

Gender, Migration and Human Rights Conference

European University Institute

Florence, Italy

18-19 June 2012

Alice Edwards

**Senior Legal Coordinator and Chief, Protection Policy and Legal Advice Section,
Division of International Protection, UNHCR**

Check against delivery

***“Distinction, Discretion, Discrimination:
The new frontiers of gender-related claims to asylum”****

The question whether persecuted women can be refugees seems uncontroversial and now well-settled as a matter of international refugee law.¹ Yet, closer scrutiny of case law suggests that there are multiple impediments to the recognition of women’s asylum claims.² In this paper, I will present three emerging trends in the jurisprudence of a number of countries, which have an impact on the recognition of gender-related asylum claims. I am calling these trends – distinction, discretion and discrimination – the “new frontiers” to gender-related claims. I am hoping that they are the “last” frontiers but I think that would be

* I would like to especially thank Gisela Thater for all her assistance with the preparation of this paper including her always detailed notes as well as her thoughtful reflections on trends in gender-related refugee claims. I would also like to thank Pamela Goldberg and Florence Vanderborght for their assistance with research for this paper; and Sanne Andersen for assistance with final editing.

¹ For an historical account of the acceptance of persecuted women as refugees under international refugee law, see A. Edwards, ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010’ (2010) 29 *Refugee Survey Quarterly* 21. See the rest of the edition for various reflections on the past 20 years of practice and policy on refugee women’s rights.

² The latest report on gender-related claims covering Europe suggests, for example, that women are more likely than men to be granted subsidiary protection than refugee status; and that there is a wide variation in recognition rates of women’s claims within the nine European countries studied: see, Asylum Aid, *Gender-Related Claims in Europe*, available at: http://www.asylumaid.org.uk/data/files/publications/187/Gender_related_asylum_claims_in_Europe.pdf

premature as the appetite and imagination of the judiciary for new tests which limit refugee recognition rates seems interminable. I will deal with each of the new trends in turn, and then wrap up with two main recommendations for combating these negative trends. Before moving to deal with these new trends, I will briefly summarize the existing state of international refugee law relating to gender-related persecution.

Setting the scene

The 1951 Convention relating to the Status of Refugees (the 1951 Convention) provides protection to persons who have “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group [MPSG] or political opinion.”³ In the absence of an explicit ground of “gender” in the refugee definition, the ground most regularly used in women’s refugee claims has been that of MPSG. There is neither a definition of MPSG in the 1951 Convention, nor a specific listing of social groups. The last minute addition of the ground by the Swedish delegate during the drafting debates also offers no guidance as to what the drafters meant by the phrase. The *travaux préparatoires* does however indicate that the drafters had doubts that there would be any cases of persecution on account of sex,⁴ and they asserted that equality was a matter for national legislation.⁵ It is no surprise that there was not a single woman among the plenipotentiaries who met in Geneva to draw up the Convention.⁶

Because of these ambiguous beginnings, national courts have developed their own approaches to defining MPSG. Two dominant approaches can be distilled from the case law – “protected characteristics” and “social perception”.⁷ The “protected characteristics” approach⁸

³ Article 1A(2) 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol.

⁴ UN Doc. A/CONF.2/SR.5, 9 (per Chairman of the Conference, the High Commissioner for Refugees).

⁵ UN Doc. A/CONF.2/SR.5, 10 (per British delegate).

⁶ A.B. Johnsson, ‘The International Protection of Women Refugees: A Summary of Principal Problems and Issues’ (1989) 1 *International Journal of Refugee Law*. 221, 222.

⁷ On the emergence and subsequent development of the two approaches, see respectively: T.A. Aleinikoff, ‘Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership of a Particular Social Group”’, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (2003), 263; M. Foster, *The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’*, April 2012, PPLA/2012/02, available at: <http://www.unhcr.org/refworld/docid/4f7d94722.html>.

⁸ This approach is attributed to the decision in *Matter of Acosta*, Interim Decision No. 2986, 19 I. & N. Decisions 211, 1 Mar. 1985, available at: <http://www.unhcr.org/refworld/docid/3ae6b6b910.html> and later clarified by the Canadian Supreme Court in *Canada (Attorney-General) v. Ward* [1993] 2 SCR 689,

examines whether a group is united either by an innate or immutable characteristic such as “sex, color, or kinship ties” or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it such as “former military leadership or land ownership”.⁹ The “social perception” approach, on the other hand, based on a plain reading of the text, examines whether a particular social group shares a common characteristic which makes it cognizable or sets the group’s members apart from society at large.¹⁰ Jurisdictions across the world have recognised such social groups as women, children, family, tribe, persons with disabilities, or based on sexual orientation or gender identity.

