Case No: C4/2004/2047

Neutral Citation Number: [2005] EWCA Civ 680
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL APPEALS DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 9 June 2005

Before :

THE RIGHT HONOURABLE LORD JUSTICE AULD
THE RIGHT HONOURABLE LORD JUSTICE CHADWICK
and
THE RIGHT HONOURABLE LADY JUSTICE ARDEN

- -

Between :

ZAINAB ESTHER FORNAH	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Miss Kathryn Cronin (instructed by **Brighton Housing Trust**) for the **Appellant**
Mr Robin Tam (instructed by **The Treasury Solicitor**) for the **Respondent**

- -

Judgment

Lord Justice Auld:

1. This case is about the practice of female sexual mutilation – circumcision - of young, single girls in Sierra Leone. It is an evil practice internationally condemned and in clear violation of Article 3 of the European Convention of Human Rights ("ECHR"). As a practice, it is not peculiar to Sierra Leone. But it so widespread there and so bound up in the culture and traditions of that country at all levels that it causes difficulties in claims for asylum by young Sierra Leonean girls who fear it. As a clear violation of their Article 3 right not to be subjected to inhuman or degrading treatment, it would undoubtedly amount to persecution in the general sense of that word. But, for young girls in Sierra Leone, seeking asylum in another country because they fear it, is it persecution for a Refugee Convention reason, namely because they belong to a "particular social group"?

2. In Sierra Leone, as the objective evidence before the Adjudicator and the Immigration Appeal Tribunal in this case indicates: it is practised widely in all levels of society, although with varying frequency; 80-90% of all women and girls have undergone the practice; women, not men, conduct it as part of an initiation rite to adulthood and hence entrée to their powerful female secret societies; it is undertaken on girls as young as 5 and now, also on adult women and pregnant girls and mothers; uncircumcised girls are perceived as less eligible for marriage and many future husbands sponsor such initiation of their future brides; no law prohibits it; and efforts by NGOs to eradicate it are actively resisted by the women's secret societies.

3. In March 2003, the applicant for permission to appeal, Zainab Esther Fornah, then a 15 year old girl from Sierra Leone, claimed asylum on her arrival in this country, on account of her fear that, as a member of a particular social group, namely of "young Sierra Leonean women", she would be subjected against her will to female genital mutilation if she returned to her home country.

The Secretary of State's decision

4. On 24th April 2003 the Secretary of State refused her claim, though he has since granted her leave to enter on humanitarian grounds under Article 3 ECHR, such leave entitling her to remain for 3 years. This appeal is concerned solely with the refusal of her claim for asylum, which, if successful, would give her leave to remain indefinitely. The Secretary of State gave two alternative reasons for refusing it: first, that the practice did not come within the definition of persecution under the Refugee Convention because girls at risk of circumcision in Sierra Leone did not form a "particular social group" within Article 1A(2) of the Convention; and secondly, because the authorities in Sierra Leone had a will to challenge the practice should she turn to them for protection.

The Adjudicator's determination

5. On 6th October 2003, an Adjudicator allowed Miss Fornah's appeal against the Secretary of State's refusal to grant her asylum. He found that the practice amounted to persecution and that she had a well-founded fear of it. And he found that the feared persecution was for a Convention reason, namely her membership of a "particular social group", which he described as one of "young, single Sierra Leonean

women, who are clearly at considerable risk of enforced …[female genital mutilation]" and, in respect of which the State provided them with no protection. He did not elaborate on that finding, either as to the facts in Sierra Leone or as to the law, save, as to the latter, to state that his "findings were based on the leading authority of *R v IAT, ex parte Shah and Islam* [1999] AC 629. He seemingly had in mind the broader base of the majority's decision in that case that Pakistani women in general were discriminated against in Pakistan in matters of fundamental human rights, in respect of which the State offered them no protection and that they were, therefore, capable of being a "particular social group" within the Refugee Convention.

The Immigration Appeal Tribunal's Determination

6. The Secretary of State appealed to the Immigration Appeal Tribunal maintaining that Miss Fornah's claim did not engage the Refugee Convention because "young, single Sierra Leonean women" were not a "particular social group" within Article 1A(2) of the Convention. On 5th August 2004 the Tribunal allowed the appeal and quashed the Adjudicator's determination. It held that the group of which she was a member was not simply that of "young Sierra Leonean women", but of "young Sierra Leonean women who [had] not undergone female genital mutilation", and that, having regard to the reasoning of the House of Lords in *Shah & Islam*, such a group could not qualify as a "particular social group" under the Convention because it did not exist independently of the feared persecution.

7. In the course of the Tribunal's determination, it observed, correctly, that what constitutes a particular social group in a particular country is a question of fact for consideration on a case-by-case basis. As to Sierra Leone, it made, in paragraph 22 of its determination, the following brief reference to the objective evidence in the case:

> "Not all young Sierra Leonean women fear female genital mutilation. Some 80% of them have already undergone circumcision and it is not inconceivable that there may be some who, perhaps out of ignorance, do not have any fear of undergoing initiation because they are looking forward to becoming women rather than being considered as children."

The Tribunal went on to find that Miss Fornah was not at risk of persecution by reason of her membership of a "particular social group" and, therefore, that her claim did not engage the Convention. In so finding, the Tribunal expressed, in paragraph 23, its reliance on the well established principle that their Lordships, in *Shah & Islam*, had acknowledged, albeit with some qualification, and with which they had to grapple on the facts of that case, that persecution cannot itself define a "particular social group".

> "23. This Respondent does not fear persecution simply because she is a young Sierra Leonean woman. What she fears is persecution, because she is a young Sierra Leonean woman *who has not undergone female genital mutilation.* The fact that she is young is not an immutable characteristic; … She will remain a woman, but it is not because she is a woman that she fears persecution and it is not said on behalf of the Respondent that all women in Sierra Leone suffer persecution. A definition of the social group which includes within it a reference to the

> feared persecution, ignores the point in *Shah & Islam* that the social group has to exist independently of the persecution."

