

‘As a woman I have no country’: the denial of asylum to women fleeing gender-related persecution Frances Webber

1. Introduction

Women have historically found it more difficult to qualify for refugee status than men. The *1951 Convention relating to the Status of Refugees* (‘the Refugee Convention’), responding to the manifest need for reliable protection for refugees following the second world war and Europe’s inadequate response to those fleeing Nazism, promised international protection for refugees from persecution. The Refugee Convention forms the cornerstone of protection for refugees all over the world; 147 countries have signed up to it. But not everyone who is fleeing danger or violence qualifies as a refugee under the Convention. As Baroness Hale said (in the case of *Fornah*),

‘Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. People fleeing national and international wars, famine or other natural disasters are referred to as refugees, and offered humanitarian aid by the international community, but they do not generally fall within the definition in the 1951 Convention.’¹

To qualify for recognition as a refugee, claimants must demonstrate that they have a ‘well-founded fear of being persecuted’ which prevents them from returning home, and that the feared persecution is ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’.

‘Persecution’ - being subjected to or threatened with serious harm - is not enough to qualify for refugee status; the refugee claimant must also show that this is linked to a Convention ground - that it is her race, or her religion, or her political beliefs, or her position in society, which has provoked the ill-treatment she fears to return to.

Although the Refugee Convention is nearly 60 years old, the courts of the countries applying it are constantly developing and re-interpreting it in response to demands for protection for new groups or from new forms of persecution, to ensure that it remains relevant and useful to the refugees of today.

¹ *Fornah* [2006] UKHL 46, available at <http://www.bailii.org/uk/cases/UKHL/2006/46.html>

2. Women and the Refugee Convention

The wording of the Refugee Convention does not include 'sex' or 'gender', and it has only been in the last decade that widespread forms of persecution of women have been recognised. When the Convention was introduced, traditional practices such as forced marriage, female genital mutilation, foot-binding, the self-immolation of widows and 'ordinary' domestic violence against women were not considered as 'persecution', although they caused serious harm to women and girls, and were carried out on them because of their sex or gender. They were not recognised because for decades 'persecution' was seen as something carried out by the state or by rulers, mainly against political dissidents or on a tribal basis. 'Persecution' was seen as something which happened exclusively in the public domain. The traditional practices affecting women tend to happen in the home or relate to the domestic or private sphere.

In the 1990s and 2000s, for the first time, in response to pressure both inside and outside the courtroom, the UK's higher courts - following the lead of courts in Canada and New Zealand - began to accept that women who were not necessarily politically active in the way men were could be refugees. They recognised that there were particular forms of persecution to which women and girls were uniquely or particularly susceptible, such as the traditional practices described above. They also began to accept that actions carried out in the private sphere - such as domestic violence - could constitute persecution if the authorities of the country concerned either could not or would not provide adequate protection. This meant that women's position in a particular society could expose them to the sorts of severe harm which could be called 'persecution'.

'Political opinion'

Traditionally, the Convention ground of 'political opinion' has been applied to those who fear state persecution for opposition activities such as membership of a banned political party. Women's refugee claims challenged that narrow perspective. The higher courts gradually began to accept that when the Convention talked about 'political opinion', this could refer to any opinion about the way society was structured or about the distribution of power. Women challenge prevailing power structures by, for example, refusing an arranged marriage, ending a violent marriage, refusing to dress or behave in accordance with socially defined roles and mores - and if they suffer harm as a result, the broader definition of 'political belief' could result in their recognition as refugees. This is expressed in a recent New Zealand case called *Refugee Appeal No. 76044*² - because the Refugee Convention is an international Convention adhered to by the majority of the world's states, the decisions of courts from many countries are used to

² 11 September 2008

help the UK courts in deciding on who is a refugee, and in recent years the higher courts have considered cases from Canada, Australia, New Zealand and the USA. In this case, the appellant claimed refugee status because, having ended her violent arranged marriage, she was threatened with 'honour killing' by her in-laws. The court pointed out that:

'The political opinion ground must be oriented to reflect the reality of women's experiences and the way in which gender is constructed in the specific geographical, historical, political and socio-cultural context of the country of origin. In the particular context, a woman's actual or implied assertion of her right to autonomy and the right to control her own life may be seen as a challenge to the unequal distribution of power in her society and the structures which underpin that inequality. Such a situation is properly characterised as "political"...

