

Immigration Appellate Authority

Asylum Gender Guidelines

These Guidelines aim to assist the Immigration Appellate Authority in fully considering all aspects of asylum seekers' claims to international protection under United Kingdom law.

'It is clear that a great deal of work has gone into producing this most useful document. I congratulate those responsible.'

— The Honourable Mr Justice Collins, President of the Tribunal

'These guidelines have been drafted after a very great deal of research by Miss Nathalia Berkowitz, Senior Legal & Research Officer, assisted by Special Adjudicator, Miss Catriona Jarvis. They are detailed, informative and immensely valuable and I hope and trust that all full-time and part-time adjudicators will note and have close regard to their contents.'

— His Honour Judge Hubert Dunn QC, Chief Adjudicator

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Section 1 Framework

Why Guidelines?

1.1 The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (together hereafter referred to as the 'Refugee Convention') applies both to men and women. It is often assumed that men and women therefore benefit equally from the international protection granted by the Refugee Convention. However, since the drafting of the Refugee Convention, the dominant conception of the refugee in Western jurisprudence has been of a man and today, women may not benefit equitably from its protections.

The reasons are twofold:

1. because the jurisprudence has not, to date, fully considered the specific issues raised by women's asylum claims and / or has tended to consider them from a framework of male experiences;
2. because the procedural and evidential requirements of the domestic asylum determination process are not equally accessible to both women and men.

1.2 To correct this imbalance States have been urged to adopt guidelines with respect to women's asylum claims by the UN Special *Rapporteur* on Violence Against Women ¹, the UN Division for the Advancement of Women ², the UN Platform for Action (1995 - see Art 147).

1.3 Gender guidelines have been introduced by Canada, Australia, the USA and UNHCR. In the UK the IAT has commended the use of the Canadian guidelines [see *Almaz Woldu Gimedhin* (IAT) (14019)]. In the UK *Gender Guidelines for the Determination of Asylum Claims in the UK* addressed to first instance decision makers in the Home Office, have been published by the Refugee Women's Legal Group in July 1998, drawing on the guidelines existing in other countries.

1.4 Most of these guidelines are applicable to the asylum claims of both men and women. They address the role of gender in the asylum determination process rather than simply the position of women asylum seekers or the role of biological sex.

1.5 In these guidelines, the terms 'women', 'woman', 'she' and 'her' apply equally to men. They are used to acknowledge that it is often women who have difficulties in relation to gender aspects of their asylum claims. Women, by virtue of their gender, may have specific protection needs and concerns.

1.6 Women refugees suffer the same deprivation and harm that is common to all refugees and they are frequently persecuted for reasons which are the same or similar to their male counterparts.

1.7 The experiences of women in their country of origin often differ from those of men, for example women's political protest, activism and resistance may manifest itself in different ways. This may alter the nature of their asylum claims, their ability to produce evidence relating to their claim, both oral and documentary, and the appropriate procedures to be used in determining their asylum claims.

For example:

- ? women may hide people, pass messages or provide community services, food,

¹ Report of the UN Special Rapporteur on Violence Against Women, 26 January 1998.

² Expert Group Meeting on Gender-Based Persecution December 1997.

- clothing and medical care;
- ? women who fail or refuse to conform to behavioural norms ('social mores') imposed on them by the state or society may suffer ill-treatment;
- ? women may be perceived as sharing the same political, religious, national, racial or other affiliations as their male relatives and have the affiliation and beliefs of their male relatives attributed or imputed to them;
- ? women may be unable, or less able, for example for legal³, economic or social (including economic) reasons to travel freely or to live on their own, or without family members thus limiting their ability to relocate within their country of origin. Women's child care responsibilities may affect their ability to relocate;
- ? women may be targeted because they are vulnerable, especially young women who can easily be sexually abused or mothers who will do anything to protect their children⁴;
- ? women may be targeted as a means of attracting or contacting or pressurising their male relatives or a whole community;
- ? women may be persecuted by members of their own family and / or community;
- ? women may be victims of domestic violence;
- ? women may be persecuted because of their choice of sexual partners including same-sex partners; and
- ? women may be victims of forced prostitution.

Aims

1.8 These guidelines aim to provide the judiciary of the IAA with the tools to enable them to fully and effectively consider and decide the asylum claims under the Refugee Convention. Specific focus on the role of gender is intended to ensure that all aspects of asylum claims are fully and fairly considered.

In particular they have the following aims:

- ? Jurisprudence - to ensure that women's asylum claims are fully considered under the Refugee Convention so that jurisprudence properly reflects the experience of both female and male refugees.
- ? Procedures – to ensure that the asylum determination process is accessible to both women and men and that the procedures used do not prejudice women asylum seekers or make it more difficult for them to present their asylum claims⁵.
- ? Evidential Requirements - to ensure that the judiciary are aware of the particular evidential problems which may be faced by women asylum seekers and that appropriate steps are taken to overcome them.

1.9 Even where gender is not a central issue in an asylum claim, giving consideration to gender-related aspects of a case will assist in fully understanding and determining the whole of an asylum claim.

1.10 The examples given in these guidelines are illustrative and not exhaustive.

³ For example Kenyan married women are legally required to obtain the consent of their husbands before obtaining a national identity card or passport and Nigerian women are required by law to obtain permission from a male family member before having an application for a passport processed see US Department of State, *1999 Country Reports on Human Rights Practices*, (February 2000). Egyptian women must have permission from their fathers to obtain a passport if they are unmarried or under the age of 21; married women must obtain the same permission from their husbands, see US Department of State, *1999 Country Reports on Human Rights Practices*, (February 2000).

⁴ "Particularly vulnerable were young women between fourteen and eighteen who were sought after and targeted for being virgins. The rebels often entered houses and compounds asking specifically for virgin girls. There are documented cases of girls as young as eight being abused." Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape, New Testimony from Sierra Leone*, July 1999.

⁵ see UN Platform for Action (1995).

Definitions

1.11 Terms relating to gender and the elements of the refugee definition are not always used very clearly. This section defines some of the important terms relating to gender issues in asylum claims.

1.12 *Gender*

Gender is not the same as biological sex. Gender refers to the socially and culturally constructed experience of being a woman or a man and the *power relations* between women and men. It affects both women's and men's social identity, status, roles and responsibilities. Gender relations and gender differences are historically, geographically and culturally specific - what it means to be a woman or a man may vary over time and place and may be affected by other factors such as race, age, class and marital status.

1.13 *Gender specific forms of harm*

Certain forms of harm are more frequently or only used against women or affect women in a manner which is different from men. These include, but are not limited to, for example, sexual violence, societal and legal discrimination, forced prostitution, trafficking, refusal of access to contraception, bride burning, forced marriage, forced sterilisation, forced abortion and (forced) female genital mutilation, enforced nakedness / sexual humiliation.

1.14 *Gender related persecution*

The terms *gender related persecution* and *gender persecution*⁶ relate to the causal relationship between the persecution and the reason for the persecution - i.e. the reason for the persecution. Where it occurs a woman may be persecuted *because of her gender* (e.g. where she is persecuted because she refuses or fails to comply with social / religious / cultural behaviour expected from a woman). Gender-related persecution is not necessarily the same as persecution on the basis of biological sex. It does not simply refer to persons being persecuted because they are biologically male or female, but to them being persecuted because they fail or refuse to comply with the social requirements of being a man or a woman.

1.15 Thus, an asylum seeker may be persecuted in a *gender specific manner* for reasons unrelated to gender (e.g. raped because of her membership in a political party), she may be persecuted in a *non-gender specific manner*, but because of her gender (e.g. flogged for refusing to wear a veil), and persecuted in a *gender specific manner* and *because of her gender* (female genital mutilation or the honour killing of an adulterous woman).

1.16 *Gender blind*

Where, on its face, a provision or policy, etc. makes no distinction between men and women.

1.17 *Gender neutral*

Where, in practice, a provision or policy, etc. provides equally for men and women. In order to achieve *gender neutrality* it may be necessary to recognise that men and women have different experiences and may thus have different fears, needs, concerns and priorities.

⁶ This term is often, incorrectly, used to cover the asylum claims of women in general or is confused with gender specific harm.

The International Protection Framework

1.18 The 1951 Refugee Convention is part of an international legal framework of protection. This framework is contained in international human rights law, including both international treaties and international customary law (which is effective in UK common law).

IAA judiciary should bear in mind that the Refugee Convention comprises part of this larger international legal protection framework for a number of reasons.

These include:

- ? That international human rights law instruments (and customary law) should be referred to for guidance in construing the Refugee Convention under principles of international treaty interpretation [see Annex II to these Guidelines and IAA Legal Factsheet '*Principles of Interpretation*', May 1999].
- ? Some of the UK's domestic asylum law has specifically been introduced to comply with international human rights treaties in addition to the Refugee Convention ⁷.
- ? The IAA's obligations in relation to the European Convention on Human Rights ('ECHR') ⁸.
- ? There are a number of international human rights instruments (in addition to the Refugee Convention) which specifically prohibit expulsion of non-citizens (and *refoulement*) on human rights grounds ⁹.

⁷ see Schedule 2, para 5(5) Asylum and Immigration Act 1996 and UN Convention Against Torture ('UNCAT') - "[w]e are determined to honour our obligations under the 1951 United Nations Convention on Refugees and the 1981 [UN] Convention on Torture and Cruel or Inhuman Treatment. Those are the principles underlying this Bill [Asylum and Immigration Bill 1995/6]". Minister of State Home Office, Baroness Blatch, HL Second Reading 14/2/96, Hansard Col. 959. Thus, following *Pepper v Hart* [1993] 1 All ER 42, they should arguably be interpreted consistently.

⁸ Following entry into force of the Human Rights Act 1998, the IAA will be obliged to apply the ECHR and, since the case of *R v Secretary of State for the Home Department ex parte Danaei* [1998] INLR 124 (CA), have been able to make findings of fact in relation to the ECHR which are binding on the Secretary of State:

"Often, of course, the Secretary of State will not have the benefit of the adjudicator's findings in Art. 3 [ECHR] cases, and this court alone [the Court of Appeal] will then have the role of exercising 'independent scrutiny' of the claim. When, however, as here, the adjudicator has made findings, then, even if he has enjoyed no particular advantage over the Secretary of State in reaching his conclusions the ECHR may perhaps be expected to take exception to a Secretary of State's decision which merely disagrees [with the adjudicator's factual findings]." [*R v SSHD ex parte Danaei* (CA) [1998] INLR 124, [1998] Imm AR 84].

"If the Secretary of State is to set aside or ignore a finding on a factual issues which has been considered and evaluated at an oral hearing by the special Adjudicator he should explain why he has done so and he should not do so unless the relevant factual conclusion could itself be impugned on Wednesbury principles, or has been reconsidered in the light of further evidence, or is of limited or negligible significance to the ultimate decision for which he is responsible." [*R v SSHD ex parte Danaei* (CA) [1998] INLR 124, [1998] Imm AR 84. For further information on ECHR see *IAA Legal Fact Sheets*].

⁹ These include: UNCAT 1984 and the International Convention on Civil and Political Rights (ICCPR) 1966 (for more on this see General Comment 15 1986) UNCAT 1984 defines torture as follows:

Article 1

- 1) For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act, he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

1.19 International Human Rights instruments and customary international law provide a wide range of rights and obligations which are binding on the United Kingdom and form part of the international protection framework.

1.20 A list of some of the relevant international treaties is in Annex II to these Guidelines.

2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

- With reference to Art 1(1) the case of *Elmi v Australia* Communication No 120/1998 noted that UNCAT would prevent expulsion of a Somali national who feared torture by the Hawiye clan. The UN Committee Against Torture considered that warring factions in Somalia would fall 'within the phrase "public officials or other persons acting in an official capacity"; case available at <http://www.unhchr.ch/tbs/doc.nsf/...6c278025679a003c37ec?Opendocument> - With reference to Art 1(2) where 'torture' is referred to in UK statutory materials regard should be had to the ordinary dictionary definition of the term in keeping with UK principles of statutory interpretation. The Concise Oxford Dictionary defines torture as: 1) the infliction of severe bodily pain especially as a punishment or means of persuasion, 2) severe physical or mental suffering. *Concise Oxford Dictionary*, Ninth Edition, Clarendon Press, (1995) at page 247.

Section 2 Persecution – Serious Harm and Failure of State Protection

2.1 To be recognised as a refugee an asylum applicant must fear a form of harm which constitutes ‘persecution’ within the meaning of the Refugee Convention.

Definition of Persecution

2.2 The Refugee Convention contains no definition of persecution; guidance is given in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status 1988, re-edited 1992 (‘UNHCR Handbook’) ¹⁰, caselaw and by academic writers.

2.3 The term ‘persecution’ is linked to violations of human rights as set out in the international human rights instruments and international customary law:

Persecution is: ‘the sustained or systemic violation of basic human rights demonstrative of a failure of state protection in relation to one of the core entitlements which has been recognised by the international community.’¹¹

‘... comprehensive analysis requires the general notion of persecution to be related to developments within the broad field of human rights.’¹²

2.4 It will be necessary to consider whether the fear is of persecution from an agent of the state (for example a police or army member) or a non-state agent (for example an opposition group) since this will affect the approach taken to deciding whether the feared treatment is ‘persecution’ within the meaning of the Refugee Convention ¹³.

State Agents

The term ‘persecution’ covers ill-treatment which is of sufficient seriousness.

Non-State Agents

The term ‘persecution’ under the Refugee Convention includes two factors:

1. serious harm or ill-treatment from non-state agents; and
2. inability or unwillingness of the State to protect the victim from such harm or ill-treatment ¹⁴

2.5 The term ‘persecution’ is thus considered in these Guidelines in the form of two questions:

¹⁰ Paragraphs 51 - 60 and 65 *UNHCR Handbook*, Geneva (1992).

¹¹ Hathaway, J., *The Law of Refugee Status*, Butterworths Canada, (1991) page 114 (referred to in these guidelines as ‘Hathaway’), see also Home Office Asylum Directorate Instructions Chapter 1, Paragraph 8.1.

¹² Goodwin-Gill, G., *The Refugee in International Law, 2nd Edition*, Oxford University Press (1996).

¹³ Important UK cases on the meaning of persecution include:

R v IAT ex parte Jonah (QBD) [1985] Imm AR 7;

Gashi v Nikshiqi (IAT) [1997] INLR 96;

Horvath v SSHD (HL) [2000] 3 WLR 379;

Horvath v SSHD (CA) [2000] INLR 15, [2000] Imm AR 205;

Horvath v SSHD (IAT) [1999] INLR 7, [1999] Imm AR 121;

Faraj v SSHD (CA) [1999] INLR 451;

Demirkaya v SSHD (CA) [1999] INLR 441, [1999] Imm AR 498;

Ravichandran v IAT (CA) [1996] Imm AR 97;

Kagama v SSHD (CA) [1997] Imm AR 137.

¹⁴ *Horvath v SSHD* (HL) [2000] 3 WLR 379.

Immigration Appellate Authority — Gender Guidelines

1. Is there a violation of human rights / harm which amounts to 'serious harm'?
This is addressed in Section 2A of these Guidelines
2. Is the state unable or unwilling to offer effective protection?
This is addressed in Section 2B of these Guidelines

Section 2A The Meaning of Serious Harm

2A.1 Whether harm, including gender-specific harm, amounts to persecution should be assessed on the basis of internationally recognised human rights standards ¹⁵.

“In our considered opinion, the term ‘persecution’ should be defined by reference to human rights standards. In this respect we agree with the academic commentators, in particular Goodwin-Gill and Hathaway, and we associate ourselves with the view expressed in [the IAT decision of] Gashi [1997] INLR 96] that decision-makers should look in particular at the preamble to the 1951 [Refugee] Convention.”¹⁶ [Horvath v SSHD (IAT) [1999] INLR 7, [1999] Imm AR 121]

2A.2 Only ‘serious harm’ will constitute ‘persecution’ within the meaning of the Refugee Convention. Not all harm or violations of human rights standards will amount to ‘serious harm’.

“The denial of human rights is not the same as persecution, which involves the infliction of serious harm.” [Islam v Secretary of State for the Home Department, R v IAT ex parte Shah, (HL) [1999] INLR 144 ¹⁷, [1999] Imm AR 283]

‘Persecution may involve physical or mental ill-treatment. Torture is such ill-treatment carried to extremes. But persecution, unlike torture, always involves a persistent course of conduct.... It involves an element of sustained or systematic failure of protection towards the person or group ¹⁸ the object of such persecution, as distinct from casual or random acts of violence inflicted on citizens at large.... an incident of torture of a person which is the sole incident affecting that person may amount to persecution if there are other incidents affecting a group ¹⁹ of which that person is a member.’ [Faraj v SSHD (CA) [1999] INLR 451]

‘... what conduct may amount to persecution is a question of degree. At one end of the scale there may be arbitrary deprivation of life, torture and

¹⁵ see also paragraphs 1.18 and section 2 above; for an earlier approach in UK caselaw see *R v IAT ex parte Jonah* (QBD) [1985] Imm AR 7: the term ‘persecution’ ‘should be given its ordinary, dictionary definition’ - the definition in the Shorter Oxford English Dictionary was ‘to pursue, hunt, drive ... to pursue with malignancy or injurious action; exp. to oppress for holding a heretical opinion or belief’.

¹⁶ The Preamble to the Refugee Convention states, *inter alia*,: “Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms”.

¹⁷ see also *Horvath v SSHD* (IAT) [1999] INLR 7 at page 28E, 30E and *Horvath v SSHD* (HL) [2000] 3 WLR 379.

