

# Refugee Law Initiative

WORKING PAPER No. 3

## **The Interpretation of the Convention Ground of ‘Membership of a Particular Social Group’ in the Context of Gender-related Claims for Asylum**

A critical analysis of the Tribunal’s approach in the  
UK

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## Abstract

Despite often making 'conventional claims' for asylum based on their political opinion, race, nationality or religion, many women also claim asylum in the United Kingdom (UK) on the basis that they fear persecution because of their gender. To be recognised as refugees, women asylum seekers must therefore often demonstrate that they fear persecution on account of their membership of a Particular Social Group (PSG). In the UK, the Refugee Convention ground of PSG is the most litigated, and women asylum seekers may face many obstacles to benefitting from the protection they require. This paper explores the development of the interpretation of the PSG ground in the context of gender-related claims for asylum and assesses its implication for the protection of women who fear gender-related persecution. In particular, it sets out a critical analysis of the Asylum and Immigration Tribunal's determination in *SB (Moldova)*<sup>1</sup> in light of the House of Lords' decision in *Fornah*.<sup>2</sup>

The paper demonstrates the Tribunal's failure to follow the decision of the majority in *Fornah* that the two limbs of article 10(1)(d) Qualification Directive, setting out the definition of a PSG, are alternatives and not cumulative and why this determination is flawed. The paper also concludes that the Tribunal has developed a more rigorous test for the definition of PSG where the group is gender-based despite the absence of domestic and international jurisprudence and rules of interpretation that would support this approach. The analysis highlights the discriminatory approach by the Tribunal and demonstrates that this approach cannot stand.

**Keywords:** *Particular Social Group, women, gender-related persecution, protection, discrimination, Qualification Directive*

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<sup>1</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002. The Asylum and Immigration Tribunal was replaced by the Immigration and Asylum Chamber in February 2010.

<sup>2</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006.

In 2010, one third of asylum applications in the UK were lodged by women and this proportion has remained constant since 2003.<sup>3</sup> Whereas many women may have “conventional” claims for asylum based on their political opinion, religion, race or nationality, many fear persecution solely because of their gender, including because they refuse to conform to established gender roles within a given society.<sup>4</sup> Women may also be subjected to harm which is gender-specific such as rape and sexual violence, forced sterilisation, female genital mutilation (FGM) and domestic violence.<sup>5</sup> However, the Refugee Convention<sup>6</sup> fails explicitly to define a refugee as someone who fears gender-related persecution because there was a lack of understanding that individuals may suffer different forms of persecution for different reasons when the Refugee Convention was drafted.<sup>7</sup> Therefore, to be recognised as refugees in the UK, women must often demonstrate that they fear persecution on account of their membership of a particular social group (PSG) because the proposition that any violence against women is political has not yet, as such, found enough support.<sup>8</sup>

This paper sets out the legal definition of PSG by considering the two main approaches to the interpretation of PSG, namely the protected characteristics and the social perception approaches. It will then evaluate the manner in which UK courts and Tribunals interpret this Convention ground in cases of women asylum seekers who flee gender-related persecution. More specifically, it will consider the Tribunal’s unwillingness to consider the two PSG approaches as alternatives and its insistence that there be an additional element of discrimination in gender-related asylum claims. The paper highlights the tensions between the higher courts and the Tribunals of the Immigration and Asylum Chamber and the resulting effect on the protection of women who flee gender-related persecution in the UK.

### ***Interpretation of the Refugee Convention***

A refugee is defined in the Refugee Convention as a person who:

*Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.*<sup>9</sup>

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<sup>3</sup> Home Office, Immigration Statistics, April to June 2011: Asylum, Table as.03: Asylum applications from main applicants by age, sex and country of nationality.

<sup>4</sup> Immigration Appellate Authority, *Asylum Gender Guidelines*, November 2000.

<sup>5</sup> UK Border Agency, *Asylum Instruction on Gender Issues in the Asylum Claim*, September 2010.

<sup>6</sup> Article 1A, 1951 Geneva Convention Relating to the Status of Refugees.

<sup>7</sup> Edwards A. ‘Age and Gender dimensions in international refugee law’, in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, edited by E. Feller, V. Türk and F. Nicholson, (Cambridge: Cambridge University Press, 2003), p. 80.

<sup>8</sup> Goodwin-Gill G. and McAdam J. *The Refugee in International Law*, 3rd Edition, pp. 81-82. Edwards, ‘Age and Gender dimensions in international refugee law’, p. 68.

<sup>9</sup> Article 1A, 1951 Convention Relating to the Status of Refugees.

The *travaux préparatoires* of the Refugee Convention show very little debate on the inclusion of PSG as a Convention ground.<sup>10</sup> The ground was suggested by the Swedish delegate who stated that social group cases existed and that the Convention should explicitly recognize this.<sup>11</sup> As pointed out in Australian jurisprudence by McHugh J in *Applicant A*:

*Courts and jurists have taken widely differing views as to what constitutes "membership of a particular social group" for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.*<sup>12</sup>

There is little in the drafting materials which may assist in the interpretation of a PSG and it is thus unsurprising that various jurisdictions have adopted different methods to define a PSG. Courts in the UK, Australia, Canada and USA have often considered the jurisprudence from other jurisdictions nonetheless. Yet, even within the UK, courts have struggled to agree on the correct approach and adopt a consistent interpretation of this Convention ground.

