Upper Tribunal
(Immigration and Asylum Chamber)

KA and Others (domestic violence – risk on return) Pakistan CG [2010] UKUT 216 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 21 and 22 April 2010

Before

MR JUSTICE STADLEN
SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE KEKIĆ

Between

KA
AA
IK

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Fripp, Counsel instructed by Paragon Law Solicitors
For the Respondent: Mr C Bourne, Counsel instructed by the Treasury Solicitor

i. *In general persons who on return face prosecution in the Pakistan courts will not be at real risk of a flagrant denial of their right to a fair trial, although it will always be necessary to consider the particular circumstances of the individual case.*

ii. *Although conditions in prisons in Pakistan remain extremely poor, the evidence does not demonstrate that in general such conditions are persecutory or amount to serious harm or ill-treatment contrary to Article 3 ECHR.*

iii. *The Protection of Women (Criminal Laws Amendment) Act 2006 ("PWA"), one of a number of legislative measures undertaken to improve the situation of women in Pakistan in the past decade, has had a significant effect on the operation of the Pakistan criminal law as it affects women accused of adultery. It led to the release of 2,500 imprisoned women. Most sexual offences now have to be dealt with under the Pakistan Penal Code (PPC) rather than under the more punitive Offence of Zina (Enforcement of Hudood) Ordinance 1979. Husbands no longer have power to register a First Information Report (FIR) with the police alleging adultery; since 1 December 2006 any such complaint must be presented to a court which will require sufficient grounds to be shown for any charges to proceed. A senior police officer has to conduct the investigation. Offences of adultery (both zina liable to hadd and zina liable to tazir) have been made bailable. However, Pakistan remains a heavily patriarchal society and levels of domestic violence continue to be high.*

iv. *Whether a woman on return faces a real risk of an honour killing will depend on the particular circumstances; however, in general such a risk is likely to be confined to tribal areas such as the North West Frontier Province (NWFP) and is unlikely to impact on married women.*

v. *Pakistan law still favours the father in disputes over custody but there are signs that the courts are taking a more pragmatic approach based on the best interests of the child.*

vi. *The guidance given in SN and HM (Divorced women – risk on return) Pakistan CG [2004] UKIAT 00283 and FS (Domestic violence – SN and HM – OGN) Pakistan CG [2006] 000283 remains valid. The network of women's shelters (comprising government-run shelters (Darul Amans) and private and Islamic women's crisis centres) in general affords effective protection for women victims of domestic violence, although there are significant shortcomings in the level of services and treatment of inmates in some such centres. Women with boys over 5 face separation from their sons.*

vii. *In assessing whether women victims of domestic violence have a viable internal relocation alternative, regard must be had not only to the availability of such shelters/centres but also to the situation women will face after they leave such centres.*

DETERMINATION AND REASONS

1. Our decision on these appeals is one on which we all agree and also one to which each member of the panel has contributed substantially. The first appellant (hereafter "the appellant") is a national of Pakistan born on 10 April 1981. The

second and third appellants are her daughters. They are also nationals of Pakistan, born on 7 May 2003 and 24 January 2007 respectively. On 20 August 2006 the appellant arrived in the UK, illegally it would appear, accompanied by the second appellant. She claimed asylum on 29 August 2006 avowing that she had a well founded fear of persecution if returned to Pakistan on the basis that she would be pursued by her abusive husband, that she would be detained and prosecuted as a result of false adultery and attempted murder charges he had filed against her and that she would be ill treated in prison. She also argued that she would lose custody rights to her child. On the same basis she argued that her removal would breach her human rights.

2. On 16 January 2008 the respondent refused the application and made a decision to remove her and her daughters as illegal entrants. On 28 January 2008 the appellants gave Notice of Appeal and their appeals were heard by Immigration Judge (IJ) Buchanan at Birmingham on 28 February 2008. The IJ found that the appellant's evidence, as outlined in her asylum interview and further expanded upon in her witness statement, was true. He found the First Information Report (FIR) she had produced to be a genuine document. That report said that the appellant had been accused of adultery with a man called YK and also attempted murder of her husband's servant who was said to have seen them commit adultery. He accepted that at the time the appellant left Pakistan she had a well founded fear of persecution on account of being a member of a particular social group, namely a woman charged with committing adultery, and that she would have been at real risk of imprisonment under the Hudood Ordinances. He also found that at that time, if re-arrested, she would have had difficulty in obtaining further bail. He concluded however that there was no risk at the time of the hearing because of the introduction of the The Protection of Women (Criminal Laws Amendment) Act, 2006 (hereafter "PWA"; some texts refer to it as "WPA")) which repealed those parts of the Hudood Ordinances that related to charges of sexual misconduct, in particular the Offence of Zina (Enforcement of Hudood) Ordinance 1979 (hereafter the "Zina Ordinance"; zina is a generic term covering adultery and non-marital consensual sex including consensual sex between a married and unmarried person). He found that the appellant would have effective protection against her husband and that she would not be at risk of an honour killing as the evidence suggested that they occurred in rural parts of the country whereas the appellant lived in Lahore and came from a relatively wealthy background. He found that she could also obtain shelter in a state run Darul Aman (house of peace). His determination dismissing the appeals was promulgated on 5 March 2008.

3. On 13 March 2008 an application for reconsideration was filed by the appellants' representatives; issue was taken with the IJ's findings on the effect of the PWA. On 27 March 2008 Senior Immigration Judge (SIJ) Latter ordered reconsideration.

4. A Case Management Review (CMR) hearing took place on 25 September 2008 before SIJ Gleeson when it was agreed by the parties that the appeal would be

suitable for possible country guidance on the effect of the PWA and related issues. The matter was then listed before a panel on 8 January 2009. Following that hearing, it was decided by SIJs Southern and Ward and Mrs Harris that the IJ had made a material error of law. A full transcript of their decision is annexed to this determination but in summary the panel found that the judge's findings as to the effect of the Act were fundamentally flawed and inaccurate. He appeared to have concluded that the prospect of an adultery charge had fallen away altogether whereas the evidence before him suggested only that the process of prosecution may have changed. He found there was no remaining risk of imprisonment without dealing with the evidence before him pointing to there remaining a risk of imprisonment on conviction even before a secular court. It was considered that the IJ also appeared to have overlooked the fact that, even if he were correct to find that the adultery allegations had fallen away, the appellant still potentially faced arrest because the other allegations in the FIR remained outstanding. As, on the findings of the IJ, the appellant had absconded from bail, the prospects of being readmitted to bail should she be arrested on return should also have been considered.

5. The Tribunal found that the appellant should not be deprived of the acceptance of her factual account and therefore, with the agreement of the parties, it was held that the starting point for the reconsideration hearing would be the following findings:

    - that the appellant's account, as outlined in her asylum interview and further expanded upon in her witness statement, is true (this evidence is summarised below);
    - the FIR is a genuine document;
    - the medical report relating to the appellant's father is also genuine; he suffers from a heart condition which existed since 1993. However, it was noted that the document did not support the appellant's claim that his condition had deteriorated markedly since the time of her arrest.

6. A further CMR Hearing took place on 8 April 2010 before SIJ Storey.

7. At the conclusion of the two-day hearing before us the parties were given extra time to submit further comments from two of the experts instructed in these appeals, Dr Lau and Dr Shah, addressing several questions raised by the Tribunal that had been referred to in earlier submissions and to make further submissions.

APPELLANT'S CASE

8. The appellant's case is set out in her asylum interview of 19 January 2007, in three witness statements dated 25 February 2008, 28 April 2009 and 22 April 2010 and in the oral evidence she gave before the IJ and before us.

9. The appellant's screening interview which took place on 29 August 2006 was concerned mainly with her method of entry and travel arrangements; however the appellant did state that false allegations had been made against her and she had spent two days in prison.

10. Her asylum interview took place on 19 January 2007. She said she had claimed asylum because her husband had filed a false adultery case against her on 21 July 2006. She stated that she had been arrested on that date by the police. Her husband made allegations that he may not have fathered the appellant's unborn child.

11. The appellant claimed that her father was a retired employee of State Life Insurance. She stated that he was financially comfortable, if not well off. Her husband was a student. His father was a lawyer. Their marriage had been arranged. She stated that they argued a lot and he was not happy that their first child had been a female. She stated that her husband had slapped her once when she asked him not to smoke near their child and had beaten her on another occasion when she had joked with a charity worker collecting funds for Imran Khan's Hospital.

12. The appellant maintained that she had been arrested by four policemen at her parent's house where she had taken refuge after an argument with her husband. She was detained for two days. Her father paid a lawyer Rs.50,000 to handle her case. She also claimed that her father paid money to the police. She was released on bail and told "to stay here". She left the country on 20 August 2006. She claimed that her husband would kill her and marry again or make her his servant if she returned.

13. The appellant maintained that her husband had threatened her father and brother, warning them not to interfere. The police had been to her father's house on two occasions but he had informed them that she had left the country. Her father sold some of her gold and some of his land to raise the six lakh rupees required for her journey. She had taken her gold with her to her father's house when she left the marital home. She had no problems leaving the country. She used a passport to which she was not entitled. An agent made the necessary arrangements.

14. The appellant's first witness statement, prepared on 25 February 2008, was a response to the Secretary of State's refusal letter. In it the appellant maintained that she was married on 15 March 2001. Her parents arranged the marriage and it was held at their house. Her husband turned out to be a cruel man and she left his house on 21 July 2006, having decided not to return to him. Her husband

registered false allegations of adultery against her out of anger and because he considered that she had brought shame upon him by leaving. She maintained that she was arrested by the police on the same date and was interrogated and harassed at the police station. She described the conditions as "very dreadful" and the police officers as "mean and humiliating". On 23 July 2006 she was released on bail. She maintained that this was because her father had instructed a lawyer and also because the charges brought against her were still under investigation. Her father acted as a surety and money was paid. She was granted police bail. It was her lawyer's advice that once she was charged under Hudood law, she would be unable to get bail and he would be unable to help her. In the meantime, he warned that she would be re-arrested and would remain in custody pending a decision in her case. The punishment for adultery was a lengthy period of imprisonment or death. Following investigation, she stated that the case was sent to the divisional police officer and charges were brought against her under Hudood law on 31 July 2006. She maintains that she was charged with the offence of adultery and her case was sent to court on 31 August 2006.

15. The appellant maintained that she would be unable to obtain protection in a woman's refuge. Her father had visited a Darul Aman and had been told that she would not be admitted because of the pending FIR. She stated that after she obtained bail she went to stay at her father's friend's house and remained there in hiding until her departure.

16. The appellant stated that her father's health had deteriorated. She said her husband continued to visit her parents' home since her departure. Her mother, at the appellant's request, visited the police station to obtain a copy of the FIR.

17. The appellant's statement of 2009 provided information of recent events. In it she maintained that her father is very ill, that he has a heart condition and suffered a stroke in 2007 after the FIR was registered. In December 2008 he suffered a heart attack and now requires surgery but is having difficulty in raising the necessary funds. She maintained that he is no longer able to work. He is cared for by her mother. Her brother had ceased his further studies as they cannot afford the fees. He, too, was without work and financially dependent upon their parents.

18. The appellant maintained that she would be arrested upon return to Pakistan and that even if she were not, she would still be at risk from her husband. She would find it difficult to live away from her parents. She had no experience of working or living independently. The family friend who had previously assisted her was now reluctant to help because of a fear of the police. The appellant had remained in touch with her family and had heard that shortly prior to her father's heart attack, the police came to the family home making enquiries of her whereabouts. They were told that the appellant's whereabouts were unknown. The appellant maintained that her parents may not have disclosed other possible incidents to her so as not to worry her. Nevertheless they had told her that her husband often telephoned and threatened them. He also drove by their house blowing his horn

and gathered with friends outside in order to intimidate them. The appellant believed that if she returned he would seek revenge for the damage to his honour and would seek to obtain custody of their children. She maintained that the Pakistani courts are biased against women and that her situation with regard to custody would be made more difficult if she were imprisoned or forced to seek refuge in a shelter. If they were imprisoned with her, it would be damaging to her children's welfare.

19. The appellant stated that it is easy to bribe the police in Pakistan and that they are unwilling to become involved in family disputes.

20. In a statement prepared during the hearing the appellant sought to clarify matters raised during the course of the hearing by the Tribunal. She confirmed she has never worked either in Pakistan or in the UK. She maintained that she did not complete secondary schooling but would like to study in the UK so as to be able to work and support herself and her daughters. She maintained that her brother worked part time giving lessons to students but was no longer doing so. He spent little time at home. She had two paternal aunts who lived with their husbands in Sialkot but they were not close to the family. A maternal aunt lived in Lahore but would be unable to provide shelter as the appellant's husband was aware of her place of residence.

21. The appellant's father has no funds to instruct a lawyer and in any event his health would not allow him to do so. Her parents live on her father's pension. The police have been to the family home about twice in the year up to March 2010. The appellant's husband still harasses her parents although this is less frequent.

22. In her subsequent oral evidence to this Tribunal the appellant adopted her most recent witness statement and confirmed that the contents were true and accurate. She stated that she did not know anybody called YK (the man named in the FIR as her co-adulterer) and was not aware of anyone being punished as a result of the allegations her husband had made.

23. In cross-examination she was asked to explain what she meant by her claim that her brother spent "little time at home". She replied "he is out with his friends". She did not know whether he lived with them but said he did not come home every day. She stated he had no permanent work. He had been giving tuition but no longer did so. She was unable to comment on how he supported himself financially.

24. The appellant stated that her father had two sisters who were both married and lived with their husbands. When she was in Pakistan she had been aware that they had enough to feed their family. Both their husbands were employed but she did not know their occupations. She stated that her maternal aunt was also married; this woman's husband worked sometimes but she did not know their situation at the present time.

25. In response to questions from the Tribunal the appellant stated that between December 2008 and the present day, the police had visited her family home 3 times. She stated that her father had retired when she married and had been on a pension ever since. She did not think he owned any property either now or at the time she left the country. She was reminded that she had stated at interview that he had sold "some" of his land to fund her journey and she was asked what had happened to the rest of it. She stated she did not know. Although recorded as having said at interview that her father had paid a lawyer to cover all the proceedings, she stated she did not know whether this was so. She was also unaware of what had happened to the family gold, some of which had been sold to pay for her journey. She assumed it had been sold.

The expert evidence

26. The Tribunal had the benefit of expert evidence from three individuals, Drs Lau and Balzani being instructed by the appellants' representatives. Dr Shah being instructed by the respondent.

Dr Lau: written report

27. A Barrister and Reader in Law at the School of Law of the School of Oriental and African Studies, Dr Lau's areas of expertise include Islamic law. He is chief examiner for Islamic Law of the external LLB of the University of London and his current position involves intensive research on modern Pakistani law. He prepared two reports for these appeals. In his main report of 5 April 2010 Dr Lau explains that although in Pakistan any zina (sexual intercourse outside marriage) is a crime, the matter is complicated because Islamic criminal law provides for different punishments for the offence. This is because there is a distinction between offences against God (hadd), for which punishments are prescribed in the Koran and offences against the public good which are defined by the state (tazir) and for which the state prescribes suitable punishment. The punishments depended on the kind of evidence available to prove the offence.

28. Dr Lau further explains in his main report that following the coming into force of the PWA (on 1 December 2006) the release of all women in prison under accusations of zina was ordered. He reports that by and large there has been compliance and that only very few women, if any, remain detained under the Zina Ordinance. He noted that prior to the PWA, the majority of zina cases ended with the acquittal of the accused woman. To his knowledge, there were no zina cases pending before any court in Pakistan.

29. He notes, however, that the amendment of the Zina Ordinance is controversial with some arguing that it would cause moral decline and others complaining it had not gone far enough. (Dr Lau's report also stated that the appellant could not be prosecuted under s.10 of the Ordinance because it no longer existed; however,

he retracted that statement in his second report and in his oral evidence). He confirms that the appellant could not be prosecuted under the hadd laws because the FIR mentions only one eyewitness to the alleged adultery and not the required four. In his view the charge of adultery cannot be re- formulated as a charge of fornication and so the appellant could not be prosecuted on that latter basis. If the appellant's husband sought to file another FIR alleging that the lesser offence of fornication had been committed, Dr Lau's view is that the appellant could successfully apply to the High Court to have it struck down since the alleged offence has already been recorded in an existing FIR.

30. With regard to the attempted murder allegation, Dr Lau notes that this was brought under s. 324 of the Pakistan Penal Code (PPC) and carries a maximum of 10 years of imprisonment. He considers that there is nothing to suggest that the appellant would not have to face these charges if returned to Pakistan.

31. Dr Lau notes that the appellant was granted bail but violated her bail conditions by removing herself from the jurisdiction of the Pakistani courts. In his opinion, she is very likely, therefore, to be arrested and detained on remand if returned to Pakistan. He considers that if refused bail, there is a risk she could be held in custody for several years especially if she is convicted by the trial court and had to appeal her conviction to the High Court.

32. On the issue of whether the appellant would be likely to receive a fair trial, Dr Lau notes that whilst trials in the higher courts are generally considered fair, no such assurances are available for the lower courts, often criticised for being vulnerable to corruption.

33. Dr Lau expresses the opinion that on the whole Pakistani police are considered corrupt, brutal and abusive, especially towards women. He considers that despite the official pronouncements and promises of reform, there have been hardly any improvements. He relies on the Country of Origin Report (COIR) of February 2010 which records human rights abuses being committed by the police and the frequent failure to punish such abuses creating a climate of impunity. He cites reports of police torture and mistreatment, extrajudicial killings, arbitrary detention, the acceptance of bribes to file or withdraw charges and the extortion of money from prisoners and their families. There were reports of many women and girls being held at police stations without any cases being registered against them and of many domestic servants being beaten up and humiliated by police officers to extort confessions of theft and other crimes. Several women reported being raped in police custody; some were held so that medico-legal checkups were delayed and incriminating evidence of any sexual assault was lost. Dr Lau considers that there are no effective mechanisms to prevent police misconduct. He finds that although a few cities have introduced measures such as female only police stations, these are piecemeal in nature and would not assist the appellant.

34. Dr Lau considers that there is a risk of the appellant becoming a victim of an honour crime committed by her husband or one of his relatives to restore the honour of the family damaged by the appellant's alleged adultery. He notes the patriarchal system in operation in Pakistan and the endorsement of Jirga systems which provide a licence to men to inflict violence and murder on their female relatives in the name of honour.

35. He reports that prison and pre-trial detention conditions are very poor.

36. He states that he is unable to provide an opinion on the position of the appellant's children whilst she is awaiting prosecution or during prosecution, although on the issue of child custody, he considered that the courts adopt a pragmatic and tend to be guided by what they regard to be in the best interests of the child. In his experience Pakistani courts generally award custody to the mother in spite of the fact that Islamic law favours the father. He considers, however, that if the appellant was convicted of attempted murder, it would be very likely that she would lose custody of the children, whereas if acquitted she would be likely to be awarded custody. He considers it possible that the appellant's husband might be able to bribe police officers and/or judiciary to take his side on the issue of custody but he points out that an individual need not be influential to bribe the authorities in this way; he just needs money. He states that it would be unlikely that a court would forbid the appellant from having any contact with her children.

37. On the issue of internal relocation, Dr Lau considers that this would not be possible for the appellant as she stands accused of a serious criminal offence and would be a wanted woman in Pakistan. He considers that it would be very unlikely that the appellant would be able to avoid detection and arrest for very long and points out that she would come to the notice of the authorities simply by entering the country (as we shall see, his oral evidence resiled from this last assertion).

38. Dr Lau reports that prior to 2006 the majority of zina cases ended with the acquittal of the accused woman albeit that she would have spent many years in jail awaiting the outcome of her appeal.

39. A second report by Dr Lau, prepared on 14 April 2010, focuses on giving a response to Dr Shah's report of February 2010 (to which we shall come in a moment). In it he states that he now agrees with Dr Shah that s.10 of the Zina Ordinance continues to apply to the appellant because the FIR was filed before the amendments to the Ordinance became effective. He disagrees with Dr Shah, however, on the risk of return noting that despite the changes governing the procedure surrounding allegations of adultery, the availability of bail and the requirement that an arrest could only be made on the basis of a court order, the appellant was arrested by the police without any court order suggesting that the procedures introduced in 2004 are not always followed. He also takes issue with

Dr Shah's assessment of the situation in Lahore and points out that at least 50% of the population of that city live in squatter camps. In his view the fact that the appellant's husband was able to file an FIR against his wife on false allegations, indicates that he is influential and determined to harm her. He disagrees that the presence of NGOs in Lahore would offer protection to the appellant and he also rejects Dr Shah's suggestion that a single woman would be able to obtain accommodation and employment in one of the large cities. In his experience, there were very few women living on their own and it was usual for divorced women to return to their parents or live with other members of their extended families.

Dr Lau: oral evidence

40. Dr Lau said that an FIR was the first step in a criminal case. Once a complaint is recorded in such a report and registered at a police station, it cannot be extinguished unless the matter goes to court and it is found there is no case to answer or (on an application) the High Court makes an order quashing it. However, an FIR is an accusation not a charge document. Its registration imposes on the police only a duty to investigate and where the investigation merits it, to bring the matter to a court. In practice there are many stale or stagnant FIRs. When considering whether to take the FIR to a court the police consult lawyers (assistant advocates), but they are part of the police service, they are not independent prosecutors able to apply an independent filter. They draw up a draft charge sheet based on the FIR, which is presented in court.

