

IN THE HOUSE OF LORDS
ON APPEAL FROM
HER MAJESTY'S COURT OF APPEAL (ENGLAND & WALES)

B E T W E E N

ZAINAB ESTHER FORNAH

Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- and -

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER

I. INTRODUCTION

1. In this appeal Your Lordships will decide whether asylum status can arise, through a gender-based Particular Social Group (PSG), where the well-founded fear is of a brutal practice of female genital mutilation (FGM), serving as a societally-embedded rite of passage by which (but not without which) Sierra Leonean females are *accepted as 'real' women* (*Statement of Facts and Issues* §§6-8). The central issue divided both the IAA (where the adjudicator found refugee status but was overturned by the IAT), and the Court of Appeal (where Arden LJ would have found asylum status but the majority of Auld and Chadwick LJ rejected it).
2. UNHCR intervenes with Your Lordships' permission, in the light of its supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the 1951 Convention) and

other refugee protection instruments: see Art. 8(a) of the 1950 Statute of the United Nations High Commissioner for Refugees. UNHCR issued the Handbook on Procedures and Criteria for Determining Refugee Status in 1979, re-edited in 1992 (the UNHCR Handbook). The UNHCR Handbook seeks to provide authoritative guidance on the interpretation of the terms of the refugee criteria in the 1951 Convention and is complemented by issuance of various Guidelines on International Protection by UNHCR. In May 2002, UNHCR issued *Guidelines on International Protection: Membership of a Particular Social Group (PSG Guidelines)*, and (2) *UNHCR's Guidelines on International Protection: Gender-Related Persecution (GRP Guidelines)*. UNHCR does not make submissions on the facts of an individual case, but is concerned with the interpretation and application of the Convention as a matter of law and principle, and to invite Your Lordships' attention to certain international and comparative material, including UNHCR's issued Guidelines.

3. The question is whether a gender-based PSG (or alternative PSGs: wide or narrow) is capable of being found on this appeal (*Statement of Facts and Issues, issues §§1, 4*). That question will be approached by reference to the circumstances relating to FGM in the society in question (Sierra Leone). Regard will be had to the “*independent existence principle*”, which avoids circularity by requiring that the PSG not be identified exclusively by reference to the feared persecution (*Statement of Facts and Issues, issue §3*). Regard will also be had to the fact that, among Sierra Leonean women there are (*Statement of Facts and Issues, issue §2*) not only those who fear FGM, fleeing the forced brutality of mutilation; but also those who do not have such fear, comprising of those who (i) are *fearless*, wanting mutilation and its societal acceptance; (ii) are *risk-free*, having undergone one-off mutilation; and (iii) are *collaborators*, women involved in conducting the rite.

4. UNHCR observes that two matters are not contentious in this appeal (*Statement of Facts and Issues* §21). It is common ground between the parties that, if Your Lordships are satisfied that there is *membership of a PSG* based on gender (and whether a wide or narrower PSG), then in this case:
 - (1) A Sierra Leonean female facing forcible FGM can in principle have a well-founded fear of “*persecution*” (*Statement of Facts and Issues* §21a). UNHCR supports this agreed approach.
 - (2) Forcible FGM can in principle involve persecution “*for reasons of*” membership of that PSG (*Statement of Facts and Issues* §21b). UNHCR also supports this agreed approach. It fits with the idea that FGM, and state-endorsement of it, is something visited *on women as women*. It is a straightforward, common sense, application of the “nexus” (causation) question. See e.g. *Shah and Islam v Secretary of State for the Home Department* [1999] 2 AC 629 at 646 (Lord Steyn), 653-654 (Lord Hoffmann).

II. MATERIALS AND COMMENTARY

Female Genital Mutilation (FGM) as a societally-embedded rite

5. In considering FGM by reference to the 1951 Convention, it should be remembered that the focus is on identifying a well-founded fear of persecution. The exercise is not of one state evaluating another state’s societal mores: see *Shah and Islam* at 655C-F (Lord Hoffmann). There is a considerable volume of literature regarding FGM as a societally-embedded rite of passage. Among its key features, recognised by way of strong consensus in the international community, are the following.
6. First, FGM involves a direct act recognised as involving extreme cruelty. This is a dangerous and potentially life-threatening procedure

that causes unspeakable pain and suffering. Especially where unsterilised, makeshift or rudimentary tools are used. The Court of Appeal called it “*an evil practice internationally condemned*” (Auld LJ at §1), “*inhuman and degrading*” (Chadwick at §46) and “*repulsive*” (Arden LJ at §58) and, in another case, “*barbarous*” (*Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075 at §68 per Munby J). The phrase “*female genital mutilation*” is carefully chosen. The 2005 UNICEF Report, *Changing a Harmful Social Convention: Female Genital Mutilation* explains (p.2) how it was adopted following a WHO recommendation in 1991, replacing the language of “*circumcision*”. It did so, to establish a clear distinction with male circumcision and emphasize the gravity of the act. In the United Kingdom the *Female Genital Mutilation Act 2003* replaced the former *Prohibition of Female Circumcision Act 1985*. Condemnation is widespread. For example, WHO, UNICEF and UNFPA (United Nations Population Fund) combined to condemn it in a 1997 *Joint Statement*. As the August 1993 Recommendations of a UNFPA *Round Table on Women’s Perspectives on Family Planning, Reproductive Health and Reproductive Rights* had put it (§8):

Genital mutilation is a major lifelong risk to women’s reproductive health and a violation of the rights of girls and women. Governments should vigorously act to stop that practice and to protect the right of women and girls to be free from such unnecessary and dangerous practices.

7. Secondly, FGM is to be approached as a form of “*violence against women*”. The practice of FGM is internationally recognised as violence against women and more specifically as harmful ‘customary’ or ‘traditional’ practice. It is a violation of the human rights of girls and women. It violates their basic rights, denying their physical and mental integrity, their right to freedom from violence and discrimination and in the most extreme cases their right to life. The UN General Assembly recognised this in its *Declaration on the Elimination of Violence Against Women* (20th December 1993), where such acts of “*gender-based violence*” (Art 1) were expressed to include “*female genital mutilation and other traditional practices harmful to women*” (Art

2(a)), which states were called on to condemn and not to “*invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination*” (Art 4). That position has been reinforced in successive reports of the Special Rapporteur on Violence Against Women. See in particular the Report of the Special Rapporteur (Ms Radhika Coomaraswamy) on Violence Against Women, its Causes and Consequences (31st January 2002).

8. Thirdly, FGM involves “*gender discrimination*”. It is an act of violence against women, linked to a societal default position where females are not otherwise ‘real women’, recognised and tolerated by states. That state recognition and toleration is in a context where international discrimination law requires positive action. It can be seen as a manifestation of deep rooted gender inequality that is deeply entrenched in social, economic and political structures. It assigns women to an inferior position in society and is seen as society’s way of reinforcing subjugation of women by society and controlling their sexuality.

