Heard at Field House
On 30 November 2004

TB (PSG – women) Iran [2005]
UKIAT 00065

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

09 March 2005

Before:

Mr A R Mackey – Vice President
Mr A L McGeachy – Vice President
Mrs M E McGregor

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation

For the Appellant: Mr K Behbahani, of Scudamores, Solicitors, London

For the Respondent: Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, who is a national of Iran, appeals with permission against the determination of an Adjudicator Mr Michael Watters promulgated 13 May 2004, wherein he dismissed an appeal against the decision of the Respondent who had refused to vary leave to enter or remain and asylum and human rights claims. We were provided with an Appellant's bundle, a country expert report by Ms Anna Enayat – Senior Associate, St Anthony's College, Oxford, a skeleton argument, list of essential reading, and copies of decisions in **ZH (Women as a Particular Social Group) Iran CG [2003] UKIAT 00207**, **JO (Internal Relocation – No Risk of Re-**

trafficking) Nigeria [2004] UKIAT 00251 and **Ozkan Degirmanci [2004] EWCA Civ 1553** by Mr Behbahani. A copy of the October 2004 Iran Country Report from the Country Information and Policy Unit of the Home Office was provided by the Respondent. When I granted permission in this matter I was satisfied that the grounds showed a basis for an appeal and that both sufficiency of protection available to this Appellant and her ability to relocate within Iran could be argued. The treatment of the membership of a particular social group issue by the Adjudicator was also clearly at issue.

The Adjudicator's Determination

2. The Adjudicator noted the Appellant was a 20 year old, single woman from Iran. She gave evidence along with her mother and step- sister. The Appellant's claim was summarised in paragraph 7 of the determination in the following manner:

> "i. The Appellant's father is a Colonel of the Entezami Force (police force) and a member of Etelaat (intelligence service). He was wounded twice in the war between Iran and Iraq. Due to an injury the Appellant's father suffered a personality change he became moody and unpredictable. He started berating and hurting the family. The Appellant's mother wanted to get a divorce.
>
> ii. In 1989 the Appellant and her mother left her father and went to Mashad and stayed there for five days. On the sixth day the Authorities raided the house and arrested the Appellant's mother who was accused of escaping from home and kidnapping the Appellant. The Appellant and her mother were required to return home and her mother was badly beaten by her father.
>
> iii. In 1991 the Appellant's father attacked her mother and step- sister. They were taken to hospital. The Appellant's uncle encouraged her mother to make a complaint to the Authorities against her father. Four months after the complaint the Appellant's uncle was accused of political activities against the regime and he was executed. The Appellant's father threatened to have the Appellant and her mother killed if they did anything against him.
>
> iv. In 1996 the Appellant's mother tried to commit suicide.
>
> v. On 9 July 2001 the Appellant and her mother were in her aunt's building. They saw demonstrators attacked in the street by the security forces and the Appellant and her

mother opened the door of their building and let some of them in. The Appellant and her mother were arrested. Haj [AR], a friend of the Appellant's father arranged for them to be released. He was a Mullah and head Aghidati-Siasi Department of Entezami Forces. He was a friend of the Appellant's father.

vi. In 2003 the Appellant obtained a diploma in mathematics and passed an entrance exam to go to university. On 23 October 2003 the Appellant's father told her that Haj [A R] wanted to marry the Appellant. The Appellant's father was very pleased. Mr AR was about 60 years of age and already married with four children. The Appellant wished to continue her studies at university and she did not wish to marry. Mr AR gave the Appellant a ring and they were formally engaged. A wedding date was set. The Appellant and her mother decided to leave Iran and go to the UK.

vii. On 4 November 2003 the Appellant and her mother arrived in the United Kingdom.

viii. On 6 November 2003 the Appellant's father telephoned the Appellant's step-sister and demanded that the Appellant and her mother return to Iran."

3. The Adjudicator then, after noting the decision of the Respondent, considered the background material, including the CIPU Report for October 2003 and other objective material produced by the Appellant's representatives, which he accepted as material. He noted from that while the Constitution, adopted by Iran, granted women and men equal rights, women however did face social and legal discrimination. They could work or study but the choice was dependent upon the husband. The state enforced segregation in most public places and prohibited women and men mixing openly. Women suffered discrimination in the legal code particularly in family and property matters. He went on to note that little detail was known of the degree of domestic violence, although surveys indicated that the level of domestic violence was very high, that women had almost no legal redress and that there was a fair amount of social tolerance of domestic violence.

4. He noted the two types of marriage, permanent and temporary, and the fact that the husband could terminate a marriage at any time and that men were allowed up to four permanent wives and unlimited number of temporary wives.

5. He then made his findings of credibility and fact. Firstly, from the oral evidence of the Appellant, he noted that she had visited the United Kingdom on two previous occasions. The first of these was

three or four years before the hearing and the second occasion seven or eight months before. During the last trip to the UK the Appellant said she did not claim asylum, as her father had not threatened to marry her to the Mullah at that time. She said that her main fear now was of the arranged marriage to the Mullah who was 60 years of age and had four children and she had heard from her father that "he had signed orders for executions". The findings of the Adjudicator, in relation to the Appellant's mother's evidence, taken from her statement and evidence at the hearing, were noted. She had visited the United Kingdom with the Appellant on a number of occasions and always returned to Iran at the end of the visits. She said that the problem was with her husband and his intention to force the Appellant to marry one of his associates. She knew what her husband and his friends were capable of and they were really scared. She advised that she did not need her husband's permission every time she left Iran as he had given permission once and this was sufficient. She also stated that she had tolerated the abuse of her husband, as he was an influential man. She did not wish to claim asylum herself before this, but now that her daughter was in danger she felt that she had to. She feared they would both be killed if they were returned to Iran.

6. Evidence from the Appellant's step- sister was also noted. She adopted her witness statement. She had lived in the United Kingdom since 1997 and been granted permanent residence based on her marriage in 1997. She said that her mother had visited the UK on five occasions the Appellant on three, including the present visit. She also recorded she had personally received ill treatment from her stepfather and still had scarring as a result of that. She had never thought that the Appellant and her mother would claim asylum but the proposed marriage to the Mullah had changed all that.

7. It was noted that it was clear from the objective evidence that the Appellant, who was over the age of 18, did not require permission from her father to leave Iran.

8. The Adjudicator accepted the credibility of the Appellant's accounts "of the incidents she related as having occurred to her and her mother."

9. His findings were then set out in paragraph 20-22 where he stated:

> "20. In **Shah and Islam** (1999) IMM AR 283 the House of Lords held that women in Pakistan constituted "a particular social group". In Iran, as in Pakistan there is discrimination against women in matters of fundamental human rights on the ground that they are women. I am persuaded by the evidence presented to me that there is institutionalised discrimination against women by

organs of the State in Iran. I have to consider whether the Appellant will face persecution if she were to be returned to Iran. The Appellant could have attempted to seek redress through the proper Authorities before seeking international protection. At question 44 of the asylum interview the Appellant stated that the actions of her father and the Mullah were illegal, but at no time did she seek protection from the relevant Authorities in Iran.

