

## Case Comment

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*Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

Through the granting of asylum, refugee law aims to protect those who are fundamentally marginalized in their country because of characteristics over which they have no control.<sup>2</sup> If an alien can demonstrate that she is unable or unwilling to return to her country of origin because of either persecution or a well-founded fear of future persecution on account of her “membership in a particular social group,” (hereinafter, “PSG”) she may qualify as a refugee eligible for asylum.<sup>3</sup>

In *Cece*, an Albanian alien fled her country and applied for asylum in the US claiming a gender-based PSG that made her an ideal target for prostitution and trafficking in her home country. Although the Board of Immigration Appeals (hereinafter, “Board”) denied *Cece*’s asylum claim, the Seventh Circuit vacated the Board’s holding, finding that *Cece*’s proposed PSG was not too broad since it was consistent with other approved PSGs in the Board’s precedent. The court’s decision represents a progressive step – though not the first – in American asylum law toward recognizing more broadly and simply defined gender-based PSGs instead of the narrow PSGs that have led to asylum denials for deserving applicants in years past. Applicants may better present their claims under broadly defined gender-based PSGs when they are not hampered by the intricacies of judge-imposed defining language, which can be both circular and unfairly disadvantageous. Broader defined PSGs are also less likely to conflate other asylum criteria, like the nexus requirement, with PSG eligibility. Consequently, the frequently

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<sup>2</sup> DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 383 (Thomson Reuters et al. eds. (2013 ed.)).

<sup>3</sup> INA § 101(a)(42)(A), 8 U.S.C.A. § 1101(a)(42). The other four eligible bases for persecution or a well-founded fear of persecution are race, religion, nationality, and political opinion. *Id.* See also ANKER, *supra* note 2, at 46-7.

raised fear, which Judge Easterbrook presents in his *Cece* dissent, that broad PSGs will allow too many refugees into America is misplaced.

## I. SUMMARY OF CASE

Johana Cece, an Albanian native, fled her country and arrived in the US in 2002 seeking asylum.<sup>4</sup> While Cece was living alone in Korce, Albania, a well-known criminal gang leader named Reqi began following her around and asking her on dates.<sup>5</sup> Cece knew that Reqi and his gang were known for participation in prostitution rings, murder, and the drug trade while enjoying complete immunity from the law.<sup>6</sup> In June 2001, Reqi followed Cece into a cosmetics store, pinned her against a wall, and threatened that he would make her do anything he wanted.<sup>7</sup> No one in the store came to Cece's aid,<sup>8</sup> and when she reported the assault, the police dismissed it for lack of proof.<sup>9</sup> A few days after the incident, someone threw a rock through Cece's window, and fearing for her safety, she went to stay in a dormitory with her sister in Tirana, 120 miles from Korce.<sup>10</sup> Her sister left one year later, and Cece, having lost access to the dormitory, was forced to live alone again.<sup>11</sup>

Cece fled to the US and applied for asylum and withholding of removal asserting that she feared returning to Albania because she believed she would be kidnapped and forced into a prostitution ring.<sup>12</sup> She claimed that as a single woman living alone in Albania, she would be a target for Reqi's gang no matter where she lived.<sup>14</sup>

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<sup>4</sup> *Cece*, 733 F.3d at 666.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 667.

<sup>8</sup> *Id.* She suspected they were too afraid of Reqi. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* In addition to receiving asylum status, aliens may receive "withholding of removal," which is another form of protection from return to persecution. ANKER, *supra* note 1, at 8. However, withholding of removal does not provide a status in the US. *Id.*

### A. *Immigration Hearing*

At the immigration hearing, the immigration judge granted Cece asylum, determining that she belonged to the PSG of “young women who are targeted for prostitution by traffickers in Albania,” that the Albanian government was unwilling or unable to protect these women, and that Cece’s testimony was credible and her fear reasonable.<sup>15</sup>

Also during the hearing, Dr. Bernd Fischer, a professor of Balkan History, described Cece’s experience as “unfortunately usual” and testified that it is an anomaly for a single woman to live alone in Albania, adding that this would make her an ideal target for a human trafficker.<sup>16</sup> He further stated that trafficking of single women pervades everywhere in Albania, not just Cece’s village, Korce, and although gangs primarily target women between the ages of sixteen and twenty-six, older women are also trafficking targets.<sup>17</sup> Finally, Dr. Fischer explained that the Albanian state does not adequately punish traffickers.<sup>18</sup>