The issue for determination by this Court and some basic propositions of law

8. Miss Fornah now seeks permission to appeal against the Tribunal's decision. As we have said, although there was no human rights appeal before the Adjudicator, the Secretary of State has accepted that it would be a breach of Article 3 to return her to Sierra Leone for the reasons on which she bases her asylum claim. However, he continues to resist that claim. In the result, the only issue before the Court is whether Miss Fornah qualifies for refugee status in addition to the humanitarian protection to which she is, in any event, entitled under the United Kingdom's obligations under the ECHR.

9. The proposed issue for appeal is, therefore, whether the persecution that Miss Fornah fears, if she were returned to Sierra Leone, would result from her membership of a "particular social group" that exists independently of the feared persecution, and, if so, what that "particular social group" is.

10. Article 1A(2) of the Refugee Convention provides:

> "For the purposes of the present Convention, the term 'refugee' shall apply to any person who … (2) … owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …"

11. The starting point is the difference between the rights conferred on a fugitive from persecution conferred by Article 3 ECHR and the Refugee Convention, as recently underlined by Lord Hope of Craighead in *R v Special Adjudicator, ex p. Hoxha* [2005] UKHL 19, in paras. 5-26, and by Lord Brown of Eaton- under-Heywood, at para 86. Much of Miss Kathryn Cronin's arguments, on behalf of Miss Fornah, went to the horrific nature of the practice and the international condemnation to which it is subject. She cited the accounts of it given by Amnesty International in a paper of 17th July 2003 and in other authoritative international literature. And she drew the Court's attention to the Female Genital Mutilation Act 2003 rendering the practice an offence with a maximum penalty on indictment of 14 years imprisonment. Such arguments went to Article 3, rather than the more confined question before the court as to the reach of the Refugee Convention, namely, not only as to whether there is well-founded fear of persecution, but also whether it is such fear of persecution for one of the five reasons in Article 1A(2) of the Refugee Convention. The distinction, however anomalous and unpalatable it may be, is legally sound, as indicated by Professor Hathaway, in the following passage in his well known study, *The Law of Refugee Status* (1991) at 112:

> "In sum, persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community."

12. In that passage, as Lord Bingham of Cornhill observed in the recent case of *Sepet v SSHD* [2003] 3 All E R 304, HL, at 311f-g, Professor Hathaway drew attention to:

> "a second requirement, no less important than that of showing persecution: the requirement to show, as a condition of entitlement to recognition as a refugee, that the persecution feared will (in reasonable likelihood) be for one or more of the five convention reasons."

In making that observation Lord Bingham drew with approval on the same distinction in the following passage from the judgment of Dawson J, one of the majority in the High Court of Australia in *Applicant A & Anor v Minister for Immigration and Ethnic Affairs & Anor* [1997] HCA 4; (1997) 2 BHRC 143, at 160:

> "By including in its operative provisions the requirement that a refugee fear persecution, the convention limits humanitarian scope and does not afford universal protection to asylum seekers. No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the convention. And by incorporating the five convention reasons the convention plainly contemplates that there will even be persons fleeing persecution who will not be able to gain asylum as refugees."

In that case the Court held, by a majority of three (Dawson, McHugh and Gunmow JJ) to two (Brennan CJ and Kirby J) that a Chinese asylum seeker was not entitled to refugee status on the basis of well-founded fear of persecution by forcible sterilisation by reason of his membership of a "particular social group", namely all fathers of families who had already produced one child, if returned to China under that country's "One Child Policy".

13. The second main proposition, to which I have already referred and to which the High Court of Australia gave its authority in *Applicant A*, and which the House of Lords acknowledged in *Shah & Islam*, is that, in general, there can only be a "particular social group" if the group exists independently of the persecution.

14. The third proposition is, as Lord Hoffmann indicated, at 652C-F in *Shah & Islam*, is that a "particular social group" cannot be identified in the abstract. It is necessary to identify the society of which it forms part in order to identify whether there are elements of that society outside the group that discriminate against it or that single it out because of its particularity. Such a group may be very large, such as Pakistani women in Pakistan, as the House held in *Shah* on account of the discrimination that

they suffered as a group in matters of fundamental human rights, and also, as two of their Lordships held, because the appellants in that case had the additional unifying characteristic of attracting opprobrium and persecution because they were suspected of adultery, in both respects the state not providing them with adequate protection. See also, as to the capacity of women who have been victims of sexual violence in the past of constituting a "particular social group", per Baroness Hale of Richmond in *ex p. Hoxha*, at para 37.

15. The fourth proposition that I would add, though it is barely separate from the last, is that this is not an area for rigid application of principle to infinitely variable national and social contexts in which fear of persecution is put forward as a claim for asylum. By way of illustration of what many might regard as a blinding glimpse of the obvious, I venture to reproduce passages from paragraphs 17 and 18 of the judgment that I gave in *Skenderaj v SSHD* [2002] EWCA Civ 567, [2002] 4 All ER 555, in which I attempted to distil the effect of a number of familiar authorities:

> "17. … I 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 setting it apart from the rest of society; (3) subject to possible qualification …, 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."
>
> 18. Though guidance can be derived from the particular groups identified in art 1A(2) and the application of the ejusdem generic rule, there is potential for a broad range of collectivities. Whether there is a particular social group of which a claimant is a member is essentially a mixed question of fact, policy and judgment in the context of the society in which it is claimed to exist. Persons with common innate characteristics, such as groups of the same gender or family do not necessarily constitute a particular social group. And particular social groups can be very large or very small …."

16. At the heart of all these considerations is the particularity of the group, namely a group of people whose common characteristics are such as to set it apart from the rest of the society in which it is found. Such setting apart may take the form of discrimination or some lesser treatment in attitude. At the very least, it seems to me such setting apart, whatever form it takes, must be such as to be perceptible both to at least some of the members of the group and to those in society outside it. A recent suggestion made by Rix LJ in *Chun Lan Liu v SSHD* [2005] EWCA Civ 249, drawing on recent Australian jurisprudence in cases arising from China's one child policy, is that perceptibility or recognition of a group as distinct by the rest of society are only aids to or evidence of the true test, namely whether the separate group is *cognisable*. Having identified, in paras 24 – 29, two strands in the jurisprudence, the first as to the

defining characteristic of a "particular social group", and the second as to its identification, this is how, at para 30, he described the second:

> "The second strand relates to how the characteristic and thus the particular social group in question may be identified by discrimination and even in part by means of discrimination amounting to persecution: bur that will not matter as long as such persecution is not the sole means of definition or identification. It may be identified by the recognition or perception of the surrounding society in general that the group in question shares a particular characteristic. Or it may be that the distinguishing characteristic and thus the group in question may simply be objectively observable, irrespective of the insight of the general society in which it is placed. It may be said that these concepts have not yet fully been worked out in the jurisprudence."