(1) UNHCR notes that, in the present case of Sierra Leone, the parties have described how entry into the acceptance of ‘real’ womanhood is also marked by a lifetime of belonging to secret women’s societies with access to customary power bases (*Statement of Facts and Issues §6*):

Uninitiated women are considered to be children and are not accepted as adults by society. They are generally barred from taking up leadership positions in Sierra Leonean society. Dr Fanthorpe expressed the view that “even to members of the Sierra Leonean underclass, an uninitiated indigenous woman represents an abomination fit only for the worse sort of sexual exploitation”.

(2) The link to discrimination is also found in the reasons which lie behind FGM’s social dynamics and social convention. The practice of FGM is an important part of girls’ and women’s cultural identity, imparting a sense of pride, of coming of age and a feeling of community membership. It is often practised on grounds that it preserves a girl’s virginity, making the procedure a prerequisite for marriage. Another justification is that it

protects girls from excessive sexual emotions and therefore helps to preserve their morality, chastity and fidelity. The common themes are that it ensures a girl's or woman's status, marriageability, chastity, health, beauty and family honour. See UNICEF, *Changing a Harmful Social Convention: Female Genital Mutilation* at p.11.

- (3) The link with gender discrimination is recognised in international law. The United Nations *Convention on the Elimination of All Forms of Discrimination Against Women 1979* (CEDAW) condemns discrimination against women and provides for action for its elimination. In that context, Article 5 requires states to take all appropriate measures to modify social and cultural patterns, and practices based on the inferiority of women or stereotyped roles.
- (4) Thus, the UN Committee on the Elimination of Discrimination Against Women, in its *General Recommendation No.14 on Female Genital Mutilation* (1990) noted with grave concern the perpetuation of FGM through continuing cultural, traditional and economic pressures, and called for effective measures to eradicate its practice. The UN General Assembly too, in its January 2002 Resolution on *Traditional or customary practices affecting the health of women and girls*, called upon all states to ratify or accede to CEDAW (§3(a)), and to adopt national measures to prohibit traditional practices such as FGM, prosecuting the perpetrators (§3(d)).
- (5) States have a duty to exercise due diligence to eliminate violence against women. CEDAW, in its general recommendation No. 19 (1992) called on States to act with due diligence to prevent and respond to violence against women. The following year, the General Assembly adopted the 1993

Declaration on the Elimination of Violence against women which urges States in its article 4(c) to “exercise due diligence to prevent, investigate and , in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”. According to the report of the Special Rapporteur (Yakin Ertuk) on Violence against Women, its Causes and Consequences (20th January 2006) (§14):

The concept of due diligence provides a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women.

- (6) It is in this context that Your Lordships are considering Sierra Leone, the parties having explained that there is there no law proscribing FGM, and indeed Sierra Leonean politicians of all persuasions have supported it (*Statement of Facts and Issues §§10-11*). This is despite the fact that Sierra Leone has both signed (21 September 1988) and ratified (11 November 1988) CEDAW.

Gender-related persecution

9. Gender-related persecution can in principle give rise to refugee status by reference to membership of a gender-based PSG.
- (1) UNHCR’s Executive Committee (ExCom)’s Conclusion No.39 (XXXVI) of 1985 on *Refugee Women and International Protection* recorded that the Committee (of which the United Kingdom is a member):
- Recognised that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.*
- (2) UNHCR’s July 1991 *Guidelines on the Protection of Refugee Women* promoted acceptance of (§71):

... the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status...

- (3) In successive *General Conclusions on International Protection* ExCom called for the promotion of criteria and guidelines responding to persecution specifically aimed at women, and an approach to refugee status which was sensitive to gender-related concerns and recognised gender-related persecution. See e.g. General Conclusions No.77 (XLVI) of 1995 at (g); also No.79 (XLVII) of 1996 at (o), No.81 (XLVIII) of 1997 at (t), No.87 (L) of 1999 at (n).
- (4) In 2002 UNHCR issued its *Guidelines on International Protection: Gender-Related Persecution*, to complement the UNHCR Handbook. These *Guidelines* were referred to in *re B; R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063 at §§34-35 (Baroness Hale). They followed the September 2001 San Remo Expert Roundtable and its summary conclusions (see *Feller, Turk & Nicholson c.5.2*).
- (5) UNHCR invites attention to the *GRP Guidelines*. They set out UNHCR's position on the approach to gender-related persecution. Key ingredients include the recognition: (a) that gender-related violence such as FGM can constitute persecution (*GRP Guidelines* §9); (b) that where it is perpetrated by non-state agents, it can suffice that the state knowingly tolerates it or is unable to offer effective protection. (§11); (c) that the causal nexus can be satisfied where (i) the persecution by non-state agents or (ii) the lack of protection by the authorities is for the Convention reason (§21); and (d) that gender-based groups (eg. based on shared characteristics of sex or sexual orientation) can properly be within the ambit of PSG (§30).

- (6) Guidelines on gender issues in asylum cases are also to be found in a series of national instruments. The first of these were the Canadian Immigration and Refugee Board (CIRB)'s *Guidelines: Women Refugee Claimants Fearing Gender-Related Persecution* (9th March 1993, updated November 1996). In the United Kingdom, the IAA issued *Asylum Gender Guidelines* in November 2000, and the Home Office has issued its own IND *Asylum Policy Instruction: Gender Issues in the Asylum Claim*. It is to be noted that the EU *Qualification Directive* (2004/83/EC) makes express reference to gender-specific acts as within the meaning of persecution (Art 9(2)(f)).
10. Gender-based PSGs were explicitly recognised in *Attorney General of Canada v Ward* (1993) 103 DLR (4th) 1, at 34b, (La Forest J). The New Zealand Refugee Status Appeals Authority (NZRSAA) recognised a PSG based on sexual orientation in the influential decision of *Re GJ: Refugee Appeal No.1312/93*. In relation to women, see eg. *Shah and Islam* (in Your Lordships' House), *Refugee Appeal No.71427/99[2000]* NZAR 545, (2000) INLR 608 and *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574. The Canadian case law was summarised in the CIRB's February 2003 *Compendium of Decisions (Guideline 4 – Women Refugee Claimants: Gender-Related Persecution)*, and the position in Europe in Crawley and Lester's May 2004 *Comparative Analysis of Gender-Related Persecution (Europe)* (UNHCR Evaluation and Policy Analysis Unit). A helpful overall commentary is Haines, *Gender-Related Persecution* (from UNHCR's San Remo Expert Roundtable). UNHCR would also commend to Your Lordships the observations of Baroness Hale in *re B; R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063 at §§30-39.
11. UNHCR suggests these three general, preliminary points which are lessons arising from the approach to gender-related persecution:
- (1) First, there is no objection based on group size. Thus, women in

Pakistan can constitute a PSG. See *Shah and Islam* at 645A (Lord Steyn), 652E (Lord Hoffmann), 658F (Lord Hope).