The definition of a refugee should be interpreted in a manner having regard to gender dimensions as gender is not explicitly included as a ground for refugee protection.<sup>13</sup> The preamble of the Refugee Convention states that the purpose of the Convention is “to assure refugees the widest possible exercise of these fundamental rights and freedoms [...] without discrimination”. The concept of a PSG must therefore be interpreted consistently with the object and purpose of the Refugee Convention.<sup>14</sup> The United Nations High Commission for Refugees (UNHCR) has submitted that the ordinary meaning of the term PSG “contains no inherent limitation on the range of factors which can serve to distinguish a group of persons from society at large”.<sup>15</sup>

Despite evidence showing that in a majority of Western states there is a “general recognition of the fundamental validity” of gender-related claims, there are still problems regarding the

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<sup>10</sup> Hathaway J. and Foster M. ‘Membership of a particular group: Discussion paper No.4: Advance Refugee Law Workshop, International Association of Refugee Law Judges, Auckland, New Zealand, October 2002’, in *International Journal of Refugee Law*, 2003, 15(3), p. 477.

<sup>11</sup> Goodwin-Gill G. *The Refugee in International Law*, 2nd Edition, (Oxford: Oxford University Press, 1998), p. 46.

<sup>12</sup> *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225; (1997) 142 ALR 331 (24 February 1997).

<sup>13</sup> UNHCR Guidelines on International Protection: *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 2002, para. 2. Edwards, ‘Age and Gender dimensions in international refugee law’, pp. 79-80.

<sup>14</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999. UNHCR Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2002, para. 2.

<sup>15</sup> UNHCR’s Intervention: *Islam (A.P.) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.) (Conjoined Appeals)*, Case for the Intervener, 25 March 1999.

understanding of women's specific experience of persecution and the interpretation of PSG.<sup>16</sup> The UNHCR has provided helpful guidance in defining a PSG by stating that:

*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.*<sup>17</sup>

As highlighted by Baroness Hale in *Fornah*, despite the fact that sex or gender is not included as one of the Convention grounds and that the proposal to include sex in the list of factors of the non-discrimination clause at article 3 of the Refugee Convention was opposed, it was nevertheless agreed at the 2001 San Remo Expert Roundtable 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.*<sup>18</sup>

### ***Approaches to the Convention ground of membership of a Particular Social Group***

In international jurisprudence there are two approaches to determining whether a particular social group exists.<sup>19</sup> The first approach is the "protected characteristic" or "immutability" one, which requires the group to share an immutable characteristic or a characteristic so fundamental to their human dignity that it should not be denied.<sup>20</sup> This doctrine of *ejusdem generis* was found to be the most helpful by the House of Lords in the case of *Shah and Islam*.<sup>21</sup> *Ejusdem generis* literally means "of the same kind" and is a rule of construction which may assist in defining a general term following in a list of particular terms and which should be interpreted in a manner consistent with the general nature of the enumerated items.

<sup>16</sup> Yahyaoui Krivenko E. 'Muslim women's claims to refugee status within the context of child custody upon divorce under Islamic Law', in *International Journal of Refugee Law*, 2010, 22(1), p. 49.

<sup>17</sup> UNHCR Guidelines on International Protection: "*Membership of a particular social group*", 2002, para. 11.

<sup>18</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 84.

<sup>19</sup> Baroness Hale of Richmond described both tests in her judgment in the case of *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006 at paragraph 99.

<sup>20</sup> *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985; *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

<sup>21</sup> Macdonald I. QC and Toal R. *Macdonald's Immigration Law & Practice*, 7th Edition, (London: LexisNexis, 2008), p. 847. The House of Lords in the case of *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999, found that women in Pakistan constituted a PSG, both Mrs Shah and Mrs Islam had been accused of adultery, Mrs Islam had also been subjected to domestic violence.

In the USA, courts have used the *ejusdem generis* rule of construction to interpret membership of a particular social group since the case of *Matter of Acosta*.<sup>22</sup> In *Matter of Acosta*, the Board of Immigration Appeals established that particular social groups are comprised of individuals who share a common characteristic that they cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. The Board came to this conclusion by analogy with the other Convention grounds, namely that they all concerned characteristics that are either immutable or fundamental to an individual's identity. The Board of Immigration Appeals expressly recognized gender as one such characteristic. By applying this principle, the Board of Immigration Appeals has recognized PSGs based on gender, tribal and clan membership, sexual orientation, family (parents of Burmese student dissidents), and past experiences (former member of national police).<sup>23</sup>

The second approach is the "social perception" one which requires that society sets the group apart from society as a whole.<sup>24</sup> As explained by UNHCR and accepted by the Lords in *Fornah*:

*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.*<sup>25</sup>

Referring to the drafting history of the term "particular social group", McHugh J said that:

*It follows that, once a reasonably large group of individuals is perceived in a society as linked or unified by some common characteristic, attribute, activity, belief, interest or goal which itself does not constitute persecution and which is known in but not shared by the society as a whole, there is no textual, historical or policy reason for denying these individuals the right to be classified as "a particular social group" for Convention purposes.*<sup>26</sup>

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<sup>22</sup> *Matter of Acosta* A-24159781, United States Board of Immigration Appeals, 1 March 1985.

