

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 18th February 2003

Date determination notified:

06.06.2003

Before:

The Honourable Mr Justice Ouseley (President)

Mrs J A J C Gleeson

Mr R Baines JP

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

For the Appellant: Mr M Blundell, Home Office Presenting Officer

For the Respondent: Mr A Patel, Atkins Public Law

DETERMINATION AND REASONS

INTRODUCTION

1. The Secretary of State for the Home Department appeals against the decision of an Adjudicator (Mr B.H. Forster, OBE) promulgated on 3 September 2002 whereby he allowed the asylum and human rights appeals of Ms Hesami, a citizen of Iran, the Claimant.
2. She was born in 1969 and following her marriage in Iran in 1992, she had a daughter, born in Iran on 14 April 1994. She arrived in the United Kingdom with her daughter on 30 September 2001 with a valid passport, and used what the Adjudicator described as verbal deception to gain entry to the United Kingdom. She claimed asylum in February 2002.

3. The Adjudicator allowed her appeals against the Secretary of State's refusal of her claim on the basis that he accepted her account of her husband's domestic violence towards her, which he characterised as "serious", causing injury some of which was permanent. The daughter feared the father, wished no contact with him and was at risk of psychological damage if returned to Iran. The protection of the law for a wife maltreated by a husband who was a drug and alcohol user was in practice very difficult to invoke successfully. The Adjudicator concluded that the legal discrimination against women, the social pressures against invoking what protection there was and the "virtual uselessness" to her of the police and Courts, meant that the Claimant was a member of a particular social group, which we infer to be Iranian women. In the event of divorce proceedings being successful, the father was likely to obtain custody of the daughter. This appears to have been part of the Adjudicator's reasoning as to discrimination in state protection, the existence of a particular social group and the Claimant's persecution because of her membership of it. The Claimant was thus being persecuted for a Convention reason.
4. The Adjudicator also concluded that returning the Claimant to Iran would amount to a disproportionate interference with the rights of the Claimant and her daughter under Article 8 ECHR.
5. The Secretary of State contended that it was not clear what particular social group the Adjudicator had concluded the Claimant was a member of. We infer that it was Iranian women in general because of the Adjudicator's reference to and discussion of R v IAT ex parte Shah and Islam [1999] 2 AC 629, 1999 Imm AR 28. He is clearly enough drawing parallels between the position of women in Pakistan in general and in Iran in general. He was not relying upon some narrower group such as those women who faced adultery charges and a lack of state protection from the consequences, the narrower group seen as an alternative basis for the decision in Shah and Islam.

THE CLAIMANT'S CASE

6. It is necessary to set out some of the detail of what happened to the Claimant in Iran, before examining the background evidence.
7. She married, through family arrangement, an older, well-educated, religious man. After a year or so, her husband became verbally abusive and began to drink alcohol. He became a regular user of alcohol, opium and cannabis, and went from verbal abuse to physical violence as he withdrew from drugs. He had been a regular user of cannabis, but only of harder drugs in the last two or three years, and that was when the violence started, once a month at first and then once or twice a week. He would punch her, slap her face and kick her. His nail had scratched her on the chest once, leaving a scar. She regularly had bruising.

8. She had visited the United Kingdom where her brother worked on three occasions, once with her husband. She described how one day during that visit he:

“Had been drinking heavily and became angry very quickly and punched her on the upper arm causing a bruise. That happened two years ago and ever since she has been in constant fear that he would physically abuse her.

Within the last two years he had become short tempered and more and more verbally and physically violent towards her and the physical violence increased to four or five times a week. She said that she became alarmed about how he might treat her and her daughter and although he had not hit the latter, he had showed no interest in her and never took time to play with her”; paragraphs 16 and 17 of the Adjudicator’s determination.

9. She had not sought the protection of the United Kingdom authorities, as she was a guest in the country and frightened of him but she had seen her G.P. Now she was here, she was on a prescribed anti-depressant.

10. She said that her parents had seen his outbursts and were fed up with his behaviour but to no avail. She had turned to a psychiatrist because of her mental suffering, latterly two or three times a week. She had not sought medical help in Iran. Her parents would not let her contact the police because that could bring great shame upon her family.

“Her husband said many times that he would change his ways but she now knew that she could not trust him as she had taken him back before and he always returned to violence. She feared for her daughter.”, paragraph 19.

11. She later said that she had gone to the police once but had not made an official complaint. She had reported matters to a policeman who was a friend of the family, and in particular of her husband, who like him took drink and drugs. Nothing had happened; the policeman had said it was a family issue, to be resolved according to what the husband said should happen.

12. Her daughter had often seen his violence which had made her quiet, withdrawn and stressed; her sleep suffered. She did not want to see her father.

13. Before she left Iran to come to the United Kingdom, her husband had gone away for some 4 months and had not been in contact with her or her daughter, so she decided with her parent’s consent to flee to the United Kingdom to escape the violence of her husband upon his return to Shiraz. She said she could not hide from him in Iran, because of the social structure.

