



UNHCR Note on Refugee Claims Based on Coercive Family Planning Laws or Policies

A. Introduction

1. Family planning policies are an exercise of State authority in socio-economic development and can legitimately be aimed at improving the quality of life and common welfare of the population. As worded in Principle 5 of the 1994 Programme of Action of the United Nations International Conference on Population and Development (ICPD): “Population-related goals and policies are integral parts of cultural, economic and social development, the principal aim of which is to improve the quality of life of all people.”¹ There is thus no inherent connection between family planning policies and persecution. Family planning per se is broadly accepted as a proper response to population pressures, provided these are not targeted at a particular group or community, but are of general application and there is no discrimination in the intent behind, or in the application of, the policy or relevant laws.

2. At the same time, while serving legitimate socio-economic objectives, population policies should be consistent with internationally recognized human rights standards, justice and the survival of national, regional and minority groups.² Hence, as evident from the wording of the 15 Principles of the Programme of Action agreed by the ICPD, a careful balance needs to be maintained between the recognition of individual human rights and the right of nations to develop.³

3. Over the past four decades, the right of parents to decide freely and responsibly on the number and the spacing of their children has developed as a key aspect of reproductive rights. The 1968 International Conference on Human Rights held in Teheran reached agreement on this particular issue, proclaiming that parents have a basic right to determine freely and responsibly the number and spacing of their children.⁴ This emerging human right was affirmed at the World Population Conference held in Bucharest in 1974⁵ and then given expression in treaty law in the

¹ ICPD, 5–13 September 1994, Cairo, Egypt. The General Assembly has similarly affirmed that “the principal aim of social, economic and human development, of which population goals and policies are integral parts, is to improve the standards of living and quality of life of the people”, A/RES/39/228, 18 December 1984, meeting no. 104, para. 5.

² World Population Plan of Action, adopted by consensus of the 137 States represented at the United Nations World Population Conference in Bucharest, August 1974, para. 14(d).

³ ICPD, “Follow-up action to be taken by the United Nations: Implications of the recommendations of the International Conference on Population and Development for the work programme on population”, Report of the Secretary-General, E/CN.9/1995/5, para. 9.

⁴ Para. 16 of the resulting Proclamation of Teheran reads: “The protection of the family and of the child remains the concern of the international community. Parents have a basic human right to determine freely and responsibly the number and the spacing of their children.”

⁵ All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so; the responsibility of couples and individuals in the exercise of this right takes into account the needs of

1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 16(1)(e) of which provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:...The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

4. A potential conflict may arise between the interest of individuals to decide freely and responsibly on the number and spacing of their children and the interest of States in pursuing economic and social policies for the common welfare of their people through population control policies. In situations where there may be a potential conflict, it needs to be assessed whether the State, in pursuing its socio-economic objective, may legitimately restrict an individual's ability to exercise the right in question and if so, to what extent, since such an interference should not be disproportionate in relation to the legitimate aim pursued.

5. In this context, it has been widely recognized that family planning policies should not be either compulsory or coercive. For instance, the Human Rights Committee, in clarifying Article 23 of the 1966 International Covenant on Civil and Political Rights,⁶ has stated in its General Comment No. 19: "... When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or *compulsory*..."⁷ The same is reiterated in the ICPD Programme of Action, which states, *inter alia*: "Reproductive health-care programmes should provide the widest range of services *without any form of coercion*. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so".⁸ It also provides: "... The principle of informed free choice is essential to the long-term success of family-planning programmes. Any form of coercion has no part to play."⁹

their living and future children, and their responsibilities towards the community (Principle 14f, World Population Plan of Action).

⁶ Article 23(2) of the 1966 International Covenant on the Civil and Political Rights (hereafter "ICCPR"), as well as Article 16(1) of the Universal Declaration of Human Rights (hereafter "UDHR"), provide for the right of men and women of marriageable age to marry and to found a family.

⁷ General Comment No. 19, Protection of the family, the right to marriage and equality of the spouses (Article 23), 27 July 1990, para. 5 (emphasis added).

⁸ See Principle 8, (emphasis added).

⁹ ICPD, Programme of Action, Chapter VII, Section B on Family Planning, para. 7.12. See also Chapter VII, Section A on Reproductive Rights, para. 7.3, which states:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community. The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government- and community-supported policies and programmes in the area of reproductive health, including family planning ...

6. In view of the above, coercive family planning laws or policies which prescribe the number of children parents can have and/or which provide for enforcement measures or sanctions to promote compliance with such laws or policies, or punish individuals for breaching them, are not in conformity with international human rights standards.