21. Even if I am wrong that there is a real risk for the Appellant in her home area, she could get round that risk by moving elsewhere within Iran. It would not be unduly harsh to expect the Appellant to relocate. She is a young woman and while she might find it difficult to find housing and employment these matters are not determinative.

22. Mr Behbahani submitted that the Appellant's rights under Article 3 of the 1950 Convention are engaged. For the reasons I have set out above, I am not satisfied that the Appellant faces a real risk of suffering inhuman or degrading treatment, were she to return to Iran."

The Appellant's Submissions

10. Mr Behbahani invited us to agree that, given the particular circumstances of this Appellant, as were accepted by the Adjudicator, she was entitled to surrogate protection under both the Refugee Convention and the ECHR. He asked us to note from the determination in **ZH** (paragraph 50) that the Tribunal had stated:

> "It is necessary to start with **Shah and Islam**. We emphasise in doing so that 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 Refugee Status; **[1999] 2 AC** 629 and 635 E 655 F."

He also asked us to note the recent determination of the Tribunal in **JO** (paragraph 18) where the Tribunal had stated:

> "However we do think it arguable that Miss Finch successfully identified the existence in Nigeria of a combination of legal and social measures of discrimination sufficient to demarcate women as a particular social group. We accept that these may not be as comprehensive as those identified by the House of Lords when they reached their judgment in **Shah and Islam [1999] 2 AC 629** as obtaining for women in Pakistan.

However, in our view their Lordships made clear in their judgment that the PSG category should not be interpreted narrowly. The fact that since **Shah and Islam** women have not been found by the IAT or the courts to be a PSG in more than one or two countries suggests to us that too little regard has been paid to the fact that all that was required in **Shah and Islam** (per Lord Hoffman) was the existence of legal and social conditions which were discriminatory against women. Possibly also there has been too much focus on rejecting PSG arguments by reference to sub-categories (e.g. women at risk of FGM, as at one point in this case trafficked women). The more delimited the proposed category, the greater the prospect there is of circularity in definition."

11. He submitted that while the reasoning in **JO** differed in some ways, and possibly contradicted the overall approach in **ZH**, the two cases showed the paramount need to guard against basing individual decisions, in these types of cases, on generalisations relating to the status of woman in any particular country. In this case therefore the Tribunal was invited to approach this Appellant's claim by reference to the particular facts of her claim and not base it on the overall general situation regarding women in Iran which was accepted as different to the general situation regarding Pakistani women, at the time of the decision in **Shah and Islam**.

12. We were also asked to note that the Respondent had not cross appealed nor filed a Respondent's notice and this left two central issues for determination which were:

    (i) The sufficiency of protection available, and

    (ii) The issue of internal flight.

13. Mr Behbahani then addressed the issue of sufficiency of protection. He submitted that the findings of the Adjudicator that the Appellant could have sought domestic protection before claiming international protection, against her father and the Mullah, were perverse and it was highly unlikely that this Appellant could access a sufficiency of protection. The Adjudicator failed to have regard to several highly relevant factors. He submitted the character of the Appellant's father, and that of the Mullah, and their intent, given their track record of subjecting the Appellant and her family to past ill-treatment and further threats of ill-treatment, together with their very influential positions within the Iranian legal organs, were highly relevant factors that should have been taken into account.

14. He asked us to note that Iranian law conferred property rights on the father to the extent that the Appellant was effectively the

property of her father. This was noted in Article 1170 of the Iranian Civil Code and is referred to in Mrs Enayat's report (page 1). Next he referred us to Iranian law and custom entitling a father to arrange and/or force his daughter's marriage against her will (section 2.1 of Mrs Enayat's report).

15. Several other factors from Mrs Enayat's report were also brought to our attention in this regard. We note these (with the relevant material submitted in support) as:

    (i) Iranian law dictated that the Appellant would not be able to marry without her father's permission (Section 2.2 of the Enayat report.)

    (ii) Iranian law not only offered no real practical protection against violence of the father but also effectively legitimised ill treatment and even murder. (Sections 2.3 and 3 of the Enayat report, an attachment to the Enayat report "Shirin Abadi as the legal punishment for murdering one's child", and a Canadian Refugee Board Report, "Domestic Violence and Murder" contained at page 108 of the Appellant's bundle)."

    (iii) Iranian law empowered the Mullah with "exceptional influence" against the Appellant. (Section 2.4 of the Enayat Report, an extract from the UN Special Rapporteur on Violence Against Women, dated March 2004 – page 124 of the Appellant's bundle, a Human Rights Report, page 95 of the Appellant's bundle, and a further UNHCR Report "Independence of the Judiciary" pages 137, 138 and 145 of the Appellant's bundle.)

    (iv) In addition to the above the general and discriminatory nature of Iranian law and custom would add obstacles to the appellant trying to obtain sufficiency of protection. (These he noted at section 1 of the Enayat Report, the report from Professor Haleh Afashar – page 39 of the bundle, and Elizabeth Mayer pages 10, 11, 19 and 21 of the Appellant's bundle."

16. On the issue of internal flight he submitted the findings of the Adjudicator were irrational given the particular facts of the Appellant's case. Regard should be given to the position of her father and the significant influence of the Mullah, which could be used to apprehend the Appellant immediately on her return to Iran irrespective of her ability to exercise internal flight. We were referred to the Court of Appeal decision in **Degirmenci,** which highlights the need to consider the issue of immediate risk on return in relation to the reasonableness of internal flight (paragraphs 18 and 19 of that determination).

17. In this regard it was submitted that the Appellant, if returned to Iran, would be detained and questioned (Amnesty international Report page 77 of the bundle). At that time the Iranian authorities could use the procedures they have in place to identify and investigate the background of the Appellant. Beyond this we were asked to note that the Appellant had stated, in her SEF (page A12) that in November 2003, her father had telephoned her step sister and threatened her and her mother if they went back to Iran.He stated that he would force them to go back to the Iranian Embassy and "We knew that they would kill us if we go back to Iran." In the light of such threats, and the influence of the Appellant's father and the Mullah, it was submitted that it was reasonably likely the authorities in Iran, or even the Embassy in London, already had notice that would alert the authorities on their return. In such a context it was submitted that it was not possible for the Appellant to discreetly return to Iran without exposing herself to the real risk of her father and/or the Mullah having knowledge of their return.

18. For all the reasons submitted we were invited to find that the Appellant had established her claim for international protection. We were urged to take into account the UNHCR observation and recommendation that:

> "All in all, the situation in the Islamic Republic of Iran is a very complex and complicated one. It is extremely difficult to apply very strict and clear guidelines when assessing the claim of an Iranian asylum seeker. Apart from the clear cases in which, based on objective facts and events, there is an evident problem of credibility, in other cases in which credibility is not the issue but the issue is interpretation of the level of persecution with regard to the individual case, one should always take into account global or arbitrariness and inconsistency in application of the legal system that is part of every day life in Iran. This is indeed one of the commitments that President Khatami has promised to address whilst stressing the importance of the Rule of Law. However it is clear that the situation is still far from being one in which the interpretation of Rules and application of the law is clear cut and consistent. One should therefore liberally use the principle of the benefit of the doubt when credibility is not the issue with respect to Iranian asylum claims." (UNHCR Report page 181 of the bundle).

