

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**Secretary of State for the Home Department (Respondent)**

**v.**

**K (FC) (Appellant)**

**Fornah (FC) (Appellant)**

**v.**

**Secretary of State for the Home Department (Respondent)**

**Appellate Committee**

**Lord Bingham of Cornhill**

**Lord Hope of Craighead**

**Lord Rodger of Earlsferry**

**Baroness Hale of Richmond**

**Lord Brown of Eaton-under-Heywood**

**Counsel**

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**For Fornah**

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**Intervener in Fornah**

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Tim Eicke

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**For Fornah**

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17 and 18 JULY 2006

ON

WEDNESDAY 18 OCTOBER 2006

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT  
IN THE CAUSE**

**Secretary of State for the Home Department (Respondent) v. K (FC)  
(Appellant)  
Fornah (FC) (Appellant) v. Secretary of State for the Home  
Department (Respondent)**

**[2006] UKHL 46**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. The question in each of these appeals, arising on very different facts, is whether the appellant falls within the familiar definition of “refugee” in article 1A(2) of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. It is common ground in each case that the appellant has a well-founded fear of being persecuted if she were to be returned to her home country, Iran (in the first case) and Sierra Leone (in the second). In each case the appellant is outside the country of her nationality and is unable or, owing to her fear of persecution unwilling, to avail herself of the protection of that country. The only issue in each case is whether the appellant’s well-founded fear is of being persecuted “for reasons of ... membership of a particular social group”. The practical importance of this issue to the appellants is somewhat mitigated by the Secretary of State’s acceptance that article 3 of the European Convention on Human Rights precludes the return of the appellants to their home countries, because of the treatment they would be liable to suffer if returned. But the Secretary of State contends, and the Court of Appeal has in each case held, that such treatment, although persecutory, would not be “for reasons of ... membership of a particular social group” and therefore the appellants fall outside the definition of refugee. The correct understanding of this expression is a question of theoretical but also practical importance since the appellants enjoy stronger protection if recognised as refugees.

*The first appeal: the facts*

2. The first appellant is an Iranian citizen. She is married to B with whom, and their child, she lived in Iran. In about April 2001 B disappeared. It appears he was arrested, and he has since been held in prison without, so far as the first appellant is aware, charge or trial. On her one visit to him in prison he appeared to her to show signs of ill-treatment. The grounds for his detention are not known. About two or three weeks after B's disappearance Revolutionary Guards, agents of the Islamic Iranian state, searched the first appellant's house and took away books and papers. About a week later the Revolutionary Guards again visited the first appellant's house: they searched the house further, and insulted and raped her. Following this incident the first appellant made herself scarce. She was not again approached by Revolutionary Guards and nor were members of her family. But the school year began on 23 September 2001 and on the following day the headmaster of the school attended by her son, then aged 7, told her that the Revolutionary Guard had been to the school to make enquiries about the boy. The Adjudicator found that the Revolutionary Guards had approached the school in an open manner knowing that this would come to the attention of the first appellant and that it would cause her great fear. She was indeed very frightened, and fled from Iran with her son. The Adjudicator accepted that in the then current situation in Iran the families of those of adverse interest to the authorities could well be targeted. The first appellant travelled via Turkey to the United Kingdom where, on 5 October 2001, the day after her arrival, she claimed asylum.

3. The first appellant's asylum claim was refused by the Secretary of State on 30 November 2001. She appealed to an Adjudicator (Mr D J B Trotter) who upheld her claim, holding that she had a well-founded fear of persecution for reasons of her membership of a particular social group, namely her husband's family. He also upheld her human rights claim under article 3, a decision which the Secretary of State has not challenged. But he appealed successfully against the asylum decision to the Immigration Appeal Tribunal which held, in a Determination dated 29 September 2003, that "the family is the quintessential social group" but that the Court of Appeal decision in *Quijano v Secretary of State for the Home Department* [1997] Imm AR 227, showed (para 12 of the Determination) that

“where the primary member of a family is not persecuted for a Convention reason, then the secondary members

cannot be said to be persecuted for being members of the primary person's family.”

Here, B was not shown to be detained for a Convention reason, and so the first appellant could not succeed. In a judgment considered in more detail below, the Court of Appeal (Tuckey, Clarke and Laws LJ: [2004] EWCA Civ 986) upheld this conclusion, which the first appellant challenges and the Secretary of State supports.

*The second appeal: the facts*

4. The second appellant was born in Sierra Leone on 23 May 1987. She arrived in the United Kingdom on 15 March 2003, aged 15, and claimed asylum. The basis of her claim was that, if returned to Sierra Leone, she would be at risk of subjection to female genital mutilation (FGM).

5. In 1998 the second appellant and her mother were living in her father's family village to escape the civil war, and she overheard discussions of her undergoing FGM as part of her initiation into womanhood. In order to avoid this she ran away, but she was captured by rebels and repeatedly raped by a rebel leader, by whom she became pregnant. An uncle had arranged her departure from Sierra Leone to the United Kingdom. She resisted return on the ground that, if returned, she would have nowhere to live but her father's village, where she feared she would be subjected to FGM.

6. FGM is performed on the overwhelming majority of girls in Sierra Leone apart from Krios, a small minority of the population. The operation, often very crudely performed, causes excruciating pain. It can give rise to serious long-term ill-effects, physical and mental, and it is sometimes fatal. The operation is performed by older women, members of secret societies, and is a rite of passage from childhood to full womanhood, symbolised by admission of the initiate to these secret societies. Even the lower classes of Sierra Leonean society regard uninitiated indigenous women as an abomination fit only for the worst sort of sexual exploitation. Because of its totemic significance the practice is welcomed by some women and accepted by almost all. In society as a whole the practice is generally accepted where it is not approved, and the authorities do little to curb or eliminate it.

7. The practice of FGM powerfully reinforces and expresses the inferior status of women as compared with men in Sierra Leonean society. The evidence is that despite constitutional guarantees against discrimination, the rights of married women, particularly those married under customary and Islamic laws, are limited. Their position is comparable with that of a minor. Under customary law, a wife is obliged always to obey her husband, with whom she can refuse sexual intercourse only in limited circumstances. She is subject to chastisement at his hands.

8. FGM has been condemned as cruel, discriminatory and degrading by a long series of international instruments, declarations, resolutions, pronouncements and recommendations. Nothing turns on the detail of these. Their tenor may be illustrated by a recent Report of the UN Special Rapporteur on violence against women (E/CN.4/2002/83, 31 January 2002, introduction, para 6):

“Nevertheless, many of the practices enumerated in the next section are unconscionable and challenge the very concept of universal human rights. Many of them involve ‘severe pain and suffering’ and may be considered ‘torture like’ in their manifestation. Others such as property and marital rights are inherently unequal and blatantly challenge the international imperatives towards equality. The right to be free from torture is considered by many scholars to be *jus cogens*, a norm of international law that cannot be derogated from by nation States. So fundamental is the right to be free from torture that, along with the right to be free from genocide, it is seen as a norm that binds all nation States, whether or not they have signed any international convention or document. Therefore those cultural practices that involve ‘severe pain and suffering’ for the woman or the girl child, those that do not respect the physical integrity of the female body, must receive maximum international scrutiny and agitation. It is imperative that practices such as female genital mutilation, honour killings, Sati or any other form of cultural practice that brutalizes the female body receive international attention, and international leverage should be used to ensure that these practices are curtailed and eliminated as quickly as possible.”

In some countries, including the United Kingdom, effect is given to this international consensus by the prohibition of FGM on pain of severe criminal sanctions.

9. By letter dated 24 April 2003 the Secretary of State granted the second appellant limited leave to enter but rejected her claim to asylum because (so far as now relevant) he did not consider that girls who were at risk of being subjected to FGM formed a social group within the terms of the Refugee Convention. The second appellant appealed to an Adjudicator (Mr M R Oliver). At the hearing before him her credibility was not challenged and all issues were resolved in her favour in his Determination promulgated on 6 October 2003. The Adjudicator found that her fear was for a Convention reason, “ie. because of her membership of a particular social group, that of young, single Sierra Leonean women, who are clearly at considerable risk of enforced FGM”. On the Secretary of State’s appeal to the Immigration Appeal Tribunal this decision was reversed. In its Determination notified on 5 August 2004, the Tribunal was not satisfied that the social group identified by the Adjudicator, “that of young, single Sierra Leonean women”, or that identified by counsel, “young Sierra Leonean women”, could properly be regarded as a particular social group within the meaning of the Refugee Convention. In judgments considered in more detail below the Court of Appeal (Auld and Chadwick LJJ, Arden LJ dissenting) upheld this decision: [2005] EWCA Civ 680, [2005] 1 WLR 3773. The second appellant challenges this decision which the Secretary of State, while in no way condoning or justifying the practice of FGM, supports. Leave to intervene in the House was granted to the United Nations High Commissioner for Refugees, and the House derived great help from the submissions of counsel on his behalf which, although properly directed to principle, were strongly supportive of the second appellant’s appeal.

*Article 1A(2) of the Refugee Convention*

10. Article 1A(2) of the Refugee Convention as amended defines a “refugee” for purposes of the Convention as any person who

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such

fear, is unwilling to avail himself of the protection of that country;...”

It is well-established that the Convention must be interpreted in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms. Since the Convention is an international instrument which no supra-national court has the ultimate authority to interpret, the construction put upon it by other states, while not determinative (*R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 508-509, 515-518, 524-527, 528-531), is of importance, and in case of doubt articles 31-33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964) may be invoked to aid the process of interpretation. But the starting point of the construction exercise must be the text of the Refugee Convention itself, because it expresses what the parties to it have agreed: see *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 WLR 397, para 4, and the cases there cited. Central to the definition of refugee are the five specified grounds, the Convention reasons as they are often called, on which alone a claim to recognition as a refugee may be founded under the Convention. Treatment, however persecutory or abhorrent, will not found such a claim unless inflicted (or to be inflicted) for one or other of these five Convention grounds. Thus the question at the heart of each of these appeals is whether the persecution feared by each appellant will be for reasons of her membership of a particular social group.

### *The meaning of “a particular social group”*

11. The four Convention grounds most commonly relied on (race, religion, nationality and political opinion), whatever the difficulty of applying them in a given case, leave little room for doubt about their meaning. By contrast, the meaning of “a particular social group”, for all the apparent simplicity and intelligibility of that expression, has been the subject of much consideration and analysis.

12. The leading domestic authority is the decision of the House in *R v Immigration Appeal Tribunal, Ex p Shah and Islam* [1999] 2 AC 629. The appellants were married Pakistani women who had been forced to leave their homes and feared that, if they were returned to Pakistan, they would be at risk of being falsely accused of adultery, which could lead

to extreme social and penal consequences against which the state would offer no effective protection. Their claim for asylum was based on the “membership of a particular social group” ground, but different definitions were advanced at different stages of the social group in question: pp 632, 644, 649-650. By differing majorities the House accepted, on the evidence adduced in the case, that the appellants’ claim should succeed, either on the basis of their membership of a wider social group, that of women in Pakistan (pp 645, 652, 655, 658), or of a narrower social group, that of women who had offended against social mores or against whom there were imputations of sexual misconduct (pp 645, 655, 658-659). Lord Millett dissented, not as I understand because he did not consider the appellants to be members of a particular social group, but because he did not consider that the feared persecution would be for reasons of such membership (pp 664-665).

13. Certain important points of principle relevant to these appeals are to be derived from the opinions of the House. First, the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being: pp 651, 656. Secondly, to identify a social group one must first identify the society of which it forms part; a particular social group may be recognisable as such in one country but not in another: pp 652, 657. Thirdly, a social group need not be cohesive to be recognised as such: pp 643, 651, 657. Fourthly, applying *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 263, there can only be a particular social group if it exists independently of the persecution to which it is subject: pp 639-640, 656-657, 658.

