

7. Gender related persecution and the Refugee Convention Art 1A(2)

Critically evaluate the following statement through a comparative examination of the jurisprudence of decisions on at least one example of gender related claims:

As the 2002 UNHCR gender guidelines note, the analysis of sex and gender in the context of refugee law has been expanded through the practice of states, the case law of domestic courts and academic writing. This expansion has occurred in parallel to, and has been assisted by, developments in international human rights law. It is UNHCR's position that the refugee definition 'properly interpreted' includes gender-related claims, and that further amendment is not necessary in order to recognise the gender dimension of persecution.

In your view, do the 2002 UNHCR gender guidelines accurately present the legal position for the example of gender related claims that you have chosen to discuss?

Introduction

The particular difficulties facing many women as asylum seekers stem not from the absence of 'gender' in the Refugees Convention's grounds but rather from the failure of decision makers to acknowledge and respond to the gendering of politics and of women's relationship to the state when applying that definition to individual cases.'¹

The failure of the Refugee Convention to specifically refer to gender as one of the grounds upon which an individual can be recognised as a refugee has largely been seen as the basis for the marginalisation of women asylum seekers. This has led some to call for the refugee definition to be amended to add 'gender' to the list of enumerated Convention grounds. When presented with claims by women asylum-seekers based on gender, the response of decision-makers has largely been to attempt to recognise the applicant as a

¹ Heaven Crawley, "Gender, Persecution and the Concept of Politics in the Asylum Determination Process (2001) 9 *Forced Migration Review* 17.

member of a ‘particular social group’ within the meaning of the Convention. It is this latter approach which is reflected in the UNHCR 2002 Gender Guidelines.²

This paper examines whether this approach, in focusing on the specificity of women’s experiences of persecution, adequately takes account of the role of gender, as opposed to sex, in shaping those experiences. It examines the jurisprudence surrounding one type of gender-related harm, namely family violence. It argues that the approach of the common law courts, as reflected in the UNHCR 2002 Gender Guidelines, which relies primarily on the ‘particular social group’ ground to support gender-related claims of persecution, over-emphasises the vulnerability and dependency of women and fails to recognise the power relationships and structures within which gender-related persecution occurs. It shows that the accepted approach is underpinned by the ‘public/private’ dichotomy which recognises gender-related harms as within the Refugee Convention only when these ‘private’ harms can be converted into matters of ‘public’ concern. It argues that there is a need to give greater attention to the ‘political opinion’ ground when considering gender-related claims and to thereby give full recognition to the political context in which women’s persecution occurs.

I. Gender and the Definition of a Refugee in Article 1A(2)

1. UNHCR and States’ responses to gender-related persecution

The particular problem of refugee women has been of concern to UNHCR, refugee policy makers and states since the mid-1980s. UNHCR has led international moves highlighting gender in refugee law.³ In 1991, UNHCR published its *Guidelines on Protection of Refugee Women*.⁴ These Guidelines aimed to achieve the protection of women refugees

² Guidelines on International Protection No.1: Gender-Related Persecution within the Context of Article 1A(2) of the International Convention and/or its 1967 Protocol relating to the Status of Refugees (hereafter UNHCR 2002 Guidelines).

³ In 1985, UNHCR first considered and noted the protection problems faced by refugee women in Executive Committee Conclusion No.39 (XXXVI) on Refugee Women and International Protection. In para (k) ExCom “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.

⁴ UNHCR, *Guidelines on Protection of Refugee Women*, 1991 (UNHCR, Geneva).

by promoting the allocation of resources and use of appropriate strategies and recommended behaviours to ensure refugee women were provided with equitable protection and assistance, and that the specific problems they face would be addressed. These Guidelines were designed to serve both as an internal document for UNHCR field staff and as a standard setting policy document for adoption by government.

Several UNHCR Executive Committee (ExCom) Conclusions called for the development of appropriate guidelines by states.⁵ In 1993 Canada became the first country in the world to adopt comprehensive gender guidelines.⁶ The *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* were the first national guidelines to formally recognise that women fleeing persecution because of their gender could be recognised as refugees under the Convention. The Guidelines, which were revised in 1996, provide examples of how women may be persecuted on the grounds of race, religion, nationality or political opinion, and consider the range of particular social groups of which women may be members.⁷ The United States Immigration and Naturalization Service's *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* followed in 1995.⁸

Australia responded to UNHCR's calls by publishing its *Guidelines on Gender Issues for Decision Makers* in 1996.⁹ The Australian Guidelines assess the relevance of the Convention grounds to claims of gender related persecution, the availability of state

⁵ In 1995, the UNHCR ExCom recommended that "in accordance with the principle that women's rights are human rights, [the gender guidelines] should recognise as refugees women whose claim to refugee status is based and 1967 Protocol, including persecution through sexual violence or other gender-related persecution." Executive Committee Conclusion No.77 (XLVI), "General Conclusion on International Protection" (1995).

⁶ Immigration and Refugee Board, 'Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act: *Women Refugee Claimants fearing Gender-Related Persecution* (Ottawa, 9 March 1993).

⁷ Discussed in LaViolette, "Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines" (2007) *International Journal of Refugee Law* 169 at 175-180.

⁸ Immigration and Naturalisation Service (INS), 1995, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*.

⁹ Department of Immigration and Multicultural Affairs (DIMA), 1996, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers*.

protection and the availability of an internal flight alternative.¹⁰ The United Kingdom introduced its *Asylum Gender Guidelines* in 2000.¹¹

In 2002, UNHCR published its Guidelines on gender-related persecution to provide interpretative guidance to states, decision makers and practitioners.¹² Whilst UNHCR's 1991 guidelines were a forerunner of national gender guidelines, the 2002 Guidelines focus more specifically on legal protection issues and build on the national guidelines. They specifically acknowledge the benefit obtained from the guidance developed by state and non-state actors.¹³ More recently, in 2008, UNHCR published the *Handbook for the Protection of Women and Girls*, which sets out the legal standards, principles, roles and responsibilities guiding the protection of refugee women and girls.¹⁴

2. Gender in the refugee determination process

The definition of a refugee is contained in Article 1A(2) of the Refugee Convention. It states that a refugee is a person who:

Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

¹⁰ The current Australian *Gender Guidelines* for departmental decision-makers who assess the claims of on-shore and off-shore applicants for a protection visa are contained in PAM3 of Department of Immigration and Citizenship's policy guidelines. Department of Immigration and Citizenship (DIAC), 2010, *Gender Guidelines*, PAM3. These Guidelines "are intended to assist decision makers better understand gender-related issues, increase awareness of the impact of gender-related factors and to promote a sensitive approach to women's claims." They are stated to be "consistent with international practice and meet the Government's commitment to providing services in an equitable and accessible way." Para 6.1. In 2010 the Refugee Review Tribunal adopted its *Gender Guidelines* which apply to merits review of decisions of DIAC to refuse a protection visa: Migration Review Tribunal and Refugee Law Tribunal, 2010, *Gender Guidelines*, 10 May 2010.