<sup>23</sup> Aleinikoff A. 'Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'', in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by E. Feller, V. Türk and F. Nicholson, (Cambridge: Cambridge University Press, 2003).

<sup>24</sup> *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225.

<sup>25</sup> UNHCR Guidelines on International Protection: "*Membership of a particular social group*", 2002, para. 13 and *Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department* [2006] UKHL 46, para. 15. Ms Fornah was 15 years old when she claimed asylum in the UK on the basis that if returned to Sierra Leone she would be at risk of FGM. The House of Lords found that (intact) women in Sierra Leone are members of a PSG.

<sup>26</sup> *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225.

The proposition made by McHugh J is that the group can be large and it can also suffice that society as a whole perceives the group as linked or unified by some common characteristic.

UNHCR believes that the two approaches should be reconciled in order to address protection gaps which can result from varying approaches to the interpretation of PSG.<sup>27</sup>

It is accepted that a PSG cannot be defined by the persecution to which it is subjected.<sup>28</sup> This would effectively make the definition of a PSG redundant as anyone who was persecuted by the state or by non-state actors in the absence of state protection would fall into this category and would be entitled to refugee status. Neither is there a requirement that the group share an element of cohesiveness, co-operation or interdependence.<sup>29</sup> This concept first propounded in the US case of *Sanchez-Trujillo* in the Ninth Circuit Court of Appeals<sup>30</sup> was unanimously rejected by the House of Lords in *Shah & Islam*. The Ninth Circuit Court of Appeals recognized the weakness of their approach in the case of *Hernandez-Montiel* and rejected the need for the group to be cohesive and homogenous when they found that Mexican gay men with female sexual identities were members of a particular social group.<sup>31</sup> Australian jurisprudence also rejected this approach in *Applicant A*.

Further, there is no requirement for there to be a voluntary, associational relationship; its members need not be homogenous and it may include large numbers of persons.<sup>32</sup> What is more, not all members of the PSG need to be persecuted.<sup>33</sup> A wide definition of the group may help to avoid circularity arguments regarding the group being defined by the persecution.<sup>34</sup> However, persecution itself may be a relevant factor in determining the visibility of a group in a particular society.<sup>35</sup>

Establishing that an asylum seeker is a member of a PSG is but one of the elements required to be recognised as a refugee. Asylum seekers must also establish a reasonable likelihood that they are at risk of persecution *on account of* that Convention ground.<sup>36</sup> This element of causation is met when membership of a PSG is an effective cause for the persecution; it need not be the only

<sup>27</sup> UNHCR Guidelines on International Protection: “Membership of a particular social group”, 2002, para. 10.

<sup>28</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999. *NS (Social Group – Women – Forced marriage) Afghanistan CG* [2004] UKIAT 00328, para. 53.

<sup>29</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999.

<sup>30</sup> *Sanchez-Trujillo v. Immigration and Naturalisation Service*, 801 F.2d 1571 (9th Cir. 1986).

<sup>31</sup> *Hernandez-Montiel v. Immigration and Naturalisation Service*, 225 F.3d 1084 (9th Cir. 2000).

<sup>32</sup> *NS (Social Group – Women – Forced marriage) Afghanistan CG* [2004] UKIAT 00328, para. 53.

<sup>33</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999, per Lord Steyn.

<sup>34</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999.

<sup>35</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 15.

<sup>36</sup> Goodwin-Gill, *The Refugee in International Law*, 2nd Edition, 1998, p. 364.

or primary reason.<sup>37</sup> The nexus can be linked to either the motivation of the persecutors or to the absence of State protection in cases of non-state agents of persecution.<sup>38</sup>

### *Discrimination*

There has been some disagreement about whether an element of discrimination is essential in establishing the existence of a PSG. If discrimination is an essential element, discrimination can be found where victims of persecution are being targeted because of distinguishing characteristics listed in the Convention grounds. Additionally, or alternatively, the element of discrimination is found in the state persecution or lack of state protection in cases of non-state actors of persecution.

The Court of Appeal questioned the need for discrimination as a requirement for the existence of a PSG in cases where persecution emanated from non-state actors.<sup>39</sup> In effect, the Court of Appeal was expressing the belief that the requirement of the group being set apart from society as established in the case of *Shah and Islam* may not be a condition in non-state actors of persecution cases. The Court of Appeal justified this finding by stating that references to non-discrimination principles in the case of *Shah and Islam* was simply a manner to show that cohesiveness of the group was not an element of the definition.

Furthermore, it would be circular to require the group to be defined by a certain degree of discrimination before considering whether the group is persecuted for that reason.<sup>40</sup> In other words, as persecution of members of a PSG for reason of such membership is necessarily discriminatory, it would be senseless to require evidence of the discrimination before considering whether the persecution is for reason of membership of that PSG. Considering discrimination in the definition of a PSG may also result in the risk that the group is defined by the persecution to which it is subjected. The element of discrimination is therefore to be found in the persecution itself.<sup>41</sup>

### ***The UK's interpretation of membership of a Particular Social Group***

In the UK, an asylum applicant is someone who “makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the United Kingdom's

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<sup>37</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 17.