In light of these two variable approaches, and recognizing both as valid legal interpretations, UNHCR in its 2002 guidelines on MSPG adopted a definition of MSPG that treats the two tests as alternatives, rather than cumulative,¹¹ tests:

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,

available at: <http://www.unhcr.org/refworld/docid/3ae6b673c.html>. This approach is also followed in the United Kingdom: *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, [*Shah and Islam*] available at: <http://www.unhcr.org/refworld/docid/3dec8abe4.html>.

⁹ See, *Acosta*.

¹⁰ The social perception approach is attributed to the Australian High Court based on an ordinary reading of the words, see *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225, available at: <http://www.unhcr.org/refworld/docid/3ae6b7180.html>. Gender was recognized under this approach in the case of *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, 11 April 2002, available at: <http://www.unhcr.org/refworld/docid/3deb326b8.html>. It is also followed in France: *CE, SSR*, 23 juin 1997, 171858, *Ourbih*, 171858, France: Conseil d'Etat, 23 June 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b67c14.html>. The French test is summarized as a two-part test: (a) The existence of characteristics common to all members of the group and which define the group in the eyes of the authorities in the country and of society in general; and (b) The fact that the members of the group are exposed to persecution. See, UN High Commissioner for Refugees, *UNHCR Statement on the Application of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to Victims of Trafficking in France*, 12 June 2012, available at: <http://www.unhcr.org/refworld/docid/4fd84b012.html>.

¹¹ Regrettably not all jurisdictions have accepted the “alternative” view intended by this definition. In the United States, for example, a number of courts have wrongly interpreted UNHCR’s definition as cumulative rather than alternative: see, UN High Commissioner for Refugees, *Rocio Brenda Henriquez-Rivas, Petitioner v. Eric H. Holder, Jr, Attorney General, Respondent. The United Nations High Commissioner for Refugees’ Amicus Curiae Brief in Support of Petitioner*, 23 February 2012, No. 09-71571 (A098-660-718), available at: <http://www.unhcr.org/refworld/docid/4f4c97c52.html>. Likewise, the European Union Qualifications Directive appears to treat them as cumulative, although the view of different member states varies on this: *DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 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)*, 20 December 2011, L337/9, Article 10, 1 (d), available at: <http://www.unhcr.org/refworld/docid/4f197df02.html>.

conscience or the exercise of one's human rights.¹²

UNHCR also stated clearly in its Guidelines on Gender-Related Persecution 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 than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.¹³

And further that:

Women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.¹⁴

UNHCR has also indicated that sexual orientation and gender identity are valid grounds for refugee status falling within the MPSG ground.¹⁵

There is of course much more that could be said by way of introduction, but I hope this will suffice to set the scene. I will now turn to look at the three new trends in gender-related claims.

Distinction

The first new frontier is what I am calling "distinction" – by this I refer to the introduction by the United States' Board of Immigration Appeals (BIA) in *Matter of C-A-* of two requirements that the "social group" be (a) socially visible and (b) that the group have a degree of particularity beyond normal demographic indicators.¹⁶

On the question of social visibility, the BIA said one needs to consider "the extent to which members of a society perceive those with the characteristic in question to be members of the

¹² UN High Commissioner for Refugees, *Guidelines on International Protection No. 2: "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*, 7 May 2002, HCR/GIP/02/02, para. 11, available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

¹³ UN High Commissioner for Refugees, *Guidelines on International Protection No. 1: 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*, 7 May 2002, HCR/GIP/02/01, para. 30, available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>.

¹⁴ UNHCR, *Guidelines on MPSG*, para. 15.

¹⁵ UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, available at: <http://www.unhcr.org/refworld/docid/48abd5660.html>; UN High Commissioner for Refugees, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department - Case for the first intervenor (the United Nations High Commissioner for Refugees)*, 19 April 2010, available at: <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>; UN High Commissioner for Refugees, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, available at: <http://www.unhcr.org/refworld/docid/4551c0d04.html>.