17. In my view, Rix LJ, in the last sentence of that paragraph, rightly acknowledges the elusiveness of the concepts in play, if "concepts" are what they are. The reasoning process in each case is so dictated by the subject matter that the more we try to constrain the enormous variety of questions that arise for determination by a straightjacket of definitions and formulae the more difficult it becomes. I echo the call now of many tribunals at the highest level in this fraught area of asylum law to keep it simple, bearing especially in mind that such cases are determinable at first instance, often in large numbers, by the Secretary of State's responsible officers and adjudicators, not by panels of jurists trying out points of lofty principle for size. For that reason, I respectfully doubt the utility of introducing to the already imprecise division between discrimination and setting apart, as candidates for the reason for persecution, some seemingly objective or "cognisable" quality of separateness of a group, but one which is unperceived by the rest of society, as the reason for that society's persecution of it.

18. Looking at the problem posed on the facts of this case, it is, in my view, important to keep the following broad and relatively elastic propositions in mind when considering the available candidates in this case for a "particular social group". They seem to be: 1) Sierra Leonean women generally; 2) young, single Sierra Leonean women; 3) Sierra Leonean women who have not yet undergone the practice and fear it; 4) young, single Sierra Leonean women who have not undergone the practice and do not fear it; or 5) Sierra Leonean women or young, single Sierra Leonean women who have not undergone the practice, whether or not they fear it.

Submissions

19. Miss Fornah and the Secretary of State took *Shah & Islam* as their respective starting point, but each relied on it to contrary effect. Miss Cronin, on behalf of Miss Fornah, stressed the point taken from the broader definition of a "particular social group" in that case, that it could consist of Pakistani women in general. Mr Robin Tam, for the Secretary of State, relied on the proposition for which the case is the leading English authority, that a "particular social group" for the purpose of the Convention cannot be defined solely by reference to the persecution.

20. Miss Cronin submitted that it is possible to identify a "particular social group" here because: 1) *Shah & Islam* shows that the fact that a group is large and that not all members of it are persecuted does not prevent it from being a "particular social group"; 2) it is immaterial that some members of the group accept the practice as the norm and some do not - they are all, but certainly the latter, entitled to protection; and 3) there is no effective state protection in Sierra Leone from the practice.

21. Miss Cronin maintained that the "particular social group" for the purpose is "young single women in Sierra Leone who are at risk of circumcision", that is, between 80% and 90" of them. She said that, as such, they were clearly identifiable as group in Sierra Leonean society, in consequence discriminated against in that way, and without any protection from the State. The fact that the group was fluid, in the sense that once persecuted a young Sierra Leonean woman left it, was, she submitted, immaterial, since *Islam & Shah* is authority, in particular in the speech of Lord Steyn at 640C-642C, for the proposition that there is no requirement of cohesiveness for a "particular social group", merely that it is "cognisable".

22. In response to a question from the Court how she met the difficulty that, on her approach, they were defined as a "particular social group" by reason of the persecution, she acknowledged that the persecution could not itself be the defining element, but said that, in combination with the characteristics of the group on which reliance was placed, it "could be part of the identification". Put another way, she said that the persecution in this instance is not the sole or primary means by which young, single uncircumcised Sierra Leonean women are recognisable as a "particular social group". The group exists independently of the persecution because it is made up of young women who are discriminated against in that, unless they submit to the persecution, they will not be perceived to be full members of society. These are young women who can only obtain social acceptance or change of status in their society by undergoing the practice, that is, undergoing an initiation which is itself persecutory, and one for which there is no comparator in Sierra Leone for boys.

23. In making those submissions, Miss Cronin relied upon a passage from the judgment of McHugh J, one of the majority in *Applicant A*, at 22, and on certain dicta of Lords Steyn, Hoffman and Hope of Craighead in *Shah & Islam*, the material parts of which I set out at paragraphs 37 - 39 below. The general effect of them is that persecution is not always entirely separable from the discriminatory attitudes of society that may give rise to it or that result from the attitude of state authorities in failing to protect against it.

24. Mr Tam prefaced his submissions by acknowledging that the practice is clearly contrary to Article of 3 ECHR and that, if it amounted to persecution under the Refugee Convention, the State of Sierra Leone could not be said to provide adequate or any protection. However, he observed, rightly as I have indicated, that the Refugee Convention, in its definition of persecution, is narrower in its application to persecution in respect of which it imposes asylum obligations by confining it to persecution for one of the five Refugee Convention reasons.

25. The main thrust of Mr Tam's submissions on that issue was that society's attitude to young women in Sierra Leone is more complex than that of society in Pakistan towards women in its country, because the practice of female genital mutilation in Sierra Leone, which Miss Fornah fears, is a deeply-embedded part of that country's

culture and traditions. It is performed by women on women, and there is evidence suggesting that the vast majority of women undergo it willingly as an initiation into womanhood and membership of women's societies. In consequence, he maintained that the practice is a "rite of passage" commonly accepted by the society in question - namely the men and women of Sierra Leone - not one of discrimination or cruelty to an unwilling section or "particular social group" of that society. And, as to young Sierra Leonean women who have not yet undergone it, he noted that the evidence showed that, though some feared it, others welcomed it, making it difficult to identify a particular social grouping of them for this purpose.

26. Mr Tam also made two further points. First, he noted that in any individual case the practice can only be undergone once. The only women in Sierra Leone "at risk" of it are those - generally young - women, who have not yet undergone it. And, once they have undergone it they become part of the group carrying it out. Such a characteristic, he submitted, does not come within the definition of a "particular social group" for two reasons. First, it is not a grouping by reference to innate and unchangeable characteristics. Secondly, the only basis upon which they could logically be grouped together for this purpose is by reference to the "persecution" or the threat of it, which is an impermissible approach on the reasoning in *Shah & Islam.*

27. Secondly, he said that if, on that account, a wider definition is suggested, similar to that in *Shah & Islam,* of Sierra Leonean women generally, a large proportion of the "group", namely those who have already undergone the practice, are no longer capable of being persecuted or threatened with persecution in this way; and there could be no persecution from outside the group at all, because only women conduct the practice.