41. Criminal cases in most of Pakistan (including Lahore) are heard in the trial or Session Courts with appeals lying onwards to a Court of Appeal, the High Court and the Supreme Court. In relation to certain matters governed by Islamic law, including zina, appeal lies to the Federal Sharia Court. The latter is a very powerful court. It is currently quite liberal, but there is no guarantee, under mounting pressure from Islamists, that this will continue.

42. On the basis of an FIR and their duty to investigate, the police have powers of arrest and bail. The police can release on bail and it is even possible to apply for pre-arrest bail, so no arrest takes place at all. The PPC distinguishes between bailable and non-bailable offences, the latter only allowing for bail to be granted at the discretion of the court.

43. So far as women are concerned an amendment made in 2006 to s. 347 of the Code of Criminal Procedure (CCP) by Ordinance XXXVI (otherwise known as the Law Reforms Ordinance, see COIR, February 2010, 11.48) accorded them a right to bail except in three sets of circumstances "relating to terrorism, financial corruption and murder". In his view the murder exception includes attempted murder under s.324 of the PPC. If any of the exceptions applies bail might still be granted but only at the discretion of the judge. When applying for bail there is state provision for help from government-appointed lawyers, but good legal help costs money. If appeals have to be made to the High Court even a middle-class family might not

be able to afford to find lawyers qualified to appear there (although some public-minded elite lawyers do some of this type of work pro bono).

44. Dr Lau opined that even if only detained for one night in police detention, that will tarnish a woman's reputation. If a woman with children is detained for any period either her children will have to be looked after by members of her family or guardians will be appointed.

45. The PWA 2006 was passed in order to address the widespread abuse and misuse by men of adultery charges against women (failed rape charges brought by women could be converted by their husbands into adultery allegations which had led to many women being incarcerated and convicted by lower courts on very flimsy evidence - only to be eventually acquitted by the Federal Sharia Court). The PWA had led to a number of changes: many women had been released from prison and men who press new charges of adultery that fail can now find themselves prosecuted for making false accusations. He believed, however, there was a real risk in the coming years that the Federal Sharia Court might strike down all or some parts of the PWA.

46. Dr Lau said that he now agreed with Dr Shah that an accusation in an FIR of an offence of zina under s.10 of the 1979 Zina Ordinance would still be prosecutable in the Pakistani courts, notwithstanding that the 2006 Act had now abolished it. However, the appellant's eligibility for bail would be decided according to the reformed legislation.

47. Dr Lau said that he did not think that being a woman would prevent someone getting a fair trial, but it was only at the level of the higher courts that judicial standards were adequate and much, in any event, depended on the social standing and reputation of the accused.

48. In Pakistan there was a vibrant NGO culture, but their resources were small in comparison with the level of unmet legal needs.

49. He did not consider he had any expertise on women's shelters, but he had visited the Panaj Centre in Karachi in early 2010. It had been a government-run centre (Darul Aman) but had latterly been taken over by a local NGO. It was well-run but his understanding was that most were badly run and not much better than prisons. He considered that it was doubtful such a shelter would accept a woman facing a charge of attempted murder.

50. Whilst honour killings were now criminalised and courts could impose punishments irrespective of any agreement between the accused and the victim's family, honour killings could often still be hidden away or presented as a domestic accident.

51. In cross-examination Dr Lau reiterated that FIRs can be a source of harassment. It is easy to bribe the police to file an FIR. Whilst many FIRs lie on the file and nothing happens, it would be easy for the appellant's husband to reactivate his, if she was to return. If, however, she were to return to another part of Pakistan, he did not think the police would be likely to know, as there is no central register of FIRs. If her husband were to learn that she had returned to another part of Pakistan, the police in Lahore could take steps to have her arrested and returned to Lahore.

52. In answer to questions from the Tribunal about the criteria used by the courts to decide whether to exercise their discretion to grant bail, Dr Lau said the three main considerations were (1) the seriousness of the offence; (2) danger to the public; and (3) the risk the accused would interfere with the criminal trial. But someone in breach of bail conditions would find it difficult to get bail, albeit being a mother with two children would be a factor in a woman's favour.

53. He was not confident that the proviso introduced by Ordinance XXXVI stating that (subject to three exceptions) a woman could not be imprisoned for more than six months was absolute, as there were cases of women held on remand for several years.

54. He reiterated his disagreement with the view stated in Dr Shah's report that women would go to the police for help. Nor did he agree with Dr Shah's opinion that in Lahore all cases in which the police were accused of persecutory conduct were taken seriously. The UK Parliamentary Fact Finding Mission in which he had been involved early in 2010 had found some cases where government officials (including in Lahore) had acted wrongfully.

55. Dr Lau agreed that for a court deciding whether to grant bail one factor was the strength of the case. If in the appellant's case there was, for example, a witness statement from the servant, that might make it strong enough. He did not think that at the level of trial courts there was a risk of an unfair trial, although judges could be influenced by bribes and threats. He had limited knowledge of prison conditions although as part of the new human rights culture the courts have tried to highlight poor prison conditions.

56. Dr Lau agreed that government-run women's shelters dealt with women transferred to them by a court order and so would accommodate women facing criminal charges, but he still thought that the fact that the appellant faced a serious charge of attempted murder would count against her being sheltered. For women who have been put on trial, even if later acquitted, their reputations were compromised in the eyes of society. If their families rejected them, they could be forced to try and survive on their own in large cities or towns, some ending up in prostitution.

57. On the second day of the hearing Dr Lau gave further evidence regarding a "Note" he had prepared after discussions overnight with Dr Shah designed to clarify the one real point of disagreement between them on points of Pakistani law: In the light of a further case shown to him by Dr Shah since he prepared his "Note" he accepted that an FIR pre-dating the 2006 WPA would proceed under the "old" s.10 zina.

58. In further evidence given on the second day of the hearing, the only continuing area of disagreement between Dr Lau and Dr Shah concerned the amendment of s. 497 of the CCP by Ordinance XXXVI. Dr Lau considered that the reference to 10 years imprisonment meant "up to 10 years", not "10 years or more" (as Dr Shah contended). In relation to the Tribunal's query as to whether this provision imposed an absolute prohibition on a woman being detained beyond six months, he considered that terrorist cases would be dealt with under separate anti-terrorist laws. He suspected that in any case lower court judges would not necessarily apply this safeguard and so it would be left to applicants to appeal higher to get their continuing detention quashed. He confirmed that it was his view that if the FIR against the appellant was accompanied by a witness statement from the servant, that would constitute "reasonable grounds" for both possible arrest by the police and probable denial of bail by the courts. Risk of absconding would also be a relevant factor. However, he did not think there were any centralised records kept of people who had absconded.

59. In further cross-examination Dr Lau agreed that one possible court reaction to a previous record of having absconded would be to impose more stringent bail conditions and not necessarily to refuse bail.

60. In response to further questions posed by the Tribunal in a memorandum sent to the parties shortly after the hearing Dr Lau prepared a short supplementary report commenting on Dr Shah's answers to the same.

Dr Balzani: written report

61. Dr Balzani is a Reader in Social Anthropology at Roehampton University, an Associate Lecturer with the Open University and currently chief examiner for the Anthropology A-level. Her CV emphasised that she was not a lawyer by training but during the course of her career she has taken a specialist interest in South Asia where she has conducted extensive ethnographic fieldwork, as well as amongst the settlers who have established themselves in the UK. She had written two reports for this case, one in October 2008, and the other on 20 March 2010. Both make frequent references to recent major country reports on Pakistan. The second was, she wrote, partially collated from responses she had received from two contacts in Pakistan, Mr Jamal Asad, Advocate in the High Court in Lahore and Hina Jalani, the Special Representative of the UN Secretary-General on the situation of human rights defenders, and Advocate of the Supreme Court of Pakistan. In her written reports Dr Balzani makes clear that in her opinion the

appellant would be at risk of arrest and imprisonment as a result of the FIR registered against her and she may find that her children are given in custody to their father or taken into care while she awaits trial and possibly serves a prison sentence. She would continue to be at risk of physical violence from her husband and his family. If her husband was determined enough and had sufficient resources he could track her down in Pakistan. Even if one of Pakistan's women's shelters took her in, they are dysfunctional and themselves constitute a risk of harm, as was made clear by a 2008 report by the South Manchester Law Centre, Safe to Return?: Pakistani women, domestic violence and access to refugee protection – a report of a transnational research project conducted in the UK and Pakistan. Once her father died her brother may well decide not to help her and it was he who was most likely to inherit any property, land or money belonging to their father. She would find it extremely difficult to live alone for any length of time in Pakistan; only those who are economically secure and have a good network of family and friends for support can manage this. As a lone woman who needed to work to feed herself and her children the appellant would be more vulnerable to harassment and sexual abuse. The social consequences of an accusation of adultery for a woman were serious; many of the women who were accused of moral crimes pre-2006 had their lives blighted by these accusations and even if exonerated by the courts were unable to return home. The children of such women were also harmed by the stigma attached to the mother.

62. In addition to various observations on the legal position in Pakistan in relation to adultery, Dr Balzani's report chronicles the high incidence in Pakistan of violence against women. She believes that the appellant is at real risk of an honour crime committed or arranged by her husband or family. She is likely to face a period in detention and in both pre-trial and custodial detention prison conditions are extremely poor. Levels of corruption in the Pakistan judiciary are high particularly in the lower courts and women and children are especially vulnerable to exploitation. Dr Ballzani observes although there had not been any systematic study available to assess whether the number of cases involving women charged with the crime of adultery had decreased, the anecdotal evidence (she referred to her e-mail correspondence with her two Pakistan lawyer contacts) suggests that there has been a dramatic decrease in the registration of cases of adultery against women under the Hudood Ordinances. This appears to be based on unofficial figures collected by women's rights and human rights organisations from different police stations. Her contact, Asad Jamal, confirmed that the police and judiciary were aware of the changes and that the new procedures had been adopted across the country.

63. Dr Balzani quotes Anjali Gandhi of the European Union of Public Relations as stating in August 2004 that 88% of women in prison in Pakistan were there as a result of the Zina Ordinance In the wake of the introduction of bail for zina offences, Dr Balzani observes in her October 2008 report that the Minister for Women's Development and Youth Affairs (Sumaira Malik) announced that following the release of female prisoners, they would be provided with legal aid,

personal and financial surety for their bail and accommodation for those who were homeless.

64. Dr Balzani opines that as the appellant does not have employment or accommodation for herself and her children, her economic situation would weigh heavily against her in court should her husband seek to gain custody of the children. Further, the children would be given in custody to their father or taken into care while she awaited trial. She acknowledged that in some cases children serve prison sentences with their mothers but considered that they may have been confined to children born there. She reflected that it was possible that the appellant's husband would seek custody not because of any fatherly affection but as one more way of causing distress to his wife and, in such circumstances, might not care for the children very well. She also suggests that the children might be at risk from their father who may well decide to kill them.

65. Dr Balzani refers to the website of the Sustainable Development Policy Unit with regard to custody of children in Pakistan. She lists several factors which it is said are considered by the courts when granting custody. These are:

- the welfare of the minor
- the age, sex and religion of the minor; the welfare of younger children is generally regarded as being in the mother's custody
- the character and capacity of the proposed guardian; courts usually reject baseless allegations against mothers
- any existing or previous relations of the proposed guardian with the minor's property
- the minor's preference (usually accepted at about nine years of age)
- whether siblings would be divided; courts prefer to keep children united
- whether either or both parents have remarried
- whether the parents live far apart
- the child's comfort, health, material, intellectual, moral and spiritual welfare; the mere fact that the mother is economically less secure than the father is not usually reason enough to deny her custody because maintenance is the father's responsibility irrespective of who has custody
- the mental and psychological development of the minor, which should not be upset by a reversal of the existing status quo.

<u>Dr Balzani: oral evidence</u>

66. In her oral evidence Dr Balzani re-emphasised that she was not a legal expert. Having had the benefit of reading Dr Lau and Dr Shah's reports, she said she would need to rethink her opinion that in Pakistan marital rape was not a crime. She continued, however, to take a different view from Dr Shah about the extent to which liberalising legal reforms had altered entrenched societal attitudes. Family structures were deeply patriarchal and women were blamed for the breakdown of

a marriage. Police and other government officials had the same values as the wider society. Whilst she did not think the appellant would be persecuted by the police, they would not be willing to protect her. The level of accountability for official abuses was limited. The NGO sector was actively helping women affected by domestic violence but their resources were limited. Honour killings were still a serious problem. In Lahore the majority of the population lived in poverty or difficult conditions and the middle classes covered a broad spectrum. In Pakistan as a whole the criminal justice system existed side by side with the traditional Jirga courts, who were groups of senior males who could act, at least in rural areas, as judge, jury and executioner.

67. As regards women's shelters, Dr Balzani said their standards were very variable, the South Manchester Law Centre report, Safe to Return? had identified serious shortcomings. For single women it would not be easy to relocate; having children would make it even more difficult. Even assuming a shelter would assist the appellant on return, the time women were allowed to stay in them was limited and finding work and accommodation thereafter would be very difficult.

68. In cross-examination Dr Balzani agreed she had no fieldwork experience in Pakistan, although she considered that her research work in the UK, which included interviews of women and men who originated from Pakistan, added to her insight. She had a paper soon to be published on the problems of domestic violence in Pakistan. She defended her statement that the appellant's father-in-law, being a lawyer, would know ways and methods, legal and illegal, to advance his son's attempts to have the appellant prosecuted. She thought that the appellant's family might be able to ensure she got help from a lawyer up to a point, but whether that would be sufficient was difficult to say. If the appellant tried to relocate she would face difficulties at every stage. The Safe to Return? report had noted that sometimes educated women found it harder to cope with relocation.

69. Asked to clarify, her comment that the retention of hadd punishments was "worrying", Dr Balzani said that she meant it created concerns about future changes given the general societal attitudes to women. She agreed that the FIR particulars in this case would not sustain a charge of adultery under hadd, but thought the details of witnesses it gave were designed to scare and worry the appellant. Whether it reflected a genuine belief or was purely malicious, she could not say.

70. In reply to questions from the Tribunal, Dr Balzani said she thought that the Safe to Return? report had been careful to explain its methodology and to produce qualitative research supported by some statistical data, but she agreed it was not a comprehensive survey of women's shelters in Pakistan. She agreed her report did not always identify her sources. She agreed her comments on inheritance law and practice needed modification, as daughters do inherit, although their shares were less than brothers.

Dr Shah: written report

71. Dr Shah is a Lecturer in Law at the University of Hull. He had practised law as an advocate in the district courts in Islamabad. His main interest was in Pakistan criminal law; His publications included a monograph, Women, the Koran and International Human Rights Law: The Experience of Pakistan (2006) Leiden: Martinus Nijhoff Publishers. Dr Shah's report of 23 February 2010 sets out the legal position of the pre-PWA Zina Ordinance on adultery, non-marital consensual sex and the evidential requirements for these offences. He explains that in 1979 General Zia Ul-Haq promulgated five ordinances one of which was the Zina Ordinance. The PWA has had a significant impact on the Ordinance. In addition, the PWA has amended several provisions of the PPC, the CCP and the 1939 Dissolution of Muslim Marriages Act.

72. There are two sets of laws dealing with sexual offences in Pakistan: the Zina Ordinance (dealing with hadd punishment) and the PPC (dealing with tazir punishment). The former distinguishes between sexual acts committed by married and unmarried persons but the latter makes no such distinction (s.496B). The result is that sexual intercourse is illegal in Pakistan except between a husband and wife. Adultery was treated as a separate offence under s. 497 of the PPC but it was repealed by the Zina Ordinance in 1979 (s. 19) and the PWA did not restore it. An individual cannot be tried for both adultery and non marital consensual sex.

73. The Zina Ordinance (s. 5) describes zina as a man and a woman wilfully having sexual intercourse without being married to each other. Section 2 of the Ordinance provides two types of punishment for zina: hadd, a fixed Islamic punishment and tazir, a punishment where the court can exercise discretion. For the purposes of punishment, the determining factors are set to be marital status, age, whether the parties to zina are sane and the number and gender of witnesses. If zina is committed by a married, sane and adult person (18 years for a male and 16 years for a female), he or she would be stoned to death in public as a hadd punishment. If a person is unmarried than the punishment is 100 lashes. A minor is liable to imprisonment for up to 5 years with or without a fine. The tazir punishment for married and unmarried persons is imprisonment of not less than four years and not more than 10 years. A fine could also be imposed. The addition of 30 lashes has been abolished by virtue of the Abolition of the Punishment of Whipping Act 1996. A case falls into the tazir rather than the hadd category when the evidential requirement of four adult male Muslims' testimony or a confession is not met. Dr Shah reports that no one has ever been stoned to death under the Zina Ordinance in Pakistan to date.

74. Dr Shah reports that the main criticism regarding the Zina Ordinance was the power of the police to register a case of zina. Police often abused their power by registering such cases on unfounded allegations, leading to the arrest and lengthy

detention of men and women. Prior to the implementation of the PWA, a case of zina was registered in a police station and any police officer above the rank of Assistant sub Inspector could investigate the matter. Following registration of a case, the usual procedure was for the police to arrest the accused, have them medically examined and record their statements. Evidence from the scene of the alleged crime was also collected and statements of available witnesses were recorded. If the investigation was not completed within 24 hours, the accused had to be produced in court. If the investigating officer considered that there was insufficient evidence, the accused was discharged; however if he was satisfied that sufficient evidence to support the complaint did exist, he was required to submit a charge sheet within 14 days after the registration of the case to a competent court. Under the Criminal Law Amendment Act 2004, the power of investigation in such cases now lies with the superintendent of police, a police officer of higher rank who is in charge of the district police force. The aim of the change was to show that cases of zina would be taken seriously and investigated by a senior police officer. The most important change is described as the prohibition of arrest by police without the permission of the court. As of 2004 it has been a requirement that the police have to establish in a court that an offence has actually been committed rather than the fact that a mere complaint has been made.

75. The effect of the PWA on the Ordinance has been to delete all zina offences other than those liable to hadd punishment, and to insert them within the PPC. Zina liable to tazir has been renamed as fornication and been inserted in the PPC and s.496B. This offence covers married and unmarried persons and is punishable with imprisonment for up to 5 years and a fine up to 10,000 rupees (hence a reduction in the sentence by half). The same punishment is accorded to the crime of making a false accusation of fornication – qazf under the Qazf Ordinance - although a court has the discretion not to pass any judgment in this regard.

76. Dr Shah explains how the PWA has changed the procedure of complaint in zina cases. The power of registering a case is taken away from the police and given to a Session judge. The court must examine on oath at least four adult male Muslim witnesses to the act of penetration necessary for constituting the zina offence. If the judge considers that there are sufficient grounds for proceeding, then a summons will be issued for the accused to attend but if there are insufficient grounds, the complaint can be dismissed. The Session court is equivalent to the Crown Court in the UK. Dr Shah is of the view that the era of revenge for complaints of zina against women and young couples who want to marry each other against the wishes of their families has ended. He also maintains that the practice of sending women to prison for lengthy periods whilst awaiting investigation and/or trial has ended. The procedure for lodging complaints in fornication cases has also been amended in that complaints must now be filed at a magistrate's court.

77. A further significant change is that the offence of fornication under s. 496B has been made a bailable offence as has zina liable to hadd. It is not possible for a crime to be punishable both under the Zina Ordinance and the PPC. The criminal procedure code determines which court has the power to try a particular case unless specified by law. According to the Zina Ordinance a Session court will prosecute cases of zina liable to hadd and cases of fornication under the PPC are decided by a first-class magistrate.

78. The PWA has also added further grounds for divorce to the Dissolution of Marriages Act. Where a woman alleges that she has been falsely accused of a zina offence, she can approach a court for a divorce. Ill-treatment by a husband, even where such conduct does not amount to physical cruelty, can also be grounds for divorce. Cases are to be decided within six months.

79. Dr Shah reports that his search for registration of zina cases undertaken in June 2009 in three districts of Pakistan revealed no new cases under the new law by the Session courts. Enquiries made of the District Prosecutor of Rawalpindi, the District Attorney of Islamabad and a Session Judge also disclosed none. He concludes that the PWA has blocked the way for registering false cases of zina and fornication.

80. However he points out that the PWA has no retrospective application and therefore the appellant would still be tried under s. 10 of the original Zina Ordinance.

81. Having noted that the appellant claimed that her husband had admonished her several times not to continue her 'affair', Dr Shah expresses the view that her husband had the opportunity to kill his wife if he had wanted to; however he chose not to take the law into his own hands.

82. In his February 2010 report, Dr Shah addresses the issue of custody. He notes that the law recognises dual control of father and mother. He confirms that male children remain with their mother until the age of seven whereas female children remain until they attained puberty. He reports that children are not sent to prison with their mother where a conviction takes place but that mothers of young children tend to receive lenient sentences and having young children is a compelling basis for obtaining bail. If a woman is sent to prison, the courts can appoint a guardian for her children. The welfare and consent of children are key factors in the choice of a guardian. The father is normally considered to be the most natural guardian after a mother but maternal grandparents are also a popular choice.

