RECENT CASES

ASYLUM LAW — PARTICULAR SOCIAL GROUP — FIRST CIRCUIT INDICATES RECEPTIVENESS TO GENDER PER SE SOCIAL GROUPS. — *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020).

In the decades since the passage of the Immigration and Nationality Act[1] (INA), U.S. immigration authorities and courts have adopted different positions on whether domestic violence survivors — who experience so-called "private" harm by nonstate actors — are eligible for asylum protection.[2] As a result, U.S. immigration law has generated insecurity, rather than freedom, for domestic violence survivors.[3] Recently, in *De Pena-Paniagua v. Barr*,[4] the First Circuit offered clarity by affirming the viability of domestic violence asylum claims and opining on the cognizability of particular social groups (PSGs) defined solely by gender and nationality, such as Dominican women.[5] The court challenged the Attorney General's standard for cognizable PSGs articulated in *In re A-B-*,[6] potentially making more domestic violence survivors eligible for asylum protection. As such, the First Circuit's opinion in *De Pena-Paniagua* was a positive development for survivors of domestic violence seeking asylum protection. However, the First Circuit should have provided even clearer guidance to adjudicators by disclaiming the practice of infusing PSG determinations with the public-private dichotomy, which can unduly undercut asylum claims by survivors of gendered violence.

Jacelys Miguelina De Pena-Paniagua (De Pena) is a Dominican national who applied for asylum and based her claims on her account of abuse suffered at the hands of her former partner, Hanlet Rafael Arias Melo (Arias).[7] According to De Pena, Arias abused her for the majority of their relationship: He was verbally abusive.[8] He raped her five times.[9] He threatened her multiple times, and, in January 2013, he "threw a telephone at her head" and beat her severely.[10] De Pena reported the incident to local police, who considered it an attempted

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[1] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

[2] *See* Jessica Marsden, Note, *Domestic Violence Asylum After* Matter of L-R-, 123 YALE L.J. 2512, 2524–25, 2528–30 (2014).

[3] *Cf.* Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 325–26 (1993) (emphasizing that "privacy" is a gendered concept that often reinforces male dominance without benefitting women equally).

[4] 957 F.3d 88 (1st Cir. 2020).

[5] *See id.* at 95–98.

[6] 27 I. & N. Dec. 316 (Att'y Gen. 2018).

[7] *De Pena-Paniagua*, 957 F.3d at 89.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 90; *see id.* at 89–90.

homicide but did not arrest Arias.[11] De Pena fled to the U.S. border and was detained by Border Patrol agents near Laredo, Texas, in December 2013.[12]

The immigration judge (IJ) denied De Pena's subsequent requests for asylum, withholding of removal, and protection under the UN Convention Against Torture[13] (CAT).[14] The IJ concluded that discrepancies in De Pena's testimony showed she lacked a "subjective or objective fear of persecution"[15] and further found that De Pena had not shown Dominican officials were unable or unwilling to provide protection.[16] To qualify for asylum protection, an applicant must show "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[17] The Board of Immigration Appeals (BIA) has interpreted "particular social group" to mean a class of individuals who share an immutable or fundamental characteristic[18] that is both particular and socially distinct.[19] De Pena appealed the IJ's decision to the BIA, arguing that her proffered PSGs, all derivative of "Dominican women unable to leave a domestic relationship," were cognizable and that the abuse she suffered amounted to persecution on account of her membership in those groups.[20]

The BIA affirmed the decision of the IJ, finding no clear error in the IJ's conclusions and determining that De Pena's proffered PSGs were not cognizable.[21] The BIA grounded its rejection of De Pena's proffered PSGs in its reading of Attorney General Jefferson Sessions's decision in *In re A-B-*, which it considered intervening precedent.[22] In *A-B-*, the

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[11] *Id.* De Pena's medical records document trauma to her face, chest, and right arm. *Id.* at 90.

[12] *Id.* at 89–90.

[13] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

[14] *De Pena-Paniagua*, 957 F.3d at 90–91.

[15] *Id.* at 91; *see id.* at 90–91. The IJ cited De Pena's decision to leave her son in the Dominican Republic and her public Facebook posts of her children as evidence that she was not fearful for the life of her child or her own life. *Id.* at 91.

[16] *Id.*

[17] 8 U.S.C. § 1101(a)(42)(A).