- (2) Secondly, a PSG can exist albeit not all are at risk. The PSG may be a group some of whose members do not (a) face or (b) fear the persecution. Compliant or powerful women in Pakistan may be safe from suspicion for adultery. Non-practising or privileged homosexuals may be safe from harm. See *Shah and Islam* at 644G-645A (Lord Steyn), 653G and 652H (Lord Hoffmann).
- (3) Thirdly, it is appropriate to consider alternative gender-based PSGs, wider and narrower. For a wider PSG, gender may be the sole unifying feature (eg. women; or homosexuals). For a narrower PSG, gender may arise in conjunction with other features (eg. women suspected of adultery; or practising homosexual men). See *Shah and Islam* at 645A-C (Lord Steyn), 652C-653D (Lord Hoffmann), 658F-H (Lord Hope), 659A (Lord Hutton).

The approach to “Particular Social Group” (PSG)

12. In 2002 UNHCR issued *Guidelines on International Protection: Membership of a Particular Social Group*, to complement its Handbook. Alongside its *GRP Guidelines*, UNHCR’s *PSG Guidelines* arose out of the San Remo Expert Roundtable and its summary conclusions (see *Feller, Turk & Nicholson c.4.2*). The *PSG Guidelines* set out UNHCR’s position on the approach to PSG, and UNHCR invites Your Lordships’ attention to them.
13. UNHCR suggests that there are these key ideas which inform the approach to the 1951 Convention category “for reasons of ... membership of a particular social group”:

- (1) The Convention is concerned with international protection, where refugee status arises out of a well-founded fear of persecution for a Convention reason and lack of national protection. This has been described as “*surrogacy*” protection. See eg. *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495C (Lord Hope), 509A (Lord Clyde).
- (2) The Convention should be interpreted as a living instrument with an autonomous meaning based on its object and purpose, as well as its humanitarian underpinnings. See eg. *Re B; R (Hoxha) v Special Adjudicator* [2005] 1 WLR 1063 at §§7-8 (Lord Hope).
- (3) Identifying the PSG cannot be achieved solely by reference to the feared persecution. This is an “independent existence” principle. Its function is to avoid circularity. The person is (a) a person who is facing persecution. They need (b) to show that persecution is for reasons of membership of a PSG. They cannot (c) simply point to ‘those persons who are persecuted’ as sufficing. Otherwise (d) it would be sufficient to be a person facing persecution. This principle is associated with *A v Minister of Immigration and Ethnic Affairs* (1997) 142 A.L.R 331 (Applicant A) (McHugh J at 358). See *Shah and Islam* at 639H-640A (Lord Steyn), 652G (Lord Hoffmann), 657C (Lord Hope).
- (4) The “independent existence” principle is subject to an important qualification. Acts of persecutors (a) can be relevant and (b) can create a (societally-recognised) PSG, provided that the PSG is not defined exclusively by reference to the persecution. This is exemplified by the example of persecution “*for being left-handed*”, described in *Applicant A* at 359 (McHugh J). See *Shah and Islam* at 645E-G (Lord Steyn), 656H-657A (Lord Hope).

- (5) Two approaches may be taken in regard to defining a PSG. First, is what may be called the “*protected characteristics approach*”. In order to identify the PSG, it is helpful to ask whether members of the PSG share a common characteristic which unite the group. It may be (a) “*immutable*”, which the individual cannot, or (b) “*fundamental*”, which the individual ought not to be required to, forsake because the characteristic is closely linked to the identity of the person or is an expression of fundamental human rights. This approach is associated with the analysis of the US Board of Immigration Appeals in *In re Acosta (1985) 19 I.&N. 211(US)*, reflected in the Supreme Court of Canada’s “*good working rule*” in *Ward v Attorney General of Canada (1993) 103 DLR (4th) 1 at 33h*. See *Shah and Islam* at 644D (Lord Steyn), 651E (Lord Hoffmann), 658E-F (Lord Hope).
- (6) The second approach is the “social perception” approach. The question to be established is whether the PSG is “*cognisable*” as a group, viewed objectively in terms of the relevant society. It may be cognisable “*objectively*” having regard to the circumstances considered by a Court. It may be seen to be “*set apart*”, for cultural, social, religious or legal factors. This approach is associated with *Applicant A*, where McHugh J said PSG would generally involve external perception (1997) 142 A.L.R 331 at 359 and Dawson J described a cognisable group set apart within society (at 341). See also *Shah and Islam* at 657D-H (Lord Hope); *Applicant S* [2004] HCA 25 at §§27, 30, 34, 62-63, 69, 76; *Liu v Secretary of State for the Home Department* [2005] 1 WLR 2858 at §§26, 30 (Rix LJ).
- (7) Crucially, there is here no “legal litmus test”, but “*a global appraisal in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic*

limits, has a broad humanitarian purpose”: words of Sedley J, which reflect a warning given by Kirby J in *Applicant A*. This insight was endorsed in *Shah and Islam* at 646F (Lord Steyn), 649G (Lord Hoffmann); and by UNHCR’s San Remo Expert Roundtable (c.4.2 §8). It explains why there is no requirement of “cohesiveness” (see *Shah and Islam*), or “immutability” (see *Liu v Secretary of State for the Home Department* at §14); why the “protected characteristics” approach is a “good working rule” (see *Ward*); why the *ejusdem generis* interpretation is not a rigid rule (*Ouanes v Secretary of State for the Home Department* [1998] 1 WLR 218); and why societal-perception is described as a feature of a PSG “generally” (*Applicant A* per McHugh J), and “in general terms” (*Shah and Islam* at 657D per Lord Hope), but not a precondition (*Applicant S*). This is also why UNHCR’s position is that the protected characteristics and social-perception approaches referred to in EU *Qualification Directive* Art 10(1)(d)) should be reconciled by EU member states to permit alternative, rather than cumulative, applications of the two concepts.

14. Your Lordships have previously considered the following further ideas, though UNHCR would caution against their being seen as requirements, preconditions or legal litmus tests (see §13(7) above):

- (1) First, the idea that the PSG ground is interpreted in the light of the other four enumerated Convention grounds: “*for reasons of race, religion, nationality ... political opinion*”. This has been called a *ejusdem generis* approach. See *Shah and Islam* at 640H and 643C (Lord Steyn), 651F (Lord Hoffmann), 656F (Lord Hope).
- (2) Secondly, the idea that the interpretation of the PSG ground is informed by the Convention preamble emphasising “*the principle that human beings shall enjoy fundamental rights and*

freedoms without discrimination". This has been described as a purposive approach. See *Shah and Islam* at 638H-639D and 643E (Lord Steyn), 650H-A (Lord Hoffmann), 656E (Lord Hope). See too Art 31 of the *Vienna Convention on the Law of Treaties*, considered in *R (ERRC) v Immigration Officer Prague Airport* [2004] UKHL 55 at §18.