14. Notwithstanding that, she had told the Home Office that her initial intention had only been to escape the stress and tension and to visit her brother. What triggered the asylum application was that:

“She had heard that her husband was now pressing to get the child back and had also threatened her, through her solicitor. She said that she feared he would take her child from her and that this was the more likely outcome in Iran”; paragraph 22.

The Adjudicator also records her evidence at paragraph 26 as follows:

“She said that since she arrived in the United Kingdom her husband would ring her at her brother’s house, but they would only argue and he was angry because she had brought their daughter here. Her daughter would not speak to him. She said that he had threatened her through her solicitors who had said that her husband was complaining that she had stolen his daughter and taken her away and was very angry and would kill her if she went home. There was a court case which was still continuing and she was convinced that if she returned to Iran the fighting would start again and he would be even more angry because she had brought her daughter here”.

15. The Claimant confirmed to the Tribunal, through her advocate Mr Patel, in the light of the objective evidence that women needed their husbands’ consent to travel abroad, even more so if taking a child, that her husband had agreed to her coming to the United Kingdom with the child to visit her brother, as she had done before; (Divorce in Iran and the US State Department report; the CIPU Report is less specific).
16. She said that she could not leave her husband; in Iran he would find her. She could not live alone because of the way in which she would be regarded. It would be extremely hard to rent a house. Whatever the divorce laws might say, it was very difficult for a woman to divorce a man, and even more so to retain custody of a child. The daughter would be psychologically scarred. Her family in Iran would be unable to help much; paragraphs 27 – 28.
17. The Adjudicator reached the conclusions which we have set out in paragraph 3. There was comparatively little elaboration of the reasoning behind the conclusions as to “particular social group” but it is clear that the Adjudicator accepted the personal and expert evidence of the Claimant in the light of the background evidence. He applied Shah and Islam, recognising that domestic violence did not itself create a “social group” and that the Geneva Convention “was not designed to give relief to all those who lived under a less liberal social order.”
18. The components of his judgment were that women in Iran were discriminated against, they were less fairly treated than men, less weight was given to their evidence in Court. Family and religious pressures deter complaint or divorce; it is seen as bringing shame on a family if domestic issues are raised outside the family. He added that complaint or seeking divorce would be “virtually useless” because of the weight given to the husband’s evidence and the low prospects of the wife retaining custody of a child.
19. The Adjudicator did not have the assistance of any representative from the Home Office in analysing the facts or assessing their significance as

constituting “persecution”. Nor did he have any submissions from the Home Office, beyond the contents of the refusal letter, as to what would constitute “a particular social group.”

20. We say that because Mr Blundell for the Secretary of State has not sought to take issue with the Adjudicator’s acceptance of the Claimant’s evidence, nor with his characterisation of her as having suffered “serious domestic violence”, or its being assessed as sufficient to constitute “persecution.” In the circumstances, that is sensible and fair. The Claimant has not had the opportunity to deal with some of the questions to which her own evidence gives rise e.g. if the husband consented to her departure, why was she fleeing while he was away but yet had not intended to stay in the United Kingdom until she had been here a while? There is evidence of a clear and not altogether surprising angry reaction from the husband and father to the realisation that the wife is now proposing to live abroad having initially taken the child just for a visit: at least some of the threats were made via her solicitor and parents but the husband had engaged lawyers to pursue a court case. But it was these threats, after she had not returned with the child, which caused her to seek asylum. The husband had also left the family, before the Claimant came to the United Kingdom, and when asked whether that was a permanent departure or not, the Claimant in interview (p 24) said “we sent him a message to come back and resolve his problems in conjunction with his family. This never happened”. The Claimant however left for the United Kingdom while he was away, and her evidence was that she had taken him back before. There is a wide range of fact and degree potentially covered by the domestic violence recorded on her evidence, varying from the persistent, unpleasant but low level to something altogether more serious, which receives no analysis from the Adjudicator.
21. We set out those matters lest it be thought that the facts of this case gave guidance as to what constitutes persecutory ill-treatment. With that cautionary note for other cases, we approach the issues which do arise on the basis that the Claimant was at real risk of suffering from ill-treatment which reached the level necessary to constitute persecution.

THE SUBMISSIONS

22. The Secretary of State appealed on the grounds that the Adjudicator, who accepted that the written law and Constitution of Iran gave women certain rights of divorce against abusive husbands, ought to have concluded that the State did not discriminate against women, at least in that respect.
23. The substance of the Secretary of State’s submission was that women in Iran in general could not be regarded as constituting “a particular social group” and that there were significant differences in the legal framework and practical protection afforded to women in Iran by comparison with Pakistan, albeit that social and legal attitudes were not

the same as those in western countries. There was also a legal framework within which women could divorce their violently abusive husbands and obtain custody of the children. There was a sufficient degree of protection in place, even though it might not always be successful. The Adjudicator had not recognised the significance and availability of the legislative provisions. In any event, the Claimant had made no real effort to access the systems of protection which did exist and the Adjudicator's approach ignored the significance of her lack of effort in that respect. If she had not sought police help because of a resulting "climate of imputed shame", that was an inadequate reason for seeking international protection. In reality this was a case of localised or individualised domestic violence and the Claimant should have considered moving elsewhere in Iran. If the Claimant was being persecuted, she was not being persecuted because of membership of a particular social group; she was being ill-treated by her husband in respect of which State protection was available and had not been invoked by the Claimant.