¹⁸ Note - this is not specifically referring to a ‘particular social group’ within the meaning of the Refugee Convention.

¹⁹ see footnote 18.

*cruel, inhumane and degrading punishment or treatment. In such a case the conduct may be so extreme that one instance is sufficient. But less serious conduct may not amount to persecution unless it is persistent*²⁰.
[Demirkaya v SSHD (CA) [1999] INLR 441, [1999] Imm AR 498]

2A.3 Hathaway's approach to the meaning of persecution, within the Refugee Convention, is frequently referred to. He states:

*Persecution is: 'the sustained or systemic violation of basic human rights demonstrative of a failure of state protection in relation to one of the core entitlements which has been recognised by the international community. The types of harm to be protected against include the breach of any right within the first category, a discriminatory or non-emergency abrogation of a right within the second category, or the failure to implement a right within the third category which is either discriminatory or not grounded in the absolute lack of resources'*²¹

2A.4 Hathaway refers above to three levels of human rights and the situations in which their breach may constitute serious harm²². The three levels of human rights are:

Level One Rights:

Rights stated in the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR) which countries may not derogate from even in times of compelling national emergency. They include:

- ? Freedom from arbitrary deprivation of life (Art 6 ICCPR);
- ? Freedom from torture, cruel, inhuman or degrading punishment or treatment (Art 7 ICCPR);
- ? Freedom from slavery and servitude (Art 8 ICCPR);
- ? freedom from imprisonment for inability to fulfil a contractual obligation (Art 11 ICCPR);
- ? protection from retroactive criminal prosecution (Art 15 ICCPR);
- ? right to be recognised as a person in law (Art 16 ICCPR); and
- ? freedom of thought, conscience and religion (Art 18 ICCPR).

According to Hathaway failure of the state of origin to ensure these 'first level' rights will, under any circumstances 'be tantamount to persecution'²³.

Level Two Rights:

Rights stated in the UDHR and in the ICCPR from which states may derogate during a state of emergency which has been officially proclaimed. These rights include:

²⁰ With regard to persistence of the harm see also *Ravichandran v IAT* (CA) [1996] Imm AR 97: 'Persecution must at least be persistent and serious ill-treatment without just cause by the state, or from which the state can provide protection but chooses not to do so.'

²¹ Hathaway, J., page 114, see also Home Office Asylum Directorate Instructions Chapter 1, Paragraph 8.1.

²² see Hathaway, pp 109–112.

²³ Hathaway at page 109.

- ? freedom from arbitrary arrest and / or detention (Art 9 ICCPR);
- ? freedom from arbitrary arrest and/or detention (Art 9 ICCPR);
- ? right to equal protection for all (Art 26 ICCPR);
- ? rights, in criminal hearings, to a fair and public hearing and a presumption of innocence (Art 14 ICCPR);
- ? protection of family and privacy (Art 17 ICCPR);
- ? right to freedom of movement inside a country and to choice of residence (Art 12 ICCPR);
- ? freedom to leave and return to one's country of origin (Art 12 ICCPR);
- ? liberty of opinion, expression, assembly and association (Arts 19, 21, 22 ICCPR);
- ? right to form and join trade unions (Art 22 ICCPR);
- ? right and opportunity to take part in the conduct of public affairs, and vote in periodic and genuine elections (Art. 25 ICCPR); and
- ? right to have access to public employment without discrimination (Art 25 ICCPR).

A failure to ensure these rights will generally be a violation of a state's basic duty of protection of its nationals unless 1) the government's derogation was strictly required by the problems of a real emergency situation, and 2) the derogations are not applied in a discriminatory way and 3) that the derogation was not inconsistent with other aspects of international law.

*'Where, for example, the failure to respect a basic right in this category goes beyond that which is strictly required to respond to the emergency (in terms of scope or duration), or where the derogation impacts disproportionately on certain subgroups of the population, a finding of persecution is warranted.'*²⁴

Level Three Rights:

Rights in the UDHR and carried forward in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)²⁵. The state will be in breach if it secures the rights in a discriminatory manner or where it takes no steps to ensure the rights despite having adequate finances to do so. These rights include:

- ? right to work, including just and favourable conditions of employment, remuneration and rest (Arts 6 and 7 ICESCR);
- ? right to an adequate standard of living including: food, clothing, housing (Art 11 ICESCR);
- ? right to enjoyment of highest attainable standard of health (Art 12 ICESCR);
- ? right to education (Arts 13 and 14 ICESCR);
- ? protection of the family, especially children and mothers (Art 10 ICESCR); and
- ? right to engage in and benefit from cultural, scientific, literary and artistic expression (Art 15).

According to Hathaway 'a state is in breach of its basic obligations where it either ignores these interests notwithstanding the fiscal ability to respond or where it excludes a minority of its population from their enjoyment. Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter, or health care will at an extreme level be tantamount to the deprivation of life or

²⁴ Hathaway at page 110.

²⁵ Generally the ICESCR does not demand immediate compliance, but rather demands that States "take steps to the maximum of [their] available resources" to "achieve progressively the full realisation of the rights" without "discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution.’²⁶

Discrimination

2A.5 Protection from persecution based on discrimination is an important purpose of the Refugee Convention and the elimination of discrimination based on sex is a fundamental tenet of international human rights law (e.g. Art 2 ICCPR, Art 3 ICESCR 1966, Convention on the Elimination of All Forms of Discrimination Against Women 1979 (‘CEDAW’)).

*The relevance of the preambles [to the Refugee Convention] is twofold. First, they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the Convention. [Lord Steyn, *Islam v Secretary of State for the Home Department, R v IAT ex parte Shah*, (HL) [1999] INLR 144, [1999] Imm AR 283]*

*In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the [Refugee] Convention [Lord Hoffman, *Islam v Secretary of State for the Home Department, R v IAT ex parte Shah*, (HL) [1999] INLR 144, [1999] Imm AR 283]*

2A.6 Definition of discrimination:

*The Refugee Convention is concerned ‘with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect.’ [Lord Hoffman, *Islam v Secretary of State for the Home Department, R v IAT ex parte Shah*, (HL) [1999] INLR 144, [1999] Imm AR 283]*

To discriminate is: to ‘make a distinction in the treatment of different categories of people or things esp. unjustly or prejudicially against people on grounds of race, colour, sex, social status, age, etc.’ [The New Shorter Oxford English Dictionary, Oxford University Press (1993)]

2A.7 Discrimination (and discriminatory treatment) may:

- ? Amount to ‘serious harm’ within the meaning of the Refugee Convention;
- ? be the / a factor which turns ‘harm’ into ‘serious harm’ and a breach of human rights (for example - discriminatory access to police protection or education); and
- ? be a factor in failure of state protection in the Refugee Convention (thus the State may protect some groups in society and not others).

²⁶ Hathaway at page 111.

2A.8 The state may discriminate in relation to a wide range of harm and all levels of human rights. For example:

- ? The State and its agents may themselves discriminate directly - e.g. through discriminatory laws and the application of laws in a manner which impacts disproportionately against certain groups or individuals.
- ? Non-state agents may carry out discriminatory activities or social / cultural / religious discriminatory norms may exist and, the State and its agents may support, be unwilling, or unable to take serious action to combat the discrimination²⁷.

2A.9 Discrimination against women may include (but is not limited to):

- ? political rights – e.g. women may be discriminated against in relation to voting or being able to be involved in mainstream or grassroots politics or to be publicly involved;
- ? economic rights - e.g. there may be legal and or social / cultural restrictions on women taking paid employment or employment outside the home;
- ? professional - e.g. women may be barred from certain types of employment or restricted in their ability to undertake them;
- ? education - e.g. women may be discriminated against in their access to education including basic literacy;
- ? health care - e.g. women may be discriminated against in their access to health care including birth control of their choice;
- ? marriage rights - e.g. women may not be free to choose their own partner due to legal and /or social / cultural / religious restrictions;
- ? property rights - e.g. women may not be allowed to own or inherit property (or not equally with men);
- ? child custody rights - e.g. women may not be entitled to custody of their children on divorce;
- ? freedom of movement - e.g. women may be restricted in their freedom of movement including their ability to move outside the home, to travel or to travel alone or to travel without the consent of a male relative; and
- ? equal protection of the law - e.g. violence most often suffered by women may not be illegal or prosecuted or subject to evidential restraints, women's evidence may not be considered equal to men's.

2A.10 A discriminatory measure, in itself or cumulatively with others, may be 'serious harm' in some circumstances, for example:

- ? if the discrimination has consequences of a substantially prejudicial nature for the person concerned (see further at paragraph 2A.11), for example, serious restrictions on right to earn a livelihood, to practise or not practise the religion of their choice, restrictions on freedom of movement such as forced seclusion or lack of access to normally available education, legal, welfare and health provision; *and*

²⁷ see for example the views of Lord Steyn regarding the position of women in Pakistan as expressed in *Islam v SSHD; R v IAT ex parte Shah* [1999] INLR 144 (HL): "The distinctive feature of this case is that in Pakistan women are unprotected by the State: discrimination against women in Pakistan is partly tolerated by the State and partly sanctioned by the State". In relation to the same issue Neal, D. states: "Some nations officially condemn sex discrimination, but fail for cultural reasons to protect women in particular instances, Others actively proscribe sex discrimination or guarantee women's rights, but are unsuccessful in adequately enforcing such prohibitions and safeguards - often because social traditions or religious laws eviscerate progressive legislation." [in 'Women as a Social Group: Recognising Sex-Based Persecution as Grounds for Asylum' Columbia Human Rights Law Review [Vol. 20:1 1988] 203].

- ? if the discriminatory measures, irrespective of how serious they are, lead the person concerned to feel apprehensive and insecure as regards their future existence²⁸.

“New Zealand refugee jurisprudence accepts [Hathaway’s view] that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard various acts of discrimination, in their cumulative effect, can deny human dignity in key ways and should properly be recognised as persecution for the purposes of the Convention.” [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

‘Although we did not hear full argument on the point, my preliminary view is that breach of third category rights [i.e. socio-economic rights] cannot be said as a matter of law to amount to persecution just as it cannot be said as a matter of law that breach of these rights could never amount to persecution. It is a matter of fact and degree and judgement in the individual case.’ [Horvath v SSHD (CA) [2000] INLR 15, [2000] Imm AR 205]

2A.11 Discriminatory restrictions on women may in themselves constitute serious harm if they have consequences of a substantially prejudicial nature for the women concerned: for example, compelling a woman to wear the veil will violate her right to freedom of conscience and religion if she has deep beliefs regarding this.

“the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs.” [Fatin v INS 12F. 3d 1233 (3rd Cir. 1993), also approved in Fisher v INS 37 F.3d 1371,1379-1381 (9th Cir.1994) and Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

“... the Fisher decision is ... important for the recognition it has given to the significance of being required to comply with codes and requirements fundamentally at odds with one’s own conscience and beliefs or deeply held convictions, or to engage in conduct that is abhorrent to one’s own beliefs.” [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

2A.12 A wide range of penalties may be imposed on women for disobeying restrictions placed on women (including cultural, social and legal restrictions). Such penalties will often constitute serious harm. Where restrictions are placed on both men and women, the punishment for breaching those restrictions may be greater for women than men. Where a woman will receive heavier punishment than will a man then this will constitute serious harm.

2A.13 Restrictions on women may have social, medical or other consequences for women which constitute ‘serious harm’. For example, consequences for women in

²⁸ see paragraphs 53, 54 & 55 UNHCR Handbook.

mixed marriages or child or arranged marriages, and on separation, divorce or widowhood²⁹.

Violence Against Women

2A.14 The fact that violence and / or discrimination against women occurs in every country is *irrelevant* when determining whether gender-specific forms of harm³⁰ amount to 'serious harm'.

2A.15 The fact that, within a particular country, violence and / or discrimination against women is endemic and / or socially / culturally accepted is *irrelevant* when determining whether gender-specific forms of harm amount to 'serious harm'.

Whether particular treatment amounts to 'serious harm' should be decided on the basis of international human rights standards. [see e.g. Lord Hoffman, *obiter* in *Islam v SSHD; R v IAT ex parte Shah* [1999] INLR 144 (HL), [1999] Imm AR 283]

2A.16 Gender-specific harm does not differ analytically from other forms of ill-treatment and violence that are commonly held to amount to persecution and may constitute torture or cruel inhuman or degrading treatment or punishment.

2A.17 Gender-specific harm may include *but is not limited to* sexual violence and abuse, female genital mutilation, marriage-related harm, violence within the family, forced sterilisation and forced abortion³¹. For further details see Definitions Section of these Guidelines.

²⁹ Human Rights Watch World Report 1996 reported as follows: "In late 1994 the Women's Rights Project [Nigeria] and Human Rights Watch / Africa sent research teams to Nigeria to investigate discrimination against widows in the south and forced child marriage in the north. In some areas of the south, we found that widows were forced to endure humiliating rituals when their husbands died and that they were denied inherited property under discriminatory customary law. In five northern states that we visited, we found that girls are customarily forced by their families into marriage, frequently before puberty, despite the girls' express objections or attempts to run away. Many child brides are compelled to engage in sexual relations as soon as they are married and, as a consequence, they become pregnant and give birth before they are physically mature. This can not only increase their risk of death in childbirth, but also cause serious medical complications due to early pregnancy, including obstetric or vesico-vaginal fistula ... Girls suffering from their complications smell from the constant leakage of urine, and many are abandoned by their husbands and families." In Nigeria '[a]lthough women are not barred legally from owning land, some customary land tenure systems only men can own land, and women can only gain access to land only through marriage or family. In addition many customary practices do not recognise a woman's right to inherit her husband's property and many widows were rendered destitute when their in-laws took virtually all of the deceased husband's property. Widows are subjected to unfavourable conditions as a result of discriminatory traditional customs and economic deprivation. 'Confinement' is the most common rite of deprivation to which widows are subjected, and it occurs predominately in eastern Nigeria. Confined widows are under restrictions for as long as 1 year and usually are required to shave their heads and dress in black garments. In other areas, a widow is considered a part of her husband's property, to be 'inherited' by his family.' - US Department of State, *1999 Country Reports on Human Rights Practices*, February 2000. - For more information concerning the particular problems which occur as a result of widowhood see Owen, M, 'A World of Widows', Zed Books (1996).

³⁰ see definitions at para. 1.11 - 1.17.

³¹ We would regard enforced abortion as torture, as we would enforced mutilation or sterilisation. I can undertake to put the guidance in instructions to caseworkers and to make that guidance available to the House' Minister of State Home Office Ann Widdecombe MP, HC Consideration of Lords Amendments to the Asylum and Immigration Bill 1995/6, 15/7/96, Hansard Col 842. "I stress that both personally and as a Minister I utterly accept that forcible abortion, sterilisation, genital mutilation and allied practices would almost always constitute torture. In fact, they would probably 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." Minister of State Home Office Ann Widdecombe MP, HC Consideration of Lords Amendments to the Asylum and Immigration Bill 1995/6, 15/7/96, Hansard Col 844. "*Rape and other forms of sexual*

2A.18 Sexual violence can include, *but is not limited to*, rape³²; enforced nakedness, mechanical or manual stimulation of the erogenous zones; the insertion of objects into the body openings; the forced witnessing or commission of sexual acts; forced masturbation; fellatio and oral coitus; a general atmosphere of sexual aggression, the loss of the ability to reproduce plus threats of the above: sexual violence is a form of aggression.

'... rape is a form of aggression and ... the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts....' [Prosecutor v Jean-Paul Akayesu (ICTR) Case No. ICTR-96-4-T, 2 September 1998³³]

'We want to kill the myth that rape is sexually motivated - it is usually intended to inflict violence and humiliation.' [Deputy Assistant Commissioner Wyn Jones of the Metropolitan Police³⁴]

2A.19 Sexual violence may be a violation of the right not to be subjected to torture or cruel inhuman or degrading treatment or punishment and may be a crime against humanity³⁵.

" the deliberate ill-treatment inflicted on [the applicant] by being beaten, being placed in a tyre and hosed with pressurised water, combined with the humiliation of being stripped naked, fell clearly within the scope of the prohibition of Article 3 [ECHR]. The Commission also found that rape

violence clearly amount to persecution in the same way as do other acts of serious physical abuse." Minister of State Home Office Baroness Blatch, HL Committee 20/4/96, Hansard Cols. 1485-1486.

³² Rape has now been defined in international law. The International Criminal Tribunal for Former Yugoslavia has defined rape as: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person. - see *Prosecutor v Anto Furundzira*, (ICTY) Case No. IT-95-17/1-T, 10 December 1998. The International Criminal Tribunal for Rwanda defines rape as 'physical invasion of a sexual nature committed on a person under circumstances which are coercive' and defines 'sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact ... [such as the incident] in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd'. - see *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998.

(<http://www.un.org/ict/english/judgements/akayesu.html>)

³³ International Criminal Tribunal for Rwanda, case available at:

<http://www.un.org/ict/english/judgements/akayesu.html>

³⁴ *The Guardian*, January 45, 1985, reported in Temkin, J., *Rape and the Legal Process*, Sweet and Maxwell (1987) at page 161.

³⁵ Rape is listed as a crime against humanity in the Statutes of the International Tribunals for Former Yugoslavia and Rwanda. The Rome Statute of the International Criminal Court lists as crimes against humanity 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity'. Protocol II to the Geneva Conventions 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts lists acts which are prohibited against non-combatants or former combatants including 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'. A 1995 report of the Inter-American Commission on Human Rights on Haiti concluded that rape as a weapon of terror against women is a crime against humanity in peacetime.

committed by an official or person in authority on a detainee must be regarded as treatment or punishment of an especially severe kind. Such an offence struck at the heart of the victim's physical and moral integrity and had to be characterised as a particularly cruel form of ill-treatment involving acute physical and psychological suffering. 79. The Commission found that the applicant had been the victim of torture at the hands of officials in violation of Article 3" -Aydin v Turkey (ECHR) (1997) 25 EHRR 251

2A.20 Sexual violence may have serious *physical, psychological* and social consequences for both male ³⁶ and female victims.