<u>Dr Shah: oral evidence</u>

83. In oral evidence Dr Shah said that lawyers he had contacted in Pakistan had confirmed his view of s.497 of the CCP. If he was wrong about that provision -

and so bail on an attempted murder charge against a woman was not automatic - then he thought it was significant that an existing case authority said that previous absconding could not be the sole basis for denying bail. The approach of the courts to deciding whether there were reasonable grounds for granting bail or for proceeding with a charge would be to look at whether there was independent evidence, e.g. medical, forensic. The FIR itself was not treated as evidence. If the case involved a woman with young children the court would be more ready to grant bail. By his statement that in Lahore all cases alleging persecution by the police or other state officials would be taken seriously, he had meant to describe legal processes, not necessarily legal practices. He agreed that in Lahore there were many poor people, but it was Pakistan's second largest city and very expensive to live in. It had a better educational ratio and literacy rate. The quality of its lawyers and judges was better. He could not rule out that trial judges who dealt with the appellant's case might be corrupt, but there was no good reason to think they would be.

84. In cross-examination Dr Shah said his expertise was primarily in the law of Pakistan but he believed that his 32 years spent in Pakistan gave him a better understanding of practices in the courts. He had also published academic work dealing with mixed issues of law and society, including work on honour killings. In his view the PWA would not prevent an FIR relying on s.10 of the old zina law from proceeding. Although the legal advisers within the police department had no formal power to decide whether a police prosecution (having investigated the FIR) should proceed, in practice their comments played an important role; but even if the police decided not to prosecute, he agreed that the FIR is not extinguished.

85. Regarding s.347 of the CCP as amended by Ordinance XXXVI, he stood by his view that the reference to "imprisonment for 10 years" meant "10 years and above". Lawyers he had been in contact with in Pakistan told him this interpretation was the most likely, albeit also confirming there was no decided cases on the issues. He did not share Dr Lau's belief that lower-level (trial) courts would not apply this liberalising provision. All judicial personnel operating in the courts, except perhaps in rural areas, would know them. If a person was already in prison, then bail would not be automatically given and there would need to be an application to the court.

86. He accepted that when in his main report he stated that women facing adultery charges would be protected by the state, he was referring to legal form; in practice bias, administrative inefficiency and such factors could play a role, mainly at the lower court level.

87. Dr Shah said he doubted that in order for a court to be satisfied there were "reasonable grounds" for a prosecution proceeding, a statement from a witness would be enough. Corroborative medical evidence might not be considered necessary but in general the courts would want to see physical evidence of assault

or injury. He agreed, however, that unscrupulous complainants or lawyers could obtain false medical evidence.

88. In answer to questions from the Tribunal, Dr Shah said he was not sure whether the police could detain a person who had jumped bail without the permission of a court. There was no case law on powers of arrest for breach of bail, although he knew that guarantors could be summoned to court. He thought Dr Lau was right in saying that in terrorism cases special law (deriving from anti-terrorism legislation) would prevail over the Ordinance. Although trials could sometimes continue in absentia, in ordinary cases it was likely that in such cases the charges would just lie on the file.

89. In a written answer to further questions posed by the Tribunal shortly after the hearing Dr Shah reiterated certain aspects of his earlier evidence.

BACKGROUND EVIDENCE

Criminal justice system

Police practices

90. The USSD Report, March 2010 states that during 2009 the Society for Human Rights and Prisoners' Aid (SHARP) reported 2,300 cases of torture by police. Corruption within the police was rampant, particularly amongst low-level officials, low salaries and poor working conditions being key factors. Police were known to charge fees to register genuine complaints and accepted money for registering false complaints. Bribes to avoid charges were commonplace. Individuals paid police to humiliate their opponents and to avenge personal grievances. Police effectiveness varied greatly by district, ranging from reasonably good to ineffective. As in previous years, the Punjab provincial government conducted regular training in technical skills and protection of human rights for police at all levels. The Karachi city government reportedly gave facilities to the city's human rights officers for training. During 2008 at least two NGOs (Sahil and SHARP) trained police.

91. A Sentinel Country Risk assessment of October 2008 prepared by Jane's reports that the police were not regarded by the population as either friends or protectors but that they were, in general, mistrusted and feared because their culture was one of intimidation rather than service. They were also subject to manipulation by powerful landlords in rural areas and 'influentials' in the cities. Corruption was rife. Investigative procedures were generally brutal and frequently consisted of torturing a suspect until a confession was obtained.

92. The HRCP Report for 2009 notes that in the Punjab disciplinary action was taken against 1,688 officials of the police service.

Arrest procedures and treatment whilst in detention

93. According to the same USSD report an FIR is the legal basis for any arrest. Police may initiate FIRs when complainants offer reasonable proof a crime was committed. An FIR allows police to detain named suspects for 24 hours after which only a magistrate can order detention for an additional 14 days, if police shows such detention is material to the investigation. In practice the authorities did not fully observe these limits on detention. FIRs were frequently issued without supporting evidence to harass or intimidate detainees or were not issued when adequate evidence was provided unless the complainant paid a bribe. Police also detained relatives of wanted individuals to compel suspects to surrender. Police routinely did not seek a magistrate's approval for investigative detention and often held detainees without charge until a court challenged their detention. Some women in detention were sexually abused. The report observed that the law stipulates that detainees must be bought to trial within 30 days of their arrest. Bail pending trial is required for bailable offences and permitted at the court's discretion for non-bailable offences with sentences of less than 10 years. (We know from para 32 of the Special Immigration Appeals decision in Naseer & Others 2010] UKSIAC 77/2009 that individuals suspected of terrorism can be held in preventative detention for up to a year subject, notionally, to three-monthly review by a judicial board and that a recent presidential ordinance of October 2009 permits those suspected of terrorism to be detained for up to 90 days without judicial oversight or the right of access to a court.)

Judiciary and the courts

94. The same report explains that in Pakistan there are several court systems with overlapping and sometimes competing jurisdictions: criminal; civil and personal status; terrorism; commercial; family; military; and Sharia. The report states that despite the law providing for an independent judiciary, in practice the judiciary continues to be subject to executive branch influence at all levels. The USS Report March 2010 notes that lower courts remain corrupt, inefficient and subject to pressure from wealthy, religious and political figures. Government control over the court system is achieved by the politicized nature of judicial promotions. Delay is said to be endemic:

> " Delays in justice in civil and criminal cases arose due to antiquated procedural rules, weak case management systems, costly litigation to keep a case moving in the system, and weak legal education. These problems undermined the right to effective remedy and the right to a fair and public hearing.
> …
>
> Lower courts remained corrupt, inefficient, and subject to pressure from prominent wealthy, religious, and political figures. The politicized nature of judicial promotions increased the government's control over the court system. Unfilled judgeships and inefficient court procedures resulted in severe backlogs at both trial and appellate levels."

95. In many cases trials did not start until around 6 months after the filing of charges, SHARP estimating that approx 55% of the prison population was awaiting trial.

96. The report also describes the continued operation in Pashtun and Baloch areas of local council meetings (known as Panchayats or Jirgas), at times in defiance of the established legal system. Such councils, particularly prevalent in rural areas, settled feuds and imposed tribal penalties on perceived wrongdoers, including fines, imprisonment, or even the death penalty.

Prison conditions

97. Much of the evidence before us on prison is derived from the information contained in the USSD reports for 2009 and 2010. According to them, prison conditions are extremely poor and fail to meet international standards. The main problems are overcrowding, ill-treatment by prison officials (particularly of inmates who refused to pay bribes) and inadequate food and medical care, leading to chronic health problems and malnutrition for those unable to supplement their diet with help from family or friends. The difficulties are exacerbated by lengthy pre-trial detention and it is reported that prisoners on remand were not always segregated from convicted criminals. Observations made in sources cited by Drs Lau and Balzani, for example, the Asian Human Rights Commission report 2008, the Freedom House report of 2009, the HRCP report 2008 are to similar effect.

98. Overcrowding appears to be a major problem and was reported as widespread, except for the cells of wealthy or influential prisoners. The International Crisis Group Asia report of October 2008 noted that the prisons were overburdened by 133% countrywide in 2007. According to SHARP, 95,000 prisoners occupied 72 jails originally built to hold a maximum of 36,075 persons (USSD, March 2010). The Asian Centre for Human Rights (ibid) recorded that in 2007, 89,542 prisoners occupied 82 prisons; the majority were awaiting trial. The Human Rights Commission of Pakistan (HRCP) report of 2008 (published 1 April 2009 and cited in COIR at 13.02) reported that the capacity for prisoners in 20 jails in Sindh was 9,000 but over 20,000 prisoners were kept there. The report added that 59,000 prisoners were detained in 32 prisons in Punjab which were meant for detaining no more than 21,000. At least 76 prisoners were reported to have died in prisons across the country during 2008 and at least 163 prisoners had been injured (COIR, 13.07) SHARP reported that in 2009 there were 168 deaths in jails (USSD, March 2010; HRCP 2009). A report of 2007 by the same body, published in May 2008, noted that prisoners in Pakistan, especially those on death row, lived in cramped overcrowded cells and often faced abuse (COIR, 13.04). Overcrowding is blamed on a sluggish criminal justice system. There is no information, however, on whether the rates of overcrowding apply across the board or whether they are

worse for male or female prisoners. According to the HRCP Report for 2009 7,700 prisoners remain on death row.

99. Overcrowding has led to riots inside some prisons.

100. In Pakistani prisons there are three classes of cells. Class A, which is reserved for influential or wealthy prisoners, allows for the employment of servants and provides facilities such as television and furniture. At the other end of the spectrum Class C cells provide the most basic of accommodation with dirt floors. Middle class prisoners, it seems, occupy Class B.

101. It is reported that police often do not segregate detainees from convicted criminals and that prisoners with mental illness usually lack adequate care and are not segregated from the general prison population. The failure to separate prisoners on remand from convicts is also noted in a Daily Times news article of 22 March 2004 cited by Dr Balzani in her October 2008 report. There are also reports of mistreatment of those in custody and some extrajudicial killings.

102. However there are some signs of change. Apart from the release of substantial numbers of female prisoners awaiting trial (as a result of the PWA reforms), the courts have taken up the issue of poor prison conditions, a development Dr Lau characterises as part of the "new human rights culture". The Prime Minister has declared that prison reform will be a major part of his legislative agenda. According to the International Crisis Group Asia report (October 2008) his Cabinet intends to present a Bill in Parliament seeking an end to the practice of imprisoning defendants awaiting trial (although we have no information on its progress). The same report noted that better training of prison staff in recent years and the interaction of more qualified personnel have somewhat improved prison conditions. We note that following a complaint of torture by a death row inmate in Adiala prison (in Rawalpindi), the judiciary launched an enquiry into prison conditions and the Prisons Department in June 2008. In October 2008 the Daily Times reported that after the imposition of national judicial policy, the authorities released 1,000 prisoners. The Punjab Home Department conducted medical tests of 32,464 prisoners in 29 prisons across the province on the directives of Chief Justice Chaudhry when he visited prisons across the country (USSD March 2010). The International Committee of the Red Cross (ICRC) has an agreement with authorities to allow independent visits to prisons throughout the country, and the authorities at local, provincial, and national level permitted some human rights groups and journalists to monitor prison conditions for juvenile and female inmates (COIR, 13.05). There have been no reports of riots since 2008.

Women and the law

103. Since the experts' reports draw heavily on what is said about women and the law in Pakistan in major country reports, we need only add some highlighting here. The latter refer to gradual progress in enhancing the legal protection of women.

The concluding comments of the 30th session of the Committee on the Elimination of Discrimination against Women (11 June 2007, cited in COIR, 23.03) noted a number of positive developments in Pakistan. Despite expressing a number of concerns, the Committee commended the Pakistani government on the adoption of a National Plan of Action in 1998, national policy for advancement and empowerment of women 2002, and agenda reform action plan of 2005. It considered the reorganisation of the Ministry of Women Development and the creation of a National Commission on the Status of Women to be positive developments and welcomed the efforts taken to support female victims of violence. The Committee noted the recent legal reforms aimed at eliminating discrimination against women and promoting gender equality. It welcomed the 2002 amendments to articles 51 and 59 of the Constitution under the legal framework order to increase women's political participation in the National Assembly and the Senate, the 2000 amendment to the Pakistani Citizenship Act 1951 providing for nationality to the children of foreign spouses, the adoption in 2002 of the Prevention and Control of Human Trafficking Ordinance, the adoption in 2004 of the Criminal Law Amendment Act to facilitate the prosecution of honour killing, and the adoption in 2006 of the PWA amending some of the Hudood Ordinances. The USSD Report for 2010 notes that in 2008 Parliament outlawed forced marriages. The HRCP Report for 2009 notes that the Criminal Law Amendment Bill, offering better protection against sexual harassment at the workplace by amending the PPC and the CCP was passed by the Senate.

104. However, the major reports make clear that the effect of these changes in practice has been limited. The general position is summarised in the USSD Reports 2009 and 2010 is as follows. Although the Pakistan constitution makes all citizens equal before the law and prohibits discrimination on the grounds of sex and although Pakistan is a signatory to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in practice women continue to face discrimination in family law, property law and the judicial system.

105. The Government of Pakistan's third and forth periodic reports to the UN Committee on the Rights of the Child, dated 4 January 2008, stated that the PWA was designed to end practices such as preventing or obstructing women to get their share in inheritance, sale of woman, forced marriage, nikah [Islamic wedding ceremony] with the Holy Quran, custom of 'vani' or giving a woman in marriage to settle a feud and pronouncement of divorce three times. These inhuman practices have been made offences under the PPC (COIR February 2010, 23.08). The Human Rights Commission for Pakistan (HRCP) Report 2008 notes that there had been three relatively new laws and amendments safeguarding women against violence and abuse, namely the Honour Killing Act of 2004, the Code of Criminal Procedure (Amendment) Ordinance, 2006, and the PWA Act of 2006. These laws deal with honour killing, customs of swara and vani [where children are promised in (forced) marriage to settle blood-feuds], allowing bail to women in most of the offences and amending the Zina Ordinance. However, this

Report also cautions that these new laws have still not been extended to the Provincially Administered Tribal Area (PATA) of NWFP– "which means that the crimes kept occurring without being checked under proper laws."

106. The USSD Report 2008 noted that implementation of the PWA was a problem because of the lack of training of police and the lack of awareness of the bill's technicalities and according to women's rights groups, the PWA was poorly enforced. However, according to the Aurat Foundation, prior to the PWA approximately 66% of the female prison population was awaiting trial on adultery related offences under the Hudood ordinances whereas after its passage the authorities released from prison 300 to 500 women due to the less harsh guidelines in the bill. Para 23.08 of the COIR notes that the USSD IRF Report 2009 stated that according to the Society for Human Rights and Prisoners Aid, the number of adultery-related cases against women considerably dropped during 2008-09.

107. Paras 23.42-23.48 of the same COIR cover the subject of domestic violence noting at 23.42 that:

> "On 17 February 2009, the Aurat Foundation released its 2008 annual report on the 'Situation of Violence Against Women in Pakistan'. The report covered the period January to December 2008 and recorded a total of 7,733 cases of violence against women reported in the print media. Of those cases, 5,686 were registered with the police. [57b]"

108. The COIR observes that on 4 August 2009 the Domestic Violence (Protection and Prevention) was passed by Pakistan's National Assembly but has yet to be passed by the Senate, so it remains the case that there is no specific legislation prohibiting domestic violence (23.39, 23.42.). Domestic violence remains a widespread and serious problem (23.43, 23.47). Para 23.46 records that:

> "The Freedom House *Freedom in the World 2009* Country Report on Pakistan observed that:
>
> > "A combination of traditional norms, discriminatory laws, and weak enforcement contributes to a high incidence of rape, domestic abuse, acid attacks, and other forms of violence against women; according to the HRCP, up to 80 percent of women are victims of such abuse during their lifetimes. Female victims of rape and other sexual crimes are often pressured by police not to file charges, and they are sometimes urged by their families to commit suicide. Gang rapes sanctioned by village councils as a form of punishment for crimes committed by the targeted woman's relatives continue to be reported, despite the fact that harsh sentences have been handed down against the perpetrators in some cases." [19a]"

109. Paras 23.49-23.61 deal with honour killings and paras 23.62-23.66 with rape. They observe that according to the HRCP 2008 report in 2008 at least 1,210 women were

killed for various reasons during the year, including 612 in incidence of so-called honour killings. This meant that approximately 3 women were killed daily across the country. Paras 23.01-23.02 note that according to the Human Rights Commission of Pakistan report for 2008 (published 1 April 2009), cases of violence against women remained at a high level. Because of a lack of education, awareness of their own rights, and most importantly, severe economic dependence, women were extremely vulnerable in the face of adversity. The government and private sector launched or continue to work on several schemes and projects designed to address specific issues but were unable to make any significant headway.

110. On 30 March 2010 President Asif Zardari signed the Protection Against Women and Harassment at Workplace Bill, aimed at providing a safe working environment. Last-minute amendments extended the protection to men as well. Punishment for the guilty, or violators of a code of conduct, ranges from a censure to an unspecified fine.

111. On the release of women in prison and under the Hudood Ordinance, the US State Department International Religious Freedoms report 2009 stated that approximately 2,500 women had been released. It reported however that many were unable to return to their homes because of social ostracism and most were housed in government-run shelters. Women who were arrested under the Ordinance on charges of fornication, adultery and possession of liquor were now having their cases heard under the PWA (COIR, 11.49).

112. The Freedom House Freedom in the World 2009 country report on Pakistan observed that there was a high incidence of rape, domestic abuse, acid attacks and other forms of violence against women due to a combination of traditional norms, discriminatory laws and weak enforcement.

Women and the criminal justice system

113. We dealt earlier with what is said in the background country materials and by the experts concerning the police, the courts and prison conditions generally, but there are certain specific matters relating to women that need highlighting here.

114. The USSD Report 2008 noted that in 2005 authorities expanded the number of special women's police stations with all-female staff in response to complaints of custodial abuse of women, including rape. Court orders and regulations prohibit male police from interacting with female suspects, but male police often detained and interrogated women at regular stations. Although the law contains provisions for inmate release on probation, scarcity of resources made this option impossible in most cases. An article from the Dawn newspaper of 27 November 2009 reported the establishment of the first independent women's police station with a 24 hour helpline in Karachi. It was intended that cases and investigation would be

undertaken independently by female police officers regardless of whether women were victims or the accused.

115. Earlier, in 2007, the USSD reported the establishment of separate complaint cells at police stations supervised by female police officers and accessible 24 hours a day. In 2008 there were said to be 9 such police stations in Pakistan designed for women who do not want to lodge a complaint at a regular police station. Islamabad, Karachi and Lahore each have such a police station. There were also several women's complaint centres at existing police stations which offer legal assistance and counselling to female victims of violence.

Women and prison conditions

116. The report prepared by the HRCP 2008 refers to numerous cases of illegal confinement, torture and harassment at police stations throughout the year. Many women and girls were said to have been held without any cases being registered against them. Several women reported being raped in police custody. In many cases, female relatives of those wanted by the police were held in a bid to pressure the wanted men to surrender themselves.

117. It was reported that during 2008 around 64 children and 163 juvenile prisoners aged 8 to 18 were imprisoned with adults in the Adiala jail in Rawalpindi because they had to be kept with their convicted mothers. These children were not being provided the basic necessities such as a proper diet, clean clothing, books and toys and did not have a separate playground.

118. It is recounted by the HRCP's 2008 report that the Senate Committee on Women's Development suggested building a separate jail for women after visiting a prison in Rawalpindi where it found the female ward had 172 detainees instead of its capacity of 80. An 87 acre piece of land had been acquired for the purpose. The committee also called for enhancing the daily dietary allowance of Rs. 20 per prisoner to at least Rs. 100 as there were many female detainees with young children. It also recommended the provision of at least one full-time medical specialist and one medical officer for the women's wards as well as a skin specialist cope with the growing number of cases of scabies and other diseases. Responding to prisoners complaints against female prison wardens and superintendents regarding manhandling, abusive speech and beating, the Senate urged the government to arrange special behavioural training courses for the staff and acquisition of services of a psychiatrist to seek attitude change among the prisoners and prison staff. The committee directed the prison authorities to discontinue the practice of taking male and female prisoners to court in the same vehicle and suggested separate transport arrangements for female prisoners.

119. It would appear that the release of large numbers of female prisoners following the 2004-2007 law reforms has had an impact on overcrowding, but figures are difficult to ascertain.

120. Figures provided by the HRCP Report for 2008 (for an unspecified period) indicate that of the 1,500 women in prison throughout the country, 421 amongst them are convicted prisoners. The same article reports that a study conducted by the Society for Advancement of Community Health Education and Training (SACHET), again for an unspecified period, indicated that the 7,000 women and children in Pakistani prisons included those awaiting trial.

121. The South Manchester Law Centre Safe to Return? report has a brief section on violence against women in custody. It acknowledges that in July 2000 the government put forward measures to protect women who came into contact with the criminal justice system but notes that the policy designed to introduce women's police stations has not been implemented (although we note from other evidence that such policies have begun to take effect). It points to a policy prohibiting women from being detained after sunset but notes that it is not followed. A case study of a woman from Multan who was ill treated in police custody is set out in the report. The authors conclude that false FIRs are registered against women, that there is bribery and corruption within the police force, that female as well as male police officers use abusive tactics against female suspects, that the police intimidate females in custody with threats of rape and sexual assault and that women's access to justice is obstructed by the influence of wealth.

