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**NIANG V. GONZALES,
422 F.3d 1187 (10th Cir. 2005)**

FACTS

Petitioner Awa Niang was born in Senegal in 1970 into the Tukolor Fulani tribe.¹ According to her account, it was the practice of the tribe for girls to be subjected to female genital mutilation (FGM) and to consummate their arranged marriages by age 12.² In accordance with her tribal customs, she was to be subjected to FGM and was promised in marriage to her cousin, who already had three other wives.³ Petitioner refused to consummate her marriage and her family acquiesced until she was almost 25.⁴ When she still refused at this later age, however, her family removed her clothes, beat her and burned her with a hot iron.⁵ They then performed FGM on her, "so that [she] wouldn't be able to commit adultery and so that no one would want to have anything to do with [her]."⁶ Petitioner left her house the next morning, staying at a friend's house for the next four years.⁷ She obtained her law license at the university and then came to the United States in 1999, where she did not seek asylum but entered as a nonimmigrant visitor.⁸ While in the United States, petitioner married and later divorced Elhadji Fall, due to the fact that they could not have normal sexual relations because of her FGM.⁹ During her marriage she received a letter from a Senegalese friend stating that her family considered her an adulteress and would kill her if she returned.¹⁰

The INS initiated removal proceedings against Niang, and the immigration judge (IJ) found her to be removable.¹¹ She subsequently requested either asylum,¹² restriction on removal,¹³ relief from removal under the Convention Against Torture (CAT),¹⁴ or voluntary departure.¹⁵

¹ Niang v. Gonzales, 422 F.3d 1187, 1191 (2005).

² *Id.*

³ *Id.*

⁴ *Id.* at 1191–92.

⁵ *Id.* at 1192.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 8 U.S.C. § 1158 (2001) (setting out requirements and procedures for a grant of asylum).

¹³ 8 U.S.C. § 1231(b)(3) (2001) (excepting removal to countries where the alien's life or freedom would be in jeopardy).

¹⁴ The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 112 Stat. 2681 (1998), 1465 U.N.T.S. 85 (prohibiting the return of an alien to a country where it is more likely than not that he or she would be tortured).

¹⁵ 8 U.S.C. § 229c (allowing voluntary departure as an alternative to deportation proceedings).

The IJ denied her petitions for asylum, restriction on removal, and relief under the CAT because he disbelieved Niang's account of the circumstances surrounding the FGM.¹⁶ Niang appealed to the Board of Immigration Appeals (BIA) who affirmed the IJ's decision and dismissed the appeal, noting that she had not demonstrated that the IJ's ruling was clearly erroneous.¹⁷ Niang appealed this decision on the basis that (1) the BIA erred in affirming the IJ's adverse credibility finding and (2) her undisputed genital mutilation constitutes past persecution on account of membership in a social group however it occurred.¹⁸

HOLDING

The Tenth Circuit Court of Appeals affirmed denial of relief under Convention Against Torture.¹⁹ However, the court reversed the decision of the BIA with respect to asylum and restriction on removal, and remanded the case back to the BIA.²⁰

ANALYSIS

Noting that the BIA's decision demanded particularly high deference, the court used the substantial evidence standard of review.²¹ First the court examined the requirements to obtain asylum and restriction on removal.²²

The relevant statute for asylum provides two ways to meet the refugee status requirement: basing a claim on past persecution or on a well-founded fear of future persecution.²³ This case focused on Section 1208.13(b)(1) of the Code of Federal Regulations, which addresses past persecution.²⁴ Essentially, if an applicant can prove past persecution in the applicant's country of nationality, he or she shall be found a refugee.²⁵

¹⁶ *Niang*, 422 F.3d at 1193.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1202.

²⁰ *Id.*

²¹ *Id.* at 1196.

²² *Id.* at 1194–96.

²³ See 8 C.F.R. § 1208.13(b) (2001) (setting these two options as exclusive ways to establish refugee status).

²⁴ See 8 C.F.R. § 1208.13(b)(1)(2001) ("An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality [on one of the forbidden grounds]..., and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution").

²⁵ *Id.*

Refugee status does not guarantee the grant of asylum, however, as that decision remains in the Attorney General's discretion.²⁶

The court then examined the restrictions on removal. According to the relevant statute, to obtain a restriction on removal, an applicant must show that his "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."²⁷ The statute further states that if the applicant has suffered past persecution in his or her country because of race, religion, nationality, membership in a particular social group, or political opinion, it will be presumed that the applicant's life or freedom would be threatened on return to his or her natural country.²⁸

Both asylum and restriction on removal may be granted under the claim of past persecution.²⁹ In order for FGM to be the basis of a claim of past persecution, the applicant must establish that 1) the FGM constituted persecution; 2) the applicant belonged to a particular social group; and 3) there was a nexus between the FGM and membership in the group.³⁰ The court found that although the BIA disbelieved Niang's accounts of how the FGM occurred, she could still be entitled to relief, if she could show that women of the Tukulor Fulani tribe constitute a social group and that she was subjected to FGM because she belonged to that particular social group.³¹ The court found the term "social group" in the statute was ambiguous, and deferred to the BIA's analysis in *In re Acosta*.³² According to *Acosta*, persecution is

directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some

²⁶ *Niang*, 422 F.3d at 1195 (citing *In re Cardoza-Fonesca*, 480 U.S. 421, 428 (1987)) (finding that an alien is a refugee does no more than establish that the alien may be granted asylum in the discretion of the Attorney General).