"... while being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.... 86. the [European] Court [of Human Rights] is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected [by Turkish gendarme officers while in detention] amounted to torture in breach of Article 3 of the Convention [ECHR]. Indeed the Court would have reached this conclusion on either of these grounds taken separately." [Aydin v Turkey ((ECHR)) (1997) 25 EHRR 251]

2A.21 Sexual violence may have traumatic *social* repercussions for the victim ³⁷. These may be affected by the victim's cultural origins and / or social status. Such

³⁶ see page 17.

³⁶ Sexual violence may have severe consequences for male victims and, in the UK, men are said to be reluctant to admit to having been forced into sex, see report of research carried out at the Royal Free and University College Medical School, London - The Guardian, 26 March 1999. In relation to the physical consequences where the victim is young see, *for example*, footnote 29. In relation to the psychological effects of rape: "Rape commonly results in severe and long-lasting psychological sequelae that are complex and shaped by the social and cultural context in which the rape occurs. Most of the data on the psychological effect of rape come from studies of adult Western women in peacetime who have suffered a single episode of rape. They describe both short term and long term effects. Commonly reported feelings at the time of the rape include shock, a fear of injury or death that can be paralyzing, and a sense of profound loss of control over one's life. Longer-term effects can include persistent fears, avoidance of situations that trigger memories of the violation, profound feelings of shame, difficulty remembering events, intrusive thoughts of the abuse, decreased ability to respond to life generally, and difficulty re-establishing intimate relationships. ... In any culture women may not voice their distress in "psychological" terms. For example in the study of 107 Ugandan women raped during war, only two presented with what could be called psychological symptoms (nightmares and loss of libido). Fifty-three percent described their distress in physical complaints (headaches, chest pain and rashes) and 57% in gynaecological symptoms... The persistence of perceived infestation in this group often despite multiple treatment for symptoms (approximately two thirds had no clinical findings of infection) reflects a common sequel to rape of feeling dirty and infected... For Ugandan women, the experience of rape disrupted their sense of community:

social repercussions may include, but are not limited to, rejection by (or of) the spouse and by family members, stigmatisation or ostracism by the wider community, and punishment and / or deprivation of education, employment and other types of assistance and protection. Where a victim of sexual violence has no alternative but to marry her attacker or become a prostitute, these are also human rights violations.

"Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed ... [it] also causes a psychological trauma that results on the one hand from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them." [Raquel Marti de Mejia v Peru, Case 10.970, Report No. 5/96, Inter-American Commission on Human Rights, March 1 1996]

2A.22 Forcible abortion, sterilisation or acts involving genital mutilation are infringements of the right to freedom from torture, inhuman and degrading treatment or punishment³⁸, of the right to private and family life³⁹ and may be crimes against humanity and, as such, will constitute 'serious harm'⁴⁰.

Rome Statue of the International Criminal Court

Art 7 - Crimes against humanity

1. For the purpose of this statute 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity

keeping this aspect of their lives secret alienated them from other people. These women often expressed the fear that they would be rejected by their partners and the rest of the community.' Swiss, S. and Giller J.E., *Rape as a Crime of War: A Medical Perspective* in 'The Journal of the American Medical Association' August 4 1992 Vol. 470.

³⁷ For example, in Kosovo ethnic Albanian women consider that '[rape] is the worst possible thing ... they would rather die than be raped, especially the unmarried, whose life is then essentially over.' Indeed the subject is so fraught that counsellors and doctors have great problems in finding out who the victims are: 'They cannot come and admit that they have been raped', according to the humanitarian medical agency, *Medecins sans Frontieres*, reported in *The Guardian*, 19 October 1999 *Kosovo's Wounded Women find no peace*. In relation to Uganda 'Rape commonly results in severe and long-lasting psychological sequelae that are complex and shaped by the social and cultural context in which the rape occurs... In a study of 107 Ugandan women who had been raped by soldiers, only half had told anyone about the rape incident as many as 7 years after the rape, despite the fact that all still had problems related to the rape when they finally spoke of it.' and 'For Ugandan women, the experience of rape disrupted their sense of community; keeping this aspect of their lives secret alienated them from other people. These women often expressed the fear that they would be rejected by their partners and the rest of the community.' Giller, JE, *War, Women and Rape*, London University 1995. Thesis; quoted in Swiss, s and Giller JE, *Rape as a Crime of War: A Medical Perspective* in 'The Journal of the American Medical Association' August 4 1992 Vol. 470.

³⁸ Right to freedom from torture, inhuman and degrading treatment and punishment: ECHR 1950 Art. 3, ICCPR 1966 Art. 7; CAT 1984, UDHR 1948 Art. 5.

³⁹ Right to private and family life: ECHR 1950 Art. 8; ICCPR 1966 Art 17, UDHR Art. 12.

⁴⁰ "We would regard enforced abortion as torture, as we would enforced mutilation or sterilisation." "I stress that both personally and as a Minister I utterly accept that forcible abortion, sterilisation, genital mutilation and allied practices would almost always constitute torture. In fact, they would probably 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." - Ann Widdecombe MP, Minister of State for the Home Office, House of Commons Consideration of Lords Amendments to the Asylum and Immigration Bill 1995/6(?), Hansard Col. 842 – 844. "Caseworkers are reminded that the following acts, when committed or sanctioned by officials, would probably always constitute torture: forcible abortion, forcible sterilisation, or acts involving genital mutilation and allied practices." Home Office Asylum Directorate Instructions July 1998, Chap. 3, para 2.1.

Harm Within Family Life

2A.23 Physical and mental violence and ill-treatment within the family is a wide-spread and often gender-specific form of harm. The fact that such treatment occurs within the family context does not mean that it will not constitute 'serious harm' - treatment which would constitute 'serious harm' if it occurred outside the family will also constitute 'serious harm' if it occurs within a family context. As with other forms of harm whether it constitutes 'serious harm' within the meaning of the Refugee Convention should be assessed on the basis of internationally recognised human rights standards.

2A.24 Harm within family life and marriage-related harm includes, *but is not limited to*:

- ? *forced marriage* - marriage of a person without their free consent ⁴¹;
- ? domestic violence ⁴²;
- ? '*dowry death*' or *bride burning* – where a woman is subject to bullying, mental and physical harm and may be murdered or driven to suicide by her husband and / or in-laws who are dissatisfied with the dowry given by the bride's family or in order to obtain further payments of dowry from the bride's family ⁴³;

⁴¹ Art. 23(3) ICCPR: 'No marriage shall be entered into without the free and full consent of the intending spouses.'; Art. 12 ECHR: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

⁴² For example in Turkey '[s]pousal abuse is serious and widespread. According to the Family Research Institute in the Prime Minister's Office, beating in the home is one of the most frequent forms of violence against women.' Spousal abuse was only made illegal in 1998 and 'is still considered an extremely private matter, involving societal notions of family honour. Few women go to the police, who in any case are reluctant to intervene in domestic disputes and frequently advise women to return to their husbands.' In Nigeria '[r]eports of spousal abuse are common, especially those of wife beating in polygamous families. Police normally do not intervene in domestic disputes, which seldom are discussed publicly. The Penal Code permits husbands to use physical means to chastise their wives as long as it does not result in "grievous harm" which is defined as loss of sight, hearing, power of speech, facial disfigurement, or other life threatening injuries.' - US Department of State, *1999 Country Reports on Human Rights Practices*, February 2000.

⁴³ In Pakistan these deaths are often associated with burns caused by explosions in defective and dangerous ovens, see Canadian IRB Human Rights Briefs: *Women in Pakistan*, June 1994, see also '*The Agony of Pakistan's Stove-burnt brides*', *The Guardian*, 3 August 1998. In India the 1993 census notes that approximately 5,000 dowry-related deaths, including suicides, were reported in eight states plus the capital, Delhi although it is officially illegal to demand dowry from the bride's family (see Dowry Prohibition Act 1961 and Dowry Prohibition (Amendment) Act 1984). Husband's families 'commonly demand more dowry after the wedding. Brides often become victims of mental and physical abuse when they fail to meet

- ? 'honour killings'- where a woman is killed in order to retain the 'honour' of her family; for example, this may occur where a woman has a sexual relationship, including a marriage relationship, with someone not approved of by the family, or is in some other manner considered to have affected the honour of the family⁴⁴;
- ? *Sati* - a Hindu practice whereby a widow 'attains virtue' by burning herself alive on her [late] husband's funeral pyre⁴⁵; and
- ? *Mut'a/sigheh* or temporary pleasure marriage - a 'temporary' form of marriage; it may be, in effect, a form of legal prostitution⁴⁶ or even rape⁴⁷.

Homosexuals / Sexual Life

2A.25 Social and cultural norms regarding appropriate gender roles and behaviour may mean that homosexuals face violations of their human rights and suffer persecution. Restrictions on the ability to freely choose and practice their sexual orientation may be a breach of the right to respect for private life. Social, cultural and other restrictions which oblige homosexuals to marry persons of the opposite sex may violate the right to marry only with full and free consent⁴⁸ and the right to respect for private life.

"There can be no doubt that sexual orientation and activity concern an intimate aspect of private life" under Article 8 ECHR [Laskey, Jaggard and Brown (ECHR) [1997] 24 EHRR 39⁴⁹]

these demands. In a large number of cases the abuse culminates in suicide or murder', see Canadian IRB Human Rights Brief: *Women in India*, September 1995.

⁴⁴ In Brazil '[m]en who commit crimes against women, including sexual assault and murder, are unlikely to be brought to trial. Although the Supreme Court in 1991 struck down the archaic concept of "defence of honour" as a justification for killing one's wife, courts are still reluctant to prosecute and convict men who claim that they attacked their wives for infidelity.' - US Department of State, *1999 Country Report on Human Rights Practices in Brazil*, (February 2000). With reference to honour killings in Pakistan see Amnesty Report September 1999, *Pakistan, Honour killings of girls and women*. The report states that, according to the non-governmental Human Rights Commission of Pakistan 286 women were reported to have been killed for reasons of honour in 1998 in Punjab province alone. (pages 3-4 of the report). In Iran the killing will normally be carried out by the family of the woman herself, rather than that of her husband. See Sana al-Khayyat, *Honour and Shame: Women in Modern Iraq* (1990) page 21-22 quoted in *Re MN* Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority.

⁴⁵ In India *sati* is illegal (Abolition of Sati Act 1829, Commission of Sati (Prevention) Act 1987), however the practice is said to continue see *Human Rights Brief: Women in India*, Canadian DIRB September 1995; see also Owen, M. *World of Widows*, Zed Books (1996) pp 18-19.

⁴⁶ see *The Status of Women Under Islamic Law*, Nasir, J. Graham & Trotman 1990; *Outlines of Muhammadan Law*, Fyzee, A. Oxford University Press, 1974 In Iran under article 1075 of the civil code, 'temporary marriage, is limited by a period of time, normally specified in the marriage contract. This period may vary from one hour to a maximum of 99 years. The husband may terminate the marriage at any time. He has no obligation to provide financial support, and neither husband nor wife are permitted to inherit from the other. In Iran a man may have an unlimited number of temporary wives'. - para. 2.6.1 *Human Rights Briefs: Women in the Islamic Republic of Iran*, Canadian DIRB, June 1994. see *The Status of Women Under Islamic Law*, Nasir, J. Graham & Trotman 1990; *Outlines of Muhammadan Law*, Fyzee, A. Oxford University Press, 1974.

⁴⁷ 'In Algeria, reports suggest that armed groups have abducted women and girls for forced, temporary "marriages" in which the captive women and girls are raped, sexually abused and often mutilated and killed' - Report of the UN Rapporteur on Contemporary Forms of Slavery, 22 June 1998. (<http://www.hri.ca/fortherecord1998/documentation/commission/e-cn4-sub2-1998-13.htm>)

⁴⁸ Art. 23(3) ICCPR: 'No marriage shall be entered into without the free and full consent of the intending spouses.'; Art. 12 ECHR: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

⁴⁹ see also, among other ECHR cases, *Dudgeon v UK* (ECHR) (1981) 4 EHRR 39.

“... it seems to me there is now a broad international consensus that everyone has a right of respect for his private life. A person’s private life includes his sexual life, which thus deserves respect. Of course no person has a right to engage in interpersonal sexual activity. His right in this field is primarily not to be interfered with by the state in relation to what he does in private at home, and to an effort by the state to protect him from interference by others. That is the core right. There are permissible grounds for state interference with some persons’ sexual life - e.g. those who most easily express their sexual desires in sexual activity with small children, or those who wish to engage in sexual activities in the unwilling presence of others. However the position has now been reached that criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable. If a person wishes to engage in such activity and lives in a state which enforces a criminal law prohibiting such activity, he may be able to bring himself within the definition of a refugee.” [Jain v SSHD (CA) [2000] Imm AR 82, [2000] INLR 71]

2A.26 Where a case involves a homosexual asylum applicant who is in stable relationship in the UK IAA judiciary should also bear in mind the Home Office concession policy on same sex relationships ⁵⁰.

⁵⁰ Home Office Concession Policy on unmarried couples (including same-sex relationships) announced by Immigration Minister on 10 October 1997 (implemented 13 October 1997), and amended on 16 June 1999.

Section 2B The Failure of State Protection

2B.1 Where an asylum applicant fears persecution from non-state agents, in addition to establishing a well-founded fear of ‘serious harm’, she must also show that the state has failed or would fail to protect her⁵¹. A failure of state protection may exist in the following situations⁵²:

- ? If ‘serious harm’ has been committed by non-state agents and the authorities are *unwilling* to give effective protection **or**
- ? If ‘serious harm’ has been committed by non-state agents and the authorities are *unable* to give effective protection.

If ‘serious harm’ has been inflicted *by the State or its agents* (associated organisations or groups) it follows that there is a ‘failure of state protection’⁵³.

2B.2 The State of origin is not expected to provide a guarantee against all risk of persecution, rather the level of protection to be expected is a practical standard in keeping with every state’s primary duty to provide protection to those within its jurisdiction.

‘The primary duty [to protect] lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals’⁵⁴. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals.’ [Horvath v SSHD (HL) [2000] 3 WLR 379]

⁵¹ *Horvath v SSHD* (HL) [2000] 3 WLR 379.

⁵² see para. 65 UNHCR Handbook, see also *Horvath v SSHD* (HL) [2000] 3 WLR 379 ‘There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the [Refugee] Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery’.

⁵³ ‘In a case where the allegation is of persecution by the state or its own agents the problem [of whether there is state protection and / or a need for surrogate international protection] does not, of course, arise. There is a clear case for surrogate protection by the international community.’ *Horvath v SSHD* (HL) [2000] 3 WLR 379.

⁵⁴ In fact the duty of the state would appear to be owed not just to nationals, but to all within its jurisdiction - see, for example, General Comment 15 on the position of aliens under the ICCPR available at <http://www.unhcr.ch/tbs/doc.nsf/...d86ec12563ed004aaa1b?Opendocument>

2B.3 The actual practice in the country of origin should be considered rather than theory. In some cases state protection may exist in theory, but not in actual practice.⁵⁵ Where state protection exists it must be meaningful, accessible, effective and available to a woman regardless of her culture and position. It should be borne in mind that documentary evidence may not always be available⁵⁶.

2B.4 A woman may be unwilling or unable to alert the authorities of her country of origin to her need for protection, for example, where doing so may put her at risk of violence, harassment, shame, rejection by her society or even prosecution⁵⁷.

2B.5 The legal duties of home states include specific obligations to protect women's human rights, for example:

- ? Art. 3 ICCPR 'The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant';
- ? Art. 3 ICESCR 'The States Parties to the present Covenant undertake to ensure the equal rights for men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant';
- ? Art. 2 UDHR 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex ...'; and
- ? Art. 2 CEDAW 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women ...'.

⁵⁵ For example - in Brazil, men who commit crimes against women, including sexual assault and murder, are unlikely to be brought to trial, courts are reluctant to prosecute and convict men who claim that they attacked their wives for infidelity and preliminary results from a study by the Catholic Pontifical University of Sao Paulo indicate that about 70% of criminal complaints regarding domestic violence against women are suspended without a conclusion and only 2% of criminal complaints of violence against women lead to convictions - see US Department of State, *1999 Country Reports on Human Rights Practices in Brazil*, (February 2000). In Ecuador the law does not allow a person to lay a complaint against a member of their own family thus women who are victims of domestic violence must be accompanied to visit the police authorities by a third party who will file the complaint on their behalf. It is reported that police officers and judges 'tend to look upon domestic violence as a problem between man and wife which should be resolved privately, namely within the family, and they perceive women who are victims of such violence as having asked for it and deserving the blame for it'. Further 'in, general, women who approach the police meet with little but indifference and humiliation. As soon as a women enters the police station, she is reminded that she cannot file a complaint against her husband, and the person who is accompanying her to lay the charge is often intimidated' - see Research Directorate Canadian Documentation, Information and Research Branch Immigration & Refugee Board, *Human Rights Brief: Domestic Violence Against Women in Ecuador*, December 1994.

⁵⁶ UNHCR Handbook at paragraphs 196, 197, 203, 204.