14. In *Shah and Islam*, the House cited and relied strongly on *In re Acosta* (1985) 19 I&N 211, a relatively early American decision given by the Board of Immigration Appeals. Construing “membership of a particular social group” ejusdem generis with the other grounds of persecution recognised by the Convention, the Board held the expression to refer to a group of persons all of whom share a common characteristic, which may be one the members cannot change or may be one that they should not be required to change because it is fundamental to their individual identities or consciences. The Supreme Court of Canada relied on and elaborated this approach in *Attorney-General of Canada v Ward* [1993] 2 SCR 689, 738-739, and La Forest J reverted to it in his dissent in *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593, 642-644. The trend of authority in New Zealand has been generally in accord with *Acosta* and *Ward*: T A Aleinikoff, “Protected characteristics and social perceptions: an analysis

of the meaning of ‘membership of a particular social group’” *UNHCR’s Global Consultations on International Protection*, ed Feller, Türk and Nicholson, (2003), pp 263, 280. The leading Canadian authorities were considered by the High Court of Australia in *Applicant A*, above, where the court was divided as to the outcome but the judgments yield valuable insights. Brennan CJ, at p 234, observed:

“By the ordinary meaning of the words used, a ‘particular group’ is a group identifiable by any characteristic common to the members of the group and a ‘social group’ is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the member of the group from society at large. The persons possessing any such characteristic form a particular social group”.

Dawson J (p 241) saw no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions might each be a particular social group. Gummow J (p 285) did not regard numerous individuals with similar characteristics or aspirations as comprising a particular social group of which they were members: there must be a common unifying element binding the members together before there would be a social group of this kind.

15. Increased reliance on membership of a particular social group as a ground for claiming asylum prompted the UNHCR to convene an expert meeting at San Remo in September 2001, which was followed on 7 May 2002 by the issue of *Guidelines on International Protection* directed to clarifying this ground of claim. Having identified what it called the “protected characteristics” or “immutability” and “social perception” approaches, which it suggested would usually, but not always, converge, the UNHCR proposed:

“B. *UNHCR’s Definition*

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.
11. The protected characteristics approach may be understood to identify a set of groups that constitute

the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.
13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.”

The UNHCR accepted that a particular social group could not be defined exclusively by the persecution members suffer or fear, but also accepted the view advanced in *Applicant A* and accepted by some members of the House in *Shah and Islam* that persecutory action towards a group may be a relevant factor in determining the visibility of a group in a particular society. It appears to me that the *UNHCR Guidelines*, clearly based on a careful reading of the international

authorities, provide a very accurate and helpful distillation of their effect.

16. EU Council Directive 2004/83/EC of 29 April 2004, effective as of 10 October 2006, is directed to the setting of minimum standards among member states for the qualification and status of third country nationals or stateless persons as refugees, or as persons who otherwise need international protection, and setting minimum standards for the content of the protection granted. The recitals recognise the need for minimum standards and common criteria in the recognition of refugees, and for a common concept of “membership of a particular social group as a persecution ground”. The Directive expressly permits member states to apply standards more favourable to the applicant than the minimum laid down. Article 10 provides (with Roman numerals added to the text):

*“Reasons for persecution*

- I Member States shall take the following elements into account when assessing the reasons for persecution ...
- (d) a group shall be considered to form a particular social group where in particular:
- [(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- [(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
- [(iii)] depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.”

Read literally, this provision is in no way inconsistent with the trend of international authority. When assessing a claim based on membership of a particular social group national authorities should certainly take the matters listed into account. I do not doubt that a group should be considered to form a particular social group where, in particular, the criteria in sub-paragraphs (i) and (ii) are both satisfied. Sub-paragraph (iii) is not wholly clear to me, but appears in part to address a different aspect. If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published *Comments* on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met. With regard to (iii), the UNHCR comments:

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

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

### *The meaning of “for reasons of”*

17. The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple “but for” test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case.

18. I do not understand these propositions to be contentious. They are in my opinion well-attested by authorities such as *Shah and Islam*, above, pp 653-655; *R(Sivakumar) v Secretary of State for the Home Department* [2003] UKHL 14, [2003] 1 WLR 840, paras 41-42; *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, paras 21-23; *Suarez v Secretary of State for the Home Department* [2002] EWCA Civ 722, [2002] 1 WLR 2663, para 29; *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, paras 32-33, 67-71; *Minister for Immigration and Multicultural Affairs v Sarrazola* [2001] FCA 263, para 52; and *Thomas v Gonzales* 409 F 3d 1177 (9th Cir, 2005). They are also reflected in the *Michigan Guidelines on Nexus to a Convention Ground*, published following a colloquium in March 2001. Whatever the difficulty of applying it in a particular case, I do not think that the test of causation is problematical in principle.

### *The claim of the first appellant*

19. The persecution feared by the first appellant was said to be for reasons of her membership of a particular social group, namely her husband’s family. In resisting her claim the Secretary of State did not seek to contend that a family cannot be a particular social group for purposes of the Convention. He accepted that it could, consistently with the submission of counsel on his behalf in *Skenderaj v Secretary of State*

*for the Home Department* [2002] EWCA Civ 567, [2002] 4 All ER 555, para 21, that

“a family group could be a particular social group, since society recognises the family bond as distinct and attaches importance to it, but only if society also sets it apart in such a way as to stigmatise or discriminate against it for that reason.”

The Secretary of State’s acceptance reflects a consensus very clearly established by earlier domestic authority such as *Secretary of State for the Home Department v Savchenkov* [1996] Imm AR 28, and also by international authority. In *Minister for Immigration and Multicultural Affairs v Sarrazola* [2001] FCA 263, paras 28-34, there was held to be little doubt that persecution by reason of being a member of a particular family could constitute persecution for reasons of membership of a particular social group. In *Thomas v Gonzales*, above, the conclusion was reached

“that the harm suffered by the Thomases was not the result of random crime, but was perpetrated on account of their family membership, specifically on account of the family relationship with Boss Ronnie.”

The consensus is clearly reflected in the academic literature: J Hathaway, *The Law of Refugee Status* (1991), pp 164-166; G S Goodwin-Gill, *The Refugee in International Law* (1996), p 361.

20. A special problem has been thought to arise where a family member attracts the adverse attention of the authorities, whether for non-Convention reasons or reasons unknown, and persecutory treatment is then directed to other family members. Laws J, sitting at first instance, addressed this problem in obiter observations in *R v Immigration Appeal Tribunal, Ex p De Melo* [1997] Imm AR 43, 49-50, when he said:

“It is necessary next to examine the second question: is the alleged or actual persecution ‘for the reasons of ... membership of a particular social group’? Mr Kovats [for the Secretary of State] submits as follows. Where an

individual is persecuted for a *non*-Convention reason, concurrent or subsequent threats (or, presumably, acts) against his family likewise cannot be regarded as persecution for a Convention reason. If it were otherwise, the person initially ill treated? here, the father? would have no claim to asylum under the 1951 Convention, and so it would be anomalous were the members of his family, persecuted or ill-treated simply because of their association with him, to be accorded Convention rights.

I do not consider that this argument is correct. Let it be assumed that an individual has been ill-treated or terrorised for a reason having nothing to do with the Convention. He has no Convention rights. But, on the view I have taken, his family may form a particular social group within the meaning of the Convention. If then *they* are persecuted because of their connection with him, it is as a matter of ordinary language and logic, *for reasons of* their membership of a family? the group? that they are persecuted. I see nothing anomalous in this. The original evil which gives rise to persecution against an individual is one thing; if it is then transferred so that a family is persecuted, on the face of it that will come within the Convention. The definition of ‘refugee’ in article 1 of the Convention treats membership of a particular social group as being *in pari materia* with the other ‘Convention reasons’ for persecution: race, religion and so forth. Mr Kovats’ argument implies, however, that membership of a particular social group is (at least on some sets of facts) to be regarded as merely adjectival to or parasitic upon the other reasons. With deference to him, that in my judgment amounts to a misconstruction of article 1 with the consequence that his submission proceeds on a false premise. Moreover I incline to think that the argument accords to the persecutor’s *motive* a status not warranted by the Convention’s words. The motive may be to terrorise the person against whom the persecutor entertains ill will (for a ‘non-Convention’ reason) by getting at his family; but when it comes to the question whether the family are persecuted by reason of their membership of a particular social group? the family? I do not see that the persecutor’s motive has any relevance.”

These observations of Laws J were relied on by the appellant in *Fabian Martinez Quijano v Secretary of State for the Home Department* [1997] Imm AR 227, where the appellant’s claim related to persecutory

treatment directed to him because of his relationship with his stepfather who had crossed a Columbian drug baron. His appeal to the Court of Appeal against an adverse decision given before *De Melo* was unsuccessful. The reason given by Thorpe LJ at p 232 was this:

“Second I conclude that the persecution arises not because the appellant is a member of the Martinez family but because of his stepfather’s no doubt laudable refusal to do business with the cartel. The persecution has that plain origin and the cartel’s subsequent decision to take punitive action against an individual related by marriage is fortuitous and incidental as would have been a decision to take punitive action against the stepfather’s partners and their employees had the business been of that dimension.”

Morritt LJ (p 233) put it a little differently:

“But the fear of each member of the group is not derived from or a consequence of their relationship with each other or their membership of the group but because of their relationship, actual or as perceived by the drugs cartel, with the stepfather of the appellant. The stepfather was not persecuted for any Convention reason so that their individual relationship with him cannot cause a fear [for] a Convention reason either. In short the assumed fear of the appellant is not caused by his membership of a particular social group.”

Roch LJ (p 234) also put the point differently:

“The anomaly that would arise in the present case, were the arguments of the appellant’s counsel to be correct, that the appellant’s stepfather would not be entitled to claim political asylum under the Convention, whereas all other members of the family would be entitled to political asylum, is merely an indicator that this family is not ‘a social group’ liable to persecution because it is ‘a particular social group’. The other members of the family are being persecuted because they are related to the stepfather who has offended the drug cartel, who have decided to retaliate against the stepfather by persecuting

him and members of his family. Who will constitute part of the family or social group is entirely the decision of the drug cartel. It may include those living in the stepfather's house who are not related to him by blood or marriage. These considerations underline, in my opinion, the fact that in the circumstances of this case the Martinez family is not 'a particular social group'.

21. The reasoning of Laws J in *De Melo* was in my respectful opinion correct, and the Court of Appeal were wrong to reject it in *Quijano*. The drug baron's persecution of the stepfather was plainly not for a Convention reason, and he could not have claimed recognition as a refugee. But there was nothing in the facts as briefly reported to suggest that the real reason for the persecutory treatment of the appellant was anything other than his family relationship with his stepfather. That relationship may in one sense have been fortuitous and incidental, as Thorpe LJ described it, but if it was the reason for the persecution he feared it was, in principle, enough. Morritt LJ, as I read him, asked himself what was the cause of the appellant's fear and not, as he should, what was the cause of the apprehended persecution. Roch LJ accepted the argument which Laws J rejected, in my view rightly, in *De Melo*.

22. In the present case the Immigration Appeal Tribunal followed *Quijano* (see para 3 above), as it was bound to do. The Court of Appeal were also bound by the court's earlier decision which, as accepted by Laws LJ in his leading judgment (para 11), had overruled his judgment in *De Melo*. The short answer to the appeal, he held (para 20), was the answer given in *Quijano*. Clarke LJ had obvious difficulty accepting the ratio of *Quijano*, but did so for reasons which he expressed in this way (para 27):

"The reference to 'for reasons of membership' of such a group, say a family, suggests that the focus should be on the persecutor's purpose (my emphasis). As Laws LJ put it, the feared persecution must be the persecutor's end and not a means to another end. That is essentially what was decided in *Quijano*. It is not therefore sufficient to ask simply why B was being persecuted. The answer to that question could be that it was for two reasons, namely the persecutor's wish to persecute A and the family relationship between B and A. If, as *Quijano* shows, the purpose or end of the persecutor is the key factor in the context of the Convention, the answer becomes clear. It is

that B does not have a well founded fear of persecution for reasons of membership of his or her family because the persecution feared is not for those reasons but for whatever reasons prompted the authorities to persecute A.”

Tuckey LJ agreed with both judgments. The binding authority of *Quijano* presented the court with an insoluble problem, by distracting attention from the crucial question: what will be the real reason for the persecution of the claimant of which the claimant has a well-founded fear?

23. I am satisfied that the Immigration Appeal Tribunal and the Court of Appeal, through no fault of their own, reversed the Adjudicator’s decision on a false basis. But it does not follow that the first appellant’s claim should have succeeded. The Secretary of State points out that when the first appellant made herself scarce after the two visits to her house by Revolutionary Guards, there was no further approach to her, even when she visited her husband in prison, and there was no evidence of pressure on any other family member. These are fair points, and the Adjudicator might have accepted them and rejected the first appellant’s claim. But having heard the evidence he did not, and made a clear finding that the persecution she feared would be of her as a member of her husband’s family. It is not indeed easy to see any basis other than their relationship with her husband for the authorities’ severe ill-treatment of the first appellant and their deliberately menacing conduct towards her young son. The Secretary of State suggests that the real reason for the persecution feared was not her membership of her husband’s family but her bilateral marriage relationship with her husband, but this does not account for the implied threat to the child.