Domestic violence and honour killings

122. Domestic violence remains a widespread and serious problem according to the USSD Report 2010. Husbands reportedly beat, and occasionally killed, their wives. Other forms of domestic violence include torture and shaving. In-laws abused and harassed married women. Dowry and family related disputes often resulted in death or disfigurement by burning or acid. According to the Aurat (Woman) Foundation, an NGO working for female empowerment in Pakistan, cited in the USSD Report, the cases of violence against women increased 13% in 2008 from the previous year. It was reported that 1,384 women were killed in that year, 1,987 were abducted, there were 680 cases of domestic violence, 274 cases of sexual assault, 683 cases of suicide and 50 cases of stove burning. It was reported that 604 honour killings took place .According to a 2008 HRCP report, 80% of wives in rural Punjab feared violence from their husbands and nearly 50% in developed urban areas admitted that their husbands beat them. Women who tried to report abuse faced serious challenges. Police and judges were reluctant to take action in domestic violence cases, viewing them as family problems. Police, instead of filing charges, usually responded by encouraging the parties to reconcile. Abused women were returned to their abusive families.

123. According to information in the same report, a 2005 law established penalties for honour killings. Human rights groups criticised the legislation because it allows the victim or the victim's heirs to negotiate monetary restitution with the perpetrator of the crime in exchange for dropping charges, a law known as qisas

and diyat. As honour crimes generally occurred within families, perpetrators were able to negotiate nominal payments and avoid more serious punishment.

124. Numerous women's rights NGOs such as the Progressive Women's Association, Struggle for a Change, War against Rape, Sehar and the Aurat Foundation were active in urban areas. Their primary concerns included domestic violence and honour crimes.

125. The International Refugee Board (IRB) in a response to an information request entitled Pakistan: honour killings targeting men and women especially in the northern areas (2001 to 2006) dated 24 January 2007 is cited in the COIR (23.49-23.54). Honour killings are described as the custom in which mostly women and some men are murdered after accusations of sexual infidelity. The killers seek to avenge the shame that victims are accused of bringing to their families. They are known by different names depending on the area in Pakistan in which they are practised. In Sindh and Punjab provinces they are referred to as karo kari and kala kali respectively (where karo/kala refers to the "blackened" or dishonoured man and kari/kali to the "blackened" woman. They are called tor tora in the NWFP and Sinyahkari in Baluchistan). Such killings are often said to be carried out by men who believe their honour has been breached by the sexual misconduct of female family members even when it is only an allegation. The National Commission on the Status of Women indicates that it is not just honour killings but all forms of domestic violence that are frequently intended to punish a woman for a perceived insubordination supposedly impacting on male honour. According to the IRB they are reportedly the most prevalent in rural areas of Pakistan. More than half of all reported honour killings in 2004 occurred in southern Sindh but the practice was also believed to be widespread in Punjab, Baluchistan, NWFP and the FATA. The HRCP noted an increase in these types of killings in urban areas such as Lahore in 2005. The Human Rights Watch report for 2009 stated that in 2008 particularly gruesome cases were reported from Sindh and Baluchistan provinces. Between January and December 2008 the Aurat Foundation reported that 472 women were recorded as being killed in honour killings, 1,516 were documented as murdered and 123 cases of attempted murder were recorded. There were a total of 7,733 recorded cases of violence against women in 2008. Similar statistics are provided by the HRCP and other news reports. The HRCP Report for 2009 notes that during 2009 there was a 13% increase in violence against women, 1,404 women being murdered, 647 of them in the name of honour. Domestic violence cases rose from 137 in 2008 to 205 in 2009.

126. Further information on violence against women is provided by the Asian Human Rights Commission in February 2010 and covers the year 2009. The Aurat Foundation, reports a total of 4,514 incidents of violence against women between January and June 2009. Between January and May 2009, 90 women were believed to have been killed in the name of honour in the Punjab, 7 in the North-West Frontier Province. However, the Commission notes that one can assume that all cases are not reported.

127. The Human Rights Watch World Report for 2010 reports that violence and mistreatment of women and girls remain serious problems. It is reported that in an important step forward Pakistan's Parliament unanimously passed legislation in November 2009 to amend s. 509 of the PPC in order to penalise sexual harassment of women at any public or private workplace, or in public spaces. The changes to the Penal Code are expected to be made as part of a more comprehensive anti-sexual harassment bill pending in Parliament. In another significant move, it is reported that the National Assembly passed the Domestic Violence (Prevention and Protection) Bill in August 2009. The law seeks to prevent violence against women and children through quick criminal trials and a chain of protection committees and protection officers.

128. Dr Shah in his February 2010 report notes that most cases involving women's rights violations concerned women from rural and tribal backgrounds and that most honour killings take place in Baluchistan, the Sindh provinces and the tribal areas of the NWFP.

129. He identifies three broad patterns of honour killings. First, the victims are mainly young men and women although women outnumber men. These young people either want to marry each other against the wishes of their families or they are suspected of having a sexual relationship. Married women are rarely killed according to Dr Shah. Second, honour killings generally take place in rural areas and are rare in cities. Third, they are mainly tribal tradition. Male perpetrators are generally able to escape punishment by fleeing from their home area and, for example, hiding in the mountains.

130. The Safe To Return? report refers to killings in the name of honour being a legitimate defence to murder. It is stated that in the vast majority of cases the fact that the killing is carried out in the name of honour serves to mitigate the severity of the punishment or leads to acquittal.

131. The CEDAW report of 3 August 2005 acknowledges that the government and people of Pakistan realise that violence against women is a serious issue. It notes that this is routinely highlighted and reported in the media which creates a heightened awareness of the problem and reports that the judiciary has played a proactive and constructive role in combating violence against women. It notes that in 2001 a new section was added to the CCP; s. 174A is specifically directed at curbing dowry-related violence which requires all burns cases to be reported to the nearest magistrate by the registered medical practitioner designated by a provincial government and officer in charge of the station. Women's lack of access to legal information, aid or protection is said to contribute to the violence against them. The government therefore launched the US $350 million Access to Justice Programme with the assistance of the Asian Development Bank. Women are among the main beneficiaries of the programme. Legislation against pornography and prostitution and against trafficking was also introduced in 2002. Other

measures taken to combat violence against women are also reported: women's police stations have been set up in 10 cities, government run crisis centres have been established which provide free legal and medical aid and temporary shelter to female victims of violence, including domestic violence. In the four years prior to the preparation of the report the centres provided assistance to nearly 5,000 women. Seven additional centres were expected to be operational by June 2005; one of these was to be in Lahore. The government enacted the Women in Distress and Detention Act 1996 which establishes a fund for assisting women in conflict with the law. The Punjab province has revamped the medico-legal system to enable quick follow-up on cases involving violence against women. Fifteen medico-legal centres have been established to facilitate easier access to medico-legal aid.

132. Information is provided on the punishment awarded to individuals accused of honour killings. Of the 160 cases decided in Punjab by the lower judiciary (the time span is unclear), the death sentence was awarded to 52 persons and life imprisonment to an additional 59; the rest were awarded lesser punishments.

Child custody

133. From the observations of the experts on the issue of child custody and what is stated in the major country reports, the position appears to be as follows. Under Pakistani family law which is based on Islamic law, the father controls virtually all aspects of his family's life. He decides where his wife and children will live, how the children are to be educated and whether or where they may travel. Courts rarely, if ever, give custody of children to a woman who is not a Muslim, who will not raise the children as Muslims, does not plan to raise them in Pakistan, or has remarried. Any matter of custody can only be resolved through the appropriate local judicial system. In Pakistan most mothers do not earn an income. The courts keep this in mind in determining what is in the best interests of the child. The father is legally bound to take care of his children no matter what since he is the income earner. A mother is not so bound. That is why, in most cases, the father is granted custody. Laws protecting the rights of mothers are written into the Koran. According to Dr Shah in his main report (para 54) the law recognises dual control of father and mother. Although the father is the legal and natural guardian of a minor, the right of Hizanat (custody of a minor) vests in the mother. He refers to a case cited in PLD 2008 Lahore 533 as authority for the proposition that the mother is entitled to custody of the male child until he has reached the age of seven years and of her female child until she has attained puberty. Dr Balzani in her main report broadly concurs, stating that in the Pakistan legal system women who are divorced are typically entitled to custody of children from the marriage until sons reach the age of 7 and the daughters reach puberty (she adds that at this point mothers may lose custody of any decision-making rights, although there is some flexibility as the best interests of the child are regarded as paramount). Dr Lau emphasised to us that he considered that the courts adopt a pragmatic approach and tend to be guided by

what they regarded as in the best interests of the child, generally awarding custody to the mother in spite of the fact that Islamic law favours the father.

134. The USSD Report records that family law provided protection for women in cases of divorce, including requirements for maintenance and laid out clear guidelines for custody of minor children and their maintenance. However, many women were unaware of these legal protections or unable to obtain legal counsel to enforce them.

Assistance to women

135. The HRCP in its report dealing with 2007 (dated 29 March 2008) states:

> "Shelters for women are grossly inadequate taking into account the number of cases against women reported ever year. Police station personnel are not trained properly to deal with cases reported by women and do not take their complaints seriously. Women's stations are few and far between and many people do not know their locations. The government has set up a few women's shelters in the main cities, all the while promising more shelters every year to reach the target that they propose.
>
> Unfortunately, the existing centres are under-staffed and ill-equipped to handle most cases, and are often unable to house women in the building due to lack of space or facilities. Some centres lie out of use. Promises of free medical and legal aid as well as psychological counselling are hardly ever followed through due to lack of funds and trained personnel. It is reported that only 17 out of 25 government women crisis centres are operational. Women have to either depend on the Darul Aman, which has a reputation for treating its occupants as inmates and with reports often surfacing about abuse and drug rackets. The other options are private and NGO shelters which are extremely few and unable to cater on a large scale.
>
> There is also very little awareness about their government created facilities for distressed women. The Gender Crime Cell at the National Police Bureau in Islamabad is little known to [the] public and is extremely constrained by lack of human resources. Details of complaints and reports it had received and disposed are not made public either (NGO Statement: Pakistan presented at the 38th Session of CEDAW Committee, United Nations, May 21, 2007)."

136. In sections of the COIR dealing with assistance available to women it is noted that even though the government has expanded the number of women's police stations, they did not function properly (23.67), that in its 2008 report the USSD said that in addition to approximately 250 facilities operating as ad hoc emergency shelters for women in distress, there were 70 district-run shelters (Darul Amans). In some of these, women were abused (23.68), and they had notoriety for being similar to detention centres with curfews, ill treatment and absence of a gender-sensitive environment (23.69). Reference is also made to an Inter Press Service News Agency article dated 8 March 2007 stating that most of these centres were deserted ("the lack of women attending the centre [being] …down to poor commitment, coordination and lack of guidelines") and lacking

resources for basic services. At paras 23.57-58 reference is made to a statement dated 4 December 2007 from a local Women's Resource Centre noting that there is only one government centre operating in Sindh (in Karachi) and in Lahore "only two working women hostels and very few private ones". As regards NGO assistance, it was noted that numerous women's rights NGOs were active in urban areas and their primary concerns included domestic violence, the Hudood Ordinance, and honour crimes (23.76). A Karachi NGO of lawyers had a separate desk to deal with the problems of women (23.78); the HRCP Report 2008 noted that private shelters continued to run and provide refuge as well as rehabilitation services allowed by their services and outreach but their facilities were few and far between (23.77).

137. As some of the sections of the COIR dealing with assistance available to women are significantly different from those in the 2009 report, it is also pertinent to note what is stated in the latter, some of whose entries (curiously) cite more recent sources. At para 23.27 of the 2009 report it is stated:

> "In a Response to Information Request dated 4 December 2007, regarding the circumstances under which single women could live alone in Pakistan the Immigration and Refugee Board of Canada (IRB) noted, following correspondence with an adjunct professor of gender studies and international studies at the University of Denver, that:
>
> > 'It is very hard for single women to live alone both in urban and rural areas. … It depends on age, class education, and urban or rural setting. Young unmarried/divorced women in all classes in urban areas find it difficult to live alone. They cannot get apartments to be rented. If they own a property, they can more conveniently opt to live alone but again there is social pressure around them and they have to face all kinds of gossips and scandals. In such case age is the biggest problem. Older women can live alone but still they feel insecure socially and physically. We do have examples now in the big cities where highly educated and economically independent women opt to live alone but their percentage is very low. In the rural areas they mostly live with joint family even if they do not get along with them …'"

138. At 23.29 of this same Report it is added:

> "The same source noted:
>
> "The following information was provided in correspondence received on 22 November 2007 by a professor of law at the university of Warwick who specialises in women's human rights and gender and the law, who has written various publications on Pakistan and who is also a professor at the University of Oslo:
>
> > 'The response to your question depends on the circumstances, location, socio-economic, educational and professional status of the single female. Generally it would be accurate to say that single women are rarely able to live on their own without a male member of the family in Pakistan. Reasons for this are numerous but they primarily stem from

custom and culture that requires a woman to have a male family member to be in a protective and supervisory role. Society also frowns upon women living on their own and [this] would not help the reputation of the single woman. You may find one in a million single woman who has the means and can live in a big city with helpers, etc. to assist and protect her. This of course is a minority and an exception rather than the rule.'

139. Paragraph 23.37 cites an IRIN report dated 11 March 2008 observing that domestic violence remained "endemic" in Pakistan and referring to "[a] lack of safe shelters for women victims of domestic violence, limited awareness of the issue and the absence of specific legislation all compound[ing] the problem". Other entries of the 2009 COIR deal with the services provided in the centres. At paras 23.55 – 23.56 note is made of the USSD Report 2007 reference to crisis centres run with legal NGOs and providing the following services:

- Medical aid
- Legal aid
- Social Counselling
- To investigate cases of violence/case history
- Establishing linkages with law enforcing agencies/police complaint cells
- Training of micro-credit entrepreneurship
- Rehabilitation through micro finance
- Provision of interest free credit to R.15000/- in each case.

140. Paras 23.61-2.62 refer to the USSD Report 2008 noting that there were "[n]umerous women's rights NGOs" being active in urban areas and "[t]heir primary concerns included domestic violence, the Hudood Ordinance and honour crimes" and the website of the NGO, Lawyers for Human Rights and Legal Aid, providing details of a protection centre available in Karachi and the website of the Progressive Women's Association giving information about an "AASRA" shelter in Rawalpindi, established in 1999, to assist domestic violence victims. This Association also mentions having "facilitated over 17,000 cases of abuse against women in 1987" and lists the facilitation as including offering alternatives for residential living situations.

141. We should also note that the UKBA Operational guidance Note for Pakistan dated 4 February 2010, includes the following section (3.8):

> "3.8 Women victims of domestic violence
>
> Some female applicants will apply for asylum or make a human rights claim based on the grounds that they are the victims of domestic violence and are unable to seek protection from the authorities."

142. The OGN concludes at para 3.8.8 that:

> "As noted above, case law has confirmed that Pakistani women are members of a particular social group within the terms of the 1951 Refugee Convention. Asylum claims from Pakistani women who have demonstrated that they face a serious risk of domestic violence which will amount to persecution or torture or inhuman or degrading treatment must be considered in the context of the individual circumstances of each claim. In individual cases, sufficiency of protection by the state authorities may not be available, and although internal relocation may be possible in some circumstances, where it is not a grant of asylum may be appropriate."

143. Paras 3.11 deals with women accused of committing adultery or having an illegitimate child. Having outlined the changes ushered in by the PWA 2006, para 3.11.7 dealing with internal relocation for such cases states that:

> "[v]ery careful consideration must be given to whether internal relocation would be an effective way to avoid a real risk of ill-treatment/persecution at the hands of, tolerated by, or with the connivance of, state agents. If an applicant who faces a real risk of ill-treatment/persecution in their home area would be able to relocate to a part of Pakistan where they would not be at real risk, whether from state or non-state actors, and it would not be unduly harsh to expect them to do so, then asylum or humanitarian protection should be refused."

The South Manchester Law Centre, "Safe to Return?" report

144. Safe to Return? is a report dated January 2007, written by N Siddiqui, S Ismail & M Allen. It describes itself as a "trans-national study of the complex issues which impact on Pakistani women who might seek refugee protection in the UK against domestic violence".

145. Its study of women's refuges in Pakistan is based on a number of research methods, in particular qualitative interviewing, individual (legal) case studies, a field trip in November 2005-February 2006, where 'familiarisation' interviews were carried out with relevant stakeholders, and a later field trip in June-July 2006, where one of the researchers (assisted some of the time by a research consultant) undertook visits to a range of service provision contexts in Pakistan, and carried out both individual interviews and (seven) group discussions (1.8). The report explains that it was not possible to identify a sample using formal survey or sampling methods; the scattered nature of provision, and the lack of formalised networks, meant that the two field workers had to use less formal methods to contact potential participants (1.5.) The study also assembled and drew upon a range of documentary sources across both countries (1.1.). The report notes that monitoring and evaluation data was not available in Pakistan and much information was sourced from newspapers. The authors note that it was difficult initially to make contact with service providers in Pakistan, but that as the research progressed participants facilitated access to other service providers and to women victims/ survivors who were using services (1.4.3.). The Pakistan-based research was carried out in the regions of Punjab, Sindh and the North West Frontier Province, with specific focus on cities in these regions, namely

Peshawar, Lahore, Faisalabad, Islamabad, Rawalpindi, Karachi and Hyderabad (1.5.1). Several shelters were visited in two of the three regions covered by the report.

146. Service provision for women victims of domestic violence in Pakistan is described as "particularly severe" and inadequate, Para 11 of the report's summary states:

> "[this] can be seen at all levels, from legislation through to over-subscribed women's shelters which are limited in number and in resources, and crucially, to the lack of rehabilitation or aftercare. There is no system of state care or re-housing for women made homeless following violence; this fact alone plays a major role in the decisions many women make to return to violent relationships, exacerbated by their weak socio-economic position, lack of education and financial dependence. Additionally, the attitudes towards women who attempt to live without a male relative that pervades society in Pakistan results in their isolation and ostracism, exposing women to further risk of harm."

147. Para 12 of the summary deals with specific concerns about shelters in Pakistan:

> "The majority of shelters are grossly under resourced and offer very poor or no childcare provision. Policies within shelters which exclude boys over the age of five create severe dilemmas for women, and provide disincentives to access shelters. They are usually overcrowded, provide sub-standard facilities, rarely have a key worker system, offer poor working conditions, no casework supervision, and no training or worker accountability. The workers often appear to run shelters with very little input from trustees. Life after living in a shelter often means returning to a violent situation, remarriage or returning to the natal family if they are willing or able to allow her access. In the absence of these 'options', women are often open to sexual exploitation to support the children and to avoid destitution."

148. The report's view of internal relocation as stated at para 19 of the summary is that:

> "…This study has demonstrated the limited and temporary circumstances in which women reach a 'place' which can be deemed 'safe'. The specific conditions relevant to women in both Pakistan and the UK (where they may face involuntary return) place most women in circumstances which, rather than offer safety, heighten potential danger."

149. In the body of the report the authors note that services providing support for women victims/survivors in Pakistan do not necessarily have domestic violence as their main focus of work (1.4.1). Although shelters do have counsellors, they offer little or no longer term support (1.4.2.2). Most of the organisations who were supporting women victims/survivors had experienced threatened or actual violence and most employed security guards at their premises (1.4.1).

150. In chapter six, which is devoted to the subject of "Access to services and shelter provision in Pakistan", the authors explain that the first stage of contact for a woman before admission to a shelter is a crisis centre: "Crisis centres play a

crucial role in assessing a woman's needs and the risk she faces. A woman is never turned away without a full assessment of her case…Lawyers, advice workers and counsellors are available to offer immediate support to women at the centres". Such centres accept referrals from all over Pakistan, including self referrals (6.2.1).

151. Shelters, the report observes, are subdivided into (i) government shelters, (ii) NGO and private shelters and (iii) "Islamic" shelters. Government shelters or Dar-ul-Amans are funded by the provincial governments' Social Welfare and Women's Departments who issue guidelines on their running. Admissions to these shelters are only accepted via the courts and police. The maximum period of stay is three months but in some cases women can remain until their cases are resolved, which can be up to a year (6.3). They provide food, clothing, accommodation as well as counselling and basic vocational skills. They have security guards posted at the entrance of the main gates. These shelters restrict inmates' travel outside, conditions in them are extremely poor and the general ethos is to treat women as prisoners. Some are overcrowded and the workers who run them appear to have little input from shelter managers or trustees (6.3).

