REFUGEE

UNHCR COMPILATION OF CASE LAW ON REFUGEE PROTECTION IN INTERNATIONAL LAW

STATUS DETERMINATION AND PROTECTION INFORMATION SECTION (SDPIS)
DIVISION OF INTERNATIONAL PROTECTION SERVICES (DIPS)
United Nations High Commissioner for Refugees
CP 2500, CH – 1211 Geneva 2, Switzerland

E-mail: refworld@unhcr.org
Website: http://www.refworld.org/

March 2008

UNHCR
The UN Refugee Agency

This "UNHCR Compilation of Case Law on Refugee Protection in International Law" is an overview, which highlights almost 70 judgments/decisions of seminal value. The cases are organized thematically, according to several main refugee law-related issues (such as inclusion, internal flight alternative and exclusion). The Compilation provides short summaries for the poignant issues in each case.

In addition, links to Refworld have been provided to UNHCR interventions, where available.

Due to language issues and availability, the cases provided in this first edition of the Compilation are mostly from Anglo-Saxon jurisdictions, although a concerted effort has been made to encompass a variety of jurisdictions.

All the judgments/decisions are available in full-text on Refworld at www.refworld.org.

TABLE OF CONTENTS

1. Inclusion

1.1 Well-founded fear

1.1.1. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, 9 March 1987 (US Supreme Court)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b68d10

To show a "well-founded fear of persecution", an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country.

1.1.2. *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* [1988] AC 958, 16 December 1987 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b67f40

The requirement that an applicant for refugee status had to have a "well-founded" fear of persecution if he was returned to his own country meant that there had to be demonstrated a reasonable degree of likelihood that he would be so persecuted, and in deciding whether the applicant had made out his claim that his fear of persecution was well-founded the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant's fear was objectively justified.

- *UNHCR's Intervention*: *R v. Secretary of State for the Home Department, ex parte Saravamuthu Sivakumaran, Skandarajah Vaithialingam, Nadarahaj Vilavarahaj, Navaratnasingham Vathahan, Vinasithamby Rasalingan, Kandiah Navaratnam*, Case for the Intervener, 1987
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47a707960

1.2 Acts of persecution

1.2.1. *Korablina v. Immigration and Naturalization Services*, No. 97-70361, 158 F 3d, 23 October 1998 (US Court of Appeals for the 9th Circuit)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47baf7292

Persecution may be found by cumulative, specific instances of violence and harassment toward an individual and his or her family members.

1.2.2. *Refugee Appeal No. 71427/99*, 16 August 2000 (New Zealand Refugee Status Appeals Authority)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7400

Core norms of international human rights law are relied on to define forms of serious harm within the scope of persecution.

1.3 Agents of persecution

1.3.1. *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, (2001) 2 WLR 143, 19 December 2000 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b73b0

For the purposes of the 1951 Convention, persecution may be by bodies other than the state. Persecution is not limited to cases where a state carried out or tolerated the persecution; it encompasses instances where a state is unable to afford the necessary protection to its citizens.

1.3.2. *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14, 11 April 2002 (High Court of Australia)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3deb326b8

"Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state." [para.31]

1.4 State/Sufficiency of protection

1.4.1. *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, 30 June 1993 (Supreme Court of Canada)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b673c

The test as to whether a state is unable to protect a national is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense. The claimant need not literally approach the state unless it is objectively unreasonable for him or her not to have sought the protection of the home authorities. The Immigration and Refugee Board, if the claimant's fear has been established, is entitled to presume that persecution will be likely and that the fear is well-founded if there is an absence of state protection. The presumption goes to the heart of the inquiry, which is whether there is a likelihood of persecution. The persecution must be real – the presumption cannot be built on fictional events – but the well-foundedness of the fears can be established through the use of such a presumption.

The claimant must provide clear and convincing confirmation of a state's inability to protect absent an admission by the national's state of its inability to protect that national. Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant. This presumption, while it increases the burden on the claimant, does not render illusory Canada's provision of a haven for refugees. It reinforces the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant.

1.4.2. *Horvath v. Secretary of State for the Home Department* [2000] INLR 15, 6 July 2000 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6e04

"In the context of an allegation of persecution by non-state agents, the word 'persecution' implies a failure by the state to make protection available against the ill-

treatment or violence which the person suffers at the hands of his persecutors. […]The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals." [pp. 5 & 8]

1.5 *Sur place* claims

1.5.1. *Danian v. Secretary of State for the Home Department* [2000] Imm AR 96, 28 October 1999 (England and Wales Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e71dd564

An applicant who could establish that he had a well-founded fear of persecution on Convention grounds should fall under the scope of the inclusion clauses, irrespective of whether the actions giving rise to such a fear had been carried out in good or bad faith.