7. Additionally, both the means or methods used to enforce coercive family planning laws or policies and the sanctions imposed in response to breaches of such laws may result in serious human rights violations and hence persecution.

8. Proceeding on the basis that coercive forms of family planning constitute a violation of human rights, this Note seeks to provide guidance for the assessment of claims for refugee status based on a fear of persecution arising out of opposition to, or non-compliance with, compulsory family planning policies, in particular in situations where there is a refusal to forcibly abort a child conceived outside the permitted quota or to undergo sterilization. The two key issues that will be examined are the threshold at which the harm feared amounts to persecution and the nexus to one or more of the five grounds set out in the refugee definition of the 1951 Convention relating to the Status of Refugees.

B. Well-founded fear of persecution

Persecutory laws and policies

9. As set out above, the legitimate socio-economic and demographic objective of a family planning law or policy does not outweigh the individual's right to found a family and to decide freely and responsibly on the number and spacing of his or her children. Interference with that right, as envisaged by coercive family planning laws or policies, would therefore be disproportionate and unjustified. Even though a coercive family planning law or policy is not in conformity with accepted human rights standards, this does not in itself necessarily make it inherently persecutory, as only serious harm resulting from a human rights violation constitutes persecution. As in all cases where an applicant claims to fear persecution as a result of a law of general application, it must be established that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced.¹⁰ Similarly, if an individual is not able to have children for medical reasons, a well-founded fear of persecution based on such a law could not be established, since the individual concerned would not be able to breach the coercive family planning law.

10. A law or policy which restricts the right to found a family or to decide freely and responsibly on the number and spacing of children may be considered persecutory if the applicant holds strong political or religious convictions, the disregard of which

¹⁰ UNHCR, "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", (hereafter "UNHCR Guidelines on Gender-Related Persecution"), HCR/GIP/02/01, 7 May 2002, para. 10.

would make his or her life intolerable.¹¹ An evaluation of the subjective element of the refugee definition must thus necessarily involve an assessment of the personality of the particular asylum-seeker.¹² For example, a person with strong religious beliefs or whose religion forbids family planning may suffer intolerable mental agony and harm if forced to comply with a law or policy on family planning, such as through the use of contraceptives, in order to avoid prosecution. Although an act of compliance, in the sense of refraining from having more than the permitted number of children, may not be physically painful or harmful, it could nevertheless be so abhorrent to the individual's deepest beliefs that it would be tantamount to persecution.¹³

11. A coercive family planning law or policy that prescribes forced abortion or forced sterilization as methods of enforcement would, however, always be considered inherently persecutory in view of the serious human rights violations each individual subject to these measures would suffer. Forced abortion and forced sterilization violate the physical integrity or security of the person and may well, in some cases, also pose a threat to life, for example, when an abortion is carried out at an advanced stage of pregnancy. The harmful physical and psychological impact of these enforcement measures has been widely acknowledged in international fora.

12. For instance, the Committee on the Elimination of Discrimination against Women has stated that “[c]ompulsory sterilization or abortion adversely affects women's physical and mental health ...”¹⁴ and that “... States parties should not permit forms of coercion, such as non-consensual sterilization ... that violate women's rights to informed consent and dignity.”¹⁵ In addition, forced abortion and forced sterilization were mentioned as two forms of sexual assault on women during the negotiations leading up to the adoption on the 1993 Declaration on the Elimination of Violence against Women.¹⁶ The 1995 Beijing Platform for Action defined the term “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life” and included among such acts “forced sterilization and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection”.¹⁷ The Beijing Declaration also explicitly recognized and reaffirmed that the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.¹⁸

¹¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, 1979, reedited 1992, (hereafter “UNHCR Handbook”), para. 40.

¹² *Ibid.*

¹³ “Gender-related persecution: An analysis of recent trends”, prepared by UNHCR Division (now Department) of International Protection in connection with a symposium on gender-based persecution, Geneva, 1996, p. 97, referring to *Fatin v. Immigration and Naturalization Service*, US Court of Appeals Third Circuit, 20 December 1993, at 1242.

¹⁴ General Recommendation No. 19, 11th session, 1992, on violence against women, para. 22 (concerning Articles 16 and 5 of CEDAW).

¹⁵ General Recommendation No. 24, 20th session, 1999, on Article 12 CEDAW (women and health), para. 22.

¹⁶ GA resolution, 48/104, 20 December 1993.