24. Mr Blundell submitted that there was no basis for treating this Claimant as a member of a narrower social group, constituted by women who faced the threat of adultery charges, and a lack of State protection from the consequence, the narrower group envisaged in Shah and Islam.
25. The Adjudicator's reasoning on Article 8 ECHR was also inadequate.
26. Mr Patel for the Claimant submitted that the key issue was whether the position of women in Iran could be distinguished from that identified in Pakistan in Shah and Islam: there was in both countries institutionalised discrimination and an institutionalised lack of protection. In reality divorce was difficult to obtain. He relied on a Tribunal decision, Fateme [00TH00921] 3rd April 2000, in which women in Iran were held to constitute a "particular social group."
27. The reality was institutional discrimination for women facing spousal abuse as it was in Pakistan. If the Claimant were to live away from her husband, away from her home, she would be conspicuous with or without her child. She would be at risk of vigilante action. With or without divorce, she risked separation from her daughter. Internal flight was at best only an option after divorce. Were she to have a relationship with another man she would be at risk of adultery charges and stoning to death.

THE BACKGROUND MATERIAL

28. The Home Office relied upon the October 2002 Iran Country Assessment from CIPU, and an earlier document "Divorce in Iran", produced by the Home Office which largely dealt with the period 1994-1998.

29. Paragraphs 5.119 – 5.121 of the CIPU Report deal with the position of women generally. The ideal woman is seen by the clerical elite as an obedient wife and mother. Paragraph 5.120-121 says:

“5.120. Both the Constitution and international conventions adopted by Iran grant men and women equal rights. This conforms to Islamic criteria. Further, Article 21 of the Constitution stipulates that the government shall guarantee women’s rights in all respects and create a favourable atmosphere for restoring their material and spiritual rights. [3(b)].

5.121. This is not to say that women do not face social and legal discrimination. [4(f)]. The view of women in a primarily familial context and motherhood role continues to be encouraged. Women may work or study, [4(k)] although some areas of study are closed to women, female students are segregated from male teachers, and social constraints inhibit their opportunities.”

30. General discrimination is then discussed: enforced gender separation in public and a prohibition on women mixing openly with unmarried men or men not related to them. There are reserved sections for women on public transport and segregated entrances to many public buildings. Women are doctors, police officers and journalists; they hold a few posts of political and diplomatic weight, and have some judicial roles in family courts and as investigative judges. The CIPU Assessment says:

“These developments indicate some change in the situation of women in Iran.”

31. The CIPU Assessment recognises discrimination against women in the legal code, particularly in family and property matters, and the difficulties which they face in obtaining legal redress particularly outside large cities.

32. In paragraph 5.126-8 it says:

“5.126. Under the legal system, women are denied equal rights of testimony and inheritance. [10(j)] In a bill passed by the Majlis 22 May 2002 gave divorced mothers the same custody rights over boys as girls [5(al)] and now awaits Guardian Council approval. A woman’s testimony is worth half that of a man’s, making it difficult for a woman to prove a case against a male defendant. [9(c)].

5.127. Violence against women in the family is recognised, with “blood money” (Deyah) only awarded if the aggrieved party is a man. In addition, families of female victims of violent crimes are reported to have to pay for an assailant’s court costs. The Majlis have just passed a bill equalising blood money for men and women (before, that of men was worth twice that of women), but the law has yet to be ratified. Little detail is known of the degree of domestic violence in Iran, with no official statistics on abuse within the family. [4(f)] There is a lack of legislative provision to regulate actions against women. Iran welcomed UN contributions to the drafting of a

convention on the elimination of forced labour and trafficking in women for sexual and other exploitation. [10(n)].

5.128. A prominent Iranian scholar, Ayatollah Bojnourdi, spoke out in favour of the revision of laws, which are discriminating between men and women. In 1998 the judiciary's Bureau of Women's Affairs further said that legislation meant to reduce hardship for women in divorce and property cases had not yet properly implemented."

33. Paragraph 5.131 records:

"Limited practical improvement in the condition of women is evident. The Deputy Speaker in the Majlis has stated that laws need to be amended before women can enjoy their full rights. In 1998 the Government published several papers on a three-year action plan to help prevent, identify and deal with violence against women [10(b)]."

34. The CIPU Assessment discusses divorce in relation to permanent marriage as is the Claimant's. Although a husband is not required to cite a reason for divorce, and this case does not concern the disadvantage of being divorced by the husband,:

"conditions under which a woman may divorce depend on the year that she married, and the legislation that was in effect at the time of her marriage".

35. An attempt recently to ease the path to divorce for women appears to have stalled.

36. In 1986, the government issued a 12 – point model contract for marriage and divorce which limited a man's traditional Islamic privileges, recognising a woman's rights to a share of matrimonial property and to alimony.

