

IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)
BETWEEN:

THE QUEEN

- and -

(1) IMMIGRATION APPEAL TRIBUNAL
(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondents

ex parte

SYEDA KHATOON SHAH

Appellant

(1) SHAHANNA SADIQ ISLAM
(2) JAHANZEB ISLAM
(3) ORANGZEB ISLAM

Appellants

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR
REFUGEES (UNHCR) INTERVENING
CASE FOR THE INTERVENER

INTRODUCTION

The UNHCR, as mandated by United Nations General Assembly Resolution 428(v) of 14 December 1950, currently protects some 22 million "persons of concern", including refugees. Under the Statute of the Office of the UNHCR, it has been charged by the United Nations with, *inter alia*, supervising [the] application of international conventions for the protection of refugees. The UNHCR's supervisory role in relation to the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) is expressly recognised by Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

As explained in the UNHCR's Petition to Your Lordships' House for leave to intervene in these proceedings, the UNHCR has a clear interest in ensuring that the 1951 Convention is interpreted both properly and uniformly by its state parties. The requirement for a uniform interpretation of international treaties throughout the Contracting States also underlies the House of Lords' approach to the interpretation of international treaties: T v Secretary of State for the Home Department [1996] AC 742.

The appeals before your Lordships raise an important point of construction of the 1951 Convention, namely the interpretation of the phrase particular social group in Article 1A(2). The UNHCR considers that, given its supervisory role, it is appropriate for it to make clear its own views on this issue and further to provide any additional assistance to Your Lordships that it can.

THE MEANING OF PARTICULAR SOCIAL GROUP

The UNHCR's position is as follows. **Individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live may, in principle, constitute a particular social group within the meaning of Article 1A(2) of the 1951 Convention.** Such persons do not always constitute a 'particular social group'. In order to do so the

values at stake must be of such a nature that the person concerned should not be required to renounce them.

This will be the case where those values represent fundamental human rights. In many societies, women are more likely to believe in - or be perceived as believing in - values at odds with the social mores of society, as they are subject to discriminatory social rules. This situation is reflected in a number of international instruments for the protection of women. Women who object to those rules - or are perceived to object to them - are capable of constituting a particular social group.

The UNHCR's position is in part reflected by the decision of the US Board of Immigration Appeals in

Re Acosta (1985) 19 I&N 211 as follows:

"... we interpret the phrase 'persecution on account of membership [of] a particular social group' to mean persecution that is directed towards 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, colour or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever 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 identities or conscience".

This passage was cited with approval by the Canadian Supreme Court in Attorney General of

Canada v. Ward (1993) 103 DLR (4th) 1 and by the English Court of Appeal in Ouanes v. Home Secretary [1998] 1 WLR 218 at 224D-G.

Particular social group means a group of people who share some characteristic which distinguishes them from society at large. That characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it. Thus, where a person holds beliefs or has values such that requiring them to renounce them would contravene their fundamental human rights, they may in principle be part of a particular social group made up of like-minded persons.

The UNHCR submits, further, that it is not necessary, as a matter of principle, that a person actually holds such beliefs. They may be a member of such a group if they are perceived to hold them.

The position taken by UNHCR above, is supported by the observations of Henry LJ in this case below and Justice McHugh in in A v Minister for Immigration and Ethnic Affairs [1998] INLR 1; in particular his observations at [1998] INLR 31B-E:-

"A group may qualify as a particular social group, however, even though the distinguishing features of the group do not have a public face. It is sufficient that the

public is aware of the characteristics or attributes that, for the purposes of the Convention, unite and identify the group. In Roman times, for example, Christians were a particular social as well as religious group although they were forced to practise their religion in the catacombs. If the homosexual members of a particular society are perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole, they will qualify for refugee status. Nor is it necessary that the group should possess the attributes that they are perceived to have. Witches were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft."

It is important to appreciate that UNHCR's position does not entail defining the particular social group by reference to persecution suffered. Indeed, the UNHCR agrees with the conclusion of the Court of Appeal in the present cases that persecution alone cannot determine a group where none otherwise exists.

The distinguishing characteristic which defines the group consists in a shared set of values which

are not shared by society at large or, conversely, a common decision to opt out of a set of values shared by the rest of society.