Conclusions

28. As is already clear, it is first necessary in any individual case to identify whether there is a well-founded fear of persecution, and for that purpose whether it is by reason of membership of a "particular social group" in the society from which the asylum claimant has come. In the case of non-state persecution, and, to a lesser extent in certain instances of state persecution by low ranking state agents (see *R (Bagdanavicius) v SSHD* [2003] EWCA Civ 1605, at paras 43-44), there is the further element of insufficiency of state protection. There are thus often three inter-linked elements – fear of persecution, the reason for it, namely membership of a "particular social group", and lack of state protection to allay the fear.

29. But the first two elements must be identified, at least provisionally, before the third, where applicable, needs to be considered, as Lord Hoffmann made plain in his discussion in *Shah & Islam,* at 652F-653A and 653E-G. McHugh J, in *Applicant A,* put their relationship well in the following passage at page 18 of the judgments:

> "… sterilisation could be the basis of a well-founded fear of persecution by the appellants. But that does not mean that the words 'well-founded fear of being persecuted' should be ignored when construing that part of the phrase which is in dispute. The phrase 'a well-founded fear of being persecuted for reasons of … membership of a particular social group' is a compound conception. It is therefore a mistake to isolate the

> elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole.
>
> Where the claim is one of a 'well-founded fear of being persecuted for reasons of … membership of a particular social group', the interaction between the concepts of 'persecuted', 'for reasons of' and 'membership of a particular social group' is particularly important. Defining the group widely increases the difficulty of proving that a particular act is persecution 'for reasons of … membership' of that group. … "

30. In my view, and for the reasons advanced by Mr Tam that I have summarised in paragraphs 24 and 25 above, the nearest candidate for such grouping here is "young single women who have not been circumcised and who are, therefore, at risk of circumcision". As Chadwick LJ observed in the course of counsel's argument, once they have been subjected to the practice, they are no longer under threat of such persecution by reason of being women. That is what distinguishes this case from *Shah & Islam,* where the persecution did not release the Pakistani women from their membership of the "particular social group" identified by the House of Lords, whether broadly or narrowly defined.

31. Accordingly, the grouping here calls into play the general rule to which I have referred that the characteristics of a "particular social group" must be such that it exists independently of the persecution that membership of it engenders. One of many authoritative formulations of that general rule is that of Lord Hope of Craighead in *Shah & Islam,* at 656G-657A, as the third of three general points:

> "… while the risk of discrimination by society is common to all five of the Convention reasons, the persecution which is feared cannot be used to define a particular social group. The rule is that the Convention reasons must exist independently of, and not defined by, the persecution. To define the social group by reference to the fear of being persecuted would be to resort to circular reasoning. *Applicant A. v Minister for Immigration and Ethnic Affairs,* 71 A.L.J.R. 381, 401, per McHugh J. But persecution is not the same thing as discrimination. Discrimination involves the making of unfair or unjust distinctions to the disadvantage of one group or class of people as compared with others. It may lead to persecution or it may not. And persons may be persecuted who have not been discriminated against. If so, they are simply persons who are being persecuted. …."

32. Now, it is at this point necessary to consider another section of McHugh J's judgment in *Applicant A,* and dicta of Lords Steyn, Hoffmann and Hope in *Shah & Islam,* which, whilst acknowledging that well-established general rule, have accepted that, when considered alongside the third element of insufficiency of state protection,

persecution may have some role to play in identifying the group. Miss Cronin relied heavily on this qualification to the potential circularity of the argument.

33. In *Applicant A*, McHugh J said, at page 22 of the judgments:

> "… while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in the society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.
>
> The fact that the actions of the persecutors can serve to identify or even create 'a particular social group' emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit. Only in 'particular social group' category is the notion of 'membership' expressly mentioned. The use of that term in conjunction with 'particular social group' connotes persons who are defined as a distinct *social* group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. …."

34. With respect to McHugh J, although he has rightly acknowledged that there may be circumstances qualifying the general rule, he does not, in his left-handed man analogy, appear to me to give a principled illustration of it, unless there is at the back of it a reliance on state tolerated persecution such as to constitute insufficiency of state protection. Without that consideration, it seems to me that his unstated premise at the start of his analogy is the same as his conclusion at the end, namely that left-handed men are a "particular social group". He begins by assuming that left-handed men, though not, on that account, a "particular social group" are persecuted "because they are left-handed". He then reasons that they become a "particular social group" because of *public perception* that they are being persecuted because they are left-handed. And he finishes by suggesting, contrary to his stated starting point, that it is because they are left-handed, not the resultant persecutory acts, that they become a "particular social group".

35. Perhaps another way of putting it might be to say that if persecution starts for some unexplained reason, and then develops, it creates a momentum that may bring the victims of the persecution within the definition. Yet another might be to say that where persecution starts and creates a public perception of a "particular social group", it is not the persecution itself, but the public perception of what may lie behind the perception that is the reason for the persecution. However one attempts to formulate it by the sort of analogy that McHugh J drew, it seems to me that the proposition

remains circular. And it also offends logic in another sense because the existence of a "particular social group" resulting from public perception of persecution of its members would seemingly depend on whether and when the persecution has reached such a level as effectively to create that perception.

36. With respect, it seems to me that Lords Steyn, Hoffman and Hope, in *Shah & Islam,* identify logically and pragmatically the role of persecution as a contributor to the identification of a "particular social group", particularly in cases of non-state agency persecution, where the third inter-linked element is most commonly in play - insufficiency of state protection.