- (3) Thirdly, the idea that viewed in these ways the focus of PSG is on groups who are discriminated against. That allows for the inclusion (a) of groups coming within the Convention's anti-discriminatory purpose and objects, and (b) of grounds on which a person may be discriminated against by society. See *Shah and Islam* at 639C (Lord Steyn), 651D (Lord Hoffmann), 656F (Lord Hope).

FGM as gender-related persecution

15. UNHCR's position is that FGM can constitute gender-related persecution, a well-founded fear of which can require asylum status on grounds of a gender-based PSG.

- (1) Attention has been invited above to UNHCR's approach to gender-based persecution: see §9 above, and especially UNHCR ExCom No.39 (XXXVI) of 1985; UNHCR's 1991 *Guidelines on the Protection of Refugee Women*; and UNHCR's *GRP Guidelines 2002*.
- (2) The *GRP Guidelines* refer to gender-related asylum claims including FGM (§3), identifying FGM as a form of persecution (§9), whether reflected in persecutory laws emanating from traditional or cultural norms (§10) or where (albeit that the practice is prohibited in theory) a state continues "*to condone or tolerate the practice*" (§11). They go on to deal with nexus (§§20-21) and gender-based PSGs (§§28-31).

- (3) In May 1994, UNHCR's Division of International Protection issued its general advice on FGM in a *Memorandum* to its Washington Office, entitled *Female Genital Mutilation*. It explained that (§7):

... we must conclude that FGM, which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child, and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence. Therefore, a woman can be considered as a refugee if she or her daughters/dependents fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or to allow her daughters to undergo the practice.

- (4) UNHCR's 1994 *Memorandum on FGM* was provided on 8th July 1994 to the Refugee Legal Centre in London. Baroness Rendell has recently referred back to that material in a debate on FGM and asylum in Parliament (House of Lords, 8th December 2005). The 1994 letter also included a survey and some summaries, drawing on the then state practice on gender-related persecution cases, from Canada, France and the United States. UNHCR's *Memorandum on FGM* of 1994 was cited in the influential US decision of *In re Kasinga (BIA 1996) 21 I.&N. Dec 357*: see §18(6) below.

16. The acceptance that FGM can constitute persecution, and that women (or subgroups of women) can constitute a PSG, is to be found in the Canadian (CIRB) Guidelines (1996); the United Kingdom IAA's *Asylum Gender Guidelines* (2000); and the Australian Department of Immigration and Multicultural and Indigenous Affairs Paper *Gender-Related Persecution (Art 1A(2)): An Australian Perspective* (2003). The *European Parliament resolution on female genital mutilation* (20th September 2001) recorded the Parliament's strong condemnation of FGM (§1) and its hope that Community institutions and Member States would "recognise the right to asylum of women and girls at risk of being subjected to FGM" (§14). In the United Kingdom:

- (1) The Home Office Immigration and Nationality Directorate's *Asylum Policy Instructions* state the following general position (§5):

Women may be subject to gender-related abuse resulting from social customs or conventions because there is no effective means of legal recourse to prevent, investigate or punish such acts. Such failure of state protection may occur, but is not limited to, legislation (eg marital rape exemptions in law), lack of police response to pleas for assistance and/or a reluctance, refusal or failure to investigate, prosecute or punish individuals and encouragement or toleration of particular social/ religious/ customary laws, practices and behavioural norms or an unwillingness or inability to take action against them.

- (2) Applying this approach to FGM, the APIs continue (§7(iv)):

Women who may be subject to FGM have been found by the courts in some circumstances to constitute a particular social group for the purposes of the 1951 Convention. Whether a PSG exists will depend on the conditions of the "society" from which the claimant comes. If there is a well-founded fear, which includes evidence that FGM is knowingly tolerated by the authorities or they are unable to offer effective protection, and there is no possibility of an internal flight option, a claimant who claims that she would on return to her home country suffer FGM may qualify for refugee status.

- (3) It is noteworthy, as Crawley and Lester's survey of the European position point out (at §162); and as the IAA's *Asylum Gender Guidelines* record (§2A.17 n.31), that the United Kingdom Home Office Minister Ann Widdecombe made the following statement on 15th July 1996:

I utterly accept that forcible abortion, sterilisation, genital mutilation and allied practices would almost always constitute torture ... There is no doubt in my mind that anyone making a case to us on those grounds would have an extremely good case for asylum.

17. As will be explained below (§§18-19), FGM as gender-related persecution attracting asylum status came to be judicially recognised in the 1990s: first, in France (*Diop*, 1991), then Canada (*Farah*, *Canadian IRB*, T93-12198, 13 July 1994), the United States (*Kasinga*, 1996) and Australia (*N97/19046*, 1997). It is also reflected, for example, in Germany, Austria and Belgium. It was at first accepted in the United Kingdom IAT (*Yake*, Appeal Number 00TH00493, 19th January 2000, Ivory Coast) and the Court of Appeal (*P&M v Secretary of State for the Home Department* [2005] ImmAR 84). The adjudicator in the present

case accepted it (*Fornah*, 2003). But the IAT did not (*Fornah*, 2004), nor did it in some other cases (following *Hashim (MH)*, [2002] UKIAT 02691) nor the majority in the Court of Appeal (*Fornah v Secretary of State for the Home Department* [2005] EWCA Civ 680).

18. The following picture emerges from available materials:

(1) In France in 1991 the Commission of Refugee Appeals accepted in the case of *Aminata Diop CRR 164078* (18th September 1991, concerning Mali) that FGM could constitute persecution and that women facing FGM could constitute a PSG. The claim failed on the facts, in circumstances where there was an adverse credibility finding and the evidence was that Mali only tolerated FGM where the woman or her guardian consented to it. The Commission accepted that refugee status could arise in the case of a woman exposed to FGM against her will, where FGM was commanded, encouraged or tolerated by the state. The *Diop* case was referred to in UNHCR's May 1994 *FGM Memorandum* and in the attachments to UNHCR's July 1994 *Letter to RLC*. It is understood that the position of principle has since been reinforced in France, refugee status being upheld in *Kinda CRR 366892* (19th March 2001, Somalia) and *CCR 369766* (7th December 2001, Mali). See *Aleinikoff* (San Remo Expert Roundtable) at pp.280-282; also *Oosterveld, Refugee Status for Female Circumcision Fugitives* (1993) UTFLR 277 at 278-279.