'The appellant's severance of her relationship with her husband was an unambiguous act of self-emancipation from an abusive relationship and the structures of power and inequality which had sanctioned that relationship from the moment the appellant had been forced into it. Her unilateral action in ending the marriage was seen by the respective families as a direct challenge to her role and duties and to their authority to control her behaviour for the benefit of their collective communal identity and status. As such, it engaged the obligation under custom or law to police the collective code of honour by removing from the collectivity the stain of dishonour. This required the appellant's death. The appellant's challenge to inequality and the structures of power which support it was plainly "political". She is at risk of being persecuted "for reasons of" political opinion.'

'Membership of a particular social group'

It is generally easy to understand and recognise racial, nationality-based, political and religious persecution. But for many decades national authorities and courts were confused about the other ground qualifying a victim of persecution as a refugee. In particular, they thought for a long time that people had to be associated in a club or association to qualify as a 'member of a particular social group' - they had to know each other. But in 1999 it was established that the words just meant a group defined by a recognisable characteristic, similar to race or religion. In all societies, women are perceived as distinct from men, and in most societies, women have less power and are subjected to discrimination in employment and other fields and to sexual and domestic violence. Where there is institutionalised discrimination, and no effective recourse against male violence, women subjected to such violence who leave and claim asylum abroad can validly claim to be refugees 'for reasons of their membership of a particular social group', defined by their gender.

The first case which established this principle in the UK is known as *Shah and Islam*.³ The House of Lords' judicial committee (the UK's highest court, the precursor of the Supreme Court) held in 1999 that women from Pakistan who faced serious domestic violence, against which they would not be protected by the authorities because of entrenched discrimination against women in that country, could qualify as refugees. This institutionalised discrimination was central to the case. The Home Office argument was that it was their husbands, not the state, whom the women feared – i.e. it was a private matter. Lord Hoffmann spelled out why this argument was wrong:

'Domestic violence such as was suffered by [the appellants] in Pakistan is regrettably by no means unknown in the United Kingdom. It would not however be regarded as persecution within the meaning of the Convention. This is because the victims of violence would be entitled to the protection of the state ... What makes it persecution in Pakistan is the fact ... the State was unwilling or unable to offer her any protection. The adjudicator found it was useless for Mrs Islam, as a woman, to complain to the police or the courts about her husband's conduct. On the contrary, the police were likely to accept her husband's allegations of infidelity and arrest her instead. The evidence of men was always deemed more credible than that of women. If she was convicted of infidelity, the penalties could be severe. Even if she was not prosecuted, as a woman separated from her husband she would be socially recognized and vulnerable to attack, even murder, at the instigation of her husband or his political associates.'

He continued:

'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 ... the concept of a social group is in my view perfectly adequate to accommodate women as a group in a society that discriminates on grounds of sex, that is to say, that perceives women as not being entitled to the same fundamental rights as men...'

'What is the reason for the persecution which the appellants fear? Here it is important to notice that it is made up of two elements. First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about

³ *Shah and Islam* [1999] UKHL 20, at <http://www.bailii.org/uk/cases/UKHL/1999/20.html>

this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men ... the legal and social conditions which according to the evidence existed in Pakistan and which left [Mrs Islam] unprotected against violence by men were discriminatory against women. For the purposes of the Convention, this discrimination was the critical element in the persecution. In my opinion, this means that she feared persecution because she was a woman.'

The women's appeals were allowed and both were recognized as refugees. Since this groundbreaking decision, women fleeing domestic violence in countries including Afghanistan, Albania, China, Ethiopia, Iran, Kenya, Moldova, Sierra Leone, Somalia and Ukraine have been recognized as refugees on the basis of the entrenched discrimination and lack of state protection in their countries of origin.

In 2002, the United Nations High Commissioner for Refugees (UNHCR), the body responsible for overseeing the implementation of the Refugee Convention, issued Guidelines on Gender-Related Persecution, which state that:

*'Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.'*⁴

The guidelines point out that persecution may be gender-related in two distinct ways: the nature of the persecution may be gender-related (e.g. sexual violence), and/ or the reason for the persecution may be gender-related (i.e. because of the victim's sex or gender).