<sup>38</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999, per Lord Hoffmann. UNHCR Guidelines on International Protection: *Gender-Related Persecution*, 2002, para. 21. This is also reflected in the Directive of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2009/0164 (COD), article 9(3). The UK has decided not to opt-in to the recast Directive and thus continues to be bound by the original Qualification Directive.

<sup>39</sup> *Secretary of State for the Home Department v Skenderaj* [2002] EWCA Civ 567, para. 19.

<sup>40</sup> *Secretary of State for the Home Department v Skenderaj* [2002] EWCA Civ 567, para. 25.

<sup>41</sup> *Secretary of State for the Home Department v Skenderaj* [2002] EWCA Civ 567, para. 25.

obligations under the Geneva Convention for him to be removed from or required to leave the United Kingdom”.<sup>42</sup> The implementation of the definition of a refugee is found in the International Protection Regulations 2006.<sup>43</sup> The International Protection Regulations 2006 aim to transpose the EU Qualification Directive (QD) in the UK which lays down the minimum standards for the qualification of asylum seekers as refugees and the content of their rights.<sup>44</sup>

One of the aims of the EU Qualification Directive is to adopt a common concept of PSG while allowing EU member states to adopt more favourable standards.<sup>45</sup> Article 10(1)(d) QD provides that:

*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;*

This was transposed into the International Protection Regulations 2006 word for word except for the term “in particular” which was replaced by the term “for example”.<sup>46</sup> There have been tensions between the different levels of the judiciary in the UK regarding the accurate interpretation of these provisions.<sup>47</sup> There is extensive jurisprudence in the UK on the interpretation of a particular social group, most of which are cases dealing with gender-related claims for asylum. The interpretation of the Convention ground of a particular social group “has presented the courts with one of their greatest challenges in refugee law”<sup>48</sup> and it is the most litigated Convention ground in the UK.<sup>49</sup>

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<sup>42</sup> Paragraph 327(a) Immigration Rules (HC 395). See also paragraph 334 Immigration Rules (HC 395) which contains some exceptions where refugees can be excluded from protection in the UK if they are a danger to the security of the UK or have been convicted of a particularly serious crime and constituting a danger to the community of the UK.

<sup>43</sup> Regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI No 2525).

<sup>44</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>45</sup> Article 3 EU Qualification Directive. *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 16.

<sup>46</sup> Regulation 6(1)(d) of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI No 2525).

<sup>47</sup> Macdonald QC and Toal, *Macdonalds's Immigration Law & Practice*, 7th Edition, 2008, p. 848.

<sup>48</sup> Mark Symes and Peter Jorro, *Asylum Law and Practice*, 2010, Second Edition, para. 4.17.

<sup>49</sup> Macdonald QC and Toal, *Macdonalds's Immigration Law & Practice*, 7th Edition, 2008, p. 847.

The House of Lords<sup>50</sup> has fully endorsed the definition of PSG proposed by the UNHCR Guidelines.<sup>51</sup> The House of Lords accepted UNHCR’s approach to gender according to which “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”.<sup>52</sup> Lord Bingham said that if Article 10(1)(d) QD:

*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”.*<sup>53</sup>

Lord Brown also stated that the EU Qualification Directive and any regulations brought in under it should be interpreted consistently with the definition of a PSG contained in the UNHCR Guidelines.<sup>54</sup> Lord Hope clearly set out that a PSG need not necessarily be perceived as such by the society in which it exists. More precisely, he adopted the approach of McHugh J in *Applicant S* stating that it would be a mistake to require “recognition within the society subjectively that the collection of individuals is a group that is set apart from the rest of the community”.<sup>55</sup>

Lord Brown and Baroness Hale agreed with Lord Bingham’s reasoning. *Fornah* therefore represents the decision of the majority of the House of Lords and is binding on all courts and Tribunals in England and Wales.

Since *Fornah*, the Asylum and Immigration Tribunal has endorsed the House of Lords and UNHCR’s position on the need to reconcile both approaches.<sup>56</sup> Nevertheless, the Asylum and Immigration Tribunal,<sup>57</sup> in the case of *SB (Moldova)*, failed to apply the judgment in *Fornah* that the two limbs of Article 10(1)(d) QD are alternatives on the basis that “the observations of their Lordships were obiter, although very persuasive, because it is clear that their Lordships did not decide the cases under regulation 6(1)(d) or Article 10(1)(d) of the Qualification Directive”.<sup>58</sup>

<sup>50</sup> The House of Lords has since been replaced by the Supreme Court.

<sup>51</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 15.

<sup>52</sup> UNHCR Guidelines on International Protection: “Membership of a particular social group”, 2002, para. 12 and *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 15.

<sup>53</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 16.

<sup>54</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 118.

<sup>55</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para 46.

<sup>56</sup> *MK (Lesbians) Albania CG* [2009] UKAIT 00036, para. 350.

<sup>57</sup> It has now been replaced by the First-Tier and Upper Tier Tribunals of the Immigration and Asylum Chamber.