⁵⁷ "in cases where the alleged perpetrator is acquitted, which happens frequently, the rape charge can be converted into an adultery or fornication charge applying not only to the accused but to the rape victim as well. Moreover, medical evidence given by the victim in support of a rape charge can be used against her as proof of adultery or fornication. Even if the victim is cleared of all charges, she must nevertheless bear the shame of an act to which it is believed she consented and which is considered unacceptable in Pakistani society." - para. 2.3.2 Canadian IRB Human Rights Briefs: *Women in Pakistan*, June 1994.

'Serious harm' inflicted by the State or those associated with it

2B.6 'Serious harm' inflicted by the State and / or by those associated with the state, including sexual violence, is the responsibility of that state regardless of its formal attitude or public position in relation to such conduct⁵⁸.

Under the ECHR State authorities "are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected." [Ireland v the UK (ECHR) (1978) 2 ECHR) 25]

"Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity." [Raquel Marti de Mejia v Peru, Case 10.970, Report No. 5/96, - Inter-American Commission on Human Rights, March 1 1996⁵⁹]

"International human rights law which deals with State responsibility rather than individual criminal responsibility, bans torture both in armed conflict and in time of peace. By these human rights treaties, States have committed themselves to refrain from committing torture (through their agents)), and to prohibit and punish this crime. With regard to the latter obligation, States have accepted the compulsory jurisdiction to investigate, prosecute and punish perpetrators." - Prosecutor v Anto Furundzija [(ICTY) Case No. IT-95-17/1-T, 10 December 1998⁶⁰]

'Whatever the outcome of the domestic [criminal] proceedings [against police officers alleged to have ill-treated Mr Selmouni while in custody], the police officers' conviction or acquittal does not absolve the respondent State from its responsibility under the [European] Convention [on Human Rights].' [Selmouni v France (ECHR) (1999) 29 EHRR 403]

⁵⁸ Even where a state has taken action to prosecute employees for wrong-doing it may still be considered to have acted in breach of human rights - see *Selmouni v France* (ECHR) (1999) 29 EHRR 403. The legal doctrine of 'command responsibility' provides that commanders, superiors and other authorities are liable for crimes perpetrated by their subordinates. 'Any commander or other responsible authority who orders a subordinate to commit acts of sexual slavery or sexual violence, or who otherwise knew or should have known that such acts were likely to be committed and failed to take steps to prevent them, may be held responsible for the commission of the international crimes which those acts constitute. *The law of command responsibility relates to acts of rape and sexual violence as it does to all other serious violations of international criminal law.*' Persons who are in command may include political leaders, government officials and civilian authorities. Where acts of sexual violence are occurring on a 'widespread or notorious basis' superiors will be presumed to have knowledge of the acts, - Report of the UN Special Rapporteur, Ms Gay McDougall, on Contemporary Forms of Slavery 22 June 1998 (<http://www.hri.ca/forthe record1998/documentation/commission/e-cn4-sub2-1998-13.htm>)

⁵⁹ The Inter-American Commission on Human Rights found that the rape, and threat to rape again, by a member of the Peruvian security forces constituted torture under the American Convention on Human Rights.

⁶⁰ Available at <http://www.un.org/icty/Supplement/supp1-e/furundzija.htm>

State Law, Policy & Practices

2B.7 The existence of particular laws or social policies or social practices (including traditions and cultural practices) or the manner in which they are implemented may themselves constitute or involve a failure of state protection. Thus, for example:

- ? a law, policy or practice may be inherently persecutory;
- ? it may have a 'legitimate' goal but be administered unfairly, in a discriminatory fashion or through persecutory means; and
- ? the penalty for non-compliance with the law, policy or practice may be disproportionately severe against certain persons / groups.

For example in Pakistan the legal requirements to prove rape are extremely stringent, including a requirement that the victim must supply 'extraordinary conclusive proof' and:

"in cases where the alleged perpetrator is acquitted, which happens frequently, the rape charge can be converted into an adultery or fornication charge applying not only to the accused but to the rape victim as well. Moreover, medical evidence given by the victim in support of a rape charge can be used against her as proof of adultery or fornication.

... Even if the victim is cleared of all charges, she must nevertheless bear the shame of an act to which it is believed she consented and which is considered unacceptable in Pakistani society." [para. 2.3.2, Research Directorate, Documentation, Information and Research Branch, Immigration & Refugee Board Canada, Human Rights Briefs: *Women in Pakistan*, June 1994]

Serious harm by Non-State Agents⁶¹

2B.8 There may be a failure of state protection in relation to 'serious harm' inflicted by non-state actors. Protection may exist, in theory, but not in practice. Even where the official policy is to provide protection, no protection may exist in practice.

Such failure of state protection may occur through, *but is not limited to*

- ? legal provisions or absence of legal provisions (for example, marital rape exemptions in law);
- ? lack of access to justice and police protection;
- ? 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.

"... in Pakistan there is widespread discrimination against women. Despite the fact that the constitution prohibits discrimination on grounds of sex, an

⁶¹ On meaning of 'persecution' and 'failure of state protection' in relation to fear of non-state agents see generally *Horvath v SSHD* (HL) [2000] 3 WLR 379.

investigation by Amnesty International at the end of 1995 reported that government attempts to improve the position of women had made little headway against strongly entrenched cultural and religious attitudes. Women who were victims of rape or domestic violence often found it difficult to obtain protection from the police or a fair hearing in the courts. In matters of sexual conduct, laws which discriminated against women and carried severe penalties remained upon the statute book. The International Bar Association reported in December 1998 that its mission to Pakistan earlier in the year [heard and saw much evidence that women in Pakistan are discriminated against and have particular problems in gaining access to justice'

*... Domestic violence such as was suffered by Mrs Islam and Mrs Shah in Pakistan is regrettably by no means unknown in the UK. It would not however be regarded as persecution within the meaning of the Convention. This is because the victims of violence would be entitled to the protection of the State. The perpetrators could be prosecuted in the criminal courts and the women could obtain orders restraining further molestation or excluding their husbands from the home under the Domestic Violence and Matrimonial Proceedings Act 1976. What makes it persecution in Pakistan is the fact that according to evidence which was accepted by the special adjudicator in Mrs Islam's case and formed the basis of findings which have not been challenged, the State was unwilling or unable to offer her any protection." [Lord Hoffman in *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, pp 158-159, 1999] Imm AR 283, pp 296-297].*

"The line between discrimination and persecution may be crossed when the State becomes involved ... or where the state does not provide "a sufficiency of protection" for its citizens against the most blatant forms of discrimination by sections of the populace." [Horvath v SSHD (IAT) [1999] INLR 7, [1999] Imm AR 121]

'Serious Harm' and Social / Religious norms, practices and traditions

2B.9 Social, cultural and religious behavioural requirements, traditions and norms may consider gender-related harm to be acceptable practice. In such circumstances there will be a failure of state protection where the state is unwilling or unable to give protection⁶². It is irrelevant whether such failure is due to state approval of such social / religious / cultural behavioural norms / practices and traditions, state indifference or impotence.

Failure of state protection may exist through (this list is illustrative not exhaustive):

- ? legal provisions or absence of legal provisions;
- ? Official legislation;
- ? lack of access to justice and police protection; and

⁶² see for example domestic violence in Kenya: The Guardian 31 December 1998 'Beaten wives challenge custom' Ms Mwau of the Kenyan Federation of Women Lawyers is reported as saying "There is a wall of silence surrounding the issue of domestic violence even though it is so widespread" she said, adding that matters were made worse by an institutionalised reluctance on the part of the police and judiciary to tackle the issue." Kenyan law 'carries penalties of up to life imprisonment for rape, although actual sentences are usually no more than 10 years. The rate of prosecution remains low because of cultural inhibitions against publicly discussing sex, fear of retribution, disinclination of police to intervene domestic disputes, and unavailability of doctors who otherwise might provide the necessary evidence for conviction. Moreover, wife beating is prevalent and largely condoned by much of society. Traditional culture permits a man to discipline his wife by physical means and is ambivalent about the seriousness of spousal rape. There is no law specifically prohibiting spousal rape.'- US Department of State, 1999 Country Reports on Human Rights Practices, (February 2000).

- ? lack of police, or other appropriate, response to pleas for assistance and / or a reluctance, refusal or failure to investigate, prosecute or punish individuals.

“and, in particular, the use of tribal social values as well as Islamic ideology to control women.... Shahrzad Mojab in ‘Women from Iran’

In this context, it can be readily understood that the rejection by a woman of such teachings and of the state power used to enforce those teachings will have consequences at both the religious as well as the political levels...

... we agree with the conclusion reached by Ann Mayor in Islam and Human Rights: Tradition and Politics (2nd ed., 1995) 112 that the evidence overwhelmingly establishes that Islamic principles, Islamic law, and Islamic morality has been interpreted in Iran [by the State] to justify depriving women of any semblance of equality with men, subjecting them to a wide range of discriminatory laws and treatment, and effectively confining them to serving their husbands, performing domestic tasks, and bearing and raising children. Because the religious and political imperatives which operate at state level are intended to operate and in fact operate at the domestic or family level as well, we see no distinction on these facts between persecution by the state and persecution by male family members.” [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

‘What makes [domestic violence against women] persecution in Pakistan is the fact that according to evidence which was accepted by the special adjudicator in Mrs Islam’s case and formed the basis of findings which have not been challenged the State was unwilling or unable to offer her any protection. The adjudicator found it was useless for Mrs Islam, as a woman, to complain to the police or the courts about her husband’s conduct. On the contrary, the police were likely to accept her husband’s allegations of infidelity and arrest her instead. The evidence of men was always deemed more credibly than that of women. If she was convicted of infidelity, the penalties could be severe. Even if she was not prosecuted, as a woman separated from her husband she would be socially ostracised and vulnerable to attack, even murder, at the instigation of her husband or his political associates.’ [Islam v SSHD; R v IAT ex parte Shah (HL) [1999] INLR 144, [1999] Imm AR 283]

Internal Relocation / Flight

2B.10 Where an asylum seeker has a well-founded fear of persecution in one part of their country of origin or habitual residence, but it is *reasonable* to expect them to relocate to another part of that country then they will not be entitled to refugee status⁶³,

⁶³ The issue of internal relocation falls to be considered only once it has been decided that a woman has a well-founded fear of persecution in one area of country of origin / habitual residence, see *Sharef* (IAT) (15858).

[see *Robinson v Secretary of State for the Home Department & IAT* (CA) [1997] Imm AR 568 ⁶⁴]

2B.11 The question to be asked in deciding whether it is reasonable to expect an asylum seeker to re-locate is: - would it be unduly harsh for the asylum seeker to relocate within their country of origin [see *Karanakaran v SSHD* (CA) [2000] INLR 122, [2000] Imm AR 271].

2B.12 An asylum seeker's gender must be taken into consideration when deciding whether internal relocation is reasonable or unduly harsh. Financial, logistical, social, cultural, legal⁶⁵ and other barriers may significantly affect a woman's ability to travel to another area of the country, and to stay there without facing hardship ⁶⁶.

2B.13 An internal relocation alternative must offer reasonable longevity and be a substantive durable alternative to international protection through asylum. An asylum seeker must not be 'punished' for not choosing internal relocation in the past. There is no duty upon an asylum seeker to 'run and hide' (*Ahmed* 1993 FCJ 718 Canada FCA 1993, p31 Hathaway).

⁶⁴ "Where it appears that persecution is confined to a specific part of a country's territory the decision-maker should ask: can the claimant find effective protection in another part of his own territory to which he or she may reasonably be expected to move? We have set out in paras 18 and 19 of this judgement appropriate factors to be taken into account in deciding what is reasonable in this context. We consider the test suggested by Linden JA - 'would it be unduly harsh to expect this person to move to another less hostile part of the country?' - to be a particularly helpful one.' The factors set out in paras: 18 -19 are: 'all the circumstances of the case, against the backdrop that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example (a) if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic rights.' - *Robinson v Secretary of State for the Home Department & IAT* (CA) [1997] Imm AR 568 - see also para 91 UNHCR Handbook.

⁶⁵ For example Kenyan married women are legally required to obtain the consent of their husbands before obtaining a national identity card or passport and, in Egypt, unmarried women require the consent of their fathers to obtain passports and travel whereas married women require the consent of their husbands; women in Saudi Arabia are not legally allowed to drive motor vehicles and, if they ride in a vehicle driven by a man who is not an employee or a close male relative, risk arrest - see US Department of State, 1999 *Country Reports on Human Rights Practices*, (February 2000).

⁶⁶ For example, in Sudan, 'Violence against women continues to be a problem ... In particular displaced women from the South were vulnerable to harassment, rape, and sexual abuse. The Government did not address the problem of violence against women, nor was it discussed publicly.' US Department of State, 1999 *Country Reports on Human Rights Practices*, February 2000.

Section 3 Convention Grounds

General Proposition

3.1 The Refugee Convention exists to provide protection to both men and women. The Convention should thus be interpreted in a manner which reflects the experiences of both men and women. This is important when considering whether the asylum claim fits into one, or more, of the Convention grounds. 'Religion' and 'political opinion' in particular should be properly interpreted to include women's experiences.

3.2 In interpreting the Refugee Convention grounds (i.e. race, religion, nationality, political opinion, membership of a particular social group) it is important to bear in mind that the preamble to the Refugee Convention expresses the intention of the drafters to uphold fundamental rights. Guidance should therefore be sought from international human rights law⁶⁷.

3.3 Women may face persecution because of a Refugee Convention ground which is attributed or imputed to them. In many societies a woman's political views, race, nationality, religion and social affiliations are often seen as aligned with relatives or associates or with those of her community. It is therefore important to consider whether a woman is persecuted because of a Convention ground which has been attributed or imputed to her⁶⁸.

3.4 Causation - the Refugee Convention requires that a person must have been persecuted 'for reasons of' one of the Convention grounds. It is not necessary that all members of the group be persecuted. The criteria will be satisfied either where the 'serious harm' was inflicted for a Convention ground or there is a failure of State protection for a Convention ground –[see - *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283⁶⁹.]

3.5 In some cases a woman may be placed at risk of persecution simply by removing her to her country of origin from a country where she has been residing. The

⁶⁷ see Annex III to these Guidelines and the *IAA Factsheet on Treaty Interpretation*. *The relevance of the preambles* [to the Refugee Convention] *is twofold. First, they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the Convention.* - Lord Steyn, *Islam v Secretary of State for the Home Department, R v IAT ex parte Shah*, (HL) [1999] INLR 144, [1999] Imm AR 283.

⁶⁸ *Danian v SSHD* (CA) [2000] Imm AR 96, [1999] INLR 533.

"... The following propositions are elementary, but need to be restated to assist in identifying the issues in this case: 1. On any view, the Geneva Convention ... only applies in a case where the applicant has a well-founded fear of persecution in the country to which it is proposed to send him by reason of, inter alia, political opinion. 2. That political opinion maybe one imputed to him by the authorities of the country in question, even if it is not in fact held by him..."

⁶⁹ 'Suppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question 'Why was he attacked?' would be 'because a competitor wanted to drive him out of business'. But another answer, and in my view the right answer in the context of the [Refugee] Convention, would be 'he was attacked by a competitor who knew that he would receive no protection because he was a Jew.' Lord Hoffman, *Islam v Secretary of State for the Home Department, R v IAT ex parte Shah*, (HL) [1999] INLR 144, [1999] Imm AR 283.

risk of return for women may be even greater than for men, for example, where women face difficulties in travelling alone or without a male escort.

“Amnesty International has stated that at the border [of Turkey] the names of all those entering and leaving Turkey are checked against computer records of wanted political suspects. Given the high profile of her family members’ involvement, and the history of her own activities, we have concluded that the appellant in this case falls within the category of those persons with a well founded fear of persecution for her perceived political opinion.” [Bulut v SSHD (IAT) (19241) ⁷⁰]

Race

3.6 Both men and women may be persecuted on the basis of their race. Women may be targeted, not simply because of their own race, but also because they are perceived as propagating a racial group or ethnic identity through their reproductive role. This may also affect the form which persecution on the grounds of race takes, for example, sexual violence or control of reproduction. Moreover humiliation of women may be used as a method of humiliating an entire community ⁷¹ and mass rape may be a means of genocide. (For example the rape of Kosova Albanian women by Serbs in the Federal Republic of Yugoslavia ⁷²; the rape of ethnic Chinese women in Indonesia ⁷³, the rape of Tutsi women in Rwanda ⁷⁴ the use of forcible mixed marriage ⁷⁵.) Rape and sexual abuse in such circumstances will be crimes against humanity in international humanitarian law relating to both internal and international conflicts ⁷⁶.

“Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community.” [Raquel Marti de Mejia v Peru, Case

⁷⁰ see also Senga (IAT) (12842).

⁷¹ *‘The [RUF] rebels sought not only to control and degrade their victims but also to undermine and degrade the authority of the family and community. The victims described feeling terror, humiliation, and shame, and their parents, husbands, and community elders described feeling powerless at their inability to protect them.’* - Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape, New Testimony from Sierra Leone*, July 1999.

⁷² The Guardian, 14 April 1999: *“Serb forces pick off young women as a way of asserting their power and of attacking the ethnic Albanian population by impregnating women with a Serbian child”*.

⁷³ The Guardian, 15 July 1998 *“Raped for the ‘crime’ of being Chinese”: “The sexual terrorism of the Chinese community ... began in early May [1998] when riots broke out after several protests against the then president, Suharto. While the lootings and burnings of Chinese properties stopped after a week, the rape of women of the minority that is hated and envied for its economic success has continued [i.e. the Chinese community]. The Times, 23 June 1998 “Rape victims relive Jakarta riot horror”; “Horrible stories of gang rape and racist violence are emerging after the rioting that shook Jakarta [Indonesia] last month. Like the looting itself, these attacks appear to have been specifically targeted - this time against Chinese women, many of whom are said to be still in hiding out of shame”*.