24. Since it is common ground that a family may be a particular social group for purposes of article 1A(2), the questions here are whether the Adjudicator was entitled to conclude that on the facts the family of the first appellant’s husband was such a group and, if so, whether the real reason for the persecution which she feared was her membership of that group. Whether applying the UNHCR definition (para 15 above) or article 10(d)(i) and (ii), jointly or alternatively, of the EU Directive (para 16 above), I am of opinion that he was clearly so entitled. Subject to a correct self-direction of law, the second question is one of fact: the Adjudicator did not misdirect himself and reached a tenable conclusion. For these reasons, and those given by my noble and learned friend Lord Rodger of Earlsferry, I would accordingly allow the

first appellant's appeal, set aside the orders of the Immigration Appeal Tribunal and the Court of Appeal and restore the order of the Adjudicator.

*The second appellant's claim*

25. It is common ground in this appeal that FGM constitutes treatment which would amount to persecution within the meaning of the Convention and that if the second appellant was, as she contends, a member of a particular social group the persecution of her would be for reasons of her membership of that group. Thus the very limited issue between the parties is whether the second appellant was a member of a particular social group, however defined. The parties' agreement that fear of FGM may found a successful claim to recognition as a refugee (if for reasons of membership of a particular social group) obviates the need to analyse a mass of material which would otherwise be relevant. But in truth the parties' agreement on this point is all but inevitable, for a number of reasons.

26. First, claims based on fear of FGM have been recognised or upheld in courts all round the world. Such decisions have been made in England and Wales (*Yake v Secretary of State for the Home Department*, 19 January 2000, unreported; *P and M v Secretary of State for the Home Department* [2004] EWCA Civ 1640 [2005] Imm AR 84), the United States (*In re Kasinga* (1996) 21 I & N Dec 357, *Abankwah v Immigration and Naturalization Service* 185 F 3d 18 (2d Cir 1999), *Mohammed v Gonzales* 400 F 3d 785 (9<sup>th</sup> Cir 2005), Australia (*RRT N97/19046*, unreported, 16 October 1997), Austria (*GZ 220.268/0-XI/33/00*, unreported, 21 March 2002), and Canada (*Re B(PV)* [1994] CRDD No 12, 10 May 1994; and *Compendium of Decisions, Immigration and Refugee Board*, February 2003, pp 31-35). Secondly, such agreement is consistent with clearly expressed opinions of the UNHCR. Representative of its consistent view is a memorandum of 10 May 1994 on Female Genital Mutilation, which in para 7 says:

“On this basis, we must conclude that FGM, which causes severe pain as well as permanent physical harm, amounts to a violation of human rights, including the rights of the child, and can be regarded as persecution. The toleration of these acts by the authorities, or the unwillingness of the authorities to provide protection against them, amounts to official acquiescence. Therefore, a woman can be

considered as a refugee if she or her daughters/dependents fear being compelled to undergo FGM against their will; or, she fears persecution for refusing to undergo or to allow her daughters to undergo the practice.”

Thirdly, this agreement is consistent with the view taken by the European Parliament, which on 20 September 2001 adopted a resolution (A5-0285/2001) expressing the hope that the European institutions and member states should recognise the right to asylum of women and girls at risk of being subjected to FGM and calling for the UN General Assembly to give priority to the topic ‘access to asylum procedures for women at risk of female genital mutilation.’ Fourthly, the agreement is consistent with guidelines issued by national authorities, including those of Canada (“Women Refugee Claimants Fearing Gender-Related Persecution”, 13 November 1996), Australia (“Gender-Related Persecution (Article 1A(2): An Australian Perspective”, Department of Immigration and Multicultural and Indigenous Affairs, 2001). A similar approach has been officially taken in this country. In guidance entitled “Gender issues in the asylum claim” the Home Office states (in para 7(iv)):

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

This reflects a statement made by Miss Ann Widdecombe MP in the House of Commons on 15 July 1996 (HC Hansard, col 818):

“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.”

Fifthly and more generally, the parties’ agreement is wholly consistent with the humanitarian objectives of the Convention and reflects the international abhorrence of FGM expressed in the instruments compendiously referred to in para 8 above.

27. Asylum claims founded on gender-based discrimination have sometimes succeeded on the ground of membership of a particular social group widely defined. *Shah and Islam*, above, and *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 (in each case “women in Pakistan”) are examples, and, with reference to FGM, *P and M v Secretary of State for the Home Department*, above, paras 41, 49 (“women in Kenya”, although this was qualified by “particularly Kikuyu women under the age of 65) and *Re B(PV)*, above (“women and minors”). In other FGM cases the particular social group has been more narrowly defined: “young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had FGM, as practiced [sic] by that tribe, and who oppose the practice” (*In re Kasinga*, above); “Cameroonian women subject to mutilation” (*GZ*, above); “Yoruba women in Nigeria” (*RRT N97/19046*, above) and “a Yopougon woman [of the Ivory Coast] who may be subject to FGM” (*Yake*, above). On occasion, as in *Shah and Islam*, above, alternative definitions of the particular social group have been found acceptable, as in *Mohammed v Gonzales*, above, where “young girls in the Benadiri clan” and “Somalian females” were both held to be particular social groups.

28. When the second appellant’s case was presented in the Court of Appeal, her counsel submitted that the relevant particular social group was “young single women in Sierra Leone who are at risk of circumcision”, which was between 80% and 90% of them ([2005] 1 WLR 3773, para 21) but Auld LJ considered (para 30) the nearest candidate for such grouping to be “young single women who have not been circumcised and who are, therefore, at risk of circumcision”. Having reviewed the evidence and the authorities in some considerable detail, he expressed his conclusion in para 44 of his judgment:

“Applying those considerations to the facts of this case, I have reached the view that the pointers are away from, rather than towards, female genital mutilation of young, single and uncircumcised Sierra Leonean women

constituting persecution ‘for reasons of’ their membership of a ‘particular social group’. They are as follows. (1) The practice, however repulsive to most societies outside Sierra Leone, is, on the objective evidence before the adjudicator and the tribunal, clearly accepted and/or regarded by the majority of the population of that country, both women and men, as traditional and part of the cultural life of its society as a whole. (2) Far from the persecution that the Pakistan women feared in *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629 by reason of their circumstances, namely ostracism by society and discrimination by the state in its failure to protect their fundamental human rights, the persecution here would result in a full acceptance by Sierra Leonean society of those young women who undergo the practice into adulthood, fit for marriage and to take a full part as women in the life of their communities. (3) It follows that, however harshly we may stigmatise the practice as persecution for the purpose of article 3, it is not, in the circumstances in which it is practised in Sierra Leone, discriminatory in such a way as to set those who undergo it apart from society. It is, as McHugh J observed in the *Applicant A v Minister of Immigration and Ethnic Affairs* 71 ALJR 381, 397 (see para 29 above), important to keep in mind the composite nature of the asylum test, and, as Lord Hope emphasised in *Ex p Shah*, at p 656 (see para 31 above), the distinction between persecution and discriminatory conduct giving rise to it. (4) Considered on its own, a critical common characteristic of the claimed ‘particular social group’ is that its members have not been circumcised. But, as soon as they have undergone the practice, they cease to be members of the group. To confine the grouping to young, single girls who, for the time being, have not been circumcised, though logical, would be contrary to the general rule that it is impermissible to define the group solely by reference to the threat of the persecution. (5) As to the possible qualification of the general rule by reference to insufficiency of state protection, this case, as I have said, is readily distinguishable from *Ex p Shah*. As Lord Steyn, put it in that case, at p 644, when identifying the rationale for the formula ‘for reasons of ... membership of a particular social group’:

‘This reasoning covers Pakistani women because they are discriminated against and as a group they

are unprotected by the state. Indeed the state tolerates and sanctions the discrimination.’

See also, per Lord Hope, at p 658:

‘The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women.’

However, as I have said, although female circumcision in Sierra Leone may be condemned as a violation of article 3 and to constitute persecution of young uncircumcised girls on that account, its practice in that country’s society is not discriminatory or one that results from society having set them apart, other than by the persecution itself. There is, therefore, no factual basis upon which the court could have resort to insufficiency of state protection against discriminatory conduct to qualify the general rule that, for the purpose of the Refugee Convention, a ‘particular social group’ cannot be defined solely by reference to the persecution.”

29. In a reasoned judgment of his own, Chadwick LJ concluded (para 52) that the particular social group could not be defined as “all women in Sierra Leone”, or “all young, single Sierra Leonean women”. Were young Sierra Leonean women a particular social group? He concluded not, because (para 56) the defining characteristic of the group was inseparable from the persecution which the second appellant feared.

30. Arden LJ thought it clear (para 61) that Sierra Leonean women in general could not be a particular social group since the group so defined would include women who no longer feared FGM because they had undergone it and might practise it on others. But she concluded (paras 61, 66) that the persecutory treatment feared by the second appellant would be by reason of her membership of a particular social group, namely those prospectively adult women in Sierra Leone who had not yet undergone FGM and so remained intact. She would accordingly have allowed the appeal.

31. Departing from the submission made below, but with the support of the UNHCR, Miss Webber for the second appellant submitted that “women in Sierra Leone” was the particular social group of which the second appellant was a member. This is a submission to be appraised in the context of Sierra Leonean society as revealed by the undisputed evidence, and without resort to extraneous generalisation. On that evidence, I think it clear that women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men. They are perceived by society as inferior. That is true of all women, those who accept or willingly embrace their inferior position and those who do not. To define the group in this way is not to define it by reference to the persecution complained of: it is a characteristic which would exist even if FGM were not practised, although FGM is an extreme and very cruel expression of male dominance. It is nothing to the point that FGM in Sierra Leone is carried out by women: such was usually the case in Cameroon (*GZ*, above) and sometimes in Nigeria (*RRT N97/19046*, above), but this did not defeat the applicant’s asylum claim. Most vicious initiatory rituals are in fact perpetuated by those who were themselves subject to the ritual as initiates and see no reason why others should not share their experience. Nor is it pertinent that a practice is widely practised and accepted, a contention considered and rejected in *Mohammed v Gonzales*, above. The contrast with male circumcision is obvious: where performed for ritualistic rather than health reasons, male circumcision may be seen as symbolising the dominance of the male. FGM may ensure a young woman’s acceptance in Sierra Leonean society, but she is accepted on the basis of institutionalised inferiority. I cannot, with respect, agree with Auld LJ that FGM “is not, in the circumstances in which it is practised in Sierra Leone, discriminatory in such a way as to set those who undergo it apart from society”. As I have said, FGM is an extreme expression of the discrimination to which all women in Sierra Leone are subject, as much those who have already undergone the process as those who have not. I find no difficulty in recognising women in Sierra Leone as a particular social group for purposes of article 1A(2). Had this submission been at the forefront of the second appellant’s case in the Court of Appeal, and had that court had the benefit of the UNHCR’s very articulate argument, it might, I think, have reached the same conclusion. If, however, that wider social group were thought to fall outside the established jurisprudence, a view I do not share, I would accept the alternative and less favoured definition advanced by the second appellant and the UNHCR of the particular social group to which the second appellant belonged: intact women in Sierra Leone. This was the solution favoured by Arden LJ, and in my opinion it meets the Convention tests. There is a common characteristic of intactness. There is a perception of these women by society as a

distinct group. And it is not a group defined by persecution: it would be a recognisable group even if FGM were entirely voluntary, not performed by force or as a result of social pressure.

32. Since, in this case, there is no issue on causation, I would (in full agreement with my noble and learned friend Baroness Hale of Richmond) allow the second appellant's appeal on her preferred basis, set aside the orders of the Court of Appeal and the Immigration Appeal Tribunal and restore the order of the Adjudicator.

33. I would invite the parties to both appeals (other than the Intervener) to make written submissions on costs within 14 days.

### **LORD HOPE OF CRAIGHEAD**

My Lords,

34. In agreement with all of your Lordships, I would allow these appeals and make the orders proposed by my noble and learned friend Lord Bingham of Cornhill. I should like however to add a few comments on the issues raised as to what constitutes a "particular social group" within the meaning of article 1A(2) of the Refugee Convention of 1951. I do not wish to depart from anything that I said about the meaning of these words, or about the definition of which they form part, in *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 69. But there are some additional points that may be worth making in the light of developments following that judgment and on the facts of these appeals.

