provides *significant* guidance for issues of refugee law" and in construing INA provisions.<sup>110</sup> The UNHCR is "widely considered useful in giving content to the obligations that the [Refugees] Protocol established" and which the United States signed into law.<sup>111</sup> Furthermore, in its Proposed Rules, the Department of Justice directs courts to the UNHCR for guidance concerning vague and divergent refugee law.<sup>112</sup> The court's omission of the UNHCR Group Guidelines from its analysis is particularly troubling because "[o]ne of the most noteworthy developments in U.S. asylum law has been the weight given by the U.S. authorities—including the INS, the [BIA], and the federal courts—to the [UNHCR] interpretation of the refugee definition contained in its [guidelines]."<sup>113</sup>

Second, the Sixth Circuit did not address the INS Gender Guidelines, which the Ninth Circuit in *Mohammed* relied on in finding "gender [to be] an immutable trait that can qualify under the rubric of 'particular social group.'"<sup>114</sup> Again, the INS Gender Guidelines are not binding on the IJ, BIA, or federal courts; however, these guidelines are the INS agency's *own* guidelines and, therefore, should have been

---

108. *Rreshpja v. Gonzales*, 420 F.3d 551, 555-56 (6th Cir. 2005).

109. *Mohammed*, 400 F.3d at 798 (citing *UNHCR Group Guidelines*, *supra* note 34, at 4).

110. *Id.* at 798 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-40 (1987) (emphasis added)); *see also* *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

111. *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

112. *Department of Justice Proposed Rules*, *supra* note 23, at 76589-90.

113. DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 10 (3d ed. 1999) (footnote omitted). Furthermore, according to the INS Basic Law Manual, "[w]here the [BIA] has not addressed specific issues . . . reference to international law may assist in determining whether an alien meets the . . . definition of refugee." *Id.*

114. *Mohammed*, 400 F.3d at 797 (citing *INS Gender Guidelines*, *supra* note 29, at 4).

considered by the Sixth Circuit in *Rreshpja*'s asylum claim.<sup>115</sup> By not considering the UNHCR Group Guidelines and INS Gender Guidelines, the Sixth Circuit in *Rreshpja* did not persuasively reject the Ninth Circuit's reasoning in *Mohammed*.

Third, the Sixth Circuit claimed in *Castellano-Chacon* that it "joins the First, Third and Seventh Circuits" in adopting the BIA's definition of a particular social group.<sup>116</sup> Thus, the Sixth Circuit's rejection of *Mohammed* illustrates another discrepancy: its failure to find young, Albanian women as qualifying members of a PSG contravenes the Third Circuit's decision in *Fatin v. INS*.<sup>117</sup> The court in *Fatin* found that persecution based on gender *could* constitute persecution of a member of a PSG.<sup>118</sup> Thus, the Sixth Circuit's decision creates a precedential conflict in regard to the interpretation of the BIA definition. The Sixth Circuit ought to have explained why it interpreted the BIA's definition in regard to gender-based asylum claims differently than did the Third Circuit.

### C. Unwarranted Fears of "Floodgate" Claims

Finally, the court's reasoning, justifying the denial of young, Albanian women as a PSG, demonstrates the type of decision that commentators on gender-based asylum claims criticize for fearing "floodgate" claims and attempting to avoid "an unwanted influx of women seeking asylum."<sup>119</sup> The Sixth Circuit reasoned that *Rreshpja*'s group could not be a particular social group because then "virtually any young Albanian woman who possesses the subjective criterion of being 'attractive' would be eligible for asylum in the United States."<sup>120</sup> Furthermore, the Sixth Circuit disagreed with the Ninth Circuit's determination "that virtually all of the women in Somalia are entitled to asylum in the United States."<sup>121</sup> The court also pointed to cases rejecting a group's refugee status on the basis of being "too large and diverse" to qualify.<sup>122</sup> Despite these contentions, the Sixth Circuit curiously

---

115. The INS Gender Guidelines cite the Third Circuit's analysis in *Fatin*, recognizing that women can qualify as a particular social group. *INS Gender Guidelines, supra* note 29, at 10.

116. *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (9th Cir. 2003).

117. 12 F.3d 1233 (3d Cir. 1993).

118. *Id.* at 1240.

119. *See supra* note 52 and accompanying text.

120. *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005). The Tenth Circuit addressed this concern in *Niang* and found "the focus with respect to such claims should be not on whether either gender constitutes a social group (which both certainly do)," but rather whether the victim is persecuted on account of her gender. *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005).

121. *Rreshpja*, 420 F.3d at 555-56.