19. We requested Mr Behbahani to take us to where there was evidence that the Appellant would be at a real risk of maltreatment from the Mullah, as opposed to that which appeared to have been established in the Adjudicator's determination, at the hands of her father. We stated that we were

seeking this information, noting the Mullah's position within Iranian society and, whether or not given his position he was able to bring the forces of the Iranian State into play in possible maltreatment of the Appellant on return. We indicated that we could possibly see the argument that there were Article 3 ECHR risks, but also wanted to investigate the Refugee Convention nexus, of "membership of a particular social group."

20. Mr Behbahani submitted that the risk of persecution to this Appellant was reasonably likely to arise from the Appellant's reluctance or refusal to marry the Mullah. He submitted that if she did, possibly under duress, decide to marry the Mullah then, that of itself, was a breach of her rights to marry someone of her own choice and could be seen as persecutory. This, combined with the evidence of violence in the past and threats from both the father and the Mullah, established a real risk, in his submission. He also referred us to the expert's report, which covered the relationship that was evident between the Mullah and the Appellant's father. The Appellant was engaged to a high profile figure, who she had apparently rejected and run away from. This placed the Mullah and her father in a position where there was a serious loss of face. He referred us to page 9 of the Enayat report, and part of the section 2.4 "The Influence of the Mullah". Firstly this notes that the Mullah, to whom she was engaged, was the head of the "Aqidati" in the Niru-Entezami (Law Enforcement Forces – LEF). This organisation is the political and ideological bureau of the armed forces and is established especially for the purpose of ensuring loyalty of the armed forces through surveillance and ideological indoctrination. Mrs Enayat considered that:

> "The head of the 'Aqidati' bureau of the Law Enforcement Forces would enjoy considerable influence. Such an individual would certainly have been able to arrange the client's (Appellant's) release from detention following the 9 July 2001 demonstrations in Tehran…
>
> The head of the Aqidati is also the person to whom the [Appellant's] father would have appealed for help in rescuing his wife and daughter even if he were not friends with the man…
>
> The 'favour' as Iranian favours, even among friends routinely do, would have generated a cultural 'debt'.
>
> So the father's refusal to arrange the requested marriage would have meant a loss of goodwill by someone who could destroy him and would have put him in a potentially hazardous position. His acceptance of the alliance, on the other hand, would have brought general rewards. There can be little doubt that a woman who is the object of such an

arrangement would fear a reaction whether she went along with her father's plans or rejected them.

There are many ways in which punishment for the 'slight' would have been meted out by the person in the Mullah's position. For example through what is known as the 'Gozinesh' system, which was put into place soon after the 1979 revolution. Gozinesh is a process for 'selection' to ensure that those admitted to universities and other institutions of higher learning, or to state employment, (and in other large private sector institutions), conform ideologically. The process has ideological and security components….

A word from the Mullah could prevent [the Appellant] from ever taking a university place and having access to the more respectable or desirable types of employment (indeed this would be one of the most difficult problems she would face if she were to attempt to relocate. Since Gozinesh background checks are conducted on a nationwide basis any application for say a secretarial job in a government, or indeed many private organisations would immediately reveal her whereabouts.

Once married [the Appellant] would, except by her husband's consent, have little hope of obtaining a divorce."

21. He also asked us to note the distinction between an "arranged" marriage and a "forced" marriage and the comments in the Enayat Report in that regard. He submitted that the Appellant could not realistically marry another man without the permission of her father (CIPU paragraph 6.151) and that, while an application to the court was technically possible, the expert report indicated this was theoretical rather then real and would of course expose the whereabouts of the Appellant to her father.

22. In his final submissions to us Mr Behbahani referred us to a number of places in the Appellant's evidence where the Appellant had made reference to threats from the Mullah and the likely result of those. In particular he asked us to note:

    (i) The last three paragraphs of the Appellant's statement (A11, A12), here the Appellant had stated:

        "My father threatened even to kill me himself if I did not marry Haj [A] and also told me that Haj [A] could be dangerous if I did not marry him. Two days later Haj [A] visited me and told me that he loved me and threatened me again. He gave me 24 hours to think about it. We knew there is no safe place in Iran for us and they would find us easily…the next day Haj [A]

and his sisters came to our house and gave me a ring and we were engaged formally"

Also in the last paragraph it was stated:

"On 6/11/03 my dad phoned SD (sister-in-law) and threatened us if we did not go back to Iraq. He said he would force us to go back by Iranian Embassy. We were worried about my uncle but we knew that they would kill us if we go back to Iran."

(ii) At questions 9 and 10 of the interview record sheet (B4) the Appellant was asked: "Who threatened you?" and she replied: "The Mullah and my father". She was then asked: "What did they threaten you with?" the reply to this was: "They threatened me that he will bring up again the history of my criminal case and also my mother's life, she is sick already. …I was arrested in a student demonstration in 2001. I was in the uprising of students and I brought a few of the students to my aunt's house, which was in the area. A few of the security guards saw us and we went into that house and were dragged out."

(iii) Replies given by the Appellant to questions 50-58 in the interview record (B12 and B13), he submitted also indicated real risks to the Appellant from the Mullah. In these questions the Appellant stated that the Mullah would kill her if she refused to marry him (and that her father would do the same). When asked why she considered the Mullah was capable of carrying out the threat she replied: "Because he has done things – killing is nothing to him, he has ordered to kill my uncle my mother's brother. He told us".

(iv) In the answer to the final question 72, the Appellant had replied to the question: "Who do you fear? And replied: "from my father and that Mullah." He submitted that these references indicated not only the substantive risk to the Appellant, at the hands of her father, but also those from the Mullah. In addition the position and influence of the Mullah would, in his submission, mean that the organs of the Iranian state could be brought into play as part of the persecution against the Appellant under the influence and direction of the Mullah.

23. We were next referred to the objective evidence showing the implication of senior Iranian officials in violence against women. In

particular the UNHCR – Iran Report of March 2003 and the United Nations Economic and Social Council Report "Integration of the Human Rights of Women and Gender Perspective – Violence Against Women" (3 March 2004 – page 124 of the bundle). This stated:

> "97 On 3 January 2003 the Special Rapporteur sent a communication to the government in connection with information received regarding the existence of violence and discrimination against women in the Islamic Republic of Iran. According to information received, women face discrimination in the criminal justice system and are subjected to forms of torture, such as stoning, amputation and blinding, which amount to torture, forced marriages, high levels of domestic violence and sexual violence at the hands of gangs and organised crime rings. Furthermore, information was transmitted of allegations of widespread violence against women prisoners and political opponents that purportedly took place primarily during the time of Ayatollah Khomenini was in power and included alleged rape, torture and exclusion of many women. The special Rapporteur expressed particular concern about the reported involvement and senior state and religious officials in these crimes, and about allegations of continued torture and sexual abuse of women prisoners."