¹¹ Immigration Appellate Authority (IAA), 2000, *Asylum Gender Guidelines*.

¹² Guidelines on International Protection No.1: Gender-Related Persecution within the Context of Article 1A(2) of the International Convention and/or its 1967 Protocol relating to the Status of Refugees.

¹³ Namely, the US, Australia, Canada, the United Kingdom, Sweden, the European Council on Refugees and Exiles, UK Refugee Women's legal group and the South African National Consortium on Refugee Affairs (at para 35).

¹⁴ UNHCR, *Handbook for the Protection of Women and Girls*, January 2008. This handbook replaced its 1991 *Guidelines on the Protection of Refugee Women*.

One of the first things that is apparent is that the definition is written in the masculine person and does not include sex, gender or sexuality as a protected ground for persecution.¹⁵ The failure of the definition to include a reference to sex or gender raises the question as to whether this means that women are missing out on protection due to a failure of decision makers to understand their claims as coming within the scope of the definition.¹⁶ Feminist scholars have argued that in “portraying as universal that which is in fact a male paradigm, ... women refugees face rejection of their claims because their experiences of persecution go unrecognized.”¹⁷ However, feminist’s concerns go beyond the mere language of the refugee definition and, as discussed below, seek to challenge the public/private dichotomy which underpin the assessment of gender-related claims.

2.1 Distinguishing between ‘sex’ and ‘gender’

When considering the nature of gender-related persecution it is important to understand the distinction between ‘gender’ and ‘sex’. The distinction is an important one for refugee protection because not every aspect of the differences between women and men is related to their biology.¹⁸ As Crawley notes, the terms ‘gender’ and ‘sex’ have tended to be used interchangeably.¹⁹ However, unlike ‘sex’ which is biologically defined and therefore innate, the term ‘gender’ refers to the social construction of power relations between men and women and the implications of these relations for women’s (and men’s) identity, status, roles and responsibilities.²⁰ As LaViolette explains, “gender is linked to the hierarchical relationships between men and women and it encompasses the

¹⁵ Gabrielle Simm, ‘Exotic Others: Gender and Refugee Law in Canada, Australia and the United States’ LLM Thesis, 2005 at ??

¹⁶ Simm, note 15 at 4 citing Heaven Crawley, *Refugees and Gender: Law and Process* (2001), 1.

¹⁷ Jacqueline Greatbatch, “The Gender Difference: Feminist Critiques of Refugee Discourse (1989) 4(1) *International Journal of Refugee Law* 518. See also Doreen Indra, “Gender: A Key Dimension of the Refugee Experience (1987) 6 *Refugee* 3 who argues that the omission of ‘gender’ from the enumerated Convention grounds is an illustration of “the depth of gender delegitimation in refugee contexts”.

¹⁸ UNHCR Position Paper, *Gender-Related Persecution* (January 2000).

¹⁹ Crawley, note 1 at 17.

²⁰ Crawley, note 1 at 17. See also LaViolette, note 7 ‘Sex’ refers to the biological category to which a person belongs at birth. However ‘gender’ is a concept referring to social, cultural, and psychological values as well as learned beliefs, at 180.

identity, social status, and roles and responsibilities of men and women.”²¹ Gender refers to the specific expectations a society holds in relation to how men and women shall behave.²²

Crawley makes the important observation that “gender relations and gender differences are historically, geographically and culturally specific, so that what it is to be a ‘woman’ or ‘man’ varies through space and over time.”²³ Therefore, “any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualise those experiences.”²⁴

The UNHCR 2002 Guidelines note the distinction between ‘gender’ and ‘sex’. They state:

Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.²⁵

As LaViolette points out, the 2002 UNHCR Guidelines’ definition of gender is not constrained by biological notions of sex; they advocate for a ‘social constructionist interpretation’ of ‘gender’.²⁶

²¹ LaViolette, note 7 at 180.

²² LaViolette, note 7 at 181. The Refugee Women’s Legal Group in the UK has said, “Gender is a social relation that enters into, and partly constitutes, all other social relations and identities. Women’s experiences of persecution, and of the process of asylum determination, will also be shaped by differences of race, class, sexuality, age, marital status, sexual history and so on. Looking at gender, as opposed to sex enables an approach [to the refugee definition] which can accommodate specificity, diversity and heterogeneity.’ RWLG *Gender Guidelines* at para 1.10.

²³ Crawley, note 1 at 17

²⁴ Crawley, note 1 at 17.

²⁵ UNHCR Guidelines 2002, note 2 at I.3

²⁶ LaViolette, note 7 at 211-212.

2.2 Gender assumptions of international refugee law

Many academics have noted that the ways in which the claims of refugee women are represented and analysed “reflects the way dominant concepts of gender have become embedded and accepted as the norm in the interpretation and implementation of refugee law.”²⁷ As Ankerband observes whereas it is assumed that the definition of a refugee is gender neutral, in fact it has negative implications for women when its *application* is based on gender assumptions.²⁸ Crawley points out that although international law is gender-neutral in theory, in practice “it interacts with gender-based domestic laws and social structures which relegate women and men to separate spheres of existence.”²⁹ In the context of international asylum law, “the consequences for women of this dichotomous perspective are fundamental and profound.”³⁰

3. Public/Private Dichotomy

Central to the gendered critique of international law, including refugee law, has been an analysis of the public/private dichotomy. The terms ‘public’ and ‘private’ are used to refer both to the distinction between State and society, and to the distinction between non-domestic and domestic life.³¹ In both dichotomies, the State is conceived of as ‘public’, and the family, domestic and intimate life are viewed as ‘private’. It is an “ideological distinction in so far as it presents society from a male perspective and ignores the political nature of the family.”³²

As Crawley observes, binary categories such as public/private appear to offer the possibility of “describing and analysing the world in a way which appeals to stability, completeness and authority.”³³ However these dichotomies and the “binary oppositions”

²⁷ Crawley, note 16 at 17.

²⁸ Ankerbrand, Birthe, 2002, “Refugee Women under German Asylum Law” 14(1) *International Journal of Refugee Law* 45 at 46 emphasis added.

²⁹ Crawley, note 16 at 19.

³⁰ Crawley, note 16 at 19.

³¹ Crawley, note 16 at 17.