37. As to children, the CIPU Assessment in paragraph 5.142 – 5.143 states:

"5.142. In the event of divorce, the father traditionally has legal custody of his children [2d]][4(b)], unless a woman can show her spouse to be an unfit father and applies under legislation passed in November 1998 to obtain custody. [4(f)][10(b)] The civil code provides for custody of a male child to belong to the mother until the child is 2 years old and of a female child until she is 5. [2(d)][4(b)]. Women who remarry are forced to give up custody of children from earlier marriages to their father. [4(f)].

5.143. The position of a divorced woman and further relationships after divorce can be fraught, with accusations of "immoral behaviour" and possible "adultery" brought to the Ershad. [2(m)].

38. There is clear discrimination between the treatment under the Islamic Penal Code accorded to women and to men adulterers – in process, evidence and punishment.

39. Use both of opium and hashish is not uncommon, and severe penalties exist for users and traffickers particularly of harder drugs.

40. "Divorce in Iran" provides further detail. The Iranian civil code permits a husband to register the divorce of a wife without her consent and without specified grounds. But under Iran's Personal Status Law, a wife needs to establish a breach of a stipulated condition in effect in the model code; those provisions cover maltreatment such that the marriage has become untenable, i.e. if the marriage entails her being "harmed". An Islamic Judge has power to order or refuse the divorce if requested by a woman.
41. The paper also states:
- "In addition to the above conditions, a woman is entitled to initiate a divorce under the terms of Iran's Civil Code:
- ... according to article 1130 of the Civil Code, if the wife can prove to the court that the continuation of the marriage would be harmful to her, she can force the husband to divorce her. If the court is unable to force the husband to divorce her, then the court will divorce her instead. However, because the legislators have very specific rules for proving harm, it is often very difficult for women to convince the court that the marriage is harmful to them. Much is left to the judge's discretion, and in a patriarchal society, and where religious leaders favour men over women, it means that women do not often win their cases. For instance, in the current situation, physical abuse must result in permanent injury for it to be grounds for divorce. As well, the husband's drug addiction is not cause for divorce on the grounds of harm, unless it is shown that his consumption of opium has economically ruined him and made it impossible to support the family".
42. It discusses the difficulties of proving the necessary pain and suffering. One beating may not suffice; hospital and police records may be necessary to satisfy a court to a high standard of proof. Divorces initiated by women are very time-consuming, expedited divorces taking only months are often linked to a husband's drug or alcohol addiction. If a husband physically ejects a woman who has been unsuccessful in divorce proceedings, he is obliged to provide her with financial support. After divorce, he loses authority over her. It is possible for an Iranian woman who obtains a civil divorce abroad to take steps to obtain recognition of that divorce under Iranian law.
43. As to child custody, in the absence of agreement, a divorced woman retains custody of sons till two and daughters till seven. The Claimant's daughter is over seven.
44. Dr. Mir-Hosseini, an academic researcher on gender and family issues in the Muslim world, whose views are referred to in "Divorce in Iran" provided an expert report for the Claimant much of which is already reflected in the material which we have described. She emphasises the practical difficulties for a woman in proving her case. Although a husband's harmful drug addiction can found divorce by his wife, proof of that fact would require him to have been convicted of a drugs offence. Police and medical reports of repeated injuries would be required to sustain divorce based on physical abuse. Likewise, if the mother

wanted to retain care of the daughter after the age of seven, she would have to show the husband's mental or moral corruption in much the same way. There were no "safe houses" for women such as this Claimant.

45. The Claimant also relied on other background material. "Human Rights in Iran", a UNA-UK publication of 2000, referred to clerical hostility to the emancipation, western-style, of women. Their position had undergone no sustained change. Women were still banned from many public offices and the armed forces, and subjected to severe penalties for incorrect wearing of the chador. There had been public executions of women for drug smuggling. There was anecdotal evidence of horrific wife abuse and it was reported that domestic violence was condoned. Although harsh discriminatory laws were not universally enforced in Iran, they were widely feared.
46. The decision of the Tribunal in Fatemeh drew upon the expert opinion of a Mr Edge and Sabeh Afshan, from SOAS and the University of York. Those opinions were given in 1997. They dealt in particular with the position of women charged with adultery by their husband, as Mrs Fatemeh had been, and at consequent risk of imprisonment, and lashing, if not stoning to death.
47. The US State Department Report of March 2002 states "The Government discriminates on the basis of religion and sex"; statistics on the domestic abuse of women are not publicly available; such abuse is considered a private matter. The law against rape is rarely enforced. Women, however, have access to primary and secondary education although their professional opportunities suffer from social and legal constraints.
48. Graduate education abroad for women is not permitted. The Report echoes much that is found in the CIPU Assessment on the availability of divorce to wives and the limits on custody.
49. On a more polemical note, the International Federation of Iranian Refugees in "Human Rights Violations in Iran" states:

"Women in Iran encounter violence and discrimination at all levels. Violence against women is not only condoned but also perpetrated by the Islamic Republic of Iran, and is prevalent both in government institutions and domestic life. No safeguards exist to protect women in Iran.

The sexual apartheid that permeates social, cultural and political life in Iran constitutes a form of oppression and persecution that creates of the majority a second-class citizenry. Women's dress, work, socialising, familial and intimate relationships, reproduction and sexuality are all subject to control, either by male family members or the state. Women's autonomy, forms of cultural expression, and freedom of movement are severely circumscribed. Laws that criminalize adultery or fornication are disproportionately used against women and create an additional risk of persecution for women who are victims of sexual violence.