[18] *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

[19] *In re* M-E-V-G-, 26 I. & N. Dec. 227, 239 (B.I.A. 2014) (explaining that particularity means asylum seekers must show that the social group is defined by features that create "a clear benchmark for determining who falls within the group"); *In re* W-G-R-, 26 I. & N. Dec. 208, 216–17 (B.I.A. 2014) (explaining that social distinction means a social group must be "*perceived* as a group by society," *id.* at 216, in the country of origin).

[20] *See De Pena-Paniagua*, 957 F.3d at 91–92.

[21] *See id.* at 91. The BIA reviews an IJ's factual and credibility findings for clear error. 8 C.F.R. § 1003.1(d)(3)(i). The BIA reviews questions of law, discretion, and judgment de novo. *Id.* § 1003.1(d)(3)(ii).

[22] *De Pena-Paniagua*, 957 F.3d at 91. According to the BIA, *A-B-* overruled *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), which found that the PSG of "married women in Guatemala who

Attorney General found that asylum seekers who base claims on domestic violence are likely not members of cognizable PSGs.[23] The Attorney General concluded that a cognizable PSG must "'exist independently' of the harm asserted in an application for asylum,"[24] in part because "[i]f a group is defined by the persecution of its members, then the definition of the group moots the need to establish actual persecution."[25] Accordingly, the Attorney General denied asylum to an applicant who claimed membership in a PSG of "El Salvadoran women who are unable to leave their domestic relationship where they have children in common."[26] In De Pena's case, the BIA concluded that De Pena's PSGs were equivalent to those found not cognizable in *A-B-* and denied her claims on that ground.[27]

The First Circuit remanded to the BIA.[28] Writing for the panel, Judge Kayatta[29] disclaimed the BIA's reading of *A-B-* as precluding PSGs that, like De Pena's, are based on an inability to leave a domestic relationship.[30] Analyzing the decision in *A-B-* itself, the First Circuit determined that the language used by the Attorney General in no way signaled a categorical bar to PSGs based on inability to leave domestic relationships.[31] Instead, the court found that *A-B-* suggested nothing beyond a relative unlikelihood that such groups satisfy particularity and distinction requirements for cognizability.[32]

The panel next scrutinized the BIA's conclusion that, based on *A-B-*, social groups defined by abuse suffered in domestic relationships presented impermissible grounds for asylum as a matter of law.[33] The court rejected the notion of such a categorical bar, concluding that the Attorney General in *A-B-* erred by conflating the persecution experienced by an asylum seeker with the reason they are unable to leave the relationship.[34] According to Judge Kayatta, nothing in *A-B-* obviated the need to examine the particularities of De Pena's allegations.[35] The

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are unable to leave their relationship" was cognizable. *Id.* at 388; *De Pena-Paniagua*, 957 F.3d at 91.

[23] *In re* A-B-, 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018).

[24] *Id.* at 334 (quoting, inter alia, *In re* M-E-V-G-, 26 I. & N. Dec. at 237 n.11).

[25] *Id.* at 335.

[26] *Id.* at 343.

[27] *De Pena-Paniagua*, 957 F.3d at 91.

[28] *Id.* at 98.

[29] Judge Kayatta was joined by Chief Judge Howard and Judge Barron.

[30] *See De Pena-Paniagua*, 957 F.3d at 92–93.

[31] *See id.*

[32] *See id.*; *see also In re* A-B-, 27 I. & N. Dec. 316, 335–36 (Att'y Gen. 2018) (stating that such PSGs are "defined by . . . vulnerability to private criminal activity [and] *likely* lack the particularity required," *id.* at 335 (emphasis added), and that "there is *significant room for doubt* that . . . society views these women . . . as members of a distinct group," *id.* at 336 (emphasis added)).

[33] *See De Pena-Paniagua*, 957 F.3d at 93–94.

[34] *See id.* at 93.

[35] *Id.*

panel found that because the BIA neglected to conduct a fact-specific analysis of De Pena's claims, its decision was "arbitrary and unexamined."[36]

On appeal, De Pena argued her proffered PSGs were cognizable because "a group based on gender . . . satisfies the particularity requirement" and because nationality and gender meet the immutability requirement.[37] Signaling agreement, Judge Kayatta noted that a numerically large PSG based on gender and nationality alone may meet particularity and social distinction requirements.[38] The court opined that claiming membership in a broad group defined only by women in a particular country is "hardly . . . a fool's errand" because women are almost always seen as a distinct, defined social group.[39] The court concluded that a large PSG does not preclude a finding of particularity when the PSG shares a common "underlying immutable characteristic" like gender.[40] However, the panel was limited by law to the PSGs presented to the BIA in earlier proceedings and was unable to determine whether a social group defined only as women in a particular country — in this case, a group defined as "Dominican women" — is cognizable.[41]

The First Circuit's decision in *De Pena-Paniagua* was consistent with several recent circuit court decisions[42] and disclaimed an attempt to heighten asylum eligibility requirements by distorting the definition of "particular social group."[43] However, the court should have gone further and provided clear guidance on how to adjudicate domestic violence asylum claims. In the decades since the passage of the Refugee Act of 1980,[44] asylum seekers have navigated evolving definitions of

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[36] *Id.* at 94; *see also id.* at 93–94.

