

# **GLOBAL MIGRATION AND GENDER NETWORK**

**Women - no longer a forgotten minority  
under Australian asylum law**

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## Introduction

Global trends demonstrate that the number of asylum seekers and refugees increases every year. At the start of 2005, the number of people of concern to the United Nations High Commissioner for Refugees (UNHCR) had risen to 19.2 million. Of this, fifty one per cent are generally women and girls. Providing a response to the forced movement of asylum seekers requires international cooperation and commitment. However, in this time of “asylum fatigue” those at the margins of refugee protection, such as female asylum seekers, risk being excluded from international protection.

The end of the Cold War period saw new types of refugee flows. These included female asylum seekers fleeing persecution specifically directed at them based on their “sex” or “gender”. In many societies women are regarded as the private property of their fathers and then their husbands<sup>1</sup>. As a result, women face differential treatment within the legal system and are vulnerable to sexual violence<sup>2</sup>. For female asylum seekers, gender inequality is a primary cause of their forced migration.

In the new wave of refugees from the Middle East, Africa and Asia, many women claim persecution on the basis of social and religious mores or arising from domestic violence. These forms of persecution are difficult to reconcile with the post-World War II perception of refugees seeking asylum for ideological reasons. Fortunately, these events have coincided with developments in international human rights law relating to women and the recognition of sexual violence as a crime against humanity under international criminal law, thus heightening the importance of sexual and gender-based persecution in the asylum context.

Australia is a signatory to the United Nations Convention relating to the Status of Refugees 1951 (henceforth Refugees Convention) and its Optional Protocol of 1967, as well as to international human rights treaties. Although the Refugees Convention guarantees equal rights for both men and women, as this article will demonstrate, the perceived gender neutrality of international refugee protection has proven to be a significant obstacle for the protection of female asylum seekers. The nature and varying forms of sexual and gender-based persecution are difficult to fit the refugee definition. Yet, in spite of the restrictive application of the Refugees Convention to individual cases of sexual and gender-based persecution, Australian courts have expanded the protection available for female asylum seekers. By requiring consideration of their claims in the social and cultural context of the countries from which female asylum seekers have fled, the courts have accorded claims of sexual and gender-based persecution with broader recognition within the ‘membership of particular social group’ ground of the Refugees Convention.

This article begins with a discussion of the particular nature and the different forms of sexual and gender-based violence suffered by female asylum seekers and the international protection available to them. The experiences of female asylum seekers and the extent to which they are reflected or constructed under the Refugees Convention are then examined. Finally, this article discusses the existing Australian jurisprudence and the extent to which Australian refugee law has developed to include claims of sexual and gender-based persecution.

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<sup>1</sup> Deborah Anker, “Refugee Status and Violence Against Women in the ‘Domestic Sphere’: the Non-state Actor Question” (2001) 15(3) *Georgetown Immigration Law Journal* 391, 401.

<sup>2</sup> Stephen Knight, “Reflections on Khawar: Recognising the Refugee from Family Violence” (2003) 14(1) *Hastings Women’s Law Journal* 27, 28.

## Forms of sexual and gender-based persecution

The nature and the various forms of sexual and gender-based persecution must be evaluated to appreciate the complexities facing the international or domestic refugee determination processes.

The UNHCR has grouped sexual and gender-based violence into five broad categories, including sexual violence, physical violence, emotional and psychological violence, harmful traditional practices and socio-economic violence<sup>3</sup>. According to the UNHCR, sexual violence constitutes:

rape (including marital rape), child sexual abuse, forced sodomy, anal rape, sexual abuse, sexual exploitation (including trafficking, forced undressing, coerced marriage, forced child bearing, engagement in pornography or prostitution, sexual extortion for the granting of goods and services), sexual harassment and sexual violence as a weapon of war and torture.<sup>4</sup>

UNHCR has defined physical violence to include beating, punching, kicking, biting, burning, trafficking and slavery. Emotional and psychological violence includes abuse or humiliation (requiring a victim to engage in humiliating acts) and confinement<sup>5</sup>, harmful traditional practices such as female circumcision, early marriages, forced marriages, honour killings<sup>6</sup> and maiming, infanticide and a denial of education for women and girls<sup>7</sup>. Finally, UNHCR defines socio-economic violence as including discrimination and a denial of opportunities, ostracism based on sexual orientation and obstructive legislative practices<sup>8</sup> that restricts women's rights.