³² *Ibid.*

³³ Crawley, note 16 at 18.

which stem from them have major implications for the way that these issues are conceived of and analysed. As Crawley explains, “these categories, and the boundaries which divide them, are actually political and ideological constructions which are both gendered and have gendered consequences.”³⁴ It is important to recognise that these boundaries are not fixed; they fluctuate and are subject to challenge.³⁵

Crawley argues that distinctions which are drawn between the ‘public’ and ‘private’ are largely responsible for “the current mismatch between women’s experiences of persecution and their interpretation in asylum policy and practice.”³⁶ She argues that challenging the public/private dichotomy “has important implications for analysing the claims of refugee women because it ensures that such analysis is not limited to a narrow range of ‘women’s issues’ or to areas where women are present.”³⁷

Although the basis of the public/private distinction has been “thoroughly attacked and exposed as a culturally constructed ideology, it continues to have a strong hold on legal thinking.”³⁸ Whilst the refugee definition does not intrinsically exclude women’s experiences, in practice the public/private distinction is used such that “what women do and what is done to them is often seen as irrelevant to refugee law.”³⁹ Crawley argues that women are less likely than their male counterparts to be found to be refugees, “not because of the absence of explicit recognition of gender-related persecution, but because of the social and political context in which the claims of women are adjudicated.”⁴⁰ The problem she says lies “primarily in the fact that decision-makers, in applying the refugee

³⁴ Ibid.

³⁵ Ibid.

³⁶ Crawley, note 16 at 19. Crawley does not dispute the existence of the public/private distinction or its value for clarification and analysis, but argues “that conceiving of the boundaries as fixed and rigid and confining inquiry and analysis within the limits of these boundaries can serve to reinforce the existing power relations, including those which are exclusionary and oppressive.” at 20. She says that “[o]nly by challenging this dichotomy can it be demonstrated that this division is an ideological construct rationalising the exclusion of women from the sources of power.” At 20.

³⁷ Ibid.

³⁸ Crawley, note 16 at 19

³⁹ Crawley, note 16 at 20.

⁴⁰ Ibid.

definition, have typically failed to acknowledge and respond to the gendering of politics and of women's relationship to the State."⁴¹

4. Gender-related persecution

Women are persecuted for the same reasons as men, for example they are arrested and tortured due to their publicly demonstrated political opinions. However, often women's experiences of persecution differ from those of men. Frequently women face gender-based persecution. Binder observes that 'gender-based persecution' may have two different meanings.⁴² The first concept, that of women persecuted *as* women relates to the types and forms of persecution that are gender-specific, such as rape, female genital mutilation or domestic abuse. The second concept, that of women persecuted *because* they are women, addresses the causal relationship between gender and persecution. The term 'gender-related persecution' refers to the latter and focuses on the bases of persecution. This two-pronged definition of gender-based persecution illustrates that gender-specific harm is not necessarily persecution perpetrated *because of* the victim's gender. As Haines explains, 'gender-related' persecution refers to the experiences of women who are persecuted *because* they are women, that is, because of their identity and status as women, whereas 'gender-specific' persecution refers to forms of serious harm which are specific to women.⁴³ The reasons for such persecution and the form it takes may however overlap.⁴⁴ For example, in the case of female genital mutilation, a woman may be persecuted both *as and because* she is a woman.⁴⁵ In this paper, the term 'gender-related' persecution is used to include both gender specific and gender based persecution.

The term 'gender-related persecution' is adopted in the UNHCR 2002 Guidelines. The Guidelines recognise that 'gender-related persecution' is a term which has no legal

⁴¹ Crawley, note 16 at 21.

⁴² Binder, Andrea, 2001, "Gender and the 'Membership in a Particular Social Group' Category of the 1951 Refugee Convention" 10 *Columbia Journal of Gender and Law* 167.

⁴³ Haines, Rodger, 2003, "Gender-related persecution" in *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, Erika Feller, Volker Türk & Frances Nicholson (eds.). Cambridge University Press, Cambridge, pp. 319 at 326 citing Crawley note, 16 at 7.

⁴⁴ Haines, note 43 at 326.

⁴⁵ Binder, note 42 at 168.

meaning *per se*.⁴⁶ It “is used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status.”⁴⁷ The Guidelines note that gender-related claims “have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.”⁴⁸

5. Addition of gender as the sixth Convention ground

The failure of the Refugee’s Convention to specifically refer to gender as one of the grounds on which an individual can be recognised as a refugee and given protection has “largely been seen as the basis of women’s marginalisation” and has led to calls for ‘gender’ to be added to the Convention grounds.”⁴⁹ Early feminist critiques of refugee law included advocating for the addition of a sixth ground of gender to the refugee definition.⁵⁰ These calls for a sixth ground have been met with the argument that amending the Convention may serve to undermine the protection of women asylum seekers.⁵¹ For example, Binder says that “[w]hile a reformulation of the refugee definition would be desirable, political realities and trends in immigration policies inevitably lead to the conclusion that this approach is not very promising for the near future.”⁵²

Ankerband argues that the addition of a sixth ground would “bear the risk of reducing diverse female experience to a specific category of gender related persecution which might lead to an even stronger exclusion of women from the traditional refugee women

⁴⁶ UNHCR 2002 Guidelines, note 2 at I(1).

⁴⁷ Ibid.

⁴⁸ Ibid at I.3

⁴⁹ Crawley, note 1 at 17.

⁵⁰ Discussed in Spijkerboer, *Thomas, Gender and Refugee Status: Beyond the Public/Private Distinction* (2000) at 164-5.

⁵¹ Simm, note 15 at 31.

⁵² Binder, note 42 at 193.

and depoliticise women's lives."⁵³ Similarly, Haines says that "[q]uite apart from the fact that there is no realistic prospect of the Convention being expanded in this way, the argument in favour of a sixth ground may have the unintended effect of further marginalising women if misinterpreted as an implicit concession that sex and gender have no place in refugee law at present."⁵⁴ In his view, the failure of decision makers to recognise and respond appropriately to the experiences of women derives not from the fact that the Convention does not refer specifically to persecution on the basis of sex or gender, "but rather because it has often been approached from a partial perspective and interpreted through a framework of male experiences."⁵⁵ He argues that the main problem facing female asylum seekers is "the failure to incorporate the gender-related claims of women into their interpretation of the *existing* enumerated grounds and their failure to recognise the political nature of seemingly private acts of harm to women."⁵⁶ Haines' argument is that the text, object and purpose of the Convention require a gender-inclusive and gender-sensitive interpretation.⁵⁷ Ankerband concludes that it is "preferable to reinterpret the existing law in a gender sensitive way and to amend the asylum law to clarify that the definition of a refugee may properly be interpreted as providing protection for women fleeing from gender related persecution."⁵⁸

UNHCR's position is that the refugee definition in the 1951 Convention has to be interpreted in a 'gender sensitive way'. This is reflected in the Guidelines which emphasise that the elements of the definition of a refugee "require a gender-sensitive interpretation."⁵⁹ The development of gender guidelines is an example of a human rights

⁵³ Ankerband, note 28 at 55-56. See also Indra who argues that the addition of 'gender' as a Convention ground would do little to improve the position of women asylum seekers without a redefinition of 'persecution' to give credibility to women's private sphere experiences.