[37] *Id.* at 95.

[38] *Id.* at 96.

[39] *Id.* at 95; *see also id.* at 95–96. The court noted, among other things, that "gender [sometimes] serves as a principal, basic differentiation for assigning social and political status and rights." *Id.* at 96.

[40] *See id.* at 97. Other broad groups defined by immutable characteristics, including race, are specifically protected by the INA. 8 U.S.C. § 1101(a)(42).

[41] *De Pena-Paniagua*, 957 F.3d at 98.

[42] *See, e.g.*, Diaz-Reynoso v. Barr, 968 F.3d 1070, 1074, 1079 (9th Cir. 2020) (rejecting categorical disqualification of a PSG defined as "indigenous women in Guatemala who are unable to leave their relationship," *id.* at 1074); Ticas-Guillen v. Whitaker, 744 F. App'x 410, 410 (9th Cir. 2018) (finding that "gender and nationality can form a particular social group"); Paloka v. Holder, 762 F.3d 191, 192–93 (2d Cir. 2014) (remanding to the BIA for further consideration of a PSG based on age, gender, and nationality).

[43] As the First Circuit noted, the Attorney General's decision in *A-B-* purported to prevent asylum seekers fleeing domestic violence from using PSG formulations based on precedential BIA decisions. *See De Pena-Paniagua*, 957 F.3d at 95. The First Circuit ultimately found that the Attorney General "clearly [did] not" categorically bar domestic violence asylum seekers. *Id.* at 93.

[44] Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.).

"particular social group."[45] Much of the inconsistency across IJ, BIA, and circuit court decisions regarding the cognizability of PSGs reflects a misplaced concern that, without heightened PSG requirements, the asylum system will overextend to protect individuals who have experienced only so-called private harms.[46] These heightened PSG requirements are unfaithful to the INA, which has other requirements that effectively guard against a "floodgate" scenario.[47] While the First Circuit in *De Pena-Paniagua* curtailed the influence of the public-private dichotomy in De Pena's case, the court's limited holding may not provide adjudicators with the guidance they need to apply the statutory framework to domestic violence asylum cases.[48]

The public-private dichotomy itself has been subject to a slew of feminist critiques[49] that retain force when applied to substantive asylum law. Though different versions of the public-private distinction are invoked in different contexts, the public-private dichotomy generally distinguishes acts that implicate general welfare and political systems (the "public") from acts that implicate family structures and small-scale markets (the "private").[50] In practice, the public-private dichotomy legitimizes the hopeless flexibility of "public" and "private" conceptions — nearly any "public act" can be construed as "private," and vice versa.[51] By permitting a "withdrawal of the law from the so-called domestic

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[45] The definition of "particular social group" has taken various forms since the term was codified in U.S. law in the Refugee Act of 1980. *See id.* § 201, 94 Stat. 102–03. Partially because "refugee" is undefined in key documents, PSG requirements have been interpreted in different ways. *See* DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 5:40 (2020 ed.).

[46] *See* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 120, 132–33 (2007) (discussing the "floodgate" justification for stricter asylum eligibility requirements). This "floodgate" concern is misplaced because the same women likely to be eligible for asylum protection in the United States are those least able to leave their home country, often due to sociopolitical constraints, their status as primary caretakers for family members, and lack of financial resources to leave. *Id.* at 133. Statistical trends from other countries support the idea that the "floodgate" concern is misplaced: for example, after Canada recognized asylum claims based on gendered violence, such claims actually decreased. *See id.*

[47] Such requirements include that the persecution experienced in the past or feared in the future be "on account of" a protected ground. 8 U.S.C. § 1101(a)(42).

[48] *Compare* Rreshpja v. Gonzales, 420 F.3d 551, 555–56 (6th Cir. 2005) (finding a PSG of "young, attractive Albanian women," *id.* at 556, to be defined too broadly to be a PSG under the INA), *with* Paloka v. Holder, 762 F.3d 191, 192–93 (2d Cir. 2014) (remanding for further consideration of whether "young Albanian women," *id.* at 92, constitutes a PSG).