Rape as persecution

To be raped is obviously to suffer serious harm. It was a 1998 case in the International Tribunal for the Former Yugoslavia, *Furundzija*,⁵ which established that rape could amount to torture. Whether a victim of rape qualifies as a refugee, however, depends on a number of other factors beside the fact of having been raped.

⁴ UNHCR, *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 3, available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>

⁵ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: <http://www.unhcr.org/refworld/docid/40276a8a4.html>

The first is the 'Convention reason'. Rape has tended to be treated like any other form of violence - the authorities and the courts don't accept that rape per se is always gender persecution. Men can be raped (and frequently are, in prisons), not because they are men but for some other reason, which may be political or may simply be because they are too weak to resist in a brutal environment.

Rape is accepted as persecution under the Refugee Convention when it is inflicted as a punishment, by someone in authority, for example against political opponents under arrest in a police station, or in order to extract information or a confession (like other forms of torture). Then, it is accepted as political persecution.

The second problem facing a victim of rape is that to qualify as a refugee, as we have seen, the Convention looks to the future, not the past - so the claimant needs to establish a fear of persecution. The fact that she has been subjected to serious harm in the past does not qualify her unless she can show that there are good reasons to believe it will happen again if she is forced to return (the courts have held that claimants have to show there is a 'real risk' or a 'reasonable likelihood' of persecution).

It has proved very difficult for women to obtain refugee status on the basis that they have been raped by soldiers during war or civil conflict - even when it is pursuant to a deliberate policy, as in Bosnia and Kosovo. Judges have a tendency to see rape in these circumstances as a matter of 'dreadful lust' - and so almost accidental, something random and therefore unlikely to happen again. On this basis, judges have rejected many refugee claims from women who have been raped in this situation. But some more progressive judges have recognised that rape is frequently systematically used as a weapon of war, and therefore that there is a real risk of its recurrence. In cases where it is accepted that rape is used as a weapon of war, it is generally perceived as being for reasons of race or ethnicity or imputed political opinion.

In the 2005 case of *Hoxha and B*,⁶ in the House of Lords, Lady Hale made some crucially important observations on the nature of rape during war as persecution, and its effects, specifically the stigma attaching to the victim in traditional communities:

'All four members of the B family suffered persecution at the hands of the Serb police... But the persecution of Mrs B was expressed in a different way from the persecution of her husband and sons. She was raped in front of her husband, her sons and twenty to thirty of their neighbours. As Rodger Haines QC notes in his paper on "Gender-related persecution"....:

⁶ *Hoxha and B* [2005] UKHL 19, available at <http://www.bailii.org/uk/cases/UKHL/2005/19.html>

"Women are particularly vulnerable to persecution by sexual violence as a weapon of war."

He goes on to quote Heaven Crawley, *Refugees and Gender: Law and Process*, 2001, pp 89-90:

"During war, women's bodies become highly symbolic and the physical territory for a broader political struggle in which sexual violence including rape is used as a military strategy to humiliate and demoralise an opponent; women's bodies become the battleground for 'pay-backs', they symbolise the dominance of one group over another . . . It is important to recognise that sexual violence and rape may be an actual weapon or a strategy of war itself, rather than just an expression or consequence. In the context of armed conflict or civil war, the rape of women is also about gaining control over other men and the group (national, ethnic, political) of which they are a part.'

[T]he UNHCR published *Guidelines on Gender-Related Persecution [which] make the same point at para 24:*

". . . the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction."

If sexual violence is used in this way, the consequences, not only for the woman herself but also for her family, may be long-lasting and profound. This is particularly so if she comes from a community which adds to the earlier suffering she has endured the pain, hardship and indignity of rejection and ostracism from her own people. There are many cultures in which a woman suffers almost as much from the attitudes of those around her to the degradation she has suffered as she did from the original assault. The UNHCR Guidelines recognise that punishment for transgression of unacceptable social norms imposed upon women is capable of amounting to persecution.'

This judgment recognises both that rape in the context of armed conflict may be persecution within the Refugee Convention (when it is used as a weapon of war), and also that the way a raped woman is subsequently treated within her community (being ostracised, treated as immoral, and perhaps subjected to further sexual violence) may also qualify her for refugee status.