⁷⁴ see *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T available at <http://www.un.org/ict/english/judgements/akayesu.html>

⁷⁵ Human Rights Briefs: Women in Bangladesh, Canadian DIRB, December 1993, para. 5.2; *“The CHTC [Chittagong Hill Tracts Commission] has also documented cases of forced marriage of tribal women to Muslim men. According to the CHTC ‘forced intermarriage is one way in which women are used as an instrument to integrate the [tribal] hill peoples into Bengali society and to change the demographic balance in the area.”*

⁷⁶ Rape and sexual assault fall within the acts prohibited by common Article 3 of the Geneva Conventions (which applies to internal conflicts) and are specifically outlawed by Protocol II (which applies to internal conflicts). Rape (which is broadly defined and includes sexual assaults, see the international law definitions of rape at footnote 33) is specified to be a crime against humanity in the Statutes of the International Criminal Tribunals for Rwanda and Former Yugoslavia and in the Rome Statute of the International Criminal Court.

10.970, Report No. 5/96, Inter-American Commission on Human Rights, March 1 1996]

3.7 A woman's racial identity may be perceived to be linked with that of other members of her family or community. Her racial identity or loyalty may thus be called into question where she has married into or taken a partner of another racial group. A woman may thus be persecuted either because of the racial identity of her birth or upbringing or the racial identity of the family and / or community that she has married into.

Nationality

3.8 Both men and women may be persecuted on the basis of their nationality. Nationality should be understood, not simply as citizenship but, in its broadest sense, to include ethnic, religious and cultural and linguistic communities⁷⁷.

3.9 Women may be deprived of full citizenship rights in certain circumstances - for example if they marry a foreign national. In such circumstances it may be necessary to consider what harm results from this loss and whether it may amount to 'serious harm' and persecution on the basis of nationality.

3.10 A woman's nationality may be aligned, or perceived as being aligned, with that of other members of her family or community, including the family or community that she has entered into through marriage. Imputed or attributed nationality may therefore be an important reason for persecution of a woman.

Religion

3.11 A woman may face harm for her adherence to, or rejection of, a religious belief or practice.

3.12 Religion as a Convention ground includes *but is not limited to*:

- ? the freedom to **hold** a belief system of one's choice or **not to hold** a particular belief system and;
- ? the freedom to **practice** a religion of one's choice or **not to practice** a prescribed religion⁷⁸.

[freedom of religion is] *one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries depends on it.* [Kokkinakis v Greece (ECHR) (1993) 17 EHRR 397]

⁷⁷ see Goodwin-Gill, G. *The Refugee in International Law*, Clarendon Paperbacks(1996), page 45.

⁷⁸ Freedom of religion as defined in the major international human rights conventions makes this clear.

Art. 18 ICCPR:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Art. 18 UDHR:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Art 9 ECHR:

Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

*'[freedom of religion] also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious conviction.'*⁷⁹ [Kokikinakis v Greece (ECHR) (1993) 17 EHRR 397]

3.13 Where the religion assigns particular roles or behavioural codes to women; a woman who refuses or fails to fulfil her assigned role or abide by the codes may have a well-founded fear of persecution on the ground of religion.

3.14 Failure to abide by the behavioural codes set out for women may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes about religion.

3.15 There may be considerable overlap between religious and political persecution. Examples of this overlap may occur, *but are not limited to*, where:

- ? the state is a theocracy;
- ? the state supports or favours a particular religious persuasion (including atheism / secularism⁸⁰);
- ? political activities are undertaken by religious groups or;
- ? political groups have a religious agenda;
- ? the state tolerates or otherwise fails to provide protection against the activities and/or social practices of non-state agents who are supporters of a particular religious persuasion (regardless of the state's formal attitude to such activities and / or social practices).

In such circumstances the asylum claim should be considered under the Convention grounds of 'political opinion' and 'religion'.

"It is clear that in Iran there is no clear and defined boundary to political opinion. Autocratic states pass tyrannous laws and frequently do so under the guise of religion. It is not possible in our view to make a sweeping statement that the breach of so-called Islamic precepts does not involve also the expression of political opinion. It may not necessarily do so but it can and often does. A woman who is westernised must we think have considerable difficulty in concealing it. If she reveals it in our view it is

⁷⁹ Thus, in this case, the European Court of Human Rights found that a Greek law making proselytising an offence was in breach of the right to freedom of religion under Art 9 ECHR. See also *Iftikhar Ahmed v SSHD (CA)* [2000] INLR 1.

⁸⁰ For example, in Turkey there is a ban 'on the wearing of religious head garments in government offices and other state-run facilities. Hundreds of women who wear head coverings have lost their jobs in the public sector as nurses and teachers. During the year 312 teachers, including 180 student teachers, lost their jobs for wearing head coverings. Women who wear head coverings also have been prohibited from registering for university courses since 1998, and 47 professors and university administrators were dismissed for wearing or supporting the wearing of head garments. The armed forces regularly dismiss individuals whose official files reflect participation in Islamist fundamentalist activities.' By contrast, in Sudan, a 'number of government directives require that women in public places and female students and teachers conform to what the Government deeded an Islamic dress code.' US Department of State, *1999 Country Reports on Human Rights Practices*, February 2000.

perceived in Iran to be the expression of a political opinion contrary to the state. It is not merely transgression of Islamic mores it is transgression of an Islamic mora as interpreted by this particular regime and the two are indistinguishable. We are not going so far as to say that every woman can say that she will not abide by the dress laws and by so doing bring herself within the Convention, it depends on the circumstances, but in this case ... the perception will be that she is making a political statement and therefore the persecution will be for a Convention reason on that basis.” - Fathi and Ahmady (IAT) (14264)

“Given the theocratic nature of the current regime in Iran, the appellant’s opposition, both to the patriarchal society comprising her extended Arab family and to the male domination of women in Iranian society at large, is conveniently addressed under both the ‘religion’ and ‘political opinion’ grounds.” - Re MN, Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority

‘the Islamic principle of inferiority of women is now 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 dogmas. The Islamic state uses without any restraint the enormous state power in order to regulate the life of women from the moment they are born to the last stage in the burial ceremonies. Every moment in the life of women is regulated in one way or another by the powerful state machinery.’

In this context, it can be readily understood that the rejection by a woman of such teachings and of the state power used to enforce those teachings will have consequences at both the religious as well as the political levels.

... we agree with the conclusion reached by Ann Mayor in Islam and Human Rights: Tradition and Politics (2nd ed., 1995) 112 that the evidence overwhelmingly establishes that Islamic principles, Islamic law, and Islamic morality has been interpreted in Iran [by the State] to justify depriving women of any semblance of equality with men, subjecting them to a wide range of discriminatory laws and treatment, and effectively confining them to serving their husbands, performing domestic tasks, and bearing and raising children. Because of the religious and political imperatives which operate at state level are intended to operate and in fact operate at the domestic or family level as well, we see no distinction on these facts between persecution by the state and persecution by male family members.” [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

3.16 A woman's religious identity may be perceived to be aligned with that of other members of her community and / or family. Her religious beliefs and / or loyalty may be called into question where she has married into another religious group and indeed she may even lose her religious identity ⁸¹. Imputed or attributed religious identity should therefore be considered in a woman's asylum claim.

⁸¹ see Pearl, D and Menski, W., *Muslim Family Law*, Sweet and Maxwell (1998), paragraphs 6-23, 6-31.

Political Opinion

3.17 The Refugee Convention does not provide a definition of persecution, but guidance may be sought from international human rights law, the views of academics and the UNHCR Handbook⁸² as well as from caselaw.

'In the 1951 Convention, 'political opinion' should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.' [Goodwin-Gill, G. *The Refugee in International Law*, Oxford University Press, (1996) page 49]

'The notion of persecution on account of political opinion was conceived in liberal terms [by the drafters of the Refugee Convention] ... protection on the ground of political opinion was to be extended not only to those with identifiable political affiliations or roles, by also to other persons at risk from political forces within their home community.' [Hathaway, J, *The Law of Refugee Status*, Butterworths Canada (1991), page 149]

3.18 What makes an action or opinion political or non-political is the social structure and social context of the asylum-seeker's country of origin⁸³. This point is considered further at paragraph 3.22.

3.19 The Convention ground 'political opinion' covers both the holding of the opinion itself and the expression of that opinion⁸⁴.

'... there is merit in [the] submissions that it would be wrong to deny this appellant the protection afforded by the Convention on the basis that the authorities may leave him alone if he refrains from expressing any political opinion whatsoever.' [Bakor (IAT) (13793)]

'[the adjudicator drew a distinction between actions and political beliefs], a distinction which we find to be of limited value in asylum law, with great respect to the Special Adjudicator.' [The Home Office Presenting Officer]

"properly in our view, accepts that this was a misdirection of law. A political belief or affiliation may be manifested in more than one way. An intellectual might pen a tract or a pamphlet, a cinematographer might make a propaganda film, a political activist might campaign for his or her party in an election, or someone may simply go to fight for a cause in which they believe." [Orlov (IAT) (18505)]

⁸² UNHCR Handbook paragraphs 80-86.

⁸³ see letter from Patrick Tigere, Legal Adviser Standards and Legal Advice Section, Department of International Protection UNHCR Geneva to IAA dated 20 February 2000 - *'What makes an action or opinion political or non-political is the social structure and therefore depends on the social context within which the action in question is deemed to take place. This concept has been well-established in refugee studies and needs to be applied in considering female asylum claims in a gender sensitive way'*.

⁸⁴ see for example UNHCR Handbook paragraphs 80 - 86:

Article 19 of the ICCPR also links opinions and the expression of those opinions:

- 1) *Everyone shall have the right to hold opinions without interference.*
- 2) *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

Article 10 ECHR:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

Article 11 ECHR:

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

3.20 It is important not to underestimate or overlook the political reasons for a woman's persecution even though she may not regard herself as acting politically. She may not directly claim, orally or in writing, that she has been persecuted for reasons of political opinion and may find it difficult to explain the reasons for her persecution⁸⁵.

Mainstream and Grassroots Politics and Political Activity

3.21 Both women and men are visibly active in conventional politics and political activities such as, *but not limited to*, belonging to political parties, trade unions or other groups / associations / movements, making speeches, attending demonstrations and writing publications.

3.22 Women's role in society means that they may be more active forms of political activity seen more often as being within women's domain or in keeping with women's roles. It is necessary to ensure that 'political opinion' is interpreted to include women's political activities.

3.23 Political activities often undertaken by women (as well as by men) may include (but are not limited to): providing community services, food, clothing, medical care, hiding people and passing messages from one person to another. The context in which these activities are performed makes them political, regardless of whether they are inherently political. For example posting posters is not inherently political, but will be if, for example, they support a particular party or cause; cooking food is not inherently political, but will be if for example, it is part of or supportive of Trade Union activities. Such political activities may put women at risk of persecution on the basis of an actual or imputed political opinion.

3.24 The penalty for engaging in political activity, whether actual or imputed, may be more severe for women than men if engaging in such activities also involves breaching social and cultural norms precluding women's involvement in such matters. For example women may both receive punishment from the state for their activities and be socially ostracised.

Opposition to discrimination against women

3.25 Involvement in the women's movement with the aim of improving women's position within society is political activity.

there is *'little doubt that feminism qualifies as a political opinion'* [*Fatin v INS* [1993] 12 F.3d 1233 (3rd Circuit)⁸⁶]

Non-compliance with Societal / Religious Codes of Behaviour for Women

3.26 Opinions and conflicts concerning the role of women within society and women's behaviour are conflicts of a political nature. Thus where a woman is

⁸⁵ UNHCR Handbook paragraph 67: 'It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 [Refugee] Convention is met with in this respect.' and paragraph 66: 'Often the applicant [for asylum] himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail'.

⁸⁶ US Court of Appeals, Third Circuit.

persecuted as a result of her opposition to, or refusal to comply with, the prescribed role of women in her country of origin such persecution will be on the basis of her political opinion⁸⁷. There may also be overlaps with persecution on other grounds.

3.27 In many countries clear social roles and behaviour are prescribed for women⁸⁸. They may be:

- ? prescribed by the state through law, legal structures and social policies;
- ? prescribed by society, or individuals or groups within society, and upheld or tolerated by the state; and
- ? prescribed by society, or individuals or groups within society, and the state may or be unable, or otherwise fail, to protect those who refuse or fail to conform.

Such social roles and behaviour may be extremely wide ranging, including, for example: restrictions on ability to vote, to access education, to control reproduction through contraception, to drive a car, to travel alone, to leave the home, to choose a marriage partner, to take employment or to practice certain professions, to dress without adherence to dress codes, to live without male protection, to apply for a passport or identity card, to choose a lesbian sexual partner, and to reject female genital mutilation.

The Islamic state [of Iran] uses without any restraint the enormous state power in order to regulate the life of women from the moment they are born to the last stage in the burial ceremonies. Every moment in the life of women is regulated in one way or another by the powerful state machinery. [Re MN, Refugee Appeal NO 2039/93, 12 February 1996, Chairman: R.Haines, New Zealand Refugee Status Appeals Authority]

3.28 Women may also be persecuted under this head where they do not intentionally or openly oppose or reject the prescribed social roles and behaviour, but do so inadvertently, accidentally or are perceived to do so⁸⁹.

“The 9th Circuit in Fisher ... held that [in order to prove that she would be persecuted if returned to her country of origin] the refugee claimant did not have to show that she would take conscious steps to violate the moral codes to discharge this burden. Recognition had to be given to the fact that violation of the codes could occur inadvertently.... [in relation to this case] the relentless pressure and harassment to which the appellant was subjected drove her to breaking point and led others to observe that she was likely to explode at the slightest provocation. Given who she is and given her deeply held beliefs, we find it would be highly likely that before long she would be driven to the same point. [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

⁸⁷ 90 Spijkerboer, Thomas, *Women and refugee status: Beyond the public / private distinction*, Emancipation Council (1994) 'women who fear persecution because they transgress social mores in general are not persecuted because they are women. They are persecuted because they refuse to be 'proper' women. When seen in its context one cannot but consider such an act of defiance as being both political and religious'.

⁸⁸ Note: roles and behaviour may also be prescribed for men.

⁸⁹ see also UNHCR Handbook paragraphs 82 and 83.

“Furthermore, it was not necessary for a claimant to intend to make her views known to the Iranian regime. Martyrdom is not required. [for an asylum seeker to prove persecution].” [Re MN Refugee Appeal No 2039/93, 12 February 1996, Chairman: R. Haines, New Zealand Refugee Status Appeals Authority]

3.29 A woman who opposes discrimination against women may be perceived as also holding particular other political views and thus may be persecuted for political opinions attributed to her, regardless of whether she does actually hold those views.

3.30 A woman who expresses views of independence from or refuses or fails to conform to the legal, social or cultural norms of society regarding women’s behaviour may be perceived as holding certain political views and thus persecuted on the basis of political opinions attributed to her, regardless of whether she does actually hold those views.⁹⁰ [See *Fathi and Ahmady* (IAT) (14264) above at paragraph 3.14 above].

Sexual Orientation

3.31 A woman’s choice of sexual orientation may itself be, or may be perceived as, an expression of political opinion⁹¹.

Imputed / Attributed Political Opinion - Family and Community

3.32 A woman may suffer harm on the basis of an imputed political opinion as a result of the perception that her political views are aligned with those of dominant community or family members including both her own birth family and community and that which she has married into.

“Mr Hurst [the HOPO] in his submissions before us submitted that if we were to find that the second appellant had been raped and tortured then we should conclude that this had nothing to do with the husband’s political activities and views. We have to say that this suggestion is not an attractive argument, and that the whole story is really linked to the husband’s activities. In her evidence before us, the second appellant specifically said that she was questioned about her husband and that the authorities were concerned to find out about him. We reject Mr Hurst’s submission and find as a fact that the detentions, tortures and rape arose as a result of her husband’s political activities.” [Findik (17029), (IAT)]

“The [European] Commission [of Human Rights] found it established that during her custody in the Derik gendarmerie station [in Turkey]: ‘... the applicant [a 17 year old Kurdish woman] was blindfolded, beaten, stripped, placed inside a tyre and sprayed with high pressure water, and raped. It would

⁹⁰ Women’s dress may be seen as symbolising particular political views, thus in Turkey attempts were taken to prevent an elected female politician from taking her seat on the basis that she wore a headscarf, viewed by Turkey’s secular elite as a symbol of political Islam and fundamentalism (The Guardian, ‘Headscarf MP warns off army’ 4 May 1999) and women are barred from wearing religious head coverings in government offices and other state-run facilities - see footnote 79 above.

⁹¹ For example, this may be the situation where laws, policies or society prescribe a sole or primary role for women as wives and mothers.

appear probable that the applicant was subjected to such treatment on the basis of suspicion of collaboration by herself or members of her family with members of the PKK, the purpose being to gain information and / or to deter her family and other villagers from becoming implicated in terrorist activities." [Aydin v Turkey (ECHR) (1997) 25 EHRR 251]

3.33 A woman may be harmed not simply for her own political views or those attributed/imputed to her but also to harm an entire family or community for its political views or affiliations.

In Sierra Leone the 'RUF forces perpetrated systematic, organised and widespread sexual violence against girls and women including individual and gang-rape, sexual assault with objects such as sticks and firewood, and sexual slavery. These sexual crimes were most often characterised by extraordinary brutality and frequently preceded or followed by violent acts against other family members...