152. The NGO and private shelters are more diverse. In Pakistan NGOs and INGOs work in general in difficult conditions. Their focus is on providing short-term welfare services (6.11). The authors describe visits to some of the better private sector centres. Dastak in Lahore (funded by international donors), Mera Ghar, a Christian shelter (funded by the Catholic church), the Edhi shelter house, Ghosa-e-aafiyat (a centre funded through private donations) and Pannah, a shelter in Karachi (funded by international donors). Dastak is described as being protected by two armed security guards twenty-four hours a day with a caretaker and warden, an in-house psychologist and a teacher (to provide basic education to young children) also on the premises. "The address of the shelter is strictly confidential and the shelter has its own van to transport women to and from the shelter for legal, medical, reconciliation and mediation appointments". It has a capacity to admit 30 women. The women receive free meals, clothing and legal representation (with small charges for legal documents). "The disadvantages of not turning women away", the report discerns, "is that conditions, even in this example of best practice, were overcrowded and limited by European standards". It is said to be the only shelter in Pakistan that allows all women the freedom to leave the shelter between 9 and 5, although there are arrangements for women to stay out later which, in order to protect the woman, involve the shelter contacting the police if she does not return at the time agreed: a list of women residing at the shelter is sent to the local police station every two weeks. Another shelter in Lahore, the Edhi shelter, is said to accept self referrals and to allow women to remain at the shelter as long as they want and, whilst there, to leave whenever they want; but they are encouraged to reconcile because of the generally held view that women cannot survive without men in Pakistan. There is no aftercare support for women, but women can return to the shelter if they need to. Pannah, an NGO shelter in Karachi, is said to be guarded 24 hours a day and to have a

strictly confidential address. Referrals are made by NGOs, lawyers and police. Aside from catering for the women by providing free food, medical, education and legal assistance, the centre runs a vocational skills programme to empower women and help them become economically independent.

153. A description is also given of one example of an "Islamic" shelter which provides shelter provision framed with an explicitly "Islamic" approach.

154. Features shared in common between government and private shelters are noted as being that they never turn women away and that (as a result of a recent change in government policy) they do not admit boys of over the age of five (previously boys up to the age of eleven were admitted). "As a result the boys are separated from their mothers and sent to the orphanages or madrassas in the locality" (6.3)

155. In an overview of service provision for women victims of domestic violence in Pakistan, it is stated:

> "Overall it was our impression that, whilst the shelters are under resourced (some of them acutely so), they have been able to implement some good practices, for example, in some cases offering in-house counselling and psychological support. Legal assistance is also immediately available to women from female lawyers present in the crisis centres, or from lawyers based in the same building as the crisis centres. Fieldwork observations indicated that women in some shelters are encouraged to develop skills that will empower them, with some shelters offering in-house training on a wide range of issues to raise awareness of women's rights…" (6.1).

156. At 6.6. the report states that:

> "Generally, privately funded shelters or those with religious affiliations provided better facilities. … Pannah, funded by multiple donors, has excellent living conditions and offers more services to the women than other shelters. …Although there were some commonalities between all the different types of shelters, the quality of provision varied considerably. The residents of some shelters complained about the poor diet they were given, overcrowded rooms and general poor living conditions, not having access to medical treatment, lawyers not appearing at court hearings and restrictions on their mobility. …"

157. Further commenting on the comparison between government and NGO or private shelters, the report states at 6.7.3:

> "In an acknowledged context of shortfall in provision, the NGO sector and privately-run shelters try to provide a safe home for women in a country that offers little protection to them. Shelters were visited in two of the three regions covered by this report. In these shelters, the majority of women were from rural areas. One key difference between NGO shelters and Darul Amans is that the latter install metal fencing within their buildings to restrict women's mobility…The government shelters are still largely regarded as, and referred to as, "sub-jails". The conditions could be considered as a contravention of women's human rights – since freedom of

movement and a right to independence and quality provision is greatly compromised.

There are some NGO run shelters that offer similar and perhaps better living conditions than Darul Amans, including one shelter in Lahore which is regarded as the first progressive women's shelter in Pakistan. However, in general, polices and practices of controlling women's behaviour and restricting their mobility reinforce the customs and practices imposed on women in society at large and limits the decisions they can make about how they live their lives.

…

The majority of the shelters restrict women's mobility; often in the name of safety…The policy of most shelters is to allow women out of the buildings only to attend court hearings or hospital appointments. This reinforces the male view that women should remain indoors as if they go out the may do something to dishonour the shelters. But the closed character of the shelters has attracted other criticism, including the charge that a number of shelters have developed into brothels."

158. One of the main problems with all the shelters is said by the authors to be the lack of childcare provision. Childcare and education are extremely limited and in some shelters non-existent (6.6). The other service observed to be obviously lacking is aftercare work with women. Women in shelters are limited in the choices they can make about their lives: "[m]ost of them are therefore either forced to return to violent relationships or remarry…". However, at 6.15 the authors acknowledge that:

> "…if adequate provision is made available it is clearly not impossible for a woman to live on her own, although as indicated earlier she will be very visible, under suspicion as a 'lone' woman, and vulnerable to harassment and exploitation. If a woman's basic needs are met (for example, accommodation, financial assistance and protection) then a woman can survive."

159. This observation is further qualified at 8.7, where, on the topic of lone women, the authors observe:

> "Participants endorsed the prevailing view that Pakistani communities viewed a woman living or travelling alone in Pakistan with suspicion. A woman living independently would have a range of negative assumptions made of her based on her behaviour and lifestyle. In turn, being thought of 'badly' by wider society effectively legitimates harassment of her…Many participants queried whether the UK authorities grasped how unacceptable it is amongst members of the Pakistani community…for women to live alone, particularly without male support…".

160. At 8.11, dealing with internal relocation, it is stated:

> "All participants (apart from the Home Office) stated that it would be difficult, if not impossible, for a lone woman, with or without minor children, to live safely and independently in Pakistan. Whilst the situation of the woman might vary from case to case, the experience of legal practitioners handling the relevant evidence

> supported these doubts about the viability of internal relocation. Apart from the difficulty of obtaining work and accommodation in her attempts to settle into a new community, participants concluded that a lone woman would be regarded with considerable suspicion. The dangers associated with the inter-connectedness of communities, and the complicity of the police in the way in which they service individuals within communities, have been highlighted above and heighten the ensuing dangers of internal relocation."

161. The authors add that the requirement for all citizens to carry an identity card could compromise women's safety and prevent them from accessing the limited services available.

162. The report is not entirely clear on the subject of confidentiality. The addresses of Dastak and the Edhi shelter, for example, are specifically described as being kept strictly confidential, but it appears from what is said earlier that women's initial point of contact is normally with a crisis centre and that, before a woman is referred on to a centre, the policy is for the centre worker to immediately inform the family that the woman is with them. "This is done", the report states at 6.2.1, "to prevent husbands or families from registering false cases against women or the NGOs which can lead to workers in NGOs being arrested…If the family wishes to visit or contact the woman they are told to make arrangements through the office and a meeting will be arranged with the consent of the woman" (6.2.1).

163. In 6.14 the report compares shelters in Pakistan and the UK, concluding:

> "Whilst the distribution and quality of provision in Pakistan is in many respects inferior to that of the UK, it is important to note features of practice that are, in fact, better than the UK. Some shelters in Pakistan, for example, offer immediate access to lawyers, counsellors and psychologists. This is generally not available in the UK…One other crucial difference…is that [shelters in Pakistan] never turn a woman away, whereas in the UK shelters do have the option of turning women away."

164. On the other hand, in contrast to the situation in the UK, Pakistan agencies, it is noted, "do not help women with rehousing or financial assistance after leaving the shelters" (6.15). In Pakistan class divisions also affects initial access of women to a shelter, her ability to access services once there, and the situation she faces after leaving the shelter (6.15). However, the initial impression that the latter had a greater range of options gave way to the view that "in reality they faced the same stigma and barriers around shame and honour experienced by women from poor backgrounds. In fact they often stood to lose more if they fled because of their status and privileged positions" (7.5.1).

Submissions

165. In their submissions both parties chose to focus primarily on the appellant's case, only referring to general issues as and when they thought it appropriate.

Mr Fripp

166. Amplifying his skeleton argument Mr Fripp before us emphasised that the appellant's account had been accepted by the IJ and that on the basis of her evidence her husband was someone who had taken a prolonged interest in pursuing her though the courts and making threats. The police had visited her parents' house a number of times. Therefore we should regard the FIR as one that will continue to be pursued. It was an FIR that contained not just the s.10 zina offence but also the attempted murder offence. It was unlikely that at the relatively low level of the Pakistan judiciary she would get bail or that the prosecution would not proceed to trial. He asked us to find that Dr Lau's understanding of Ordinance XXXV1 was likely to be the correct one and so the appellant would not be entitled to automatic bail and would not be granted discretionary bail.

167. Mr Fripp highlighted that Dr Lau and Dr Shah agreed that for the purposes of a bail application an FIR supported by a witness statement could be enough to mean that bail was denied.

168. The facts of the appellant's case would need to be looked at by the Tribunal, he submitted, against the backdrop of a patriarchal society in which women were subject to a high degree of gender violence and there were pervasive problems of corruption. Women in Pakistan who had been exposed to allegations of adultery and police detention were regarded as of damaged character and faced social isolation. Relatives would be reluctant to help out. Someone intent on pursuing a malicious complaint could get quite a long way in the courts. Dr Shah had accepted that a complainant could obtain false medical evidence to back up their case. Hence the appellant was unlikely to get bail and also unlikely to get a fair trial.

169. Mr Fripp said he did not seek to suggest that in this case there was a risk of free standing persecution by the state (what he called the "Iqbal- type case": see decision reported by the IAT in June 2002 known as Muzafar Iqbal, later cited as MI (Fair Trial, Pre Trial Conditions) Pakistan CG [2002] UKIAT 02239). Rather it should be seen as a case of persecution by a non-state actor, her husband, exploiting a defective legal system. We should find that, far from being willing or able to protect the appellant, the state would collude in her persecution.

170. If, however, the Tribunal considered it was an Iqbal–type case, then he would accept that that case set out the correct legal test, namely that the appellant would have to show she would face a real risk of a flagrant denial of a fair trial. He did not seek to argue that the Pakistan judicial process was likely in general to result in such flagrant denial, although lower levels of the judiciary were considered to be infected by corruption, only that it was a system which permitted aggrieved individuals to manipulate it for persecutory ends, especially when, as here, there

was a discriminatory aspect. Post-2006 a relatively isolated case was still capable of arising notwithstanding the 2006 PWA reforms.

171. It was very likely, therefore, submitted Mr Fripp, that the appellant would face being detained and remaining so until her case came to trial. That could itself take more than two years and so even without having regard to her possible conviction, she would experience persecution through having to endure extremely poor prison conditions for up to two years.

172. As regards country guidance, Mr Fripp said that the two current cases having most relevance to the appellant's case were SN and HM (Divorced women – risk on return) Pakistan CG [2004] UKIAT 00283 and FS (Domestic violence – SN and HM – OGN) Pakistan CG [2006] UKIAT 000283, but that there appeared to be no Tribunal guidance of continuing relevance concerning issues of detention or prosecution of women in Pakistan arising from malicious allegations. He asked the Tribunal to find that whilst in recent years the Pakistan state had taken some steps to improve the position of women, including the 2006 PWA, serious problems remained.

173. The Tribunal should find, urged Mr Fripp, that the appellant would face persecution in her home area of Lahore and that she would not have a viable option of relocation. He contended that the background evidence, particularly that relating to the inadequacies of women's shelters and the lack of any system of after-care (he referred to the Safe to Return? report) strongly demonstrated that the difficulties a woman in the appellant's position would face would be immense.

Mr Bourne

174. The respondent's position as set out in a skeleton argument and presented by Mr Bourne was that the appellant was not at risk of persecution from the state and, to the extent that she was at risk of violence from her husband, she would be able to obtain effective state protection either directly or through NGOs. Even if the Tribunal found she was at risk in her home area, it would be reasonable to expect her to relocate to avoid the risk posed by her husband.

175. Applying the principles set out in Iqbal the threat of prosecution facing the appellant would not, he submitted, result in persecution.

176. Mr Bourne asked us to find that existing Tribunal country guidance on the position of Pakistani women facing a real risk of violence from their husbands, SN & HM SN & HM in particular, as having continuing efficacy. Following SM & H, the Tribunal should first consider risk in the appellant home area and, if satisfied she was at risk there, whether she would be able to achieve effective protection by relocating. His skeleton argument summarised the respondent's position that the appellant did not have a well-founded fear of persecution thus:

"a. There is no evidence that the Appellant has been charged with a criminal offence, there is only an FIR registering a case against her;

b. The Appellant cannot be arrested and imprisoned on her return to Pakistan on the basis of the allegations set out in the FIR, as she is entitled to bail as of right and the police would have to apply to the court for a warrant for her arrest. There is therefore no risk of pre-trial detention on the basis of the allegation of adultery made by her husband;

c. There is no evidence to suggest the Appellant will not have received a fair trial if she is charged and the case is pursued against her;

d. If convicted the Appellant is not at risk of the death penalty; and

e. The effect of recent changes to Pakistani law have had a significant effect on the position of women subject to allegations of adultery, demonstrating a liberalisation in approach and changes in social and cultural norms."

177. Of the three experts in this case Mr Bourne contended that only Dr Lau and Dr Shah were of any real help and that they were only fully experts on issues of Pakistan law. Their observations otherwise were merely their own glosses on evidence which the Tribunal could evaluate for itself.

178. Mr Bourne said that he disputed Mr Fripp's view that if the appellant faced persecutory prosecution it would not be state persecution, but private actor prosecution. Subject to two differences, the appellant's case was an Iqbal-type case. Thus the appellant either had to show that the Pakistani criminal justice system was generally persecutory or that there were specific features of her case that would make her experience of the system persecutory. He considered the effect of Dr Shah's evidence to be that the criminal justice system is not generally persecutory and that the appellant's case could not show any such special features. The two differences from Iqbal were that the appellant here is a woman facing gender-specific charges and that since it was written there have been significant changes in Pakistani law and practice affecting women.

179. It was accepted, said Mr Bourne, that on return to her home area the appellant's husband was likely to learn she had returned (something his later submission appeared to resile from), but that as the couple no longer lived together, there would be no risk of a repetition of the domestic violence she suffered previously. There was no substance to Mr Fripp's claims that her husband and/or his family was likely to target her for an honour killing and, since 2005, honour killings have been fully criminalised. To the extent that Dr Lau and Dr Balzani (chiefly the latter) opined that the appellant would be at risk of honour killing, their views were derived from their own reading of the background evidence and the latter did not demonstrate out what they said. Dr Balzani was not presented as an expert on the law and her own research was largely anecdotal evidence of an unspecified kind.

180. In Mr Bourne's submission the appellant had far too many hurdles to surmount, each too dependent on speculation. She would have to show (the numbering is our own): (i) that she would come to the attention of the authorities; (ii) that the police would decide to proceed with a prosecution based on the FIR, particularly bearing in mind that the FIR was now 4 years old; (iii) that she would be denied automatic bail; (iv) that she would be denied discretionary bail; (v) that there would be sufficient supporting evidence to persuade the court to let the prosecution proceed; (vi) that her pre-trial detention would be of lengthy and/or would involve ill-treatment; (vii) that whilst going through the criminal justice process she would not be able to get the help of a competent lawyer; (viii) that the trial or Session Court would be corrupt; that further appeal to the higher Courts/Federal Sharia court would not necessarily exonerate her; (ix) that even if at risk of persecution in her home area she would not be able to access adequate help from a women's shelter elsewhere; and (x) that she would be unable to get help through her family with finding accommodation of her own and achieving the means to live. Whilst internal relocation for women living on their own was not an attractive option, it was clear that in the larger cities and towns such women were able to get by. Each of these stages in the appellant's argument was, he submitted, open to question and there was an accumulation of uncertainty. It had to be remembered that as a result of law reforms the police investigation/prosecution would now have to be conducted by a police officer above the rank of Assistant Sub-inspector; and arrests in cases of zina could not take place without the permission of a court; the appellant would now be entitled to bail as of right; the police would have to produce evidence to support the FIR complaint; the courts would be unlikely to let a prosecution proceed unless the evidence was adequate; and even if it did proceed there was no reason to think the appellant's trial would be unfair or that further appeals to the higher courts/Federal Sharai Court would not remedy any injustice. Prison conditions could not be said to amount to ill-treatment.

Legal Framework

181. Both parties stated that they treated the law governing cases raising issues of prosecution as persecution as correctly set out by Muzafar Iqbal. At para 25 of this decision the Tribunal noted:

> "25. Where evaluation of issues of prosecution versus persecution must be made, it is vital decision-makers avoid a fragmented approach. Particular care must be taken to focus on the criminal justice process involved as a whole. Which ever parts of the criminal law process are being examined - be it the initial laying of information, the bringing of charges, the arrest, the detention, the consideration of bail, the trial itself, the subsequent punishment - the refugee decision-maker must be alert to how these stages interact and what safeguards apply at each stage. Also relevant will be the nature of the law in question and whether its provisions adequately ensure justice. Only a holistic approach to this issue can ensure the decision-maker weighs any harms involved cumulatively, not just separately. .."

182. At para 74 the following summary of conclusions was given:

"1. Although it is not the purpose of refugee law to adjudge guilt or innocence under the national law of the country of origin, the type of examination a refugee decision-maker must conduct when considering the issue of prosecution versus persecution is no less evaluative than it is in respect of any other issue. Incomplete or sketchy evidence is not a valid reason for failing to decide whether a claimant faces justice or injustice.

2. Whether a prosecution amounts to persecution is a question of fact. All the relevant circumstances have to be considered on a case-by-case basis.

3. Particular care must be taken to focus on the criminal justice process as a whole. Only a holistic approach to this issue can ensure the decision-maker weighs any harms cumulatively and not just separately.

4. Whether prosecution amounts to persecution must be analysed by reference to international human rights norms. The utility behind doing so is that international human rights instruments contain specific guarantees relating to the criminal justice process and that these are increasingly used in major general country reports to assess the performance of a State`s criminal justice system.

5. In line with the human rights approach to the definition of persecution (and protection) approved in *Horvath* and its basis in a notion of a hierarchy of human rights, account must be taken of the fact that the right to a fair trial is not an absolute, non-derogable right. Just as under international human rights law examining the issue of fair trial in the context of return or refoulement there is no violation unless the risk faced is that of a flagrant denial of a fair trial, so too under the Refugee Convention prosecution does not amount to persecution unless likely failures in the fair trial process go beyond shortcomings and pose a threat to the very existence of the right to a fair trial.

6. When considering whether the generality of citizens face a real risk of persecution under the criminal justice system of their country of origin, it is important to establish the scale of any violations of relevant human rights such as the right not to be exposed to ill treatment during detention or the right to a fair trial. A useful benchmark is that set out in Article 3 of the Convention Against Torture, namely whether the level of abuse of human rights rises to the level of a "consistent pattern of gross, flagrant or mass violations of human rights".

7. Applying these principles to this case, the adjudicator had sufficient evidence before him to establish: (i) that the police would no longer have any reason to target the appellant; (ii) however, the charges facing the appellant might proceed, even though false; (iii) but the Pakistani courts would recognise they were false and would exonerate him at least by the time of the trial; (iv) that he might nevertheless first undergo a period of pre-trial detention; (v) although this would mean he experienced hardships, these would not rise to the level of serious harm so as to make his a case of persecution rather than prosecution; (vi) even on the assumption that he might still face a real risk of serious harm from the relatives of the man

killed at the demonstration (against which the authorities could not protect him), he would be able to avail himself of an internal flight (protection) alternative."

183. It is salient to observe that although the treatment of prosecution as persecution in Muzafar Iqbal has been endorsed by the higher courts in Harari [2003] EWCA Civ 807 and Batayav [2003] EWCA Civ 1489 (the latter noting, however, an important point of caution regarding use of phrases such as "frequent", "routine", "general" and "systematic"), since 2002 there have been a number of important cases dealing with fair trial in an asylum or extradition context, both before the ECtHR is Strasbourg and in the UK, in particular the decision of the House of Lords in EM (Lebanon) [2008] UKHL 64 . At para 34 of that case Lord Bingham made reference to the joint partly dissenting opinion of three judges of the European Court of Human Rights (ECtHR) - Judges Bratza, Bonello and Hedigan - in Mamatkulov and Askarov v Turkey (2005) 41 EHRR 25, 537, para OIII 14, which helpfully encapsulates the existing position in Strasbourg case law regarding claims based on a real risk of exposure to an unfair trial:

> "While the court has not to date found that the expulsion or extradition of an individual violated, or would if carried out violate, article 6 of the Convention, it has on frequent occasions held that such a possibility cannot be excluded where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country. What constitutes a 'flagrant' denial of justice has not been fully explained in the court's jurisprudence but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of article 6 if occurring within the Contracting State itself. As the court has emphasised, article 1 cannot be read as justifying a general principle to the effect that a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. In our view, what the word 'flagrant' is intended to convey is a breach of the principles of fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article."

184. As to prison conditions, in SH (prison conditions) Bangladesh [2008] UKAIT 00076 the Tribunal noted at para 26 that the approach taken by the ECtHR to applications from persons alleging that prison conditions in High Contracting States violate Article 3 are usefully summarised in Ramirez Sanchez v France App.no. 59450/00, BAILII: [2006] ECHR 685, 4 July 2006 as follows:

> "*General principles*
>
> 115. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

116. In the modern world States face very real difficulties in protecting their populations from terrorist violence. However, unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see *Labita v. Italy* [GC], no. 26772/95, BAILII: [2000] ECHR 161, § 119, ECHR 2000-IV; *Selmouni v. France* [GC], no. 25803/94, BAILII: [1999] ECHR 66, § 95, ECHR 1999 V; and *Assenov and Others v. Bulgaria*, BAILII: [1998] ECHR 98, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3288, § 93). The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see *Chahal v. the United Kingdom*, BAILII: [1996] ECHR 54, judgment cited above, § 79). The nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (*Indelicato v. Italy*, no. 31143/96, BAILII: [2001] ECHR 599, § 30, 18 October 2001).

117. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, for instance, *Ireland v. the United Kingdom*, BAILII: [1978] ECHR 1, 18 January 1978, Series A no. 25, p. 65, § 162). …

118. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among other authorities, *Kudla v. Poland* [GC], no. 30210/96, 10 BHRC 269, § 92, ECHR 2000-XI). In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see, among other authorities, *Raninen v. Finland*, BAILII: [1997] ECHR 102, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-2822, § 55). However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, among other authorities, *Peers v. Greece*, BAILII: [2001] ECHR 296, no. 28524/95, § 74, ECHR 2001-III).

119. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see, among other authorities, *V. v. the United Kingdom* [GC], no. 24888/94, BAILII: [1999] ECHR 171, § 71, ECHR 1999-IX; *Indelicato*, cited above, § 32; *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, BAILII: [2004] ECHR 318, § 428, § 428, ECHR 2004-VII; and *Lorsé and Others v. the Netherlands*, no. 52750/99, BAILII: [2003] ECHR 59, § 62, 4 February 2003).

In that connection, the Court notes that measures depriving a person of his liberty may often involve such an element. Nevertheless, Article 3 requires the State to

ensure that prisoners are detained in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see *Kudla v. Poland*, (2000) 10 BHRC 269, cited above, § 94; and *Kalashnikov v. Russia* no. 47095/99, BAILII: [2002] ECHR 596, § 95, ECHR 2001-XI). The Court would add that the measures taken must also be necessary to attain the legitimate aim pursued.

Further, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (*Dougoz v. Greece*, no. 40907/98, BAILII: [2001] ECHR 213, § 46, ECHR 2001-II)."

185. Given the close correspondence between ill treatment contrary to Article 3, persecution and serious harm, we consider this summary sheds helpful light on claims to a real risk of suffering one or more of these types of harm.

186. Para 339K of HC395 states that:

> "The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

187. Para 339O, headed "Internal Relocation", states:

> "(i) The Secretary of State will not make:
> (a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or
> (b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.
> (ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.
> (iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return."

ASSESSMENT: GENERAL

The experts

188. It is right to say that there was a great deal of common ground between Dr Lau and Dr Shah on matters of Pakistan law and both representatives acknowledged that both had given evidence in good faith and on the basis of real expertise in the field of Pakistan law. In any event, we found the evidence both gave as to relevant aspects of Pakistan law and practice to be weighty. Both possess formidable academic credentials and have also been able to draw on the opinions of lawyers and judges practising in Pakistan (Dr Shah having experience as a law practitioner in Islamabad). Both impressed us by their readiness to adjust their position according to the state of the evidence as it developed during the proceedings. However, whilst we recognise that both have also written on aspects of Pakistan society as well as on matters of Pakistan law, we note that by and large they based their opinions on such matters on the background evidence as found in major country reports. Although both had published work dealing with such aspects it was far less clear to us that what they told us about such aspects reflected any particular expertise. Dr Lau, for example, was not entirely consistent in the evidence he gave concerning whether an attempted murder suspect would be accepted by a Darul Aman and ventured opinions on the level of risk to women of honour killings that did not distinguish carefully between key variables. Dr Shah, for example, ventured to suggest that in Lahore cases of persecution by government officials are taken seriously and in that city "[m]ost of the people are educated and wealthy", a suggestion very difficult to square with the background country information. It was noticeable that at the hearing both experts were readier to qualify some of their opinions on non-legal issues under cross-examination. Dr Shah, for example, conceded that in his written report his references to Lahore just cited his primary focus was on formal legal processes normally followed rather than actual practices. A further, related, caveat we have is that is that once these two experts turned from evaluating general issues of law to evaluating social and political matters and the appellant's particular case each in our view was rather too ready to adopt and defend a view on her likely situation on return, without fully addressing the evidence pointing to a different view. For example, in his report Dr Lau for his part said he was sure that the appellant could not achieve safety by relocating as the police would locate her; yet under questioning at the hearing stated a different view, without mentioning his shift in position. Dr Shah seemed too ready to assume that the appellant would be able to seek and obtain police protection in her home area.

189. We found Dr Balzani's use of answers sent to her by two lawyer contacts in Pakistan very useful and this lent weight to her observations on the law and practice in Pakistan. We also recognise that in an important sense hers was the hardest task in that she was asked to cover a great deal of ground relating to the general legal and social situation in Pakistan and the position of women generally as well as women facing adultery accusations. However, whilst we are grateful for her help in drawing together different background sources of relevance and conveying comments by two lawyers in Pakistan, we must confess to finding her own observations of limited help otherwise. Her own lack of legal expertise did not stop her stating her opinion incorrectly on a number of legal matters; Dr Shah

in his written oral evidence correctly identified a number of such errors (although it is fair to say that her error concerning marital rape is also made by the latest US State Department report). She did not furnish sufficient information about her own research methodology on the main issues at stake in this appeal. Much of her interview-based research conducted with men and women of Pakistan origin in the UK appeared to be with Ahmadis, whose experiences in Pakistan are likely to be very different from most Pakistanis. Quite a few of the opinions she expressed in her report were not sourced. Her readiness to state dogmatic conclusions both about general legal, social and political matters and about the likely risk facing the appellant did not instil confidence in us that she reached her conclusions by a proper consideration of evidence pointing for and against them. We accept she was sincere in seeking to discharge her duty to the Tribunal to assess the evidence objectively, but we do not think her evidence reflected sufficient command of the subjects covered.

190. There were a number of differences between the three experts on matters other than Pakistan law. For example, they did not agree over the issue of whether the appellant's husband was likely to get custody of the appellant's children. To take another example, although Dr Lau found it outrageous (in oral evidence) that Dr Shah should say (in his February 2010 report) that allegations of adultery are common and often the precursors of divorce, Dr Balzani had expressed the same view in her report of October 2008 where she maintained that it was known that husbands accused their wives of adultery simply to get rid of them. However, since we derived limited assistance from all three on such matters, we need only refer to such differences in limited contexts in the course of our later analysis of the appellant's case.

FIRs

191. We find Dr Lau's and Dr Shah's evidence on FIRs to reflect faithfully the background evidence and to clarify it considerably. On the one hand, an FIR on its own does not demonstrate that a person faces prosecution. It is not a charge document and whether anything results from it depends on the outcome of the police investigation into it. Both Dr Lau and Dr Shah confirmed that there were many "stale" or "stagnant" FIRs. Even if the police decide (after investigation of an FIR) to draw up a charge sheet, they may decide not to proceed in the light of comments made by police lawyers. If they do proceed to prosecute on the basis of an FIR, the court will normally only allow that prosecution to proceed if it is supported by independent evidence. On the other hand, once the FIR is registered at the police station, the police fall under a duty to investigate it and to decide whether to bring the matter to court. Even though the police lawyers who advise them are police employees and have no independent powers to filter out weak cases, it appears their advice normally carries eight. Sometimes the lower courts will not expect much by way of evidence and both Dr Lau and Dr Shah agreed that some types of evidence could be manufactured by complainants. In addition, an FIR remains registered unless a lower court has not allowed a prosecution

based on it to proceed or (on application for judicial review) a High Court has quashed it. If a person was known to have left the country, even for some period of time, that will not necessarily result in its reactivation either indirectly (through prompting from the complainant) or directly. Dr Shah did not disagree with Dr Lau's assessment that the current FIR system contained inadequate safeguards against vexatious or malicious complainants using it as a source of harassment or worse. The absence of any substantial independence of prosecution decisions from the police decisions is a serious flaw.

192. However, it appears that the misuse of FIRs in adultery cases has now been ended by the PWA 2006 reforms. The law has changed radically. It is no longer possible for husbands to have FIRs registered at the local police station; this can only happen if a judge agrees to it. The important proviso is that FIRs alleging zina that were registered before 1 December 2006 can still proceed under the Zina Ordinance.

The Police

193. It was common ground between the three experts that there were serious problems affecting the police in Pakistan, especially corruption. At the same time, the evidence fell well short of establishing (nor did Mr Fripp seek to argue) that in general the police were fundamentally unwilling or unable to carry out law and order functions and ensure the protection of the public. It cannot be said that there is a consistent pattern of police impunity for wrongdoings: we note from the HRCP 2009 Report that in the Punjab, for example, the authorities have taken disciplinary action against 1688 police officials. In the cities the police at the higher echelons are said to be highly educated.

194. Of particular importance to the issues dealt with in this case is the fact that the powers of the police to arrest and detain women had been severely constrained by legislative reforms in 2004-2007 and subsequent case law it may be that further legislation aimed to protect victims of domestic violence will eventually be passed.

195. One matter on which Dr Lau and Dr Shah felt unable to comment was whether police had the power to detain someone who had absconded from bail without first obtaining authorisation from a court, especially if that person was a woman. However, in the context of an asylum-related appeal, it does not seem to us that much turns on the apparent difference. For even if we assume that the police do have this power and would be likely to exercise it, all three experts observed that there is provision for a lawyer to seek pre-arrest bail. Thus a person returning to his or her home area may well have the ability to protect themselves against possible police arrest by arranging for a lawyer to apply for pre-arrest bail at the same time.

The judiciary and the courts

196. We do not understand any of the experts to assert, nor does the background evidence support the view that the Pakistan judiciary is fundamentally corrupt. That said, significant failings are very evident, especially at the level of the lower courts and the courts in rural areas, where incompetence, corruption and other failings are prevalent. In our opinion, however, these problems have to be kept in perspective. Pakistan's very adverse rating for judicial corruption (ranked third worst by Transparency International in 2006) was reached largely on the basis of evidence as to what happens at the lower levels of the judiciary. Furthermore, in the cities and larger towns the standards of the judiciary are said to be higher and there exist numerous NGOs and a volatile press often able to monitor cases and their outcomes. Nor should it be forgotten that recent political developments in Pakistan have shown that the judiciary in general has been able to play a very influential (activist) role (even if sometimes a quite politicised role) in bringing about a less executive-dominated distribution of power and authority.

197. So far as concerns the treatment women receive from the courts, whilst Dr Balzani is certainly right in describing the courts as dominated by men who reflect the patriarchal values of the wider society, several factors already touched on suggest significant advances. First, changes affected by amendments introduced in 2006 [by Ordinance XXXVI] have accorded women a right to automatic bail except in very limited circumstances. Second, the PWA 2006 appears to have put a virtual end to aggrieved husbands using the law to mount unfounded adultery charges leading to the incarceration of a very significant number of women. Since 2004 higher level police officers now have to conduct the investigations and the courts control the process. The 2006 reforms also included provisions which act as an additional deterrent to false accusations: men can be charged with marital rape; and if they bring adultery charges found to be baseless, they themselves can face prosecution. Third, although these legal reforms cannot be said either to reflect or to have resulted in more liberal practices in Pakistan society generally, they clearly have not just been paper changes. The great majority of an estimated 2,500 women incarcerated on adultery charges have been released. Further legislative changes are likely, notwithstanding the vocal hostility of fundamentalist political parties and groups. Fourth, in relation to zina offences, the court system provides for cases to be taken to the Federal Sharia Court. In recent years its rulings have been extremely protective of women's rights and strong in striking down injustices. There is some legitimate concern that it may soon be forced, by a seemingly odd alliance between fundamentalists and legal experts, to rule some of the PWA 2006 provisions invalid as being contrary to Islamic law, but neither Dr Lau nor Dr Shah suggested that the relatively liberal approach of the higher courts to women would not persist.

<u>Cases in which a complaint of adultery has been the subject of a registered FIR prior to the coming into force of the PWA 2006.</u>

198. Notwithstanding the above, it was the opinion of Dr Shah, eventually echoed by Dr Lau, that cases in which a complaint of adultery has been the subject of an FIR registered with the police prior to the coming into force of the PWA 2006 would be dealt with under the Zina Ordinance. Their opinions were supported by the decision of the Supreme Court of Pakistan in Shakeel v State, PLD 2010 Supreme Court 47 which Dr Shah cited to us. We would observe, however, that such cases are a residual category likely to be relatively few in number.

Prison conditions

199. As noted earlier, there is a broad consensus in the major country reports that prison conditions in Pakistan are extremely poor and fail to meet international standards, the main problems being overcrowding, instances of ill-treatment by prison officials and inadequate food and medical care. That said, there are some signs of improvement in the more recent period and we note that no major international body has argued that conditions in Pakistan prisons generally fall below the high threshold of Article 3 ill treatment as enunciated by the ECtHR in Ramirez Sanchez (or by their UN International Civil and Political Covenant (ICCPR) equivalent) In any event, we lack evidence sufficient to show that that imprisonment in Pakistan routinely results in conditions or practices that would generally be said to breach Article 3. We do not know, for example, whether prisoners are locked up too much of the time, not being permitted enough time out of their cells for fresh air, exercise, recreation and the like. There is scant information on sanitation and on ventilation, bedding and laundry facilities. It may be that if relatives are allowed to supply food, they would also be permitted to provide other necessities and services, but we were not provided with any evidence on this. We have no information on visiting arrangements and little evidence relating to the availability of medical care. We are not told whether the same conditions apply to male and female prisoners. We note that prison officials kept juvenile offenders in the same facilities as adults but in separate barracks and it is likely that there are different facilities for women too. Dr Balzani's report of October 2008 collates several sources and refers to a 1996 report by the UN Special Rapporteur on the use of fetters in Pakistani prisons; however there is no mention of this as a continued practice in the more recent evidence before us.

200. (We would also note that neither party in this appeal sought to argue to the contrary, although Mr Fripp correctly highlighted that under Article 3 case law, assessment of the impact on prison conditions on any particular individual has to be undertaken by reference to a wide range of considerations including age, sex and health.)

Women and bail

201. The only major point of disagreement between Dr Lau and Dr Shah concerned whether a woman facing a charge of attempted murder would be entitled to automatic bail by virtue of the amendment made to the Code of Criminal Procedure

(Second Amendment) Ordinance, 2006 (Ordinance XXXVI). We remind ourselves of the precise text of this provision:

"Amendment of section 497, Act V of 1898. – In the Code of Criminal Procedure, 1898 (V of 1898), in section 497, in sub-section (1), in the first proviso, the words "or any woman" shall be omitted and after the first proviso amended as aforesaid, the following new provisos shall be inserted; namely:-

> "Provided further that a woman accused of such an offence shall be released on bail, as if the offence is bailable, notwithstanding anything contained in schedule-II to this Code or any other law for the time being in force:
>
> "Provided further that a woman may not be so released if there appear reasonable grounds for believing that she has been guilty of an offence relating to terrorism, financial corruption and murder and such offence is punishable with death or imprisonment for life or imprisonment for ten years, unless having regard to the facts and circumstances of the case, the court directs that she may be released on bail:
>
> Provided further that where a woman accused of an offence is refused bail under the foregoing proviso, she shall be released on bail if she has been detained for a continuous period of six months and whose trial for such offence has not been concluded, unless the court is of the opinion that delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on her behalf."

202. We also remind ourselves that, although aided by two eminent experts in Pakistan law, we are having to consider matters of interpretation of law which to us is foreign law and to do so without the benefit of much by way of relevant Pakistan case law. The fact that the courts in Pakistan use English and operate a system of precedent roughly modelled on the English legal system makes our task slightly easier, but no less deserving of caution on our part.

203. The second proviso just cited clearly imposes a twofold requirement: one relating to the type of offences; another relating to the types of punishment. We agree with Dr Lau and Dr Shah that the "murder" exception must include attempted murder because the phrase used is "relating to murder". On the issue of whether the second requirement relating to types of punishment encompasses punishment "up to 10 years" (Dr Lau's position) or "10 years or over" (Dr Shah's position), we take note of Mr Fripp's submission that if the drafters had meant the latter they could have said so, but the same could be said about Dr Lau's construction ("up to 10 years"). On the principle of euisdem generis, the class of exceptions dealt with in this amendment is clearly intended to cover only extremely serious or grave punishments: the other two of the trilogy are death and life imprisonment. If Dr Lau was right, the exception would include all offences which carried a maximum of 10 years, even though the relevant minimum might range from 0-9 years. That would mean including, so far as we understand matters, a significant range of offences, not all of which could be categorised as extremely serious or

grave. They include, for example, the following offences under the PPC: s.386 (extortion) s.392 (robbery), s.412 (receiving stolen property) and s.413 (handling stolen property). Accordingly we are satisfied that there is a right to automatic bail both in relation to the outstanding s.10 zina offence and the s.324 PPC offence of attempted murder (which carries a maximum sentence of 10 years imprisonment).

204. We are unclear, however, that the right of women to bail can be wholly absolute. That is not only counterintuitive (since it suggest that even dangerous women charged with (non—terrorist) multiple murder could not be detained) but difficult to square with the further provision in the same Ordinance limiting detention of women awaiting trial to 6 months. It might be argued that this provision was only meant to cover women detained prior to this reform or women who fell under the exceptions to automatic bail, but equally it appears to contemplate residual categories of women who miss out on bail. But we have nothing to suggest that women facing either adultery or attempted murder charges would fall into one of these residual categories. Certainly the fact that she has absconded from bail previously would not disentitle a woman to automatic bail if she was entitled to it: see Mumtaz Ali v State.

205. If we are wrong about the automatic bail provision, and the matter of bail for a woman in the position of the appellant caught by the exceptions to Ordinance XXXIV would in fact fall to be considered only for discretionary bail, then on balance we would accept that there is a real risk that such a woman would be denied bail. The matter is, however, finely balanced. We acknowledge that the case law cited by Dr Lau and Dr Shah does show that the courts are prepared not to treat absconding as a reason in itself for denying bail. There is also the fact that for a woman being a mother with children appears to act as a factor in favour of bail being granted. We also accept that of the three main considerations Dr Lau said would be applied by the courts when deciding whether to grant bail ((1) the seriousness of the offence; (2) danger to the public; and (3) the risk the accused would interfere with the criminal trial) the appellant would only fall under the first. However, in the appellant's case it is not simply that she had absconded from the Provincial government's territory; she had also fled the country's jurisdiction and also been the cause of lengthy delay in the processing of her case. We have not been shown any case indicating that discretionary bail would be granted easily in such circumstances. Further, as Mr Fripp pointed out, we cannot exclude that the appellant's husband may have obtained statements from his named witness and perhaps fabricated other evidence and so, that is to say, ensuring the courts would consider there was independent evidence/a prima facie case.

206. Continuing to examine what our position would have been had we not found there was an automatic right of bail available to a woman in the appellant's position, we would then have further accepted that on denial of bail a woman in such a position would face a period of detention of at least several months. The

background evidence contained nothing to suggest that a case like this would be expedited.

207. We do not think, however, on this scenario that women similarly situated to the appellant would face more than 6 months in detention. We see no reason to think that the further safeguard contained in the 2006 amendment to Ordinance XXXVI would not operate (save in terrorist cases) in favour of every woman, at least in urban areas where the courts are likely to exercise normal individual vigilance.

Women and prison conditions

208. We have already dealt with prison conditions. On the basis of our earlier findings we would assess that whilst conditions in prison may be poor, the evidence falls well short of establishing that in general they amount to ill-treatment for detainees of either sex.

Adultery charges against women

209. From our earlier summary of the expert and background evidence, it is clear that the 1979 Zina Ordinance has been significantly altered by legal reforms in 2004 and 2006. Pre-2006 the Zina Ordinance stipulated two types of punishment for zina: hadd and tazir. A case fell into the tazir category when the requirements for hadd punishment (4 adult male Muslims' testimonies or a confession) were not met. The punishment for tazir for married and unmarried persons is rigorous imprisonment for a minimum of 4 and a maximum of 10 years. Offences involving rape carry no less than 4 and not more than 25 years. Under the Zina Ordinance police often abused their powers by registering FIRs based on unfounded allegations. Any police officer above the rank of assistant sub-inspector could investigate the matter. As a result of the Criminal law (Amendment) Act 2004 and the PWA 2006, police were prohibited from effecting an arrest without the permission of a court in cases of zina. Investigation had to be conducted by an officer at the level of superintendent of police. As noted by Dr Shah, another important change brought about by the 2004 Act was that "the police have to convince the court that an offence has actually been committed rather than merely a complaint made by a family member or husband (see 2005 Yearly Law Reports 1634)". As a result of the Ordinance XXXVI amendments, women became entitled to automatic bail in all cases except for offences relating to terrorism, financial corruption and murder and such offences are punishable with death, or imprisonment for 10 years (s.497). Further even women denied bail under the discretionary provisions are to be admitted to bail after 6 months if their trial is not concluded and the delay is not caused by her.

210. The PWA 2006 also made significant changes to bail provisions in cases involving both zina liable to hadd under s.5 of the Zina Ordinance and fornication under s.496B of the PPC. Both are made bailable offences, meaning that bail is the

"indefensible right of the accused" Dr Shah at para 30 of his report cites in support PLD 1963 Supreme Court 478.