²⁷ *Niang*, 422 F.3d at 1194 (citing 8 U.S.C. § 1231(b)(3)(A) (2001)) (excepting instances of deportation).

²⁸ See 8 C.F.R. § 1208.16(b)(1) (2001) (explaining that evidence of past persecution will be presumptive of future persecution).

²⁹ See 8 U.S.C. § 1158 (2001) (naming past persecution as grounds for asylum); see also 8 U.S.C. § 1231(b)(3) (2001) (establishing a presumptive entitlement to restriction on removal on basis of past persecution).

³⁰ *Niang*, 422 F.3d at 1197.

³¹ *Id.* at 1201.

³² *In re Acosta*, 19 I. & N. Dec. 211, 233-34 (1985). In *Acosta*, the BIA denied an appeal for asylum and withholding of deportation because *Acosta* failed to meet the requirement of a social group. *Id.* at 234. He based his claim on the fact that he was a taxi driver in San Salvador who refused to participate in guerrilla-sponsored work stoppages, which lead to threats of violence. *Id.* However, because his membership in the group of taxi drivers was something *Acosta* had the power to change, he did not meet the standards of a social group. *Id.*

circumstances it might be a shared past experience such as former military leadership or land ownership... [W]hatever 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.³³

Thus, the Tenth Circuit now joins five other circuits in adopting BIA's interpretation in *Acosta*.³⁴

Applying these guidelines, the *Niang* court found that female members of a tribe would constitute a social group.³⁵ The court rejected the contention that the decision proffered in *In re Kasinga*,³⁶ where the BIA demanded an additional element, namely that the social group must include only those persons who oppose the offensive practice.³⁷ Accordingly, the court held that opposition is not necessary when the social group is otherwise defined by gender and tribal membership.³⁸

Next, membership in the social group must be the reason for the victim's persecution.³⁹ The court reemphasized the point that opposition to the FGM did not need to be proven to establish a nexus.⁴⁰ In this way, the *Niang* court agreed with the Ninth Circuit in *Mohammed v. Gonzales*,⁴¹

³³ *Id.* at 233.

³⁴ *Niang*, 422 F.3d at 1199; *see, e.g., Alvarez-Flores v. INS*, 909 F.2d 1 (1st Cir. 1990) (holding that being a cheesemaker in El Salvador without other evidence of persecution from local guerillas does not support a finding of well-founded fear of persecution); *Elien v. Ashcroft*, 364 F.3d 392, 396-97 (1st Cir. 2004) (holding that it would be unsound policy to recognize Haitians who have committed crimes in the U.S. as a social group, in light of Haiti's policy of detaining and punishing such persons upon return to the country); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing that Iranian women who so oppose national laws that they are willing to suffer the consequences of noncompliance constituted a social group); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir. 2003) (adopting the *Acosta* definition but holding that "tattooed youths" were not a social group); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998) (using the *Acosta* standard and holding that parents of Burmese dissidents did not comprise a social group); *Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir. 2005) (*en banc*) (finding that an individual family constituted a social group as they were subject to physical violence and intimidation because of their relation to the racist father-in-law).

³⁵ *Id.* at 1200.

³⁶ *In re Kasinga*, 21 I. & N. Dec. 357 (1996). In *Kasinga*, the BIA granted asylum to a young woman from the Tchamba-Kunsuntu Tribe of northern Tongo. *Id.* at 358. The board found that young women who are members of this tribe and have not been subjected to FGM as practiced by the tribe, and who oppose the practice, are recognized as a social group within the definition of "refugee" in 8 U.S.C. § 1101(a)(42)(A) (1994). *Id.* at 365.

³⁷ *Niang*, 422 F.3d at 1200.

³⁸ *Id.*

³⁹ *See* 8 C.F.R. § 1208.13(b)(1) (2001) *supra* note 24 and accompanying text (); *see also* 8 U.S.C. § 1231(b)(3) (2001) *supra* note 13 and accompanying text ().

⁴⁰ *Niang*, 422 F.3d at 1201.