⁵⁴ Haines, note 43 at 326-327 citing Spijkerboer, Thomas, *Gender and Refugee Status: Beyond the Public/Private Distinction*.

⁵⁵ Haines, note 43 at 327 citing Crawley, note 16 at 35.

⁵⁶ Ibid, emphasis added citing Crawley, note 16 at 35.

⁵⁷ Ibid.

⁵⁸ see Ankerbrand, note 28 at 56.

⁵⁹ 2002 UNHCR Guidelines, note 2 at I.A.8

approach to refugee law, which advocates an expansion through interpretation of the existing refugee law definition.⁶⁰

II. Comparative Examination of Jurisprudence on Family Violence

1. The nature of family violence

The problem of violence against women within the family, commonly referred to as ‘domestic’ violence is enormous and multifaceted.⁶¹ Domestic violence is a form of violence, perpetuated overwhelmingly by men against women, which has historically been regarded as ‘private and outside the state’s regulation. As Macklin observes, in the context of refugee claims, it is “the paradigmatic example of gender-specific abuse committed by ‘private actors’.”⁶² Violence within the family or ‘family violence’ is a broader term than either domestic or intimate violence in that it can include abuse inflicted by fathers on their daughters and relatives against other female relatives. This violence includes physical, sexual and psychological abuse inside and outside the home, and “is deeply intertwined with prejudices viewing women as inferior, as the property of their male relatives and requiring women to be obedient and sacrifice their needs to serve men.”⁶³

Family violence is a widespread and often gender-specific form of abuse. It can take many different forms, but commonly involves some form of psychological and/or physical brutality and can include, beating with hands or objects, biting, spitting, punching, kicking, slashing, stabbing, strangling, scalding, burning, attempted drowning and food deprivation. Sexual abuse, including rape, is likewise a common concomitant

⁶⁰ In the refugee law context, a human rights approach looks to law for the solution to the problem posed by gender in the refugee determination process. It asserts that re-interpretation of existing refugee law is capable of recognising gender-related persecution: Priscilla Warren, “Women are Human: Gender-Based Persecution is a Human Rights Violation against Women” (1994) 5 *Hastings Women’s Law Journal* 281 cited in Spijkerboer, note 54 at 168.

⁶¹ Crawley, note 16 at 129.

⁶² Macklin, Audrey (1998), “Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims” 13 *Georgetown Immigration Law Journal* 25 at 48.

⁶³ Crawley, note 16 at 129

of violence within the family and takes many different forms. Family violence sometimes takes specific forms such as so-called ‘honour killing’, ‘dowry death’, bride burning and the custom of *sati*.⁶⁴

Women may also be subjected to other forms of violence which are more subtle than physical violation but equally as damaging. For example, women may be confined to their home so that they become isolated from their friends, family and others, their lives and those of their family may be threatened and they may be made to fear the loss of their children. All of these are “manifestations of the prevalence of violence against women by family members and reflect varying levels of tolerance of such violence by the State.”⁶⁵

Just as family violence has, until relatively recently, been largely ignored officially by State authorities, it has been viewed with considerable scepticism by decision-makers in the refugee determination process. However, despite the increasing acknowledgement of its existence, its conceptualisation within the asylum determination process remains highly problematic.⁶⁶ Until recently, there has been no discussion about whether women fleeing violence within the family can claim refugee protection, and the case-law has almost invariably *not* supported women’s asylum claims in these circumstances. However, in recent years there has been increased recognition of the ways in which family violence can form the basis of a claim for asylum.

2. Family violence and the Refugee Convention

The following section considers the problems encountered by claims made on the basis of gender-related persecution as they relate to the elements of the Refugee Convention and the relevant case law.⁶⁷

⁶⁴ Crawley, note 16 at 129.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Crawley, note 16 at 130ff.

2.1 ‘Serious Harm’

Crawley argues that often the most serious problem faced by women is the role played by the public/private dichotomy in undermining the seriousness of the harm experienced.⁶⁸ Although violence within the family is now recognised as a human rights concern,⁶⁹ it still remains “on the margin.”⁷⁰ As Copelon observes, violence within the family is still considered “different, less severe, and less deserving of condemnation and sanction than officially sanctioned violence.”⁷¹ As Crawley notes, this is due to the fact that family violence tends not to be viewed as ‘violence’. It is regarded as ‘personal’, ‘private’ or a ‘family matter’, “its goals and consequences are obscured, and its use justified as chastisement or discipline.”⁷² The fact that family violence occurs in the ‘private’ sphere of the home, behind closed doors, “is critical in understanding this conceptualisation.”⁷³

In many cases, given the obvious severity of the harm experienced, whether the harm meets the requisite level of ‘serious harm’ within the meaning of ‘persecution’ for the purposes of the Refugee Convention definition, either does not arise or is not explicitly addressed.

2.2 ‘Persecution’, Failure of State Protection and the Nexus Requirement

Establishing that family violence constitutes ‘serious harm’ is not sufficient to establish that there is ‘persecution’.⁷⁴ No matter how severe the act of harm may be, it cannot be based solely on a personal dispute. The failure of the State to protect against the perpetration of such violence must also be shown and this has proved highly problematic in cases involving family violence.

⁶⁸ Crawley, note 16 at 130.

⁶⁹ For example, *Declaration on the Elimination of Violence Against Women*.

⁷⁰ Crawley, note 16 at 130.

⁷¹ Copelon, “Intimate Terror: Understanding Domestic Violence as Torture” In Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) University of Pennsylvania Press, Pennsylvania) cited in Crawley, note 16 at 130.

⁷² Crawley, note 16 at 130.

⁷³ *Ibid.*

⁷⁴ *Ibid* at 133.