211. In addition the PWA 2006 took all offences out of the Zina Ordinance except zina liable to hadd punishment. The offence of rape was also taken out of the Ordinance and inserted into the PPC Code (s.375) so that, inter alia, the evidential requirement of 4 adult male witnesses is abolished and marital rape is instituted as an offence. Zina liable to tazir is renamed fornication and inserted into the new PPC as a new section 496B. False accusation of zina or fornication are created as separate offences (PWA s.7, s.21). Zina liable to hadd punishment cannot (as before) be convertible into a complaint of fornication or vice versa. The power to register a case as zina has been taken away by s.8 PWA and give to the Session Judge. Likewise no court is allowed to take cognisance of an offence of fornication under s.496B except on a complaint lodged before a first class magistrate. The court is required to examine two witnesses on oath as to the act of fornication. If there is no sufficient ground for proceeding, the complaint shall be dismissed. The courts also have an additional power in the case of a husband who has made untrue accusations of zina to convict him. A wronged wife can make an application for dissolution of their marriage under lian. According to Dr Shah an allegation of zina by a husband is sufficient ground for obtaining divorce on the basis of mere aversion towards her husband.

Honour killings

212. It is clear from the background evidence that honour killings remains a serious problem in Pakistan; something like 600 women are killed each year in honour killings. However, we would reject the view that it is as prevalent and entrenched a problem as Dr Balzani, the authors of the Safe to Return? report (who state that men charged with honour killings are normally acquitted) and to some extent Dr Lau, contended it was. First, the worst examples of the phenomenon are largely confined to areas of Pakistan where the Jirga systems still hold sway, such as the North West Frontier Province. Second, it is clear that the continuing incidents of honour killings are predominantly located in rural areas of Pakistan, not in the urban areas. Third, the legislative reforms introduced during the past decade to safeguard women against violence and abuse, in particular the Honour Killings Act 2004 and the adoption in 2006 of the Criminal Law Amendment Act to facilitate the prosecution of honour killings have clearly had a significant effect. To reiterate figures cited earlier from the CEDAW Report, of the 160 cases decided in Punjab by the lower judiciary (the time span is unclear), the death sentence was awarded to 52 persons and life imprisonment to an additional 59; the rest were awarded lesser punishments.

Child Custody

213. The Tribunal recalls that in EM (Lebanon) [2008] UKHL 64 the House of Lords was concerned with the application in Lebanon of Sharia law relating to the

custody of children stipulating that at the age of 7 the physical custody of a male child custody would pass by force of law to his father or another male member of his family; any attempt by the mother to retain custody of him there would be bound to fail. Whatever may be the position in Lebanon, it is clear from the evidence we have as to law and practice in Pakistan that the position is somewhat different. Whilst the law continues to favour the father, in practice the courts seek to adopt a pragmatic approach, awarding custody to the mother wherever that appears in the best interests of the child.

Women and domestic violence

214. The existing Tribunal country guidance cases dealing with victims of domestic violence in Pakistan are SN and HM and FS. In para 47 of SN and HM the Tribunal stated that, absent any evidence filed on behalf of the appellants, it would consider the account of available assistance for women at risk from family problems, as set out in the CIPU Country Report for Pakistan, April 2004. Having set out the relevant passages of that report the Tribunal then stated:

> "48. The same CIPU Country Report accepts that internal flight options are limited for women, but it does not state that there are no internal flight possibilities and each case will depend on its own particular factual matrix. We find that some support is available in the cities, and we also consider the geographical scale of Pakistan (covering an area of about 307,374 square miles, with a population of 140,470,000); the question of internal flight will require careful consideration in each case. The general questions which Adjudicators should ask themselves in cases of this kind are as follows –
>
> > (a)Has the claimant shown a real risk or reasonable likelihood of continuing hostility from her husband (or former husband) or his family members, such as to raise a real risk of serious harm in her former home area?
> >
> > (b)If yes, has she shown that she would have no effective protection in her home area against such a risk, including protection available from the Pakistani state, from her own family members, or from a current partner or his family?
> >
> > (c) If yes, would such a risk and lack of protection extend to any other part of Pakistan to which she could reasonably be expected to go …having regard to the available state support, shelters, crisis centres, and family members or friends in other parts of Pakistan?"

215. The italicised summary of FS, so far as is relevant here, states:

> "(2) The background evidence on the position of women at risk of domestic violence in Pakistan, and the availability to them of State protection remains as set out in SN and HM. … It appears that the current intention of the authorities is to improve the State protection for such women, although progress is slow. Every case will still turn on its particular facts and should be analysed according to the step by step approach set out at para 48 of SN

> and HM, with particular regard to the support on which the appellant can call if she is returned."

216. More recently, in SN (Pakistan) [2009] EWCA Civ 181, Scott Baker LJ noted that:

> "31. We were referred to a number of documents in particular a Home Office operational guidance note and a US State Department report relating to Pakistan, both of which documents were very recent in relation to the date of the original hearing before Immigration Judge Walters. Miss Chan, for the Secretary of State, submits that, on careful reading, these documents take matters no further. She also observes that there is no country guidance dealing with the general question of single women with children being returned to Pakistan. It is true that there is no country guidance. Perhaps it would be helpful if there was a country guidance case dealing with issues that arise in such circumstances."

217. We would observe that it was not strictly correct to say there was no existing Tribunal country guidance on single women in Pakistan. The current country guidance cases of SN and HM and FS then gave, and still do give, some guidance on the position of, inter alia, single women - considered as one of the categories of women at risk from family problems (it would appear that neither of these cases was drawn to Scott Baker LJ's attention). However, particularly bearing in mind that both these cases are now several years old and in them the Tribunal had little before them by way of background evidence apart from a CIPU report, we take his Lordship's comment as a helpful reminder of the need to have regard to the latest country information (from as many sources as possible) to ascertain whether it discloses the need for any revision of existing Tribunal country guidance covering the position of women victims of domestic violence and other women affected by family problems in Pakistan (including single women). There is not any existing country guidance that deal specifically with the issue of women facing accusations of adultery and past observations in reported cases have, of course, considered the position prior to the 2004-2007 reforms.

218. The importance of having regard to the latest country information is also highlighted for us by the nature of the expert report by Dr Balzani. Leaving aside our earlier comments on her report and addendum, it is noticeable that a significant number of her sources are not based on recent research. The only exception is the January 2008 Safe to Return? report, but even that report is now over two years old and its own fieldwork research dates from trips made in 2005 and 2006. It also relies in part on several older sources.

219. Turning in more detail to the Safe to Return? report, it has some other features (besides being several years old) which call for caution on our part. It is a campaigning document written in part by legal representatives who act for women in UK asylum-related cases and in places expressly notes that it reflects the experience of such representatives (see the reference at 8.11 to "the experience of legal practitioners handling the relevant evidence"). The report also contains a

critique of the existing case law of the Tribunal and higher courts on internal relocation which it considers too restrictive; it is not simply an assessment of the situation in Pakistan. Further we find certain features relating to the nature of its principal findings and conclusions troubling. Many are set out in the form of broad generalisations with very little by way of qualification. The reason why that is a concern is that the authors candidly explain elsewhere in the report that their research had various limitations: that their primary research only covered parts of Pakistan; that they did not have access to comprehensive data regarding women's centres in Pakistan and that it relied heavily on a limited number of interviews (individual and collective) with various participants who were either victims of domestic violence or service providers for such women. The report also acknowledges the need for more research and for more diverse data (presently the authors explain, researchers are heavily reliant on press cuttings). On one or two key points of detail (see below our discussion about confidentiality) its findings are unclear. Such qualifications should in our view have made the authors less ready to generalise.

220. However, it remains that by virtue of the empirical research the authors conducted, and the fact that they seek to put that in the context of other studies and reports available, it represents the most detailed study that exists. In addition, although the limitations of the reach and quality of their own research do not deter the authors from advancing a series of broad generalisations, the specific observations made by the principal field worker (and her assistant) show a clear determination to record faithfully all aspects, positive and negative, of the service provisions visited. (It is also a valuable source of information on subjects not intrinsically related to domestic violence - see e.g. its coverage in chapter 4 of the legal context impacting on women in Pakistan - but these are now somewhat dated).

221. We turn then, to our main conclusions. Having considered all the available evidence, it does not seem to us that it calls for any major modification of existing Tribunal country guidance on domestic violence. Existing guidance recognises that women in Pakistan who are divorced or are the victims of domestic violence or who will return as single women face difficulties arising from the patriarchal nature of the society there and the subservient position of women. Since FS there have been some important legal reforms and a number of state and private initiatives designed to alleviate the position of such women. It would be wrong to say they have had little noticeable effect (consider e.g. the mass release of women from prisons; the dramatic changes to the laws relating to adultery and the ending of the option for husbands to register adultery-related FIRs at police stations); however, political and economic events since the fall from power of General Musharaff have created countervailing forces. It would be unwise, therefore, to assume the situation will not be subject to change in the next few years.

222. It remains our assessment that within Pakistan there are many differences in the way that family, tribal and cultural (and sometimes religious) patterns of living

impact on the position of women. One of the persons interviewed by the main Safe to Return? fieldworker noted, for example, the sharp contrast between the position of women from rural areas as compared with that of women in Lahore: "Lahore is a city and here women are progressive" (6.7.1). Such variations and different perceptions in a country with a large population spread over a large geographical area make it very difficult to generalise as to what will be the situation facing returning women who are victims of domestic violence. Against this background it continues to make very good sense that country guidance should continue to avoid broad generalisations and should emphasise the need for examination of the individual's particular circumstances. That is as true whether one is examining risk in a person's home area or in a place of potential relocation.

223. However, as regards the issue of internal relocation as it affects women who are divorced or who are victims of domestic violence or who will return as single women, it is important to examine more closely what services exist for them by way of crisis centres, shelters or refuges and to consider these taking into account a range of factors such as class, age, health, education, child responsibilities etc.

224. We have devoted considerable space to what is said in the background evidence about women's crisis centres, shelters and refuges. That is because the evidence on which Mr Fripp relies includes the expert report of Dr Balzani and on the 2008 Safe to Return? report, both of which appear, at least in some passages, to take the position that women's shelters in general do not offer adequate protection to women victims of domestic violence in Pakistan. If that view is accepted, then existing Tribunal country guidance requires major revision.

225. We do not criticise Dr Balzani or the authors of the Safe to Return? report for advancing such a view for it must be said that there are some items of evidence which, taken in isolation, would appear to lend it strong support: for example it is said in a 2007 press report that government centres for such women are "deserted" and it is said by one source that they are only open to women who are referred by courts. Some of the women interviewed by the authors of the Safe to Return? report made serious criticisms of the care they had received. But, as we hope will be clear from our lengthy summary of the relevant background evidence, on these and other points of fact it is not always a situation where the evidence only points one way. We must also bear in mind that whilst the fieldwork conducted by the main Safe to Return? researcher sheds significant light on the state of service provision, there does not exist any study that has conducted an independent nationwide survey of such centres and the conclusions reached in many other sources are based on just a few examples or on anecdotal evidence.

226. We shall come shortly to the evidence relating to the appellant, which included the fact that her father sought to secure a place for her in a government Darul Aman in Lahore but was told they could not assist someone who faced an FIR

alleging serious criminal charges. We also take account of Dr Lau's opinion that generally speaking Darul Amans were unlikely to take an attempted murder suspect.

227. Having considered all the evidence, we find that women's shelters, whether government or private, are unlikely to turn women away if they face charges relating to adultery. As regards government shelters the evidence was indeed that they are principally designed for use by women who have been referred by the courts. Further, as we have seen, one of the main purposes of setting up shelters for women has been to respond to husbands seeking to misuse adultery laws for their own ends. There is virtually no evidence to suggest that women are turned away in respect of such charges. Although we lack clear evidence, we also doubt that women would be turned away from shelters if they face other serious criminal charges that are raised against them in conjunction with adultery charges. Once again, workers in the shelters would be all too aware that the husbands involved in such cases seek to misuse not just the adultery laws but other laws when acting oppressively against their wives. (How workers would react to a woman facing criminal charges unrelated to a background of domestic violence/adultery is much less clear, but even here we would note that the general thrust of the background evidence is that women are not turned away.)

228. At all events, what has to be considered is not simply the position in government centres but the state of overall provision for such women and in this regard it is clear that, in the void created by inadequacies in state provision, a significant role is played, at least in a number of urban parts of Pakistan, by private charitable organisations, NGOs and INGOs (If Dr Lau's experience is anything to go by, it would also appear that private charitable organisations can step in to take over existing Darul Amans.)

229. The evidence adduced by Mr Fripp highlighting the serious drawbacks of existing government and private centres affords good reason in our view not to accept uncritically sources which appear too ready to present a benign picture. Equally, we find some of the negative descriptions given in some of the sources to be far too sweeping, particularly given the evident lack of any comprehensive survey of provision nationwide.

230. The claim that government centres are only open to women referred to by the courts and/or police is consistent with the major reports and with the findings set out in Safe to Return? (at 6.3), but it would be quite wrong to draw from this the inference that service provision in Pakistan for women victims of domestic violence overall is underused or only open to women referred by the authorities. The claim that government centres are "deserted" cannot be entirely correct, since the Human Rights Commission of Pakistan noted that, at least so far as concerns crisis centres, 17 (out of 25) of them were operational and, according to the Safe to Return? report, the position overall is that shelters are "oversubscribed". Furthermore, it is important not to lose sight of the fact that service provision in

the private sector is often described as responding via crisis centres (which in turn are open, in some instances at least, to referrals from all over Pakistan, including self-referrals) to direct contact made by women in trouble.

231. It is extremely difficult to accept the assertion that the centres/refuges generally fail to keep their addresses secret from the families of such women. According to the Safe to Return? report, the first points of contact for women who are victims of domestic violence are the crisis centres. This report's authors appear to have found that at this stage crisis centre workers will often make contact with the woman's family or relations, but their findings on this subject are described as being based only on what was found in one crisis centre where the researcher did an internship (6.2.1.) It is stated:

> "If the woman is accepted by the shelter then the worker will immediately inform the family that she is with them. This is done to prevent husbands or families from registering false cases against women or the NGOs which can lead to workers in NGOs being arrested…If the family wishes to visit or contact the women they are told to make arrangements through the office and a meeting will be arranged with the consent of the woman."

232. However, in the next paragraph the authors emphasise that "The address of the shelter is strictly confidential". And, as we have already highlighted, they describe the procedure at three of the specific centres visited as being to keep the refuge's address strictly confidential without suggesting that this procedure was ineffective. This report also makes very clear that in any event in almost all these refuges those who run them employ security guards around the clock.

233. Although the evidence, especially that set out in the most detailed treatment contained in Safe to Return? is not entirely clear, it seems that the crisis centres can sometimes inform the women's family that they are involved (this also serves the objective which many centres appear to have of helping the women and families to reconcile), but that in any event women's shelters keep their addresses strictly confidential. Whilst Safe to Return? and other sources also make clear that there have been problems in a number of (if not most) centres where family members have made threats against the centre and centre workers, at the same time the fieldwork visits recorded in Safe to Return? do not suggest that any of the centres visited generally failed as a consequence to protect the women they helped.

234. As regards conditions, it is sufficiently clear that in general such centres/refuges are under-resourced and that women in them suffer varying degrees of hardship. In some centres it would appear that they lack even very basic facilities. However, as is acknowledged by the authors of Safe to Return?, private centres offer a somewhat better standard of assistance than government centres and conditions in some of the private centres visited (which admittedly were said to be considered as the "better" ones) were not described as falling short of basic minimum standards (Pannah, indeed, was described as having "excellent living

conditions"). It must also be borne in mind that it would appear from the Safe to Return? report that quite a few of the centres in the private sector offer a number of services to women, including legal assistance, counselling, vocational training, employment opportunities, health care and sometimes education for any children. It is clearly not the case that this private sector provision is generally of a high standard; even in this sector conditions in some centres are grossly inadequate. However, it is difficult to gainsay that the generality of existing centres manage to provide effective assistance to women who turn to them for help without exposing them to conditions that are below basic minimum standards.

235. It appears to be suggested by some passages in the Safe to Return? report, that women's centres/refuges generally expose the women occupants to sexual exploitation and prostitution. We do not know what some of the active women's NGOs and lawyers in Pakistan, who refer women to such centres have made/would make of the Safe to Return? critique, although we would not be surprised if some took umbrage at the implied suggestion that they are routinely complicit in a pattern of inhuman and degrading treatment of women who have turned to them for help. But there was no suggestion that any of the shelters visited by the Safe to Return? researcher(s) were considered by them to expose women occupants to sexual exploitation or prostitution. The essential fact as we see it is that all that can safely be said is that at present some of the existing centres fail to protect their women occupants and some provide conditions that fall below basic standards. There is no empirical basis for concluding that the above negative features mean that in existing centres conditions generally are inhuman or degrading or even unduly harsh. Whilst therefore we consider that decision makers need to be vigilant for further evidence that may come to light based on a more comprehensive survey, we consider the background evidence overall continues to indicate that although there are far too few centres relative to the underlying need for them, women who are victims of domestic violence are able, through the diverse network of government centres, women's NGOs and private charities, to obtain assistance and protection in urban parts of Pakistan away from their family networks.

236. We wish to emphasise, however, that what emerges very strongly from the Safe to Return? report is that it is not sufficient simply to consider the issue of internal relocation by reference to whether there are available and adequate centres/refuges. Focus has to be not only on the provision but the general position women who make use of such centres will find themselves in the longer term.

237. One of the main conclusions of the report is that there is a lack of after-care and rehabilitation and the absence of any re-housing for women made homeless following violence. Its authors emphasise that this fact plays a major role in limiting the decisions and choices such women then go on to make (see para 11). But the report also informs us that although in several centres/refuges, women are expected to leave after a relatively short time, those who run them do

sometimes allow women to stay longer and sometimes even allow them back. So whilst we think the Safe to Return? report draws helpful attention to the need to look at the longer-term situation such women face, we do not find that the evidence contained in this report or the other sources helps us very much in forming a clear picture of how women victims of domestic violence who have made use of women's centres and refuges then resolve their difficulties in terms of finding places to live and work. The Safe to Return? report argues that the position is that in general such women end up being forced to return to their abuser husbands/families or face serious exploitation. But there is very little empirical evidence cited in support of these broad generalisations and, given the numbers of women said to use these services, we would have expected, if the general position was that these centres/shelters routinely failed to end the cycle of oppression the women who turn to them face, that would have been evident in the form of more reported cases in the press or in the Pakistan Human Rights Commission report or in available cases studies. Nevertheless, the uncertain state of the evidence makes it imperative in our view that decision-makers pay particular regard to how they think the individual applicant/appellant will be able to manage getting on with their lives after they have left the centres/refuges.

238. We need to consider further to what extent other factors such as class, age, culture, tribe, religion etc can further modify the position of women victims of domestic violence.

239. It is fairly clear that women who have their own financial means or access to financial help from family members or friends or who are well-educated or professional women are likely to be able to secure residential accommodation. We accept the observation made by the Safe to Return? authors that possessing a class status higher up the social ladder does not mean that such women do not still face discrimination and a degree of stigmatisation. However, even the authors themselves accept that if women have financial means they can in general survive (see 6.15) and the evidence is lacking to indicate that such women are in general unable to cope with such difficulties; although clearly some do not cope and some may even find they have lost more than poorer women (7.5.1) .

240. On the other hand, concerning age, it would appear that most centres/refuges do not adequately cater for the needs of young girls on their own (Safe to Return?, 6.10) and young adult women are likely to find it more difficult to live alone than others (we note that is also the view taken by the Canadian IRB in December 2007).

241. Another important variable concerns women who have male children over five. From the Safe to Return? research, taken together with other materials, we are satisfied that women with boys over five may not be able to find a centre or refuge that will allow them to live together; the boys above this age are placed in orphanages or madrassahs in the area. As described by the Safe to Return? report:

> "[O]n admittance the mother is informed of this policy and has to then make a choice of being with her sons or accepting a place at the shelter. If the woman chooses to enter the shelter her sons are referred to the local madrassas or orphanages. This practice has not taken into consideration the impact this has on the children who may have been a witness to the violence. Apart from the trauma of separation from their mother the children may have specific psychological needs because of their previous experiences in their homes".

242. We do not say that such arrangements are necessarily to be seen as making the mother and her son's relocation unreasonable, only that this may be a factor which has considerable significance when considering the reasonableness of internal relocation.

ASSESSMENT – THE APPELLANT

243. It is not in dispute that if the appellant can succeed in showing a well-founded fear of persecution, it would be for a Refugee Convention reason, namely membership of a particular social group. The latest Home Office OGN for 4 February 2010 continues to agree with the decision reached years ago in Shah and Islam [1999] 2 AC 629 that women in Pakistan constitute a particular social group for such purposes.

Point of Return

244. Despite suggestions to the contrary by Dr Lau in his report (which he departed from in evidence before us,) we find that the appellant would not be at risk of being identified by the authorities at the point of return to Pakistan, to whichever of the major cities that was. Dr Lau and Dr Shah were both sure that there existed no central register of FIRs, nor did either suggest that there was any centralised register of persons facing criminal charges; and, as far as we can ascertain, lists compiled of wanted persons would not extend to criminal cases such as the appellant's. We can proceed, therefore, to first consider the appellant's situation on the hypothesis (first) of a return to her home area.