The motive of the attackers, according to what they told the victims, was both to be rewarded for having endured hardship in the bush and to punish their victims for supporting the current government or having sexually accommodated ECOMOG soldiers...

The rebels sought not only to control and degrade their victims but also to undermine and degrade the authority of the family and community. The victims described feeling terror, humiliation, and shame, and their parents, husbands, and community elders described feeling powerless at their inability to protect them.' [Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape, New Testimony from Sierra Leone*, July 1999]

Membership of a Particular Social Group

Brief Framework of Analysis

3.34 The three questions to be asked in this framework of analysis are set out below and then referred to in detail.

In considering whether an appellant is a member of a 'particular social group' it may be useful for decision-makers to ask:

1. what is the 'particular social group' in question - is the group definable? **and 2 or 3**
2. does the 'particular social group' have an identity in the country of origin in the eyes of a) the community at large or b) the persecutors; **or**
3. do the members of the 'particular social group' have a 'shared immutable characteristic' i.e. one which either (a) is beyond the ability of the appellant to change either because it is innate and unchangeable or because it is a former characteristic of the appellant which cannot now be changed (e.g. previous membership of the army) or (b) is so fundamental to their identity, their human dignity or conscience that they ought not to be required to change. [see *Re*

ZWD, Refugee Appeal No. 3/91 (New Zealand Refugee Review Board)⁹²

The existence of discrimination against the group in question may have a particular role in determining whether the group is a particular social group under the Refugee Convention [see *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283].

Identity in the country of origin

3.35 A particular social group will exist where a group of individuals with a particular characteristic are recognised by society as being different from others in the society.

A 'particular social group may either be 'voluntary and self-generating' or may, in effect, be created by society where the individuals who form part of the 'particular social group' 'have been set apart by the norms of customs of that society, so that all people who have their particular characteristic are recognised as being different from all others in that society.' [*Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

3.36 Whether they do so will depend on the evidence and the factual situation in the particular country of origin. Persons who may constitute a 'particular social group' in one country or at one point in history may not in another country or at another point in history.

'To identify a social group, one must first identify the society of which it forms a part.' [per Lord Hoffman *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

'As social customs and social attitudes differ from one country to another, the context for the [enquiry as to whether particular individuals are 'members of a particular social group'] is the country of the person's nationality. The phrase can thus accommodate particular social groups which may be recognisable as such in one country but not in others or which, in any given country, have not previously been recognised.' [per Lord Hope *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

'It is generally agreed that the [particular social] group must constitute a cognisable group sharing common characteristics which set its members apart from society at large and for which they are jointly condemned by their persecutors. What constitutes a cognisable group is in my opinion a function of the particular society in which it exists. Westernised women may be cognisable as a distinct social group in an Islamic country in the Middle East but not in Israel; just as landowners were such a group in pre-Revolutionary Russia but would not be in England today.' [per Lord Millet *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

⁹² Other important cases on particular social group include: *SSHD v Savchenkov* (CA) [1996] Imm AR 28, *Re ZWD*, Refugee Appeal No. 3/91 (New Zealand Refugee Review Board), *Re GJ* [1998] INLR 387 (NZRSAA); *A v MIAH* [1998] INLR 1, 30 G (Aust HC), *Re Acosta* (1985) 19 I & N 211 (US BIA), *Canada (AG) v Ward* [1997] INLR 42.

3.37 The society of a country of origin, the acts of persecutors and other external factors have a role in defining a ‘particular social group’

‘In general terms a social group may be said to exist when a group of people with a particular characteristic is recognised as a distinct group by society. The concept of a group means that we are dealing here with people who are grouped together because they share a characteristic not shared by others, not with individuals. The word ‘social’ means that we are being asked to identify a group of people which is recognised as a particular group by society. As social customs and social attitudes differ from one country to another, the context for this inquiry is the country of the person’s nationality.’ [per Lord Hope *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

3.38 The actions of the persecutors may identify or even cause the creation of a ‘particular social group’.

- see *A v Miah* [1998] INLR 1, 30 G (High Court of Australia)
- per Lord Steyn, *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283

Shared immutable characteristics

3.39 Particular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change. Examples of such characteristics are gender, age, race, marital status, family and kinship ties, sexual orientation, economic status and tribal or clan affiliation. Whether these factors are unchangeable, depends on the cultural and social context in which the woman lives, as well as the perception of the agents of persecution and those responsible for providing state protection.

3.40 *Ejusdem Generis* (‘of the same kind’) approach to ‘particular social group’ This approach stresses the characteristics of the individual members of the ‘particular social group’.

‘Applying the doctrine of ejusdem generis, we interpret the phrase ‘persecution on account of membership in a ‘particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis’ [Re Acosta (1985) 19 I & N 211, quoted with approval in *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

3.41 Discrimination - in identifying whether a group will constitute a ‘particular social group’ the existence of discrimination against that group will be of importance.

‘In 1951 the draftsmen of Art 1A of the Convention explicitly listed the most apparent forms of discrimination then known, namely the large groups covered by race, religion, and political opinion. It would have been remarkable if the draftsmen had overlooked other forms of discrimination. After all, in 1948 the Universal Declaration [on Human Rights] had condemned discrimination on the grounds of colour and sex. Accordingly,

the draftsmen of the Convention provided that membership of a particular social group would be a further category. [per Lord Steyn *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

'In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the [Refugee] Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. The obvious examples, based on the experience of the persecutions in Europe which would have been in the minds of the delegates in 1951, were race, religion, nationality and political opinion. But the inclusion of 'particular social group' recognised that there might be different criteria for discrimination, in pari materiae with discrimination on the other grounds, which would be equally offensive to principles of human rights. In choosing to use the general term 'particular social group' rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the [Refugee] Convention.' [per Lord Hoffman, *Islam v SSHD; R v IAT ex parte Shah* (HL) [1999] INLR 144, [1999] Imm AR 283]

Cohesiveness

3.42 There is no legal requirement that a 'particular social group' will only exist if the members of the group are cohesive or known to each other.

*'... I cannot accept the view ... that the expression 'particular social group' connotes a number of people joined together in a group with some degree of cohesiveness, co-operation or interdependence. It would exclude the victims of persecution on the ground of birth or social or economic class which was precisely the kind of persecution which the framers of the 1951 [Refugee] Convention are most likely to have had in contemplation. The requirement appears to have originated in the decision of the US Court of Appeals (Ninth Circuit) in *Sanchez-Trujillo v Immigration and Naturalisation Service* (1986) 801 F 2d 1571 but the decision has not been followed in other circuits in the US Department of State, and the requirement has been rejected in both Canada and Australia. In my opinion it should be rejected here also. The presence of such a factor may demonstrate that a distinct social group exists; its absence does not demonstrate the contrary.'* [per Lord Millett, *Islam v SSHD; R v IAT ex parte Shah* [1999] INLR 144 (HL), [1999] Imm AR 283 - see also per Lord Steyn and per Lord Hoffman]

Existence separately of persecution

3.43 A 'particular social group' must exist independently of the feared persecution. [*Islam v SSHD, R v IAT ex parte Shah* [1999] INLR 144, [1999] Imm AR 283]

Family or kin association

3.44 Family or kin associations may define a particular social group. There are cases where women are persecuted solely because of their family or kinship

relationships, for example, a woman may be persecuted as a means of demoralising or punishing members of her family or community, or in order to pressurise her into revealing information. [see, for example, *Quijano v Secretary of State for the Home Department* (CA) [1997] Imm AR 227⁹³]

Size of the group

3.45 The fact that the particular social group consists of large number of the female population in the country concerned is *irrelevant* - race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.

⁹³ see also the discussion of this issue in Crawley, H, *Women as Asylum Seekers: A Legal Handbook*, ILPA (1997) and in Hathaway, J *The Law of Refugee Status*, Butterworths(1991).

Section 4 Well-founded Fear

4.1 Determination as to whether the asylum applicant has a 'well-founded' fear will include:

- determining whether the applicant has a subjective fear of return; **and**
- determining whether that fear is objectively 'well-founded'⁹⁴

Both involve an assessment of **all** the evidence including oral and documentary evidence. Issues of credibility should be considered in light of **all** of the evidence including the documentary evidence about the asylum applicant's country of origin⁹⁵.

'It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. [Horvath v SSHD (IAT) [1999] Imm AR 121, [1999] INLR 7]

'...the adjudicator's credibility finding cannot stand in the light of the lack of reference to any part of the documentary evidence submitted to him. An adjudicator need not refer to each and every part of the evidence. However it is essential that there is reference to a sufficient part of the documentary evidence to indicate that conclusions are based on the evidence as a whole, and, in particular, that any consideration of credibility takes place with an appreciation of the appellant's country of origin'. [Tharmalingam (IAT) (18452)]

'... the probative value of an asylum seeker's evidence must be evaluated in light of what is known about the conditions in the country of origin. If a Special Adjudicator fails to relate an appellant's story to the background evidence on the appellant's country, he has necessarily applied the wrong approach in the case.' [Jeyakumar (IAT) (18779)]

'An adjudicator must remind himself about the background material and reach his findings on credibility in the light of all the documentary evidence before him. He cannot make a finding on credibility in a vacuum.' [Acero Garces (IAT) (14675)]

4.2 The nature and quality of the evidence presented at a hearing will be affected by the evidential and procedural requirements adopted both before the hearing and *at the hearing*. These may cause particular problems for women asylum seekers. All factors within Section 5 on evidential and procedural issues should thus be considered.

4.3 Country of origin information - An assessment as to whether a woman's fear of persecution is credible and well-founded should not be simply based on general conditions in the applicant's country of origin but should take into account the particular experiences of women in that country.

⁹⁴ see UNHCR Handbook paragraphs 37 - 50 and *SSHD v Sivakumaran et al* (HL) [1988] Imm AR 147.

⁹⁵ *R v IAT ex parte Sardar Ahmed* [1999] INLR 473 (QBD), *Horvath v SSHD* (IAT) [1999] Imm AR 121, [1999] INLR 7.

Section 5 Procedural and evidential issues

5.1 Particular procedural and evidential issues may arise in relation to the asylum claims of women.

5.2 Women's approach to pursuing their asylum claims may well be different than that of some men.

"The first and foremost preoccupation [of victims of torture] is with their asylum claim. There is a noticeable difference between men and women in the manifestation of this anxiety, with exceptions, of course. Men are often much more vocal and active in their anxiety, they change solicitors, seek letters, reports, ask to be brought forward in the queue. They cannot settle. Most women I have seen [over 9 years of therapeutic work with survivors of torture] have just melted into the background after their arrival especially if they have no children, or have left their children behind. They are frequently 'befriended' by a lawyer who does nothing and they stay in the room allocated to them for weeks, months on end, just putting time and distance between themselves and their shame." [Hinchelwood, G. Dr. ⁹⁶, *Gender-based Persecution: Report to the UN Expert Group Meeting on Gender-based Persecution*, November 1997]

Procedures and requirements – Application / Pre-Appeal Stage

5.3 The procedures and evidential standards / requirements adopted before the hearing by representatives and the Home Office ⁹⁷ will all affect the nature and quality of the Home Office decision and the evidence presented on appeal. For example, if a woman has been interviewed in the presence of her family members she may not have disclosed certain facts relevant to her claim for asylum ⁹⁸ and where a woman has not been able to check the contents of her Home Office interview this may affect the reliability of that record (currently the Home Office 'interviewing officers will no longer offer a read over of the written notes after an asylum interview' - letter from the Asylum Policy Unit of the Home Office to the Immigration Law Practitioners Association dated 23 June 2000).

Procedures and requirements at the Appeal Stage

5.4 The nature and quality of the evidence given at a hearing may be affected by the procedures adopted at the IAA, for example those adopted during the course of the hearing. Thus judiciary should consider whether the procedures which they adopt facilitate and encourage full disclosure by the asylum seeker.

5.5 Women's asylum claims will be more appropriately considered if interviewer, representative and decision-makers, including judiciary, are aware of the particular procedural and evidential difficulties that women asylum seekers face.

⁹⁶ Medical Foundation for the Care of Victims of Torture.

⁹⁷ For information generally on the conduct of Home Office asylum interviews at ports see Crawley, H., *Breaking Down the Barriers: A report on the conduct of asylum interviews at ports*, ILPA (1999).

⁹⁸ 'Provide women the opportunity to be questioned by themselves, out of the hearing of other members of their family. Victims of sexual abuse may not feel comfortable recounting their experiences in front of their fathers, husbands, brothers or children' UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, (1991).

At the hearing

5.6 IAA judiciary may regulate the procedure to be followed at hearings; see Rule 30 Immigration and Asylum Appeals (Procedure) Rules 2000. Thus consideration should be given to:

- 1) provision of a female interpreter;
- 2) provision of an all female panel (Adjudicator, HOPO, interpreter)⁹⁹;
- 3) hearing the appeal in a more informal environment such as that adopted by the family courts, with the parties sitting around a table rather than a formal court setting;
- 4) hearing the case 'in chambers' (see Rule 40 Immigration and Asylum Appeals (Procedure) Rules 2000);
- 5) excluding family members, and / or others, from the hearing room (see Rule 40 Immigration and Asylum Appeals (Procedure) Rules 2000);
- 6) making the determination anonymous (i.e. not including the appellant's name or other facts identifying the appellant); and
- 7) requesting that evidence regarding sexual assaults be given in writing¹⁰⁰ or through video link. Consideration should be given to the above even where not requested to do so by an appellant or their representative.

Access to the Determination Process

5.7 Female asylum seekers' access to the asylum determination process may be hampered by a variety of factors and this may affect their asylum claims.

5.8 Women who arrive as part of a family unit are sometimes not interviewed or are cursorily interviewed about their experiences by either the Home Office or the representatives. In such circumstances full details of women's asylum claims are unlikely to be disclosed¹⁰¹; even where it is the woman, rather than the man, who has the stronger claim for asylum. Male relatives may fail to raise relevant issues because they are unaware of the details or their importance or ashamed to report them. For example, where the woman is not questioned herself, no evidence may have been given that a woman has been subjected to sexual violence, threats or harassment by police as a result of her own political opinions or those of her family. Further no evidence may have been given concerning persecution of the woman from within the family itself.

5.9 Even where women are invited to make independent claims for asylum (and / or are warned by the Home Office about the potential risks of not making an independent claim) women may still have particular difficulties in accessing the asylum determination process.

5.10 The Home Office, representatives, *and women themselves*, often assume that their asylum claims are derivative of male relatives' claims. A woman's claim for

⁹⁹ see for example *Tiganov* (IAT) (11193), *Akyol* (IAT) (14745). See also para. 28 European Union Minimum Guarantees on Asylum Procedures: "Member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin."

¹⁰⁰ Australian Department of Immigration and Multicultural Affairs Guidelines on Gender Issues for Decision Makers ('ADIMA' Guidelines) at 3.26, Immigration and Refugee Board of Canada Gender Guidelines ('Canadian Guidelines') D3

¹⁰¹ Provide women the opportunity to be questioned by themselves, out of the hearing of other members of their family. Victims of sexual abuse may not feel comfortable recounting their experiences in front of their fathers, husbands, brothers or children' - UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, (1991), see also ADIMA Guidelines 3.10, 3.27.

refugee status is not necessarily derivative and may be as strong or stronger than that of her male relative.

5.11 Women asylum seekers may not put themselves forward for interview or to claim refugee status independently of their family ¹⁰². There are various reasons for this which may include (but are not limited to):

- ? that official matters are generally dealt with by the man in the family;
- ? a concern not to offend their husband or male associate(s) / relative(s) by acting independently;
- ? fear of disclosing information which will bring them into disrepute;
- ? fear that details of the interview may be disclosed to others;
- ? fear of dealing with officials;
- ? a belief that she may achieve safety in other ways; and
- ? the fact that accepting that one is an exile may be very difficult (see further at 5.43).

5.12 Women may be extremely concerned that the details of the claim and / or the fact that they have claimed asylum be kept secret ¹⁰³. Where an asylum interview or questioning is not confidential this is likely to affect an asylum seeker's disclosure of information and may discourage the making of an asylum claim.

5.13 When women apply for asylum as a dependant, they are not necessarily informed *in private*, or in terms and language they understand, of their right to make an independent application for asylum at any stage, or to obtain legal advice on the benefits of doing so. This may affect the number of women making independent claims for asylum and may lead to delay in their making claims - as they will only make the claims having obtained advice or where there is no other option for the family. Thus delay in making an asylum application should not necessarily affect the credibility of a woman's asylum claim (see further at 5.43).

5.14 Not all female asylum seekers enter the UK as part of a family, or other group. Women who enter and seek asylum on their own may also be affected by the matters raised above.

Obtaining Oral Evidence

¹⁰² Women's approach to pursuing their asylum claims may well be more passive than that of some men. See Hinchelwood, G. Dr. (Medical Foundation for the Care of Victims of Torture), "Gender-based Persecution: Report to the UN Expert Group Meeting on Gender-based Persecution 9-14" November 1997: *"The first and foremost preoccupation [of victims of torture] is with their asylum claim. There is a noticeable difference between men and women in the manifestation of this anxiety, with exceptions, of course. Men are often much more vocal and active in their anxiety, they change solicitors, seek letters, reports, ask to be brought forward in the queue. They cannot settle. Most women I have seen [over 9 years of therapeutic work with survivors of torture] have just melted into the background after their arrival especially if they have no children, or have left their children behind. They are frequently 'befriended' by a lawyer who does nothing and they stay in the room allocated to them for weeks, months on end, just putting time and distance between themselves and their shame."*

¹⁰³ ADIMA Guidelines 3.28.