[49] *See generally* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 10–43 (1992) (discussing internal and external feminist challenges to the public-private dichotomy); Olsen, *supra* note 3, at 321–26 (describing three levels of public-private dichotomy critiques).

[50] Gavison, *supra* note 49, at 5. One conceptualization of the public-private dichotomy characterizes "private" dealings as closely tied to a person's identity, *id.* at 6–7, and "public" dealings as involving broad "social or political structures," *id.* at 7.

[51] *See id.* at 20–21; Olsen, *supra* note 3, at 324.

sphere,"[52] the public-private dichotomy renders vulnerable populations susceptible to abuse and contributes to a culture of impunity.[53] Moreover, male-centric perspectives on human rights have "privilege[d] public over private activity"[54] in a manner that is reflected in U.S. asylum adjudications.[55] These critiques underscore why adjudicators should treat the categorization of harms as "private" and unactionable with care when determining whether proffered PSGs are cognizable as a matter of law.

Perhaps in light of concerns animating the traditional critiques of the dichotomy,[56] the statutory role of the public-private dichotomy in U.S. asylum law is limited. United States asylum law embodies the public-private dichotomy to the extent it provides more liberal protection to individuals subjected to state-sponsored, "public" persecution but requires an affirmative showing of a state's failure to protect before an applicant is eligible for asylum protection arising from harm by a non-state actor.[57] Even adjudicators sympathetic to harm suffered by domestic violence survivors may believe U.S. law precludes their eligibility for asylum protection under the theory that "domestic violence is unrelated to state action, a prerequisite for claiming refugee status."[58] However, in cases where an applicant's home country has failed to protect them from private harm, the private origin of persecution does not bar an applicant's eligibility for asylum protection.[59] Further, the INA does not define "particular social group" and the statute's text does not

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[52] Olsen, *supra* note 3, at 323.

[53] *See* Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence–Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 135–36 (2012); Anne Weis, Note, *Fleeing for Their Lives: Domestic Violence Asylum and* Matter of A-B-, 108 CALIF. L. REV. 1319, 1344–45 (2020).

[54] Pamela Goldberg & Nancy Kelly, Recent Development, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195, 196 (1993).

[55] *Id.* at 206–08.

[56] *Cf.* Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361, 390 (2012) (discussing feminist critiques of the distinction in the context of disparate treatment of asylum applicants who base claims in female genital cutting compared to those who base claims in domestic violence).

[57] *See* 8 U.S.C. § 1101(a)(42)(A) (requiring an applicant to show they are "unable or unwilling to avail himself or herself of the protection of" their home country to be eligible for asylum as a refugee); *cf.* Olsen, *supra* note 3, at 320 (discussing the extension of Fourteenth Amendment protection to public, but not private, violations).

[58] *See* Weis, *supra* note 53, at 1321; *see also id.* (disagreeing with classifications of domestic violence as predominantly private in nature).

[59] *See, e.g.*, Orellana v. Barr, 925 F.3d 145, 153 (4th Cir. 2019) (remanding for further consideration of whether Salvadoran officials were unable to protect the applicant from her abuser); Pan v. Holder, 777 F.3d 540, 543 (2d Cir. 2015) ("Private acts can also constitute persecution if the government is unable or unwilling to control such actions."); Garcia v. Att'y Gen., 665 F.3d 496, 503 (3d Cir. 2011) (concluding an applicant was persecuted after finding Guatemalan officials were unable to protect the applicant from a gang member).

indicate that PSG determinations should be shaped by considerations of whether the persecution is private or public in nature.[60]

The public-private dichotomy can alter an adjudicator's assessment of an applicant's claim in a manner antithetical to the INA when it extends beyond its confined statutory role and impacts PSG determinations. An applicant suffering harm from nonstate actors needs to show only that she is "unable or unwilling to avail [herself] of the protection [of her home country] because of persecution or a well-founded fear of persecution" due to a protected ground and not otherwise barred from asylum protection.[61] When adjudicators decline to examine other statutory requirements diligently and instead focus on the origin of an applicant's harm when determining whether proffered PSGs are cognizable, they ignore key provisions of the guiding statute.