Women fleeing family violence do not fit the popular conception of a refugee because of the source and location of the persecution. Such violence generally occurs in the home and by definition the assailant has a personal relationship with the asylum seeker and is not an anonymous representative of the State.⁷⁵ As a result, the State connection required in the definition of a refugee may be difficult to see since the State never actively commits and seldom overtly condones this type of violence against women.⁷⁶ Although the harm in these cases is not inflicted by the State authorities, the State is often *unwilling or unable* to offer *effective* protection to women, either because it supports the actions of the individuals concerned, because it tolerates them or because it has other priorities.⁷⁷

In *Islam and Shah*⁷⁸ The applicants were two married women from Pakistan who argued that if they were forced to return to Pakistan they would be at risk of being beaten by their husbands, that the state would not protect them, and that they were at risk of criminal prosecution for adultery for which the penalty could be flogging or stoning to death. The central issue addressed by the House of Lords was the ‘particular social group’ ground. However, what comprised ‘persecution’ and how the link or nexus could be made between the feared persecution and the ‘particular social group’ ground was also discussed by Lords Hoffman and Steyn.

These judgments analysed ‘persecution’ as constituted by *both* a serious harm and a failure of state protection. Lord Hoffman specifically referred to this ‘formula’ as “Persecution = serious harm + failure of State protection.”⁷⁹ Both Law Lords found that even if the serious harm were committed by a non-state actor for personal, non-

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ In such cases, the failure of State protection may take several forms:

1. The existence of official legislation which condones violence within the family;
2. A refusal to investigate or prosecute individual cases and/or a reluctance to convict or punish;
3. A lack of police response to pleas for assistance.

Discussed in *Crawley*, note 16 at 133-138.

⁷⁸ *Islam v Secretary for the Home Department; R v Immigration Appeal Tribunal and Another; Ex parte Shah* [1999] 2 WLR 1015.

⁷⁹ At para 565 (Hoffman L.)

Convention reasons, the claims could be recognised where the failure of State protection was for a Convention reason, in this case, a gender-defined particular social group.⁸⁰

Their Lordships found that the evidence of state tolerated or sanctioned discrimination established the link, since state inaction was as much the reason for the harm feared as the direct violence and threats of denunciation by the women’s husbands. In the words of Lord Steyn, “[g]iven the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic.”⁸¹

*Refugee Appeal No. 71427/99*⁸² concerned an Iranian woman fleeing her violent first husband, in this case in the context of a custody battle over their son. As in *Shah* there was overwhelming evidence that the State condoned, if not encouraged, the ‘private’ violence from which the applicant fled. The NZ Refugee Status Appeals Authority (RSAA) had no difficulty in finding the Convention grounds of religion, political opinion and particular social group applied.

In his judgment, Haines “unpacked and made explicit many of the underlying assumptions of *Shah*, creating a framework both practically and theoretically coherent for analysing persecution and the relationship between non-State actor agency and state responsibility.”⁸³ On the issue of nexus, Haines restated the *Shah* conclusion and removed any ambiguity from its formulation or implications: persecution consists of a serious harm and a failure of state protection:

This means that if a refugee claimant is at real risk of serious harm at the hands of a non-State agent (e.g. husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of

⁸⁰ At 558 (Steyn L); 564-5 (Hofman LJ)

⁸¹ At 558. See also Hoffman L at at 564-5.

⁸² Refugee Appeal No. 71427/99 [2000] N.Z.A.R. 545.

⁸³ Anker, Deborah, 2001, “Refugee Status and Violence Against Women in the ‘Domestic’ Sphere: The Non-State Actor Question” 15 *Georgetown Immigration Law Journal* 391 at 396.

state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention ground.⁸⁴

Haines found that the failure of state protection from the husband and the harm from the state itself “is because she is a woman.” The Iranian state condones if not actively encourages the non-state actors to cause serious harm to women, “through a system of institutionalised discrimination and subordination of women.” The nexus is supplied by the failure of state protection ‘limb’ of persecution.

In relation to the standard for assessing state protection in these cases, Haines concluded that the state fails to protect when it does not bring the level of risk of harm from the non-state actor to well below a well-founded fear.⁸⁵ He rejected the reasoning of the House of Lord in *Horvath v Secretary of State for the Home Office*⁸⁶ in which their Lordships, using various tests, concluded that the standard of state protection should be analysed separately either from the concept of persecution or a well-founded fear.⁸⁷ As Anker observes, Haines’ approach represents “a holistic understanding of refugee status and protection.”⁸⁸

In *Khawar*,⁸⁹ the applicant was a Pakistani woman who had fled severe violence from her husband. The evidence showed that the applicant had attempted and failed to obtain

⁸⁴ At para 112.

⁸⁵ At para 66.

⁸⁶ Ibid.

⁸⁷ Anker, note 33 at 397.

⁸⁸ Ibid.

⁸⁹ *Minister for Immigration and Multicultural Affairs v Khawar*, (2002) 187 ALR 574; 210 CLR 1.

police protection on several occasions.⁹⁰ The High Court addressed issues of persecutory intent and state action not addressed in other decisions.

The High Court adopted the dual understanding of persecution and its implications for the nexus requirement as outlined in *Shah*. McHugh and Gummow JJ found that “the persecution in question lies in the discriminatory inactivity of State authorities in not responding to the violence of non-State actors.”⁹¹ Kirby J found that it is “sufficient that there is both a risk of serious harm to the applicant from human sources and a failure on the part of the state to afford protection that is adequate to uphold the basic human rights and dignity of the person concerned.”⁹²

His Honour quoted the RSAA’s reasoning in *71427/99* at length for the proposition that the nexus requirement is satisfied where there is a showing of a link between a Convention ground and either the harm amounting to persecution or to the failure of protection by the state. According to Kirby J because ‘persecution’ is a construct of two separate but essential elements, if either of the two constitutive elements is ‘for reason of’ a Convention ground the “summative construct is itself for reason of a Convention ground.”⁹³

In a brief judgment, Chief Justice Gleeson agreed that persecution can be found based on the “combined effect” of multiple agents.⁹⁴ The Chief Justice found that the nexus

⁹⁰ McHugh and Gummow JJ in their joint opinion accepted the following submissions made by the applicant: “[T]hat (a) she was unable to obtain police protection in respect of the domestic violence she suffered; (b) that state of affairs represented a denial of fundamental rights otherwise enjoyed by nationals in Pakistan; and (c) it was a form of selective or discriminatory treatment which amounted to persecution by the State authorities.” At para 79.

⁹¹ *Ibid.*

⁹² At para 114. His Honour relied on the decision of the RSAA in *Appeal No. 71427/99* to detail the following classification of cases based on the level of State involvement:

- a. Persecution committed by the state concerned;
- b. Persecution condoned by the state concerned;
- c. Persecution tolerated by the state concerned.
- d. Persecution not condoned or not tolerated by the state concerned nevertheless present because the state either refuses or is unable to offer adequate protection.

⁹³ At para 120.

