AT AUCKLAND

Before: R P G Haines (Chairman) T E Gutnick (Member, UNHCR)

Counsel for the Appellant: Ms M L Robins

Appearing for the NZIS: No appearance

Date of Hearing: 5 April 1995

Date of Decision: 12 February 1996

## DECISION

This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a national of the Islamic Republic of Iran.

## THE APPELLANT'S CASE

The appellant is a 36 year old single woman who has lived most of her life in [ X ], a city located in the Khuzestan province of Iran. She comes from a large family comprising four sisters and three brothers. Her father died some years ago but her mother still lives in Iran. The appellant is an anaesthetist technician by occupation.

The appellant left Iran on 21 March 1993 and, after spending several months in Turkey, arrived in New Zealand on 7 August 1993. She applied for refugee status at Auckland International Airport. In detailed statements subsequently submitted in support of her refugee application, she has advanced her case on four principal grounds:

1 Her race and religion.

2 Her family background and the political activities of family members.

3 The oppression of female members of her family by male family members.

4 The oppression of women in Iranian society.

Because of the degree of overlap involved, it was submitted, in the alternative, that the Authority should take into account also the cumulative effect of the foregoing grounds in determining whether the appellant possesses a well-founded fear of persecution for reason of her race, religion, nationality, membership of a particular social group or political opinion.

## RACE AND RELIGION

Iran is frequently (albeit mistakenly) thought of as a nation of Persians of the Shi'ite religion. It is in fact a country with five major ethnic minorities: Azari Turks, Kurds, Baluchis, Arabs and Turkman. These minorities have their own distinct cultures and traditions as well as their own written and spoken languages which are different from the dominant Persian (Farsi) language. The religion for almost all of them, except the Turks, is the Sunni sect of Islam which is different from the official religion of Shi'ite Islam. Due to centralisation policies of all the Iranian governments since the 17th Century, these minorities have always been suppressed and deprived of cultural, linguistic and religious rights: Shahrzab Mojab, "Women from Iran", A paper delivered at the CRDD Workshop of Women Refugee Claimants, Toronto, June 21, 1990 as part of a study entitled "The Socio-Cultural Context to Refugee Claims made by Women - Case Studies: Iran, Somalia and Latin America" 2.

Women of the national minorities have been the victims of both the autocratic policies of the central government and of the dominant patriarchal social relations within Iran generally, and within their own minority groups in particular.

The appellant is of Arab descent and is a Shi'ite Muslim. She has referred the Authority to evidence that her Arab ancestors have, for a very long time, been associated with Khuzestan and, in particular, [ X ]. She has also referred to evidence that, traditionally, Arabs from the south west of Iran have been viewed with distrust by the central government in Tehran. This distrust increased after the 1979 Revolution and, in particular, after the commencement in September 1980 of the eight year Iran-Iraq War. The significance of this traditional distrust between Persians and Arabs is seen in the fact that one of the proffered reasons for the Iraqi offensive of September 1980 concentrating on the Iranian port cities of Khorramshahr and Abadan was that the majority of their residents were Arabic-speaking, and Iraqi intelligence was confident they would switch sides: Dilip Hiro, *The Longest War: The Iran-Iraq Military Conflict* (1990) 49.

## FAMILY BACKGROUND AND POLITICAL ACTIVITIES OF FAMILY MEMBERS

A resistance movement known as the Khuzestan Liberation Movement was founded in the time of the Shah by MAN, a cousin of the appellant's father. MAN was executed in the early 1960s for his activities. The appellant's brother-in-law, AAN, was a leading personality in the movement and, following his arrest during the reign of the Shah, was sentenced to life imprisonment. After serving twelve years of his sentence, he was released in 1979 upon the deposing of the Shah and the seizure of power by Ayatollah Khomeini.

Following the release of AAN from prison, the appellant's father arranged for the appellant's eldest sister, K, to marry A. At that stage, K was 36 years of age and the appellant's father was under increasing pressure to arrange her marriage before she became "unmarriageable". Within the value system of the tribal patriarchal system, it was seen as a great honour for the appellant's family to have K married to A.

Shortly after his release from prison, AAN resumed his activities in the Khuzestan Liberation Movement with the result that he was imprisoned again in 1984 and tortured. The Khuzestan Liberation Movement was at this stage operating inside Iran in support of Iraq. They were hoping that if Iraq won the war, [ X ] would be made independent. Four years later, in 1988, AAN managed to escape to Iraq. K herself was subjected to almost daily visits by the Komiteh and questioned as to her husband's whereabouts. The rest of her family, including the appellant, also fell under suspicion. Although K eventually joined her husband in Iraq, he subsequently disappeared. After his disappearance, K returned to Iran where she is still subjected to continuing visits by the Komiteh and surveillance.

The appellant's eldest brother, Y was arrested by the authorities shortly after AAN was detained in 1984. Y was held in prison for three years. Like A, he too was tortured.