In an earlier case, called *ex parte Ejon*,⁷ the High Court accepted that the traumatic nature of rape may well make it impossible for the victim to talk about it, sometimes for years. The

⁷ [1997] EWHC Admin 854 (9 October, 1997)

applicant in the case had made an asylum claim which did not refer to her having been multiply raped and taken as a sex slave by soldiers in Uganda, and it was only some years after her claim had been refused and her appeal rejected that she was able to talk about it in the course of therapy. Encouraged by the support she was receiving, she made a fresh claim for asylum which included details of what had happened to her. But the Home Office refused this new claim on the basis that she could and should have given the details of her sexual ill-treatment when she first claimed. Strong psychiatric evidence about the crippling effect of the trauma on her, together with evidence of scarring consistent with very violent sexual abuse of an unprepared young woman, persuaded the judge in the High Court that the Home Office was wrong to disallow the new evidence.

In *NS (Social Group - Women - Forced marriage Afghanistan)*⁸ an immigration judge had held that a young Afghani woman had been raped purely because her assailant found her attractive (and so did not qualify for refugee status since her rape was not for one of the Convention reasons, and was unlikely to recur). The Tribunal overruled this conclusion, saying it was not based on the evidence. The woman (a mother of three), her husband and her family, who had all supported the overthrown Najibullah regime, had been targeted as Uzbeks and Communist sympathisers by a powerful warlord. Her husband was imprisoned and then disappeared, her sister killed for refusing to marry one of the warlord's militia, and she was raped after refusing to marry the warlord's nephew. Her uncle, who tried to protect her, was killed. There was no law in Afghanistan protecting women from rape or forced marriage. The Tribunal held that the legal status of women in Afghanistan, and the legal and social discrimination against them, meant that one reason for the treatment of the appellant was her status as a woman without effective protection from an adult male or males. They allowed her appeal and she was granted refugee status.

Honour violence

Women who offend traditional or religious mores by their mode of dress, by refusing to marry, by seeing men to whom they are not related or married, by lesbian relationships or by other conduct perceived as reflecting adversely on the honour of their family may be at risk of serious, sometimes even fatal violence from family members. Women fleeing such violence are refugees under the Refugee Convention. The violence they fear may be seen as religious or political persecution; religious persecution covers persecution of those who refuse to comply with religious duties, and political persecution, as we have seen above, covers persecution of those who challenge the distribution of power and can protect women refusing to submit to male

⁸ CG [2004] UKIAT 00328

power. Or the violence can be seen as persecution for reasons of the women's membership of a 'particular social group', e.g. 'women' or 'women who transgress social mores' or 'lesbians' in the particular society, depending on the evidence in the particular case (see 'Membership of a particular social group' above).

In a very important and influential decision in 1996, MN, the New Zealand Refugee Status Appeals Authority (NZRSAA) found that an Iranian woman who had lost her virginity and feared death at the hands of her very traditional family (who had already killed two of her female cousins for similar reasons), qualified for refugee status. The Authority held that the persecution she feared was on religious and political grounds, since she consciously opposed the way 'Islamic principles, Islamic law, and Islamic morality have been interpreted in Iran to justify depriving women of any semblance of equality with men, subjecting them to a wide range of discriminatory laws and treatment, and effectively confining them to serving their husbands, performing domestic tasks, and bearing and raising children'. In a later decision, *Refugee Appeal No. 76044* (2008), the Authority held that a Kurdish Alevi woman whose family threatened to kill her after she ended her violent marriage qualified for refugee status, having a well-founded fear of persecution for reasons of political opinion (the assertion of her right to control her own life, which would be seen as a challenge to the gender inequality and patriarchal power relations in her society).

The House of Lords case of *Hoxha and B* (referred to above under '*Rape as persecution*') was also about honour violence, in that Baroness Hale was considering how in traditional societies, being a victim of rape is perceived as a stain on the family's honour and disclosure can result in violence or even death at the hands of family members.

Honour violence against women is accepted as gender-related persecution, whether for reasons of religion, political opinion or membership of a gender-defined social group. But the perpetrator (as in the case of domestic violence and some sexual violence) is a private individual, in these cases a member or members of the refugee claimant's own family. Where the claimant's fear is accepted as genuine and well-founded, the main issue dealt with by the courts is whether the authorities of her own country are able and willing to provide protection. As Lord Hoffmann observed in *Shah and Islam* (quoted above), women fearing private violence in the UK would not qualify as refugees if they fled to another country, because the authorities here have a system of protection which includes a criminal justice system whereby perpetrators can be arrested, charged and imprisoned, and civil remedies such as injunctions.