Refugee jurisprudence has for some time been criticized for its overemphasis on the protection of civil and political rights at the expense of social and economic rights<sup>9</sup>. As civil and political rights concern violence committed in the public sphere, sexual and gender-based persecution of women (which operates within a social and cultural context and is therefore private) has been considered as falling outside the realm of international human rights protection<sup>10</sup>.

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<sup>3</sup> UNHCR, "Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response" (May 2003) 15.

<sup>4</sup> Ibid, 16.

<sup>5</sup> Ibid, 17.

<sup>6</sup> As many as 5,000 women and girls are killed every year for violating their "family honour", many of them for the dishonour of having been raped. "Honour killings" take many forms. Women and girls are murdered mostly by male members of their own families. In other cases, young girls and women have been forced to commit suicide and others are disfigured by acid burns. Such killings have been reported, *inter alia*, in Bangladesh, Brazil, Egypt, India, Israel, Italy, Jordan, Pakistan, Turkey and Uganda. Most of the perpetrators go unpunished or receive reduced sentences based on the justification of having murdered to defend their misconceived notions of "family honour". See UNFPA, Report of the Special Rapporteur, Civil and Political Rights, Including Questions of Disappearances and Summary Executions, U.N. ESCOR, U.N. Doc.E/CN.4/2000/3, 78-84 (2000); U.N. Population Fund, The State of World Population 2000, Lives Together, Worlds Apart – Men and Women in a Time of Change, chapter 3 [6] (2000) <<http://www.unfpa.org/swp/sepmain.html>>.

<sup>7</sup> UNHCR, above n 3, 18.

<sup>8</sup> Ibid.

<sup>9</sup> This is an extension of the broader critique that international law (and international refugee law) is an inherently gendered system which reinforces male domination. See Hilary Charlesworth, "What are Women's International Human Rights?" in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 58; Nancy Kelly, "Gender-Related Persecution: Assessing the Asylum Claims of Women" (1993) 26(3) *Cornell International Law Journal* 625, 628-629.

<sup>10</sup> H. Charlesworth, C. Chinkin and S. Wright, "Feminist Approaches to International law" in R. J. Beck, A. C. Arend and R. D. Vander Lugt (eds) *International Rules: Approaches from International law and International relations* (1996), 265; Jacqueline Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse" (1989) 1(3) *International Journal of Refugee Law* 518, 519; Jacqueline Castel, "Rape, Sexual Assault and the Meaning of Persecution" (1992) 4(1) *International Journal of Refugee Law* 39. However, recent case law has challenged this artificial public/private construct and demonstrates its fluidity by interpreting the Refugees Convention broadly to include claims of sexual and gender-based persecution perpetrated by non-state actors. See *R*

The root causes of sexual and gender-based persecution and the social context within which they originate are important considerations in evaluating whether female victims fall within the Refugees Convention. Persecution is generally inflicted on women and girls because of their sex and gender<sup>11</sup> and in most cases it involves ‘private’ violence, where the perpetrator is a non-state actor<sup>12</sup>.

In most cases involving sexual and gender-based persecution, gender or sex acts as the persecutor’s single motivation or becomes a significant factor among others. Cases involving female asylum seekers do not constitute random violence. The perceived risk factor in most instances is being female<sup>13</sup>.