1.5.2. *Refugee Appeal No. 75139*, 18 November 2004 (New Zealand Refugee Status Appeals Authority)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=467908082

"A *sur place* refugee claim may be grounded either in events in the country of origin or grounded in the refugee claimant's activities abroad. […]Claims based on activities outside the country of origin can present special difficulties. It is possible for an individual, having no well-founded fear of being persecuted, to deliberately and cynically set about creating circumstances exclusively for the purpose of subsequently justifying a claim to refugee status. To protect the system from those who would seek, in a *sur place* situation, to manipulate circumstances merely to achieve the advantages which recognition as a refugee confers, the Authority has interpreted the Refugee Convention as requiring, implicitly, good faith on the part of the refugee claimant." [paras. 4 & 9]

2. *Non-refoulement*

2.1 Indirect *refoulement*

2.1.1. *T.I. v. United Kingdom*, Application No. 43844/98 (Decision on admissibility), 7 March 2000 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6dfc

"[…][T]he fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the [ECHR] to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3. […] [T]the existence of

this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials, or from the consequences to health from the effects of serious illness.

[…] [T]he indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution." [pp. 14 & 15]

- *UNHCR's Intervention*: *T.I. and the United Kingdom*, Submission by the United Nations High Commissioner for Refugees, Application No. 43844/98, 4 February 2000
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42f7737c4

2.1.2. *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, (2001) 2 WLR 143, 19 December 2000 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b73b0

The Secretary of State for the Home Department was not entitled to authorise the removal of two asylum seekers to safe third countries which restrictively interpreted Article 1A(2) of the 1951 Convention so that "persecution" only covered conduct attributable to a State.

2.2 National security (of the country of refuge) exception

2.2.1. *Chahal v. United Kingdom*, Application No. 70/1995/576/662, 11 November 1996 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b69920

"Article 3 [of the ECHR] enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation […].

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to

Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion […]. In these circumstances, the activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees." [paras. 79 & 80]

2.2.2. *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, 2002 SCC 1, 11 January 2002 (Supreme Court of Canada)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c42bdfa0

"[…][I]n exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the [Canadian Charter of Rights and Freedoms] or under s. 1. (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like"[…]) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases." [para. 78]

- *UNHCR's Intervention*: *Manickavasagam Suresh (Appellant) and the Minister of Citizenship and Immigration, the Attorney General of Canada (Respondents)*, Factum of the Intervenor, United Nations High Commissioner for Refugees, 8 March 2001
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3e71bbe24

2.3 Principle of *non-refoulement* in customary international law (prohibition of torture and cruel, inhuman and degrading treatment or punishment)

2.3.1. *Soering v. United Kingdom*, Application No. 1/1989/161/217, 7 July 1989 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6fec

"Article 3 [of the ECHR] makes no provision for exceptions and no derogation from it is permissible under Article 15 [of the ECHR] in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall...

extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article." [para. 88]

2.3.2. *Cruz Varas and Others v. Sweden*, Application No. 46/1990/237/307, 20 March 1991 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6fe14

Expulsion by a Contracting State of an asylum-seeker may give rise to an issue under Article 3 of the ECHR, and hence engage the responsibility of that State under that Convention, where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned.

3. Illegal entry

3.1 Scope of Article 31 of the 1951 Convention

3.1.1. *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999] EWHC 765 (Admin), [2001] Q.B. 667, 29 July 1999 (England and Wales High Court, Administrative Court)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6b41c

The purpose of Article 31 of the 1951 Convention was to provide immunity for genuine refugees whose quest for asylum reasonably involved a breach of the law. Where the illegal entry or use of false documents or delay could be attributed to a *bona fide* desire to seek asylum then that conduct should be covered by Article 31. Article 31 not only extended to those claiming asylum who were ultimately granted refugee status but also to those claiming in good faith. To enjoy the protection of Article 31 a refugee must have come directly from the country of his persecution, presented himself to the authorities without delay and have shown good cause for his illegal entry or presence. A short stop en route to an intended sanctuary could not forfeit the protection of Article 31.

3.2 Penalties (including detention)

3.2.1. *Amuur v. France*, Application No. 17/1995/523/609, 25 June 1996 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b76710

"In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 [of the ECHR], the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.

Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions.

Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.

Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status." [paras. 42 & 43]

3.2.2. *A v. Australia*, CCPR/C/59/D/560/1993, 30 April 1997 (UN Human Rights Committee)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b71a0

It was not *per se* arbitrary to detain individuals requesting asylum. Nor was there a rule of customary international law which would render all such detention arbitrary. Every decision to keep a person in detention should, however, be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.

3.2.3. *Refugee Council New Zealand Inc, The Human Rights Foundation of Aotearoa New Zealand Inc and "D" v. Attorney General*, M1881-AS01, 31 May 2002 (Interim Judgment) (High Court of New Zealand)[1]
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47bafd4d2

"Necessary" in the context of Article 31(2) of the 1951 Convention meant the minimum required, on the facts as they appeared to the immigration officer (1) to allow the Refugee Status Branch to be able to perform their functions; (2) to avoid real risk of criminal offending and (3) to avoid real risk of absconding. While difficulty or delay in securing identity information was relevant to the proper exercise of discretion to detain, it was not decisive of it. The policy of detention "where the identity […] of a refugee status claimant can not be established [and there do not] appear particular reasons for allowing them to enter the community unrestricted" reversed the approach required by Article 31(2), which required liberty except to the extent that necessity required otherwise, and could not be sustained. While no doubt in certain cases the more restrictive conditions of penal detentions might be "necessary" to prevent a refugee status claimant from escaping with a view to committing crime or absconding, there was no evidence to establish that such regime was necessary for all or even a great number of claimants.