24. It was noted that this illustrated further support for the well-foundedness of fears held by the Appellant, particularly when her risk arose "from the slighting" of a senior official within the intelligence forces.

25. Referring to the comparison with the determination in **Shah and Islam** Mr Behbahani submitted that the discrimination in Iran was probably of a more sophisticated nature but was arbitrary in nature and systemic to the Iranian regime.

The Respondent's Submissions

26. Ms Holmes submitted that the Adjudicator's determination did appear to be at fault by failing to engage fully with the risks from the Appellant's father and the Mullah in the assessment of the Appellant's case. She accepted that the mechanics of how the risks to the Appellant did arise have not been covered and therefore the determination would appear to be in error. However she submitted we could reach our own conclusions. She submitted that the Enayat Report did not cover the extent of the Mullah's authority. It stated that he was a senior official in the LEF but did not explain whether his power was local or national and it was thus

speculative to reach conclusions on how the Mullah would react at the time of the Appellant's return. She submitted that it could be equally likely that the Mullah and the Appellant's father would not contact officials either at the airport or elsewhere so that a lookout could be made for the Appellant, as this would expose them to embarrassment and further loss of face. In this situation therefore, it was equally likely they would keep quiet.

27. She also submitted that the use of the Gozinesh was also speculative and there was no evidence to suggest that the Mullah would use such a system against the Appellant. In this situation she submitted that the likelihood of risks to the Appellant through the Mullah using the organs of the Iranian state were remote.

28. Beyond this she submitted that the risk was also reduced given that there was no evidence to suggest the father or the Mullah would know when the Appellant had returned. Thus in this situation the reality of any risk to this Appellant on return to Iran was not established and thus the Appellant's claim should be dismissed.

29. She then turned to the determination in **ZH** and submitted that the Appellant in that case was in a worse position and more at risk of domestic violence than this Appellant. The linkage to risks from the Mullah as submitted was quite tenuous and therefore the risks to this Appellant were less than that which had been rejected in **ZH.** Finally she submitted that the Enayat Report, in relation to coerced marriages, appeared to refer to these marriages being with younger girls and the Appellant may therefore not fall within the type of risk and profile as put forward in the Enayat Report.

30. In reply Mr Behbahani submitted on the coerced marriage point that the Appellant was indeed only 19 when she was coerced into the engagement to the Mullah and accordingly hardly fell outside the situations discussed in the Enayat Report.

31. He submitted that we were in a position to reach our own conclusions but that, if we did not consider the Adjudicator had made sufficient findings on the risks to this Appellant from the Mullah, we should remit the matter for a fresh hearing or alternatively hear evidence ourselves including, at that time from the expert Mrs Enayat, if necessary.

32. After a short consideration of whether the matter should be remitted we advised the parties that we considered we had sufficient information before us to reach our own conclusions. We indicated that we considered, on the evidence there appeared to be a real risk of a breach of Article 3 of the ECHR but we needed to reserve our determination on the asylum issue.

The Issues

33. We found the issues before us to be:

(i) On the basis of the submissions put to us, and our own consideration of the determination of the Adjudicator, was that decision one that contained any material error of law?

(ii) If so, were we able to reach our own conclusions on the evidence before us?

(iii) In reaching those conclusions is there a real risk of serious maltreatment in breach of Article 3 of the ECHR on return?

(iv) Is there a real risk of the Appellant being persecuted for reasons of one or more of the five Refugee Convention reasons?

(v) If the answer to (iii) and /or (iv) is "Yes," is an Internal relocation alternative available to this Appellant?

Decision

34. On the first issue we are satisfied that there are material errors of law in the determination of the Adjudicator. Firstly the findings in paragraph 20 of the determination made by the Adjudicator failed to give reasoned consideration to evidence that had been accepted by the Adjudicator. The Adjudicator considered the Appellant would not be at risk because she would seek redress through proper authorities in Iran. However prior to this he had accepted the credibility of the Appellant in relation to the incidents she had related and also that there was institutionalised discrimination against women by the organs of the state in Iran. The failure to give reasoning for the conclusion which, on the face of it would appear to be somewhat perverse, is a clear error of law. Secondly the findings in paragraph 21, relating to relocation also lack reasoning. The Adjudicator has not engaged with the objective evidence or the accepted evidence of the Appellant. He has failed to recognise that the Appellant's father and the Mullah are in apparently highly influential positions and could be reasonably expected to use their positions to locate and maltreat the Appellant elsewhere in Iran (as they had in the past-and as explained further below). The failure to consider these issues, which were clearly relevant is also a further error of law. The reasoning in paragraph 22 is also similarly flawed.

35. Addressing the second issue we find that as there are clear material errors of law in the determination and as the credibility of the Appellant, and her witnesses, has been accepted, we can go

on to consider risks to the Appellant, reaching our own conclusions on the totality of the evidence now available to us.

36. Turning therefore to the third issue, whether there is a real risk of persecution or maltreatment in breach of Article 3 of the ECHR? This has required us to make an in depth assessment of the evidence provided by the parties, including the country expert report by Ms Anna Enayat, the CIPU Report of October 2004,the United Nations and UNHCR material and the objective evidence in the Appellant's bundle. In this assessment it is necessary to ascertain whether there are real risks to the Appellant of serious harm either from her father, the Mullah, or organs of the state of Iran that could be influenced by either her father, the Mullah, or both of them, to persecute or maltreat her. In respect of the assessment of real risk of serious harm, since the father and the Mullah, in their personal capacity, are non-state actors, consideration should also be given as to whether she would be at real risk from the failure of state protection. Also in that regard, if a real risk from non- state actors were found to be present, the issue of internal relocation would need to be considered (Issue (v)).

37. We are satisfied that the evidence provided by the Appellant, her mother and step sister, when viewed with the objective evidence, and in particular the evidence of the Enayat Report, (which was not significantly challenged by the Respondent), shows there is a reasonable likelihood the Appellant would suffer serious harm at the hands of her father on return.

38. We would agree that evidence of past persecutory treatment by the father has been more directed towards the Appellant's mother than to the Appellant herself. In 1989 and in 1991 the Appellant's mother was attacked. In 1991 there was an attack on the Appellant's step- sister as well. The evidence indicates that the Appellant's father had threatened the Appellant if she did anything against him. The substantive risks to her however, as she claimed, have arisen since her father decided she should be married to the Mullah. Apparently this arose in repayment for the cultural debt to the Mullahh following his actions in obtaining the release of the Appellant from the authorities, after she was detained for taking students involved in the demonstration into the home of her aunt. The evidence of the Appellant was that her reluctance to marry the Mullah had led to her being threatened by her father with death. Her evidence was that he had told her that he would kill her and, based on his past behaviour, she considered he was capable of doing so. In support of this she set out, in her evidence, that her uncle had been killed in a revenge killing arranged by her father, which involved the uncle being framed and executed in 1992. This was after the maternal uncle had been involved in assisting the Appellant's mother to try and obtain a divorce from the Appellant's father.