The regime's failure to prosecute offenders, both of sexual violence and of domestic abuse, denies women equality before the law and the effective protection of the state."

PARTICULAR SOCIAL GROUP AND THE REASON FOR PERSECUTION : THE LAW

50. It is necessary to start with Shah and Islam. We emphasise in doing so what both Lord Steyn and Lord Hoffmann said: everything depends on the evidence and findings of fact in the particular case: generalisations as to the place of women in particular countries are out of place when dealing with issues of refugee status; [1999] 2 AC 629 at 635E, 655F.
51. Lord Steyn recognised that a prevalence of domestic abuse and violence towards women did not of itself give rise to refugee status; what was distinctive in Pakistan was that there was no state protection : discrimination was partly tolerated and partly sanctioned by the State, a discrimination embodied in substantive and procedural statute law, constitutional provision notwithstanding; 635E-F. This affected not just the risk of severe punishments to which men would not be subject, but a woman's evidence would not be admissible on the most serious charges. The combination of social and evidential discrimination embodied in statutes or sexual conduct meant that the very act of seeking state protection against rape, by making an accusation against a man, would probably lead to a charge of adultery with its attendant detention, trial and severe punishment against the complainant.
52. This context, as summarised by Lord Steyn and Lord Hoffmann, shows both the extent and gravity of the Pakistan state's own discrimination against women and its toleration of or indifference to persecution by others. Lord Hope at p 658D emphasises that it is the nature and scale of the discrimination in Pakistan which is critical in the definition of the group.
53. Lord Steyn identified women in Pakistan as a particular social group because they all shared a common immutable characteristic, gender. He adopted the reasoning in Acosta's case 191 & N 211. He said:

"This reasoning covers Pakistani women because they are discriminated against and as a group are unprotected by the State. Indeed the state tolerates and sanctions the discrimination." 644 E-F.
54. Lord Steyn also concluded that there was a more narrowly circumscribed particular social group. This was defined by the coincidence of gender, the suspicion of adultery and their unprotected position in Pakistan against such suspicion. Neither of those categories was thought to involve the circular reasoning that the particular social group was defined by reference to its being persecuted : these groups existed, as required by the Convention, "dehors" or independently of persecution.

55. The effective, or an effective, cause of their persecution was their membership of either or both of those groups. As Lord Steyn said :
- “Given the central feature of state – tolerated and state – sanctioned gender discrimination, the argument that the Appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic;” 646D.
56. This shows that he saw the case as one of persecution by the state; if the persecution was by the husbands alone it was not for a Convention reason.
57. Lord Hoffmann states that the domestic violence suffered by the Appellants would not be regarded as persecution in the United Kingdom because of the state’s protection available against it, 648C; it becomes persecution in Pakistan because the state was unwilling or unable to offer protection against it, 648D. The protection to which Lord Hoffmann referred in the United Kingdom was not confined to the criminal law, but reflected the civil or family court’s powers as well.
58. The Appellants feared persecution “for reason of” their membership of the social group, women in Pakistan, because of the combination of their husbands’ violence and the state’s denial to them of protection against that serious harm, 653 E-F. Discrimination by itself was not enough (655E) but the distinguishing feature to Lord Hoffmann of these cases was the particular evidence as to the position in Pakistan of these Appellants : it did not follow that all Pakistani women were persecuted or persecuted for a Convention reason. That evidence was of institutionalised discrimination against women by the police, the courts and the legal system, “the central organs of the state,” 655B.
59. Thus for Lord Hoffmann, the particular social group, women in Pakistan, was a particular social group because of the institutionalised discrimination against women. The persecution arose from the combination of serious harm from the husbands and the state’s denial of protection, indeed a denial in circumstances where its invocation could lead to adultery charges and a trial weighted against the complainant. The persecutor was the state in its response to the harm done by the husbands.
60. Lord Hope agreed with both Lords Steyn and Hoffmann on the basis upon which they considered that the women were being persecuted “for reasons of “ their being women.
61. Lord Hutton expressed no view on whether women in Pakistan were a particular social group, being content to conclude that the narrower class, suspected of adultery, were.
62. Lord Millett, dissenting, offered a powerful critique of the concept of discrimination as a tool in defining a particular social group and of state

tolerance of ill-treatment as constituting persecution for a Convention reason.