General

5.15 Women face particular difficulties in making their case to the authorities, especially when they have had experiences which are difficult and painful to describe ¹⁰⁴.

5.16 In the light of some of the particular difficulties which women may face the *judiciary* may wish to consider the procedures which *they* adopt during the hearing and note the options set out at 5.4 above. Adjudicators conducting first hearings may wish to raise these issues at a pre-hearing stage.

5.17 A non-confrontational exploratory interview is critical to allow for the full discussion of past experiences relating to a woman's claim and to facilitate the giving of all evidence which may be relevant to her claim. Where such an interview has not taken place this may affect the nature and quality of the evidence presented at appeal ¹⁰⁵.

5.18 It is necessary to be aware that the manner in which the Home Office interview(s) was conducted and the manner in which the hearing is conducted may affect the evidence given. Evidence may be best obtained if during an asylum interview of a female asylum seeker the interview room and surrounding environment are conducive to open discussion, including providing ample time and ensuring that there are no disturbances ¹⁰⁶ and if interviewers and decision makers are aware of, and take into account, for example, women's childcare responsibilities and schedules, distances to be travelled and issues of privacy. Failure to pay attention to such issues may affect the nature and quality of the evidence given ¹⁰⁷.

5.19 Even where the interviewer and the interviewing environment have been supportive of an asylum seeker and good practice has been followed, the interview process itself will impact on the manner in which an asylum seeker gives her testimony and the information which she reveals ¹⁰⁸.

5.20 Any indication that a woman's claim may not be treated as confidential is likely to seriously hinder her ability to provide full details of her claim and may discourage her from making a claim ¹⁰⁹.

5.21 Emotional trauma and depression is likely to affect a woman's ability to give testimony ¹¹⁰, her demeanour and the nature of the evidence which she gives.

¹⁰⁴ see *R v SSHD ex parte Ejon*, (QBD) [1998] INLR 195 a case in which the asylum seeker was unable to disclose her past experiences of sexual violence. See also ADIMA Guidelines at 3.12 and 3.13. See also Hinchelwood, Dr. G. (Medical Foundation for the Care of Victims of Torture), 'Interviewing Female Asylum Seekers' Paper delivered at UNHCR Symposium on Gender-Based Persecution 23 February 1998 and UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

¹⁰⁵ Goodwin-Gill, G., *The Refugee in International Law*, Oxford University Press (1996), page 355: 'Research show section that errors in testimony increase dramatically in response to specific questions (25% - 33% more errors) by comparison with spontaneous testimony given in the form of a free report. Such free reports also tend to be sketchy and incomplete, however, and can be most effectively filled out by using 'open', rather than 'closed' questions.'

¹⁰⁶ ADIMA Guidelines 3.15.

¹⁰⁷ see UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991: 'Be patient with female applicants to overcome inhibitions, particularly regarding sexual abuse. Questions may need to be asked in a number of different ways before victims of rape and other abuses feel able to tell their stories. Enough time should be allowed during the interviewing process to permit the female applicant to build a rapport with the interviewer so she is able to recount her experiences. Do not ask for details of the sexual abuse; the important thing in establishing a well-founded fear of persecution is to establish that some form has occurred.'

¹⁰⁸ ADIMA Guidelines 3.21.

¹⁰⁹ ADIMA Guidelines 3.13.

¹¹⁰ see *R v SSHD ex parte Ejon*, (QBD) [1998] INLR 195 in which it was accepted by the High Court that the applicant had been unable to disclose evidence because of psychological damage. See also Bremner et al *Deficits in Short-Term Memory in Post Traumatic Stress Disorder*, *am J Psychiatry* 150:7, July 1993 -

5.22 Women may not realise that it is essential to disclose certain information. Where there are factors which would cause women not to disclose such information, they are unlikely to do so unless clearly asked about such experiences.

Effective Communication

5.23 The failure to appreciate cross-cultural differences may jeopardise the quality of the information revealed by a woman and prevent an effective interview taking place. For example the terms 'rape', 'assault', 'detain', 'charge', 'arrest', 'court' and 'hearing' may have different meanings or different connotations in different countries ¹¹¹.

5.24 Cultural and other differences and trauma play an important role in determining demeanour i.e. how a woman presents herself physically, for example, whether she maintains eye contact, shifts her posture or hesitates when speaking ¹¹².

5.25 Body language can be interpreted in many different ways. It is important that interviewers ensure they avoid gestures which may be perceived as intimidating or culturally insensitive or inappropriate and therefore inhibit discussion ¹¹³.

Obtaining Oral Evidence: Presence of Family Members

5.26 Female victims of violence, discrimination and abuse often do not volunteer information about their experiences and may be particularly reluctant to do so in the presence of family members or members of their community ¹¹⁴.

5.27 Women from all societies and especially from societies where the preservation of privacy in sexual or marital matters are important may be very reluctant to disclose certain information relevant to their asylum claim or that of other members of their family particularly where that information relates to sexual or family matters ¹¹⁵. There

alterations and impairment of memory may be linked to post traumatic stress. Among the literature on the psychological effects of migration, war, etc. See Bathai P, *Stress in Exile*, Issues in Social Work Education Vol. 12.2, Summerfield and Toser, *'Low Intensity' War and Mental Trauma in Nicaragua*, Medicine and War Vol. 7, 84-99 (1991), Summerfield D., *Addressing Human Response to War and Atrocity*, in Beyond Trauma (Kleber RJ, ed. 1995). See also the discussion of these issues in *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

¹¹¹ ADIMA Guidelines 3.18, See also the discussion of this issue in *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

¹¹² ADIMA Guidelines 3.29, See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991: *'Be aware of gender differences in communication, particularly non-verbal communications. As an interviewer avoid intimidating gestures that inhibit responses. In assessing the credibility of the female applicant, for example, do not judge it on the basis of such Western cultural values as the ability to maintain eye contact.'* - See also the discussion of this issue in *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998: *'... it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be "decoded" in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question.'*

¹¹³ ADIMA Guidelines 3.23.

¹¹⁴ ADIMA Guidelines 3.12, 3.13, 3.27. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991.

¹¹⁵ The International Criminal Tribunal for Rwanda has noted 'the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of [Rwandan] witness to disclose graphic anatomical details of sexual violence they endured.' - see *Prosecutor v Jean-Paul Akayesu* (ICTR) Case No. ICTR-96-4-T, 2 September 1998. Moreover the reporting of rape to authorities is very low even in Western countries. Temkin, J., *Rape and the Legal Process*, 1987, Sweet and Maxwell

are good reasons for women not to disclose information about their experiences of sexual violence. These can range from the fact that it is very hard to do to the fear that her experiences may become known to others and lead to her being ostracised from her family and / or community¹¹⁶. Further “some women cannot bear to believe the facts of their having been raped and therefore not only deny it to outsiders but even deny their experience to themselves.”¹¹⁷

5.28 If family or community members are present during the giving of evidence / interviewing this may affect the nature and quality of the evidence given¹¹⁸. Good interviewing practice includes asking asylum seekers *privately* whether they want to be interviewed outside the hearing of other members of the family, especially male family members and children.

5.29 These factors apply to pre-hearing interviews and also to the giving of directions and the hearing of a woman’s asylum appeal at the IAA.

Obtaining Oral Evidence Interpreters, Interviewers and Appeals

5.30 A woman may be reluctant, or find it difficult, to talk about her experiences through a male (or even female) interpreter or one who is a member of her community especially where these experiences relate to sexual or family issues¹¹⁹.

5.31 Many women have been abused by men. Coupled with a fear and distrust of authorities, this fact is likely to seriously inhibit the capacity of a woman to divulge details of her experiences to a man or through a male interpreter¹²⁰.

discusses rape reporting rates in the UK, USA and New Zealand in some detail - see pages 8-16 and notes the very low reporting of rape in those countries. She records a number of surveys including: USA: United States National Crime Survey 1979 estimated that 50% of forcible rapes were reported to the police, a survey by Diana Russell of sexual assault in the San Francisco area in 1978 found that only 1 in 10 rapes (excluding marital rape) were reported to the police. New Zealand: it has been estimated, in 1982, that four out of five 'rape offences' are not reported. Britain: The British Crime Survey: Scotland (published by the Scottish Office 1984) noted that 92% of sexual offences were not reported to the police; in England and Wales the British Crime Survey (published by the Home Office 1982) estimated that only 46% of rape and indecent assault offences were recorded. A survey conducted by Women's Own magazine in 1986 found that 76% of women who claimed to have been raped did not report it to the police; according to the London Rape Crisis Centre 75% of women who reported sexual assault to them between 1976-80 did not report the offence to the police. In the UK the police have concluded that special interviewing techniques and procedures are necessary when dealing with the alleged victims of sexual violence. These initiatives are reported at pages 159-164 of Temkin, J., *Rape and the Legal Process*, 1987, Sweet and Maxwell and include special training for police officers dealing with alleged victims of sexual violence, rape suites, the use of female staff. Note also the pronouncements of the then Deputy Assistant Commissioner Jones of the Metropolitan Police (The Guardian, January 45, 1985) 'We want to kill the myth that rape is sexually motivated - it is usually intended to inflict violence and humiliation.' In relation to Uganda 'in a study of 107 Ugandan women who had been raped by soldiers, only half had told anyone about the rape incident as many as 7 years after the rape, despite the fact that all still had problems related to the rape when they finally spoke of it.' and 'For Ugandan women, the experience of rape disrupted their sense of community; keeping this aspect of their lives secret alienated them from other people. These women often expressed the fear that they would be rejected by their partners and the rest of the community.' Giller, JE, *War, Women and Rape*, London University 1995. Thesis; quoted in Swiss S and Giller JE, *Rape as a Crime of War: A Medical Perspective* in 'The Journal of the American Medical Association' August 4 1992 Vol. 470.

¹¹⁶ In Kosovo ethnic Albanian women consider that '[rape] is the worst possible thing ... They would rather die than be raped, especially the unmarried, whose life is then essentially over.' Indeed the subject is so fraught that counsellors and doctors have great problems in finding out who the victims are: 'They cannot come and admit that they have been raped', according to the humanitarian medical agency, *Medecins sans Frontieres*, reported in The Guardian, 19 October 1999 *Kosovo's Wounded Women find no peace*; ADIMA Guidelines 3.12, 3.13, 3.28, 4.8.

¹¹⁷ Dr Hinchelwood, (Medical Foundation for the Care of Victims of Torture), see letter from Medical Foundation for the Care of Victims of Torture to the IAA dated 21 February 2000.

¹¹⁸ ADIMA Guidelines 3.12, 3.13.

¹¹⁹ ADIMA Guidelines 3.13. See also UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees, 1991: 'The recruitment and training of female interpreters is a precondition for the most effective interviewing.'

5.32 The asylum applicant should be asked whether she would like a female interviewer and / or interpreter. The European Union Minimum Guarantees on Asylum Procedures state that: “Member States must endeavour to involve skilled female employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin.”¹²¹

5.33 Merely being a female does *not* guarantee an awareness of gender issues¹²² and even where the interviewer / interpreters have been female an asylum seeker may still not have fully disclosed all important features of her asylum claim¹²³.

5.34 These factors may also apply to the giving of directions and the hearing of a woman’s asylum appeal at the IAA.

Obtaining Oral Evidence: Interviews and Appeals: Asking the Right Questions

5.35 The information revealed by an asylum seeker will reflect the ways in which questions are asked¹²⁴. Unless the correct questions are asked it is unlikely that full disclosure will be made either at interview or during the appeal hearing. The use of interpreters exacerbates this problem - unless clear and precise questions are asked they may be interpreted with a different meaning or nuance¹²⁵.

5.36 Some knowledge about the status and roles of women in the country from which the applicant has fled may assist the questioner in asking the right questions¹²⁶.

5.37 Questions asked during asylum interviews and hearings sometimes reflect the dominant conception that a refugee is generally a man involved in conventional politics¹²⁷. It is important to ensure that the questions asked encompass the problems often faced by women. For example:

- a) Questions about political activities should not focus only on political activities as narrowly defined - such as office holding, but should be wider ranging as political activities may also include *but are not limited to* providing food or shelter, message taking, hiding people or refusing to conform to particular social norms.
- b) Where questions are asked about 'persecution' or 'torture' female asylum

¹²⁰ ADIMA Guidelines 3.13, 60. See also UNHCR Guidelines on the Protection of Refugee Women ('UNHCR Guidelines').

¹²¹ see European Union Minimum Guarantees on Asylum Procedures, para. 28.

¹²² In Sierra Leone 'Victims of sexual abuse frequently reported female rebels having taken part in rounding up operations [for rape and sexual abuse] and often singling out girls and women for their commanders.' Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape, New Testimony from Sierra Leone*, July 1999

¹²³ ADIMA Guidelines 3.21.

¹²⁴ For information on the conduct of Home Office asylum interviews see Crawley, H., *Breaking Down the Barriers: A report on the conduct of asylum interviews at ports*, ILPA (1999).

¹²⁵ ADIMA Guidelines 3.18.

¹²⁶ ADIMA Guidelines 3.14.

¹²⁷ Crawley, H., *Women as Asylum Seekers: A legal handbook*, ILPA (1997) paragraph 2.2.4 at p24 and also Crawley, H., *Breaking Down the Barriers: A report on the conduct of asylum interviews at ports*, ILPA (1999).

seekers may not give information about the particular ill-treatment which they have suffered. This may occur because the asylum seeker does not herself understand that the terms 'torture' or 'persecution' may include sexual violence, violence within the family, marriage-related harm, abortion and other forms of harm often suffered by women. A different approach might include asking whether an applicant had been, and feared being, 'treated badly'¹²⁸.

5.38 Non-confrontational open and / or indirect questions allow the questioner to establish the applicant's reasons for fleeing and to obtain indications about whether gender-related harm has occurred¹²⁹.

5.39 More direct follow-up questions should be asked to ascertain details of the woman's full experiences. It should be remembered that a woman may not know what information is relevant to her claim and the questioner must use their skills to ensure that the correct information is disclosed¹³⁰. Moreover the questioner may not be aware of what information is relevant until the end of the interview. In such circumstances steps should be taken to ensure that a woman is questioned about these issues.

'... while the burden of proof in principle rests on the [asylum] applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application...' - paragraph 195, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva (re-edited 1992)

'While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.' [paragraph 199, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva (re-edited 1992)]

Credibility

5.40 Women may face additional problems in demonstrating that their claims are credible¹³¹. Information to support a woman's claim may not be readily available and the nature of women's experiences and position in society may make it difficult or impossible for them to document their claims or provide evidence.

Absence of Documentary Evidence

5.41 Absence of Documentary Evidence In many circumstances refugees do not have documentary evidence relating to events which have taken place or their fears of future persecution¹³². The nature of women's activities and place within society may lead them to have particular problems¹³³.

¹²⁸ Crawley, H., *Women as Asylum Seekers: A legal handbook*, ILPA (1997).

¹²⁹ see footnote 64 above.

¹³⁰ ADIMA Guidelines 3.27.

¹³¹ Immigration and Refugee Board of Canada Gender Guidelines ('Canadian Guidelines') D.

¹³² see, for example, UNHCR Handbook paragraphs 196-197, 203.

¹³³ Canadian Guidelines C2: '...decision-makers should consider the fact that the forms of evidence which the claimant might normally provide ... of state inability to protect, will not always be either available or useful in cases of gender-related persecution.'

The following are some examples (this list is not exhaustive):

- a) an asylum seeker who has been persecuted because she consistently refuses to wear the veil in protest against Islamisation is unlikely to have a document to show this;
- b) an asylum seeker who has been persecuted on the basis of her husband's membership of a political party may not herself hold a party membership card and may be unable to produce her husband's card or evidence of their relationship;
- c) an asylum seeker who has been persecuted on the basis of political activities such as running a soup kitchen for trade unionists, or providing shelter for politicians may not hold a party membership card;
- d) an asylum seeker who has been persecuted because of her sexual orientation is unlikely to have documentary evidence of her sexual orientation¹³⁴; and
- e) reports regarding circumstances in the asylum seekers country of origin may fail to document or address particular issues relating to women, even where a sub-section of the report pertains to women.

Corroboration

5.42 In many cases evidence given by an asylum seeker will not be corroborated; absence of corroboration does not mean that the account given is not credible. It is an error of law to require corroborative evidence in an asylum case¹³⁵.

Delay

5.43 Delay in claiming asylum or revealing full details of an asylum claim will not necessarily be due to the lack of credibility of a particular asylum claim or claimant.

- ? *A woman's priority is to achieve safety and security* (for herself and / or family members). She may not claim asylum whilst she is able to achieve safety, however temporary or illusory, through other means, whether legal or illegal. This may account for the delay in claiming asylum.
- ? Accepting that one is an exile is very difficult especially if it means leaving loved ones at home. This difficulty may be expressed as ambivalence about enduring exile; this is not an uncommon phenomena among women asylum seekers¹³⁶.
- ? Torture, sexual violence and other persecutory treatment produce feelings of profound shame¹³⁷. This 'shame response' is a major obstacle to disclosure. Many victims will never speak about sexual violence or will remain silent about

¹³⁴ Such cases may be considered either under the Convention ground of 'particular social group' (see paragraphs 3.34 - 3.38 above) or political opinion (see paragraphs 3.17-3.33).

¹³⁵ *Ackah* IAT (10953) "By making a general finding of lack of credibility and following that with a recording of statements made by the appellant with no reason as to why these should not be credible, apart from lack of substantiation, leaves open the distinct possibility that the reason for the lack of credibility was the lack of substantiation ... an appellant is entitled to know why an adjudicator disbelieves him or her, be it that the statements are inherently improbable, the evidence is contradictory or inconsistent, or the witness' demeanour and the way in which evidence is given. In this determination (apart from the lack of substantiation) there is no reason." *Kasolo* (IAT) (13190) 'It is a misdirection, in our view, to imply that corroboration is necessary.'