Thus, it is not the reaction to the behaviour of such persons which is the touchstone defining the group. However, the reaction may provide evidence in a particular case that a particular social group exists. It is possible for people who hold views which transgress the social mores of their society to constitute a particular social group in circumstances where they do not face harsh treatment as a result. In such a case, of course, no issue of refugee status would arise because of the absence of persecution.

The UNHCR's position that persons who transgress or are perceived to transgress social mores are capable of constituting a particular social group is reflected in Conclusion 39 "Refugees, Women and International Protection" adopted by UNHCR's

Executive Committee ("ExCom") in 1985. This:-

"Recognised that states, in the exercise of their sovereignty, are free to adopt the interpretation that women-asylum seekers who face harsh or inhuman treatment due to their having transgressed social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention".

Excom is made up of 53 Member States of the United Nations including the United Kingdom and, traditionally, adopts its Conclusions by consent. Paragraph 1 of the Statute of the Office of the United Nations High Commissioner for Refugees provides that:-

"In the exercise of its functions, more particularly, when difficulties arise, and for instance with regard to any controversy concerning the international status of these persons, the High Commissioner shall request the opinion of the advisory committee on refugees if it is created."

ExCom Conclusions are rightly described as "some of the `soft law' background to refugee protection".

Ultimately, whether a person who transgresses, or is perceived to transgress, social mores is able to establish membership of a particular social group will depend on the particular facts of his or her case. The UNHCR makes no submissions on the facts of the cases before Your Lordships. It is concerned with the underlying principle at stake. Your Lordships' House is invited to find that the construction of 'particular special group' advanced by the UNHCR follows from the application of the international law canons of treaty construction as enshrined in the Vienna Convention on the Law of Treaties 1969. Further, its position finds considerable support in the judicial decisions and administrative practice of the states party to the 1951 Convention.

APPROACH TO CONSTRUCTION

This section addresses the approach that must - as a matter of international law - be adopted in

interpreting treaties. The construction of international treaties is a different exercise to the construction of many statutes.

The rules for interpreting international treaties are well-established in customary international law and have been comprehensively codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 as follows:-

Article 31

1 A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2 The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3 There shall be taken into account together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4 A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of

Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure;
or
- (b) leads to a result which is manifestly absurd or unreasonable.

Thus, the primary principles are that a treaty must be interpreted (i) in good faith, (ii) in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and (iii) in the light of its object and purpose. These principles must be adhered to in determining the meaning of the term "refugee" including the criterion of particular social group in Article 1 A(2) of the Geneva Convention. Accordingly, these primary principles of interpretation are developed and put into context below.

The Convention must be interpreted in good faith

This requirement flows from Article 26 of the Vienna Convention which specifically establishes that every treaty in force is binding upon the parties to it and must be performed by them 'in good faith'. Sir Ian Sinclair in *The Vienna Convention on the Law of Treaties*, 2nd ed., comments as follows at pages 119-120:-

Whose good faith is in issue in the process of interpretation? Given that the principle of good faith in this context is so closely linked with the principle *pacta sunt servanda*, it is primarily the good faith of the parties to the treaty. Where a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith which should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up.

Inherent in this principle is the idea that, where a treaty has been entered into on the express understanding that it should be construed and applied in a particular manner, it is wrong for a party to seek subsequently to resile from that understanding. The preamble to the Convention indicates that one of its underlying principles was that "human beings shall enjoy fundamental rights and freedoms without discrimination". The principle of good faith requires that the Convention now be construed consistently with this principle.

Moreover, as stated at paragraph 14 above, the UK - as a member of ExCom - has recognised that international law permits an interpretation of 'particular social group' which includes women who have transgressed social mores.

Ordinary meaning of its terms

The Convention must be interpreted in accordance with the ordinary meaning to be given to its terms. The term particular social group means a group whose members are in some way distinguishable from society at large. The UNHCR submits that any innate or unchangeable characteristic may serve to distinguish the group from the rest of society. As stated at paragraph 8 above, an unchangeable characteristic means either one which is physically unchangeable or a

characteristic which an individual should not be required to change.

The ordinary meaning of the words do not permit a more restrictive construction. It was open to the drafters of the Convention to restrict the meaning of the term in a number of ways. For example, it would have been possible to qualify particular social group by requiring that the group be recognised as a cohesive unit by society. That no such qualification to the term was made is of significance in construing the term and if it is submitted that no internal cohesion is necessary for a particular social group to exist. The UNHCR refers to the passage of Justice McHugh's judgment in A v Minister for Immigration and Ethnic Affairs [1998] INLR 1 set out at paragraph 9 above.