63. In our judgment, the following conclusions ought to be drawn. First, women in Pakistan formed a social group not just because they were women, but because they were also discriminated against. This appears in the speeches of all three in the majority, and indeed from the rejection of that proposition by Lord Millett. Second, it appears inescapably from the way in which the discrimination has been described that it includes legislative, judicial and police discrimination in the way in which women could obtain, and indeed suffer from seeking, state protection. The lack of state protection is inherent in the discrimination relied on.
64. Third, the women were not persecuted “for reason of” their membership of their group by the husbands against whom the state was unwilling or the women were afraid to seek the state’s protection. Whilst that would have been a possible analysis, the majority, confirmed by the rejection of their reasoning by Lord Millet, clearly rejected as unrealistic the view that the husbands were persecuting their wives for a Convention reason. It was the serious harm done by the husbands in combination with the state’s inaction in providing protection or reinforcing of the harm when protection was sought, which gave rise to the persecution and to the persecution for a Convention reason.
65. Fourth, whether such circumstances give rise to or evidence a particular social group depends very much on the circumstances within any country at the relevant time, and the extent, nature and intensity of the social and state discrimination, including the real risk that seeking protection would rebound in further serious ill-treatment. The same is true of whether there is persecution, or persecution for a Convention reason or a lack of state protection.
66. Thus, this is a case, on the particular evidence as to the circumstances in Pakistan, of state persecution for a Convention reason. Discriminatory lack of state protection was a component of persecution, and of the reason for the persecution and the availability of state protection, but it was also part of the definition of the social group through its relevance to discrimination.
67. The crucial issue which is relevant to the definition of the group, though not necessarily determinative of it, relevant to persecution, to the ascertainment of the Convention reason, and indeed to the final component of the overall refugee definition is the nature of the state’s protection.
68. The inherent overlap between the various components which make up the total definition of a refugee was confirmed in Horvath v SSHD [2001] 1 AC 489. It is clear that the concepts of protection and persecution were not to be treated as wholly exclusive concepts, let

alone as discrete components without scope for overlap between the evidence which supported the various components. At p 497, Lord Hope regarded failure of state protection as an element in persecution in non-state agent cases. To Lord Clyde at p 520, there could be state persecution by helpless inaction in the face of the behaviour of others.

69. But the significance of allowing the concept of a lack of state protection to overlap with the concept of persecution, rather than confining it to a separate component subsequently to be addressed, is that it brings into play the state's reasons for inaction as providing the reason for persecution rather than requiring necessarily exclusive reliance on the motive of those meting out the direct ill-treatment in a non-state agent case. Therefore where the reason for the direct ill-treatment is not a Convention reason, but the state is unable to or unwilling to protect against it for a Convention reason, the state can become the persecutor, its reasons for so acting can become the reason for persecution and the case becomes not one of non-state agent persecution but of state persecution.
70. Again this recognition of the overlapping concepts accords with the decision in Hari Dhima [2002] EWHC 80 (Admin.) in which it was held that the unavailability of state protection against ill-treatment was a relevant part of showing a real risk that Article 3 ECHR would be breached by returning someone to their country. The absence of express reference to its unavailability in a manner akin to that found in the Refugee Convention did not mean that a different approach to its relevance was called for in Article 3 ECHR claims as opposed to Refugee Convention claims.
71. Finally, we turn to SSHD v Skenderaj [2002] EWCA Civ 567 [2002] A11 ER (d) 267, 26th April 2002, which concerned social group and state protection in the context of an Albanian blood feud. Auld LJ, referred to the fact sensitive nature of the judgment on "particular social group"; it is a mixture of fact, policy and judgment in any given social context. He said at paragraph 17 :

"To put counsel's respective submissions in context, we suggest that membership of a particular social group exhibits the following uncontroversial and sometimes over-lapping features: 1) some common characteristic, either innate or one of which, by reason of conviction or belief, its members, cannot readily accept change; 2) some shared or internal defining characteristic giving particularity, though not necessarily cohesiveness, to the group, a particularity which, in some circumstances can usefully be expressed as a setting it apart from the rest of society; 3) subject to possible qualification that we discuss below, a characteristic other than a shared fear of persecution; and 4) subject to possible qualification in non-state persecution cases, a perception by society of the particularity of the social group".

72. At paragraph 19, he said:

"We believe it is open to question whether, in a non-state persecution case as here, it is a necessary defining characteristic of a particular social group.

There is a particular difficulty where the persecution is by somebody other than the state. In such a case, if setting apart, discrimination or stigmatisation is an essential element, who is doing the setting apart, discriminating or stigmatising? Not necessarily society. It may just be those doing the persecuting. The state comes into it if it fails to protect, as some of their Lordships observed in *ex p. Shah*, but that failure, though a product or symptom of discrimination, goes to a different part of the refugee test”.

73. His analysis of the decision in Shah and Islam, at paragraphs 23 – 24 was that discrimination was not always an essential requirement for the identification of a particular social group, although it was clearly part of the reasoning as to particular social group in that case. He did conclude, in agreement with Lord Hope that persecutory acts or legislative discrimination could serve to identify or create a group but not be the sole basis for its definition. The Albanian family were not so much discriminated against, as not regarded as a distinct group by Albanian society. If discrimination were an essential feature, it could not be found in the state’s non-intervention because that would arise when protection was being considered.