### **International protection available for female asylum seekers**

Under international law, although a woman has a right to leave her home, she has no right to enter another state<sup>14</sup>. Article 14 of the Universal Declaration of Human Rights 1948 (UDHR) provides for an individual to “seek and to enjoy in other countries asylum from persecution”. However, this provision is not mirrored in other international human rights treaties and is omitted in the Refugees Convention<sup>15</sup>. Hence, the primary obstacle for asylum seekers is that international law fails to provide a right to seek asylum.<sup>16</sup>

As recognised in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*<sup>17</sup>:

...according to customary international law, the right of asylum is a right of States, not of the individual .... The proposition that every State has competence to regulate the admission of aliens at will was applied in Australian municipal law from the earliest days of the Court ... However, from that proposition, two principles of customary international law have followed. One is that a State is free to admit anyone it chooses to admit ... even at the risk of inviting the displeasure of another State; and the other is that, because no State is entitled to exercise corporeal control over its nationals on the territory of another State, such individuals are safe from further persecution unless the asylum State is prepared to surrender them.<sup>18</sup>

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*v Immigration Appeal Tribunal and another, ex parte Shah* (1999) 2 AC 629; *Islam and Others v Secretary of State for the Home Department* (1999) 2 All ER 545.

<sup>11</sup> Roger Haines, “Gender-related Persecution” in Erika Feller, Volker Turk and Frances Nicholas (eds) *Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection* (2003) 326; see also Widney Brown and Laura Grenfell, “The International Crime of Gender Based Persecution and the Taliban” (2003) 4(2) *Melbourne Journal of International Law* 347.

<sup>12</sup> As a result, violence committed within the domestic sphere by a woman’s husband, partner or other male family members or the local community is viewed as a “private” concern. See Celina Romany, “State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law” in Rebecca J. Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 58, 71. Walter Kalin, “Non-State Agents of Persecution and the Inability of the State to Protect” (2001) 15 *Georgetown Immigration Law Journal* 415; UNHCR, “Gender Related Persecution: An Analysis of Recent Trends” (1997) 9 *International Journal of Refugee Law* (Special Edition) 79, 92.

<sup>13</sup> Lorie Heise, “International Dimensions of Violence Against Women” (1989) 12 *Response* 13.

<sup>14</sup> This applies to both men and women. See Kristen Walker “Defending the 1951 Convention Definition of Refugee” (2003) 17 *Georgetown Immigration Law Journal*, 583.

<sup>15</sup> Mary Crock, “In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows” (2003) 12 *Pacific Rim Law and Policy* 49, 59.

<sup>16</sup> *Ibid*, 56.

<sup>17</sup> (2000) 204 CLR 1.

<sup>18</sup> *Ibid*, 45-46.

Although customary international law dictates that the right of asylum is a right of a state (and not of individuals), a state party to the Refugees Convention has a positive “non-refoulement” obligation to an asylum seeker arriving within the state’s territorial jurisdiction. Accordingly, a woman arriving within Australia’s territorial waters cannot be turned back if her claim of sexual and gender-based persecution falls within the refugee definition.

### **The recognition of sexual and gender-based persecution under the Refugees Convention**

The refugee definition has been incorporated into Australia’s Migration Act 1958 (Cth)<sup>19</sup>. As the Australian refugee determination framework incorporates the refugee definition of the Refugees Convention, any gaps in international refugee protection will continue to impact on the domestic system and limit the protection available for female asylum seekers.

Although the Refugees Convention and its definition protects both men and women<sup>20</sup>, the international refugee protection regime has procedural and structural limitations where claims of sexual and gender-based persecution are concerned. An analysis of the level of protection available for female asylum seekers under the Refugees Convention must consider the relationship between gender, sex and the elements of the refugee definition. To meet the refugee definition, an applicant must satisfy the causal nexus of the persecution being inflicted as a result of one of the five grounds of the Convention<sup>21</sup>.

Sexual and gender-based violence can give rise to harm sufficiently serious to constitute ‘persecution’ (especially in light of the broader interpretation provided under international human rights law). However, establishing that the persecution suffered results from one of the grounds of the Convention becomes problematic for sexual and gender-based persecution claims in some circumstances<sup>22</sup>. This is primarily because the refugee definition does not include ‘gender’ as a separate Convention ground and therefore sexual and gender-based persecution claims must be fitted into the five enumerated grounds of the Convention.