¹⁶ *Re C-A-*, 23 I&N Dec. 951 (BIA 2006), United States Board of Immigration Appeals, 15 June 2006, available at: <http://www.unhcr.org/refworld/docid/46979ea02.html>.

social group”.¹⁷ This test has been followed in a range of circuits in the US. In some cases, they have relied on UNHCR’s MPSG Guidelines to extract such a position, yet UNHCR holds that its guidelines have been wrongly applied.

The impact of a “social visibility” requirement on gender claims is best explained by the case of *Re A-T*. The BIA held in that case that “we are doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them”.¹⁸

Similarly, in *Perdomo v. Holder*, a case concerning the high incidence of “femicide” in Guatemala, the US’ Ninth Circuit Court of Appeals was asked whether “women between the ages of fourteen and forty who are Guatemalan and live in the United States” (the PSG designated by the appellant) or “all women in Guatemala” (the PSG offered by the Ninth Circuit) can constitute a PSG. The question was remanded to the BIA. The BIA rejected the revised definition of “all women in Guatemala”, concluding that this group was “a demographic rather than a cognizable social group” as required by the 1951 Convention.¹⁹

The jurisprudence of several circuit courts of appeal in the US continue to debate the meaning of the test. The best caution so far against the social visibility test was articulated by Posner J of the Seventh Circuit in *Gatimi v Holder*:

Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be “seen” by other people in society “as a segment of the population”.²⁰

¹⁷ *Ibid*, at 956-957.

¹⁸ *In re A-T*, 24 I&N Dec. 296, 302 (BIA 2007), United States Board of Immigration Appeals, 26 September 2007, available at: <http://www.unhcr.org/refworld/docid/47cfe7c22.html>. As noted by Foster, the decision was later vacated by the Attorney General and remanded for reconsideration, and in April 2011, the immigration judge granted the respondent the withholding of removal: see ‘The IJ’s Decision on Remand of Matter of A-T’, (2011) 88(31) *Interpreter Releases* 1937, referred to in Foster, 29.

¹⁹ *Perdomo v. Holder, Attorney General*, No. 06-71652, United States Court of Appeals for the Ninth Circuit, 12 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c3c1ef02.html>.

²⁰ *Gatimi v. Holder*, 578 F. 3d 611 (7th Circ. 2009) available at: <http://www.unhcr.org/refworld/docid/4aba40332.html>, per Posner J. at 3, as referred to in Foster, 30.

UNHCR has made similar arguments in its multiple amicus interventions on this issue.²¹ In particular, UNHCR has been at pains to stress that the social perception approach is different from social visibility and that the social perception approach does not require that the group be visible to the naked eye in a literal sense nor that the common attribute be one that is easily recognizable to the general public. Further, "social perception" does not mean to suggest a sense of community or group identification as might exist for members of an organization or association.²² While noting that visibility of a group may reinforce the existence of a social group, UNHCR has emphasized that it is not a *precondition* to recognition. Of course, there is also an argument that women are always "visible" in and to society, and that this additional test should not really affect their claims (it would however continue to affect claims of sub-sets of women).

Moving to the issue of "particularity". This is a requirement introduced in some jurisdictions that the proposed group be capable of being "accurately (...) described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."²³ The question of demography, as well as size (and floodgates), has been in the background to a number of social group claims, in several jurisdictions. In the US' Court of Appeals for the Ninth Circuit in *Sanchez-Trujillo*, in 1986, it was held that "The statutory words 'particular' and 'social' which modify 'group' ... indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance"²⁴ and in turn that the group to be "small, readily identifiable."²⁵ While the latter aspect of size has been widely criticized by legal scholars,²⁶ openly rejected by the highest courts in Australia²⁷ and the UK,²⁸ and by UNHCR,²⁹

²¹ As an example see UN High Commissioner for Refugees, *Rivera-Barrientos v. Holder, United States Attorney General: Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, 18 August 2010, No. 10-9527, available at: <http://www.unhcr.org/refworld/docid/4c6cdb512.html>.

²² *Ibid.*

²³ *Matter of S-E-G, et al.*, 24 I&N Dec. 579 at 584 (BIA 2008), United States Board of Immigration Appeals, 30 July 2008, available at: <http://www.unhcr.org/refworld/docid/4891da5b2.html>, as referred to in Foster, 31.