⁴¹ *Mohammed v. Gonzales*, 400 F.3d 785 (2005). In *Mohammed*, the court granted the petitioner's application to reopen her asylum claim because of ineffective assistance of counsel. *Id.* at 802. Her

which held that a female victim of FGM had established past persecution on the basis of being a member of a social group as defined solely by her membership in the tribe and her gender.⁴² Recognizing that the reason for the persecution was a result of her sex and tribal membership and not opposition to the practice, the *Niang* court justified such a holding.⁴³

Applying the foregoing analysis to Niang's case, the Tenth Circuit found that although the court would defer to the BIA's rejection of Niang's claim of past persecution because he found her account unbelievable, her broader claim that she suffered FGM on the basis of her social group could nonetheless afford her relief.⁴⁴ Although the BIA did not find Niang's account of how the FGM took place credible, it remained undisputed that it did take place and that she was a female member of the Tukulor Fulani tribe.⁴⁵ Thus, the court remanded the case for consideration of the broader claim of "social group."⁴⁶ Niang must then show that the persecutor was the government or a force that the government was unable or unwilling to control.⁴⁷ According to the court, if the BIA finds this third element of refugee status, Niang is considered a refugee, entitled to a presumption for asylum purposes that she has a well-founded fear of future harm on account of her social group and a presumption for restriction-on-removal purposes that she will be persecuted in her home country on account of her social group."⁴⁸

Finally, the prohibition of return under the CAT requires that the alien show that the persecution upon return to the country would be so severe as to rise to the level of torture.⁴⁹ Under the CAT, future torture is not presumed on the basis of past torture.⁵⁰ The court affirmed the BIA's determination that Niang was not eligible for relief under the CAT because evidence of past torture does not presumptively entitle an applicant to

attorney had neglected to use evidence of past infliction of FGM in her asylum claim. *Id.* at 789–90. The court found that being a female member of the Benadiri Clan of Somalia was sufficient to meet the requirements of "social group," stating "[w]e believe that opposition is not required in order to meet the 'on account of' prong in female genital mutilation cases. The persecution at issue in these cases—the forcible, painful cutting of a female's body parts—is not a result of a woman's opposition to the practice but rather a result of her sex and her clan membership and/or nationality." *Id.* at 797.

⁴² *Niang*, 422 F.3d at 1201.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1201–02.

⁴⁸ *Id.* at 1202.

⁴⁹ *Id.* at 1196 (citing *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004)) (noting that a person is entitled not to be removed to a certain country if he or she can show that it is more likely than not that he or she would be tortured if removed to that country).

⁵⁰ *Id.* at 1196.

relief.⁵¹ Although past persecution is one factor for the BIA to consider in his CAT decision, the BIA discredited Niang's description of her family's attack on her and it was rational for the BIA to find that she would not be killed or subjected to torture if she returned to Senegal.⁵²

CONCLUSION

The *Niang* court noted two outliers in circuit interpretations of "social groups." However, it seems that both *Safaie v. INS*⁵³ and *Gomez v. INS*⁵⁴ may be reconciled with the *Niang* decision. In *Safaie* the court held that Safaie's assertion of a social group as defined by all Iranian women was overbroad, "because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender."⁵⁵ Conversely, the court stated that if it could find a group of women who refused to conform to a practice and that their opposition was in the face of severe consequences, the group would satisfy the definition of a social group.⁵⁶ In other words, if Safaie had contended that she was persecuted because she was part of a group of female political dissidents, and had sufficient evidence to show the extent of her involvement and subsequent persecution, the court likely would have found a "social group." Safaie's proposed "social group" was too broad. In *Niang*, of course, opposition to FGM was not an issue because it was not a cause of the persecution, FGM itself.

Gomez, like *Safaie*, may be factually distinguished from *Niang*. In *Gomez*, the court found against an applicant for asylum when she based her persecution claim on the social group of "women who have been previously battered and raped by Salvadoran guerillas."⁵⁷ Noting that the attributes of

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994). In *Safaie*, the court denied the petitioner's application for asylum based on her fear of punishment for violating Iran's gender-specific laws. *Id.* at 640. As a university student, she had been subject to long interrogations and threats of harm. *Id.* at 639. Stating that it was unwilling to hold that all Iranian women deserve refugee status and that her objection to Iranian policies was not strong enough to create a more specific social group encompassing only Iranian female activists, the court denied that being a female in Iran constituted a social group. *Id.* at 640.

⁵⁴ *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991). In *Gomez*, the petitioner was repeatedly raped and beaten as a child by guerilla forces in her homeland of El Salvador. *Id.* at 662. The court held that it would not recognize women who have been previously battered and raped by Salvadoran guerillas, because this group of individuals did not share a fundamental characteristic which served to distinguish them in the eyes of a persecutor. *Id.* at 663-64. The court also stated that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." *Id.* at 664.