37. Lord Steyn, albeit drawing on and expressly agreeing with McHugh J's opening qualification in the passage from his judgment set out in paragraph 31 above, and seemingly his left-handed man analogy, and also on *Goodwin-Gill, The Refugee in International Law,* 2nd ed. (1996), p. 362, showed, at 645B-E, how insufficiency of state protection may provide the answer to the qualification:

> "If I had not accepted that women in Pakistan are a 'particular social group,' I would have held that the appellants are members of a more narrowly circumscribed group … I will explain the basis of this reasoning briefly. It depends on the coincidence of three factors: the gender of the appellants, the suspicion of adultery, *and their unprotected position in Pakistan.*" The Court of Appeal held (and counsel for the Secretary of State argued) that this argument falls foul of the principle that the group must exist independently of the persecution. In my view this reasoning is not valid. The unifying characteristics of gender, suspicion of adultery, *and lack of protection,* do not involve an assertion of persecution. The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by a state. Conceptually such a group does not in a relevant sense depend for its existence on persecution. The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands. …
>
> … I am in respectful agreement with this qualification of the general principle. "…[my emphases]

38. Lord Hoffmann gave the following practical example, at 653H-654C of his speech, of the relevance of persecution to the identification of a "particular social group", again by reference to insufficiency of state protection:

> "… suppose that the Nazi government in … [the] early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in

> business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? … in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question 'Why was he attacked?' would be 'because a competitor wanted to drive him out of business'. But another answer would be 'he was attacked by a competitor who knew that he would receive no protection because he was a Jew'."

39. Lord Hope of Craighead expressed the same qualification at 658A-D of his speech:

> "The rule that the group must exist independently of the persecution is useful, because persecution alone cannot be used to define the group. But it must not be applied outside its proper context. This point has been well made by *Goodwin-Gill* … He observes, pp 47-48, the importance, and therefore the identity of a social group may well be in direct proportion to the notice taken of it by others. Thus the notion of social group is an open-ended one, which can be expanded in favour of a variety of different classes susceptible to persecution. … he concludes at p. 362 that to treat persecution as the sole factor which results in the identification of the particular social group is too simple. Persecution may be but one facet of broader policies and perspectives, all of which contribute to the group and add to its pre-existing characteristics."

40. Now, where does all that leave a court in any particular case where is no or slim evidence of, say, discrimination or perceived setting apart of a group of persons from the rest of society to explain their persecution? What in such circumstances is capable of breaking the circularity of reasoning that in general prevents persecution being a legitimate explanation for this purpose? It seems to me that a court is left with the following propositions: 1) a "particular social group" cannot be defined *solely* by reference to persecution of its members; 2) however, persecution may have *some part* to play in determining whether it is "for reasons" of membership of a "particular social group"; 3) it can do so where, as a result of insufficiency of state protection from persecution, the persecution is unchecked and thereby creates a *perception in members of society outside that group* of discrimination against it or the setting apart of the group from the rest of society; 4) different considerations may apply to state and non-state persecution cases, often depending in the case of state agency persecution, on the juniority of the offending state agents; 5) however, there is a spectrum of circumstances spanning state agency and non-state actor cases (see *Bagdanavicius,* paras 45 and 46*),* and the element of insufficiency of state protection is more likely to be a relevant factor in the latter.

41. The issue of insufficiency of state protection, seemingly led the Secretary of State to concede before this Court in *P & M v SSHD* [*2004*] EWCA Civ 1640, 8th December 2004, a challenge ultimately to the decision of an adjudicator granting asylum to two young Kenyan woman, one on the ground of her fear of genital mutilation by her father who was a member of a violent religious sect that practised mutilation. The issue whether the appellants belonged to a "particular social group", namely Kenyan women, was initially central to the appeals. However, shortly before the hearing of the appeals, the Secretary of State conceded that the Tribunal's and the adjudicator's approach to that question was flawed. Notwithstanding that concession, the Court, at paragraph 37, expressed the view, *obiter* and in reliance upon *Shah & Islam*, "that there was no reason why the Adjudicator should not have come to the conclusion that women in Kenya are a particular social group and that her "decisions was correct on her findings of fact as to the position of women in Kenyan society".

42. As is apparent, that case concerned Kenyan, not Sierra Leonean society; it also concerned a very much more limited group than that of young, single uncircumcised women in Sierra Leone, namely daughters of members of a particular religious sect in which the fathers of the family practised female genital mutilation. As Mr Tam observed, the position is Sierra Leone, where the practice is widespread and accepted as a normal route to womanhood for young girls, and where it is undertaken by women, is more subtle and complex. The facts are very different.

43. When considering whether there is persecution for reasons of membership of a "particular social group", a useful starting and finishing point, it seems to me, is to consider whether, apart from the persecution, the claimed group is discriminated against by the society of which it forms part, or is perceived by that society as being set apart from it in some way. The latter - setting apart - may, but need not necessarily, be of such intensity or effect as to be discriminatory in itself, but, no doubt, would come close to Lord Hope's reasoning in *Shah & Islam*, at 656H-657A and 658A-D (see paragraphs 29 and 37 above), that identification of people with common characteristics as a "particular social group" may turn on a mix of considerations of policy and perception.

44. Applying those considerations to the facts of this case, I have reached the view that the pointers are away from, rather than towards, female genital mutilation of young, single and uncircumcised Sierra Leonean women constituting persecution "for reasons of" their membership of a "particular social group". They are as follows:

> 1) The practice, however repulsive to most societies outside Sierra Leone, is, on the objective evidence before the Adjudicator and the Tribunal, clearly accepted and/or regarded by the majority of the population of that country, both women and men, as traditional and part of the cultural life of its society as a whole.
> 2) Far from the persecution that the Pakistan women feared in *Shah & Islam* by reason of their circumstances, namely ostracism by society and discrimination by the State in its failure to protect their fundamental human rights, the persecution here would result in a full acceptance by Sierra Leonean society of those young women who undergo the practice into adulthood, fit for marriage and to take a full part as women in the life of their communities.
> 3) It follows that, however harshly we may stigmatise the practice as persecution for the purpose of Article 3, it is not, in the circumstances in which it is practised in Sierra Leone, discriminatory in such a way as to set those who undergo it apart

from society. It is, as McHugh J observed in *Applicant A*, at page 18 (see para 29 above), important to keep in mind the composite nature of the asylum test, and, as Lord Hope emphasised in *Shah & Islam*, at 656G-H (see paragraph 31 above), the distinction between persecution and discriminatory conduct giving rise to it.