35. The question whether or not the appellants have refugee status is not just of theoretical importance to the appellants. They have been given leave to enter the United Kingdom because article 3 of the European Convention on Human Rights forbids their return to their home countries for so long as they are at risk of torture or inhuman or degrading treatment or punishment there. So far so good. But leave to enter does not give them a right to remain in this country. If their claims for asylum are recognised, however, all the benefits of the Refugee Convention will then be available to them. The uncertainty that attaches to their present lack of status will be replaced by the status which the

Contracting States have undertaken to accord to a refugee and by all the rights that attach to it. This is a very substantial additional benefit which is well worth arguing for.

36. The issue in K's case centres on the family as a particular social group. The question is whether she can show that she has a well-founded fear of being persecuted in Iran for reasons of her membership of a particular social group where the persecution which she fears is directed at her as the wife of a man who is being held in detention. The Secretary of State accepts that a family can constitute "a particular social group" within the meaning of article 1A(2). The critical question, as it was put by Mr Rabinder Singh QC, is whether it can be said that the persecution which the appellant fears is "for reasons of" her membership of a particular social group at all. The issue which he raises is one of causation. But it gives rise to an important question about the family as a particular social group. What are the facts that an applicant must prove to establish that her well-founded fear is for reasons of her membership of a family?

37. The issue in Zainab Fornah's case is essentially one of definition. It is accepted that the appellant has a well-founded fear of being subjected to female genital mutilation were she to be returned to Sierra Leone. This is because she is an intact, or uninitiated, young woman who does not belong to the only ethnic group in that country, the Krio of the old Sierra Leone colony, which does not participate in this practice. The question is whether a particular social group can be identified, for reasons of her membership of which she has a well founded fear of being persecuted in Sierra Leone. Female genital mutilation is practised on intact girls and young women who are indigenous to Sierra Leone. But it is in the nature of the process that it can be inflicted only once in any female's lifetime. So the question is whether, for the purposes of this case, females in Sierra Leone generally can be said to constitute "a particular social group" within the meaning of article 1A(2). If this definition is too wide, it would be possible to define the group so as to confine it to those within that broader group who are at risk of persecution. But the more qualifications the definition contains the more grounds there may be for objection. This gives rise to the further question as to how the balance is to be struck between definitions that are unnecessarily precise and those that are unnecessarily wide.

38. Miss Fornah's case, then, raises again the point that was discussed but did not have to be decided in *Shah and Islam* as to how precise the definition must be to satisfy the requirements of that article.

The Secretary of State maintains that it is not possible, for reasons of principle, to identify a particular social group the appellant's membership of which gives rise to her well-founded fear. He says that a group which consists of females in Sierra Leone generally is too widely drawn because many of its members no longer fear female genital mutilation as they have already been initiated. He objects to a group which is defined more precisely so as to include only those females who are still at risk. He says that if this is done it is the fact of persecution alone that defines the group, and that the definition of it is therefore circular. He has other objections which apply however wide or precise the definition is, which I would reject for the reasons given by Lord Bingham and Lord Rodger.

*The "family" as a particular social group*

39. I need not dwell for long on the question whether a person's family can, in principle, constitute a particular social group within the meaning of the article. Mr Rabinder Singh QC did not seek to dispute this point. He said that the question of causation had always been at the heart of K's case. His point was that it was not enough for her to show that she was at risk of being persecuted because of her association with her husband. It had to be shown that the persecution was for reasons of her membership of a particular social group. That could not be done because there was no evidence that any other members of her family were exposed to the same risk of persecution. Furthermore, it was not known why her husband, who was the primary member of the particular social group to which she claimed to belong, was being persecuted. So it was not possible to say that she and her husband were being persecuted for the same reason. The only conclusion that could be drawn from the evidence was that she was being persecuted as an individual because of her association with her husband, and not as the member of any particular social group. It was not the family of which she was a member that was being persecuted.

40. This approach raises two quite basic questions about the facts that need to be established where the particular social group is said to be the asylum seeker's family. Can the well founded fear of persecution be said to be for reasons of her membership of that particular social group where it cannot be proved that the primary member of the family – the person whose beliefs, actions or circumstances give rise to the persecution which she fears – is being persecuted for a Convention reason? And can the fear be said to be for reasons of her membership of the family of which she and the primary member are both members

when there is no evidence that any other members of that family are at risk of being persecuted for reasons of their membership of that family?

41. I agree with my noble and learned friend Lord Rodger of Earlsferry (see para 75 of his speech) that it is not necessary to show that all members of the social group in question are persecuted before one can say that people are persecuted for reasons of their membership of that group. But does the fact that the group must be identifiable by a characteristic or attribute common to all members of the group (see Gleeson CJ, Gummow and Kirby JJ in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, para 36) mean, as he suggests, that it is necessary that all members of the group should be susceptible to the persecution in question? If so, this requirement is likely to severely limit the utility of the family as a particular social group. It has not been satisfied in K's case. There is no evidence that any other member of her family is susceptible to the persecution of which she has a well founded fear.

42. In *R v Immigration Appeal Tribunal, Ex p De Melo* [1997] Imm AR 43, 49 Laws J said that membership of a family is, in the ordinary way, plainly membership of a particular social group and that if a man's family were persecuted because of their connection with him it was, as a matter of ordinary language and logic, for reasons of their membership of a family that they were persecuted. This is a simple and direct approach to the issue, but Mr Rabinder Singh said that it was wrong. He said that the correct approach was that indicated by the Court of Appeal in *Quijano v Secretary of State for the Home Department* [1997] Imm AR 227. In that case the appellant claimed to have been persecuted as a member of his stepfather's family, and thus of a particular social group, because members of a drug cartel had persecuted the stepfather because he refused to co-operate with them and had made attacks also on the appellant and other members of the family. Thorpe LJ said at p 323 that the persecution arose not because the appellant was a member of the stepfather's family but because of his stepfather's refusal to co-operate. The cartel's decision to take punitive action against an individual related by marriage was fortuitous and incidental.

43. Morritt LJ set out the central part of his reasoning in *Quijano* in following passage at p 233:

“It is plain that the fear of the applicant, which is to be assumed, is the consequence of the refusal of his

stepfather to comply with the illegal demands of the drugs cartel in Colombia and the determination of the drugs cartel to take revenge on those they considered to be related to him. It is true that each member of the social group apart from the stepfather is likely to have the same fear and for the same reason. But the fear of each member of the group is not derived from or a consequence of their relationship with each of other or their membership of the group but because of their relationship, actual or as perceived by the drugs cartel, with the stepfather of the appellant. The stepfather was not persecuted for any Convention reason so that their individual relationship with him cannot cause a fear [for] a Convention reason either.”

At p 234 Roch LJ said that his conclusion that in the circumstances of that case the family was not a particular social group was underlined by the fact that the stepfather would not be entitled to claim asylum under the Convention and because the question who constituted part of the family or social group was entirely a matter for the decision of the drug cartel when they decided to retaliate. He added that for the family to become a particular social group it must be a family that is being persecuted or likely to be persecuted because it is that family. The fact that the stepfather was not being persecuted for reasons of his membership of the family underlined his conclusion that in the circumstances of that case the family was not a particular social group.

44. I do not agree with the approach that the Court of Appeal took to this issue in *Quijano*. It is, of course, well established that the persecution which is feared cannot be used to define a particular social group: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 264 per McHugh J. But this simply means that there must be some characteristic other than the persecution itself, or the fear of persecution, that sets the group apart from the rest of society. This may be because its members share a common characteristic other than their risk of being persecuted, or because they are perceived as a group by society. It is the latter approach that defines the family as a particular social group. Each family is set apart as a social group from the rest of society because of the ties that link its members to each other, which have nothing to do with the actions of the persecutor.

45. It is universally accepted that the family is a socially cognisable group in society: UNHCR *position on claims for refugee status under*

*the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud*, 17 March 2006, p 5. Article 23(1) of the 1966 International Covenant on Civil and Political Rights states that the family “is the natural and fundamental group unit of society and is entitled to protection by society and the State.” The ties that bind members of a family together, whether by blood or by marriage, define the group. It is those ties that set it apart from the rest of society. Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the Refugee Convention extends its protection.

46. In *Applicant S v Minister for Immigration and Multicultural Affairs*, paras 67-69 McHugh J was at pains to emphasise that it was a mistake to say that a particular social group does not exist unless it is always perceived as such by the society in which it exists. He said that it was not necessary that society itself must recognise the particular social group as a group that is set apart from the rest of that society, or that the persecutor or persecutors must actually perceive the group as constituting a particular social group. As he put it in para 69:

“It is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a ‘uniting’ feature or attribute, and the persons in that class are cognisable objectively as a particular social group.”

In their judgment in paras 17-18 Gleeson CJ, Gummow and Kirby JJ appear to disagree with McHugh J in requiring recognition within the society subjectively that the collection of individuals is a group that is set apart from the rest of the community. My own preference, with respect, is for the more cautious approach of McHugh J that it would be a mistake to insist that such recognition is always necessary. I agree with him that it is sufficient that the asylum-seeker can be seen objectively to have been singled out by the persecutor or persecutors for reasons of his or her membership of a particular social group whose defining characteristics exist independently of the words or actions of the persecutor. That is as true in cases where the family is identified as the particular social group, as it was in that case where it was contended that the particular social group comprised young, able-bodied Afghan men.

47. The reasoning of the Court of Appeal in *Quijano* requires more of an asylum seeker who claims that the particular social group of which he or she is a member is the family than is required of those who claim that the persecution of which they have a well-founded fear is for reasons of race, religion, nationality or political opinion. It is, of course, critical to identify what lies at the root of the threat of persecution. But it is not necessary to show that everyone else of the same race, for example, or every other member of the particular social group, is subject to the same threat. All that needs to be shown is that there is a causative link between his or her race or his or her membership of the particular social group and the threat of the persecution of which there is a well-founded fear. The fact that other members of the group are not under the same threat may be relevant to an assessment of the question whether the causative link has actually been established. Especially in a case such as the present, where it is not suggested that any other member of the family is at risk of being persecuted for reasons of membership of the family, the evidence of causation will need to be scrutinised very carefully. But the mere fact that no other member of the family is in that position is not determinative.

48. Then there is Morritt LJ's observation at p 233 that, as the stepfather was not persecuted for any Convention reason, the family member's individual relationship with him could not cause a fear for a Convention reason. In my opinion that approach misconstrues article 1A(2). The article directs attention to the position of the asylum-seeker, not to that of any other person with whom he or she may be associated. It is his or her fear of persecution for a Convention reason, not someone else's fear, that is in issue. As Laws J said in *De Melo* at pp 49-50, the original evil that gives rise to persecution of the individual is one thing. If it is then transferred so that family members are persecuted by reason of their membership of the same family as the individual, that on the face of it will come within the scope of the article.

49. In the Court of Appeal, para 19 Laws LJ said that if the family member faces persecution because the primary victim is persecuted for a non-Convention reason, then he too faces persecution for that reason and is not protected by the Convention. In saying this he was no doubt doing his best to follow what the Court of Appeal held to be the position in *Quijano*. But, as I have already indicated, I prefer his reasoning in *De Melo* and I would apply that reasoning to this case. The adjudicator said that there was no evidence that would enable him to conclude that K's husband was detained as a suspected political dissident. So it was not established that he was being persecuted for a Convention reason. The adjudicator also noted that, although the families of those thought to be

dissidents or otherwise of adverse interest to the authorities could well be targeted, it had not been suggested that other members of the appellant's family had been subject to pressure from the authorities. But he had no doubt that if K were to return to Iran she would be identified as the wife of a man who was still a prisoner, and that there was serious possibility that she would be persecuted because of her association with him as his wife. This led him to conclude that the persecution of which she had a well-founded fear was of persecution as a member of her husband's family.

50. Mr Rabinder Singh criticised the adjudicator's conclusion on the ground that it was based on an error of legal categorisation, which was an error of principle. But in my opinion it was entirely consistent with his earlier findings. It is plain that the appellant's well-founded fear is of being singled out for persecution simply because, as his wife, she is a member of the same family as her husband. The fact that other members of the family are not exposed to the same risk does not deprive her of the benefit of the Convention. She is entitled to its protection because the adjudicator has found that it is her relationship with him as a member of the same family that creates the risk in her case.

