"THINKING FORWARD"

'Membership of a Particular Social Group' Ground Meeting Canada's Goals in Refugee Law for Now and the Future

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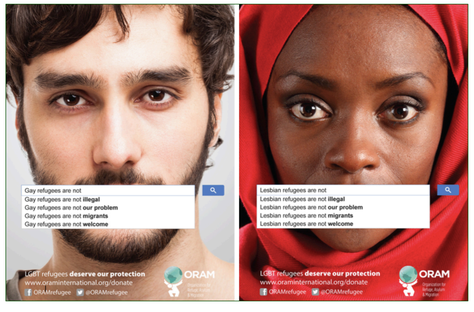
INTRODUCTION

*A **"refugee"** is any person, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group ("**MPSG**"), or political opinion, is outside his country of origin, and is unable to avail himself to protection of his country.*[1]

The reasons individuals and families flee their country of origin and seek refugee status is evolving. In recognition of this, in 2016, Canada's government-sponsored refugee program received over 21,000 refugees from Syria, prioritizing, *inter alia*, LGBTQ persons.[2]

While, MPSG has emerged as a promising ground for an evolving class of refugee claimants, it lacks a "self-evident ordinary meaning", and two interpretive tests, **(1) the protected characteristics test,** and **(2) the social perception test**, have developed from major jurisdictions, as viable approaches to determining MPSG.[3]



QUESTIONS

1. What are the strengths and weaknesses of the MPSG ground?
2. How does each interpretive test define MPSG? How do the two interpretative tests compare? Does the application of one test over another yield different results?
3. What are Canada's objectives in receiving refugees? Do the MPSG ground and the protected characteristics test help to meet those objectives?

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STRENGTHS & WEAKNESSES OF MPSG

*"… 'membership of a particular social group' is a ground which **must be given a broad and liberal interpretation** in order to protect groups or individuals who do not necessarily have political, religious, or racial ties at the root of their fear of persecution. Otherwise, this ground of 'social group' would be of very little value."*
– Immigration Appeal Board in *Richard C.R. Cruz*[4]

One of the clear strengths of the MPSG ground is its flexibility, and ability to meet some of the evolving reasons why applicants seek refugee status; grounds such as sexual orientation, gender, and former military membership. Yet, because of its amorphous nature, two different interpretative tests have developed to define MPSG.[5] Between these two tests, there are instances where on a very similar finding of facts, a different conclusion, on whether the applicant constitutes a refugee or not, will result. This apparent legal uncertainty is contrary to the paramount values of our legal system.

COMPARING THE TWO TESTS: JURISPRUDENCE FROM CANADA & AUSTRALIA

Canadian Case Using the Protected Characteristics Test: *Garcia Vasquez v. Canada (Minister of Citizenship & Immigration)* 2011 FC 477

- The applicant was from El Salvador.
- He was aggressively recruited to join a gang.
- He refused. He joined the military on contract for periods of 18-months, and then 12-months, the latter contract on a special anti-gang task force.
- When he left the military, he was seriously beaten and threatened with death.
- The applicant applied for refugee status under MPSG, as a former member of the military, particularly a special anti-gang task force, in El Salvador.

The Court found he did not constitute for MPSG, as his membership to the military was voluntary, only for a brief period of time, and was neither innate, fundamental, nor unalterable or permanent.

DEFINING A PARTICULAR SOCIAL GROUP ("PSG")

The Protected Characteristics Test:[6]

- Groups defined by an innate or unchangeable characteristic;
- Groups defined by a characteristic that is fundamental to human dignity, such that a person should not be forced to relinquish it; and
- Groups defined by a former status, unalterable due to its historical permanence.

The Social Perception Test:[7]

- A collection of persons who share a certain characteristic or element, which unites them and enables them to be set apart from society at large; and
- A group can be a PSG provided that the public is aware of the characteristics or attributes that unite and identify the group.

COMPARING THE TWO TESTS: JURISPRUDENCE FROM CANADA & AUSTRALIA

Australian Case Using the Social Perception Test: *SZEXS Applicant v. Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FMCA 1258

- The applicant was from Nepal.
- He was a member of the Royal Nepal Army and stationed in a Maoist region for 26-months.
- At the time, Maoist insurgents had committed gross human rights abuses against civilians, had killed military officers in broad daylight, and had a "hit list" of targets, of which the applicant was one.

The Court found because of the characteristics "he shared with a group of people", for which he "would be cognisable", the applicant constituted for MPSG as a "former member of the military in Nepal".

CONSIDERING CANADA'S OBJECTIVES: MPSG GROUND & PROTECTED CHARACTERISTICS TEST

An analytical reading of the *Immigration and Refugee Act,*[8] reveals Canada has these objectives, *inter alia*, in receiving refugees: (1) humanitarian objectives; and (2) procedural integrity objectives.

The flexibility of MPSG, and its ability to recognize the evolving refugee claimant contributes to Canada's **humanitarian objectives**. However, this effect is tempered by the objective protected characteristics test, which tends to be narrower in its definition of MPSG; thereby, at times, excluding some very worthy refugee claimants.

CANADA'S OBJECTIVES IN RECEIVING REFUGEES

While Canada seems to have settled into exclusively using the protected characteristics test, the debate, on which test is better suited to further the original intentions of the *Convention* drafters, is far from over.

The protected characteristics test is well-fitted to help meet Canada's **procedural integrity objectives**, with its objective test, in providing legal certainty and consistency in application of the law. Yet, MPSG, as a ground, fails to provide the same. As has been demonstrated, there are occasional inconsistencies between the tests and whether they find an applicant to be a member of a PSG or not. Such inconsistencies are troubling in light the Canada's humanitarian and procedural integrity objectives.

CONCLUSIONS

Ultimately, I suggest Canadian Courts should continue primarily turning to the protected characteristics test; however, where an applicant does not meet the test as a consequence of belonging to a PSG that is not characteristically permanent or innate, it ought to then consider whether the applicant's MPSG is perceived by larger society as being distinct and set apart.

Only when an applicant's alleged membership to a PSG is neither characteristically innate or permanent, nor, is perceived as being distinct and set apart should an applicant fail the test for MPSG. This approach will allow Canada to meet its goals in refugee law for now and the future.

QUESTIONS FOR FURTHER CONSIDERATION

- Are Canadian courts at risk of narrowing the sexual orientation ground for MPSG, because of a "floodgates" concern?
- Should a homosexual applicant's ground for MPSG be 'a homosexual in country *x*' or 'a practicing homosexual in country *x*'?
- To what degree must a homosexual applicant prove their homosexuality, if they took pains to hide it in order to avoid persecution in their country of origin?

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5. Thomas Musgrave, "Refugees", *Public international Law: An Australian Perspective*, eds. Sam Blay *et al* (1997) at 309
6. *Canada (Attorney General) v Ward,* [1993] 2 SCR 689.
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8. *Immigration and Refugee Act*, S.C. 2001, c. 27, ss.3(2) and (3).

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