(2) A similar approach has been adopted elsewhere in continental Europe. In Austria, the Independent Federal Asylum Senate has upheld such asylum claims. In *GZ (Cameroonian citizen) 220.268/0-X1/33/00, Austrian Federal Refugee Council, 21 March 2002* it was held that 'women in Cameroon who are to be circumcised' were a PSG, refugee status arising where Cameroon had failed to impose criminal sanctions or bring any charges against the practice of FGM, notwithstanding its duties

under CEDAW. In a later case (5th June 2002, Ethiopia), the IFAS is reported to have recognised ‘Ethiopian women who are to be mutilated’ as a PSG. Decisions upholding refugee status are also recorded in Belgium: *CPRR 01-0089/F1374* (22nd March 2002); and *CPRR 02-0780/R10801* (1st October 2002). See *Crawley and Lester, Comparative Analysis of Gender-Based Persecution (Europe)* (May 2004) at pp.429, 434.

- (3) In Germany refugee status has also been recognised in FGM cases, where resistance to societally-embedded FGM has evidently been regarded in some cases at least as involving the “*political opinion*” Convention ground, while in others the rationale has not been made clear. Non-use of the PSG ground may be because German authorities have considered ‘association’ or ‘participation’ (ie. ‘cohesion’) to be a necessary part of a PSG. See *Tiedemann, Protection Against Persecution Because of Membership of a PSG in German Law* (November 2000), pp.8-9, 18-20; *Crawley and Lester* at p.392; *Aleinikoff* at pp.283-284 (also reporting recognition of asylum status in the Netherlands).
- (4) Alongside the *Diop* case in France were similar developments in North America. In Canada, asylum status in relation to a well-founded fear of FGM was upheld in the case of *Farah (Canadian IRB, T93-12198, 13 July 1994)*. Asylum was granted to a family, whose daughter faced FGM. The Canadian Immigration and Refugee Board were satisfied that the authorities in Somalia would not protect the minor female claimant, she being a member of two PSGs (women and minors) and facing persecution by reason of being a female and a minor.
- (5) The position in Canada has been reinforced by many further decisions there. The CIRB’s February 2003 *Compendium of*

Decisions records (at pp.31-35) many decisions upholding refugee status for a well-founded fear of FGM, on the basis of a gender-based PSG. Those recorded are: *CRDD M94-03192* (1st April 1995, Ghana); *CRDD T95-00479* (5th July 1996, Somalia); *CRDD M95-13161* (13th March 1997, Ghana); *CRDD A96-00453* (8th December 1997, Guinea); *CRDD T97-03141* (27th May 1998, Somalia); *CRDD T-98-04876* (14th September 1999, Nigeria); *Sawadogo* (17th May 2001, Burkina Faso), *Adodo* (25th October 2001, Nigeria); *CRDD MA1-00356* (18th December 2001, Guinea). The Canadian case-law reflects a focus on narrower gender-based PSGs, typified by ‘females who are subjected to FGM’ in *CRDD M95-13161* (Ghana, 1997). But wider groups have also been recognised: in *CRDD MA1-00356* (Guinea, 2001) the PSG was simply ‘women’.

- (6) In the United States the seminal case was *In re Kasinga*, a decision of the US Board of Immigration Appeals on 13th June 1996, concerning Togo. A previous case called *In re Oluloro* (22nd March 1994, Nigeria) had held that deportation to face FGM would cause extreme hardship, prompting the question of how it would have been analysed under the 1951 Convention: see *Rudhoff* 26 St Mary’s Law Journal 877. The significance of *Kasinga* is reflected in the fact that: (a) it was reported in the *International Journal of Refugee Law* (special issue, autumn 1997 at p.213); (b) it has been described as one of the key cases recognising gender-related persecution (*Haines, Gender-Related Persecution (San Remo Expert Roundtable)* at p.321); and (c) it was cited with approval in Your Lordships’ House in *Shah and Islam* (Lord Steyn at 641F). *Kasinga* concerned FGM practised by the Tchamba-Kunsuntu Tribe. Refugee status was upheld, applying the *Acosta* test. UNHCR’s 1994 *Memorandum on FGM* was cited. The PSG was described as ‘young women of the Tchamba-Kunsuntu Tribe who had not undergone, and

opposed, FGM as practised by the Tribe’.

- (7) *Kasinga* has been applied in a series of further decisions in the United States. They include: *Abankwah v INS 185 F 3.d 18* (2nd Circuit) (9th July 1999, Ghana); *Abay and Amare v Ashcroft 368 F 3.d 634* USCA 6th Circuit (19th May 2004, Ethiopia); *Balogun v Ashcroft* USCA 7th Circuit (1st July 2004, Nigeria), a case which failed on an adverse credibility finding on the facts; *Abebe and Mengistu v Ashcroft* USCA 9th Circuit (13th August 2004, Ethiopia); *Khadija Mohammed v Gonzales 400 F 3.d 785* (9th Circuit 2005 Somalia); and *Abebe and Mengistu v Gonzales* USCA 9th Circuit (30th December 2005, Ethiopia). Unsurprisingly, by the last of these (*Abebe No.2*), the Court was describing it as “well-settled” (see §3) that FGM could constitute persecution and warrant the grant of asylum. As in Canada, wider and narrower PSGs have come to be considered by the US Courts. Thus, the Court in *Mohammed v Gonzales* accepted both (a) ‘young girls in the Benadiri clan’ and (b) ‘Somalian females’.
- (8) In Australia, the equivalent breakthrough came in 1997. The Refugee Review Tribunal decided in *RRT N97/19046* (16th October 1997, Nigeria) that a well-founded fear of FGM practised by the Yomba Tribe involved gender-related persecution on the basis of membership of a PSG: ‘Yomba women in Nigeria’.

19. In the United Kingdom, the picture is a mixed one:

- (1) In the present case of *Fornah*, both the UKIAT (5th August 2004, Sierra Leone) and the Court of Appeal (9th June 2005) held that there was no possible gender-based PSG and so refugee status could not arise. Other decisions of the UKIAT have been to like effect. Two principal cases are the *Hashim*

case, reported as *MH* [2002] UKIAT 02691 (16th July 2002, a Scottish decision concerning Sudan); and the *M* case, reported as *RM (Kenya)* [2004] UKIAT 00022 (12th February 2004, Kenya). *Hashim* rejected ‘young girls in Sudan’ as a PSG, and *M* rejected ‘women in Kenya’ (or ‘Kikuyu women under 65’). The same line of thinking informed the later cases of *RM (Sierra Leone)* [2004] UKIAT 00108 (17th May 2004, Sierra Leone), rejecting ‘young intact females’; and *JK* [2005] UKIAT 00080 (1st April 2005, Kenya), rejecting ‘women in Kenya’ and ‘Kikuyu women in Kenya who have not been subjected to FGM and oppose it’. These cases also informed the decision of the Scottish Court of Session in *Helen Johnson, Petitioner* (3rd December 2004, Sierra Leone) excluding refugee status because FGM was not directed at any particular religion or social group (at §13).