²⁴ *Sanchez-Trujillo, et al., v. Immigration and Naturalization Service*, 801 F.2d 1571 at 1576, United States Court of Appeals for the Ninth Circuit, 15 October 1986, available at: <http://www.unhcr.org/refworld/docid/4a3a3af50.html>.

²⁵ *Ibid.*, 1576.

²⁶ See, Aleinikoff.

the question of “demographic groups” still lingers. Gummow J in *Applicant A*, Australia’s leading case on MPSG, for example, agreed that demographic factors alone do not define a particular social group. But this simply raises the question: when is a factor of identity such as sex/gender merely a demographic rather than a social attribute?

In the later Australian case of *Applicant S* (a case concerning “able-bodied young Afghan males” forced into recruitment by the Taliban), McHugh J stated that, although in most societies, “able-bodied young men” would no more constitute a PSG than would “good swimmers” or “fit athletes”, which he said were “intellectual constructs, not social groups”, he went on to state that “it is possible that in Afghanistan the press-ganging of ‘able-bodied young men’ has created a perception that they are a ‘particular social group’”.³⁰ He also emphasized that “different legal, social, cultural and religious norms in different countries may bring about different results concerning similar groups or classes”.³¹ McHugh J’s approach was summed up by the joint concurring opinion of Gleeson CJ, Gummow and Kirby JJ, that “The general principle is not that the group must be recognized or perceived within the society, but rather that the group must be distinguished from the rest of society.”³² One way this can occur is by members of society perceiving the group as such, but this is not the only way.

Herein one can see echoes of the earlier Australian decision in *Khawar* and the United Kingdom’s decision in *Shah and Islam* judgments in which “Pakistani women” were an accepted social group, noting in the latter case that “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”.³³ Their social context – in addition to discrimination – framed their social group. I will return to the “discrimination” question later.

²⁷ *Applicant A* (although accepts that not every broadly defined demographic group constitutes a PSG).

²⁸ *Shah and Islam*.

²⁹ UNHCR argues that size of the persecuted group is irrelevant as the other four grounds are not subject to a size criterion: see, UNHCR, Social Group Guidelines, paras. 18-19.

³⁰ *Applicant S v. Minister for Immigration and Multicultural Affairs*, [2004] HCA 25, Australia: High Court, 27 May 2004, para. 72, available at: <http://www.unhcr.org/refworld/docid/4110e81d4.html>.

³¹ *Ibid.*, para. 76.

³² *Ibid.*, para. 27 (per Gleeson CJ, Gummow and Kirby JJ concurring).

³³ *Shah and Islam*, 658 (per Lord Hope).

Discretion

The second “new frontier” that I wanted to discuss today is that of “discretion”, that is, does the 1951 Convention protect persons who could avoid persecution by being discreet or by concealing their fundamental characteristics? Put another way, can it ever be expected that someone could lawfully be required to “live discreetly” in their country of origin in order to avoid persecution? This issue has arisen particularly in sexual orientation/gender identity cases, but it is also at issue in cases based on political opinion.³⁴ If it gains traction in any of these cases, one can also imagine that it could be applied to women’s claims outside the sexual orientation scenario, for example to cases based on the transgression of social norms. Can one expect a woman to conceal her feminist views or ways – such as opposition to FGM or forced marriage, or merely her right to wear lipstick or to dress in western style – in order to avoid persecution?³⁵

The question was considered in the UK Supreme Court decision of *HJ (Iran) and HT (Cameroon)*,³⁶ both cases involved gay men fearing persecution in Iran and Cameroon respectively. In accepting that gay men and women may be considered a particular social group,³⁷ Lord Rodger’s clarified that it was “unacceptable” to rely on the ability of the individual to “act discreetly and conceal his sexual identity indefinitely to avoid suffering persecution”, because “it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim for persecution.”³⁸ In doing so he dismissed a long line of cases in the lower courts that had relied on the discretion argument to reject cases. However, he went on to make a difference between the individual who would “live

³⁴ See, e.g., *RT (Zimbabwe) and Others v. Secretary of State for the Home Department*, [2010] EWCA Civ 1285, United Kingdom: Court of Appeal (England and Wales), 18 November 2010, available at: <http://www.unhcr.org/refworld/docid/4d0204422.html>. This case is currently pending before the UK Supreme Court (oral hearing scheduled for 18-19 June 2012 (UNHCR is intervening)).