¹⁷ Beijing Platform for Action, Strategic Objectives and Actions, Violence against Women, paras. 113 and 115.

¹⁸ Beijing Declaration, para. 17.

13. Compulsory abortion or sterilization may also amount to torture, inhuman or degrading treatment constituting persecution. Indeed, the Human Rights Committee states that in order “to assess compliance with Article 7 of the Covenant ... States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization ...”.¹⁹

14. Hence, implementation of coercive family planning policies through laws which impose compulsory abortion or sterilization would seriously breach fundamental human rights of the individuals affected. Laws which prescribe the use of such measures to enforce family planning policies are therefore inherently persecutory. Whenever such laws are applied, this would give rise to serious violations of human rights amounting to persecution.

Methods of enforcing coercive family planning laws or policies and penalties, sanctions or discriminatory treatment imposed for non-compliance

Parents

15. The distinction between prosecution and punishment for a common law offence and persecution will occasionally be obscured. This may be the case if an individual is liable to excessive punishment, if he or she faces penal prosecution for a reason mentioned in the refugee definition, or if he or she, besides fearing prosecution or punishment, has a well-founded fear of persecution, for example, as a result of discriminatory measures.²⁰

16. As indicated above, a coercive family planning law or policy which restricts an individual’s right to found a family and to decide freely and responsibly on the number and spacing of their children is not in conformity with international standards²¹ despite the legitimate social objective it seeks to achieve. Therefore, under international human rights and criminal law standards, any punishment imposed in response to a breach of such a law or policy would be considered excessive in relation to the offence committed. However, not all punishments that would be considered excessive on the basis of international human rights and criminal law standards are necessarily persecutory, as the impact of an anticipated punishment on an individual needs to be serious in order to reach the threshold of persecution.

17. As elaborated above, where a coercive family planning law is enforced by compulsory abortion or compulsory sterilization or where these sanctions are imposed for breaches of such laws or policies, such enforcement measures and sanctions, if

¹⁹ General Comment No. 28, on Article 7 of the ICCPR, para. 11.

²⁰ UNHCR Handbook paras. 57-58.

²¹ *Ibid.*, paras. 59–60. Para. 59 reads: “In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards.” Para. 60 reads:

In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.

implemented, would result in serious breaches of human rights and their impact would amount to persecution. In this context, it needs to be recalled that there may be cases where a particular State has prohibited a persecutory practice (e.g. enforced sterilization), but still continues to condone or tolerate it or is not able to stop the practice effectively, with the result that the persecutory practice in effect continues. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will, therefore, not in itself be sufficient to determine that the individual's claim to refugee status is not valid.²²

18. While penal sanctions, such as imprisonment or detention are not considered excessive forms of punishment for certain types of offences, as outlined above, these would be excessive in relation to the offence of having conceived a child outside the quota permitted by a coercive family planning law or policy even if the period of imprisonment is not considered lengthy or its nature inhumane. When determining whether the threshold of persecution is reached, the anticipated impact of a penal sanction on a particular individual needs to be assessed in light of the nature and extent of the punishment. Clearly, more extreme forms of punishment such as “re-education through labour” camps²³ would always amount to persecution for the individuals concerned.

19. It should also be noted that penal prosecution for a reason mentioned in the refugee definition may in itself amount to persecution.²⁴ Considering the various particular social groups that may exist, as set out below, penal prosecution for having exercised one's human right to found a family and to decide freely and responsibly on the number and spacing of one's children may in itself amount to persecution.

20. Certain administrative or economic sanctions, when imposed in response to breaches of coercive family planning laws or policies, may also be persecutory. Among the sanctions that have been imposed for violations of coercive family planning laws or policies are stiff fines (often higher than a year's salary) including “social compensation fines”, withholding of social services, demotion and other administrative punishments that sometimes result in loss of employment, as well as confiscation or destruction of individuals' homes or personal property by the local authorities. As with the penal sanctions above, even though economic or administrative sanctions would be considered excessive under international human rights law for such offences given the individual's recognized interest in exercising the rights in question, the anticipated impact of a particular sanction on an individual must nonetheless be assessed in order to determine if it reaches the threshold of persecution. For example, the impact of a social compensation fee on one family could be very serious and could, for example, result in a threat to the life or freedom of the persons concerned or seriously restrict the children's ability to enjoy their right to education, while the impact of a similar measure on another family could be much less serious.