<sup>58</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002, para. 69. The 2006 Regulations came into force on 9 October 2006. The case of *Fornah* was heard on 17 and 18 July 2006 and the judgment handed

However, the observations in the House of Lords were not *obiter*. On the contrary, the findings of Lord Bingham<sup>59</sup> and Lord Brown<sup>60</sup> in *Fornah* were part of the *ratio decidendi* of the case and are a proposition of law which is therefore binding on all courts of England and Wales. Lord Bingham's findings on the definition of a PSG are the reasons for his decision that women in Sierra Leone form part of a PSG. Had Lord Bingham not adopted UNHCR's interpretation of a PSG he may not have come to the same conclusion.

The Tribunal in *SB (Moldova)* considered in detail the interpretation of regulation 6(1)(d) of the International Protection Regulations 2006.<sup>61</sup> The AIT stated that the word "and" should be given its "natural meaning" and therefore that the two limbs should be considered cumulative. However, this interpretation is problematic as this would be contrary to the need to adopt a holistic interpretation as required by the Vienna Convention on the Law of Treaties having regard to the context, object and purpose of the treaty.<sup>62</sup>

The Tribunal in *SB (Moldova)* also failed to understand that the EU Qualification Directive must be interpreted consistently with the Refugee Convention.<sup>63</sup> Under EU law, national regulations must be interpreted to implement EU Directives.<sup>64</sup> The recital to the EU Qualification Directive specifically states that a "full and inclusive" interpretation of the Refugee Convention is a cornerstone of the Common European Asylum System.<sup>65</sup> The House of Lords stated that if the two approaches to PSG, namely the "protected characteristics" and the "social perception" were to be cumulative, the test would be more stringent than most international authorities, failing to reflect that the EU Qualification Directive represents minimum standards.<sup>66</sup> It may therefore be problematic to take as a starting point the literal language of the International Protection Regulations 2006 when considering the interpretation of PSG.

The reasoning of the Tribunal in this case is flawed because it is inconsistent with the House of Lords' authority on how the EU Qualification Directive should be interpreted and it has resulted

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down on 18 October 2006. However, and as explained above, the Lords considered Article 10(1)(d) QD which is transposed into the International Protection Regulations 2006 almost word for word.

<sup>59</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 15.

<sup>60</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 118.

<sup>61</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002, para. 70. This was clearly summarised in *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC), para. 133.

<sup>62</sup> Article 31(1) of the Vienna Convention on the Law of Treaties provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

<sup>63</sup> See recitals 2 and 3 of the EU Qualification Directive and as established in *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006.

<sup>64</sup> Article 288 of the Treaty on the Functioning of the European Union stipulates that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

<sup>65</sup> Recitals 2 and 3 of the EU Qualification Directive.

<sup>66</sup> *Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 16.

in a protection gap that affects women disproportionately because protection claims on the basis of membership of a PSG are more often made by women who fear persecution because of their gender.<sup>67</sup> Other immigration judges in the Tribunal have since followed this interpretation.<sup>68</sup>

### ***Gender-related asylum claims and membership of a Particular Social Group***

The Tribunal in *SB (Moldova)* emphasised the importance it had placed on the need to examine whether a PSG exists within the context of a society in question.<sup>69</sup> However, Lord Hope in *Fornah* emphasised that it was not necessary for society to recognise a PSG as being set apart from the rest of society.<sup>70</sup> The Tribunal said that it did not make sense if “former victims of trafficking” or “former victims of trafficking for sexual exploitation” are, *per se*, members of a PSG without considering the evidence relating to the society in question.<sup>71</sup> However, it may be said that persons of a certain nationality, race, religion or political opinion may be persecuted in one particular country but not in another. Indeed, a person may be a member of a PSG without necessarily being at risk of persecution.<sup>72</sup>

Baroness Hale has recognised that it is possible for individuals who share a past experience, such as being the victims of sexual violence, to show they are linked by an immutable characteristic which is capable of being independent of the persecution and the cause of their current ill-treatment.<sup>73</sup> This was followed in more recent Tribunal decisions.<sup>74</sup> However, it does not necessarily follow that the group is persecuted and the context of the society in question must be examined to establish whether the nexus between the persecution and the Convention ground is met.

### ***Discrimination***

In the case of *Skenderaj*, the Court of Appeal rejected the respondent’s submission that the PSG did not exist because “there was no setting apart or stigmatisation of, or discrimination against, the family outside the persecution alleged” because they “did not regard that as a necessary part of the definition of a PSG, particularly in a non-state persecution case”.<sup>75</sup> Nevertheless, the

<sup>67</sup> UNHCR Guidelines on International Protection: *Gender-Related Persecution*, 2002, para. 28.

<sup>68</sup> *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC), para. 134. *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC), para. 165, note however that the Tribunal in this case considered that the PSG would be identified in Albanian society by the actors of persecution amongst others, query whether this could be sufficient.

<sup>69</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002, para. 71.

<sup>70</sup> Macdonald QC and Toal, *Macdonalds’s Immigration Law & Practice*, 7th Edition, 2008, p. 856.

<sup>71</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002, para. 72.

<sup>72</sup> *Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 113. UNHCR Guidelines on International Protection: *Gender-Related Persecution*, 2002, para. 31.

<sup>73</sup> *Hoxha & Anor v Secretary of State for the Home Department* [2005] UKHL 19 (10 March 2005), para. 37.

<sup>74</sup> *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC), para. 166. *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC), para. 140-141. *HC & RC (Trafficked women) China CG* [2009] UKAIT 00027, para. 36.