51. For these reasons I would answer the questions which I posed earlier (see para 40) in this way. It is not necessary to prove that the primary member of the family of which the asylum seeker is also a member is being persecuted for a Convention reason. Nor need it be proved that all other members of the family are at risk of being persecuted for reasons of their membership of the family, or that they are susceptible of being persecuted for that reason. This approach has the advantage that it is unnecessary to identify all those who are, and those who are not, to be treated as members of the family for the purposes of article 1A(2). Questions as to whether it includes not only the asylum seeker's sisters but his cousins and his aunts too are avoided. It avoids the circularity that arises where what is said to unite persons into a particular social group is their common fear of persecution: see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Dawson J at p 242, McHugh J at p 263.

52. In my opinion the UNHCR *Guidelines on International Protection* of 7 May 2002 state the position accurately in para 17:

“An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group.”

Care is needed in applying this guideline to cases such as K’s where it is contended that the family is a particular social group and the applicant is the only family member who is said to be at risk of persecution for reasons of his or her membership of the family. The question of causation in such cases is likely to be critical. In this case however the adjudicator was entitled to hold that the causative link had been proved by the facts which he found to have been established by the evidence.

*The particular social group in cases of female genital mutilation*

53. Female genital mutilation is carried out in Sierra Leone, as it is in other countries which engage in this practice, as part of a traditional initiation ceremony which involves the whole community. Dr Richard Fanthorpe, who has been studying Sierra Leonian history and culture for over twenty years, has provided an important insight into the background to the practice in the report which he prepared for this case. Ritual initiation into the adult world is a process of sexual separation. Groups of initiates undergo instruction by members of their own sex in powers, prerogatives and social responsibilities specific to that sex in the weeks and months following circumcision or, as he termed it, excision. It is only after initiation that girls are considered fit for marriage and motherhood. In this cultural milieu, entering the adult world wholly male or wholly female is fundamental to the proper ordering of society. The ceremonies involve the whole community. Although much of the instruction takes place in seclusion, the places where this is done are specially prepared and the whole process is carefully planned. While it could conceivably be argued that a person initiated and subjected to the process against her will was the victim of an assault causing wounding, it is impossible to imagine such a case ever reaching a court in Sierra Leone. This is because the Chiefs continue to supply, more or less, the total of day-to-day governance in the provinces. Customary law tends to insulate rural communities from modern systems of justice. Custom is the province of the Chiefs, and many of these men serve actively as patrons of initiation ceremonies.

54. On these facts it is not difficult to identify females in Sierra Leone as a particular social group. I use the word “females” as it embraces all women and girls of whatever age. General descriptive

words such as “young” and “old” are best avoided as they are too imprecise. They beg questions as to how it is to be established whether a person is young or old without resorting to the actions of the persecutor to define the group. As for females in general, there is a strong element of sexual discrimination in Sierra Leone where patriarchy is deeply entrenched which serves to identify females in that country as a particular social group. The ceremonies for young women are conducted by women. Society as a whole leaves this task entirely to women. No man will interfere with what they do. Discrimination involves making unfair or unjust distinctions to the disadvantage of one group or class of people as compared with others. Women in Sierra Leone are discriminated against because the law will not protect them from female genital mutilation. Girls and women in our jurisdiction who are at risk of being forced to undergo this process are protected by the criminal law. The Prohibition of Female Circumcision Act 1985 made female genital mutilation a criminal offence in this country. The Female Genital Mutilation Act 2003 re-enacted this offence: see for Scotland the Prohibition of Female Genital Mutilation (Scotland) Act 2005. These Acts also made it an offence for a United Kingdom national to aid, abet, counsel or procure a person who is not a United Kingdom national to carry out the process on another United Kingdom national or permanent United Kingdom resident outside the United Kingdom, even if this is done in a country where the process is legal. In Sierra Leone it is a process that society expects them to undergo.

55. The question then is whether women in Sierra Leone generally cannot constitute a particular social group because, once they have undergone the process, women are no longer at risk of being persecuted in that way. As Auld LJ put in the Court of Appeal, para 30, they are no longer under threat of such persecution by reason of being women. But it would be wrong to say that a particular social group cannot exist because not all its members are at risk. As Lord Steyn observed in *Shah and Islam* at pp 644G-645A, some homosexuals may be able to escape persecution because of their relatively privileged circumstances: see also Lord Hoffmann at p 652H. Even the most targeted of groups may contain some powerful or well-connected individuals who are able to escape the persecution that is visited on everyone else. Some women in Pakistan are able to obtain protection because of their particular circumstances. Yet these objections were held not to be a satisfactory answer to the argument that women in Pakistan generally were a particular social group.

56. It is, however, possible to define the particular social group in this case more precisely. Dr Fanthorpe says in para 11 of his report that

an uninitiated indigenous woman (as opposed to a Krio or a foreigner) represents an abomination, fit only for the worst kind of sexual exploitation. So one can say, with greater precision, that the particular social group is composed of uninitiated indigenous females in Sierra Leone. I do not think that there can be any objection to defining the group in these terms. It has the advantage of excluding from the group those who have already been initiated. They can never be said under any circumstances to be still at risk. It has the advantage too of excluding those who carry out the mutilation, all of whom have already been initiated. It excludes also those females who, although living in Sierra Leone, are not at risk because they are not members of any tribe or ethnic group which is indigenous to that country. These advantages suggest that in this case precision to that extent is desirable. But I see no need to go any further than that. The definition of the particular social group to which the applicant belongs is, after all, only part of the process of determining whether or not the definition of “refugee” as a whole in article 1A(2) is satisfied. There is no need to add to the definition of the particular social group elements which explain why particular members of the social group and not others are singled out for persecution. Those elements will have to be looked at anyway under the head of causation.

57. In a paper which he prepared following a roundtable discussion in San Remo on September 2001, *Protected characteristic and social perceptions: an analysis of the meaning of “membership of a particular social group”*, T Alexander Aleinikoff criticised the elaborate definition that was adopted by the US Board of Immigration Appeals in *In re Kasinga*, 21 I & N Dec 357, as unnecessary: see *UNHCR’s Global Consultations on International Protection*, ed Feller, Turk and Nicholson (2003), pp 263-311. The case involved a claim for asylum by a young woman who feared female genital mutilation by her tribal group. The Board defined the social group as being “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practised by that tribe, and who oppose the practice.” In his view the Board’s concern that such a narrow definition was needed to make the social group more congruent was misplaced. The persecutory conduct was visited solely on women of the tribe. It was for reasons of her membership of the tribe that she was at risk. The fact that other women might not seek to flee female genital mutilation was irrelevant both to the definition of the class and to the establishment of the nexus:

“In sum, the definition of the class must describe a group that stands apart in society where the shared characteristic of the group reflects the *reason* for the persecution. This

is importantly different from saying that a defined class must only include persons likely to be persecuted” (see p 289).

58. I agree with this approach. I would avoid attempting to define the class so as to confine it to the persons who are likely to be persecuted. It is enough that it should identify the shared characteristic – the common denominator – within the wider group that reflects the reason why membership of it gives rise to the well founded fear. In Miss Fornah’s case one can say that the wider group is composed of females in Sierra Leone. But it is the fact that she is an uninitiated indigenous female that would make her a member of a particular social group in Sierra Leone, for reasons of her membership of which she would be exposed to the risk of female genital mutilation if she were to be returned to that country.

#### **LORD RODGER OF EARLSFERRY**

My Lords,

59. The two appellants whose cases are under consideration have sought asylum in the United Kingdom on the ground that they are refugees from persecution in their respective countries. In terms of article 1A(2) of the Geneva Convention relating to the Status of Refugees the term “refugee” applies to any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country....” The question in each of the appeals is whether the appellant has a well-founded fear of being persecuted “for reasons of ... membership of a particular social group”.

60. The appellant, Mrs K, is Iranian. The adjudicator found that her husband was arrested and detained by the Iranian authorities in April 2001. Some weeks later, Revolutionary Guards searched her house and took away books and papers. About a week after that, Revolutionary Guards again searched her home, insulted Mrs K and raped her. Mrs K subsequently went into hiding with friends, but she was not molested when she went to visit her husband in prison. Nor were other members

of her family put under pressure by the authorities. None the less in September 2001 Revolutionary Guards openly approached her son's school in a manner that they must have known would cause her great fear. This was consistent with the way that the Iranian authorities acted so as to menace the families of prisoners. Fearful that the Revolutionary Guards would put further pressure on her husband by putting pressure on members of the family, especially their son, she soon after left Iran. In the current situation the families of those who are thought to be dissidents or who are otherwise of adverse interest to the authorities could well be targeted. On this basis the adjudicator found that, if Mrs K returned to Iran, there must be a serious possibility that she would be detained by reason of her association with her husband and that, once detained, she would be ill-treated in a manner that amounts to persecution.

61. So Mrs K claims that she fears persecution for reasons of being a member of the particular social group comprising the family of Mr K, who has been detained by the Iranian authorities. As a general proposition, divorced from the context of the Refugee Convention, it is obvious that a family can constitute a "particular social group". Indeed, the family could well be regarded as the archetypal social group. But, given the grand scale of the preceding and succeeding words in the Convention - race, religion, nationality, and political opinion - it might be argued that in this particular context the term "social group" was intended to apply to groups of a larger scale than a family. In the Court of Appeal, Clarke LJ alluded to just that point when he said, [2004] EWCA Civ 986, para 22:

"The appellant's case is that a family group naturally falls within the definition on the basis that it is just that; it is a social group and thus a particular social group. It is not to my mind easy to see why it is not a particular social group for the purposes of the Convention, unless a particular family is not a sufficiently large group within society to be regarded as a particular social group."

His Lordship did not find it necessary to reach a final conclusion on the point, but he was plainly sympathetic to the view that a family can be a particular social group for the purposes of the Convention.

62. I accept that view. I see no basis for construing the words of the Convention in a restrictive sense. It is not hard to imagine people being

singled out and persecuted simply because of their membership of a royal family which once ruled a country but has now been overthrown. The same goes for ousted dictators. In either case, if members of the family seek asylum abroad, they are surely to be regarded as refugees for the purposes of the Convention. There is no reason, however, to stop at the families of fallen crowned heads or dictators. All that matters is that the person concerned should have a well-founded fear of persecution for reasons of being a member of a particular family which, for some reason or another, has been targeted for serious ill-treatment, against which the state affords no protection.

63. Here, on the adjudicator's findings, it is not known whether Mr K is someone who would himself have a claim to refugee status. In my view, that is irrelevant. Even if Mr K was detained for completely valid reasons, singling out the members of his family for mistreatment simply because they are members of the family of a detainee would amount to persecution for the purposes of the Convention. I would respectfully adopt the cogent reasoning of Madgwick J in the Federal Court of Australia in *Sarrazola v Minister for Immigration and Multicultural Affairs (No 3)* [2000] FCA 919, para 31. Rejecting the approach of Thorpe LJ in the Court of Appeal in *Quijano v Secretary of State for the Home Department* [1997] Imm AR 227, 229 his Honour said that the postulation of "absurdity"

"if a member of the family of a person first harmed should fall within the purview of the Convention although that person might not, with respect overlooks what is regrettably a matter of common experience. The sorts of irrational, discriminatory prejudices that result in persecution of social groups (including ethnic, religious and racial groups) not infrequently begin with antipathy towards one member of the group for non-group reasons. It then becomes transmuted into antipathy towards group members for their group affiliation or identification. An example will I hope make this clear. A is deeply humiliated by B, A then being unaware that B is, say, Jewish or homosexual; A thereupon threatens B; for that or some other reason B leaves the scene; A soon discovers B's group identity and, rankling, comes to hate and persecute other members of the group for reasons of such membership. The only absurdity is that variants of this scenario are depressingly common."

64. On behalf of the Secretary of State Mr Singh QC did indeed accept that, in principle, a family could be a particular social group for the purposes of the Convention. But, he argued, the Convention applied only where the family was targeted for itself, rather than for anything that any of its members had done. For, in that eventuality, although the victims were members of the family of the offending individual, they were really being targeted for their relationship or association with him. The example which he gave of a family whose members were persecuted simply for their membership of the family was the Bourbons in France after the Revolution: members of that family were guillotined merely because they were members of the royal family and not because of anything that, say, Louis XVI had done. Even assuming – which is far from obvious, to say the least – that the persecution of the Bourbons was unrelated to a perception that the Bourbon kings had misruled France, there is nothing in the wording of the Convention to support that narrow interpretation. Indeed, as Mr Blake QC pointed out, it would mean that, despite the Home Secretary’s acceptance that fear of persecution for reasons of membership of a family could be a ground for granting asylum, in practice a claim on that basis could hardly ever arise. The class would be emptied of virtually all content.