4. Membership of a particular social group

4.1 Definition of 'particular social group'

4.1.1. *Matter of Acosta*, A-24159781, 1 March 1985 (US Board of Immigration Appeals)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6b910

"'Persecution on account of membership in a particular social group' refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed." [para. 10]

4.1.2. *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, 30 June 1993 (Supreme Court of Canada)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b673c

In distilling the contents of the head of "particular social group", account should be taken of the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. A good working rule for the meaning of "particular social group" provides that this basis of persecution consists of three categories: (1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake

[1] The Supplementary Judgment of 18 June 2002 is available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3d1c98820. The Court held that given the requirement that the Refugee Status Branch "act in a manner that is consistent with New Zealand's obligations under the Refugee Convention", it would be unusual that detention, which by Article 31(2) had to be limited to what was "necessary", could be "necessary" to facilitate the work of the Refugee Status Branch.

the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

Exclusions on the basis of criminality have been carefully drafted in the Immigration Act to avoid the admission of claimants who may pose a threat to the Canadian government or to the lives or property of the residents of Canada. These provisions specifically give the Minister of Employment and Immigration enough flexibility to reassess the desirability of permitting entry to a claimant with a past criminal record, where the Minister is convinced that rehabilitation has occurred. This demonstrates that Parliament has not opted to treat a criminal past as a reason to be estopped from obtaining refugee status. The scope of the term "particular social group" accordingly did not need to be interpreted narrowly to accommodate morality and criminality concerns. Such a blanket exclusion is more appropriately to be avoided in the face of an explicit, comprehensive structure for the assessment of these potentially inadmissible claimants.

4.1.3. *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3dec8abe4

The term "particular social group" did not imply an additional element of cohesiveness, co-operation or interdependence. The fact that members of a group may or may not have some form of organisation or interdependence was irrelevant to the question of whether it would be contrary to principles of human rights to discriminate against its members. The rule that the group must exist independently of the persecution was useful, because persecution alone could not be used to define the group.

The concept of a social group was a general one and its meaning could not be confined to those social groups which the framers of the Convention might have had in mind. In choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.

In general terms a social group could be said to exist when a group of people with a particular characteristic was recognised as a distinct group by society. As social customs and social attitudes differed from one country to another, particular social groups could be recognisable as such in one country but not in others.

- *UNHCR's Intervention*: *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.) (Conjoined Appeals)*, Case for the Intervener, 25 March 1999
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3eb11c2f4

4.2 Female genital mutilation

4.2.1. *In re Fauziya Kasinga*, No. 3278, 13 June 1996 (Interim Decision) (US Board of Immigration Appeals) 13 June 1996
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47bb00782

The practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution.

Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a "particular social group" within the definition of the term "refugee".

4.2.2. *Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4550a9502

Women in Sierra Leone were a particular social group for the purposes of Article 1A(2) of the 1951 Convention. The undisputed evidence made it clear that women in Sierra Leone were a group of persons sharing a common characteristic, namely a position of social inferiority as compared with men, which, without a fundamental change in social mores, was unchangeable. Female genital mutilation was an extreme expression of the discrimination to which all women in Sierra Leone were subject. If, however, the wide social group identified were thought to fall outside the established jurisprudence, it would be appropriate to accept the alternative definition advanced by Fornah and the UNHCR, namely intact women in Sierra Leone. That definition met the Convention tests. There was a common characteristic of intactness; there was a perception of the women concerned as a distinct group; and it was not a group defined by persecution.[2]

- *UNHCR's Intervention*: *Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener)*, Case for the Intervener, 14 June 2006
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45631a0f4

4.3 Sexual orientation

4.3.1. *Refugee Appeal No. 1312/93, Re GJ*, 30 August 1995 (New Zealand Refugee Status Appeals Authority)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6938

Homosexuals in Iran were a cognizable social group united by a shared internal characteristic, namely their sexual orientation. Homosexuality was either an innate or unchangeable characteristic, or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed.

4.3.2. *Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084, 24 August 2000 (US Court of Appeal for the 9th Circuit)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ba9c1119

Gay men with female sexual identities in Mexico constituted a "particular social group". Female sexual identity was immutable because it was inherent in the claimant's identity; in any event, he should not be required to change it.

[2] See also para. 16 for a discussion on the interpretation of the EU Qualification Directive provisions regarding 'particular social group'.

4.3.3. *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003 (High Court of Australia)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3fd9eca84

"[P]ersecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a "particular social group" if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality." [para. 40]

4.4 Coercive family planning policies

4.4.1. *Cheung v. Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 314, 1 April 1993 (Canada Federal Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b70b18

Women in China who have more than one child, and are faced with forced sterilization because of this, form a particular social group so as to come within the meaning of the definition of a Convention refugee.

4.4.2. *Chan v. Canada (Minister of Employment and Immigration)* [1995] 3 S.C.R. 593, 19 October 1995 (Supreme Court of Canada)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b68b4

A person facing forced sterilization was assumed (without it being decided) to be a member of a particular social group. The claimant, to establish a well-founded fear of sterilization, must demonstrate subjective fear persecution and establish that this fear is well-founded in the objective sense, both on a balance of probabilities. Normally the claimant's evidence will be sufficient to meet the subjective aspect of the test where the claimant is found to be a credible witness and his or her testimony is consistent.