³⁵ On cases based on transgression of social mores, see A. Edwards, ‘Age and Gender Dimensions in International Refugee Law’, in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 46.

³⁶ *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c3456752.html>; UN High Commissioner for Refugees, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department - Case for the first intervener (the United Nations High Commissioner for Refugees)*, 19 April 2010, available at: <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>.

³⁷ *HJ (Iran) and HT (Cameroon)*, para. 10 (per Lord Hope).

³⁸ *HJ (Iran) and HT (Cameroon)*, para. 75-76 (per Lord Rodger).

discreetly” because of “social pressures” not amounting to persecution, and the situation where “a material reason” is that “he would have to behave discreetly in order to avoid persecution because of being gay”.³⁹ He stated that only the latter would be a refugee. That is, he added a “why” test.

The issue of whether this test should be applied to political opinion (and also to other cases) is currently before the UK Supreme Court.⁴⁰ It has already been criticised on several grounds, including for not entirely eradicating the discretion test, in part by treating those who would live openly and those who may not differently, and that this distinction has no basis in the Convention.⁴¹

How the issue of discretion crept (back) into refugee claims is unclear, but it has the potential to undermine one of the basic tenets of refugee law – that the Convention protects persons who possess a well-founded fear of being persecuted on account of their attributes or opinions; and that one should not therefore be compelled to hide, change or renounce them in order to avoid persecution.⁴² The preferred approach would appear to be one that requires a context-specific examination of the predicament the person would face upon return, and whether the *risk* of that harm arising meets the threshold of well-foundedness.⁴³

Discrimination

The third new frontier is the question whether discrimination needs to define the social group. It is widely acknowledged – in the words of Brennan CJ in *Applicant A* – that the 1951 Convention “is not simply [concerned with] the protection of those who suffer a denial of enjoyment of their fundamental rights and freedoms; they must suffer that denial by

³⁹ *Ibid.*, paras. 61-62.

⁴⁰ *RT (Zimbabwe) and Others*.

⁴¹ The “why” test has already been criticized, see: Janna Weßels, *JH (Iran) and another – Reflections on a New Test for Sexuality-Based Asylum Claims in Britain*, Paper presented at the Fleeing Homophobia Conference, VU University Amsterdam, 5-6 September 2011, available at: http://www.rechten.vu.nl/nl/Images/Wessels_tcm22-230739.pdf. See, also, James C. Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44 *New York University Journal of International Law and Politics* 315, 2012.

⁴² UN High Commissioner for Refugees, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, para. 13, available at: <http://www.unhcr.org/refworld/docid/4090f9794.html>.

⁴³ It is also therefore an evidentiary question involving the likelihood of risk (reasonable possibility) of persecution.

prescribed kinds of persecution, that is, persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion".⁴⁴ In other words,

[T]he feared persecution must be discriminatory [in the sense of being imposed for a discriminatory purpose]. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination ("race, religion, nationality, membership of a particular social group or political opinion") mentioned in Art 1(A)(2). The persecution must be "for reasons of" one of those categories. This qualification excludes indiscriminate persecution which is the product either of inhuman cruelty or of unreasoned antipathy by the persecutor towards the victim or victims of persecution. Persecution of that kind is a general, non-discriminatory denial of fundamental rights and freedoms. The qualification also excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of "refugee". But the categories of discrimination mentioned in the definition are very broadly stated, especially the category of "membership of a particular social group".⁴⁵

Lord Hoffman, for example, stated in *Shah and Islam*:

In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. [...] In choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.⁴⁶

Lord Hoffman's assessment has not been widely followed however; and the preferred approach has been to limit the number of social groups permitted protection under the 1951 Convention. He went on to state 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.⁴⁷

Gleeson CJ in *Khawar* also noted:

Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by male or by governments.⁴⁸

So what is the problem you might ask? Well, these quotes beg the question why advocates clamour to put forward various sub-groups of women, many of them frankly being "artificial constructs" rather than real groups, rather than rely on "women" generally? If one is able to establish that a woman has been persecuted because she is a woman, or for reasons of

⁴⁴ *Applicant A*, per Brennan CJ.

⁴⁵ *Ibid.*

⁴⁶ *Shah and Islam*, p. 15 (per Lord Hoffman).

⁴⁷ *Ibid.*, p. 16 (per Lord Hoffman).