65. My Lords, all this is an elaborate way of saying that, in my respectful view, Laws J was all too plainly right when he said in *R v Immigration Appeal Tribunal, Ex p De Melo* [1997] Imm AR 43, 49 “It seems to me that membership of a family is, in the ordinary way, plainly membership of a particular social group.” Support for that view is to be found in the international jurisprudence, especially in the decisions of the United States Court of Appeals for the Ninth Circuit in *Thomas v Gonzales* 409 F 3d 1177, 1183-1188 (2005) and of the Federal Court of Australia in *Sarrazola v Minister for Immigration and Multicultural Affairs (No 3)* [2000] FCA 919. In the latter case, Madgwick J said, at para 33:

“The Universal Declaration of Human Rights (‘UDHR’) itself recognises the family as the ‘natural and fundamental group unit of society [which] is entitled to protection by society and the State’: art 16(3) and proclaims that ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as ... birth or other status’: art 2. It is a commonplace that society may discriminate against a person because of his or her family membership (that is, an aspect of his or her ‘birth or ... status’). Families of criminals for example often suffer in this way. It is

reasonable to say that the inclusion of the reference to ‘birth or other status’ in the UDHR was some recognition of this kind (among other kinds) of discriminatory tendency.”

Dismissing an appeal from Madgwick J’s decision, in *Minister of Immigration and Multicultural Affairs v Sarrazola (No 4)* [2001] FCA 263, para 31 Merkel J held that

“it is entirely consistent with the Convention that a person’s freedom from persecution on the basis that he or she is a member of a particular social group, namely a family, can be one of the fundamental rights and freedoms assured to refugees.”

He went on to conclude, at para 33:

“In my view there can be little doubt that persecution by reason of being a member of a particular family can constitute persecution for reasons of membership of a particular social group for the purposes of art 1A(2).”

66. In para 35 of his judgment in *Sarrazola (No 3)* Madgwick J noted that it is not necessary that the whole of a society or any large part of it discriminate against the members of the family for the Convention to apply. I accept that, because what matters in such cases is that the state does not afford protection from the persecution which the minority are disposed to carry out. In the present case, there is no finding about the attitude of Iranian society in general to the families of detainees. But no difficulty arises on that score: it would be quite enough if the Revolutionary Guards, agents of the Iranian state, identified the families of those detained by the state, such as the members of Mr K’s family, as a distinct group and persecuted them.

67. Therefore the family of Mr K, the detainee, can be regarded as a social group for the purposes of the Convention. Mr Singh submitted that it did not follow that Mrs K had been, or would be, mistreated for reasons of being a member of Mr K’s family. As Mr Singh himself pointed out, this argument was really an aspect of his argument about the family as a particular social group. Drawing support from *Quijano v*

*Secretary of State for the Home Department* [1997] Imm AR 227 and, in particular, the judgment of Morritt LJ at p 233, he contended that the adjudicator had been wrong to conclude that Mrs K had been singled out for ill-treatment for reasons of her membership of Mr K's family, ie simply because she was a member of Mr K's family. After all, other members of his family had not been ill-treated. So the correct inference to draw was that Mrs K had been ill-treated not for reasons of her membership of Mr K's family but because of her particularly close relationship with Mr K – perhaps giving rise to a supposition on the part of the Revolutionary Guards that she had been involved in whatever activity had led to Mr K's detention. Doubtless, the argument along those lines was very properly advanced before the adjudicator. And, indeed, on the basis of his primary factual conclusions, the adjudicator might have reached the conclusion which Mr Singh favoured. But, equally, since the adjudicator accepted that “in the current situation in Iran the families of those who are thought to be dissidents or who are otherwise of adverse interest to the authorities could well be targeted”, it was certainly open to him to infer from his factual conclusions as a whole that Mrs K has a well-founded fear of persecution for reasons of her membership of Mr K's family. There is no basis for an appellate court to second-guess the adjudicator on that matter. In so far as the decision of the Court of Appeal in *Quijano v Home Secretary* may be thought to lay down a rule of law which is inconsistent with this straightforward approach, I would overrule it.

68. For these reasons I would allow Mrs K's appeal.

69. I turn now to the case of the appellant Zainab Esther Fornah. She is from Sierra Leone where the practice of female genital mutilation is widespread as part of a female initiation rite. It is carried out by women who have themselves been initiated by mutilation. Politicians of all parties support the continuation of the practice and the state authorities make no attempt to stop it or to intervene to protect any young women, such as the appellant, who do not wish to undergo mutilation. At the time when she came to the United Kingdom and applied for asylum, the appellant was aged 15. Her initial application was rejected but the adjudicator allowed her appeal on the ground that she had a well-founded fear of enforced genital mutilation for reasons of her membership of a particular social group, namely, that of young, single Sierra Leonean women. The Immigration Appeal Tribunal allowed the Home Secretary's appeal and the Court of Appeal, Arden LJ dissenting, upheld that decision.

70. It is important to emphasise that, in line with international opinion, the Home Secretary accepts that the practice of genital mutilation is abhorrent. More particularly, he accepts that it amounts to inhuman and degrading treatment in terms of article 3 of the European Convention on Human Rights. It follows that it would be a breach of article 3 for him to return the appellant to Sierra Leone and he does not intend to do so. The question which divides the parties is simply whether the appellant faces the enforced serious harm involved in mutilation “for reasons of ... membership of a particular social group” in terms of the Refugee Convention. If so, the Home Secretary accepts that the appellant has a well-founded fear of persecution and is to be regarded as a refugee under the Convention. The point at issue is really very narrow.

71. At various stages in the course of the proceedings from the adjudicator up to your Lordships’ House, the appellant has identified the particular social group of which she is a member in different ways. I have already mentioned the group which the adjudicator specified. The principal contention advanced on her behalf before the House was that the group simply comprised women and girls in Sierra Leone. Since it is accepted that the Krio tribe does not practise female genital mutilation, the group can, however, be narrowed to women and girls in tribes in Sierra Leone which practise female genital mutilation. For the sake of brevity, I describe this group as (all) women and girls. It is accepted that in Sierra Leone, unlike in some other societies, mutilation is performed only once. So, unusually, this is a form of persecution which the persecutor will wish to carry out only once, however long the victim lives. On the appellant’s fallback argument, the alternative group would comprise women and girls who are in tribes in Sierra Leone which practise female genital mutilation and who have not yet been mutilated. Since the mutilation is part of an initiation rite, the group could be further described as women and girls who are in tribes in Sierra Leone which practise female genital mutilation as part of an initiation rite and who have not yet been initiated and mutilated. For convenience, they can be described as intact or uninitiated women and girls.

72. If the appellant is faced with persecution for reasons of her membership of one or other of these groups, in one sense it is academic to which she is thought to belong. Nevertheless, my own preference, for reasons which I shall attempt to explain as briefly as I can, is for the narrower group.

73. A convenient summary of the approach which the case law suggests should be followed in identifying a particular social group for the purposes of the Geneva Convention is to be found in the opinion of Gleeson CJ, Gummow and Kirby JJ in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 400, para 36:

“First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.”

74. I accept, of course, that all the victims of this practice of genital mutilation are, by the very nature of the act, women. The harm is “gender-specific”. So, being a woman is a *causa sine qua non* of being a victim: in other words, “but for” being a woman, the persons concerned could not be selected as victims of the practice. But, for the kinds of reasons outlined by Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Shah* [1999] 2 AC 629, 654D-F, to say that the persons concerned are persecuted simply for reasons of being women or girls may be an oversimplified approach for the purposes of the Convention. From the material which was put before the House it appears to me that women qua women are not disparaged in the tribes in Sierra Leone which practise mutilation. The persons who are disparaged are women who have not undergone the initiation ceremony which involves the process of mutilation at a time when, like their contemporaries, they could have done so. As the agreed statement of facts explains: “Uninitiated women are considered to be children and are not accepted as adults by society. They are generally barred from taking up leadership positions in Sierra Leone society.” It is further agreed that, as Dr Richard Fanthorpe explains in para 11 of a report prepared for the purposes of this case “even among members of the Sierra Leonean underclass an uninitiated indigenous woman (as opposed to a Krio or a foreigner) represents an abomination, fit only for the worst kind of sexual exploitation.” The group who are persecuted are these uninitiated and intact women who are forced to undergo mutilation.

75. To put the point another way, if one were to stop the person who was about to perform the mutilation of an unwilling victim and ask why she was doing it, she would not say that it was because the victim was a woman, but because she was an intact or uninitiated woman. In terms of

the Convention, it would not be for reasons of her membership of the social group of women and girls, but for reasons of her membership of the social group of women and girls who are uninitiated and intact. To put the matter in yet another way, while it is not necessary that all members of the social group in question are persecuted before one can say that people are persecuted for reasons of their membership of the group, it is necessary that all members of the group should be susceptible to the persecution in question. See the first of the propositions stated in the passage from *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 400, which I quoted in para 73. This requirement is not met in the case of the group comprising all women and girls since it will include women and girls who have been initiated and who, according to the practice in Sierra Leone, will not be subjected to the ordeal of mutilation for a second time. In my view, it is therefore not appropriate for purposes of the Convention to say that the uninitiated, intact, women are persecuted simply for reasons of their membership of this wider social group comprising all women and girls in the relevant tribes.

76. There is no doubt, of course, that all the women in a given society can comprise a particular social group for purposes of the Convention. That was settled by the decision of the House in *R v Secretary of State for the Home Department, Ex p Shah*. The third proposition in the summary in *Applicant S v Minister for Immigration and Multicultural Affairs* must be read accordingly. But there is no particular virtue in defining the group so widely. Of course, persecution for reasons of membership of that group equates to persecution for reasons of gender – which slots easily into the sequence of race, religion, nationality and political opinion. But, even if there is widespread discrimination against women in various aspects of life in Sierra Leone, that is not in itself a sufficient reason to overlook the true, more specific, reason for the persecution of these intact women.

77. It seemed to me that Ms Webber favoured the wider group because she feared that, if she identified the particular group as intact women, she would be vulnerable to Mr Singh's charge that she was impermissibly defining the group for the purposes of the Convention by reference to the persecution – a point on which the appellant lost in the Court of Appeal. The locus classicus for a warning against that error is the judgment of McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs and another* (1997) 190 CLR 225, 263 where he said inter alia:

“[P]ersons who seek to fall within the definition of ‘refugee’ in art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the ‘particular social group’ of which they claim membership. If it were otherwise, art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution.”

This approach was approved in *R v Secretary of State for the Home Department, Ex p Shah* [1999] 2 AC 629, 639-640, 656 per Lord Steyn and Lord Hope of Craighead. It is also reflected in the summary in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 400, para 36.

78. There is nothing in the circularity argument in the present case. As the passages which I have quoted from the agreed facts and from Dr Fanthorpe’s report demonstrate, women who remain uninitiated, when their contemporaries have undergone the rite involving mutilation, are a despised group in Sierra Leonean society. They are treated differently from other women – indeed they are not treated as adults at all. They are therefore, all too clearly, a distinct group within the society of Sierra Leone – which is, presumably, why so many women undergo mutilation in order not to be included in that group. But, again, the passages in question suggest that not all girls and women do undergo mutilation – with the result that they remain in this despised group whose members are generally not permitted to assume a leadership role in society.

79. In argument Mr Singh accepted that, if the intact women were not merely despised but were subjected to some other form of persecution, say, incarceration in harsh conditions, intact women would count as a social group for purposes of the Geneva Convention. So his argument was essentially that the group of intact women lay outside the protection of the Convention because the serious harm to which they were exposed took the form of genital mutilation. That is not a tenable position. The actions of those who persecute these women by mutilating them certainly serve to reinforce the identity of the particular social group of intact and uninitiated women. But that is not inconsistent with these women being regarded as a particular social group for the purposes of

the Convention. To quote another well-known passage from the opinion of McHugh J in the case of *Applicant A* (1997) 190 CLR 225, 264:

“Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.”

Similarly, it is the attribute of being uninitiated and so intact and not the persecutory act of mutilating them which identifies the women concerned as a particular social group in Sierra Leone.

80. For these reasons I am satisfied that the appellant belongs to the group of uninitiated intact women who face persecution by enforced mutilation. If I am wrong in choosing that more limited group, then I would, of course, accept that the appellant falls within the larger social group of women and girls who face enforced mutilation.