CONCLUSIONS

74. We do not consider that women in Iran form a particular social group. There is clearly a considerable degree of social and legislative discrimination against women in their general place in Iranian society. Traversing some laws e.g. not wearing the chador properly may lead to severe and disproportionate punishment. But there are also rights and opportunities for education at primary, secondary and professional or occupational level. They have judicial and political roles to play, and employment opportunities in a range of areas, professional and otherwise.
75. In their personal status, women are discriminated against. Their position in being divorced or seeking divorce is not equal to that of men but some rights are given upon divorce to alimony and custody. Grounds do exist and can be proven, albeit with difficulty, upon which an abusive and violent husband or one addicted to drugs or failing to provide support can be divorced.
76. Although the normal custody arrangements for children favour the father from a very young age, care can be obtained, again with real practical difficulty, of children where the father is violent or drug addicted. The evidence of friends or parents would be admissible; a woman’s evidence counts for less but is not inadmissible.
77. There is in Iran a risk of adultery charges being brought, proven and then a risk of the death penalty by stoning. Men too are subject to such risks but the evidential burden is harder to discharge against them.
78. There is some legal protection available through the police in respect of domestic violence although the evidence in general suggests that, it is usually seen as a family matter and the wife should not complain. That

it is not an invariable rule, but the wife's evidence in Court would have to be supported in a way in which the husband's evidence would not.

79. We accept that discrimination, which can include a lack of state protection, on the grounds of gender can identify a particular social group in the light of Shah and Islam. But that case also showed that the mere combination of those factors would not necessarily suffice. The conclusion that they did in Pakistan in that case depended on the particular evidence as to those circumstances in Pakistan, as their Lordships were at pains to emphasise. What is striking about the evidence in Pakistan was the widespread and intense nature of the discrimination. It was enshrined, the Constitution notwithstanding, in much legislation, in widespread, deeply felt religious and social attitudes. It was operated by all the central organs of the state. There was no state protection at all, rather there was a malevolence about the state's inaction. The very act of complaining about the violation of human rights could lead to the victim facing the apparatus of the state on trial for her life, with little chance of defence after a long stay in detention.
80. Although it is not the case that women can only be a particular social group if they face discrimination exactly as intense as that which they faced in Pakistan, we consider that the warnings issued by the House of Lords that the decision related to the particular circumstances of that case should be heeded. We consider that the Adjudicator erred in his approach to his assessment of what constituted a particular social group. He appears to have concluded in reliance on Shah and Islam that institutionalised state discrimination against women necessarily constituted women as a particular social group. It may or may not do : whether it does is a question of analysis of the material. It is sensitive to fact and degree, to the nature of the discrimination, its extent and intensity, to the availability of protection, and the degree of state assistance to the Claimant or indifference or furthering of the persecutory ill-treatment.
81. The decision in Fatemeh was based on 1997 material to a significant extent and related to fears arising from events in 1994; we have to base our decision on the background material now before us. The case also contains fairly short reasons as to why women in Iran constituted "a particular social group". It seems to proceed from the basis that institutionalised state discrimination against women necessarily constituted them a particular social group, as a result of its understanding of Lord Hoffmann's speech in Shah and Islam. For the reasons which we have given, we consider that to be too simple an analysis, insufficiently fact and degree sensitive. The case more readily fits into the narrower group identified in Shah and Islam.
82. The intensity or nature of the discrimination faced by women in Iran is markedly less than in Pakistan, their rights, protection and role significantly better. Their role is not so lowly. This applies to both their status as wives and mothers, their ability to divorce and rights

upon divorce. Their general role in state or social activities is different with educational, including higher educational, opportunities, and a range of jobs open to them including those in the police and the judiciary. In examining women in Iran as a particular social group, it is necessary to examine their general or overall position, and not just e.g. marital status laws. Their overall position is not such that women in general should be regarded as a particular social group.

83. We do not need to consider the narrower social group. There is no evidence that the Claimant faces a real risk of adultery charges from her husband or anyone else. Her concern is that he wants her back with their child, and that his threat to kill her might then be realised.
84. Although there is a degree of overlap in the way in which the relevant issues are analysed following the two House of Lords' decision to which we have referred membership of a particular social group, identified by factors including state discrimination, does not automatically mean that such a person is persecuted or persecuted for a Convention reason, or that the state in that particular case is unable or unwilling to provide protection.
85. Although the effect of the Horvath "holistic" as opposed to the step by step approach is that the issue of state protection resonates through all the stages of examination, it may not play the same role.
86. Even if we had concluded that women in Iran constituted a particular social group, it would still be necessary to consider whether, for the individual in question, she was being persecuted (as is the case here) and persecuted for her membership of that social group.
87. It could be argued and in many cases rightly that if women in Iran did constitute a particular social group because of gender based discrimination reinforced not just by an absence of state protection but by its positive acts, legislative, judicial and law enforcement more generally, the same analysis would lead to the conclusion that the persecutory treatment which the Claimant received at the hands of her husband would be state persecution for reasons of her membership of that particular social group. The reason for the absence of state protection or worse, for the constructive persecution as it was described in Horvath by Lord Clyde, would be her gender in Iran. The absence of a particular social group means that the persecutory ill-treatment she fears at her husband's hands is not for a Convention reason. He has abused her because she is his wife, with whom he lives and in relation to whom he behaves with cruelty. He does not persecute her for a Convention reason.
88. But such an approach, if followed automatically, could ignore the "protection" limbs. Either at the stage of considering whether there was state persecution or the reason for it or at the stage of applying the protection components of the definition to the individual seeking recognition as a refugee, the particular circumstances of that individual

in relation to state protection need to be considered. The “holistic” approach does not require the answer to the protection limbs to be provided solely by the answer to the earlier questions. In any event, state protection is relevant to the question of whether return to Iran would involve a breach of Article 3 ECHR.