It could be permissible to read words in a restrictive manner if that were required by either the context and/or the object and purpose of the treaty. As shown below, however, both the context of the provision and the object and purpose of the Geneva Convention are the protection of fundamental rights without discrimination. This is inconsistent with a restrictive reading of the Convention's terms.

Terms to be interpreted in their context

Sinclair emphasizes at page 127 of his book that the text of a treaty must, of course, be read as a whole. It is important, therefore, not to construe

the phrase particular social group in isolation but to give consideration to its context.

Article 1A(2) of the Convention defines 'refugee'

as a person who:-

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

Thus, 'particular social group' constitutes one of a list of factors which may be a reason for persecution. The first conclusion that Your Lordships' House is invited to draw is that the phrase particular social group must mean something over and above those other factors if it is to have any significance at all.

Further, it is submitted that the context of the phrase shows that it forms just one part of the definition of refugee. In order to establish that he or she is a refugee, an asylum-seeker must prove each of a number of separate elements:-

- (1) That he or she has a well founded fear of persecution;
- (2) That the persecution is for reasons of race, religion, nationality, membership of a particular social group or political opinion;
- (3) That the putative refugee is outside the country of his or her nationality.

(4) That he is unable, or owing to fear, unwilling to avail himself of the protection of that country.

Further, even when the decision maker determines that an asylum seeker is a refugee, applying the four conditions listed above, that person may still be excluded from protection if one of the circumstances set out in Articles 1(D), (E) and (F) is found to apply, eg, that they have not committed a serious non-political crime outside the country of refuge.

Seen in context, establishing membership of a particular social group or one of the other Convention reasons for persecution does not suffice in itself to enable refugee status to be claimed. Accordingly, if Your Lordships' House endorses the construction of the phrase particular social group advocated by the UNHCR - in accordance, it is submitted, with its ordinary meaning, context and object and purpose - protection against unmerited claims would be provided by the other elements of the refugee definition: see paragraphs 28-29 above.

Article 31(2) of the Vienna Convention provides that the context for the purposes of interpreting a treaty includes its preamble. Since the preamble is also relevant in discerning the object and purpose of a treaty, this is dealt with below.

In the light of its object and purpose

This principle requires that the court ascertains the purpose of the treaty and then interprets it in a manner which gives effect to that purpose. In so doing, regard is had to the intentions of the treaty's drafters in a manner broadly comparable to having regard to the intention of Parliament when construing domestic statutes. However, just as in domestic law where it is presumed that Parliament intends constitutional legislation to be interpreted less technically than, say, insurance statutes so too do different presumptions apply in international law to the construction of human rights instruments.

It is well-established that international human rights instruments must be construed so as to give them an effective interpretation. This principle of effective interpretation forms the backdrop against which such treaties are negotiated and signed and, therefore, must be presumed to form part of the intentions of the parties. See:- *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, Professor Lauterpacht (1949) BYIL 48.

The preamble to a treaty may assist in elucidating the object and purpose of a treaty, see: *Sinclair* at page 130. The preamble to the Geneva Convention states *inter alia*:-

Considering that the Charter of the United Nations and the Universal Declaration of

Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement.

By affirming the principle that human beings shall enjoy fundamental rights and freedoms without discrimination and by speaking of the United Nations' profound concern for refugees and its endeavour to assure refugees the widest possible exercise of these fundamental rights and freedoms, the preamble makes clear that the Convention is intended to make a contribution to the effective protection of fundamental rights and, in particular, the elimination of discrimination in the enjoyment of those rights.

That the protection of fundamental rights is an object of the Convention is further reflected in the definition of refugee in Article 1A(2). The central element of this definition is a well-founded fear of persecution. Where a person has such a well-founded fear of persecution, it is

evident that his fundamental rights are being denied.

The feared persecution, referred to in Article 1A(2), must be for reasons of race, religion, nationality, membership of a particular social group or political opinion. Such persecution may be described as selective or discriminatory. Persecution is discriminatory where its victims are targeted by virtue of attributes not shared by society as a whole. These attributes are listed in Article 1A(2).

This discriminatory aspect echoes the affirmation in the preamble of the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. 'Discrimination' itself is a broad concept entailing a contravention of the principle of equality in that persons are treated differently to others because of a characteristic which distinguishes them from society at large. The range of such distinguishing characteristics is potentially broad though, it is submitted, not open-ended. It is UNHCR's position that the relevant distinguishing characteristic may consist in any feature which is innate or unchangeable, either because it is impossible to change or because an individual should not be required to do so.