39. We have set against this evidence that the Appellant had been able to continue her schooling until 2003, when she completed a diploma in mathematics and passed the entry exam for university. In addition the Appellant has travelled to this country on two previous occasions, and, it would appear, it must have been with the consent of the Appellant's father. His control over her therefore in the past has possibly not been as all encompassing as the Appellant's evidence sought to establish. However, in this regard, we note the Appellant's explanation that all of this took place prior to her father arranging the marriage to Haj [A] and her reluctance to marry him, and then subsequent flight. We agree that there is substance in the submission that the father would have suffered a considerable loss of face, not only with Haj [A], but also obviously with his peer group in Iran. We have noted the submission of Ms Holmes that the Appellant's father (and indeed the Mullah) would be unlikely to enlist the support of state organs in persecuting or maltreating the Appellant as this could expose both of them to embarrassment. However we must set against that the evidence that when the Appellant's mother attempted to obtain a divorce, with the assistance of her brother, in 1991-1992, the father had no compunction in going to the authorities at that time, obviously making some explanation, and framing his brother-in-law, such that he was executed. He clearly overcame any possible loss of face on that occasion.

40. Thus, taking into account the totality of the evidence, including the significant position held in the police force and intelligence service by the Appellant's father, there is a reasonable likelihood he would wish to persecute his daughter and also could enlist the assistance of colleagues, within the intelligence services, in carrying out his revenge for the embarrassing slight. He has been demeaned by his daughter, (and of course his wife). We are satisfied that the level of risk that arises in this case is a real one. As there are threats of death, and/or serious physical abuse, we consider these fall within Articles 2 and 3 of the ECHR. We find there are substantive reasons for concluding there is a real risk to the Appellant of a breach of either Articles 2 or 3 of the ECHR if the Appellant were to be returned. Those risks could rise either from the likelihood of her being noted upon her return by colleagues, "tipped off" by the Appellant's father and/or the Mullah, or if she was able to pass through the airport, then when the Appellant attempted to access any services from the state, this would expose her to a real risk that her father would find out and then seek his revenge. Beyond this we agree with the submission that if she wished to marry another man she would have to obtain her father's consent and this would place her at a real risk of him finding her whereabouts.

41. We now turn to the issue of whether there are real risks of persecution or maltreatment to the Appellant from the Mullah Haj

[A]. Here we find although the risks are possibly somewhat less than with the father, nevertheless clearly the Mullah and father are close colleagues. Hence information held by one is likely to be quickly shared with the other. Haj [A] is also in a position where he has been slighted and not only may wish to seek retribution for that against the Appellant's father but also against the Appellant herself. There are two risks that arise at this point. Firstly the risks to her simply by her return on the basis of her rejection of Haj [A] and then flight to UK and secondly, if she did proceed with the marriage, the treatment that is reasonably likely to occur after marriage. In both of these situations we consider, based on the totality of the evidence, the risks from the Mullah, while possibly lower than from the father, are real and not remote or speculative. He is shown from the evdence to be a man of considerable power, which he has exercised in the past. There is a cultural debt due to him by the Appellant's family, which has not been repaid. The abuse of women in positions such as the Appellant is recognised by the objective evidence as being prevalent within Iran and the evidence shows that leading figures within the Iranian security forces are involved themselves. Evidence of this is shown in the United Nation's Economic and Social Council Report noted above. Assessing the risk therefore, at the lower level, we consider that the Appellant is at real risk of persecution or serious maltreatment either directly from the Mullah, or, also with a reasonable degree of likelihood, from organs of the Iranian state that he would instruct to carry out persecutory acts.

42. We move to the issue of whether or not the appellant has a well-founded fear of being persecuted for reasons of one or more of the five Refugee Convention reasons. Nationality and race are clearly not relevant. Political opinion may be possibly arguable on the basis that Iran, being a theocratic state, where all religious matters are inherently political, means that religious issues effectively are also political issues. However, such an argument is a tenuous and possibly strained one, and in the circumstances of this appeal, will not be pursued. This leaves us with the remaining grounds of religion and membership of a particular social group (PSG). We turn first to consideration of PSG and the causal nexus of whether this appellant is at a real risk of being persecuted for reasons of her membership of a particular social group.

43. We are of course initially guided by the findings in the seminal House of Lords determination in **Shah and Islam**. We also note the decision of the President of this Tribunal in **ZH** and the Tribunal determination (Dr Storey, Vice President) in **JO**. These three decisions were considered in the submissions at the hearing before us. We consider, however, it is necessary to take into consideration other determinations, particular those post-dating **Shah and Islam**. The decisions on the analysis of PSG we follow or are assisted by are: the Court of Appeal judgments in **Montoya [2002] EWCA Civ**

620; [2002] INLR 399, Skenderaj [2002] All ER 267, P and M v Secretary of State for the Home Department [2004] EWCA Civ 1640, the Australian High Court determination in **Applicant S v MIMA [2004] HCA 25**(www.austlii.edu.au/cases/cth/HCA), and the recent Tribunal determination (Dr Storey, Vice President) in **H M (Somali Women – particular social group) – Somalia CG [2005] UKIAT (HX/19177/03).** We have also been assisted by the New Zealand Refugee Status Appeals Authority determination in: **Refugee Appeal No. 71427/99 (16 August 2000).**

44. As Dr Storey pointed out in **HM (Somalia)** at paragraph 20, the starting point for any post **Shah and Islam** discussion of PSG is the Court of Appeal decision in **Montoya,** where the Court of Appeal agreed that the Tribunal determination in **Montoya** (01/TH/00161) had given a broadly correct summary of the existing law, binding on the court, and which was then followed. We set out the Summary of Conclusions, taken from the Tribunal determination in **Montoya** , the Court of Appeal refers to. These are:

> "55. Summary of Conclusions
>
> A. The Adjudicator was correct to conclude that the respondent could not show a Convention ground of political opinion but incorrect to conclude that he had made out the ground of membership of a particular social group (PSG). In deciding that private landowners were a PSG in current-day Colombia the Adjudicator overlooked the judgment of the House of Lords in Shah and Islam [1999] 2 A.C. 629 and in consequence applied the wrong criteria for evaluating the PSG category. She also erred in failing to consider whether there was a causal nexus between the respondent's well-founded fear of persecution and this alleged PSG.
>
> B. Taking stock of post-Shah and Islam cases both here and abroad, the Tribunal considers that the basic principles that should govern assessment of a claim based on the PSG category are as follows:
>
> (i) in order to succeed under the Refugee Convention a claimant who has a well-founded fear of persecution must show not only the existence of a PSG (the "PSG question"), but also a causal nexus between his membership of the PSG and that fear (the "causal nexus question");
>
> The PSG Question
>
> (ii) the PSG ground should be viewed as a category of last resort;

iii) persecution may be on account of more than one ground If the principal ground is membership of a PSG, then focus should be on that;