### **Persecution by non-state agents**

Much of the violence perpetrated against women is committed by non-state agents such as husbands, boyfriends, fathers, in-laws and, in the case of female circumcision, women in the local community. A fundamental principle of refugee protection is that of “surrogate protection”<sup>23</sup>, whereby international protection is provided when the applicant’s state of

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<sup>19</sup> Section 36 of the *Migration Act 1958* (Cth) provides the mechanism for Australia to issue visas to non-citizens to whom it has protection obligations under the *Refugees Convention*. The term “non-citizen” is gender neutral and is defined at section 5 of the Act as a “person who is not an Australian citizen”.

<sup>20</sup> Ninette Kelly, “The Convention Refugee Definition and Gender-Based Persecution: A Decade’s Progress” (2001) 13(4) *International Journal of Refugee Law* 559, 561. Kelly also notes that “having an equal right to protection, however, did not mean it was readily accorded to [women].” (561)

<sup>21</sup> However, the 1969 OAU *Convention on the Specific Aspects of Refugee Problems in Africa* expands its definition of “refugee” to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality. This has the result of broadening the notion of “refugee” beyond victims of generalised conflict and violence.

<sup>22</sup> Musalo K and Knight S, “Steps forward and steps back: Uneven progress in the law of social group and gender based claims in the United States” (2001) 13 *International Journal of Refugee law*, 51; Amy Stern, “Female Genital Mutilation: United States Asylum laws are in need of reform” (1997) 6 *American University Journal of Gender & Law* 89; *Chan Yee Kin v Minister for Immigration and Multicultural and Ethnic Affairs* (1989) 87 ALR 412; Kristen Walker, “Sexuality and Refugee Status in Australia”, (2000) 12 *International Journal of Refugee Law* 175, 181.

<sup>23</sup> See *Horvath v Secretary of State for the Home Department* (2000) 3 All ER 577, 580-581; *Canada v Ward* 1993) 2 SCR 689, 716-717; *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 101 FCR 501.

nationality has failed in the duties it owes to its population. Prior to the recent High Court decision in *Minister for Immigration and Multicultural and Indigenous Affairs v Khawar*<sup>24</sup>, the situation under Australian refugee law was that persecution within the domestic sphere or for cultural and religious reasons by non-state parties was inconsistent with the intention and protection provided by the Refugees Convention<sup>25</sup>.

However, as established in *Khawar* and more recently, *Minister for Immigration and Multicultural and Indigenous Affairs v S152/2003*<sup>26</sup>, the refugee definition does not require a state to be the agent of harm, and persecution by ‘private’ or non-state agents can equally fall within the refugee definition. Under Australian law, harm perpetrated by non-state agents may amount to persecution if the state condones or tolerates it or refuses or is unable to offer adequate protection. The Australian position is consistent with the standards set by the UNHCR, which is that

where ... offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable to offer protection.<sup>27</sup>

In *Khawar*, it was accepted that claims of domestic violence suffered by a Pakistani woman at the hands of an abusive husband amounted to persecution<sup>28</sup>. It was considered and accepted that in Australia, as well as in other jurisdictions, the serious harm involved in persecution may be inflicted by persons who are *not* agents of the government of the country of their nationality<sup>29</sup>. The decision in *Khawar* is consistent with the progress made internationally to address sexual and gender-based persecution, particularly in light of the advances made by UNHCR to recognize persecution committed by non-state actors as meeting the requirements of the refugee definition<sup>30</sup>.

*Khawar* was subsequently applied in the Australian case of *SBBK v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>31</sup>, in which it was held that women or divorced women in Iran constituted a particular social group. This case involved a woman claimant and her son, who sought asylum on the basis of her husband perpetrating violence against them and the Iranian state’s failure to provide them with adequate protection.