4) Considered on its own, a critical common characteristic of the claimed "particular social group" is that its members have not been circumcised. But, as soon as they have undergone the practice, they cease to be members of the group. To confine the grouping to young, single girls who, for the time being, have not been circumcised, though logical, would be contrary to the general rule that it is impermissible to define the group solely by reference to the threat of the persecution.

5) As to the possible qualification of the general rule by reference to insufficiency of state protection, this case, as I have said, is readily distinguishable from *Shah & Islam.* As Lord Steyn, put it in that case, at 644E when identifying the rationale for the formula "for reasons of … membership of a particular social group":

> "This reasoning covers Pakistani women because they are discriminated against and as a group they are unprotected by the state. Indeed the state tolerates and sanctions the discrimination."

See also, per Lord Hope, 658D-E:

> "The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women.

However, as I have said, although female circumcision in Sierra Leone may be condemned as a violation of Article 3 and to constitute persecution of young uncircumcised girls on that account, its practice in that country's society is not discriminatory or one that results from society having set them apart, other than by the persecution itself. There is, therefore, no factual basis upon which the Court could have resort to insufficiency of state protection against discriminatory conduct to qualify the general rule that, for the purpose of the Refugee Convention, a "particular social group" cannot be defined solely by reference to the persecution.

45. I would have hesitated before embarking on the analysis that I have in such a highly case-sensitive matter. But the Adjudicator's determination and reasons do not disclose any close examination of the relevant facts on the application of the words "for reasons of … membership of a particular social group" or any reasoned application of the difficult law to such facts. Fortunately, the objective evidence in the matter is clear and largely unchallenged. For the reasons I have given, I would grant permission to appeal and would, with the consent of the parties, treat the hearing of the application as the hearing of the appeal and dismiss it.

Chadwick LJ:

46. It is important to keep in mind that the question raised by this appeal is not whether female genital mutilation ("FGM"), as practised in Sierra Leone, constitutes inhuman and degrading treatment. It is accepted on behalf of the Secretary of State that it does. Nor is it in issue on this appeal that to return the applicant to Sierra Leone against her will, in circumstances in which she would be at risk of being subjected to that practice, would constitute a breach by the United Kingdom of obligations accepted under the Convention for the Protection of Human Rights and Fundamental Freedoms – article 3. It is accepted on behalf of the Secretary of State that it would. He has granted the applicant leave to remain until her 18th birthday, namely 22nd May 2005, and is likely to extend it for a further three years on humanitarian grounds. The question on this appeal is not whether the applicant is to be allowed to remain for the time being: the question is whether she is entitled to refugee status.

47. The answer to that question turns, in the context of this appeal, on whether the applicant has a "well founded fear of being persecuted for reasons of . . . membership of a particular social group" – article 1A(2) of the 1951 Convention on the Status of Refugees. And, in this Court, that question must now be addressed with the benefit of the guidance given by the House of Lords in the consolidated appeals in *Islam v Secretary of State or the Home Department, R v Immigration Appeal Tribunal and another, Ex parte Shah* [1999] 2 AC 629, as that guidance is to be understood in the light of the observations in this Court (Lord Justice Ward, Lord Justice Rix and Lord Justice Maurice Kay) in *Chun Lan Liu v The Secretary of State for the Home Department* [2005] EWCA Civ 249 – judgments in which were handed down on 17 March 2005, after the completion of oral argument in the present appeal.

48. The question before this Court in *Chun* was whether the applicant – a citizen of the People's Republic of China – was entitled to refugee status in circumstances that she feared that, if returned to China, she would be sterilised against her will. She was a married woman with two children. The threat of forcible sterilisation was said to arise from the implementation in practice, and in rural areas, of the central government's measures to control population growth by limiting parents to a single child. The problem posed by that threat – in the context of refugee status – had been considered in a number of Australian and Canadian decisions, to which the members of this Court referred in their judgments in *Chun*. As Lord Justice Rix put it, at [33]:

> "The case of parents of more than one-child families who face forcible sterilisation in China has engendered controversy and some finely balanced decisions in Canada and Australia. It seems, however, that in principle the developing jurisprudence in both countries on balance favours the possibility of finding, rather than the necessity of rejecting, a case of persecution by reason of membership of a particular social group".

49. The Immigration Appeal Tribunal had allowed the Secretary of State's appeal from the adjudicator's determination that the applicant had a well founded fear of persecution by reason of her membership of a particular social group – which he had identified as "women of child bearing age in China" but which her counsel had sought to redefine before the Tribunal as "rural women accused of transgressing social mores in relation to the population control policy by choosing to have a third child" – on the grounds, first, that the adjudicator's definition was "far too wide" and, second, that counsel's reformulation fell into the trap, identified in *Shah and Islam*, of "defining

membership of the group by reason of the persecution". As the Tribunal put it, at paragraph 13 of its determination, "Such a group would not exist independently of the persecution". The decision in this Court, allowing the appeal, was that the Immigration Appeal Tribunal had erred in failing to consider the qualification to the general principle - that the group must exist independently of the persecution – to which Lord Steyn had referred in his speech in *Shah and Islam*. Lord Justice Maurice Kay (with whom the other members of the Court agreed) said this, at [11]:

> "As I read paragraph 13 of the determination, doing so of course in the context of the determination as a whole, it is not possible to be satisfied that the Immigration Appeal Tribunal considered Lord Steyn's qualification. The reference to counsel having "fallen into the trap" of identifying the group "by means of the persecution" convinces me that the Tribunal considered the general principle but not the qualification. That in itself is sufficient for this appeal to succeed and to require the matter to be remitted to the Immigration Appeal Tribunal . . ."

50. This Court envisaged that the Tribunal to whom the matter was remitted would make the findings of fact necessary to determine whether the applicant had a well founded fear of persecution by reason of her membership of a particular social group in the sense that that phrase was to be understood on taking account of Lord Steyn's observations in *Shah and Islam* and the further guidance as to the test to be applied which the members of the Court themselves went on to give (albeit *obiter*) in their judgments in *Chun*.