21. Discriminatory measures, such as restricted enjoyment of the right to work, could also amount to persecution if they were to lead to consequences of a

²² UNHCR Guidelines on Gender-Related Persecution, para. 11.

²³ Amnesty International news release, 7 January 2005, available at <http://www.amnesty.org.uk/news/press/15852.shtml>.

²⁴ UNHCR Handbook, para. 57.

substantially prejudicial nature for the individual concerned (e.g. serious restrictions on his or her right to earn a livelihood)²⁵ or if they produced “a feeling of apprehension and insecurity” as regards the “future existence” of the individual and his or her family.²⁶ Various discriminatory measures imposed on individuals for reasons of their opposition to, or non-compliance with, coercive family planning laws could, for example, violate their right to enjoyment of just and favourable conditions of work,²⁷ an adequate standard of living including adequate food, clothing and housing, freedom from arbitrary or unlawful interference with privacy, family, home or correspondence and from unlawful attacks on honour and reputation,²⁸ as well as the right not to be arbitrarily deprived of one’s property.²⁹ The impact of such violations on an individual would then need to be assessed in order to determine whether the impact of the treatment feared would amount to persecution.

22. Even where specific measures in themselves would not amount to persecution, they could, when combined with other adverse factors, constitute persecution. Depending on the facts of the case, there may be cases where an individual or the members of a family risk being subjected to numerous administrative and economic sanctions and/or discriminatory measures, which together could make life intolerable and amount to persecution on cumulative grounds.³⁰

Children

23. A well-founded fear of persecution may also be analysed from a child’s perspective. In some instances, children born in contravention of compulsory family planning policies have been subjected to concerted and severe discrimination and been denied registration and birth certificates and have been given only restricted access to food, education, health care and other social rights. Discriminatory treatment may not always be targeted directly at the child him or herself but where the parents are, for example, demoted, obliged to pay “social compensation fines” or denied subsidized education, it is the child who may ultimately suffer the consequences of his or her parents’ serious social or financial predicament. Thus, when assessing an application for asylum made by a child asylum-seeker, the impact of the penalties or measures that may be imposed in order to enforce compliance with coercive family planning laws or policies should be evaluated, taking into account the situation of the parents and the family as a whole.

24. In making the assessment as to whether the harm suffered or feared amounts to persecution, it should be recalled that there are certain child-specific rights (i.e. rights enjoyed exclusively by children) under international human rights and humanitarian law, including the 1989 Convention on Rights of the Child, which must be respected. The recognition of these child-specific rights raises the question as to whether violations of such rights would amount to persecution and, therefore, lead to forms of persecution which can be exclusively experienced by children. In order to answer this question, it must be determined whether or not the violation of a child-specific right is

²⁵ UNHCR Handbook, para. 54.

²⁶ *Ibid.*, para. 55.

²⁷ 1966 International Covenant on Economic, Social and Cultural Rights, Article 7.

²⁸ ICCPR, Article 17.

²⁹ UDHR, Article 17.

³⁰ UNHCR Handbook, para. 53.

of a serious nature. This is particularly the case when the child's life or freedom is threatened as a result of his or her being denied basic State protection.

25. Furthermore, due to his or her age and vulnerability, a child may experience greater harm resulting from a human rights violation compared to the impact a breach of the same right would have on an able-bodied adult. Hence, a human rights violation, which may not be sufficiently serious to constitute persecution for an adult, could amount to persecution if inflicted upon a child taking into account his or her particular vulnerability.³¹ Acts and omissions, such as the denial or discriminatory provision of food or other forms of assistance, while always constituting a human rights violation may not endanger the life or health of an adult, thereby not amounting to persecution, but may have serious, if not fatal, consequences for a child.

C. Nexus to the Convention grounds

26. In the context of refugee status determination, one needs to examine whether the treatment concerned (e.g. coerced or enforced abortion and/or sterilization, as well as various penal, administrative or economic sanctions or discriminatory measures) is feared *for reasons of* one or more of the five Convention grounds. In this context, it is important to recall that nowhere in the drafting history of the 1951 Convention is it suggested that the motive or intent of the persecutor was ever to be considered as a *controlling* factor in either the definition or the determination of refugee status.³² This should be noted as the question of the motive or intent of the persecutor has been considered in a number of cases related to coercive family planning policies, where refugee status has sometimes been denied with a reference to a lack of evidence of persecutory intent.³³

For reasons of political opinion

27. Claims for refugee status based on a fear of persecution for opposing or violating coercive family planning laws or policies have been argued on the basis of a well-founded fear of persecution for reasons of political opinion.