In countries where the law permits or condones honour violence, the state is in effect adopting the violence, and is clearly unwilling to provide potential victims with protection against it. Women fleeing honour violence in such countries ought to have no difficulty obtaining refugee

status. But where women flee from honour violence in countries where there are laws forbidding it, the task for the UK refugee determination authorities and the courts is more difficult. Someone who can get protection in their own country against the violence they fear does not need international protection. But if the laws against such violence are rarely or never used, or punishments for honour violence are derisory, the protection is not real and effective, and women cannot be expected to go home and rely on paper laws which won't protect them in reality. Thus, the courts in the host country must decide what protection is provided in practice, and whether it is adequate to prevent and deter private violence, in order to decide whether claimants require refugee status. In a number of cases, the Canadian courts have found that the Israeli authorities do not provide adequate protection against honour violence to Arab Israeli women, that the Turkish government does not adequately protect Kurdish Alevi women and that the Pakistani authorities would not provide adequate protection from the threat of honour killing.

In *Re X*⁹, decided in 2000, the Refugee Board found that a young Israeli Arab Christian who had divorced her violent husband and remarried against her family's will had a well-founded fear of persecution as a woman in Israel as the Israeli authorities did not provide adequate protection against honour violence to Arab Israeli women. Nine years later, in 2009, the Federal Court found in *Jabbour v. Canada*¹⁰ that the Israeli authorities were still not providing adequate protection against honour violence to its Arab citizens. And in another Canadian case, *Erdogu v. Canada*,¹¹ the court considered the claim of a Kurdish woman that her father would kill her because her boyfriend had disclosed their sexual relationship, and found that the Turkish government's efforts to address the problem of honour killings were not effective. In *Tabassum v Canada*,¹² where the Claimant said that her husband and his family in Pakistan were threatening to kill her because she touched men's hair in the course of her work as a hairdresser and because a male friend had answered the phone when her husband called her at her flat in Canada, the Federal Court held that the Pakistani authorities would not provide adequate protection if the threat of honour killing was genuine.

⁹ Re X 2000 CanLII 21446 (I.R.B.)

¹⁰ Jabbour v Canada (Citizenship and Immigration), 2009 FC 831

¹¹ Erdogu v Canada (M.C.I.), 2008 FC 407

¹² Tabassum v Canada 2009 FC 1185

Female genital mutilation

Female genital mutilation, or genital cutting, is widely practised on women of all religious faiths in a number of traditional societies in Asia and Africa. The French courts were the first to recognise that FGM is gender-based persecution, in a decision in 1991 (Aminata Diop), but Mrs Diop's claim failed on its facts. The Canadian courts were the first to grant refugee status, to a divorced Somali woman, Khadra Farah, and her minor children, in 1994, accepting that if they were returned to Somalia Mrs Farah would lose custody of her young daughter, and would be powerless to prevent the child being subjected to the custom of female genital mutilation (FGM), to which she herself had been subjected when she was eight years old, causing terror, pain and agony and health problems relating to menstruation, conception and childbirth once she reached adulthood. The US and Australian courts followed suit, and in 2006, the House of Lords (now UK Supreme Court) held that FGM was persecution and that a young Sierra Leonean woman who fled her country aged 15 in fear of being mutilated as customary initiation into womanhood was a refugee. The Austrian, German and Belgian courts have also accepted that FGM is persecution under the Refugee Convention.

In Fornah the refugee claimant ran away when she heard her parents discussing the need to have her cut. If she returned to Sierra Leone, she would always face the risk of FGM. The Home Office argued that FGM in Sierra Leone was not persecution, but a widely accepted rite of passage from childhood to full womanhood, which was performed by secret societies of women. The House of Lords disagreed, holding that the practice 'causes excruciating pain. It can give rise to serious long-term ill-effects, physical and mental, and it is sometimes fatal'. It was 'an extreme and cruel expression of male dominance ... and the authorities do little to curb or eliminate it'.