<sup>75</sup> *Secretary of State for the Home Department v Skenderaj* [2002] EWCA Civ 567, para. 30.

Tribunal in *SB (Moldova)* rejected the finding that discrimination is not an essential requirement for establishing the existence of a particular social group when the immutable characteristic is gender.<sup>76</sup> The Tribunal in *SB (Moldova)* used the word “discrimination” in the wide sense of the term as “making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect” and stated that “discrimination involves making unfair or unjust distinctions to the disadvantage of one group or class of people as compared with others”.<sup>77</sup>

The Tribunal justified its departure from the Court of Appeal’s reasoning in *Skenderaj* by stating that:

*Whilst this judgment causes us some difficulty, our analysis is in line with the judgments of their Lordships in Shah and Islam and Fornah and K. Accordingly, if Auld LJ was saying that discrimination is not a necessary identifying characteristic of a gender-based social group, then we must respectfully disagree. Furthermore, the final sentence of paragraph 30 of the judgment appears to be at odds with Fornah and K.*<sup>78</sup>

However, although the Lords discussed the principle of discrimination in *Shah and Islam* and in *Fornah*, it is considered that this referred to the five Convention grounds themselves. Both Lord Bingham and Lord Hoffmann said that the Refugee Convention was only concerned with protecting persons who are at risk of persecution based on discrimination.<sup>79</sup> On this basis, Lord Bingham found that:

*FGM may ensure a young woman's acceptance in Sierra Leonean society, but she is accepted on the basis of institutionalised inferiority [...] 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).*<sup>80</sup>

Lord Hoffman said that “discrimination against women in matters of fundamental human rights on the ground that they are women is plainly in *pari materiae* with discrimination on grounds of race”. Perhaps the most explanatory opinion of the role played by discrimination within the Refugee Convention was given by Lord Hope in *Shah and Islam* when he described discrimination as:

*A feature which is common to all five of the Convention reasons which are set out in the paragraph. The first preamble to the Convention explains that one of its purposes*

<sup>76</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002.

<sup>77</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002, para. 43.

<sup>78</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002, para. 66.

<sup>79</sup> *Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 13. *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999.

<sup>80</sup> *Secretary of State for the Home Department v. K; Fornah v. Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006, para. 31.

*was to give effect to the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. This principle was affirmed in the Charter of the United Nations and in the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on 10 December 1948. If one is looking for a genus, in order to apply the eiusdem generis rule of construction to the phrase "particular social group," it is to be found in the fact that the other Convention reasons are all grounds on which a person may be discriminated against by society.*

Thus, persecution is discriminatory because it is for reasons of race, religion, nationality, membership of a particular social group or political opinion. This is the reason why the Refugee Convention does not afford protection to those who are persecuted or ill-treated for reasons not covered by the five Convention grounds and the reason why the Secretary of State for the Home Department may grant Humanitarian Protection to those who are at real risk of suffering serious harm regardless of the cause of the harm.<sup>81</sup> Persecution for reason of membership of a PSG is discriminatory simply because it is the membership that incites the persecutory conduct. The Tribunal was correct in finding that “the Geneva Convention was concerned to afford protection against persecution which is based on discrimination”.<sup>82</sup> Discrimination in the context of international refugee protection is understood in the following terms: “persecution is discriminatory where its victims are targeted by virtue of attributes not shared by society as a whole. These attributes are listed in Article 1A(2)”.<sup>83</sup> The element of discrimination therefore, if necessary for the existence of a PSG, comes into play because the persecution is for reason of one of the grounds listed in the Refugee Convention.

Furthermore, the position in *Skenderaj* is supported by jurisprudence from other English speaking countries. The High Court of Australia clearly stated that discrimination was not an essential defining characteristic of a PSG.<sup>84</sup> The treatment to which the group is subjected, including discrimination or persecution, may assist in identifying the group but it does not serve to define it and should not be an essential criterion for its existence. The High Court of Australia said that “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”.<sup>85</sup>

The Tribunal in *SB (Moldova)* considered extensive UK jurisprudence and provided the following propositions: (i) discrimination is not necessary to find the existence of a PSG if its members share a common characteristic and they are set part from the rest of society; (ii) where the social group is gender-based then discrimination against the gender must be shown to exist and that some degree of state involvement is “important”; and (iii) in cases where the immutable characteristic is a common background/experience which sets the group apart from the rest of

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<sup>81</sup> Paragraph 339C Immigration Rules (HC 395).

<sup>82</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002, para. 46.

<sup>83</sup> UNHCR’s Intervention: *Islam (A.P.) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.) (Conjoined Appeals)*, Case for the Intervener, 25 March 1999.

<sup>84</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* 1997, per McHugh J.