The undue influence of the public-private dichotomy on asylum determinations was embraced by the Attorney General in *A-B-*. In *A-B-*, Attorney General Sessions sought to exclude PSGs predicated on private violence from being cognizable because such a construction was impermissibly "expansive."[62] Focused on preventing a "floodgate" scenario,[63] the Attorney General conveyed concern that "broad swaths of society" may be eligible for U.S. asylum protection if PSGs can be defined by private harm.[64] The Attorney General repeatedly characterized domestic violence as private conduct,[65] minimized statutory language that recognizes that serious harm by nonstate actors can be persecution if the state fails to provide protection,[66] and declined to consider other constraining features of the INA's definition of refugee, such as the requirement that persecution be "on account of" a protected ground.[67] *A-B-* emphasized that survivors of domestic violence could be part of cognizable PSGs only in "exceptional circumstances,"[68] declining to

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60 *See* § 1101(a)(42).

61 *Id.*

62 *In re* A-B-, 27 I. & N. Dec. 316, 319 (Att'y Gen. 2018).

63 *See supra* notes 46–47 and accompanying text.

64 *A-B-*, 27 I. & N. Dec. at 335.

65 *See, e.g.*, *id.* at 319, 323, 337.

66 *See id.* at 343 ("No country provides its citizens with complete security from private criminal activity, and perfect protection is not required.").

67 This nexus element, codified in 8 U.S.C. § 1101(a)(42) with "on account of" language, requires asylum applicants to show that past persecution or feared future persecution is linked to at least one of five protected grounds: race, religion, nationality, membership of a particular social group, or political opinion. *Id.* Circuit courts often conduct a bifurcated nexus analysis that links the protected ground to either the serious harm experienced or feared, *or* the lack of state protection. *See, e.g.*, Kamar v. Sessions, 875 F.3d 811, 819–20 (6th Cir. 2017).

68 *A-B-*, 27 I. & N. Dec. at 317. According to the Attorney General, the "exceptional circumstances" involve (1) meeting requirements for PSG particularity and distinction, (2) demonstrating that the harm was due to membership in the PSG, "rather than for personal reasons," and (3) showing that leaving the home country was necessary due to the state's inability to protect. *Id.*

acknowledge that statutory language extends protection to survivors of persecution at the hands of a private actor.[69]

By emphasizing that PSG requirements do not categorically bar domestic violence asylum claims like De Pena's,[70] the First Circuit refuted part of the misplaced logic of *A-B-*. Yet the insistence that *A-B-* does not represent a full *categorical* bar to social groups proffered by domestic violence survivors still gives adjudicators ample discretion to render an applicant ineligible for asylum by concluding that a proffered PSG is defined by private harm. With that in mind, the First Circuit should have provided clearer guidance to adjudicators assessing asylum claims based on domestic violence. To facilitate more consistent decisions and ensure adjudicators apply the complete statutory scheme to an applicant's claim, the court should have clarified that, in private persecution cases, adjudicators must conduct a thorough, fact-specific inquiry to determine whether the private persecution was due to membership in a protected class and whether the state is unable or unwilling to adequately protect.[71] This guidance would mean adjudicators could not perform shallow analyses of other statutory requirements[72] under the presumption that PSGs proffered by survivors of private persecution are not cognizable.

The limited scope of the First Circuit's opinion in *De Pena-Paniagua* left meaningful room for adjudicators to apply heightened PSG standards to domestic violence survivors who seek U.S. asylum protection. The public-private dichotomy may therefore continue to relegate serious gender-based violence to private and nonactionable status in the absence of a firmer statement against allowing the private origin of persecution to bear on the cognizability of PSGs proffered by applicants. A clear dismissal of the public-private dichotomy's influence upon PSG determinations would have ensured survivors of persecution by private actors remain eligible for the asylum protection guaranteed to them under international and domestic law, provided they meet other statutory requirements. Thus, for now, the private realm may continue to drive insecurity even for those who nominally manage to escape it.

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[69] *See* 8 U.S.C. § 1101(a)(42)(A) (extending refugee protection when an applicant's home country is "unable or unwilling" to protect).

[70] *See De Pena-Paniagua*, 957 F.3d at 93.

[71] *See* Ordonez Azmen v. Barr, 965 F.3d 128, 135 (2d Cir. 2020) ("[T]he BIA's own precedential decisions require the agency to determine on a case-by-case basis whether a group is a particular social group for the purposes of an asylum claim.").

[72] To determine if a state provided adequate protection, U.S. courts and the BIA consider facts including preventative laws to combat private violence along with any case-specific probative evidence regarding responsiveness of local authorities to an applicant's complaints of persecutory harm. ANKER, *supra* note 45, § 4:11.