(iv) the PSG ground must be interpreted in the light of the basic principles and purposes of the Refugee Convention;

(v) if the PSG ground had been intended as an all-embracing category, the five enumerated grounds would have been superfluous;

(vi) the PSG ground is further limited by the Convention's integral reliance on anti-discrimination notions inherent in the basic norms of International Human Rights Law;

(vii) applying the *eiusdem generis* principle to the other 4 grounds, the PSG category must be concerned with discrimination directed against members of the group because of a common immutable characteristic;

(viii) a broad range of groups can *potentially* qualify as a PSG, including private landowners;

(ix) but whether any particular group is a PSG *in fact* must always be evaluated in the context of historical time and place;

(x) in order to avoid tautology, to qualify as a PSG it must be possible to identify the group independently of the persecution;

(xi) however the discrimination which lies at the heart of every persecutory act can assist in defining the PSG. Previous arguments excluding any identification by reference to such discrimination were misconceived;

(xii) a PSG cannot normally consist in a disparate collection of individuals;

(xiii) for a PSG to exist it is a necessary condition that its members share a common immutable characteristic. Such a characteristic may be innate or non-innate. However, if it is the latter, then the non-innate characteristic will only qualify if it is one which is beyond the power of the individual to change except at the cost of renunciation of core human rights entitlements;

(xiv) it is not necessary, on the other hand, for such a group to possess the attributes of cohesiveness, interdependence, organisation or homogeneity;

(xv) there is nothing in principle to prevent the size of the PSG being large (e.g. women), but if the claim relies on some refinement or sub-category of a larger group, care must be taken over whether the resultant group is still definably independently of their persecution;

(xvi) a PSG can be established by reference to discrimination from state agents or non-state agents (actors) of persecution;

(xvii) it is not necessary in order to qualify as a PSG that a person actually has the characteristics of the group in question. It is enough that he will be perceived to be a member of the group.

The Causal Nexus Question

C. The words "for reasons of" require a causal nexus between actual or perceived membership of the PSG and well-founded fear of persecution. Caution should be exercised against applying a set theory of causation. In Shah and Islam and the Australian High Court case of Chen no final choice was made between "but for" and "effective cause" tests, but the "but for" test was said to require a taking into account of the context in which the causal question was raised and of the broad policy of the Convention."

45. Further consideration of **Shah and Islam**, and **Skendaraj** was given in **ZH,** at paragraphs 63-67, by Ouseley J, who stated:

"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 states 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."

46. We agree with the conclusion then reached by Dr Storey at paragraph 22 of **HN**, referring to the determination in **ZH:**

> "22. It is clear from the above for the PSG requirement to be met in respect of women in a particular country, there must not only be a combination of measures of legal and societal discrimination; these must also reach a certain level and intensity: see paragraphs 65 and 79: "what is striking about evidence in Pakistan was the widespread and intense nature of the discrimination"".

47. The High Court of Australia last year in **Applicant S v MIMA**, a decisio noted with apparent approval by the UK, Court of Appeal in the recent determination in **F and M** , concluded that, during the time of the Taliban regime in Afghanistan 'able bodied young men' could constitute a particular social group. As noted later the Court of Appeal appear to have found the conclusions of the High Court of Australia supportive of their findings in **F and M**. The conclusions in **Applicant S,** given by Gleeson CJ, Gummow, and Kirby JJ, at paragraph 36, are also instructive. They state:

'Conclusions as to 'particular social group'

> 36. Therefore, the determination of whether a group falls within the definition of 'particular social group' in Article 1A(2) of the Convention can be summarised as follows. First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be shared fear of the persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two principles, but not the third, is merely a 'social group' and not a 'particular social group'. As this court has repeatedly emphasised, identifying accurately the 'particular social group' alleged is vital for the accurate application of the applicable law to the case in hand'.

48. As can be seen, this summary by the High Court of Australia is largely in accord with the UK jurisprudence we have noted above. The difference in the Australian approach is one of emphasis, with more stress being placed in the Australian jurisprudence on the requirement that the existence of the 'particular social group' requires that the group be distinguished or set apart from society at large. At paragraph 27 in **Applicant *S*** it states:

> 'The general principle is not that the group must be recognised or perceived within society, but rather that the group must be distinguished from the rest of society.'

49. The debate on whether a particular social group required members of that group to share innate, or immutable characteristics that cannot be changed and were so fundamental to their identity or conscience that they should not be forced to renounce them, as against whether the group had a distinct identity in the society of their nationality, is one that was pursued strenuously by academics and judges in this field in the late 1990s - 2000, 2001. It appears now to have been resolved following the UNHCR Global consultations (50th anniversary of the Convention) that took place in 2001/2002. This resulted in the UNHCR issuing revised guidelines. ('Guidelines on International Protection : Membership of a Particular Social Group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', HCR/GIP/02/02, 7

May 2002). Paragraphs 6, 7, 10, 11,12 and 13 are relevant and state:

> '6. The first, "the protected characteristics" approach (sometimes referred to as an "immutability" approach) examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that it is unchangeable because of its historical permanence, or (3) by a characteristic or association this is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals and families, for example, can constitute a particular social group within the meaning of Article 1A(2).
>
> 7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the "social perception" approach. Again, women, families and homosexuals have been recognised under this analysis as particular social groups, depending on the circumstances of the society in which they exist.
>
> 10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.
>
> 11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often by one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human right.

12. This definition includes characteristics which are historical and therefore cannot be changed,and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category,with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treared differently to men.

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognised as group which sets them apart.'

50. In the UK and European Union context the inclusion of both approaches is made directly in the **EC Council Directive** 2004/83/EC of 29 April 2004 on '**Minimum Standards for Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or Persons who otherwise need International Protection and the content of the Protection granted' (OJ** L 304/12 of 30.9.2004). Under our obligations to compliance with EC law we of course are bound to move our jurisprudence towards consistency with this Directive, which will come into force next year. Article 10 of the directive 'Reasons for Persecution' states at Article 10(1)(d):

'(d) A group shall be considered to form a particular social group where in particular:

- Members of that group share an innate characteristic or common background that cannot be changed, or share a characterise or belief that is so fundamental to their identity or conscience that a person should not be forced to renounce it; and

- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;'

51. Before leaving on the Directive we should set out the UNHCR Comments on Article 10(d). These state:

'In UNHCR's view, the term "social group" should be interpreted in a manner open to the diverse and change nature of groups in various societies and to evolving international human rights norms. Two main schools of thought as to what constitutes a social group within the meaning of the 1951 Convention are reflected in the Directive. The "protected characteristics approach" is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The "social perception approach" is based on a common characteristic which creates a cognizable group that sets it apart from the society at large. Whilst the results under the two approaches may frequently converge, this is not always the case. To avoid any protection gaps, UNHCR therefore recommends that member States reconcile the two approaches to permit alternative, rather than cumulative, application of the two concepts.