<sup>85</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* 1997, per McHugh J.

society there is no need to demonstrate discrimination.<sup>86</sup> In justifying point (iii) the Tribunal stated, in relation to former victims of trafficking that:

*It would then not be necessary to show, as an identifying characteristic, that there is discrimination in the wider sense against the former victims of trafficking in the society in question. To conclude otherwise would effectively result in imposing an additional and unjustified hurdle on individuals (men or women) who share a common background or past experience of having been trafficked for the purposes of sexual exploitation, but not on other groups of individuals who share a common background or past experience, such as (for example) aristocrats.<sup>87</sup>*

However, this is exactly what the Tribunal has done in relation to point (ii). The Tribunal has imposed an additional and unjustified hurdle on women who are being persecuted because of their gender. In particular, as women are often persecuted by non-state actors, there are no reasons why they should demonstrate that there is some level of state involvement or complicity in order to be defined as a PSG. It is clearly established that a refugee can be recognised as such because s/he fears persecution from non-state actors and there is an absence of state protection.<sup>88</sup> The Tribunal's approach fails to interpret the Refugee Convention in good faith that "human beings shall enjoy fundamental rights and freedoms without discrimination".<sup>89</sup>

The Tribunal in *SB (Moldova)* made the assertion that "the failure to include sex as a ground of persecution in the Geneva Convention, notwithstanding its inclusion as a basis of discrimination in article 2 of the Universal Declaration of Human Rights, may be due to the fact that it is difficult to envisage a society in which women are actually persecuted, simply because they are women".<sup>90</sup> However, this is clearly incorrect as UK jurisprudence has accepted that women may be persecuted simply because they are women. Lord Bingham said in *Fornah* that "FGM is an extreme expression of the discrimination to which all women in Sierra Leone are subject"; this is but one example of persecution of women because they are women. The Secretary of State for the Home Department in the case of *Fornah* agreed that the nexus between the persecution and the PSG had been met as "FGM is a practice undertaken on women as women".<sup>91</sup>

In accordance with UNHCR Guidelines, the need to consider the existence of a PSG within the context of the society in question is relevant where the claimant is being imputed membership of a PSG. It will almost always be the case that society in general views claimants as distinct from the rest of society whether they are at risk of persecution in their home country on account of political opinion or membership of a PSG. In *Shah and Islam*, Lord Steyn identified the PSG as

<sup>86</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002, para. 53.

<sup>87</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002, para. 54.

<sup>88</sup> *Horvath v. Secretary of State for The Home Department* [2000] UKHL 37 (6 July 2000). Hathaway J. *Law of Refugee Status*, (Canada: Butterworths Law, 1991), p.125.

<sup>89</sup> UNHCR's Intervention: *Islam (A.P.) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.) (Conjoined Appeals)*, Case for the Intervener, 25 March 1999.

<sup>90</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 00002, para. 46.

<sup>91</sup> UNHCR's Intervention: *Zainab Esther Fornah (Appellant) v Secretary of State for the Home Department (Respondent) and the United Nations High Commissioner for Refugees (Intervener)*, Case for the Intervener, 14 June 2006, para. 21(1).

“women in Pakistan” on the basis that women share an immutable characteristic of gender, that women are discriminated against in Pakistan and that they are not protected by the state.<sup>92</sup> There was no discussion of social perception in his opinion, which suggests already in this case that the two approaches to PSG were alternatives and not cumulative. Consequently, there is an urgent need to ensure that the Tribunal ends its cumulative approach to the interpretation of regulation 6(1)(d) of the International Protection Regulations 2006 as this is contrary to the *Fornah* judgment, the UNHCR *Guidelines on Membership of a Particular Social Group* and the need to interpret the Refugee Convention in light of its object and purpose under the Vienna Convention and within the aim of the EU Qualification Directive.

### ***Conclusion***

It is generally agreed that a correct interpretation of the Refugee Convention does not require the additional ground of gender to be included within the definition.<sup>93</sup> This means that where the sole reason for persecution is gender-related, asylum claims are most often argued under the PSG ground.<sup>94</sup> The discussion above reflects the difficulties for women who flee gender-related persecution and claim asylum in the UK to be recognised as refugees. This paper has highlighted the complexity surrounding the definition of a gender-sensitive concept of membership of a PSG and the resulting tension between the higher courts and the Tribunals of the Immigration and Asylum Chamber in the UK.

In *SB (Moldova)* the Tribunal adopted an incorrect interpretation of *Fornah* and in effect applied a more stringent test to PSG cases based on gender. This, it could be argued is discriminatory and should not be followed by future Tribunals. There is nothing in the drafting materials of the Refugee Convention, the rules of interpretation in the English legal system or in international law, and domestic and international jurisprudence that suggest that where the PSG is defined by gender there should be an element of discrimination in the wider sense of the word against the group before the PSG can be found to exist. Establishing an additional criterion when the PSG is defined by gender is discriminatory and cannot stand.

The case of *Fornah* is very clear on the interpretation by the Lords of article 10 of the Qualification Directive and the International Protection Regulations 2006 transposing the Directive that the protected characteristics and the social perception approaches are alternatives. In other words, a PSG can be defined by the members of the group sharing a characteristic that is immutable or that is so fundamental to their human dignity that it should not be denied, or alternatively by the members of the group sharing of a common characteristic, attribute, activity, belief, interest or goal which the society in question recognizes and which sets them apart. This

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<sup>92</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999, per Lord Steyn.

<sup>93</sup> Edwards, 'Age and Gender dimensions in international refugee law', 2003, p. 56. Haines R. QC, *Advancing a gendered interpretation of the Refugee Convention: Refugee Appeal No. 76044*, Presentation for the 2009 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, 10 September 2009.