### B. *Board of Immigration Appeals*

Subsequently, however, the Board vacated the immigration judge’s decision, finding that Cece had failed to establish past persecution and had successfully relocated within Albania.<sup>19</sup> The Board specifically found that the immigration judge erred in affirming Cece’s PSG and

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<sup>13</sup> Before coming to the US, Cece fraudulently procured an Italian passport and applied for US asylum under the Visa Waiver Program. *Cece*, 733 F.3d at 667. Although Judge Easterbrook’s dissent touches on this fraudulent procurement, this case comment focuses primarily on gender-based aspects of the case and will not discuss Judge Easterbrook’s argument. *Cece*, 733 F.3d at 683.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 667. A 2004 US Department Report corroborated this testimony. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* In order to establish a well-founded fear of persecution, an alien does not have to demonstrate that her State is the persecutor. It is enough to show that the State is either unwilling or unable to protect her. Because the Board determined that Cece’s PSG was not cognizable (as discussed below), it did not reach the issue of whether Albania was unwilling or unable to protect her. *Id.* at 675-676.

<sup>19</sup> *Id.* at 668.

noted that a social group must be visible and united by more than the risk of persecution to be eligible.<sup>20</sup>

### *C. Remand and Subsequent Appeal*

On remand, the immigration judge recognized that he was bound by the Board's determinations and denied Cece's claim for asylum. After her second appeal was dismissed by the Board,<sup>21</sup> Cece appealed to the Seventh Circuit.<sup>22</sup>

### *D. Seventh Circuit*

On February 6, 2012, a three-judge panel of the Seventh Circuit Court of Appeals granted Cece's petition for rehearing en banc and vacated the Board's opinion and judgment.<sup>23</sup> Judge Rovner began the Seventh Circuit decision by stating the statutory asylum eligibility requirement: To be eligible for asylum, an applicant must show that she is "unable or unwilling to return" to the country of her nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>24</sup> The applicant must then establish "a nexus between her fear of future persecution and one of those five protected grounds."<sup>25</sup> An applicant who successfully proves past persecution is "presumed to have a well-founded fear of future persecution, which the Attorney General can rebut by demonstrating a change in conditions in the applicant's home country."<sup>26</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The immigration judge, however, expressed concern with the Board's conclusions – namely that Cece's proposed social group was defined mostly by the harm inflicted on its members and that Cece had presented insufficient evidence that internal relocation was not reasonable.<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Cece*, 733 F.3d at 662.

<sup>24</sup> 8 U.S.C. § 1101(a)(42)(A).

<sup>25</sup> *Cece*, 733 F.3d at 668 (quoting *Escobar v. Holder*, 657 F.3d 537, 542 (7th Cir. 2011)).

<sup>26</sup> *Cece*, 733 F.3d at 668; 8 C.F.R. § 1208.13(b)(1).

The issue in this case was whether Cece sufficiently demonstrated that she belonged to a PSG that is cognizable under the Immigration and Nationality Act.<sup>27</sup> Because Congress has not directly addressed what it means precisely by “social group,” the court deferred to the Board’s interpretation.<sup>28</sup> The Board had previously held “social groups” to be “groups whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change.”<sup>29</sup> For example, it would not have been appropriate to ask Cece to marry a man who could protect her because her decision to marry someone of her own choice was too fundamental to her identity and conscience.<sup>30</sup>

The court disagreed with the Board’s conclusion that Cece’s social group “[was] defined in large part by the harm inflicted on the group, and [did] not exist independently of the traffickers.”<sup>31</sup> Even if other individuals who share Cece’s common characteristics suffered past persecution or had a well-founded fear of future persecution, this did not mean that persecution was the only element that linked the social group.<sup>32</sup> Thus the Seventh Circuit recognized Cece’s PSG by focusing on its fundamental, immutable characteristics instead of the persecution its members endured or feared. The individuals in this group were united by the common and immutable characteristics of being (1) young, (2) Albanian, (3) women, (4) living alone, which

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<sup>27</sup> *Cece*, 733 F.3d at 668.

<sup>28</sup> *Id.* (quoting *Chevron, USA, Inc. v. Natural Resources Def. Council Inc.*, 467 U.S. 837, 842-3 (1984) (“If Congress has directly spoken to the precise question at issue, then a court must follow that clear guidance . . . If, however, the statute is silent or ambiguous, the court must defer to authoritative agency interpretations of the law”).