In May 2009, UNHCR issued a Guidance note on refugee claims relating to female genital mutilation, which 'establishes that a girl or woman seeking asylum because she has been compelled to undergo, or is likely to be subjected to FGM, can qualify for refugee status'. 'In most cases', UNHCR states, 'the potential or actual harm caused by FGM is so serious that it must be considered to qualify as persecution, regardless of the age of the claimant'. Its continuing effects may sometimes give rise to a refugee claim by someone who has already been subjected to it.¹³

The Guidance also clarifies that under certain circumstances, 'a parent could also establish a well-founded fear of persecution, within the scope of the 1951 Convention refugee definition, in

¹³ UNHCR, *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, paras 9 and 13

connection with the exposure of his or her child to the risk of FGM'. These circumstances might include witnessing the child's pain and suffering while being unable to avert it, or risking persecution by trying to prevent a child's being cut. The birth of a daughter in the country of refuge can, UNHCR adds, give rise to a sur place claim, ie, one where the claimant was not a refugee when she left her country, but fear of persecution has arisen since.¹⁴

Not all women from societies where genital cutting is practised are refugees. Refugee claims based on the fear of genital cutting are similar in this respect to those based on domestic or honour violence. Since it is not the State or its agents who are the persecutors, refugee protection is only given where it is needed, ie, where the authorities of the home country cannot or will not themselves provide potential victims with protection against the threatened violence. A refugee claim will be defeated by evidence that the authorities in the country of origin have taken 'effective and appropriate measures to eliminate FGM', including 'appropriate prevention activities as well as systematic and actual (not merely threatened) prosecutions and punishment for FGM-related crimes. Factors indicating an absence of protection include a lack of effective legislative protection, lack of universal State control, and pervasive influence of customary practices'.¹⁵

3. Conclusion

In Fornah, Baroness Hale observed that 'the world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society'. Certainly, thanks to judges like her, refugee law is much more female-friendly now than it was twenty years ago.

But the fact that rape, honour violence and FGM, among other forms of violence meted out to women, have now been recognised as persecution under the Refugee Convention by the highest courts of the UK and other countries, does not mean that women asylum seekers in the UK (or other countries of refuge) basing their refugee claim on one or other of these forms of violence are automatically or generally granted refugee status. The legal arguments may have been won, but the procedure for claiming refugee status, and the widely observed 'culture of disbelief' in the UK Border Agency (UKBA, whose officials decide refugee claims) and among immigration judges, makes the road to recognition as a refugee a very rocky one, which comparatively few succeed in traversing.

¹⁴ Ibid. Para 11-12

¹⁵ UNHCR, *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 21

The procedure

The Refugee Convention states that a refugee is someone who is outside her own country and is unable or unwilling to return owing to a well-founded fear of being persecuted. This definition means that refugee status cannot be claimed by someone who is still inside her own country. Worse, it means that someone fleeing their country cannot go to a foreign embassy and seek a visa as a refugee, as they don't become a refugee until they are outside their country. Thus, to claim refugee status, an asylum seeker must get to a safe country. But no western country wants refugees, so they all make it as difficult as possible for them to get there. When people start fleeing a country in large numbers, because of war or repression, visa requirements are imposed, and enforced by fining airlines which carry visa-less passengers. Thus Kosovans fleeing Serbian atrocities, Zimbabweans escaping Mugabe's thugs, refugees from the Lord's Resistance Army from Uganda or the Democratic Republic of Congo - have all found they could not get to Europe legally. There is no lawful way a refugee can get to Europe. The choice is to obtain false travel documents or to travel clandestinely in lorries.

The Refugee Convention recognises that refugees often have to travel illegally, and it prohibits States from imposing penalties on refugees arriving illegally, provided they claim asylum promptly. But many countries, including the UK, frequently detain asylum seekers who arrive with false documents or who are found hiding in trucks. There is no legal time limit for the detention of asylum seekers, and detention for over a year is not unknown. Home Office policy indicates that generally, vulnerable asylum seekers - those who have evidence that they have been tortured, children, pregnant women - should not be detained. Many are wrongfully detained - as many as a thousand children a year are detained with their families - although the new government is committed to ending the immigration detention of children.