<sup>94</sup> Such as for example in cases of Female Genital Mutilation (FGM), see Crawley H. *Refugees and Gender: Law and Process*, (Bristol: Jordan Publishing Limited, 2001), p. 77.

interpretation is in line with UNHCR guidance and was adopted by the highest court in the UK. Decision-makers should not be concerned by floodgates arguments as the consideration of an asylum claim remains an individual assessment dependent on the need to demonstrate a well-founded fear of persecution on account of a Convention ground. There are many elements to be met before asylum seekers are recognized as refugees and adopting an inclusive and non-discriminatory interpretation of the Convention ground of PSG will not necessarily result in an increase in the grant of asylum by the UK Border Agency or allowed appeals by the Tribunal. It will however, ensure fairness for asylum seekers with gender-related claims within the asylum determination procedure.

Future asylum appeal hearings in the Tribunal of the Immigration and Asylum Chamber should ensure an inclusive and gender-sensitive interpretation of the Refugee Convention, the Qualification Directive and any regulations brought in under it. The Tribunal should apply the same set of rules to define a PSG irrespective of the particular characteristics of the social group to ensure fairness and the protection of women asylum seekers who claim asylum because they fear persecution on account of their gender.

Despite the issues examined above the courts and Tribunals in the UK have found the following PSG to exist: women in Pakistan;<sup>95</sup> (intact) women in Sierra Leone;<sup>96</sup> women in the Ivory Coast;<sup>97</sup> women in Somalia;<sup>98</sup> women in Afghanistan;<sup>99</sup> women in Bangladesh;<sup>100</sup> women charged with committing adultery in Pakistan;<sup>101</sup> women who have committed adultery from Punjab, India;<sup>102</sup> women in Kenya (and particularly Kikuyu women under the age of 65);<sup>103</sup> women in Liberia belonging to those ethnic groups where FGM is practiced;<sup>104</sup> women (at risk of FGM) in Sudan;<sup>105</sup> young Iranian women who refuse to enter into arranged marriages;<sup>106</sup> lesbian women in Albania;<sup>107</sup> women who do not conform to the heterosexual narrative and perceived as lesbians in Jamaica;<sup>108</sup> former victims of trafficking in Moldova, Nigeria, Thailand, Albania and China.<sup>109</sup>

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<sup>95</sup> *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999.

<sup>96</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006.

<sup>97</sup> *MD (Women) Ivory Coast CG* [2010] UKUT 215 (IAC).

<sup>98</sup> *HM (Somali Women, Particular Social Group) Somalia* [2005] UKIAT 00040.

<sup>99</sup> *NS (Social Group – Women – Forced marriage) Afghanistan CG* [2004] UKIAT 00328.

<sup>100</sup> *SA (Divorced woman – illegitimate child) Bangladesh CG* [2011] UKUT 00254(IAC).

<sup>101</sup> *KA and Others (domestic violence – risk on return) Pakistan CG* [2010] UKUT 216 (IAC).

<sup>102</sup> *BK (Risk – Adultery -PSG) India CG* [2002] UKIAT 03387.

<sup>103</sup> *P & Anor v Secretary of State for Home Department* [2004] EWCA Civ 1640.

<sup>104</sup> *SK (FGM – ethnic groups) Liberia CG* [2007] UKAIT 00001.

<sup>105</sup> *FM (FGM) Sudan CG* [2007] UKAIT00060.

<sup>106</sup> *TB (PSG – women) Iran* [2005] UKIAT 00065.

<sup>107</sup> *MK (Lesbians) Albania CG* [2009] UKAIT 00036.

<sup>108</sup> *SW (lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 00251(IAC).

<sup>109</sup> *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002. *PO (Trafficked Women) Nigeria CG* [2009] UKAIT 00046. Note that this case has partly been overturned by the Court of Appeal in *PO (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 132 but on other issues not concerned with PSG. *AZ*

These are welcome developments which may afford some level of protection for women who flee gender-related persecution in their countries of origin. However, the failure by the Tribunal to apply the findings by the Lords in *Fornah* and by the Court of Appeal in *Skenderaj* means that the definition of a PSG is an issue which is likely to continue to be highly litigated, to the detriment of women asylum seekers who seek international protection in the UK on the basis of their gender. Finally, it is important to remember that the Refugee Convention grounds of political opinion or religion may be relevant where women are persecuted because they refuse to comply with or are seen to transgress social mores<sup>110</sup> even though this was recommended as falling within the ground of PSG by the UNHCR Executive Committee in 1985.<sup>111</sup> More than twenty-five years later, women must be recognised as active agents where relevant and not necessarily as passive members of a social group.

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*(Trafficked women) Thailand CG* [2010] UKUT 118 (IAC). *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC). *HC & RC (Trafficked women) China CG* [2009] UKAIT 00027.

<sup>110</sup> Crawley, *Refugees and Gender: Law and Process*, 2001, p. 73. Haines, QC, *Advancing a gendered interpretation of the Refugee Convention: Refugee Appeal No. 76044*, 2009. This is being done in New Zealand, see Yahyaoui Krivenko, 'Muslim women's claims to refugee status within the context of child custody upon divorce under Islamic Law', 2010, p. 63.

<sup>111</sup> EXCOM Conclusion on Refugee Women and International Protection, No. 39 (XXXVI) – 1985, para. (k).

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