28. Political opinion should be understood in the broad sense as incorporating any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to how the government is implementing its population policies. It would also include non-conformist behaviour, which leads the persecutor to impute a political opinion to him or her. In this sense, there is not, as such, an inherently political or an inherently non-political activity but the context of the case should determine its nature, bearing in mind in particular the

³¹ See also references to the subjective element of fear of persecution, UNHCR Handbook, paras. 40–42 and 52.

³² Guy S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, 2nd edition, 1996, pp. 50–51.

³³ In these cases, adjudicators have argued that the enforcement of a compulsory family planning policy, albeit through the use of methods amounting to persecution, is not based on any motivation other than general population control. See *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 FC 314 (CA), at 319, where Linden JA said that the Refugee Division had “wrongly required that a ‘persecutory intent’ be present, whereas a ‘persecutory effect’ suffices”.

context in which the State is enforcing its population control policies. As UNHCR's Guidelines on Gender-Related Persecution note:

A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant. It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.³⁴

29. Actively resisting or breaching a State policy on compulsory family planning could clearly be considered a statement directly pertaining to an important governmental policy that would fall within the ambit of the above definition of political opinion, regardless of whether the individual consciously challenges the policy as such (whether verbally or through the actual conception of more than the permitted number of children) or whether he or she refuses to comply solely because of his or her wish to have another child. Moreover, an individual's own refusal or failure to comply with a compulsory population control programme or his or her association with others who expressly resist or oppose such a programme may cause such a political opinion to be imputed to that individual.³⁵ Claims for refugee status should, therefore, not be routinely denied on the grounds that, as long as the action taken by a government official against a claimant is the enforcement of an ordinary law of general application, the government is necessarily engaging in prosecution and not persecution. In order to make a comprehensive assessment, one needs to look at all the relevant factors in the case and context, including the question as to whether, in view of their invasive and excessive character, the sanctions imposed on persons challenging the policy can be said to merely constitute the neutral efforts of a government to encourage or ensure compliance with a government policy.³⁶

30. Hence, since opposition or resistance to a compulsory State family planning policy can be viewed as an expression of an opinion critical of the State's policy, the nexus to the political opinion ground is established if the persecutory treatment is feared or inflicted for reasons of the individual's opposition or resistance to the policy (whether verbally and/or through his or her actions).

For reasons of race

31. When assessing claims for refugee status based on a fear of persecution for opposing or violating coercive family planning laws or policies, it may also need to be examined if certain ethnic groups are specifically targeted by such laws or policies, methods of enforcement, punishments or discriminatory measures.

³⁴ UNHCR Guidelines on Gender-Related Persecution, para. 32.

³⁵ *In re C.Y.Z., Applicant*, Interim Decision No. 3319, US Department of Justice, BIA, 4 June 1997, p. 10.

³⁶ It is quite possible for a law or policy of general application to be persecutory where the penalty is disproportionate to the objective of the law, regardless of the authorities' intent. See Legal Services Immigration and Refugee Board, Interpretation of the Convention Refugee Definition in the Case Law, 31 December 1999, chapter 9, section 9.3.2; *Cheung v. Canada (Minister of Employment and Education)*, [1993] 2 FC 314 (CA), per Linden JA.

For reasons of religion

32. Resistance to, or non-compliance with, a compulsory family planning law or policy could, in specific cases, be characterized as a manifestation of an individual's religious belief, identity or way of life.³⁷ If religious convictions can be shown to be the reason why a compulsory family planning policy is violated, (i.e. religion being the reason why a parent opposes the birth-control methods imposed), it might then be argued that the persecution was feared for reasons of religion, because religious beliefs made it impossible for an individual to comply with a coercive family planning law or policy or required the individual to act in a way which provoked the punishment. Again, each case must be determined on its merits.

For reasons of membership of a particular social group

Parents

33. Claims for refugee status based on a fear of persecution for opposing or violating coercive family planning laws or policies have also been argued on the basis of a well-founded fear of persecution for reasons of membership of a particular social group.

34. In UNHCR's Guidelines on Membership of a Particular Social Group,³⁸ the "protected characteristics" approach and the "social perception" approach adopted in different national jurisdictions have been reconciled to produce the following definition:

[A] particular social group is 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.³⁹

As the Guidelines note: "It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be 'cohesive'."⁴⁰

35. By applying the "social perception" element of the definition above, one would thus need to examine, *inter alia*, whether those who verbally or through their conception of more than the permitted number of children oppose or breach a coercive family planning policy, are perceived as a cognizable group by the society in question.