89. It is necessary to consider the two limbs of state protection : the state’s inability and the Claimant’s unwillingness, because of a well-founded fear of persecution, to avail himself of it. The Claimant, asserting the state’s inability to provide protection relied, on the objective material, her expert and her own experience. But her own experience scarcely supports either contention : she only once and informally sought police assistance and that from a friend of her husband’s who himself was a drunkard and a drug addict. She sought no divorce proceedings even though her evidence would be admissible and her parents would have been able to give evidence. She had made no formal complaints which could have been used in divorce proceedings, if convictions are required, either in relation to drug or alcohol abuse or in relation to violence. She had not sought medical assistance for or recording of any of the harm she suffered which again would have been of evidential value. As Auld LJ said in Skenderaj at para. 44 in relation to the second limb of state protection : “It would not qualify under this alternative that he does not seek protection because he has a well-founded belief that the state won’t provide it or, as the adjudicator appears to have found, because of a societal norm not to seek it.” Fear of an imputed social climate does not suffice for the second limb.
90. The objective evidence does not support the Adjudicator’s conclusion as to the “virtual uselessness” of state protection. There are protective divorce provisions which on the Claimant’s evidence and her parents would apply to her case and which have never been tried. Those same provisions apply in relation to care of the child. The evidential difficulties facing a woman are real, but the background material shows the nature of the additional evidence which can be gathered and this Claimant would not need to depend on her own evidence alone. Her and her family’s reluctance to seek legal or police help does not demonstrate a state’s inability to protect.
91. We accept that the police are reluctant and unlikely generally to intervene in domestic violence cases against a husband but the evidence does not show such a reluctance in respect of drug or alcohol abuse, nor that the reluctance is marked where there is other supporting evidence, e.g. from parents. In this country, the attitude of the police towards domestic violence has been one of reluctant involvement, though we accept not to the same degree as in Iran, but it would still have been regarded as part of a system of protection.
92. The inability of the state to provide protection cannot always be tested solely by reference to the police, if as here, relief can be obtained through divorce. Lord Hoffmann looked at both criminal and civil or family court protection in the United Kingdom in Shah and Islam. In

domestic violence, the availability and consequences of divorce constitute a relevant part of the system of state protection. It may be difficult to obtain, but the legislative provision exist, they are not simply ignored by the courts or made impractical for all to use, as the background material on custody and alimony shows. Relevant grounds apply to this Claimant and she is not dependant wholly on her own evidence. The Iranian state, whatever its other discriminatory acts, is not unable or unwilling to provide protection in this instance. The evidence also does not support the conclusion that this couple cannot live apart, before divorce; they have at times done so. It does not support the conclusion that after divorce there would be persecution.

93. For those reasons too, we do not consider that there is a real risk of the Claimant's Article 3 rights being breached upon return to Iran nor does the picture overall show that those seeking redress in the courts or through the police are liable to a serious common-charge of adultery. Nor has that been the Claimant's concern.
94. The Adjudicator's reasons do not deal with much of the objective evidence on discrimination and divorce: civil or family matters and criminal. His conclusion that proving matters would be "extremely difficult" so that the courts are "virtually useless" is not borne out by a full reading of the available background material. We do not accept that the different approach to the award of custody means that there is no relevant court protection.
95. Finally, we accept the submission that there are inadequate reasons for the Adjudicator's conclusion that there would be a disproportionate interference with the mother and child's Article 8 rights.
96. It is not entirely clear, and it might be unfair to put too much weight on a singular as opposed to plural, whether the expectation underlying the conclusion was that the mother might return to Iran leaving her daughter behind; such an assessment would require some explanation. Mr Patel suggested that it related to the fear that in Iran, the daughter would be taken from the mother. If that be so, it is difficult to see how that would engage Article 3 ECHR, or Article 8 within this jurisdiction. Equally problematic is the assumption that the way in which a foreign country might determine custody and care of a child, national of that country, as between its separating or divorcing parent, nationals in that country, engages Article 8. In effect the Adjudicator was making a decision as between two parents, not having heard from the father, both of whom appear to want the child, whom the mother wants to keep away from him having decided whilst here not to return. There are undoubtedly problems in a case of this sort over the interface with custody decisions. If his concern was who would have custody of the child, this problem would require more consideration than, with respect, it received. It may be that his comment related to the mother's personal integrity, in which case it adds nothing of substance to the conclusions on persecution and falls with it.

97. Accordingly, this appeal is allowed.
98. We do not consider that it is right to remit the Article 8 point to an Adjudicator. We assume that mother and daughter would return together; if not, such disruption to family life here would be the consequence of the Claimant's decision. If the fear was that the child would be put into the father's custody on divorce or separation, the Iranian custody laws are not so inhuman as to constitute a breach of Article 3 – there is no assertion or evidence of child abuse.

MR JUSTICE OUSELEY
PRESIDENT