⁵⁵ *Safaie*, 25 F.3d at 640.

⁵⁶ *Id.*

⁵⁷ *Gomez*, 947 F.2d at 663-64.

the social group must be discrete, the court held that "possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."⁵⁸ This decision may be reconciled with *Niang*, however, when considering the factual differences of the cases. While *Niang* was targeted because she was a female member of the Tukolor Fulani tribe in Senegal, the victim in *Gomez* was targeted because she was a female living in El Salvador. In other words, *Niang's* social group was defined both by tribe and gender, while *Gomez's* relied solely on gender. It would seem that the court in *Gomez* saw a lack of specificity which translated into a lack of probable persecution upon return to El Salvador. While being a female in the Tukolor Fulani tribe created a 20% chance of being subjected to FGM,⁵⁹ the percentage of women in El Salvador who were attacked had not been determined. Thus, the *Gomez* court seemed to read an element of substantive probability in determining what constituted a "social group."

A similar Sixth Circuit decision could also be seen to reject the notion that gender and clan membership alone would meet the requirements of a social group, but may be better understood as setting specific limitations on such a definition of social group. In *Rreshpja v. Gonzales*,⁶⁰ the Sixth Circuit held that being an attractive woman who risked being kidnapped and forced into prostitution upon her return to Albania could not constitute a social group.⁶¹ The *Rreshpja* court distinguished these facts from those of *Mohammed* because in *Mohammed*, the applicant presented evidence that 80 percent of all females were victims of FGM in Somalia,⁶² while petitioner in *Rreshpja* did not show concrete evidence that young women in Albania were forced into prostitution as pervasively.⁶³ Thus, like *Gomez*, *Rreshpja* seems to set out a substantive evaluation of the proposed social group, specifically in terms of the probability of being affected by the objectionable practice. This view of the requirements of "social group," however, seems to impinge on the next requirement in the refugee status evaluation, namely a showing that the applicant would be persecuted or has a well-founded fear of

⁵⁸ *Id.* at 664.

⁵⁹ *Niang*, 422 F.3d at 1193.

⁶⁰ *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Cir. 2005). In *Rreshpja*, the petitioner fraudulently obtained a non-immigrant visa after a man attempted to kidnap her in her home country of Albania. *Id.* at 553. She alleged that she was at risk of prosecution because she was likely to be kidnapped and forced into prostitution if she returned to her country. *Id.* The court found that young, attractive Albanian females did not constitute a social group under 8 U.S.C.S. § 1101(a)(42)(A) and denied her asylum. *Id.* at 556. The court noted that it would not recognize generalized and sweeping classifications to meet the requirements of social group, nor could a social group be circularly defined by the fact that it suffers persecution. *Id.* 556–57.

⁶¹ *Id.* at 555.

⁶² *Mohammed*, 400 F.3d at 801.

⁶³ *Rreshpja*, 420 F.3d at 555–56.

persecution based on membership in the social group. *Rreshpja* may not present a directly contrary ruling to *Niang*, but it did set a more restrictive substantive standard on who may constitute a social group.

Examining this case law, the *Niang* decision is the latest in several similar holdings by the other circuits which have broadened the understood meaning of "social group." This represents a recent acceptance by the courts to recognize sex as forming the basis for a social group, therefore taking a broad reading of *Acosta*. It also reflects changing philosophy within the INS. Beginning in 1995, the INS started an initiative which included a directive to Asylum Officers to consider gender-based claims within the framework of existing international human rights instruments, such as United Nations guidelines.⁶⁴ Such guidelines prescribed a broader understanding of persecution, as it was implicated by gender-based claims. The trend to adopt more liberal interpretations of sexual persecution will serve to bring American asylum policies in line with internationally-accepted standards.

The broad interpretation given to *Acosta* in *Niang* will have the effect of giving broader asylum and restriction on removal protection to those facing prosecution because of their gender. The *Niang* court has joined others in agreeing that objection to a particular practice is not a requirement in defining "social group." Women who suffer persecution through FGM, for example, are rarely targeted because of their individual beliefs, as opposed to their gender, and this decision will lessen the burden for these victims to meet the "social group" requirement for asylum. This also holds true for women seeking asylum from particularly gender-oppressive societies, in which women are targeted without regard to political or ideological affiliation. There will likely be greater consistency in IJ and BIA decisions regarding classifications of social groups as circuits continue to agree on this interpretation. Finally, these recent holdings also have the potential to broaden protection even further, to include those who, for example, face persecution because of sexual orientation.

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⁶⁴ See *Fisher v. INS*, 79 F.3d 955, 967-68 (9th Cir. 1996) (citing the 1979 Convention on the Elimination of All Forms of Discrimination Against Women and the 1993 Declaration on the Elimination of Violence Against Women as documents to be consulted in deciding gender-based claims).