<sup>29</sup> *Cece*, 733 F.3d at 669.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* This finding by the Board led it to hold that Cece’s PSG was not cognizable. *Id.*

<sup>32</sup> *Id.*

made them an ideal target for trafficking.<sup>33</sup> These elements combined to form a PSG of young, single, Albanian women living alone *who fear prostitution*.<sup>34</sup>

Judge Rovner concluded that although the court did not need to decide whether gender *per se* may constitute a cognizable PSG, gender plus one more narrowing characteristic could.<sup>35</sup> The major problem that the court found with the Board's rejection of Cece's (Albanian woman plus "young" plus "single" plus "living alone") PSG was this rejection's inconsistency with prior decisions. The court did not think that Cece's social group was substantively different than that of young women in some African tribes fleeing female genital mutilation practices or Jordanian women fleeing the threat of honor killings – both groups that the Board had previously approved.<sup>36</sup> Given that the Board's decisions were inconsistent, the court could not condone arbitrariness by picking one of the inconsistent decisions to follow.<sup>37</sup> Thus, the court held that, in rejecting Cece's social group, the Board erred in light of its own precedent.<sup>38</sup> Because the court was not deciding this issue on first instance (since the Board and immigration judge had all the relevant facts before them), there was no need to remand on the PSG issue.<sup>39</sup> Judge Easterbrook dissented, arguing that Cece's proposed PSG was much too broad.<sup>41</sup>

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<sup>33</sup> *Id.* at 672.

<sup>34</sup> *Id.* at 672.

<sup>35</sup> *Id.* at 676.

<sup>36</sup> *Id.* at 669.

<sup>37</sup> *Id.* at 676.

<sup>38</sup> *Id.* at 677.

<sup>39</sup> *Id.*

<sup>40</sup> The court also overruled the Board's determination that there was insufficient evidence to show that internal relocation was not a feasible means for Cece to avoid persecution. *Id.* Because this is not an issue raised by the PSG considerations that are the focus of this case comment, I will not address the internal relocation question in depth. Suffice it to say that the court remanded the internal issue relocation back to the Board to consider that Cece had only felt safe while living with her sister and that Albania was a small country for someone who is well known to Reqi to hide. *Id.* at 678.

<sup>41</sup> *See id.* at 680. Judge Manion also dissented, arguing that living alone is not an immutable characteristic, "young" is too subjective an adjective to define an element of a cognizable social group, that Cece suffered from general lawlessness in Albania rather than targeted persecution, and that there was sufficient evidence to show that she could have internally relocated. *See id.* at 683-8. Again, because this was not a gender-based argument, this case comment does not address this contention in depth.

## II. DISCUSSION

Persecution against women has become an all too frequent tragedy around the world. Female trafficking is one culprit, but other forms of persecution, like those involving female genital mutilation, domestic violence, and forced marriage, also prevail.<sup>42</sup> Asylum reform at the protected grounds stage (the PSG stage in *Cece*) of the eligibility determination is one way to offer better protection to those women who come to America after suffering persecution on account of their gender or gender plus other immutable characteristics. This reform is proposed in the context of broadening definitions of gender-based PSGs.<sup>43</sup> Gender-based PSG claims are those in which the applicant's gender is the defining fundamental characteristic or one of the defining fundamental characteristics that led to her past or fear of future persecution.<sup>44</sup>

Broader and simpler definitions for gender-based PSGs have already met approval internationally and even in the Board's precedent. The UNHCR specifically recognizes women as being particularly vulnerable to trafficking because of gender.<sup>45</sup> Some tribunals of other states have also recognized a trafficking nexus for broad PSGs made of "young women in Albania."<sup>46</sup> In the American case, *Matter of Acosta*, the Board held that "social groups" are "groups whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change."<sup>47</sup> *Matter of Acosta* then recognized sex – a large group – as an immutable characteristic.<sup>48</sup> Further Board

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<sup>42</sup> ANKER, *supra* note 2, at 410.

<sup>43</sup> *See generally* ANKER, *supra* note 2, at 387-423.

<sup>44</sup> ANKER, *supra* note 2, at 405.

<sup>45</sup> United Nations High Commissioner for Refugees, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked at 2(HCR/GIP/06/07) (Apr. 7, 2006) *available at* <http://www.unhcr.org/443b62b2.html>.

<sup>46</sup> ANKER, *supra* note 2, at 423.

<sup>47</sup> 19 I. & N. Dec. 211, 233-34 (1985).