122. *Id.* at 555 (citing *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003)).



neglected to consider that gender is a social group no larger than past accepted particular social groups including race, nationality, and religion.<sup>123</sup> Denying Rreshpja's group refugee status because "virtually any" member of her social group "would be eligible for asylum in the United States" is contrary to the purpose behind asylum law in the first place.<sup>124</sup>

In addition, asylum claims, if granted, are made one at a time on a case-by-case basis, despite the fact that "large numbers of people in the world suffer [the same] oppression and persecution."<sup>125</sup> Gender-based claims (in addition to other enumerated ground claims) are subject to procedural and evidentiary hurdles and thus only "stipulate the reasons for the persecution."<sup>126</sup> Therefore, once Rreshpja demonstrates statutory eligibility, she must further show that asylum is warranted as a matter of discretion of the Attorney General.<sup>127</sup> In Rreshpja's case, she would have been denied asylum for lack of establishing a well-founded fear of future persecution even if the Sixth Circuit had found that young, Albanian females *could* constitute a particular social group.<sup>128</sup> Thus, it does not follow that large segments of the population will suddenly be rendered eligible for asylum just because young, Albanian women are found to constitute a PSG.<sup>129</sup>

Noticeably, gender-based asylum claims are prevalent in U.S. courts and deserve equal recognition to persecuted groups which qualify on the enumerated grounds of "race, religion, nationality, membership in a

---

123. See *supra* note 56 and accompanying text.

124. *Rreshpja*, 420 F.3d at 556. "Inherent in the concept of refugee status is the principle that an individual requires international protection because his country . . . is not safe for him." *Department of Justice Proposed Rules*, *supra* note 23, at 76,592. Decisions such as these are also contrary to the progressive trend protecting victims. See generally Tiefenbrun, *supra* note 13, at 379-80, 384 (discussing the U.S. Trafficking Victims Protection Act, the U.N. Protocol, and U.S. Department of State efforts).

125. Randall, *supra* note 56, at 299.

126. *Id.*

127. 8 U.S.C. § 1158(a)(2)(B) (2000).

128. The Sixth Circuit further found that, just because the police could not apprehend her attempted kidnapper, did not mean the Albanian government acquiesced to the kidnapping for prostitution. *Rreshpja*, 420 F.3d at 557. Rreshpja most likely did not have a well-founded fear of future persecution because the Department of State has moved Albania from a Tier 3 country to a Tier 2 country and the police there are no longer considered a threat. See 2005 TIP REPORT, *supra* note 14, at 52; *cf.* Singh v. INS, 134 F.3d 962, 968 (9th Cir. 1998) (finding no persecution where police responded to victim but failed to take action); Surita v. INS, 95 F.3d 814, 819-20 (9th Cir. 1996) (finding persecution when police failed to respond to the victim and did not provide an explanation).

129. See Nessel, *supra* note 27, at 101-02, for a discussion on the fears attached to the *In re Kasinga* decision and how they were unwarranted.

particular social group, or political opinion.”<sup>130</sup> Had the Sixth Circuit properly regarded the BIA’s definition of a PSG and those shared characteristics that qualify, in addition to considering other interpretations of gender-based asylum claims, it probably would have come to a different conclusion—that young, Albanian females *can* qualify as a PSG for asylum purposes, even if Rreshpja’s individual claim did not.

## V. CONCLUSION

Although gender is not specifically included as an enumerated factor under the Convention or the INA, it is widely accepted that it can be considered in adjudicating asylum claims. Therefore, gender should qualify a refugee as a member of a particular social group if she can establish either past persecution or a well-founded fear of future persecution “on account of. . . [her] membership in [the] particular social group.”<sup>131</sup> When considering whether a group qualifies as a PSG, the Sixth Circuit should first consider the BIA’s definition and analysis of what constitutes a shared immutable group characteristic as well as how the group members are perceived in the alien’s society. Only after the court has considered the group’s characteristics under the full BIA definition should the court determine whether a circular argument exists. Next, the court should consider the relevance of other jurisdictions’ decisions, as well as the definition established by the UNHCR and INS Gender Guidelines, even if it chooses not to follow these authorities. Finally, if the court denies the asylum claim, it should question whether it is denying refugee status simply because the social group is too large and may cause an influx of refugees. Such grounds are not valid because statutory eligibility does not automatically qualify an applicant for asylum status. Rather, an applicant must further convince the Attorney General of the necessity of asylum based on a well-founded fear in a particular case.

In light of the facts that asylum laws were created to end the persecution of refugees, and that Albanian females are subject to kidnapping and prostitution, to hold that a young, Albanian female is not a member of a particular social group is a harsh interpretation of the BIA’s definition of a PSG and common immutable characteristics. Moreover, asylum claims are subject to procedural and evidentiary

---

130. See Refugees Convention, *supra* note 18; Refugees Protocol, *supra* note 18.

131. *Castellano-Chacon v. INS*, 341 F.3d 533, 547 (6th Cir. 2005); *Gallagher*, *supra* note 15, at 105.

hurdles and are decided on a case-by-case basis, thus a fear of opening the floodgates to refugees entering the United States is unwarranted and not a valid reason to dismiss an asylum claim. Therefore, gender-based claims should be sufficient to qualify a group as a PSG for refugee status and members should be granted asylum as long as an individual group member surpasses the hurdles of asylum law in the United States.

Jessika Johnson\*

---

\* J.D. candidate 2007, Tulane University School of Law; B.A., Communications and English, 2003, University of California—Santa Barbara. The author is originally from San Anselmo, California.