By recognising persecution by non-state parties as satisfying the requirements of the Refugees Convention, Australian jurisprudence offers much broader protection for sexual and gender-based persecution claims than states such as Germany, France and Switzerland, which have accepted the ‘accountability theory’<sup>32</sup>. Under the ‘accountability theory’, a signatory state is

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<sup>24</sup> (2002) 210 CLR 1 [13] per Gleeson CJ

<sup>25</sup> *Ndege*, above n 59. This case involves a woman who endured beatings and threats of violence from her husband. She claimed she did not know how to seek assistance from the police. Some months into a visit to Australia, she left her husband and took her three children to seek shelter and assistance at a women’s refuge. During the hearing she claimed that marital violence is considered normal in Tanzania, such that the authorities would have refused to take action if she had made a complaint. Further, as her husband was a professional man and a former senior bureaucrat, he would have been able to bribe the police and the judiciary. If returned to Tanzania, she feared for her husband’s revenge for leaving him and ostracism by her family and society for failing to comply with Tanzanian custom. However, on appeal before the Federal Court, Justice Weinberg conceptualized the harm she suffered as “private” harm and not falling within the Refugees Convention. [50].

<sup>26</sup> (2004) 205 ALR 487

<sup>27</sup> UNHCR, *Guidelines on the Protection of Refugee Women*, U.N. Doc. ES/SCP/67 (1991) [4], [98]

<sup>28</sup> *Khawar*, above n 22, 576 – 583 per Gleeson CJ.

<sup>29</sup> *Ibid*.

<sup>30</sup> UNHCR, above n 127.

<sup>31</sup> (2002) FCR 412

<sup>32</sup> *Kalin*, above n 13, 416.

only required to extend protection when the government is responsible for the persecution suffered by a person for a Convention reason, either by inflicting or intentionally tolerating the persecution.<sup>33</sup> As such, the ‘accountability theory’ assumes that refugee law should be informed by the principles of state responsibility that have developed in public international law<sup>34</sup>.

On the other hand, the case of *Khawar* considered a ‘protection-based construction’ of the refugee definition<sup>35</sup>. A protection-based construction equates the concepts of persecution and protection<sup>36</sup>. Accordingly, the state of nationality’s failure to offer protection from harm itself satisfies the refugee definition and obliges state parties to the Convention to offer surrogate protection. The decision in *Khawar* demonstrates that the relevant equation is “persecution = serious harm + the failure of the state to protect”<sup>37</sup>. It was further considered in *Khawar* that state conduct, whether passive or active, is only relevant to the question of persecution to the extent that the conduct could itself be characterized as persecution<sup>38</sup>. By adhering to a ‘protection-based approach’, the emphasis in Australia rests on the nexus between the state’s failure to protect and the reason for the persecution, for example the victim’s membership in a particular social group, rather than on the private actor’s motivation for harming the victim or the State’s failure to protect the refugee from persecution in itself<sup>39</sup>. As such, *Khawar* provides clarity to the operation of Article 1A of the Refugees Convention by separating persecution from protection<sup>40</sup>.

The position enunciated in *Khawar* is consistent with the approach adopted by Hathaway that refugee law should not be concerned with abstract questions of culpability with regard to the extent of state practice adopted by a state to protect its citizens. Rather, refugee law must be concerned with a more concrete question of protection that considers whether a state has a formal system which operates in practice to eliminate a real risk of harm for the applicant. As Hathaway states:

the intention to harm on the part of the state is irrelevant: whether as a result of commission, omission, or incapacity, it remains that people are denied access to basic guarantees of human dignity, and therefore merit protection through refugee law.<sup>41</sup>

This is the position under Australian refugee law. This approach enables Australia to consider claims of sexual and gender-based persecution committed by non-state actors as falling within the protection available under the Refugees Convention.

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<sup>33</sup> De Costa, above n 148, 545. *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003* (2004) HCA 18 (21 April 2004) [54].

<sup>34</sup> Kalin, above n 13, 423.

<sup>35</sup> *Khawar*, above n 25, 580. The protection-based approach was adopted by Kirby J before the High Court of Australia and also by Lindgren J in *Khawar*, above n 156, 536-537.

<sup>36</sup> Reinhard Marx, “The Notion of Persecution by Non-State Agents in German Jurisprudence” (2001) 15 *Georgetown Immigration Law Journal* 447, 450.