4.4.3. *A and Another v Minister for Immigration and Ethnic Affairs and Another*, 24 February 1997 (High Court of Australia)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7180

"As there was no evidence that being parents of one child and not accepting the limitations imposed by government policy was a characteristic which, because it was shared with others, united a collection of persons and set them apart from society at large, it could not be said that the appellants feared persecution by reason of membership of any particular social group." [para. 3]

4.5 Family members

4.5.1. *Minister for Immigration & Multicultural Affairs v. Sarrazola* [1999] FCA 1134, 6 October 1999 (Canada Federal Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b76320

"In acting on the basis that the Refugees Convention is "not intended to protect family members from persecution where the family is not linked to a broader group recognised by the Convention definition" the Tribunal, in our view, made a further error of law […]." [para. 28]

4.5.2. *Thomas et al. v. Gonzales, Attorney General*, 02-71656; A75-597-033; A75-597-034; A75-597-035; A75-597-036, 3 June 2005 (US Court of Appeals for the 9th Circuit)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42d0f0854

Family membership may constitute membership in a "particular social group", and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship.

4.5.3. *Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4550a9502

"It is not necessary to prove that the primary member of the family of which the asylum seeker is also a member is being persecuted for a Convention reason. Nor need it be proved that all other members of the family are at risk of being persecuted for reasons of their membership of the family, or that they are susceptible of being persecuted for that reason. This approach has the advantage that it is unnecessary to identify all those who are, and those who are not, to be treated as members of the family for the purposes of article 1A(2)." [para. 51]

- *UNHCR's Intervention*: *Zainab Esther Fornah (Appellant) v. Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener)*, Case for the Intervener, 14 June 2006
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45631a0f4

4.6 Blood feuds

4.6.1. *Secretary of State for the Home Department v. Skenderaj* [2002] EWCA Civ. 567, 26 April 2002 (England and Wales Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3fe711024

Even if the claimant's family was a particular social group, his fear of persecution was not because of that membership but because of fear of reprisal for his uncle's act of killing one of the enemy family. In short, the effective cause was criminality – a threat of a revenge attack by another individual – rather than action taken for a Convention reason.

4.6.2. *STCB v. Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 61, 14 December 2006 (High Court of Australia)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=466823d62

In the claimant's case the reason for the persecution is not just "revenge", but "revenge for a criminal act". While some types of revenge may be motivated by Convention reasons, this was not the case here.

"Albanian citizens who are subject to the customary law" did not constitute a particular social group since *Kanun* was not a source of customary law binding on all Albanian citizens in a particular area but was merely employed by some criminals as a guise for their desire to settle accounts with other criminals.

4.6.3. *Elezaj and Others v. Sweden*, Application No. 17654/05, 20 September 2007 (Decision on Admissibility) (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473ac1e92

The applicants would not face a real and concrete risk of being killed in a blood feud upon return to Albania. The Albanian authorities would be able to obviate the risk by providing appropriate protection.

4.7 Trafficking in persons

4.7.1. *VXAJ v. Minister for Immigration and Another* [2006] FMCA 234, 20 April 2006 (Australia Federal Magistrates Court)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46691ee32

"Having failed to identify the relevant social group [i.e. trafficked women who have given evidence against traffickers] the Tribunal deprived itself of the opportunity to properly assess the applicant's fear of persecution and serious harm. […] The Tribunal has assumed that the applicant's debt and betrayal of the traffickers were factors exclusive of any motivation arising from the fact that the applicant was a sex worker. However, the fact that the harm feared by the applicant arose from her debt and betrayal of the traffickers did not preclude a finding that the applicant also feared harm because she was a sex worker." [paras. 22 & 26]

4.7.2. *SB (PSG – Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department* CG [2008] UKAIT 00002, 26 November 2007 (UK Asylum and Immigration Tribunal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47837c902

"Former victims of trafficking" and "former victims of trafficking for sexual exploitation" could be members of a particular social group because of their shared common background or past experience of having been trafficked.

4.8 Children at risk

4.8.1. *Lukwago v. Ashcroft, Attorney General*, No. 02-1812, 14 May 2003 (US Court of Appeals for the 3rd Circuit)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47a7078c3

Former child soldiers who have escaped the Lord's Resistance Army captivity may constitute a particular social group. It fits precisely within the recognition that a shared past experience may be enough to link members of a particular social group.

4.8.2. *Escobar v. Gonzales, Attorney General*, No. 04-2999, 29 June 2005 (US Court of Appeals for the 3rd Circuit)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47bb02d72

Honduran street children are not a particular social group. Poverty, homelessness and youth are far too vague and all encompassing to be characteristics that set the perimeters for a protected group.

4.9 Persons with disabilities

4.9.1. *Raffington v. Immigration and Naturalization Service et al.*, No. 02-1773, 26 August 2003 (US Court of Appeals for the 8th Circuit)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4721cd2d2

Mentally ill Jamaicans, or mentally ill female Jamaicans, do not qualify as a "particular social group" for asylum purposes, as they are not "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest." The mentally ill are too large and diverse a group to qualify. Additionally, a country's failure to provide its citizens with a particular level of medical care or education due to economic constraints is not persecution.

4.9.2. *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 21 April 2005 (US Court of Appeals for the 9th Circuit)[3]
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=42d7a5494

The harms suffered by a disabled child may be taken into account when determining whether to grant his parents' asylum application.