81. Mr Singh submitted, however, that what happened to the women in this case could not be regarded as persecution because it was carried out by women who, on the appellant’s principal submission, are members of the social group in question. On the approach which I prefer, the point does not arise since the women who carry out the mutilation of the intact women have all undergone initiation and mutilation in the past and so do not fall into the social group of intact uninitiated women and girls whose members are the victims. But, even on the wider approach, the argument is not compelling. I accept, of course, that usually persecution is carried out by those who are not members of the persecuted group. But that is not always so. For various reasons - compulsion, or a desire to curry favour with the persecuting group, or an attempt to conceal membership of the persecuted group - members of the persecuted group may be involved in carrying out the persecution. Here, for whatever misguided reasons, women inflict the mutilation on other women. The persecution is just as

real and the need for protection in this country is just as compelling, irrespective of the sex of the person carrying out the mutilation.

82. For these reasons I am satisfied that Ms Fornah is to be regarded as a refugee in terms of the Geneva Convention. I would accordingly allow the appeal in her case also.

## **BARONESS HALE OF RICHMOND**

My Lords,

83. My noble and learned friend, Lord Bingham of Cornhill, has said everything that needs to be said about each of these appeals. The answer in each case is so blindingly obvious that it must be a mystery to some why either of them had to reach this House. I would like to add a few words only because each case, in its different way, raises issues of gender-related and gender specific persecution.

84. Unlike most modern constitutions and human rights instruments, the Refugee Convention does not list sex amongst the reasons for persecution which automatically give rise to a claim for refugee status. It does not even list sex amongst the prohibited reasons for discriminating between different classes of refugees in article 3 of the Convention: a proposal to include it was resisted, either on the ground that such discrimination was unthinkable or on the ground that it was inevitable: see James C Hathaway, *The Rights of Refugees under International Law* (2005, pp 255-256). But the world community has recognised the special problems of refugee women since at least the Nairobi Conference of 1985: see UNHCR Executive Committee Conclusions on *Refugee Women and International Protection*, 18 October 1985. Such has been the progress that the San Remo Expert Roundtable in September 2001 concluded that:

“The refugee definition, properly interpreted, can encompass gender-related claims. The text, object, and purpose of the Refugee Convention require a gender-inclusive and gender-sensitive interpretation. As such, there would be no need to add an additional ground to the Convention definition.”

85. Though time was that such issues were ignored or undervalued by the refugee accepting States, we had thought that in this country, at least since the ground breaking decision of this House in *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] UKHL 20; [1999] 2 AC 629, such times were past. As the UNHCR says, in paragraph 5 of its *Guidelines on Gender-Related Persecution* (published on 7 May 2002, as a result of the San Remo meeting):

“Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognised. In the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State practice generally and in academic writing. These developments have run parallel to, and have been assisted by, developments in international human rights law and standards . . .”

86. In other words, the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society. States parties to the Refugee Convention, at least if they are also parties to the International Covenant on Civil and Political Rights and to the Convention on the Elimination of All Forms of Discrimination against Women, are obliged to interpret and apply the Refugee Convention compatibly with the commitment to gender equality in those two instruments.

#### *The persecution feared*

87. It was never in dispute that the harm which these two women feared was sufficiently serious to amount to persecution. Nor, eventually, was it disputed that their fears were well-founded. But it is worthwhile looking at the harm in a little more detail, because in each case it was either wholly or partly gender-specific.

*Mrs K's case*

88. Mrs K had been raped by the Revolutionary guard. As she put it in her written statement shortly after arriving in the United Kingdom:

“About one week later they came again to the house. This time there were three came into the house, they were different people. They came in an afternoon, this was really horrible, they said horrible things to me and I had not been properly covered when I opened the door and they insulted me. They searched everywhere.”

Only later did she bring herself to reveal to her community psychiatric nurse that the insult had been rape. The adjudicator considered carefully whether the lateness of the allegation undermined its credibility. But he accepted from the objective country evidence that “in the particular context of Iranian Islamic society even rape is accounted a shame for the victim rather than the perpetrator”. Having heard her evidence, he considered that the description given in her statement “was as near as this lady could bring herself in the aftermath of what was undoubtedly a shocking experience. I fully accept that the mores of Iranian society and in particular the attitude to women would make this a shameful matter to her and I do not accept that the late revelation of the rape undermines her credibility on the point.” She had then gone into hiding. But when the revolutionary guards came to her son’s school she determined to leave. The adjudicator concluded that if returned, she would be identified as the wife of a prisoner, someone to whom “adverse attention had been applied by the revolutionary guards”. There must be a “serious possibility that she would be detained by reason of her association with her husband (for whatever reason he was detained) and once detained a serious possibility that she would be ill-treated in a manner that amounts to persecution.”

89. Of course, not all such complaints are credible. But, if I may say so, this was an admirable example of a gender-sensitive approach to the situation in which this lady found herself – in accepting, not only the rape, but also that the final trigger for her flight might be, not the risk to herself, but the risk to her child.

*Miss Fornah's case*

90. Miss Fornah feared that if returned to Sierra Leone she would be subjected to what used to be known in this country as “female circumcision”, is now known here as “female genital mutilation” (FGM), but is increasingly referred to internationally by the more neutral term “female genital cutting”. This is to avoid alienating the communities which practise it. The common aim, however, is to persuade them that it is a harmful and degrading practice which can be stopped without giving up meaningful aspects of their culture. The international community has been dedicated to ending FGM since at least the International Conference on Population and Development in Cairo in 1994: the Programme of Action specifically mentioned FGM and called for its prohibition. In the following year, the Declaration and Platform for Action of the Fourth World Conference on Women in Beijing also called for an end to FGM. As the World Health Organisation explains, in its Policy Guidelines for Nurses and Midwives on Female Genital Mutilation,

“Internationally, there is a shift away from thinking about female genital mutilation as primarily a health issue and towards considering it as an issue of women’s health and human rights.”

91. The procedures vary from community to community but cannot in any way be compared to the removal of a boy’s foreskin. In the 1997 Joint Statement by the World Health Organisation, UNICEF and the United Nations Population Fund on *Female Genital Mutilation*, FGM is defined as

“. . . all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons.”

Four types were identified:

“Type I      Excision of the prepuce, with or without excision of part or all of the clitoris.

Type II	Excision of the clitoris with partial or total excision of the labia minora.
Type III	Excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening (infibulation).
Type IV	Unclassified: includes pricking, piercing or incising of the clitoris and/or labia; stretching of the clitoris and/or labia; cauterization by burning of the clitoris and surrounding tissue; scraping of tissue surrounding the vaginal orifice (angurya cuts) or cutting of the vagina (gishiri cuts); introduction of corrosive substances or herbs into the vagina to cause bleedings or for the purposes of tightening or narrowing it; and any other procedure that falls under the definition of female genital mutilation given above.”

92. As the Statement explains, these procedures are irreversible and their effects last a life time. They are usually performed by traditional practitioners using crude instruments and without anaesthetic. Immediate complications include severe pain, shock, haemorrhage, tetanus or sepsis, urine retention, ulceration of the genital region and injury to adjacent tissue. Long term consequences include cysts and abscesses, keloid scar formation, damage to the urethra resulting in urinary incontinence, dyspareunia (painful sexual intercourse) and sexual dysfunction. Infibulation can bring particularly severe consequences, and it may be necessary to cut open the skin to enable intercourse or childbirth to take place. It is likely that the risks of maternal death and stillbirth are greatly increased.

93. Nor can the context be compared with male circumcision. As the UNICEF Innocenti Digest, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting* (2005) observes:

“In the case of girls and women, the phenomenon is a manifestation of deep-rooted gender inequality that assigns them an inferior position in society and has profound physical and social consequences. This is not the case for male circumcision, which may help to prevent the transmission of HIV/AIDS.”

As can be seen, almost all FGM involves the removal of part or all of the clitoris, the main female sexual organ, equivalent in anatomy and physiology to the male penis. The underlying purposes of doing this are to lessen the woman's sexual desire, maintain her chastity and virginity before marriage and her fidelity within it, and possibly to increase male sexual pleasure. But these have been translated into powerful social purposes, to initiate girls into full womanhood, to maintain cultural heritage, social integration and social cohesion. Women who have not been cut may therefore face social exclusion and be denied the possibility of marriage and family life. Women themselves are brought up to believe in this as strongly as men. Sometimes, and not surprisingly, women themselves perform the operation as part of an elaborate initiation ceremony. This does not, of course, in any way detract from its purpose in serving and preserving the inferior position of women in the society. Patriarchal societies have often recruited women to be the instruments of the continued subjection of their sex.

94. Hence, it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment within the meaning, not only of article 3 of the European Convention on Human Rights, but also of article 1 or 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 7 of the International Covenant on Civil and Political Rights, and article 37(a) of the Convention on the Rights of the Child.

95. FGM is practised by all indigenous ethnic groups in Sierra Leone, including the Temne tribe to which Miss Fornah belongs, but not by the Krios (Creoles). UNICEF and others estimate that between 80 and 90 per cent of women and girls have undergone it. The form practised is excision of the clitoral hood and/or clitoris. It is carried out at adolescence as part of an elaborate ritual of initiation into the women's secret societies or Bondo. Uninitiated women are considered to be children, even, according to Dr Richard Fanthorpe, an "abomination". Entering the adult world wholly male or wholly female is seen as fundamental to the proper ordering of society. The purpose, therefore, is to remove a girl's potential for maleness. The civil war led to something of a breakdown in or distortion of traditional cultural practices. Since its ending, re-establishing the traditional social order has been seen as a priority by many. NGOs report that mass initiations have been carried out in refugee camps; older girls and women have been initiated; and the well-publicised international efforts against FGM have been countered by active resistance from the women's secret

societies. There is currently no law against FGM and no prospect of the authorities intervening to protect a woman or girl who does not want it.

96. No-one disputes that FGM amounts to persecution or that Miss Fornah's fear of persecution is well-founded. The evidence also suggests that the treatment she would face were she to succeed in resisting FGM might itself amount to persecution. Nor is there any dispute that, although the treatment itself would be meted out by non-State actors, the State is unable or unwilling to offer her adequate protection against it.

#### *Particular social group*

97. Not all persecution gives rise to a valid asylum claim. Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. People fleeing national and international wars, famine or other natural disasters are referred to as refugees, and offered humanitarian aid by the international community, but they do not generally fall within the definition in the 1951 Convention. Asylum can only be claimed by people who have a well-founded fear of persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion". Of these, "membership of a particular social group" has proved the most difficult to define, but is increasingly being used to push the boundaries of refugee law into gender-related areas such as domestic violence, enforced family planning policies, and FGM: see T. Alexander Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" in *UNHCR's Global Consultations on International Protection*, ed Feller, Turk and Nicholson (2003), pp 263-311.

98. As the UNHCR Guidelines on *Membership of a Particular Social Group* (published on 7 May 2002, the same day as the *Guidelines on Gender-Related Persecution*) point out in paragraph 2,

"While the ground needs delimiting – that is, it cannot be interpreted to render the other four Convention grounds superfluous - a proper interpretation must be consistent with the object and purpose of the Convention. Consistent with the language of the Convention, this ground cannot be interpreted as a 'catch all' that applies to all persons fearing persecution. Thus, to preserve the structure and

integrity of the Convention's definition of a refugee, a social group cannot be defined *exclusively* by the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group)."

The UNHCR's own Handbook is not particularly helpful. It says, at paragraph 77, that a particular social group "normally comprises persons of similar background, habits or social status". This reflects the understanding in 1951 that certain regimes might persecute former members of the landowning, capitalist or bourgeois classes. The recognition that gender may constitute a particular social group is more recent.

99. The 2002 Guidelines, drawn from the conclusions of the San Remo Expert Roundtable, which themselves drew heavily on a previous paper by Professor Aleinikoff, identify the two approaches which have dominated decision-making in common law countries. First is the "protected characteristics" approach, which identifies a group by reference to a unifying characteristic which is either immutable or so fundamental to human dignity that a person should not be compelled to change it: this stems from the approach taken in the United States in *In re Acosta* (1985) 19 I & N 211 and in Canada in *Attorney General of Canada v Ward* [1993] 2 SCR 689. Second is the "social perception" approach, which identifies a group by reference to a common characteristic which makes them a recognisable group and sets them apart from society as a whole: this stems from the Australian case of *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225. Not surprisingly, of course, women, families and homosexuals can qualify as particular social groups under either approach; but the social perception approach might identify "set apart" groups based on a common characteristic which is neither immutable nor fundamental.