- (2) However, other decisions have taken a different approach. In the *M* case (*RM (Kenya)*, above) the adjudicator had been satisfied that there were (alternative) gender-based PSGs. Moreover, that case later went to the Court of Appeal (8th December 2004) as *P&M v Secretary of State for the Home Department* [2005] *ImmAR* 84 where that Court of Appeal was also satisfied that the adjudicator was plainly right. Caution is needed in relation to the *Hashim* case (*MH*, above): that case was compromised on appeal (UNHCR having been given leave to intervene in the Court of Session Inner House), the family being given asylum status (6th February 2004, Home Office Ref. H100092). Finally, the adjudicator in *JK* (like the adjudicator in the present case, and the adjudicator whose decision the Court of Appeal restored in *M*) was satisfied that there was a gender-based PSG (‘women in Kenya’). So was Arden LJ in the present case in the court below.

- (3) In fact, in 2000 when the UKIAT decided the case of *Yake* Appeal No.00TH00493 (19th January 2000, Ivory Coast), the Tribunal upheld an asylum claim based on well-founded fear of forcible FGM. The Tribunal explained that, as ‘a Yopougon woman who may be subjected to FGM’ the appellant had a well-founded fear for reasons of membership of a PSG. The state had passed a law prohibiting FGM, but it was not enforced. The Tribunal regarded its conclusion as supported by (a) the decision of the US Board of Immigration Appeals in *Kasinga*, and (b) the decision of Your Lordships’ House in *Shah and Islam*.

III. SUBMISSIONS

A wider PSG: ‘women in Sierra Leone’

20. UNHCR advances submissions, first, on the appropriateness of identifying a wider gender-based PSG, such as ‘women’ or ‘women in Sierra Leone’. In the present case, the adjudicator did not adopt such an approach, nor did Arden LJ in her dissent in the Court of Appeal (§61). However the adjudicator in *JK* did adopt such an approach (‘women in Kenya’). So did the adjudicator in *RM (Kenya)*, whose decision was restored as plainly right by the Court of Appeal in that case: *P&M v Secretary of State for the Home Department [2005] ImmAR 84* at §§41, 48. The Secretary of State had there accepted that ‘women in Kenya’ was a permissible PSG (at §45). The Court of Appeal agreed. Similarly, the United States Court of Appeals (9th Circuit) has embraced a wider approach (‘Somalian females’) in *Mohammed v Gonzales* (2005); as has the Canadian Immigration and Refugee Board (‘women’ in the context of Guinea) in *CRDD MA1-00356*.
21. UNHCR supports the wider gender-based group.
- (1) A wider gender-based group is entirely appropriate in principle. It can be unnecessary to formulate a restricted narrower PSG

than ‘women in Sierra Leone’. In *Shah and Islam* it was not necessary to formulate the PSG as ‘unprotected women accused of adultery’, tailored to those women who were at risk, so as to ‘pre-empt’ the question of “nexus”: see Lord Hoffmann at 652G-H. Here, there is no difficulty with ‘nexus’, as the parties have agreed (§4(2) above). FGM is a practice undertaken on women as women, which the state condones and stands in dereliction of its anti-discrimination duty to prohibit and penalise. This is not like *Shah and Islam*, where women could access the courts for protection but under a disadvantageous framework of laws. It is worse: women have no access to the court because the violence – itself societal, discriminatory and gender-related – is not the subject of a prohibition let alone an enforced and enforceable one.

- (2) The search for a subgroup of women is more understandable in a country where the rite of FGM is practised only within a tribe or community. In *Kasinga*, FGM was practised by the Tchamba-Kunsuntu Tribe of Togo. In *RRT N97/19046*, it was practised by the Yomba people of Nigeria. Those cases focused on the women of that tribe and community, and found they were a PSG. This case is easier. It concerns a state where the rite is societally-embedded so as to apply to ‘women’ in that society. The only ethnic group which does not practice FGM is the Krios (*Statement of Facts and Issues* §5). That reinforces the appropriateness to concentrate on ‘women in Sierra Leone’.
- (3) The members of the group share a common innate and immutable characteristic: their sex. They have a well-founded fear of persecution (against which the state is not offering a sufficiency of protection), that being on grounds of their common characteristic which, like race or skin colour, they cannot change. Were it necessary, the group fits with the idea of

‘grounds on which groups are discriminated against’. The group has “*independent existence*”, not being defined solely by the persecution. What its members have in common (whether or not persecuted) is that they are women. Like race, or skin colour, or sexual orientation: with or without persecution, the shared characteristic which defines the group remains. It is a large group, but the size of the group is no bar. Not all members of the group are at risk of persecution, but that too is no bar.

- (4) An alternative characterisation is that the group is ‘cognisable’, both objectively and through societal perception. Women in Sierra Leone are distinctive and treated as distinctive. Their ‘cognisability’ is strongly reinforced by the fact that they are considered unworthy of respect and acceptance, save through a brutal gender-related initiation rite. The requirement for women in society to undergo FGM, sets them apart. That does not mean that the persecution is defining the group; rather that the acts of the persecutors are relevant to identifying (and if necessary even creating) the group’s cognisability and distinctiveness: like McHugh J’s left-handed group in *Applicant A*.

22. The Court of Appeal considered that there were insurmountable difficulties standing in the way of ‘women’ as a viable PSG. See the decision below at §§24-25 and 30 (Auld LJ), §52 (Chadwick LJ) and §61 (Arden LJ). Those difficulties related to the fact (§3 above) that among Sierra Leonean females there are (*Statement of Facts and Issues, issue §2*) not only: those who fear FGM, fleeing the forced brutality of mutilation; but also those who do not have such fear, comprising of those who (i) are *fearless*, wanting mutilation and its societal acceptance; (ii) are *risk-free*, having undergone one-off mutilation; and (iii) are *collaborators*, women involved in conducting the rite.

23. The first perceived difficulty related to women who constitute the

fearless. It was expressed by Auld LJ (at §§25, 30), but not shared by Chadwick or Arden LJ (at §§52 and 61). Auld LJ relied (§30) on the fact that: “*there is evidence suggesting that the vast majority of women undergo it willingly as an initiation into womanhood and membership of women’s societies*” (§25). The perceived problem was that ‘woman in Sierra Leone’ could not be a PSG if it included women who were willing, and even welcoming, of the cruel initiation process. UNHCR responds:

- (1) The starting-point is that not all members of the PSG need be at risk of persecution (§11(2) above). Women in Pakistan may not be suspected of adultery; non-practising or privileged homosexuals need not be at risk of persecutory ill-treatment. It follows that not all members of the PSG need have a well-founded fear of the persecutory treatment. Whether an individual has a well-founded fear of persecution will always involve, as a component of the test, whether subjectively they have a fear. If they do, it will be necessary to examine its objective well-foundedness. The PSG can exist notwithstanding that not all have (a) an objective foundation for fear, or (b) the fear itself.