4.9.3. *Hukic v. Sweden*, Application No. 17416/05, 27 September 2005 (Decision on Admissibility) (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4406d0524

Deportation of the applicants to Bosnia and Herzegovina was not contrary to Article 3 of the ECHR despite the seriousness of the fourth applicant's handicap (i.e. Down's syndrome coupled with epilepsy).

4.9.4. *Refugee Appeal No. 76015*, 14 November 2007 (New Zealand Refugee Status Appeals Authority)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4742bb022

The appellant, a relatively young Bolivian man, from a well-off family, with clear parental support, requiring particular social services by reason of his physical disability

[3] In a summary order dated 17 April 2006, the Supreme Court vacated the 9th Circuit's decision and remanded the case "for further consideration in light of *Gonzales v. Thomas*, 547 U.S. ___ (2006)." In *Thomas*, the Court held that the 9th Circuit should have applied the "ordinary remand rule," and remanded the case to the BIA for further analysis. The Court's ruling in *Tchoukhrova* indicates that the 9th Circuit erred by reaching conclusions on issues that the BIA had not ruled on in the first instance. See: *Gonzales v. Tchoukhrova*, 127 S. Ct. 57 (U.S. 2006).

(i.e. leg amputation), did not face a real chance of being persecuted if on return to Bolivia. Such inconvenience, distress or limitations on services as he faced fell short of "serious harm" by a demonstrable margin.

5. Exclusion

5.1 War crimes/Crimes against humanity

5.1.1. *Gonzalez v. Canada (Minister of Employment and Immigration)* [1994] 3 F.C. 646, 26 May 1994 (Canadian Federal Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47260ab12

The quality of persecution which a claimant might suffer if returned could not be weighed against the gravity of what had been done to engage the exclusion clause. A private soldier in action against armed enemy was not guilty of war crime or crime against humanity within Convention refugee definition. However, each individual case will depend on its own particular facts and circumstances. It may be that in a given situation, while the death of innocent civilians occurred at the time of or during an action against an armed enemy, such deaths were not the unfortunate and inevitable casualties of war as contended, but resulted from intentional, deliberate and unjustifiable acts of killing and slaughtering.

5.1.2. *Garate (Gabriel Sequeiros) v. Refugee Status Appeals Authority* [1998] NZAR 241, 9 October 1997 (High Court of New Zealand)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47879d472

The test of "serious reasons for considering" that an individual has been guilty of crimes against humanity is a lower standard of proof than the balance of probabilities. That standard of proof only comes into play, however, when the decision-maker is considering determinations of fact.

Membership of an organization which from time to time commits international offences would not normally be sufficient to exclude a person from refugee status. However, where an organization is principally directed to a limited, brutal purpose, such as secret police activity, mere membership may by necessity involve personal and knowing participation in persecutorial acts. Frequent participation in such acts is unnecessary as Article 1F(a) of the 1951 Convention only speaks of a crime against humanity in the singular.

5.1.3. *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 100, 2005 SCC 40, 28 June 2005 (Supreme Court of Canada)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=470a4a6b1a

The "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. This standard of proof applies to questions of fact. Whether the facts meet the requirements of a crime against humanity is a question of law. The facts, as found on the "reasonable grounds to believe" standard, must show that the "hate" speech did constitute a crime against humanity in law.

Crimes against humanity consist of a criminal act and a guilty mind. The criminal act for such a crime is made up of three elements: (1) one of the enumerated proscribed acts is committed; (2) the act occurs as part of a widespread or systematic attack; and (3) the attack is directed against any civilian population or any identifiable group. With respect to the first element, both the physical and mental elements of an underlying act must be made out.

As for the last two elements, they require that the proscribed act take place in a particular context: a widespread or systematic attack, usually violent, directed against any civilian population. The widespread or systematic nature of the attack will ultimately be determined by examining the means, methods, resources and results of the attack upon a civilian population. There is currently no requirement in customary international law that a policy underlie the attack. Furthermore, the attack must be directed against a relatively large group of people, mostly civilians, who share distinctive features which identify them as targets of the attack. A link must be demonstrated between the act and the attack. In essence, the act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part of it.

In addition to the mental element of the underlying act, the person committing the act must have knowledge of the attack and either know that his or her acts comprise part of it or take the risk that his or her acts will comprise part of it. Knowledge may be factually implied from the circumstances. A persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group and constitutes a crime against humanity.

5.2 Serious non-political crimes

5.2.1. *T v. Secretary of State for the Home Department* [1996] 2 All ER 865, 22 May 1996 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b70f4

A crime was a political crime for the purposes of Article 1F of the 1951 Convention if it was committed for a political purpose and there was a sufficiently close and direct link between the crime and the alleged political purpose. In determining whether such a link existed, the court would consider the means used to achieve the political end and, in particular, whether the crime was aimed at a military or governmental target, or a civilian target, and in either event whether it was likely to involve the indiscriminate killing or injuring of members of the public.

Acts of violence which were likely to cause indiscriminate injury to innocent persons who had no connection with the government of the state did not constitute political crimes for the purposes of the 1951 Convention.