Asylum seekers who arrive at a port and claim asylum are allocated a 'case owner', a UKBA official who conducts the refugee determination. They are then interviewed, first to establish how they reached the UK, and then in a full 'asylum interview', generally scheduled for some weeks later, in which they are asked to explain fully the reasons for the claim. Those who do not claim asylum at the port where they entered, must go to an Asylum Screening Unit in Croydon to make their claim, and they must do this immediately, otherwise they might not get support. Asylum seekers may obtain government-funded legal help and assistance with their claim, up to a maximum of about three hours' work, subject to means and the merits of their claim, and may claim further legal aid for their appeal. But severe legal aid cuts have left many asylum seekers unable to find a lawyer to help or represent them. Without lawyers, it is virtually impossible for claims based on gender persecution to succeed - mainly because the women themselves do not appreciate that such claims can succeed. A woman from Uganda, Somalia, Sierra Leone or

DRC may claim asylum on the basis of general violence in internal armed conflict - which does not qualify her for refugee status - and may not be aware without the help of a lawyer that the risk that she or her daughter will be subjected to FGM gives her a valid claim. As we saw earlier, she may be too ashamed to mention rape or sexual violence. It needs a lawyer to be aware of these issues and to bring them out of a confused, frightened and traumatised woman.

Once an asylum claim is made, UKBA says on its website that claims are generally dealt with within six months. But there are many thousands of asylum seekers who have been waiting for five or more years for a decision on their claim. At the other extreme, asylum seekers from a list of about 65 countries, whose claims UKBA believes can be decided quickly, may be put through the 'fast track'. They are detained, are interviewed the day after arrival, and only have a day or two to produce supporting evidence for their claim. Many NGOs assisting asylum seekers have condemned these procedures as fundamentally unfair. Yarl's Wood Immigration Removal Centre (IRC) is the main detention centre for women with children. It has been fiercely criticised as 'No place for a child' - or for women who have been subjected to rape and other forms of torture but who find themselves disrespected, demeaned and disbelieved.

The United Nations High Commissioner for Refugees (UNHCR) is the body responsible for supervising States' application of the Refugee Convention. Its Handbook on Procedures and Criteria for Determining Refugee Status, produced in 1979, is still an important guide to the process which should be followed by States in assessing refugee claims. It states that although the refugee claimant has to establish her claim, in practice the difficulties and lack of documentation faced by refugees mean that the burden should be shared by the authorities. This means that if the story told by the refugee claimant is consistent with the information held by the authorities about what happens in the country concerned, the authorities should not be too fussy in demanding further proof from the claimant.

Unfortunately, this guidance is not generally followed. UKBA officials sometimes give the impression that their purpose is to catch asylum seekers out - they seem to work from the premise that most asylum seekers are opportunistic liars, an attitude strongly fostered by the media and sometimes by government ministers, although it is very far from the truth. UKBA officials have also been subjected to heavy criticism for the poor quality of decisions refusing asylum. Decisions are given in writing, and set out the claim and the reasons for refusal in detail. Many of these 'reasons for refusal' letters betray ignorance of the conditions in the country the asylum seeker has come from - some even get the name of the country wrong. Officials frequently decide not to believe a claim because of minor differences in the story between the first and second interview, or between the interview and an asylum statement made by the asylum seeker with her lawyer. A whistle-blower who worked in an asylum determination office recently described the hostility towards asylum seekers on the part of

colleagues, who would place an 'asylum monkey' on the desk of anyone who allowed a claim. The nature and wording of asylum refusal letters has often caused despair and even suicidal thoughts among their recipients, a number of whom have committed suicide rather than be returned home.

When it comes to the appeal to the immigration judge at the First Tier Tribunal, once again the impression is frequently given that the judge is trying to find ways to reject the appeal rather than listening with an open mind to the evidence. If a claim cannot be disbelieved, because the supporting evidence is too strong, immigration judges may dismiss the appeal on the basis that the refugee claimant can find safety by going to the police, or by moving to another part of the country. Sometimes this is a valid conclusion, but very often it betrays lack of awareness of the nature of the particular country. For example, in many countries, the police are just another persecutor for women who have no family protection. Also, strong family networks provide protection and survival outside the home area, but their tentacles mean that someone who fears violence from her own family literally has nowhere she can go which is beyond the reach of the family network. In cases such as this, the refugee claimant faces a long, hard struggle, taking the case to the higher courts in the hope of getting the decision reversed.