⁴⁸ *Khawar*, para. 35 (per Gleeson CJ).

gender, then it seems less relevant whether she belongs to a broad or narrow group of women. In the important US decision in *In Re Fauziya Kasinga*, for example, the group accepted was “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”.⁴⁹ Even if they had accepted the group as “women”, only those women who could claim to be at risk of this practice would qualify for refugee status, and this would have limited the protected group to those women from Tchamba-Kusuntu tribe. The real basis for the persecution was however their gender/sex as “women”. Also, they could have raised the ground of “nationality” (as ethnicity) because it was women from their particular tribe who were at risk.

The way in which subsets of women are framed also raises the question whether “women” are a demographic group or a social group. “Sex” of course is a demographic indicator – alongside age, race, marital status, occupation, etc. – but it is also a social group set apart from society and, in some societies, set apart for the purposes of persecutory action.

The case of *Applicant S*, earlier described, which accepted “able-bodied young men in Afghanistan” as a social group, has in my view – at least in the Australian courts – the potential to lift the limits of “social group”. It is questionable whether “discrimination” was even a feature of this social group. The real issue in that case was of persecution and protection, as indicated by the qualifying sentence of McHugh J regarding the “different legal, social, cultural and religious norms” in different societies. The case departs from the general treatment of women’s claims however, in so far as the latter have had to establish a discriminatory basis to their status. It also raises questions about the discriminatory treatment of women’s claims, in so far as women continue to need to establish a discriminatory context. *Perdomo v. Holder* also presented an (lost) opportunity to find that women at risk of persecution on the basis of their gender (here Guatemalan women at high risk of murder) fall within the refugee definition in the 1951 Convention. “Guatemalan women” were in fact the social group. Whether they had a well-founded fear of being persecuted to benefit from the Convention definition would be a matter of the risk.

⁴⁹ *In re Fauziya Kasinga*, 3278, United States Board of Immigration Appeals, 13 June 1996, available at: <http://www.unhcr.org/refworld/docid/47bb00782.html>.

Conclusion

There remain many ambiguities in the interpretation of MPSG, both within and across jurisdictions, and how it relates to claims based on gender, as well as sexual orientation/gender identity. It is fair to ask whether the development of the MPSG ground has been a help or hindrance to the recognition to women's claims.

So where to from here? I wanted to flag two strategies for moving beyond the long-standing lack of harmonized approaches to MPSG, and in turn women's claims.

The first is legislative reform – it is high time that “sex” or “gender” were added as grounds to refugee status in national asylum laws. Where countries have incorporated “sex” and/or “gender” in their national legislation, the need to rely on MPSG is minimized and it would reduce the inconsistencies between lower and higher (and parallel) courts and tribunals in a single country (and between countries).

The second is to move to use the other grounds in the 1951 Convention definition wherever applicable. Too often women's claims are framed singularly under the MPSG ground, when a perfectly respectable argument of political opinion or religion could have been proffered.⁵⁰ As I asked in 2003, and again in 2010,

Why is it so difficult to recognize acts of a woman in transgressing social customs as political? Why are certain acts (for instance, acts contravening religious dress codes) considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? Why has rape during ethnically motivated armed conflict not been seen as only criminal and not also racial in character?⁵¹

Part of the answer is that advocates are not putting forward these other grounds, or they are getting limited attention by decision-makers. Various reasons may account for this narrow focus, one is gender stereotyping and the making of assumptions about the claims of women,

⁵⁰ See, e.g., *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, United Kingdom: House of Lords (Judicial Committee), 18 October 2006, available at: <http://www.unhcr.org/refworld/docid/4550a9502.html>.

⁵¹ A. Edwards, 'Age and Gender Dimensions in International Refugee Law', in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 46, at 68 (footnotes omitted). Also restated in A. Edwards 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010' (2010) 29 *Refugee Survey Quarterly* 21, at 30 (this article also notes other areas of improvement for women's claims including internal flight/relocation alternative).

the other may be the need for further capacity building.

For its part, UNHCR will be looking to revise parts of its Guidelines on MPSG in 2013 in order to clarify some of the misunderstandings outlined in this paper. We will also issue new Guidelines on Sexual Orientation and Gender Identity this year. Yet, beyond doctrinal advice, we need a more concerted effort to learn from the lessons since the guidelines were first developed as well as the findings of research in this area, and to push for improved advocacy and decision-making on gender-related claims to asylum.

Thank you.