<sup>48</sup> 19 I. & N. Dec. 211, 233 (1985). (*See also* *Mohammed v. Gonzalez*, 400 F.3d 785, 797 (9th Cir. 2005) and *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993)).

precedent included recognition of PSGs like “women who fear genital mutilation,” “Christian women in Iran who do not wish to adhere to the Islamic female dress code,” and “Iranian women who refuse to conform to the government's gender-specific laws and social norms.”<sup>49</sup> These definitions are broad because they may encompass a very large number of women; it is easy to imagine that a highly sizable portion of the Albanian female population might fear prostitution if the crime is so prevalent in the country.

Consequently, sweeping PSG definitions have raised concerns in America, the above Board precedent notwithstanding, that recognition of overly broad PSGs will result in admission of intolerably large numbers of refugees.<sup>50</sup> As a result, American attorneys and adjudicators have frequently defined PSGs in trafficking cases more narrowly and circularly.<sup>51</sup> However, I argue below that global and American legal precedent that broadens gender-based PSGs rather than narrowing them is precisely what effective asylum reform requires. Recent global developments involving frequent persecution of women, like trafficking,<sup>52</sup> emphasize the importance of combining gender with other basic *Acosta* immutable traits to form broadly-recognized PSGs – or even recognizing PSGs defined by gender *per se* – in certain cases.<sup>53</sup> Moreover, because of other eligibility requirements beyond the PSG definition stage, decisions like these will not open the floodgates to intolerably large numbers of female refugees who fall into these broad PSGs.

The court’s decision in *Cece* is a sign that American asylum law is moving in the right direction with respect to broadly and simply defined gender-based PSGs. Although the court did not decide the question of whether gender *per se* can constitute a cognizable PSG (for it had no need to do so), this ruling is a clear stand in favor of the recognition of “gender plus” PSGs.

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<sup>49</sup> *Cece*, 733 F.3d at 669-70.

<sup>50</sup> ANKER, *supra* note 2, at 387 and 405.

<sup>51</sup> *Id.*

<sup>52</sup> ANKER, *supra* note 2, at 410.

<sup>53</sup> *Id.*



Here, the cognizable PSG consisted of gender plus the elements of being young, single, and living alone in Albania. The court correctly asserted that “women who fear female genital mutilation,” a recognized PSG, and “women who fear prostitution,” are not so different.<sup>54</sup> Prostitution is arguably an equally cognizable harm as FGM. The fact that Cece is single, young, and living alone enhances her potential to be an ideal target for traffickers. These are the underlying characteristics that account for her fear.<sup>55</sup> Judge Easterbrook contended that Cece’s was an ineligible social group because even though the Board would probably acknowledge “Albanian women” as an element in a PSG, it would not recognize “single,” “young,” or “living alone” as such.<sup>56</sup> However, it would be unfair to claim that the Board would not recognize these elements simply because of the language used to describe Cece’s PSG.<sup>57</sup> By looking at the type of fear present in Cece’s PSG – fear of prostitution/trafficking – rather than the language used to describe it, Judge Rovner allowed the court’s decision to comply with the Board’s precedent of granting asylum to aliens with a well-founded fear of persecution based on a gender-based PSG. Asylum law, still a burgeoning area in the American legal field, benefits from such judicially preserved consistency as its case law continues to grow.

*Cece* is particularly illuminating for its firm distinction between the PSG and nexus requirements in asylum eligibility. *Cece* was such an ideal target for traffickers precisely on account of the fact that she was a young, single woman living alone. This was not just a group of young, single women living alone who all happened to be trafficked; it was a group of women who had been trafficked or feared being trafficked *because* they are young, single, and living alone in Albania. By failing to grasp this distinction, Judge Easterbrook did not give due regard

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<sup>54</sup> *Cece*, F.3d at 672.

<sup>55</sup> *Id.*

<sup>56</sup> *Cece*, 733 F.3d at 681.

<sup>57</sup> *Id.* at 672.

to the nexus element of asylum. Consequently, his worry that certain gender-based PSGs are too broadly defined is hasty. Even a gender-based group that includes more members than Cece's PSG would still have to pass the nexus requirement. In other words, members of that group would still have to fear persecution *on account of* the elements that define that group. As the Tenth Circuit explained in *Niang v. Gonzalez*, “[t]here may be understandable concern in using gender as a group-defining characteristic . . . But the focus with respect to such claims should be not on whether either gender constitutes a social group . . . but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”<sup>58</sup> This underscores the argument that concerns about overly broad or narrow PSGs should be addressed through other definitional criteria since PSG is only one element of asylum eligibility.<sup>59</sup> By principally defining Cece's PSG as “women who fear prostitution,” Judge Rovner ensured that elements in Cece's PSG definition would not be conflated with other requirements of refugee eligibility like nexus. Although she acknowledged the factors that made Cece's fear well-founded, she did not attempt to stuff the PSG definition with reasons of *why* Cece's PSG is persecuted; those reasons belong at the nexus stage of examining Cece's claim.