⁹⁴ At para 27.

requirement is satisfied where at least one agent of persecution is motivated by a Convention reason:

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.⁹⁵

The Court accepted that the nexus to the gender-defined particular social group could be established even if the husband's violations were for personal reasons since the failure of state protection was "for reasons of" gender. The Court found relevant gender-related reasons evidence in the "well-established pattern of discrimination against women and in favour of men in Pakistan." It also found acquiescence in an acceptance of the unavailability of protection of women against the violence of men "by those organs of the state that are charged with a protective role."⁹⁶

Khawar was decided at almost the same time as the UNHCR's 2002 Guidelines were issued. The decision is consistent with the UNHCR's affirmation "that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status."⁹⁷ As Knight observes, the UNHCR also adopts the formula that Persecution = Serious Harm + Failure of State Protection, and subscribes to the notion that the nexus requirement is satisfied by proof of a causal link between either.⁹⁸

⁹⁵ At para 31.

⁹⁶ At para 127. Anker, note 33 notes that the significance of *Khawar* is that it extends protection beyond those cases where state discrimination is formalised and official, at 401

⁹⁷ UNHCR 2002 Guidelines, note 2 at para 2.

⁹⁸ Knight, Stephen, "Reflections on *Khawar*: Recognising the Refugee from Family Violence" 14 *Hastings Women's Law Journal* 27 at 45. This formulation has also been embraced by leading international scholars in the field (eg Michigan Guidelines) who emphasise that the focus of the nexus inquiry is properly on the reasons for the asylum seekers' fear "and not on the personal motivations of the potential persecutors." On the subject of nexus the Guidelines are simple and straightforward:

3. Link to a Refugee Convention ground

The second problem facing asylum seekers fleeing family violence arises from the failure to appropriately and accurately conceptualise the relationship between the harm feared and the relevant Refugee Convention ground. There are two possible bases for linking the persecution to a Convention ground: membership of a ‘particular social group’ and ‘political opinion’.

3.1 Membership of a particular social group

That women constitute a ‘particular social group’ within the meaning of the Refugee Convention has been “the pervasive position in literature addressing gender-related persecution and the problem of establishing the persecution ground.”⁹⁹ It is also the position taken by Hathaway:

Gender is properly within the ambit of the social group category ...
[g]ender-based groups are clear examples of social subsets defined by an innate and immutable characteristic.”¹⁰⁰

The use of the ‘particular social group’ basis of the refugee definition to extend protection to women who face persecution finds strong support in the pronouncements of the UNHCR and governmental bodies and the administrative decisions of several countries.¹⁰¹

The ‘particular social group’ ground is the most common approach in cases involving family violence.¹⁰² The problem in claims based on family violence has frequently

“In cases where there is a risk of being persecuted at the hands of a non-State actor (eg husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.” UNHCR 2002 Guidelines at Para 21.

⁹⁹ Crawley, note 16 at 72

¹⁰⁰ Hathaway, James C., 2005, *The Rights of Refugees under International Law* at 591.

¹⁰¹ Crawley, note 16 at 72.

¹⁰² Crawley, note 16 at 139.

revolved around the need to define the social group without reference to the harm that has been experienced or feared.¹⁰³

The definition of the relevant social group, specifically its exact scope, was considered by all the justices in *Khawar*. McHugh and Gummow JJ found that the evidence supported a particular social group comprising “at its narrowest, married women living in a household which did not include a male blood relative to whom the woman might look for protection against violence by members of the household.”¹⁰⁴ Justice Kirby noted the argument made by the Government that categories encompassing large numbers of people such as “women in Pakistan” could never satisfy the legal requirements of the Convention. He suggested that the focus on the failure of state protection rather than on the “domestic conflict” would allow the decision-maker to define a particular social group “in a principled manner, specifically by reference to the ground upon which the state concerned has withdrawn the protection of the law and its agencies.”¹⁰⁵

The Chief Justice accepted that “it would be open to the Tribunal, on the material before it, to conclude that women in Pakistan are a particular social group.” Chief Justice Gleeson’s suggestion that “women in Pakistan” be recognised as a particular social group is in conformity with the UNHCR’s observation that some jurisdictions have recognised “women” as a social group and that the size of a group should not be a relevant criterion in determining whether a particular social group exists.¹⁰⁶

The High Court rejected the need to show “enmity” or “malignity” by the State. It found it sufficient to show “state perception of a particular social group as “inferior”, “less deserving” or “second class” by reference to the rest of society, and in particular, a [State’s] view of members as not possessing the same human rights as the rest of society

¹⁰³ Crawley, note 16 at 141

¹⁰⁴ At para 81.

¹⁰⁵ At para 126.

¹⁰⁶ UNHCR, “Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, HCR/GIP/02/02, 7 May 2002 at 18-19.

or, if possessing them, as not entitled to have them enforced and protected to the same extent as the rest of society.”¹⁰⁷

The Canadian jurisprudence evidences the most liberal interpretation of ‘particular social group’ by a signatory state. The Supreme Court of Canada’s approach is to interpret this ground in accordance with the anti-discrimination principles inherent in civil and political rights.¹⁰⁸ In the landmark case of *Canada (AG) v Ward*, the Court devised three categories for the grant of ‘social group’ and stated that the first would embrace gender-related persecution.¹⁰⁹

Courts in the United States have struggled to attribute meaning to the phrase ‘membership in a particular social group.’ There have been two divergent approaches: the first has been a restrictive tendency to refuse to allow gender to define social group, and the second has been a more liberal inclination to allow for a broader definition of social group.¹¹⁰ In the United States, the landmark case was *Kasinga*.¹¹¹ The Board of Immigration Appeals (BIA) decided that female genital mutilation had been imposed on the applicant because of her membership of a ‘social group’.¹¹² Following *Kasinga*, while the decisions of the courts were not entirely consistent, asylum was granted to women fleeing gender-related persecution.¹¹³

¹⁰⁷ At para 141 and see also para 26.

¹⁰⁸ Ibid.

¹⁰⁹ Discussed in Connors, J, (1997), “Legal Aspects of Women as a Particular Social Group” *International Journal of Refugee Law Special Issue* 114 124-6; LaViolette, note 7 at 174. In *Ward*, the Supreme Court of Canada recognised that a particular social group may be defined by: (1) an innate or unchangeable characteristic; (2) voluntary association for reasons so fundamental to human dignity that members should not be forced to forsake the association; (3) past membership in a voluntary association, unalterable due to its historical permanence (at 739). The Court listed gender as an example of such a characteristic in (1).

¹¹⁰ Discussed in Binder note 42 at 179ff. Examples of the first approach include *Gomez v INS* 947 F.2d. 660 (1991) and the second approach *In re Acosta* 19 I & N Dec. 211 (BIA, 1985) and *Fatin* 12 F.3d at 1240.