5.2.2. *Immigration and Naturalization Service v. Aguirre-Aguirre*, 526 US 415, 3 May 1999 (US Supreme Court)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b74b0

In evaluating the political nature of a crime, the general standard was whether an offence's political aspect outweighs its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature. Although an offence involving atrocious acts will result in

denial of withholding, an offence's criminal element may outweigh its political aspect even if none of the acts are atrocious. This approach is consistent with the statute, which does not equate every serious non-political crime with atrocious acts. Nor is there any reason to find such equivalence. In common usage, "atrocious" suggests a deed more culpable and aggravated than a serious one.

5.2.3. *Xie v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1023; [2004] 2 F.C.R. 372, 4 September 2003 (Canada Federal Court)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4132e5f84

An "economic crime", not including any violence, such as embezzlement of a significant sum of money for personal profit, could constitute a "serious non-political crime" for the purpose of Article 1F(b) of the 1951 Convention.

5.3 Acts contrary to the purposes and principles of the United Nations

5.3.1. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982, 4 June 1998 (Supreme Court of Canada)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b71ca

"The guiding principle is that where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to the purposes and principles of the United Nations, then Article 1F(c) will be applicable. […]

Although it may be more difficult for a non-state actor to perpetrate human rights violations on a scale amounting to persecution without the state thereby implicitly adopting those acts, the possibility should not be excluded *a priori*. […] [T]he Court must also take into consideration that some crimes that have specifically been declared to contravene the purposes and principles of the United Nations are not restricted to state actors. […]

The second category of acts which fall within the scope of Article 1F(c) are those which a court is able, for itself, to characterize as serious, sustained and systemic violations of fundamental human rights constituting persecution. This analysis involves a factual and a legal component. The court must assess the status of the rule which has been violated. Where the rule which has been violated is very near the core of the most valued principles of human rights and is recognized as immediately subject to international condemnation and punishment, then even an isolated violation could lead to an exclusion under Article 1F(c). The status of a violated rule as a universal jurisdiction offence would be a compelling indication that even an isolated violation constitutes persecution. […]

In this case there is simply no indication that the drug trafficking comes close to the core, or even forms a part of the corpus of fundamental human rights." [paras. 65, 68, 70 & 72]

5.3.2. *KK (Article 1F(c)) Turkey) v. Secretary of State for the Home Department* [2004] UKIAT 00101, 7 May 2004 (UK Immigration Asylum Tribunal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43fc2d6d11

"[T]here are some acts which, despite being political or politically-inspired, do not depend for their criminality on the individual matrix of power within a particular state. These acts […] are those which are intended to be covered by Article 1F(c). That subparagraph does not apply to every crime, nor to every political crime. It applies to acts which are the subject of intense disapproval by the governing body of the entire international community. An individual who has committed such an act cannot claim that his categorisation as criminal depends upon the attitudes of the very regime from whom he has sought to escape, because the international condemnation shows that his acts would have been treated in the same way wherever and under whatever circumstances they had been committed. […]

[T]he characterisation of acts as 'terrorist' is neither necessary nor sufficient for exclusion under Article 1F(c), it is not irrelevant, because of the clear view of the United Nations on certain sorts of terrorism." [paras. 85 & 93]

6. Internal relocation/flight alternative

6.1.1. *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* [1994] 1 FC 589 (CA), 10 November 1993 (Canada Federal Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3deb87324

The idea of an internal flight alternative (IFA) is "inherent" in the definition of a Convention refugee; it is not something separate. The onus of proof rests on the claimant to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA. An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. The alternative place of safety must be realistically accessible to the claimant. If it is objectively reasonable to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.

6.1.2. *Karanakaran v. Secretary of State for the Home Department* [2000] EWCA Civ. 11, 25 January 2000 (England and Wales Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47bc14622

When assessing the reasonableness of internal flight alternative, the decision-maker should simply ask: would it be "unduly harsh" to expect the applicant to settle there?

6.1.3. *Januzi v. Secretary of State for the Home Department; Hamid v. Secretary of State for the Home Department; Gaafar v. Secretary of State for the Home Department; Mohammed v. Secretary of State for the Home Department*, [2006] UKHL 5, 15 February 2006 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43f5907a4

On the issue of internal relocation, the question was whether it would be unduly harsh to expect an applicant who was being persecuted for reasons within the 1951 Convention in one part of his country to move to a less hostile part before seeking refugee status abroad. The words "unduly harsh" set the standard that must be met for this to be regarded as unreasonable. If the applicant could live a relatively normal life there, judged by the standards that prevailed in his country of nationality generally, and if he could reach the less hostile part without undue hardship or difficulty, it would not be unreasonable to expect him to move there. The question whether it would be unduly

harsh for an asylum-seeker to be expected to live in a place of relocation within the country of his nationality was not to be judged by considering whether the quality of life in the place of relocation met basic norms of civil, political and socio-economic human rights.[4]

- *UNHCR's Intervention*: *Hamid, (2) Gaafar and (3) Mohammed (Appellants) v. the Secretary of State for the Home Department (Respondent), and the United Nations High Commissioner for Refugees (Intervener)*, Case for the Intervener, December 2005
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43e9d8714

6.1.4. *Salah Sheekh v. the Netherlands*, Application No. 1948/04, 11 January 2007 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45cb3dfd2

The indirect removal of an alien to an intermediary country did not affect the responsibility of the expelling contracting state to ensure they were not, consequently, exposed to treatment contrary to Article 3 of the ECHR. There was no reason to hold differently where expulsion was to a different area of the country of origin.