¹³⁶ Dr Hinchelwood, Letter from Medical Foundation for the Care of Victims of Torture to the IAA dated 21 February 2000.

¹³⁷ Dr. G., Hinchelwood, (Medical Foundation for the Care of Victims of Torture), Report to UN Experts Committee, 6 November 1997

it for many years¹³⁸.

- ? Delay in claiming asylum and / or in revealing full details about an asylum claim may also be validly occasioned by other factors including many procedural and evidential factors outlined in these guidelines (see, for example, access by women to the asylum determination process at paragraphs 5.7 - 5.14 above).

Demeanour

5.44 The level and type of emotion displayed by a woman during the recounting of her experiences should play a limited role in assessing her credibility. Individual, cultural and other differences and trauma¹³⁹ all play an important role in determining demeanour and make it difficult to assess credibility.

A lack of displayed emotion does not necessarily mean that the woman is not distressed or deeply affected by what has happened¹⁴⁰. Assessing demeanour of a witness may be particularly difficult where she is from a different country, is giving evidence either through an interpreter or in English which is not their first language.

‘as Bingham MR said at various points of his article in “Current Legal Problems” 1985 Volume 38 at page 14:

“A second note of caution must also be sounded. An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships’ engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibly assume that men of different nationalities, education, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done”

There is then the further source of unreliability arising principally from the fallibility of human memory. Recollections are known to fade and to be recalled. Evidence from a witness who belongs to some other nationality giving evidence in a language other than English and through an interpreter ... again are a cause of uncertainty: a matter which an adjudicator should properly take into account in assessing credibility.... it is generally considered as central to the adjudicator’s task that there is an assessment of credibility. In a cross-cultural situation, frequently through interpreters this is a formidable task.’ [Kasolo (IAT) (13190)]

‘I cite, for the purpose of adopting it as an expression of my own view, a passage from “The Judge as Juror: The Judicial Determination of Factual Issues”, a lecture given by Bingham J at University College, London, on 7 February 1985 and published in Current Legal Problems, 1985, page 1. “...To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.” [R v SSHD ex parte Patel (QBD) [1986] Imm AR 208].

¹³⁸ see, for example, Guler, J et al., *Uganda: War, Women and Rape*, The Lancet Vol. 337, March 9 1991 set out in full at footnote 37

¹³⁹ see, for example, Swiss, S., & Guler, J., *‘Rape as a Crime of War, A Medical Perspective’*, in The Journal of the American Medical Association, see footnotes 36 and 37 above.

¹⁴⁰ ADIMA Guidelines 3.29.

'In assessing the credibility of the female applicant, for example, do not judge it on the basis of such Western cultural values as the ability to maintain eye contact.' [UNHCR, *Gender-Sensitive Techniques for Interviewing Women Refugees* (1991)]

Evidence where persecution grounds are attributed / imputed and persecution as a family member

5.45 In some circumstances women may not be able to give full details of the reasons for their ill-treatment. This may be a particular problem where women are persecuted for an imputed / attributed convention reason or where they are persecuted because they are a member of a family. Women may not know details of the activities of the relatives, community members whose views / identity are imputed or attributed to them. In many cultures men do not share information about their political, military or even social activities with their female relatives, communities or associates¹⁴¹.

Oral Evidence - discrepancies

5.46 When two (or more) people give separate accounts of the same set of circumstances it is inevitable that differences occur due to recall, emphasis and perspective. Such differences do not necessarily indicate that the witnesses are not giving a truthful account to the best of their recollection and belief.

Oral Evidence

5.47 There are many reasons, some of which are referred to above, why women in particular are not forthcoming with full information about their experiences which will be exacerbated if gender-sensitive interviewing procedures are not followed. Special care must be taken in relation to evidence pertaining to sexual violence; care must be taken before drawing any adverse inferences where an appellant, or other witness, has earlier described a rape as an attempted rape or as touching, beating or other ill-treatment or even as pain or illness¹⁴².

Country of Origin Information

¹⁴¹ Canadian Guidelines D2; UNHCR, *Gender-Sensitive Techniques for Interviewing Women Refugees* (1991): *'Understand that women in many societies do not have specific information about the activities of men in their families. Gaps in their knowledge should not be construed as lack of credibility unless there is other evidence of such lack of credibility.'*

¹⁴² *'... of 107 Ugandan women raped during war, only two presented with what could be called psychological symptoms (nightmares and loss of libido). Fifty-three percent described their distress in physical complaints (headaches, chest pain and rashes) and 57% in gynaecological symptoms. The persistence of perceived infestation in this group often despite multiple treatment for symptoms (approximately two thirds had no clinical findings of infection) reflects a common sequel to rape of feeling dirty and infected. For Ugandan women, the experience of rape disrupted their sense of community: keeping this aspect of their lives secret alienated them from other people. These women often expressed the fear that they would be rejected by their partners and the rest of the community.'* Swiss, S. and Giller J.E., *Rape as a Crime of War: A Medical Perspective* in 'The Journal of the American Medical Association' August 4 1992 Vol. 470.

Country Information

5.48 Even where a woman does not say that she fears (or has experienced) gender-related persecution¹⁴³ or gender-specific harm¹⁴⁴ her asylum claim may well be affected by the position of women in her country of origin. An assessment as to whether the fear of persecution is well-founded should not be simply based on general conditions in the applicant's country of origin but should take into account the particular experiences of women in that country.

5.49 Women's fear of persecution may be influenced by many factors which include, *but are not limited to*:

- ? *the position of women before the law (including customary / religious law)* including their standing in court, the right to lay a complaint and give evidence, the weight of the evidence of women¹⁴⁵, divorce and custody law, the right to own property and to access contraception;
- ? *the formal political rights of women* including the right to vote, to hold office and belong to a political party;
- ? *women's rights in respect of marriage, family and private life* to marry the person of their choice, or not to marry, and to determine her own sexual orientation, the right to an education, a career, and a job or remunerated activities, the status of widows and divorcees, and freedom of dress;
- ? *the consequences for women who refuse to abide by or challenge social norms regarding their behaviour* including, for example, norms regarding sexual activity and pregnancy, norms around the institution of marriage including arranged marriages and divorce and norms about behaviour and dress;
- ? *the incidence and form of violence against women* and the forms it takes (such as violence within the family, sexual abuse, honour killings, bride burning);

¹⁴³ see definitions section at paras 1.11 -1.17 above.

¹⁴⁴ see definitions at paras 1.11 -1.17 above.

¹⁴⁵ For example in Ecuador women can only bring proceedings for rape or domestic violence if they have a witness and in Pakistan a woman's evidence is of less weight than a man's - US State Department, *1999 Country Reports*, February 2000, see also Research Directorate Documentation, Information and Research Branch, Immigration and Refugee Board Canada, *Human Rights Briefs: Women in Pakistan*, June 1994.

- ? *the efficacy or protection available to women and the sanctions or penalties on those who perpetrate the violence; and*
- ? *the consequences that may befall a woman on her return.*

Country Information: Documentary Evidence

5.50 There may be limited documentary evidence about the position of women in the country of origin. Background reports and country information often lack adequate information about the problems faced by women.

- 5.51** Information regarding women may be found from, among other sources:
- ? the Legal & Research Unit of the IAA;
 - ? mainstream newspapers;
 - ? human rights organisations and institutions including those with a particular concern with women;
 - ? economic development and humanitarian organisations and institutions ¹⁴⁶;
 - ? organisations, institutions and journals specifically concerned with women;
 - ? the Internet or CD-Rom (such as UNHCR's Refworld);
 - ? specialist and expert witnesses familiar with the region and / or the gender issues involved;
 - ? Home Office bulletins as well as reports produced by CIPU ¹⁴⁷; and
 - ? The Women's Legal & Resource Centre, Asylum Aid.

Changes in the country of origin

5.52 The effect of changes in a country of origin must be considered in each particular case and whether they affect the existence and / or well-foundedness of the appellant's fears of persecution. Changes in circumstances in a country of origin which appear positive may, in fact, be irrelevant to an asylum claim, or strengthen a woman's fear of persecution, for example - where a woman fears domestic violence from family members a change of political leadership in her country of origin may be irrelevant to her asylum claim ¹⁴⁸.

5.53 Where refugee status should have been granted at the time of the application, but was not, the burden will be upon the Secretary of State to show that the circumstances have changed in the country of origin sufficiently to result in the fear no longer being well-founded ¹⁴⁹.

5.54 Where circumstances have improved in the asylum seekers country of origin since the asylum seeker left the question will still be: is there is a well fear of persecution? Any changes which may affect this question must be durable before it can be said that the basis for the fear of persecution no longer exists ¹⁵⁰.

¹⁴⁶ Economic development organisations and institutions - such as Oxfam, Concern, and the Department for Overseas Development (DFID) are often particularly concerned with the position of women.

¹⁴⁷ The Country Information and Policy Unit of the Home Office.

¹⁴⁸ Immigration and Refugee Board of Canada Guidelines, C3.

¹⁴⁹ *Mohamed Arif v SSHD* (CA) [1999] INLR 327, [1999] Imm AR 271.

¹⁵⁰ In relation to the application of the cessation clause (Art 1C95) Refugee Convention) a 'change of circumstances' in the country of origin must be one which is a 'fundamental' change 'which can be assumed to remove the basis of the fear of persecution. A mere - possibly transitory - change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable.' UNHCR Handbook paragraph 135, see also paragraph 136: 'It is frequently recognised that a person who - or whose family- has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there has been a change of regime in his

5.55 Changes in the country of origin - fear of non-state agents of persecution. Feared non-state agents of persecution may remain in existence and a danger to the asylum applicant regardless of other changes in the country of origin. The decision-maker should ask - do the changes mean that the particular fears of persecution in the particular case are not well founded at the date of determination?

Expert Evidence (including medical evidence)

5.56 If an interviewer or decision-maker receives medical, psychological, professional or other related expert evidence at any stage, it should be considered with care and assessed impartially¹⁵¹.

“In my judgement it was completely wrong for the tribunal in the present case to dismiss considerations put forward by experts of the quality who wrote opinions [about the situation in the asylum seeker’s country of origin] on this case as ‘pure speculation’ ” [per Lord Justice Sedley in Karanakaran v SSHD (CA) [2000] Imm AR 271, [2000] INLR 122]

“Any medical report or psychiatric report deserves careful and specific consideration, bearing in mind, particularly, that there may be psychological consequences from ill-treatment which may affect the evidence which is given by the applicant. In the tribunal’s view, it is incumbent upon the adjudicator to indicate in the determination that careful attention has been given to each and every aspect of medical reports, particularly given that these are matters of expert evidence which cannot be dismissed out of hand.” [Mohamed (IAT) (12412)¹⁵²]

5.57 It should be noted that there is often no physical evidence following rape or sexual violence.

country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.’

¹⁵¹ In addition to these cases see also *Zaitz v SSHD (CA) IATRF 99/0760/4*, 28 January 2000.

¹⁵² see also *Ibrahim (IAT) (17270)*, upholding the case of *Mohamed (IAT)(12412)*.

Annex I

UNHCR Gender-Sensitive Techniques for Interviewing Women Refugees

Part of UNHCR Guidelines on the Protection of Refugee Women 1991

It may be necessary to use a variety of gender-sensitive techniques to obtain information from women during the status-determination process. The recruitment and training of female interpreters is a precondition for the most effective interviewing:

- ? Be aware of gender differences in communication, particularly non-verbal communication. As an interviewer avoid intimidating gestures that inhibit responses. In assessing the credibility of the female applicant, for example, do not judge it on the basis of such Western cultural values as the ability to maintain eye contact.
- ? Be patient with female applicants to overcome inhibitions, particularly regarding sexual abuse. Questions may need to be asked in a number of different ways before victims of rape and other abuses feel able to tell their stories. Enough time should be allowed during the interviewing process to permit the female applicant to build a rapport with the interviewer so she is able to recount her experiences. Do not ask for details of the sexual abuse; the important thing in establishing a well-founded fear of persecution is to establish that some form has occurred.
- ? Recognise that women who have been sexually assaulted exhibit a pattern of symptoms that are described as Rape Trauma Syndrome. These symptoms include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion. These symptoms will influence how a woman applicant responds during the interview. If misunderstood, they may wrongly be seen as discrediting her testimony.
- ? Understand that women in many societies do not have specific information about the activities of men in their families. Gaps in their knowledge should not be construed as lack of credibility unless there is other evidence of such lack of credibility.
- ? Provide women the opportunity to be questioned by themselves, out of the hearing of other members of their family. Victims of sexual abuse may not feel comfortable recounting their experiences in front of their fathers, husbands, brothers or children.

Relevant International Conventions

Relevant international conventions include the following:

- ? The Geneva Convention on the Status of Refugees 1951 and the 1967 Protocol;
- ? The Universal Declaration of Human Rights (UDHR) (1948);
- ? The International Covenant on Civil and Political Rights (ICCPR) (1966);
- ? The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966);
- ? The European Convention on Human Rights (ECHR) (1950);
- ? The 1946 Slavery Convention and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956;
- ? 1949 Refugee Conventions on the Laws of War and two additional Protocols of 1977;
- ? Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others (1949);
- ? The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1964);
- ? The Convention on the Elimination of All Forms of Racial Discrimination (1965);
- ? The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979);
- ? The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984);
- ? The Convention on the Rights of the Child (CROC) (1989);
- ? The UN Declaration on the Elimination of Violence Against Women (1993); and
- ? The UN Platform for Action (1993).

International human rights instruments may be found in / at:

Colombey J-P (ed), *Collection of International Instruments and other Legal Texts Concerning Refugees and Displaced Persons*, UNHCR, (1995)

Ghandhi, P.R., *International Human Rights Documents*, Blackstone Press Ltd, (1995)

Plender R., *Basic Documents on International Migration Law*, Martinus Nijhoff Publishers (1997)

On the website of the UN High Commissioner for Human Rights:

<http://www.unhchr.ch/html/intlist.htm>

<http://www.unhchr.ch/test/home/inner04.htm>

Principles of International Treaty Interpretation

In interpreting the terms of Refugee Convention, regard should be had to the objects and purposes of the Treaty (see Vienna Convention on the Law of Treaties 1969¹⁵³, Part III, Arts. 31 and 32. Further information about Principles of International Treaty Interpretation can be found in the May 1999 IAA Legal Factsheet '*Principles of Interpretation*'.

The Refugee Convention should be interpreted:

In good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context, for the purpose of treaty interpretation, comprises, specifically includes the preamble and annexes of the treaty; see Vienna Convention on the Law of Treaties Art. 31

"I return to the argument on construction [of the Refugee Convention]. Mr Pannick points out that we are here concerned with the meaning of an international Convention....I agree. It follows that one is more likely to arrive at the true construction of Art 1A(2) by seeking a meaning which makes sense in the light of the convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach." [SSHD v Adan (HL) [1998] INLR 325, [1998] Imm AR 338 per Lord Lloyd of Berwick]

Principles of Interpretation

1. Where necessary to prevent ambiguity or a manifestly absurd or unreasonable interpretation, recourse may also be had to supplementary means of interpretation including the *travaux préparatoires* and subsequent agreement between the parties as to the interpretation of the treaty; see Vienna Convention on the Law of Treaties Art. 32

"It is a long-established principle of international law that it is legitimate, when interpreting a Treaty, to take into account not only the context in which it was made but also any subsequent practice in the application of the Treaty which established the agreement of the parties regarding its interpretation. This principle has been formalised in Art 31(3)(b) of the Vienna Convention on the Law of Treaties [which codifies the pre-existing public international law]." [Robinson v SSHD & IAT (CA) [1997] Imm AR 568]

2. The views of academic writers will be of assistance in interpreting the Refugee Convention:

"Of equal and perhaps of greater importance [than the caselaw] are the views of academic writers, since it is academic writers who provide the best hope of reaching international consensus on the meaning of the [Refugee] Convention." [per Lord Lloyd of Berwick, SSHD v Adan (HL) [1998] INLR 325, Imm AR 338]

3. Consistently with the way in which the Convention is interpreted in other countries.

¹⁵³ In force January 1980. See for example *Horvath v SSHD* (HL) 6 July 2000, Times 7 July 2000, *SSHD v Adan* (HL) [1998] INLR 325, [1998] Imm AR 338, *Robinson v SSHD & IAT* (CA) [1997] Imm AR 568].

“As a general rule it is desirable that international treaties should be interpreted by the courts of all the states parties uniformly” [Islam v SSHD, R v ex parte Shah (HL) [1999] INLR 144, [1999] Imm AR 283]

“In a case concerning an international convention it is obviously desirable that decisions in different jurisdictions should, so far [as] possible, be kept in line with each other.” [T v SSHD (HL) [1996] Imm AR 443]

Preamble to the Refugee Convention

Includes the following:

“Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.

The relevance of the preambles [to the Refugee Convention] is twofold. First, they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the Convention.” [Lord Steyn, Islam v SSHD R v IAT ex parte Shah, (HL) [1999] INLR 144, [1999] Imm AR 283]

Vienna Convention on the Law of Treaties 1969

Article 31 General rule of Interpretation

1. A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose.
2. The context for the purpose of the interpretation of the treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes

- (c) the agreement of the parties regarding its interpretation;
any relevant rules of international law applicable in the relations between the parties.
- 4. A special meaning shall be given to the term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.