100. The UNHCR believes that the two approaches can be reconciled, and proposes the following definition in paragraph 11 of the Guidelines:

"A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to

identity, conscience or the exercise of one's human rights.”

The Guidelines go on to comment in paragraph 12 that

“It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.”

This is repeated in paragraph 30 of the contemporaneous UNHCR *Guidelines on Gender-Related Persecution*, also resulting from the conclusions of the San Remo Expert Roundtable, which in turn drew heavily upon a paper on “Gender-related Persecution” by Rodger Haines QC, Chairman of the New Zealand Refugee Status Appeals Authority. Paragraphs 30 and 31 continue:

“. . . . Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries . . .

The size of the group has sometimes been used as a basis for refusing to recognise ‘women’ generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution. It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.”

101. Thus, while the Guidelines stop short of saying directly that women are always a particular social group, they do make it clear that if a woman is persecuted because she is a woman and women generally are assigned an inferior status in the society, she should qualify for recognition as a refugee.

102. Of course, much of the harm feared by women, including FGM, is perpetrated, not directly by the State, but by non-State agents. In paragraph 21, the Guidelines make another important point about the causal link (“by reason of”) and the ground for the persecution:

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

103. My Lords, each of the guidelines quoted above is consistent with, and in some cases directly derived from, the decision of this House in *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] UKHL 20; [1999] 2 AC 629. I believe that they represent the correct approach. How then should they be applied in the two cases before us?

*Mrs K’s case*

104. Mrs K initially put forward two possible Convention grounds for her feared persecution. First was “imputed political opinion”, that is that the authorities would attribute to her the same political opinions that had caused them to detain her husband. The adjudicator rejected this, because he could not find that her husband had been detained for political reasons. He went on:

“However it seems to me that the persecution in respect of which this lady has a well founded fear would be persecution of her as a member of a social group that is to say as a member of her husband’s family. Membership of a family is an immutable characteristic. It is not material that her husband may not have been detained and even maltreated for a Convention Reason. What is material is that this lady has a well founded fear of persecution because of her membership of this family.”

This reasoning did not take into account the Court of Appeal's decision in *Quijano v Secretary of State for the Home Department* [1997] Imm AR 227. This, as the Immigration Appeal Tribunal stated, "can simply be stated as being that where the primary member of a family is not persecuted for a Convention reason, then the secondary members cannot be said to be persecuted for being the members of the primary person's family."

105. There is no warrant in the Convention for that line of reasoning. The notion of primary and secondary members of the family is relevant when the receiving State is considering how to implement the recommendation (in the Final Act of the Conference that adopted the 1951 Convention but not in the Convention itself) that Governments take the necessary measures to protect the refugee's family, especially with a view to ensuring that the unity of the family is maintained: hence if the head of the family meets the criteria for recognition as a refugee, his dependants are normally granted refugee status as well. The notion of primary and secondary members may also be relevant where a Convention ground for persecuting one member of the family is imputed to others – perhaps the authorities may be more likely to impute a husband's religion or political views to his wife than the other way around. But the authorities deciding upon Convention claims should not resort to such sexist reasoning when deciding upon any individual's claim. It is necessary to look at the claimant in her own right, not as the adjunct or dependant of some-one else. Indeed, even when women arrive with their husbands, the Guidelines advise (in paragraph 36) that they should be interviewed separately and that it should be explained to them that they may have a valid claim in their own right.

106. Once the *Quijano* problem has gone, it is clear that the adjudicator was entitled to conclude that Mrs K feared persecution precisely because of her membership of a particular social group, namely her husband's family. He would have been entitled to reach that conclusion even if the revolutionary guards had only come after her; but the authorities had also shown interest in their seven year old son; and (although the adjudicator does not refer to this) there was evidence that they had searched Mrs K's parents' house the day after they had searched hers. The family group was of interest to the authorities precisely because it was a family group. The cohesion and solidarity of a family means that any individual can be got at through the medium of other individuals in the group. Because of the crucial role within the family assigned to women in many societies, the wife and mother may be a particular target for this type of persecution.

107. As the summary conclusions of the San Remo Expert Roundtable put it in paragraph 8 (in a passage derived from the judgment of Sedley J in *Shah*: [1997] Imm AR 145, at 153):

“Adjudicating refugee claims based on membership of a particular social group involves a global appraisal of an individual’s past and prospective situation in a particular cultural, social, political, and legal context, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.”

Protecting people against ill-treatment which targets members of a particular family, not for what they have done but for who they are, a practice well known to those who had lived through the horrors of the second world war when the 1951 Convention was drafted, is well within both the language and the purpose of the Convention.

#### *Miss Fornah’s case*

108. While the *Quijano* decision explains why Mrs K’s case had to reach this House, it is much harder to explain why Miss Fornah’s had to do so. We have been referred to case law from many different jurisdictions in which FGM has been held, not only to be persecution, but persecution for a Convention reason. We have been referred to none at all where it has not. The United Kingdom is apparently alone in the civilised world in rejecting such a claim. Nor do we reject them all: the Court of Appeal in *P and M v Secretary of State for the Home Department* [2004] EWCA Civ 1640; [2005] Imm AR 84 had no difficulty in accepting the claim of a young Kenyan Kikuyu woman who feared that her father would force her to undergo FGM.

109. It cannot make any difference that the practice is widespread and widely accepted in Sierra Leonean society. As the UNHCR Guidelines remind us, in paragraph 5:

“ ... harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds.”

There is no doubt that FGM is in breach of international human rights law and standards: indeed, the Secretary of State does not argue otherwise.

110. It cannot make any difference that it is practised by women upon women and girls. Those who have already been persecuted are often expected to perpetuate the persecution of succeeding generations, as any reader of *Tom Brown's Schooldays* knows.

111. Nor can it be seriously doubted that the persecution is visited upon its victims because they are members of a particular social group. It is only done to them because they are female members of the tribes within Sierra Leone which practise FGM. They share the immutable characteristics of being female, Sierra Leonean and members of the particular tribe to which they belong. They would share these characteristics even if FGM were not practised within their communities. Their social group exists completely independently of the initiation rites it chooses to practise.

112. The stumbling block seems to have been the fact that FGM is a once and for all event. Once done, it can neither be undone nor repeated. Thus, it was argued, if many members of the group are no longer at risk, because they have already suffered, it can no longer constitute a group for this purpose. But if the group has to be defined only to include those at risk, it then looks as if the group is defined solely by the risk of persecution and nothing more.

113. This is a peculiarly cruel version of Catch 22: if not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone. But the reasoning is fallacious at a number of levels. It is the persecution, not the fear, which has to be "by reason of" membership of the group. Even if the group is reduced to those who are currently intact, its members share many characteristics which are independent of the persecution – their gender, their nationality, their ethnicity. It is those characteristics which lead to the persecution, not the persecution itself which leads to those characteristics. But there is no need to reduce the group to those at risk. It is well settled that not all members of the group need be at risk. There is nothing in the Convention to say that all members have to be susceptible. It should not matter why they are not at risk. If the authorities of a particular State had a policy of mutilating all male

members of a particular tribe or sect by cutting off their right hands, we would still say that the intact members of the tribe or sect faced persecution because of their membership of the tribe or sect rather than because of their intactness. To return to Professor Aleinikoff, at p 289:

“In sum, the definition of the class must describe a group that stands apart in society where the shared characteristic of the group reflects the *reason* for the persecution. This is importantly different from saying that a defined class must only include persons likely to be persecuted.”

114. For these reasons, the particular social group might best be defined as Sierra Leonean women belonging to those ethnic groups where FGM is practised: then it is quite clear that the reason for the persecution is the membership of that group. But it matters not whether the group is stated more widely, as all Sierra Leonean women, or more narrowly, as intact Sierra Leonean women from those ethnic groups. For all of them, the group has an existence independent of the persecution.

### *Conclusion*

115. I therefore agree that both these appeals should be allowed, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill. For the reasons given by my noble and learned friend, Lord Hope of Craighead, this is by no means purely of academic interest to these women or to the many other women in the world who flee similar fears. They are just as worthy of the full protection of the Refugee Convention as are the men who flee persecution because of their dissident political views.

## **LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

116. These two appeals raise questions as to the proper interpretation and application of just six words in an international treaty: six words (italicised below for convenience) in the definition of “refugee” in article 1A (2) of the 1951 Refugee Convention as someone who “owing

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

117. If someone fears persecution because of race, or religion, or nationality, or political opinion, he is entitled to asylum. All these concepts have been fully explored in the jurisprudence and widely interpreted as appropriate in an international treaty drawn up with broad humanitarian aims in mind. So too a person is entitled to asylum if he fears persecution because of his “membership of a particular social group”. (It is only in relation to this category that reference to “membership” is necessary: in relation to religion, for example, the persecutor may be acting because of his own religious beliefs; his victim may have none.) What, then, is “a particular social group”? Notwithstanding that this too has been the subject of a very great deal of juridical and academic discussion around the world I was, I confess, intent at the conclusion of argument on these appeals on writing a full judgment of my own. Having now, however, had the advantage of reading the detailed opinions of each of my noble and learned friends (with all of whom I am in substantial agreement) I really cannot think that a fifth fully reasoned speech would contribute anything of value to an understanding of this issue. I content myself, therefore, with but four comments.

118. First, I entirely accept the definition of a particular social group contained in paragraph 11 of the UNHCR 2002 Guidelines as set out in para 15 of Lord Bingham’s speech. The EU Council Directive 2004/83/EC (the Asylum Qualification Directive) and any Regulations brought into force under it will, I conclude, have to be interpreted consistently with this definition.

119. Secondly, with regard to the *Fornah* appeal, I myself would prefer to define the relevant group (in line with Arden LJ’s dissenting judgment in the Court of Appeal) as “uninitiated indigenous females in Sierra Leone” (as formulated by Lord Hope at para 56 of his speech and proposed by Lord Rodger at para 74 of his speech, and essentially for the reasons they give—principally to exclude the majority of women who have already been initiated and are plainly no longer at risk). That said, I do not disagree with Lord Bingham and Baroness Hale that the group could if necessary be more widely defined to include even the initiated on the basis that all Sierra Leonean women suffer

discrimination and subjugation of which the practice of FGM constitutes merely an extreme and ghastly manifestation.

120. Thirdly, I would stress the narrowness of the “circularity” argument: the argument that there must necessarily be excluded from Convention protection the persecution of any group defined solely by the fact that its members face persecutory treatment. As paragraph 11 of the UNHCR Guidelines puts it, the people in a qualifying group must share a common characteristic “other than their risk of being persecuted”. *Secretary of State for the Home Department v Savchenkov* [1996] Imm AR 28 is a good illustration of the circularity argument in operation: the Court of Appeal there refused to accept as a particular social group those persecuted by the mafia for having refused to join or cooperate with it. Another instance of where the argument would apply is to be found in McHugh J’s judgment in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 265: “[t]hose indiscriminately killed or robbed by guerrillas”. By contrast, however, as McHugh J had just explained, left-handed men, once on that account persecuted and publicly perceived to have been persecuted for their left-handedness, *are* properly to be regarded as members of a particular social group. Being left-handed is itself clearly a common characteristic, in a way that being a victim of the mafia or of guerrillas is not. Auld LJ was, I must conclude, wrong to reject McHugh J’s left-handed group illustration. All persecution is by definition unjust and almost all of it is irrational. Assume that albinos were openly persecuted simply because of their appearance. Could it really be said that they were outside the protection of the Convention? Plainly not. I repeat, the circularity argument is a narrow one.

121. Fourthly and finally I would say just a few words about the relevance of these appeals notwithstanding the Secretary of State’s acceptance of the UK’s obligation, pursuant to article 3 of ECHR, not to send either appellant home. That concession, of course, eliminates the risks attendant upon forcible repatriation and to that extent reduces the practical importance of these appeals. Nevertheless they remain important for two reasons. First, because those granted refugee status enjoy a number of substantial rights beyond mere irremovability, for example, rights to engage in gainful employment (Chapter III of the Convention), rights to welfare (Chapter IV), travel documents enabling the refugee to travel abroad (article 28), and the opportunity for expedited naturalisation (article 34). Secondly, it must be remembered that by no means all states party to the Convention are party too to ECHR. Article 3 of ECHR will not, therefore, always preclude states from returning home others in like situations to these appellants. It

would be most unfortunate if the jurisprudence of the United Kingdom (out of step with that of most enlightened countries) were available to support a narrow view of the Convention's protective reach.

122. I too would allow both these appeals.