Past Persecution

245. Before considering whether the appellant faces current risk on return to her home area we must remind ourselves that there is no dispute about her past experiences. When she lived with her husband he was insensitive, humiliating and cruel; "he would drink a lot and beat me". In July 2006, after she had fled to her father's house, he had filed a FIR against her falsely accusing her of adultery with another man and also alleging that she and this man had attempted to murder his house-servant. Contrary to the assertion made by Mr Bourne in the respondent's additional submissions, the appellant's husband had later made a threat to kill her. He had also threatened her brother. In response to her husband lodging a FIR the police had arrested her and detained her at the police station for two days. She described the conditions there as terrible and said that the police

subjected her to humiliation. Mr Bourne sought to submit that the appellant's experiences at the police station did not amount to serious harm. We accept that the appellant's assessment of her brief detention may have been influenced by her own subjective state of shock rather than the objective severity of the conditions and treatment she experienced. On its own we do not consider that her brief detention amounted to persecution or serious harm. However, we are required to consider her past experiences cumulatively covering not only this brief detention but also the domestic violence she experienced at the hands of her husband, the ease with which he was able to have her detained and to inflict damage to her reputation on the back of a false accusation, together with his later threat to kill her and his ongoing harassment of her parents. We note that Article 4(4) of the Qualification Directive recognises that past persecution can arise from the threat as well as the actuality of serious harm/ It states that :

> "The fact that a person has already been subject to persecution or serious harm, or *to direct threats of such persecution or such harm*, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there." (Emphasis added)

246. We have no doubt that taken cumulatively the appellant's interrelated experiences as just described amounted to persecution and serious harm. Accordingly, we must approach her case so as to examine the question of whether there are good reasons to consider that such persecution or serious harm will not be repeated.

247. Before proceeding to examine whether the appellant would face a repetition of the persecution she experienced before, we need to address a difficulty that has arisen as to the accepted facts. The case was set down for a reconsideration hearing on the basis that the findings of IJ Buchanan should stand. The IJ found the appellant's account credible, stating that her account as set out in her asylum interview and witness statement was true (para 50) and the respondent's skeleton confirmed that the appellant was "entitled to the benefit of the acceptance of her account by IJ Buchanan". Yet both the respondent and Mr Fripp's skeleton arguments and main submissions to us have proceeded on the basis that all that had happened is that the police had registered an FIR against the appellant and then arrested her, in IJ Buchanan's words at para 14 of his determination "so as to be able to carry out an interview and investigation into the complaint". By proceeding on such a basis both parties failed to have regard to the appellant's earlier evidence in a witness statement that she had been charged and taken to court.

248. The IJ's presentation of the facts does mention the charge claim. As recorded by him at para 14, the appellant said in her witness statement that:

> "[S]he had only been allowed to leave the police station because the charges against her were still under investigation and the police had to finalise the registration of a FIR against her under Hudood Law. However, the police, on the basis of her

husband's complaint, had then decided to register the case of adultery under Hudood Law and had decided to charge her on 31 July 2006."

249. On the other hand, the IJ makes no reference to her having been taken to court, indeed he describes being taken to court as what she feared would have happened next had she not fled: see para 15.

250. In response to questions we asked regarding this tension, the appellant's representatives submitted that we should proceed on the basis that the appellant had been charged, whereas the respondent submitted it was more likely she did not understand the formal procedures involved in her case.

251. We share the respondent's doubt that the appellant's claim in her witness statement that she was charged can be right: if she had been charged and taken to court (she gave a specific date), it should have been possible for her to have produced not just the FIR but documents stamped by the court. There should also perhaps have been available a court summons, particularly as she had a lawyer. In the end, however, we have decided that this tension in the appellant's evidence does not matter for the purposes of this appeal. Although at one point Mr Bourne described the progression from a registered FIR to a charge brought before the court as the first in a series of speculative hurdles, he had earlier told us he accepted that the next stage would be for the police to charge her and bring the matter to court. Further and in any event, we consider that even had the appellant not made reference to being charged, it was reasonably likely that charging would have been/would be the next step. This was a case in which the police had gone to the lengths of arresting and detaining her. On the basis of the expert evidence of Dr Lau and Dr Shah, the police were thereby acting unlawfully; they should have gone first to the court for permission to do this: changes brought into effect in 2004 made that a new requirement. But whether their action was lawful or unlawful, it demonstrated active police interest and their comments to the appellant in the police station clearly conveyed that in their own minds she was the guilty party. We also know the police had maintained an active interest in the appellant's case. We can therefore proceed on the basis that whether the police had or had not formally charged her before she fled Pakistan, formal charges would be a likely next step and that, if such a step has not happened already, it would happen when the police came to learn, as we think they certainly would, of her return.

252. Although the position set out in the respondent's skeleton was to the contrary, Mr Bourne conceded before us that on return to her home area the appellant's husband would soon come to hear about this and would then inform the police. Given that the police had continued to visit her home on a periodic basis since she left Pakistan, it is very likely they would then reactivate the FIR and, as just explained, lay charges against the appellant under s.10 of the Zina Ordinance and s.324 of the PPC.

253. We are satisfied that notwithstanding the reforms ushered in by the PWA 2006 that the appellant would still face charges under s.10 of the Zina Ordinance. Section 8 of the PWA makes it quite clear that its provisions are not retrospective and Pakistan case authority cited by Dr Shah confirms that even charges arising out of pre-2006 FIRs continue under the old law. Hence the appellant will not have the protection afforded by the PWA. (However, if the PWA did apply to her, the charges made against her under s.10 could not have been converted into a charge of fornication and the courts, who would now have full control of the process from the outset, would not permit the appellant's husband to seek to reformulate a fresh FIR.)

254. The s.10 charge, however, is bailable and Dr Lau and Dr Shah were adamant that whilst the charge she would face would be under the old Zina Ordinance, the procedure for bail in her case would be governed by the law as reformed in 2004-2007. The police investigation of her case would now have to be conducted at a more senior level. Neither Dr Lau nor Dr Shah was able to assist us with whether the police would be able to arrest (and more importantly) detain the appellant prior to her coming before a court. One factor indicating this could happen is the fact it happened to her before (in 2006) even after the 2004 reforms made it unlawful. On the other hand, one of the stated objects and purposes of the PWA 2006 was to take control over adultery accusations away from the police and hand it to the courts. Further, both experts pointed out that there was provision in Pakistan law for lawyers to arrange for pre-arrest bail hearings. Given that the appellant's family had already paid a lawyer to deal with her case, we see no reason to think such an arrangement could not be made (we deal in more detail with our assessment of her or their financial circumstances below). Hence the appellant would not be at risk of detention except by order of a court.

255. We have already set out our findings on the issue of bail for women as a result of the 2004-2007 reforms. There is no dispute that in respect of the s.10 offence under the Zina Ordinance she would get bail as of right. In our judgment she would also get bail as of right on the s.324 CCP charge. Whilst we are not persuaded that the amended provisions of Ordinance XXXV1 establish wholly absolute rights, we can see no reason why the courts would consider that a woman on an attempted murder charge based on an FIR laid by her husband alleging adultery should cause them to disapply this provision. However, if we had found she would not get automatic bail, we would have been likely to find she would not be granted discretionary bail, essentially because she will be someone who had absconded from the jurisdiction by fleeing abroad and who has also been responsible for a lengthy delay in the criminal process.

256. But even if not detained the appellant would remain in the criminal justice process and continue to face prosecution under an old law which would mean that the husband would not need to worry about his false accusations resulting in him being charged. Assuming, as we must, that a more senior police officer will conduct any further police work on her case, it is nevertheless accepted that the

police have continued to visit the appellant's parents' home to enquire whether she is still abroad. They will clearly see her as someone who has absconded from justice and can be expected to insist on, and obtain from the court, stringent conditions of bail which require her to live at an identified address in her home area. Furthermore, the remand and trial process is likely to be prolonged; Dr Lau and Dr Shah told us her case could drag on for several years. By virtue of her arrest and detention in a police station for two days, the appellant's reputation has already been tarnished and it is reasonable to expect that her husband will seek to deprecate her reputation further whilst she remains in Lahore under strict bail conditions. We know that defendants are said to have to make "frequent court appearances" (US State Department Report March 2010). That being so, it is likely that the appellant's husband will seek to use these as a means of harassing the appellant.

257. It is the husband's conduct that gives us most cause for concern, although not in as many respects as Mr Fripp contends.

Child custody

258. Given that one of the appellant's own experts (Dr Lau) appeared to think that in practice the Pakistan courts would seek to favour the woman in a custody dispute, we are unsurprised that Mr Fripp did not seek to press the contention that the appellant's husband would also seek to take legal action to obtain custody of his children. In any event, we find that the evidence before us simply does not support any suggestion that he has any ongoing interest in his daughters. It was the fact that the appellant did not bear him a son, that the appellant described as being one of the motivating factors in his subsequent mistreatment of her. Despite her evidence that he telephoned her parents' home frequently, it has never been suggested that he has said to them he wants anything to do with her daughters. It was suggested at one point by Dr Balzani and Mr Fripp that her husband, even though having no real interest in the children, might nevertheless seek to press for their custody as part of his attempt to use the law in whatever way he could to oppress her. However, that is pure speculation on their part and since her husband has not sought to introduce custody into the dispute previously we see no proper basis for inferring that he would do so now. Having found that the appellant would not face detention, we do not need to consider what would happen to her children in that eventuality, but we are satisfied that if any need arose her family would make arrangements for care of her children. So far as concerns the position of her children in the event she sought help from a women's shelter elsewhere in Pakistan, we deal with that below in the section addressing internal relocation.

Honour killing

259. Given our earlier assessment of the problem of honour killings we do not think it is likely that her husband will actually seek to kill her or have her killed: in

addition to two factors we have already identified (her home area not being an area of the country where Jirga councils hold sway; hers being an urban, not a rural area) we note that she is a married woman and that married women are much less likely to be the target of honour killings than a single women. In addition, his father is a lawyer whose family's reputation (we infer) would suffer if his son sought to take the law into his own hands; the dispute has arisen in Lahore involving two families with professional status. This is a far cry from the tribal-based genesis of most continuing occurrences of honour killings.

260. Equally, however, it is accepted that the appellant's husband has previously made a threat to kill the appellant and her brother and that he has continued to visit her parents' home and to make clear that he will not stop his vendetta against the appellant. We think it reasonably likely that when she returns he will repeat his threatening and intimidating behaviour and will see the ongoing court proceedings as a way of frightening and demoralising her. We remind ourselves that persecution can arise from threats (certainly threats to kill) as well as from acts: see Article 9 of the Qualification Directive. In our judgment, whilst her likely encounter with the Pakistan criminal justice process will not in itself give rise to persecutory harm, it will do so when other circumstances are added to the equation, in particular the circumstance that her husband is very likely to continue to threaten and intimidate her.

261. It is said by Mr Bourne that if the appellant's husband continues to behave in an intimidating way, there would be nothing to stop her or her parents or brother seeking and obtaining police protection in her home area. However, for such protection to be effective it would have to operate at the local level and it is not in dispute that the local police have already shown they take the side of the appellant's husband. It also appears that when the husband comes to the house he is accompanied by other men who can be presumed to be also ready to continue to take an active interest in intimidating the appellant's family. The appellant has expressed concern that she had harmed her family's reputation. Whilst they have decided to stand by her nevertheless, we do bear in mind the advancing age of her parents and the fact that they may be less able to deal with social pressures brought to bear by a man ready to camp outside their home when he wishes. In these particular circumstances we do not consider that there would be effective protection in her home area, notwithstanding that the appellant would not face detention during the trial process.

262. We should make clear that we have reached our assessment that the appellant would be at risk in her home area without regard to the likely outcome of her trial. For the avoidance of doubt, however, we would record that we consider it highly likely that her trial would result either in a Session court finding there was no case to answer or in her acquittal. It is accepted that the husband's accusations are false. Even making allowances for the possibility he could obtain false medical evidence, the police would not be able to produce the type of forensic evidence that the courts are said to expect in adultery cases post-2006. The

husband and the witnesses named in the FIR would run the serious risk of being found to have lied under oath. The elapse of time would make it less likely that any crime scene evidence produced would withstand scrutiny.

263. Mr Fripp, with some support from Dr Lau and Dr Balzani, has argued that as the appellant would be tried before a Session Court, it would be relatively easy for the husband and his father to bribe the judge. We have already set out our conclusion that whilst we accept there is a significant amount of evidence to show that corruption takes place at the lower levels of the Pakistan judicial system, the evidence falls well short of showing that it is endemic or that for defendants before such courts there is a real risk that they will be convicted as a result of corruption. Further, if both Dr Shah and Dr Lau are right and a Session Court is equivalent to a Crown Court in England and Wales, then the level of judges is relatively senior anyway. We do not consider that the appellant has shown she would be in a different position from any other defendant on similar charges. Indeed, since all urban judges will know of the reasons why the PWA 2006 reforms were made, and that many cases involving women charged with adultery have been thrown out on appeal to higher courts, we think it a great deal less likely they would be ready to go out on a limb in a case where the evidence would not stand scrutiny. There is the additional factor that the case will come up in Lahore where the standards of lawyers and judges at all levels is generally higher than elsewhere, certainly than in the towns and rural areas. It remains, however, that the appellant's overall circumstances whilst awaiting trial, would give rise to a real risk of persecutory harm in her home area.

Internal Relocation

264. Para 339O of the Statement of Immigration Rules HC 395 as amended make clear that it is always necessary to examine the particular circumstances of the individual concerned. Relying heavily on the evidence of both Dr Lau and Dr Balzani and the Safe to Return? Report, Mr Fripp submitted that the appellant would not have a viable option of internal relocation whereas Mr Bourne urged that we take the opposite view.

265. As regards safety, we reject Mr Fripp's submission that wherever the appellant sought to move in Pakistan the authorities or her husband's family would track her down. Mr Fripp has properly not suggested that someone in her position would be on any centralised database and we can find no evidence to suggest that. As regards her husband and his family we take account of the interconnectedness of families in Pakistan. Equally, however, we bear in mind the evidence indicating that (at least in the private sector) centres/refuges generally keep their locations confidential. We consider that it is of material importance that Pakistan is a very large country geographically and has a large population, estimated in July 2008 as nearly 173 million and that there is no evidence to suggest that the state agencies either at a federal or provincial level hold sophisticated nationwide databases on their citizenry. Whilst it appears that in

some instance local police are told the names of women residing temporarily in centres or refuges for women victims of domestic violence, there is insufficient evidence to show that this leads to persons outside the local areas being able to access that information.

266. We consider that if the appellant seeks to relocate in Pakistan there is only a remote possibility of the appellant's husband's family being able to trace her through official or unofficial channels. Although the appellant's husband comes from a professional family having a lawyer for a father, the evidence does not indicate that this family has power or influence of the type that might enable it to gain the assistance of the Pakistan police and/or security services in tracking down the appellant.

267. As to reasonableness, we have already set out our assessment of the general position regarding the availability of assistance to women in the form of shelters. In short we concluded that whilst the services offered are far too few and have many shortcomings, even in the private NGO sector, nevertheless it cannot be said that women returning to Pakistan who seek to access such shelters would be at real risk either of being denied assistance or of receiving ill treatment in them. Nor do we consider the fact that the shelter workers might come to know that the appellant faced criminal charges would cause a woman in the appellant's position to be turned away, since their services are particularly designed to help women fleeing from husbands who have made false accusations against them. Whilst we have earlier observed that there can be issues of mothers in shelters facing separation from male children when they reach the age of 5, the appellant has no sons, only two daughters.

268. We note Mr Fripp's submission that the appellant has no history of employment and has modest education and that away from her home area she would lack potential male or other support. She also has two young female children and would face particular pressures as a young mother on her own. These factors would interact with the general societal discriminations faced by women in Pakistan. We accept that these features will give rise to some degree of hardship. However, we would first of all observe that she and her children have no known health problems and that she has already shown a certain degree of resourcefulness in having been able to leave her husband's home, then seek safety first with her parents and then with friends of theirs and then take steps to travel to the UK and seek asylum. It is true that in taking these steps the appellant had the support of her family but that, it seems to us, is an extremely important background consideration in her case: they have not disowned her (as some families do with women similarly situated to her) and they have shown in the past that they have been ready and able to help with obtaining legal assistance and financial assistance.

269. The appellant now says in her most recent witness statement and in evidence to us that her father no longer has property or assets and faces expensive medical

treatment and would not be able to assist as before, something she repeated before us. We consider this inconsistent with her earlier evidence that her father had sold only some of his property and gold to help her leave the country; and in our judgment she has not adequately explained how it has come about that she can say he no longer has any other property or any gold. In any event, it remains, even on her own latest account, that he has a pension following retirement from employment in the professional sector and she has not suggested that the family's standard of living has declined. We also know that the appellant has three sets of relatives, none of whom are said to be poor or to have expressly turned their back on her. Given the lengths to which her father and mother went to before to assist her we do not consider that they would leave her to relocate elsewhere in Pakistan without any kind of family assistance, whether in the form of financial or other assistance. Even though the appellant's level of education is modest, it is still above that of many women in the larger cities and she (although she chose to give evidence before us through an interpreter) speaks English. We agree with Dr Shah that this would be an asset for some employers in the big cities. She would, of course, have two young children and so if she were to work would need help with their care during the day, but it seems clear that such help is available at a low cost.

270. The appellant says that she fears social isolation and disgrace. The expert and background evidence highlights the damage done to women's reputation by being made the subject of FIRs relating to adultery allegations and being detained in police custody. We do not seek to belittle the difficulties the appellant will face in her home area as a result of her husband's past vendetta against her and his likely continued pursuit of her through the courts, but we do not consider that in *other parts of Pakistan* her history would become known or that she would need to make it known to those she associated with. It is clear from the background evidence that in the larger cities single women with children can get by and there is not the same level of social scrutiny that occurs in the smaller towns and rural areas.

271. For the above reasons we conclude that the appellants would have a viable option of internal relocation.

Accordingly our disposal of the appellants' cases is as follows:

The IJ materially erred in law and his decision is set aside.

The decision we remake is to dismiss the appellants' appeals.

Signed

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)

ANNEX A: DECISION FINDING A MATERIAL ERROR OF LAW

PANEL: **Senior Immigration Judge Southern**
Senior Immigration Judge Ward
Mrs J Harris

REASONS FOR THE DECISION THAT THERE IS AN ERROR OF LAW IN THE DETERMINATION, 8 January 2009

1. Reconsideration has been ordered of the determination of Immigration Judge Buchanan who, by a determination dated 29th February 2008, dismissed the appellant's appeal.

2. The appellant, who is a citizen of Pakistan born on 10th April 1981, arrived in the United Kingdom in August 206 and claimed asylum shortly afterwards. The basis of her claim was that she faced a real risk of persecutory ill-treatment on return to Pakistan on account of entirely false allegations of adultery, theft and assault made against her by her abusive husband from whom she was estranged because of his violent behaviour towards her.

3. The Immigration Judge found the appellant to be a credible witness and accepted her account in its entirety. He accepted also that the appellant had been arrested by police after an FIR had been issued and that she had absconded from her bail, secured with the assistance of her father, in order to flee to the United Kingdom after her father concluded that no safe refuge could be found for her anywhere in Pakistan.

4. The conclusions reached by the Immigration Judge upon these findings of fact are inconsistent and contradictory. He said that at the time the appellant left Pakistan she had a well-founded fear of persecution and was "at continuing risk" but said also that she had "effective protection" from her parents.

5. Although finding that the appellant left the country only after attempts to find a safe haven elsewhere in Pakistan had failed, the Immigration Judge dismissed the appeal because he found that the introduction of the Protection of Women (Criminal Laws Amendment) Act in December 2006 was a complete answer to the appellant's fear of persecution because he understood that to result in the revocation of the Hudood Ordinances so that the appellant no longer faced any risk of imprisonment.

6. There are a number of difficulties with that assessment. We are satisfied that the understanding of the Immigration Judge of the evidence before him relating to the effect of the Act was fundamentally flawed and inaccurate. He appeared to have concluded that the prospect of an adultery charge had fallen away altogether whereas the evidence before him suggested only that the process of prosecution may have changed. He said there was no remaining risk of imprisonment but the

Immigration Judge did not deal with the evidence before him that pointed to there remaining a risk of imprisonment upon conviction even before a secular court.

7. Further, the Immigration Judge appears to have overlooked the fact that, even if he were correct to find that the adultery allegations had fallen away, the appellant still potentially faced arrest because there remained outstanding the other allegation in the FIR of theft and assault. As, on the findings of the Immigration Judge, the appellant had absconded from bail, the prospect of being readmitted to bail despite this should she be arrested on return should have been considered.

8. Taken together we are satisfied all this amounts to a sufficient error in reasoning and a sufficient misunderstanding of the appellant's case and the evidence before the Immigration Judge as to constitute an error of law. Those errors were material because we cannot be sure that the outcome would have been the same if not for them.

9. That being the case the decision of the Immigration Judge cannot stand and the Tribunal must substitute a fresh decision to allow or to dismiss the appeal. But it is common ground and agreed between the parties that the Immigration Judge was entitled to reach the findings of fact he did and that the appellant should not be deprived on the acceptance of her factual account.

10. Therefore, with the agreement of the parties, we direct that the starting point for the reconsideration hearing that is to follow will be the findings set out between paragraphs 50 to 52 of the determination, based on the summary of the appellant's account as set out between paragraphs 11 to 20. Other than that the determination shall be set aside and be of no effect.

11. The Tribunal shall carry out a fresh assessment of the risk faced by the appellant upon return to Pakistan on the basis of those findings but in the context of the current objective country evidence and any expert evidence which the parties choose to put forward.

ANNEX B: BACKGROUND MATERIALS

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