7. Cessation

7.1 Ceased circumstances

7.1.1. *In re B; R v. Special Adjudicator, ex parte Hoxha* [2005] UKHL 19, 10 March 2005 (UK House of Lords)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=423ec7784

Persecution suffered in the past was relevant to whether a person had a current well-founded fear of persecution, but an understandable unwillingness to return based upon the continuing effects of past persecution was not enough. Refugee status required there to be a current fear of persecution for a Convention reason upon return. The fact that the nature of the ill-treatment (such as rape) might lead to ostracism on return could amount to persecution for a Convention reason.

The contrast was logically and intentionally struck in Article 1C(5) between, on the one hand, Article 1A(1) (statutory) refugees, who had already been "considered" refugees (and thus recognized as such) and who, although potentially amenable to the loss of that status under Article 1C(5), would not in fact lose it if they could show "compelling reasons", and, on the other hand, Article 1A(2) refugees who had to demonstrate a current well-founded fear of persecution not only when first seeking recognition of their status but also thereafter in order not to lose it. The cessation provision in Article 1C(5) naturally took effect when the refugee ceased to have a current well-founded fear. That was in symmetry with the definition in Article 1A(2). The whole scheme of the Convention pointed irresistibly towards a two-stage rather than composite approach to Article 1A(2) and Article 1C(5). Stage one, the formal determination of an asylum-seeker's refugee status, dictated whether an Article 1A(2) applicant was to be recognized as a refugee. Article 1C(5), a cessation clause, had no application at that

[4] This position was reiterated by the House of Lords in *Secretary of State for the Home Department (Appellant) v. AH (Sudan) and Others (FC) (Respondents)* [2007] UKHL 49, 14 November 2007, available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473ae09c2.

stage, indeed no application at any stage, unless and until it was invoked by the state against the refugee in order to deprive him of the refugee status previously accorded to him.

- *UNHCR's Intervention*: *Xhevdet Hoxha v. Special Adjudicator and B v. Immigration Appeal Tribunal, and the United Nations High Commissioner for Refugees (Intervener)*, Case for the Intervener, 5 January 2005
  URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=423ec5724

7.1.2. *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004* [2006] HCA 53, 15 November 2006 (High Court of Australia)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4667e3f82

"[Articles 1A(2) and 1C(5) of the 1951 Convention] contemplate two separate inquiries, by inference occurring at different times. The first, performed in accordance with Article 1A(2), involves a determination of an applicant's "refugee" status. The question at that stage, the answer to which is merely "declaratory", is whether or not the applicant is to be recognised as a refugee.

[…] [Article] 1C(5) of the Convention cannot apply to a person who has not previously been recognised as a refugee. Nor can [Article] 1A(2) apply to a person who has already been so recognised. It follows that the approach to the grant of "refugee" status under [Article] 1A(2) cannot "mirror" or be "symmetrical to" the approach to cessation of refugee status under [Article] 1C(5). The language of the Convention, its structure and apparent scheme, deny such an interpretation." [paras. 99 & 101]

7.2 Change in personal circumstances

7.2.1. *Case Regarding Cessation of Refugee Status*, VwGH No. 2001/01/0499, 15 May 2003 (Austria Higher Administrative Court [*Verwaltungsgerichtshof*])
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f40c1584

"[…][T]he successful application for the issuance or extension of validity of a passport of the country of nationality can lead to a cessation of refugee status even when the danger of persecution remains in the country of origin and a return there is not envisaged. That will be the case where a recognised refugee insists on using a passport issued by the authorities of the country of nationality for purposes for which the Convention travel document would suffice or where a refugee wants to gain advantages bound to nationality by applying for the issuance of such a passport. However, […] in addition to voluntariness and re-availment the additional requirement of intent […] is decisive. An intent to normalise relations to the country of origin […] and to again entrust that country with the representation of one's interest will normally be missing as long as (in particular: state) persecution prevails.

Further, in the context of issuance or extension of validity of passports the difference between the situation of an asylum seeker lacking a Convention travel document and facing a yet unknown final decision and that of a refugee has to be taken into account when interpreting the action concerned […]. Thoughtful of this difference […] a rebuttable presumption of "re-availment" respectively a respective intention is unsuitable. Whether or not such intent had existed has to be investigated and examined in the particular case whereby the concerned asylum seeker will have to explain the reasons for his action." [para. 6]

8. Family unity

8.1.1. *Haydarie v. the Netherlands*, Application No. 8876/04, 20 October 2005 (Decision on Admissibility) (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=468cbc9fd

A complaint under Article 8 of the ECHR following a local authority's refusal to grant a provisional residence visa to allow children to join their mother was inadmissible as the mother had failed to meet the minimum income requirements and as there was no evidence that she had made serious efforts to find gainful employment.

8.1.2. *Tuquabo-Tekle and Others v. the Netherlands*, Application No. 60665/00, 1 December 2005 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43a29e674

There had been a violation of Article 8 of the ECHR where the authorities, in refusing to allow an individual to reside in the Netherlands with her mother, stepfather and siblings, had failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other.