<sup>37</sup> *Khawar*, above n 25, 603 per Kirby J.

<sup>38</sup> *Khawar*, above n 25, 594 per Gummow and McHugh JJ.

<sup>39</sup> Laura Adams, “Fleeing the Family: A Domestic Violence Victim’s Particular Social Group, (2003) *Lyola Law Review*, 49.

<sup>40</sup> Such an approach is further endorsed by UNHCR which states that: “there now exists jurisprudence that has attributed considerable importance in refugee status determination to the availability of state protection inside the country of origin. ....[t]his somewhat extended meaning may be, and has been, seen as an additional though not a necessary argument in favour of the applicability of the Convention to those threatened by non-state agents of persecution.” UNHCR, *Interpreting Article 1A of the 1951 Convention Relating to the Status of Refugees* (2001)

<sup>41</sup> James Hathaway, *The Law of Refugee Status* (1991) 128.

## Membership of a particular social group and claims of sexual and gender-based persecution

A doctrinal and policy obstacle for sexual and gender-based persecution claims is the requirement that the fear of persecution must be a result of one of the five grounds of the Refugees Convention. In an Executive Committee conclusion, the UNHCR has claimed that the ‘membership of a particular social group’ ground of the Refugees Convention is considered the most appropriate for female asylum seekers fleeing sexual and gender-based persecution<sup>42</sup>. In Australia, the decision of *Khawar* has determined that ‘gender’ could be the defining characteristic of a ‘particular social group’ and where a pattern of discriminatory treatment exists, women in a country could constitute a ‘particular social group’ for the purposes of the Refugees Convention.

The ‘religion’ and ‘political opinion’ grounds are also suitable and can accommodate women fleeing sexual and gender-based persecution. There appears to be a considerable degree of overlap between the religion and political opinion grounds in many cases involving women fleeing in fear of punishment for transgressing social mores<sup>43</sup>.

A comprehensive analysis of the extent to which Australian refugee jurisprudence has considered sexual and gender-based persecution as falling within the Convention grounds is beyond the scope of this article. Nevertheless, it is useful to make some brief observations about the extent to which sexual and gender-based persecution claims have been considered under the ‘membership of a particular social group’ ground of the Convention in Australia.

International jurisprudence on the definition of a ‘membership of a particular social group’ is diverse and continues to evolve. In particular, two approaches have developed in common law jurisdictions: the ‘protected characteristics’ approach and the ‘social perception’ approach<sup>44</sup>. Australian courts have adopted a ‘social perception’ approach, which examines whether a group shares a common characteristic that sets it apart from society at large<sup>45</sup>. For example, in *Applicant S v MIMIA*<sup>46</sup>, a ‘particular social group’ was considered to fall under the Refugees Convention if:

- the group was identifiable by a characteristic or attribute common to all members of the group;
- the characteristic or attribute common to all members of the group was not the shared fear of persecution;
- the possession of that characteristic or attribute distinguished the group from society at large.

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<sup>42</sup> The UNHCR has adopted that “states in the exercise of their sovereignty are free to adopt the interpretation that women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of Article 1A(2) of the 1951 United Nations Refugees Convention”. UNHCR, 5

<sup>43</sup> Whilst the membership of a ‘particular social group’ ground continues to be the most utilized Convention ground, research conducted by Australian Feminist Lawyers and the Women’s Rights Network of Australia has found that the success of asylum claims are greater when the claimed persecution is wholly or partially for reasons of race or political opinion. Stephanie Cauchi, Mary-Jane Ierodionou and Angela Perry, “The Invisible Women: A Report on Gender-Based Persecution Claims by Women Asylum Seekers in Australia” (November 2003) 22

<sup>44</sup> Turk and Nicholas, above n 12, 17.

<sup>45</sup> Ibid.