Further, many human rights instruments prohibiting discrimination do not attempt comprehensively to

list the characteristics upon which discrimination might be based but, instead, recognise that an exhaustive definition is impossible. An example is provided by Article 26 of the International Covenant on Civil and Political Rights 1966 which states:-

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.

(emphasis added)

Article 2 of the Universal Declaration of Human Rights 1948 is to similar effect:-

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Given that the Convention is intended to make a contribution to the protection of fundamental rights without discrimination and given the broad definition of discrimination found in many international instruments, it is submitted that refugee in Article 1A(2) was not intended to be given a restrictive meaning.

Such an approach to construction accords with the established principle that human rights instruments in particular should be interpreted in a generous manner. See: the European Court of

Human Rights in Loizidou v. Turkey (Preliminary Objections) (Series A No. 310): (1995) 20 EHRR 99, at paragraph 72 and Your Lordships' House in Minister for Home Affairs v Fisher [1980] AC 319, per Lord Wilberforce at pages 328-330 and especially at 328H.

Aids to interpretation

Article 31(3)(c) of Vienna Convention provides that any relevant rules of international law applicable in relations between the parties shall be taken into account in interpreting a treaty. In determining whether or not women fall within the definition of refugee and attract the consequent protection provided for by the Convention, regard should be had to international agreements dealing specifically with the rights of women. There have been significant international developments in this area. The pressing need effectively to deal with discrimination against women has been recognised by the conclusion of various international agreements. Examples are the International Covenant on Civil and Political Rights, Convention for the Elimination of all forms of Discrimination against Women, the UN General Assembly's Declaration on Violence against Women and Beijing Final Declaration.

NOTE ON COMPARATIVE LAW MATERIALS

A Note on comparative law materials is provided for Your Lordships' information as an Annex to

this Case. UNHCR makes its submissions to Your Lordships' House upon the grounds summarised earlier and, in particular, the correct approach to the construction of the Geneva Convention as an international humanitarian Treaty. UNHCR does not, as such, take a formal position on any of the national or international decisions or materials referred to in the Annex. It observes, however, that UNHCR's proposed construction of the phrase "particular social group" is well within the scope of that term as it has been variously construed by different national courts or authorities in recent years. UNHCR submits that its proposed construction of the term "particular social group" is a sensible one, well rooted in international law and reflecting a moderate approach in the light of all the comparative law material.

CONCLUSION

Your Lordships' House is invited to find that there is strong support in the terms, context and object and purpose of the 1951 Convention and in the practice of international organisations and of other Contracting States that the term 'particular social group' should be given an interpretation that is capable of including individuals and in particular women, who have - or are perceived to have - transgressed the social mores of their society.

Your Lordships' House is invited to find that such a construction results from the application of the international law canons of treaty construction as enshrined in the Vienna Convention on the Law of Treaties. It follows from the ordinary meaning of the term 'particular social group' which contains no inherent limitation on the range of factors which can serve to distinguish a group of persons from society at large. Further, this interpretation accords with the context of the provision and the primary purpose of the Convention which is that human beings are able to enjoy their fundamental rights and freedoms without discrimination. The persecution of women accused of transgressing social mores is discriminatory in nature. This is because it is directed towards persons with particular attributes not shared by society at large and is prompted by those attributes. It can thus be seen that the persecution itself is not the defining characteristic of the social group. To exclude such persons from the definition of 'refugee' would be to fail to give proper effect to the anti-discrimination aims of the Convention.

The Canadian experience suggests that to hold women can constitute a "particular social group" does not "open the floodgates" although that should not be a consideration in determining an application for refugee status. The fact that any

assessment of an individual's claim to refugee status has to take into consideration all the requirements of Article 1 A(2) of the 1951 Convention ensures that that is so: membership of a particular social group, just as actual or imputed political opinion, in itself will not be sufficient to found a claim to refugee status. To restrict unnecessarily the meaning of "social group" in a way neither foreseen by the drafters of the Convention nor endorsed by the UN agency mandated to protect refugees world-wide would be to misinterpret a core-element of the "refugee" definition and deny protection to those deserving of international protection under Article 1 A(2).

PETER DUFFY QC

TIM EICKE

MARIE DEMETRIOU