¹¹¹ *In re Kasinga* Interim Decision 3278 (BIA 1996).

¹¹² The particular social group was defined by “the immutable or fundamental characteristics of gender, ethnicity, opposition to the practice, and the fact of having ‘intact genitalia’”.

¹¹³ Discussed in Karen Musalo and Stephen Knight, “Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States” (2001) 13 *International Journal of Refugee Law* 51, 54.

In *Matter of R-A*¹¹⁴, the BIA took an approach contrary to the understanding of ‘social group’ outlined in *Kasinga*. The BIA reversed a grant of asylum made to a woman who had fled serious domestic violence and the failure of the State to protect her. Although the immigration judge specifically relied on *Kasinga* in making her finding, the BIA found that the abuse was personal. This decision was subsequently overturned by the Attorney-General.¹¹⁵

In New Zealand, ‘particular social group’ is interpreted consistently with anti-discrimination and human rights concepts. In *Re MN*, an Arab/Iranian woman who had been the victim of abuse by male family members and who held opinions contrary to those of the Iranian government, was held to be a member of a particular social group.

In *Shah*, the House of Lords gave a broad meaning to ‘membership of a particular social group’ emphasising that the cohesiveness of the group is not an essential requirement. Lords Hoffman, Steyn and Hope found that because women in Pakistan were discriminated against as a group in relation to their fundamental human rights in comparison to men, and as the State provided them with no protection, women in Pakistan constituted a ‘particular social group.’¹¹⁶

¹¹⁴ In *Re R-A*- Int. Dec 3403 (BIA, 1999). This case concerned a Guatemalan woman fleeing her husband’s severe physical and other violence from which the State provided no protection. Discussed in Binder at 181ff; Karen Musalo and Stephen Knight, “Gender-Based Asylum: An Analysis of Recent Trends” (2000) Vol 77, No.42 *Interpreter Releases* 1533; and The Committee on Immigration and Nationality Law of Association of the Bar of the City of New York, *Gender-Related Asylum Claims and the Social Group Calculus: Recognising Women as a ‘Particular Social Group’ Per Se* (March 27, 2003).

¹¹⁵ See *In re R-A*-, Int Dec. 3403 (Att’y Gen. 2001) (vacating decision of the BIA and remanding for consideration after final promulgation of proposed regulations published at 65 Fed. Reg. 76588 (Dec 7, 2000). In the United States, the government introduced legislation in response to this case by way of amendments that represent “a position more consistent with international norms and US jurisprudence than the BIA’s now vacated decision.” Musalo and Knight explain that these legislative changes were the result of “... a national advocacy effort to reverse the Matter of R-A- decision involving an 18 month ... campaign ... [of] congressional lobbying, grassroots mobilization, and a highly successful media strategy.” at 57-9.

¹¹⁶ At para The decisions in *Islam and Shah* have been described by Goodwin-Gill as “a model in jurisdictions which continue to wrestle with the interpretation of membership of a particular social group’, and as a challenge in those which have either opted out of providing protection to refugees, or have chosen the narrow path to protection, through interminable and unconvincing essays in sub-division.”

3.1.6 The limitations of the ‘particular social group’ ground

Crawley says that the argument for framing the asylum claims of women within a ‘particular social group’ is a powerful one, yet there are what she calls both “political and strategic concerns” associated with arguing for women as a ‘social group’.¹¹⁷ Crawley argues that “examining more rigorously the relationship between the nature of the persecutory measures against women and the potential grounds of the application” indicates that in many cases such claims can be framed within the more conventional grounds of religion or political opinion, “if gender relations, which by implication involve issues of power, are reconceptualised.”¹¹⁸ As she notes, looking beyond the public/private dichotomy, it could be argued that women who refuse to comply with laws or transgress social mores “are not being persecuted because they are women but because they are actively opposing a political/religious norm.”¹¹⁹

As Kneebone has observed, the issue of family violence shows how the public/private dichotomy is used to construct refugee women “as a vulnerable, apolitical victim in a patriarchal society.”¹²⁰ She argues that the international jurisprudence which has recognised successful claims by women on the basis of gender-related persecution is

¹¹⁷ Crawley, note 16 at 72. The first of these concerns relates to the size of the social group. She says that although this argument has no basis in fact or reason. The fact that some ‘women’ constitute a ‘particular social group’ does not lead inexorably to the consequence that all women are automatically entitled to refugee status. The applicant will still be required to establish that the fear of persecution is well-founded, that the nature of the harm inflicted or anticipated rises to the level of serious harm, and that there is a failure of State protection. However, the reality is that the perceived size of the prospective social groups is important in a context where there is an overall trend towards trying to reduce the number of asylum seekers and limit recognition rates (at 72). Crawley goes on to say that arguing that ‘women’ *per se* constitute a ‘particular social group’ is unlikely to be accepted because in reality ‘women’ are not a cohesive group. Even within individual countries, women fall into their own sub-groups, economically, socially and culturally. More often than not, the persecution is not applied equally to all women. Women have different experiences of oppressive rules, behaviours and mores and also the relationship between the persecution and the ground will vary dependent upon the circumstances of the individual woman. (at 73). Therefore, the very assumption that women have common experiences which can be explained by reference to their gender alone can itself undermine the argument for recognising women as a social group.

¹¹⁸ Crawley, note 16 at 73.

¹¹⁹ Ibid.

¹²⁰ Kneebone, Susan, 2005, “Women within the Refugee Construct: ‘Exclusionary Inclusion’ in Policy and Practice – The Australian Experience” 17 *International Journal of Refugee Law* 7 at 37.

underpinned by what is effectively the ‘conversion’ of the ‘private’ into the ‘public’.¹²¹ The central objection to the use of the ‘public-private’ characterisation in this context is, as Kneebone recognises, that it perpetuates the myth that women’s issues are ‘private’ unless there is some state involvement or ‘public’ characterisation of the persecution. This perpetuates the idea that refugee women’s issues are not ‘political’ unless they arise from her status as the object of a power relationship.¹²²

As Kneebone points out, the argument that has been applied in the domestic abuse cases is that the social group is defined by vulnerability to abuse and the link to the persecution provided by the state’s inability or unwillingness to intervene. That is, the state is said to be complicit in the persecution by non-state agents. It involves the state taking over the patriarchal role.¹²³ The domestic violence cases indicate that the public-private distinction constructs the female asylum-seeker “as the object of a patriarchal power relationship for which the state is substituted.”¹²⁴ There is a failure to accept that the position/status of refugee women is “inherently political”.¹²⁵

3.2 Political opinion

Challenges to social mores and norms have typically been considered as ‘personally motivated’ and have not been characterised as ‘political’. Consequently women asylum seekers who have claims based on opposition to extreme institutionalised oppression have typically struggled to bring themselves within the protection of refugee law.¹²⁶ However, there are strong arguments to support these claims as being supported by the ‘political opinion’ ground. A woman who expresses views of independence from the social or cultural dominance of men in her society may be found to have been persecuted or to fear persecution because of her actual or imputed political opinion. As Crawley

¹²¹ Kneebone, note 120 at 37.