States have recognised women, families, tribes, occupational groups and homosexuals as constituting a particular social group for the purpose of the 1951 Convention. To avoid misinterpretation, UNHCR would

encourage Member States to provide in their legislation for further examples of "sexual orientation". Other examples would be gender, age, disability, and health status.

With respect to the provision that "[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of the article", UNHCR notes that courts and administrative bodies in a number of jurisdictions have found that women, for example, can constitute a particular social group within the meaning of Article 1A(2). Gender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. This does not mean that all women in the society qualify for refugee status. A claimant must demonstrate a well-founded fear of persecution based on her membership in the particular social group.

Even though less has been said in relation to the age dimension into interpretation and application of international refugee law, the range of potential claims where age is a relevant factor is broad, including forcible or under-age recruitment into military service, (forced) child marriage, female genital mutilisation, child trafficking, or child pornography or abuse. Some claims that are age-related may also include a gender element and compound the vulnerability of the claimant.

UNHCR encourages States, in cooperation with UNHCR, to adopt guidelines on assessing the asylum applications of women and children.'

52. As we will note in our conclusions and agreed definition of the particular social group applicable in this case, gender and age status are included. The PSG we identitfy appears to be consistent both with the EU Qualifications Directive and UNHCR comments.

53. In this appeal the Adjudicator, did not consider it necessary to consider whether the appellant fell within a PSG.He merely dismissed the appeal on the basis the Appellant should have sought protection from the Iranian authorites or alternatively internally relocated. The Adjudicator did find however, at paragraph 20 of his decision, (set out at paragraph 9 above), after noting the determination in **Shah and Islam** that:

"In Iran, as in Pakistan there is discrimination against women in matters of fundamental human rights on the ground that

they are women. I am persuaded by the evidence presented to me that there is institutional discrimination against women by organs of the state in Iran."

54. From our own analysis of the objective evidence we find ourselves in general agreement with those conclusions. In our findings relating to the nexus issue, later in the determination, we adopt this finding by the Adjudicator in support of our conclusion that the causal nexus in this case arises between the persecution and the failure of state protection.

55. As stated in paragraph 34 we consider the findings of the Adjudicator contain material errors of law. We are thus in the position where we ourselves must seek to determine whether this appellant falls within a PSG, guided by the jurisprudence and analysis above, particularly noting the conclusions set out in **Montoya** and the EC Qualifications Directive

56. It can be seen that it is necessary, in PSG gender cases, firstly to establish, objectively, on the facts as found, the general and prevailing country conditions as they relate both to women and to the specific applicant. Then the specification of the PSG can be made. The PSG initially suggested by Mr Behbahani was: "Women in Iran who are forced by their fathers to marry high ranked Iranian officials, such as Mullahs". At the outset we note that the more generalised PSG definition: "Women in Iran", was considered in **ZH** (paragraph 74) where it was found in that case that it was not considered that "Women in Iran" formed a PSG. We consider that, on the totality of the objective evidence now available, particularly that from the UNHCR and United Nations Economic and Social Council Report (paragraph 23 above), the High Court of Australia decision in **Applicant S v MIMA** and the **New Zealand Refugee Appeal No. 71427/99** (none of which were before the President in **ZH**), that it could well be argued now that "Women in Iran" may form a particular social group. However, in this case, for reasons, which we set out below, a more confined PSG is a realistic assessment for the predicament of this appellant.

57. The PSG identified by Mr Behbahani, in our view, appeared capable of being circulatory, as the group could be said to be partly defined by the persecution. Women who are *forced* to marry obviously implies an element of coercion, and possibly persecution, within it. Even if more of the potential persecutory treatment may arise after the marriage. We therefore did not accept the group submitted by Mr Behbahani could be applicable. We also considered that Mr Behbahani wrongly laid stress in the causation on the "*forced*" marriage, rather than the reality of this appellant's situation, where the risks to her arise from *her refusal to enter into* an arranged marriage. Mr Behbahani agreed with us that the PSG should not be defined in a

circulatory manner so as to include the persecution feared. In this situation we considered a more appropriate PSG to be: "Young Iranian Women who refuse to enter into arranged marriages". We must now consider whether this group, so defined, is a valid one and whether the appellant has a well-founded fear of being persecuted *for reasons of her membership of that group*. While noting and agreeing with the caution set out in **JO** (paragraph 18), at paragraph 10 above, we consider that the more confined PSG, we have set out, is a realistic approach to the factual situation of this appellant. We also consider the group we define, is not defined by the persecution, as in many cases nothing may happen to the young women in this predicatment. It does however, based on the assessment of the objective evidence here, have the necessary element of discrimination, and that discrimination against such young women may assist in the identification of the group. It is also a group recognisable in Iranian society, due to their lack of acceptance of generally acceptable cultural and social *mores*.

58. The PSG, so defined, therefore is in a similar discriminatory situation, as required under the other four Convention grounds (sub-paragraphs 55B (vi),(vii),and (xi) of **Montoya)**. In this regard, we note in particular the section in the Enayat Report: "2.4. The Influence of the Mullah" and the punishment for a "slight," that could be meted out by a person in the Mullah's position, when a "cultural debt" or favour is offered, but not fulfilled. Beyond this we note the UN material referred to above, in relation to the treatment of young women as well. We also have considered that the PSG, as defined, exists in that its members share a common immutable characteristic, which they are not in a position to change without there being a breach of core human rights, in particular the right to marry persons of their own choice (Article 23(3) ICCPR,1966).

59. As was established in **Shah and Islam,** and later in **Horvath**, by the House of Lords, persecution by non-state actors, must involve both a real risk of serious harm and also a failure of state protection: P = SH + FSP. We have established that we consider there would be a risk of serious harm from both the appellant's father and the Mullah. Would there also be a failure of state protection in this situation? We are satisfied that, from the objective evidence, at the required level of proof, that there would be a failure of state protection. In this regard we agree with the conclusion of the Adjudicator (paragraph 20 of his determination). The whole nature of the Iranian authorities attitude to the treatment of women as shown by the objective evidence, illustrates a real risk that the state, or authorities acting in the name of the state carry, out actions, either through their own activities, or operation of the law, with impunity, against women at a level of intensity that is clearly discriminatory. The UN

material set out above clearly shows this. That discrimination effectively condones behaviour by men in situations akin to that of the father and the Mullah. Indeed, particularly in the case of the Mullah, the evidence indicates that the Mullah would use the organs of the state to extract his retribution or revenge upon the appellant. The risk of that happening is, on the evidence accepted here, beyond being remote or speculative and is, in our conclusion, well-founded.