8.1.3. *Azizi v. Canada (Minister of Citizenship and Immigration)* [2005] FCA 406; [2006] 3 F.C.R. 118, 5 December 2005 (Canada Federal Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4716146527

Regulations, which resulted in the exclusion of Convention refugees abroad, or Convention refugees seeking resettlement, as members of the family class by virtue of their relationship to a sponsor who previously became a permanent resident and at that time failed to declare them as non-accompanying family members, were not *ultra vires.*

8.1.4. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, 12 October 2006 (European Court of Human Rights)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45d5cef72

Since the second applicant was an unaccompanied foreign minor, the Belgian Government was under an obligation to facilitate the family's reunification. Her detention constituted a violation of her right to family life under Article 8 of the ECHR.

8.1.5. *AD (Qualification Directive – Family Member) Afghanistan v. Secretary of State for the Home Department* [2007] UKAIT 00065, 23 July 2007 (UK Asylum and Immigration Tribunal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46a499292

Pursuant to Article 2(h) of the EU Qualification Directive, the claimant could not be considered, for the purpose of maintaining family unity, as a family member of his brother, who ad been granted indefinite leave to remain in the United Kingdom as a refugee, and accordingly was not entitled to a United Kingdom residence permit.

9. Nationality/Statelessness

9.1 Well-founded fear

9.1.1. *Revenko v. Secretary of State for the Home Department*, 31 July 2000 (England and Wales Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6f32c

Mere statelessness or an inability to return to one's country of former residence was insufficient. To qualify as a refugee a stateless person must also show a well-founded fear of persecution on Convention grounds.

9.2 Country of former habitual residence

9.2.1. *Maarouf v. Canada (Minister of Employment and Immigration)* [1994] 1 F.C. 723, 13 December 1993 (Canada Federal Court)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47bda74c2

The definition of "country of former habitual residence" should not be unduly restrictive so as to pre-empt the provision of "surrogate" shelter to a stateless person who has demonstrated a well-founded fear of persecution on any of the enumerated grounds. A country of former habitual residence should not be limited to the country where the claimant initially feared persecution. The argument that habitual residence necessitates the claimant be legally able to return to that state is contrary to the shelter rationale underlying international refugee protection. Once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return. The concept of "former habitual residence" seeks to establish a relationship to a state which is broadly comparable to that between a citizen and his country of nationality. Thus the term implies a situation where a stateless person was admitted to a country with a view to a continuing residence of some duration, without necessitating a minimum period of residence. The claimant must have established a significant period of de facto residence in the country in question.

9.2.2. *Al-Anezi v. Minister for Immigration & Multicultural Affairs* [1999] FCA 355, 1 April 1999 (Federal Court of Australia)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7617

A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.

9.2.3. *Thabet v. Canada (Minister of Citizenship and Immigration)* [1998] 4 F.C. 21, 11 May 1998 (Canada Federal Court of Appeal)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47bda9972

Where a claimant has been resident in more than one country, it is not necessary to prove that there was persecution at the hands of all those countries; but it is necessary to demonstrate that one country was guilty of persecution and that the claimant is unable or unwilling to return to any of the states where he formerly habitually resided.

9.2.4. *Refugee Appeal No. 72635/01*, 6 September 2002 (New Zealand Refugee Status Appeals Authority)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=402a6ae14

"[…] [W]here a stateless person has habitually resided in more than one country, in order to be found to be a Convention refugee, such person must show that he or she has a well-founded fear of being persecuted for a Convention reason in at least one country of former habitual residence, and that he or she is unable or, owing to such fear, is unwilling to return to each of his or her other countries of former habitual residence. In short, the well-founded fear of being persecuted for a Convention reason must be established in relation to each and every country of former habitual residence before a State party to the Convention has obligations to the stateless person." [para. 121]

9.3 Multiple nationalities

9.3.1. *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689, 30 June 1993 (Supreme Court of Canada)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b673c

The burden of proof rests on the claimant to show a well-founded fear of persecution in all countries of which he or she is a national.

The Board must investigate whether the claimant is unable or unwilling to avail himself or herself of the protection of each and every country of nationality. Any home state protection is a claimant's sole option when available since international refugee protection is to serve as "surrogate" shelter coming into play only upon failure of national support. The inability of a state of nationality to protect can be established where the claimant has actually approached the state and been denied protection. Where the second state has not actually been approached by the claimant, that state should be presumed capable of protecting its nationals. An underlying premise of this presumption is that citizenship carries with it certain basic consequences, such as the right to gain entry to the country at any time. Denial of admittance to the home territory can amount to a refusal of protection.

9.3.2. *Jong Kim Koe v Minister for Immigration; Multicultural Affairs* [1997] FCA 306, 2 May 1997 (Federal Court of Australia)
URL: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6eb4

"Given the objects of the [1951] Convention, it can hardly have been intended that a person who seeks international protection to which, but for a second nationality he or she would clearly be entitled, would, as a consequence of a formal but relevantly ineffective nationality, be denied international protection and, not being a "refugee", could be sent back to the country in which he or she feared, and had a real chance of, being persecuted. […] [Thus] findings that a person has dual nationalities but lacks a well-founded fear of persecution in one of the countries of nationality will not necessarily preclude a finding that the person is a refugee." [p. 9]