### III. MOVING FORWARD

American asylum law scored a victory with the *Cece* decision. As recent global developments force more women to flee their countries and apply for asylum in the US, judicial recognition of more broadly and simply defined PSGs will grant stronger protection to those with eligible gender-based claims. Broader groups will help prevent conflation of PSG definitions with other requirements of refugee eligibility. Decisions like the Second Circuit's rejection of

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<sup>58</sup> 422 F.3d 1187, 1199-1200 (10th Cir. 2005) (alluding to the nexus requirement).

<sup>59</sup> ANKER, *supra* note 2, at 409.

“women who were previously targeted for sex-trafficking by members of [a gang] and who arranged to escape and avoid capture” or the Sixth Circuit’s rejection of “women subjected to rape as a method of governmental control” in their applications for asylum may have turned out differently under broader gender-based PSG definitions sharply separated from other eligibility criteria.<sup>60</sup> Those women’s PSGs may very well have been defined, respectively, as “women who fear sex trafficking” and “women who fear rape.” I would posit that such groups of women at least arguably fall into fundamentally marginalized categories over which they have no control, thus making them precisely the candidates that American asylum law aims to protect. If these women have a good shot at proving their claims,<sup>61</sup> the judiciary should not let overly narrow, PSG definitions deprive them of asylum before they reach the subsequent stages of proving eligibility, such as the nexus stage. Perhaps the above applicants’ claims would have failed even under broader PSG definitions, but policy-wise they should at least have been given an opportunity to present their arguments under more favorable conditions. The crimes committed against these women are so heinous that if American asylum law truly wishes to protect those persecuted for their membership in a particular social group, it should not let convoluted definitions distort the core underlying traits that define these groups.

After all, at least one circuit court has now agreed that Albanian women, like Cece, who fear prostitution deserve asylum. However, a narrower, more complex PSG definition in Cece’s case, much like the one she confronted in the Board’s decision, would have deprived her of the protection that she was later found to deserve. Thus where reasonable minds may support an applicant’s claim under a broad PSG definition, asylum law should encourage that definition.

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<sup>60</sup> *Id.* at 408-9. *Lushaj v. Holder*, 380 F. Appx. 41, 43 (2d Cir. 2010). *Kante v. Holder*, 634 F.3d 321, 326-7 (6th Cir. 2011).

<sup>61</sup> And what constitutes “good” may certainly benefit from discussion among leading legal minds in American asylum law.

Law must evolve with the times. The global status of refugees is such that countless women suffer persecution, at least in part, precisely because they are women. A trend in asylum law that recognizes this inherently female tragedy and tries to better address it through broader PSG definitions would better reflect the current refugee situation.

Meanwhile, a continually complex asylum-seeking process – with its detailed list of further eligibility criteria – would ensure that only those women who truly satisfy asylum law objectives can take advantage of more simply defined PSGs. These further eligibility criteria will prevent the incoming of an intolerably large number of refugees.<sup>62</sup> For example, even if the law allows for broader gender-based PSG eligibility, applicants will still have to pass the nexus requirement and prove that they have faced or fear facing persecution *on account of* the attributes that compose their PSG. Absence of state protection and infeasibility of internal relocation within the applicant’s home country are additional examples of criteria that an applicant’s claim will need to satisfy. A more lenient approach at the PSG definition stage of the asylum application will not allow the applicant to avoid demonstrating that she also satisfies these other requirements.

Perhaps as courts see that such broad gender-based PSG definitions will not open the floodgates to masses of undeserving refugees spilling into the US, they will even become amenable to recognizing PSGs based on gender *per se*. After all, other parts of the world have found that “[w]omen in any society are a distinct and recognizable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments.”<sup>63</sup> It is time that American asylum law, too, recognizes that just as

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<sup>62</sup> *Id.* at 409.

<sup>63</sup> *Id.* at 406. *Re MN*, Refugee Appeal No. 2039/93 (N.Z. R.S.A.A. 1996). (*See also* statements by the USCIS that “[w]omen hold a significantly different position in many societies than men. . . . Women may suffer harm solely because of their gender.” ANKER, *supra* note 2, at 407).

persecution may result from a person holding a certain political opinion or set of religious beliefs, living in some societies as a woman can also give rise to a well-founded fear of persecution.