<sup>46</sup> (2004) HCA 25 [36]

In contrast, the jurisprudence in Canada, the United Kingdom and the USA has emphasized the ‘protected characteristics’ approach<sup>47</sup>, which considers whether a group is united by an immutable characteristic or by a characteristic so “fundamental to human dignity that a person should not be compelled to forsake it”<sup>48</sup>. An immutable characteristic cannot be changed; it is innate (e.g. sex or ethnicity) or unalterable<sup>49</sup>. The ‘social perception’ approach, however, recognizes that external factors can be important to a proper social group definition<sup>50</sup>. By adopting a ‘social perception’ approach, Australia is able to provide much more expansive protection for female asylum seekers fleeing sexual and gender-based persecution.

According to *Applicant S*, “women” in any given society can constitute a ‘particular social group’ for the purposes of the Refugees Convention, considering that a fundamental distinction in society is the difference between men and women and that in most cultural contexts discrimination against women occurs collectively and affects all women. In *SYLB v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>51</sup>, Justice Branson discussed (in light of *Applicant S*) that it was

hard, if not impossible, to imagine a society in which women do not constitute a particular social group within the meaning of Article 1A(2) of the Refugees Convention.

Similarly, North J in the case of *Minister for Immigration and Multicultural Affairs v Cali*<sup>52</sup>, adopting a social perception approach, stated that:

while there is a great debate among theorists as to the nature of gender and its construction, Somali society is constructed along the two lines of males and females. Their roles and status are not interchangeable. There are expectations as to their behaviour and to the particular positions they may occupy in society. They are defined into womannes by law and custom as well as by sex. This is not a society in which women are first of all citizens and secondarily women.

In spite of the perceived commonality between women and the ability to separate them as a cognizable group within a society, Australian courts have a tendency to favour an assessment of subsets of social groups that have specific characteristics or circumstances which distinguish them from larger groups of women such as “Sikh women in India” or “Thai women who are discriminated against because of their gender”. In the case of *Applicant S469 of 2002 v MIMIA*<sup>53</sup>, it was considered that females in Thailand do not constitute a “particular social group” as they do not have some form of internal linking or unity of characteristics, attributes, beliefs, interests or goals to make them a cognizable group within Thai society.

Similarly, in the case of *Kaur v MIMA*<sup>54</sup>, it was held that Sikh women were far too diverse a collection of persons to be seen as united or a cognizable social group under the Refugees Convention. Such a view is further supported by Kirby J in *Khawar*, who found that categories encompassing large numbers of people, such as “women in Pakistan”, could never satisfy the

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<sup>47</sup> *Gomez v INS (USA)*, 947F.2<sup>nd</sup> 664 cited UNHCR, above n 54, 105. See generally, Nicholas Pengelley, “Female Genital Mutilation: Grounds for Grant of an Australian Protection Visa? The Ramifications of Applicant A” (1998) *Monash Law Review*, 94.

<sup>48</sup> Turk and Nicholas, above n 44

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> (2005) FCA 942

<sup>52</sup> (2000) FCA 1026

<sup>53</sup> (2004) FCA 64

<sup>54</sup> (2000) FCA 1401

legal requirements under the Refugees Convention. However, there are some cases which have decided that certain categories of women, such as “young Somali women fleeing forced marriages”<sup>55</sup>, “young Somali women without male protection”<sup>56</sup> and “single Indian women living alone in Fiji”<sup>57</sup>, can fall under the Refugees Convention.

## **Conclusion**

Australian jurisprudence on private forms of sexual and gender-based persecution and the protection available under the Refugees Convention is progressive. As the international refugee flows continue to escalate and new waves of migrants test the boundaries of international refugee protection with claims of sexual and gender-based persecution, Australian jurisprudence provides a positive example of a flexible interpretation of the refugee definition. In spite of the structural limitations of this definition and the absence of a separate Convention ground of gender, Australian courts have interpreted the Convention ground of ‘membership of a particular social group’ flexibly to broaden the protection available for female asylum seekers arriving within the state’s shores.

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<sup>55</sup> *Weheliye v MIMA* (2001) FCA 1222

<sup>56</sup> *Cali*, above n 52

<sup>57</sup> *SZAYT v MIMIA* (2005) FCA 857