51. It is important, therefore, to see what it was that this Court held, in *Chun*, had been overlooked by the Tribunal in applying the general principle which the Tribunal had derived from *Shah and Islam*. The passage in Lord Steyn's speech ("Lord Steyn's qualification") which the Court had in mind is found at paragraph 8 of the judgment of Lord Justice Maurice Kay. He said this:

> "8 A majority of the House of Lords (Lord Steyn, Lord Hoffmann and Lord Hope of Craighead) held that women in Pakistan constituted a particular social group. In addition Lord Steyn and Lord Hutton considered that the appellants also belonged to a particular social group which was more narrowly defined by the unifying characteristics of gender, of being suspected of adultery and of lacking protection from the state and public authorities. Strictly speaking, therefore, the *ratio* of *Shah and Islam* relates to the particular social group defined as "women in Pakistan" and the part of the speech of Lord Steyn (with which Lord Hutton agreed) dealing with the narrower categorisation was *obiter*. It is nevertheless of the utmost importance. He said (at p 645 C-G):
>
> > "The Court of Appeal held (and counsel for the Secretary of State argued) that this argument [i.e. in support of a more narrowly defined group] falls foul of the principle that the group must exist independently of the persecution. In my view this reasoning is not valid. The unifying characteristics of gender, suspicion of adultery

> and lack of protection, do not involve an assertion of persecution. [. . .] The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands. In *Applicant A v. Minister for Immigration and Ethnic Affairs*, 71 ALJR 381, 402, McHugh J explained the limits of the principle. He said:
>
> > 'Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.'
>
> The same view is articulated by Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (1996). P 362. I am in respectful agreement with this qualification of the general principle. I would hold that the general principle does not defeat the argument of counsel for the appellants."

And, at paragraph 9, Lord Justice Maurice Kay observed that:

> "9 . . . Although strictly *obiter*, I have no doubt that [that] is a correct statement of the law and that we should follow it."

The position in this Court, therefore, is that the principle that the particular social group – membership of which gives rise, in the applicant, to a well founded fear of persecution - must exist independently of the persecution must be applied with Lord Steyn's qualification in mind. And, as it seems to me, that requires the court to ask whether the unifying characteristics by which the particular social group is to be identified or defined necessarily include the persecution in prospect or the fear of that persecution. That, I think, is what Mr Justice McHugh had in mind when he said, in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381, at 402, that "it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group".

52. It is for that reason, as it seems to me, that the particular social group –membership of which gives rise, in the present case, to the applicant's well founded fear of persecution – cannot be identified by the characteristic that (not having undergone FGM) those within it fear the prospect of being subjected to that form of persecution. But nor can the social group be defined so widely as to include all women in Sierra Leone, or all Sierra Leonean women, or all young, single Sierra Leonean women. It is

not because she is a woman that the applicant fears persecution; it is because she is a woman who has not undergone FGM. The unifying characteristic of the social group in the present context is not gender alone; it is gender coupled with what Lady Justice Arden (whose judgment I have had the advantage of reading in draft) refers to as "intactness" – that is to say, absence of the particular form of FGM practised by women on women in Sierra Leone. Having found that FGM, as practised in Sierra Leone, was "part of a 'right *(sic)* of passage' . . . part of a cultural practice in Sierra Leone which is tied up with . . . the passing of girls from childhood to adulthood", the Tribunal was right to direct itself that the relevant question, in the present case, was whether young Sierra Leonean women (or, perhaps, young single Sierra Leonean women) who had not undergone FGM constituted a particular social group within Sierra Leone for the purposes of the Refugee Convention.

53. The Tribunal answered that question at paragraph 24 of its determination:

> "A definition of the social group which includes within it a reference to the feared persecution, ignores the point in **Shah and Islam** that the social group has to exist independently of the persecution."

54. In reaching that conclusion the Tribunal followed its earlier determination in *R* [2004] UKIAT 00108. In that case the Tribunal had directed itself that, in the light of *Shah and Islam*, what constitutes a particular social group in a particular country is a question of fact to be considered on a case-by-case basis: "they can only be a particular social group if the group exists independently of persecution and members of the group share unusual or characteristics (*sic*)". It had gone on to say this:

> " According to the objective evidence female genital mutilation is so widely practised in Sierra Leone that the percentage of women and girls who undergo the practice is as high as 80 to 90%. The logical consequence of [Counsel's] argument is that the small minority of maybe ten to twenty percent of young females who have not undergone FGM make up a particular social group. However we are not satisfied that this social group can properly be regarded as a particular social group within the meaning of the Convention."

55. An answer in the terms given by the Tribunal in the present case raises the concern that the Tribunal fell into the same error as that which was held, in this Court, to constitute a flaw in its determination in *Chun* – that is to say, that in applying the general principle which it derived from the decision of the House of Lords in *Shah and Islam* the Tribunal overlooked Lord Steyn's qualification. It can be said, in the present case, that the Tribunal failed to address that qualification in express terms; although it may be that that was what it had in mind when it referred to the need that the group exist independently of persecution and its members "share unusual or characteristics". There is there, I think, some recognition there of Mr Justice McHugh's observation (to which Lord Steyn gave his endorsement) that "while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or cause the creation of a particular social group in society." But, on balance, I am content to assume that the Tribunal may have overlooked Lord Steyn's

qualification; or, to put the point another way, I accept that it is impossible to be confident that the Tribunal had Lord Steyn's qualification in mind.

56. Should that conclusion lead this Court to allow the appeal and remit the matter to the Tribunal so that it can make further findings of fact in the light of the observations in *Chun*? Notwithstanding the powerful points to be made by Lady Justice Arden in her judgment, I am satisfied that the answer to that question is 'No'. It seems to me that the findings of fact already made by the Tribunal would lead it, necessarily, to conclude – after giving full effect to Lord Steyn's qualification – that this is a case in which the defining characteristic of the social group is that its members have not been subjected to FGM I am not persuaded that this is a case in which the actions of the persecutors "serve to identify or even cause the creation of" that particular social group. "That is not for thrust of the endeavour". Nor am I persuaded that it is possible to escape that conclusion by treating the defining characteristic as the "intactness" of its members. Intactness, in that context, means absence of the particular form of FGM practised by women on women in Sierra Leone. The defining characteristic remains inseparable from the persecution which the applicant fears. I would accept that it is not determinative that the members of the group lose their common characteristic as a result of persecution; although that is, of course, likely to be the position in fact. The critical feature, in this case, is that the common characteristic can only be identified by reference to the absence of FGM; and it is the fear of FGM that has to be relied upon in the context of article 1A(2) of the Refugee Convention.