- (2) Test it in this way. A person of religious faith could face religious persecution, even martyrdom, without fear. A widow could face being placed upon her husband’s funeral pyre with acceptance. A married woman found in an adulterous relationship might face beatings with acceptance, believing that she needed to be punished. A person might well accept, and even welcome, an act of cruelty where they have learned that this is the passport to being accepted and respected by society as a real human being, not rejected as an ‘abomination’. Suppose a society where societally-embedded homophobia took the form of compulsory castration, in order to be treated with humanity. Suppose a society where left-handed people faced compulsory

amputation, in order to be afforded human worth. The fact that some individuals may accept or even welcome the ill-treatment would not prevent refugee status (and surrogate protection) arising where a person had a well-founded fear of such extreme cruelty. Nor should it in the case of FGM.

24. The second perceived difficulty related to women who constitute the *risk-free*. It was expressed by all three judges. Auld LJ observed that “*once [women] have been subjected to the practice, they are no longer under threat of such persecution by reason of being women*” (at §30); Chadwick LJ observed that the appellant’s fear was “*not because she is a woman ... [but] because she is a woman who has not undergone FGM*” (at §52); Arden LJ said Sierra Leonean women could not be the PSG “*since that group would include women who no longer fear FGM because they have undergone it*” (at §61). UNHCR responds:

(1) Not all members of the PSG, here again, need be at risk (§11(2) above). The fact that there may be married women in Pakistan who were formerly, but are no longer, suspected of adultery, would not prevent ‘women in Pakistan’ from being the PSG. Nor that there could be homosexuals who have ceased to practise and are no longer at risk.

(2) The position is not affected because the removal of risk arises through an act of persecutory brutality. What it might mean is that an individual who has undergone FGM may no longer be able to point to a well-founded fear of persecution on return to their home country. Even then, it cannot be assumed that FGM is to be treated as a one-off act involving no continuing cruelty, and recent case-law from the United States takes a broader view: see *Mohammed v Gonzales* (9th Circuit, 2005).

25. The Court of Appeal’s third perceived difficulty, with ‘women in Sierra Leone’ as a PSG, related to women who constitute the *collaborators*.

This was expressed by Auld and Arden LJ, but not by Chadwick LJ. Auld LJ relied (at §30) on the fact that FGM in Sierra Leone is “performed by women on women” (at §25). Arden LJ observed that the group “would include women who ... may practise it on other women” (at §61), “perhaps uniquely” (§59). UNHCR responds:

- (1) The role of women as brokers in conducting the rite does not remove the nature of FGM as a gender-discriminatory act imposed on women as women (§§7-8 above). Especially when the rationale of FGM (ensuring marriageability, chastity etc) is remembered (§8(2) above), as a societally-embedded practice based on the subjugation of women and their perceived inferior status in society. The point is not unique to Sierra Leone. In *RRT N97/19046* the Australian Refugee Review Tribunal held that ‘Yomba women in Nigeria’ were a PSG, explaining that:

Even though the harm inflicted is accepted as a traditional practice and may be promoted and even carried out by women (although the ololo in Yoruba society are frequently men), they do this as disempowered participants within a traditional, patriarchal, patrilineal society. This viewpoint is succinctly summarised by African writer Efua Dorkenoo in her book, Cutting the Rose, thus: “Although the practice of FGM operates within women’s sphere, it is performed for male benefit” (p.95).

- (2) The logic is, moreover, troubling. Suppose in *Sepet v Home Secretary* [2003] UKHL 15 [2003] 1 WLR 856 there had been atrocities against Turkish Kurds by other Turkish Kurds compulsorily-recruited for military service. Take a situation where torture or killings are conducted by collaborators belonging to the same race, religion or PSG, in order to save themselves or for material gain. Or take Lord Hoffmann’s Jewish shopkeeper example (*Shah and Islam* at 654A): suppose the violent competitor acting out of business rivalry had been another Jewish shopkeeper, striking against one of their own race knowing that the state would not protect their rival. The fact that one member of a race, religion, nationality, political organisation or PSG is involved in the direct act of persecution

against another member does not of itself prevent the persecution being for a relevant Convention reason.

A narrower PSG: intact women in Sierra Leone

26. UNHCR advances submissions on the alternative of a narrower gender-based PSG, such as ‘intact women in Sierra Leone’. It is entirely appropriate to consider alternatives in this way: see §11(3) above. In the present case, Arden LJ adopted this approach (at §§63-66). The adjudicator adopted a modified narrower PSG (‘young single Sierra Leonean women’).
27. UNHCR also supports, as an alternative, a narrower gender-based group. Its submissions in that respect will focus on the group of intact women (i.e. females) in Sierra Leone. UNHCR does not exclude other variants as also being available.
 - (1) The members of the group share a common characteristic (they are females with intact genitals) which is fundamental and which they ought not in conscience to be required to forsake as an alternative to surrogate protection. Were it necessary, the group would also fit with the idea of ‘grounds on which groups are discriminated against’. Intact women share a characteristic which is part of who they are. The group has “*independent existence*”, not being defined solely by the persecution. What its members have in common (whether or not persecuted) is that they are women whose genitals are intact. Like race, or skin colour, or sexual orientation: with or without persecution, the shared characteristic which defines the group remains.
 - (2) If it matters, members of the group are ‘cognisable’, objectively and (if it matters) through societal perception. Objectively, and in the eyes of their societies, females who have not undergone FGM are distinctive. They are disenfranchised on precisely this

basis. What saves them from ostracism and worthlessness is FGM. But that does not mean that the persecution is defining the group; rather that the acts of the persecutors are relevant to identifying (and, if necessary, even creating) the group's cognisability and distinctiveness: like McHugh J's left-handed group in *Applicant A*.

28. Arden LJ supported this approach in her dissent below: see §§63-67. The majority of the Court of Appeal identified what they considered to be two main difficulties, standing in the way of 'intact women in Sierra Leone' as a viable PSG. See the judgments below at §§43-44 (Auld LJ) and §§52, 56 (Chadwick LJ).

29. The majority's first and main objection was that the narrower PSG infringed the "*independent existence*" rule, because the cognisability of the PSG was bound up with the persecutory practice of FGM. Auld LJ said that: "*To confine the grouping to young, single girls who, for the time being, have not been circumcised, though logical, would be contrary to the general rule that it is impermissible to define the group solely by reference to the threat of the persecution*" (at §44(4)). Chadwick LJ said "*this is a case in which the defining characteristic of the social group is that its members have not been subjected to FGM ... The defining characteristic remains inseparable from the persecution which the applicant fears*" (at §56). UNHCR responds:

(1) A PSG cannot be defined exclusively by the persecution. However, the "*independent existence*" principle is not violated if there is some common characteristic uniting the group, other than the feared persecution. Women who are 'intact' share such a characteristic.

(2) The shared physical characteristic (intactness) is one which ought not to matter. It is in acts of discrimination, ostracism and persecution that the characteristic is made to matter by society.