60. Our conclusions, therefore are that not only is this appellant at risk of being seriously maltreated for reasons of personal retribution or vindictiveness on the part of her father and the Mullah, which self evidentily, are not Refugee Convention reasons, but, given the discriminatory attitude of the state to young women, in the appellant's situation, there would be a failure of state protection. In this case we consider the nexus between the Convention reason and the persecution is provided by the failure of state protection. Thus, while in this case the risk of serious harm may arise for predominantly non-Convention reasons, because persecution includes, within it, a failure of state protection, (which would not be available in this case) the required causal nexus is established. Accordingly we find that the appellant is at a real risk of persecution for reasons of her membership of the particular social group we identify.

61. For clarity we refer back to the formula set out in **Shah and Islam:** P=SH+FSP. We note there must be a nexus between the persecution and the Convention reason. The persecution, in this case arises from the combination of serious harm and the failure of state protection. There is here a clear linkage between the membership of the particular social group and the failure of state protection and thus, logically the necessary causal nexus is established. In other words the nexus can arise through either limb of the above formula.

62. For a useful and instructive discussion on the logic we have adopted we have been assisted by the New Zealand decision in **Refugee Appeal No. 71427/99**. Additionally, we find that similar reasoning is apparently adopted by the Court of Appeal in the very recent decision of the Lord Chief Justice in **P and M**. At paragraph 37 of that judgment (in the Decision section) the Lord Chief Justice states:

> "… if the position was not made clear by the decision of Shah and Islam, it is clear by the decision of the Australian High Court in *S v MIMA* [2004] HCA 25, that we would apply also in this jurisdiction. The Adjudicator's decision was correct on her findings of fact as to the position of women in Kenya and society. Secondly, the Adjudicator properly identified that that constituted persecution. Thirdly she

concluded that persecution feared was due to P's membership of the social group. *It was also because of the membership of that social group that she would not receive adequate protection from the police, who on behalf of the state had the responsibility for providing protection for her*. Fourthly and finally, the Adjudicator was entitled to find that P's fear of persecution was well founded." (Italics added)

63 The sentence we have placed in italics we consider confirms the reasoning that the nexus can arise either through the serious harm or failure of state protection. Further acceptance of this appears to be set out in paragraphs 44 and 45 (particularly the first sentence) where the Lord Chief Justice appears to accept the submission made by Mr Kovats, on behalf of the Secretary of State in that case.

64. Further support for our analysis is given in the UNHCR Guidelines on International Protection 'Membership of a particular social group' (7 May 2002) referred to above in paragraphs 22 and 23 which state:

> '22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State's unwillingness to protect her for reasons of a Convention ground.
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> 23. The reasoning may be summarised as follows. The causal link may be satisfied: (1)where either there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.'

65. We consider, given the autocratic and theocratic nature of the Iranian state, and the Mullah, who is one of the parties that the appellant is at risk from, that the Convention reason of "religion" may also be arguable. However, in this case, as we have found that the risk of being persecuted has been established for reason of membership of a particular social group it is unnecessary for us to go on and give that consideration, particularly as this was not argued before us.

66. However, before leaving the issues involved in cases, where it is argued that women, or various classes of women, are being persecuted for reasons of membership of a particular social group, we note that the above analysis and our following comments may assist Adjudicator's in these gender related claims. We observe from experience that such cases often appear to become, bogged down, in pedantic, and often unnecessary, argument as to definition of the particular social group.

67. There are two fundamental questions that need to be asked in all these cases. The first is, even if it is accepted and/or assumed that women, or various sub categories of women, in a particular country can constitute a PSG, are they being persecuted for reasons of being women, in that country? In such a situation, while it may be clear that being a woman is an inherent and innate characteristic, not capable of change, and is obviously recognised as a group by the society, the reasons for the persecution are not because they are women in their country of nationality, but because of vindictiveness or attitudes of some men, and sometimes other women as well, who abuse them. In other words the reasons for the serious harm question should be addressed and answered first. Then, in cases where the harm is not from the state, and a real risk of harm is established from a non state actor, the issue of whether there will be a failure of state protection must then be considered. At this point the whole analysis of discrimination at the state level and possible failure of state protection, should then be carried out, as was done in **Shah and Islam**, and usefully in cases from Somalia in the recent decision of **HN.** If there is valid state protection (at the **Horvath [2001] 1 AC 489** level) clearly protracted analysis of what the PSG definition might be is an irrelevant exercise.

67. We must now turn to the final issue of internal relocation. The Adjudicator considered this was open to the appellant. Unfortunately he provided no reasoning for this conclusion. He did concede however that she might find it difficult to obtain housing and employment on her return. We consider that the Adjudicator's analysis is insufficient. It overlooked the position in Iranian society of both the appellant's father and more particularly, the Mullah. As noted, both are members of the LEF.

The Mullah is the head of a Bureau. There is thus a reasonable likelihood that he could contact officials at the airport to watch out for the appellant, for example by way of a mere noting of computer records, let alone possible contacts that may have been made with the Iranian embassy in the UK (as claimed in the evidence). Additionally, a similar request could be made to other members of the LEF throughout Iran. Effectively, therefore the risks to this appellant are greatly heightened by the state authorities and mechanisms available to both of the appellant's potential persecutors. Beyond this, even if the appellant were able to pass through the airport, as soon as she endeavoured to engage with any local security or police, for example if she wished to marry another man, the risk of this being relayed to her father, or the Mullah, becomes realistic, rather than speculative. In this situation therefore we do not consider that an internal relocation alternative is realistically available to this appellant. There is a reasonable likelihood of her being exposed to risks of persecution that cannot be realistically avoided by her relocation to other parts of Iran, on the evidence in this case.

69. In conclusion, therefore, we set out our findings on each issue;

i) There are substantive material errors of law in the determination of the Adjudicator.

ii) We are able to reach our own conclusions on the totality of the evidence before us, including substantive objective evidence and jurisprudence, not provided to the Tribunal in **ZH**. We were also able to rely on the accepted credibility of the appellant's own evidence.

iii) There are substantive reasons for concluding there is a real risk of a breach of Article 3 of the ECHR if this country returns this appellant to Iran. Noting the logic from the starred determination of the Tribunal in **Kacaj*** we consider that this appellant would also be at a reasonable likelihood of being persecuted on return to Iran.

iv) The real risk of this appellant suffering serious harm on return to Iran is primarily for non-Convention reasons (the vindictiveness and retribution of the appellant's father and the Mullah). However, as we consider there would also be a failure of state protection against that serious harm, we find that there is a causal nexus between the persecution (accepting that: Persecution = failure of state protection + serious harm) and her membership of a particular social group. We find therefore that the appellant is at a real risk of being persecuted for reasons of her membership of a particular social group namely: "Young Iranian Women who refuse to enter into arranged marriages ".

v) The findings of the Adjudicator in relation to internal relocation are substantively flawed as they lack reasoning. We find that an internal relocation alternative is not available to the appellant in the circumstances of this case.

vi) We find therefore the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention and there is a real risk of a breach of Article 3 of the ECHR.

70. The appeal is therefore allowed.

A R MACKEY
Vice President
Approved for electronic promulgation