¹²² Ibid at 39

¹²³ Ibid.

¹²⁴ Ibid at 41.

¹²⁵ Ibid.

¹²⁶ Crawley, note 16 at 124.

explains, “[s]he is perceived within the established political/social structure as expressing politically antagonistic views through her actions or failure to act ... If a woman resists gendered oppression, her resistance should be regarded as political activity.”¹²⁷

Kneebone observes that although claims by female asylum seekers could be categorised as involving imputed political opinion, “there is a reluctance to use the political opinion ground ...”.¹²⁸ As she notes, the characterisation of the attributes of refugee women in the context of ‘particular social group’ emphasise “her vulnerability and dependency at the expense of her ‘political opinion’ and political status.”¹²⁹

There is a growing recognition that the ‘political opinion’ ground often arises on the same facts as those which may recognise the woman asylum-seeker as a member of a ‘particular social group’. This approach has been led by Haines QC, formerly the Deputy Chairperson of the Refugee Status Appeals Authority (RSAA) in New Zealand.

In *Refugee Appeal No. 71427/99*,¹³⁰ the RSAA analysed the facts as involving both social group and religion/political opinion. Haines discussed the place of women in Iranian society, their inequality in relation to marriage, divorce and custody rights. He observed that the inferiority of Iranian women is the “basis of the policy of a despotic state that uses extreme forms of violence in order to regulate male/female relations on the basis of Islamic dogma.”¹³¹

More recently in *Refugee Appeal No.76044*,¹³² the RSAA found that the applicant’s claims established a link with the ‘political opinion’ ground. The applicant was threatened with death at the hands of family members should she return to Turkey for

¹²⁷ Crawley, note 16 at 124.

¹²⁸ Kneebone, note 120 at 25.

¹²⁹ Ibid at 31.

¹³⁰ 16 August 2000.

¹³¹ At para 86. In relation to social group, Haines found that women have an “overarching characteristic of those fundamentally disenfranchised and marginalised by the State.” (at para 108).

¹³² 11 September 2008.

reason that she had shamed the family by terminating her marriage.¹³³ The RSAA found that both the ‘political opinion’ and ‘particular social group’ grounds were relevant in this case. It observed that the ‘social group’ ground was supported by recent developments in refugee jurisprudence. However, it noted that the political opinion ground was too often overlooked in cases involving gender-related persecution. It found that the political opinion ground was, on the facts, the preferable of the two available grounds.

The judgment recognised that “[g]ender is a primary way of signifying relationships of power,”¹³⁴ and noted that ‘culture’ and ‘tradition’ are not apolitical, nor are they “detached from the prevailing power relations and the economic and social circumstances in which they operate.” In the context of ‘honour crimes’ it was noted that ‘honour’ is about “policing community norms and codes of behaviour, collective decisions and acts of punishment” and that it is ultimately “about the rigid patriarchal oppression of women.”¹³⁵ In an important passage, the RSAA recognised that the ‘political opinion’ ground must be oriented to “reflect the reality of women’s experiences and the way in which gender is constructed in the specific geographical, historical, political and socio-cultural context of the country of origin.” In this context, “a woman’s actual or implied assertion of her right to autonomy and the right to control her own life may be seen as a challenge to the unequal distribution of power in her society and the structures which underpin that equality.” Such a situation is properly characterised as “political”.¹³⁶ In

¹³³ The applicant was a Kurd from Turkey who grew up in a household dominated by her father. At the age of 17 she was told that she was to marry a man from a neighbouring village. When she objected to this, she was threatened with her life by her father. During her marriage, the applicant was regularly assaulted by both her husband and her mother-in-law. Following the rejection of the applicant’s and her husband’s applications for asylum in New Zealand, the husband attempted to kill the applicant. When she sought to end the marriage, the husband threatened her with her life and she received phone calls from her husband’s relatives in Turkey who told her that the termination of her marriage had shamed the family and that her father-in-law would ensure that the applicant is killed. Before his return to Turkey, the husband told the applicant that on her return he would cleanse his shame by killing her. She was subsequently told by members of her own family that it was a matter of honour that on her return her father or brothers would kill her. The applicant amended her second claim for refugee status to claim that she was a risk of death at the hands of her husband, his family and her family if she returned to Turkey. The decision is discussed in Rodger Haines, “Advancing a Gendered Interpretation of the Refugee Convention: Refugee Appeal No.76044” (September 2009).

¹³⁴ At paras 70-71.

¹³⁵ See paras 74, 80 and 86.

¹³⁶ See paras 83, 84 and 87.

this particular case, the applicant's assertion of her right to life and her right to control her life was a challenge to the collective morality, values, behaviours and codes of the two families and of the community. The RSAA concluded that this "challenge to inequality and the structures of power which support it is plainly 'political' as that term is used in the Refugee Convention." The applicant's desire to be "liberated from those structures was in this context a political opinion."¹³⁷

Conclusion

This paper has shown that the 2002 UNHCR Guidelines are largely consistent with the practice of states, the case law of Canada, Australia, the United Kingdom, the United States and New Zealand. In recognising that the existing enumerated Convention grounds, particularly 'particular social group' are adequate to recognise gender-related claims, the UNHCR Guidelines reflect the current practice in these jurisdictions. However, there are limitations to the 'gender-sensitive' approach advocated by the Guidelines.¹³⁸ As this paper has argued, if the 'public/private' dichotomy which underpins the understanding of gender-related claims is to be challenged, there is a need to move away from an interpretation which views 'private' harms as within the scope of the Convention only when they can be transformed into matters of 'public' concern. The recent attention given to the 'political opinion' ground as an alternative to the 'particular social group' ground, as evidenced in the judgments of Haines QC as a member of the New Zealand Refugee Status Appeals Authority, indicates that there is the potential for the recognition by decision-makers of the power relationships and structures within which gender-persecution occurs, thereby directly confronting the 'public/private' dichotomy and the gendered assumptions of international refugee law.

6838 words

¹³⁷ See para 90.

¹³⁸ For further discussion of these limitations see Pickering, Sharon, "Gender Persecution: A Response to the UNHCR Guidelines" IARLJ Conference 2002, 347-358.

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