36. By applying the "protected characteristics" element of the definition, one would need to examine whether the asserted group is defined

³⁷ See UNHCR, "Guidelines on International Protection, Religion-Based Claims under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees", HCR/GIP/04/06, 28 April 2004, paras. 5–8.

³⁸ UNHCR, "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", HCR/GIP/02/02, 7 May 2002 (hereafter "Guidelines on Membership of a Particular Social Group").

³⁹ *Ibid.*, para. 11.

⁴⁰ *Ibid.*, para. 15.

(1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.⁴¹

37. In some countries, parents with more than the permitted number of children could constitute a particular social group under both of the aforementioned approaches. A parent who is expecting, or who already has more (or fewer), children than a coercive family planning law or policy permits, is likely to be part of a socially cognizable group in a society where a particular number of children is the norm. Mothers and fathers, in their role as parents of one or more children, also share a common characteristic, which is innate and unchangeable, as well as fundamental and protected.⁴² Furthermore, mothers who are pregnant with a child conceived in breach of a family planning policy or law share another characteristic that is so fundamental to human dignity that they should not be compelled to forsake it: their right to life, liberty and security of person and to give birth to their child without interference. In this case, the risk of persecution that pregnant women may face helps to identify the social group without running foul of the rule that the persecution cannot define the group.

38. In addition, it may be possible to argue that men and women who are united in their commitment to exercise their fundamental human right “to found a family” and “to decide freely and responsibly on the number and spacing of their children” can constitute a particular social group in a society where this right is seriously restricted.

39. In this context, a particular social group may also be defined as women who have “transgressed the social mores of the society in which they live” by having more children than the number permitted by a national law or policy.⁴³

Children

40. Membership of a particular social group is perhaps the most evident Convention ground of relevance in cases involving children born in contravention of coercive family planning laws or policies (e.g. a child born outside an authorized marriage or born after the single child allowed under a restrictive family planning law or policy), although other grounds may also be applicable depending on the facts of the case. By applying the definition of social group, the second, third, fourth, and so on child who has been born in violation of a compulsory family planning policy in a society where usually only one child per family is the permitted norm, could be regarded as a member of the particular social group comprising children born in contravention of the family planning policy or law. This common and unchangeable characteristic unites this group of children, who may, moreover, be perceived as a cognizable group in the particular society in question. Adjudicators have used slightly different labels to define this group of children, including “children born in violation

⁴¹ *Ibid.*, para. 6.

⁴² ICCPR, Article 23(1), provides that the family is the “natural and fundamental group unit of society” and is “entitled to protection by society and the State”.

⁴³ UNHCR Executive Committee, Conclusion No. 39 (XXVI), 1985, refugee women and international protection, para. (k).

of coercive family planning policies”, “second children” or so-called “black children” (*hei haizi*).

D. Conclusion

41. Non-discriminatory and non-coercive policies regarding family size promoted on the basis of the common welfare, whether they encourage larger or smaller families, are a legitimate exercise of State authority. However, laws or policies on family planning should be consistent with international human rights standards and should recognize that the principle of informed free choice is essential to the long-term success of family planning.

42. Coercive family planning laws or policies, which may violate the human right of individuals and couples to found a family and to decide freely and responsibly on the number and spacing of their children, can therefore give rise to justified claims for refugee status based on a fear of persecution due to the impact a restriction of these rights may have on a particular individual and/or because of the harm he or she may suffer as a result of the methods used by officials to enforce the policy or as a consequence of the penalties or sanctions imposed for non-compliance. Claims based on the methods of enforcement or on the excessive punishment imposed are more likely to meet the threshold of persecution in the refugee definition, in particular where there is a threat of forced abortion and/or enforced sterilization. There may nevertheless also be cases where the requirement to comply with the compulsory family planning policy would be so abhorrent to the individual’s deepest beliefs that it would be tantamount to persecution. This would always be the case when a law or policy prescribes the use of forced abortion or forced sterilization as methods of enforcement or as punishments for non-compliance.

43. In most of these cases, it could be argued that the fear of persecutory treatment is linked to reasons of political opinion, since opposition to, or non-compliance with, a coercive State policy on family planning is a form of political expression. Claims may also be argued based on a fear of persecution for reasons of membership of a particular social group and in some cases, the persecution may be feared for reasons of religion or race.

Protection Policy and Legal Advice Section
Department of International Protection
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