57. It follows that although I, too, would grant permission to appeal in this case, I would dismiss the appeal.

Arden LJ :

58. Auld LJ, to whom I am indebted for sight of his judgment in draft and his analysis of the legal principles in this case, states that female genital mutilation (which I call "FGM") is a repulsive practice. There can be little doubt about that. It is also deleterious to women's health. FGM is unlawful if committed in England and Wales or by a UK national anywhere in the world (Female Genital Mutilation Act 2003).

59. As to Sierra Leone, there is no law prohibiting FGM. Perhaps uniquely, in Sierra Leone, FGM is practised by women on other women. Details of the practice are given in the United States country report for Sierra Leone of 2002:-

> "Practice
>
> > Type II (commonly referred to as excision) is the form of genital mutilation (FGM) or female genital cutting (FGC) widely practised on women and girls in Sierra Leone. It is generally practiced by all classes, including the educated elite. Sierra Leoneans who live abroad sometimes bring their daughters back to Sierra Leone to participate in initiation rites that include this procedure. Type II is usually carried out within a ritual context. It is part of the passage from childhood to womanhood.
>
> Incidence:

> Some estimates place the percentage of women and girls in Sierra Leone who undergo this procedure at 80 percent. Others put the percentage higher at 90 percent. All ethnic groups practice it except Krios who are located primarily in the western region and the capital, Freetown.
>
> Attitudes and Beliefs:
>
> The customary power bases of women in Sierra Leone lie in the secret societies. Women who administer puberty rites are revered, feared and believed to hold supernatural powers. Membership in these secret societies, including *Sande* and *Bundo,* lasts a lifetime.
>
> Groups of girls of approximately the same age are initiated into these societies. Part of the ritual is the cutting. Girls initiated together form a bond and this sisterhood lasts throughout their lives. The girls take an oath that they will not reveal anything that happened during the puberty rite.
>
> It is believed that once initiated into the society, the girl has passed into womanhood. She now has adult status and can participate in society as a woman. The secret societies are supported by some members of the influential elite who are also members of the societies or have relatives who are.
>
> Non-members of the secret societies are considered to be children, and not accepted as adults by society. They are generally barred from taking up leadership positions in Sierra Leone society. Children who come of age and have not gone through the puberty rite are liable to be forcibly seized to undergo the procedure.
>
> In working with ex-child combatants, it was found that a number of the female ex-combatants sought membership in the secret societies as a form of self-protection and evidence that they were reintegrating into society."

60. Mr Robin Tam, for the Secretary of State, accepts that forced FGM would constitute persecution for the purposes of the Refugee Convention. It would also constitute a breach of generally accepted human rights.

61. It is clear that Sierra Leonean women in general cannot be a social group since that group would include women who no longer fear FGM because they have undergone it and indeed may practice it on other women. For the purposes of this case, the social group can only be the narrower group of *prospectively* adult women, that is those women who have not yet undergone FGM. In that respect the appellant's case here differs from that in *Islam v. The Secretary of State for the Home Department* [1999] 2 AC 629. In that case, the persecution was practiced by men, not women, and it was possible, on one view in that case, to say that all women in Pakistan constituted a particular social group for the purposes of the refugee convention.

62. The striking finding of the tribunal is as follows: -

> "22. Not all young Sierra Leonean women fear female genital mutilation. Some 80% of them have already undergone circumcision and it is not inconceivable that there may be some who, perhaps out of ignorance, do not have a fear of undergoing initiation because they are looking forward to becoming women rather than being considered as children."

63. However, this finding discloses that the effect of FGM is to identify a social group in Sierra Leone, namely women accepted by Sierra Leonean society as full adult women members. Those women outside this group, if they have a common characteristic by which they can be identified as a group, must logically be capable of being a social group too. In fact, they are also perceived by Sierra Leonean society as separate and distinct from other women because they are not recognised as full adult members of society. I deal with the question whether they have a common characteristic below.

64. Are Sierra Leonean women who are prospectively adult in the sense given above precluded from being a social group in this case because, on the findings of the tribunal, not all such women have any fear of undergoing FGM because they are looking forward to being recognised as adult?

65. In my judgment, the *Islam* case does not mandate this result. As in Pakistan, the constitution of Sierra Leone provides for equal rights for women: forced FGM would appear to be a clear breach of this constitutional guarantee. The attitude of society in Pakistan to women enabled the House of Lords to find that such women constituted a social group in Pakistan. But the fact that men in Pakistan and indeed some women accepted these attitudes did not mean that women could not be such a group. Indeed, to conclude there is no particular social group in this case would be to give a victory to choice while overlooking (a) the pressures that cause that choice and (b) the fact that not all Sierra Leonean would accept that choice anyway. The appellant in this case does not.

66. The mere fact that Sierra Leonean society accepts FGM does not mean that the prospectively adult women in that society cannot constitute a particular social group for the purposes of the refugee convention for two reasons. First, they are still marked out for persecution. The social group is not identified *solely* by reference to that persecution because the members of the group have pre-existing characteristics, namely that they are intact young women. It is their intactness that identifies the group. The second reason why the fact that some members of the group could not show that they were persecuted by reason of their membership of this group because they freely undergo and accept FGM does not prevent the group from being defined as I have indicated, is this. It is not necessary that all members of a particular social group should be the object of persecution: see per Lord Hoffmann in the *Islam* case at 653G to 654, with whom Lord Hope agreed.

67. The fact that members of the group lose their common characteristic of intactness as a result of persecution must be discounted. To take account of that factor and conclude that this characteristic is not immutable for the purposes of the *Acosta* test, would be to conclude, in the case of persecuted left-handed people, that they could not constitute a particular social group for the purposes of the Refugee Convention because, when the persecution succeeds, they no longer have their left hands.

In the circumstances, I would allow this appeal.

ORDER: Appeal dismissed with costs, not to be enforced without leave of the court; the court has in mind at the moment, the parties to have liberty to apply within a week so the court is better informed before dealing with the application for permission to appeal to House of Lords; detailed assessment of the appellant's Community Legal Service Funding certificate.

(Order does not form part of approved judgment)