But that does not mean that the persecution is defining the Convention grouping, in circular fashion (§13(4) above). The same is true of race or skin colour. Take a society which, rationally, has always regarded skin colour as entirely irrelevant. Suppose that discrimination, ostracism and brutal harm are then introduced by the state. Harmful acts can make the characteristic matter, where it would not otherwise do so. The characteristic nevertheless allows the group to be identified independently of the persecution and prevents circularity in asking whether those who are persecuted are members of a PSG.

(3) Take a society in which, irrationally, eye colour or hair colour has always been regarded as a basis for discrimination, ostracism and brutal harm. The position in principle is the same: there is a unifying characteristic which unites the group, and which exists independently of whether or not the group is persecuted. The same point can be made in relation to disability, height, gender, sexual orientation, and so on.

(4) Herein lies the value of McHugh J's left-handed illustration. There can be a clear and intimate association between the shared characteristic and the persecutory ill-treatment. But the shared characteristic uniting the group exists independently of the persecution. The persecutory acts are thus relevant in principle in considering the "cognisability" of the group. It is revealing that Auld LJ felt unable to accept McHugh J's left-handed group illustration: see §§33-34.

30. A second objection to 'intact women in Sierra Leone' as a PSG was raised by Auld LJ, who emphasised that "*as soon as they have undergone the practice, they cease to be members of the group*" (at §44(4)). Chadwick LJ disagreed, holding that "*it is not determinative that the members of the group lose their common characteristic as a*

result of the persecution” (at §56). Arden LJ agreed with Chadwick LJ, explaining that: “*The fact that members of the group lose their common characteristic of intactness as a result of the persecution must be discounted*” (at §67). UNHCR responds:

- (1) The approach of Chadwick and Arden LJJ was right. There is no principled reason why the nature of the PSG is compromised by the fact that persecution can mean ‘exiting’ the group.
- (2) Logically, that is the position where group members are persecuted by being killed. But the same could be true of injury or disfigurement. Take amputation conducted on left-handed persons (Arden LJ at §67). Take, by way of parallel, the situation where a political activist is tortured into a state where they are no longer able to think, speak or function.

Some open questions

31. Finally, UNHCR wishes to draw attention to some further possible scenarios. They do not arise for decision in the present case, but they could be important in the facts and circumstances of further and other cases. UNHCR does not invite Your Lordships to rule on further hypothetical situations. UNHCR’s concern is rather to identify possible lines of argument or areas of dispute, on which Your Lordships are asked not to foreclose in the way in which the present case is analysed.

- (1) First, a situation may arise where a woman seeks to establish a well-founded fear of persecution based on the ongoing nature and effects of FGM, notwithstanding that she has undergone the process. See eg. *Mohammed v Gonzales* (9th Circuit, 2005).
- (2) Secondly, a situation may arise where a woman does not face forcible FGM, but rather faces a return to an invidious choice between: (a) the brutality of ‘voluntary’ FGM; and (b) serious and intense rejection and ostracism. See eg. *Abay and Amare v*

Ashcroft USCA (6th Circuit, 19th May 2004).

- (3) Thirdly, a situation may arise where a parent faces the horror of return with their daughter to a country where they are unable to protect her from forcible FGM. This has been described as a parent and protector facing persecution though grave torture to their child. See eg. *Abay and Amare*; also *Abebe and Mengistu v Gonzales* USCA (9th Circuit, 30th December 2005); *CRDD MAI-00356* (18th December 2001); (Farah) (Canadian IRB, T93-12198, 13 July 1994), where the mother's claim also succeeded).
- (4) Fourthly, a situation may arise where a person's resistance of or opposition to a societally-embedded practice of FGM could have the character of membership of a PSG (gender-based or otherwise) of those perceived to have rejected societal values ('transgressing social mores'). This approach, reflected in UNHCR ExCom 39 (1985), was left open by Your Lordships in *Shah and Islam*: see 644A and 646E (Lord Steyn), 649F and 653B-C (Lord Hoffmann). It featured in *Liu v Secretary of State for the Home Department* [2005] 1 WLR 2858 at §5 (Maurice Kay LJ). It was applied in *CRDD T98-04876* (mother persecuted as a woman challenging patriarch's authority and cultural norms).
- (5) Fifthly, resistance or opposition to FGM could constitute imputed political opinion. There is a recognised overlap between PSG cases and those of (imputed) political opinion. Moreover, the latter is a known basis on which FGM cases have been upheld in Germany (where the approach to PSGs has emphasised cohesiveness).

32. For its part, UNHCR would not wish to rule out these and other cases as

being candidates for refugee status, depending on the facts and circumstances of the individual case.

MICHAEL FORDHAM
Blackstone Chambers
michaelfordham@blackstonechambers.com
acting pro bono

TOM CASSELS
Baker & McKenzie LLP
Tom.Cassels@bakernet.com
acting pro bono

14.6.06

UNHCR's Core Materials:

1. UNHCR Statute 1950
2. UNHCR Handbook 1979 (re-edited January 1992)
3. UNHCR ExCom Conclusion No.39 (XXXVI) of (1985)
4. UNHCR July 1991 *Guidelines on the Protection of Refugee Women*
5. UNHCR 1994 Memorandum
 - (a) UNHCR Memorandum on FGM (10.5.94)
 - (b) UNHCR Letter to RLC (8.7.94)
6. UNHCR ExCom *General Conclusions on International Protection*
 - (a) No.77 (XLVI) of 1995
 - (b) No.79 (XLVII) of 1996
 - (c) No.81 (XLVIII) of 1997
 - (d) No.87 (L) of 1999 at (n)
7. UNHCR's Written Submissions in *Shah & Islam*
8. UNHCR Expert Roundtable (San Remo) (9.01):
 - (a) Aleinikoff (PSG)
 - (b) Summary Conclusions (PSG) (8.9.01)
 - (c) Haines (GRP)
 - (d) Summary Conclusions (GRP) (8.9.01)
9. UNHCR *GRP Guidelines* (7.5.02)
10. UNHCR *PSG Guidelines* (7.5.02)
11. Crawley and Lester (UNHCR EPAU) (May 2004)
12. UNHCR Annotated Qualification Directive (30.9.04)

IN THE HOUSE OF LORDS
ON APPEAL FROM
HER MAJESTY'S COURT OF APPEAL
(ENGLAND & WALES)

B E T W E E N

ZAINAB ESTHER FORNAH

Appellant

- v -

**SECRETARY OF STATE FOR THE
HOME DEPARTMENT**

Respondent

- and -

**UNITED NATIONS HIGH
COMMISSIONER FOR REFUGEES**

Intervener

CASE FOR THE INTERVENER

Baker & McKenzie
100 New Bridge Street
London EC4V 6JA
Tel: 020 7919 1000
Fax: 020 7919 1999
Ref: TKC/KAS/SYT
Agents for the Intervener