After completing her high school education in 1980, the appellant began working in a private hospital in [ X ] which was staffed and run by persons of Arab ethnicity. It is not clear whether she received formal training as a nurse. What is clear is that as a result of "on the job training", she eventually rose to the position of anaesthetist's technician working in the operating theatre. She regarded herself as fortunate in holding this position as her Arab origins and her family's reputation for dissident activity disqualified her from obtaining any position in a government-run hospital. She was not, however, able to escape government oversight entirely as the hospital at which she worked had its own Islamic Society or local Komiteh which was part of a system set up after the 1979 Revolution to enforce obedience or submission to the new Islamic orthodoxy. See further Robin Wright, *In the Name of God - The Khomeini Decade* (1990) 67-68; John Simpson, Behind Iranian Lines (1988) 84-85, 224, 375; Ramy Nima, *Wrath of Allah* (1983) 78.

On a weekly basis, the appellant would be summoned to the Komiteh for questioning. Sometimes the questions would relate to members of her family who had been arrested (for example, her brother-in-law, AAN, and her brother, Y) or other close family members such as her sister K. On other occasions, she would be questioned about seemingly inconsequential subjects such as the weather, or she would be summoned simply to be asked the time. These were ploys designed to harass and humiliate her as each time she was summoned, she had to leave surgery, change, report to a different wing of the hospital, return to surgery, change again, scrub up and then re-enter the operating theatre. In the meantime, her patients' interests were prejudiced. She explained that these incidents constituted severe harassment for a conscientious person already working under pressure. While she was initially able to cope, she found that after a number of years, she had reached breaking point. The appellant was also aware that a member of the operating theatre team was a Komiteh "spy" and that everything that she said and did was subject to surveillance. In addition, her clothing, manner of dress and behaviour were also the subject of close scrutiny to ensure that she acted within the confines of the new Islamic dress and behaviour code imposed by the Khomeini regime. The relentless pressure and harassment eventually took their toll and the situation became unbearable. The appellant became so on edge that the physician who led her "team" described her as a "time bomb", likely to explode at the slightest provocation. The appellant felt as if she was being tortured to death.

## THE OPPRESSION OF FEMALE MEMBERS OF THE APPELLANT'S FAMILY BY MALE FAMILY MEMBERS

In her evidence, the appellant spoke passionately of her opposition both to the patriarchal society comprising her extended Arab family, and to the male domination of women in Iranian society at large. We will address first the appellant's claim that female members of her (extended) family are oppressed by male family members.

It would appear to the Authority that Arab society in Iran can properly be described as a patriarchal society. It would also appear to have been reinforced by tribal values which have dominated that society for a very long time. Within this society, the family and tribe take responsibility for the conduct of their individual members. This is of relevance when the notion of honour and shame is considered. Women's conduct is not assessed at the individual level; it reflects on the entire family group.

However, the system of male domination in Iranian-Arab society uses not only tribal social values, but also Islamic ideology as tools to control women.

We hope that the appellant will not take offence were we to call in aid of her case a study of Iraqi women whose plight would appear indistinguishable from the appellant's, apart from the fact that the appellant is an Arab woman living in Iran while the women the subject of the study are Arab women living across the border in Iraq. The study to which we refer is by Sana al-Khayyat, *Honour and Shame: Women in Modern Iraq* (1990). The following quote is at 21-22 and possibly explains the various points made by the appellant:

### "The Ideology of Honour and Shame

To understand how behaviour is regulated and conduct controlled in Iraqi society, one must understand the Arab concept of honour, which is generally linked to the sexual conduct of women. ... Because an Arab represents his kin group, his behaviour must be honourable so that the group are not disgraced. Those who bring shame on their kin are dishonourable. In addition, a man can bring honour both to his kin and to himself by showing generosity or courage, or by having many sons.

But the most important connotation of honour in the Arab world is related to the sexual conduct of women. If a woman is immodest or brings shame on her family by her sexual conduct, she brings shame and dishonour on all her kin.

...

The phenomenon of "honour and shame" bears a direct relation to family ties, and to the complex interrelation of social organisation and conduct in Arab society. Once a woman breaks the rules, the whole family will be drawn into a sea of shame. ... The family's economic status depends on the father, so the aspect of honour as social status and wealth derives from him, while the aspect of shame derives from the mother. In some cases, losing one's honour is irreparable, while in others it can be regained. Irreparable cases are those when a women's sexual misconduct becomes public knowledge. Sexual honour is of greater importance than other forms of honour because it is reflected in male circles.".

At *op cit* 24-25, Sana al-Khayyat explains that if an Arab wife were to commit adultery, the shame would be borne by her father's relatives or her mother's male relatives, not her husband's. Any dishonour would reflect upon the husband to a lesser degree, since he can always divorce his wife and disconnect himself from her permanently, unlike her father or brother. It is interesting to note that the person who would have to kill a woman to defend the family honour is usually her brother or father, uncle or cousin. In practice, even her brother-in-law may replace her brother. The husband of a married woman is not expected or, indeed, allowed to kill her, as members of the family are seen as the possessions of their natal family.

In this same society, women are controlled by men and a woman's life is planned for her in a complex manner almost from the moment of conception. Traditionally, women are socially isolated and confined to the home. They are considered to be weaker then men, both physically and mentally. A "good woman" is one who is obedient and submissive. She is taught to serve others and to treat her parents, older brothers, senior members of the family, her husband and his family with respect. This control is exemplified by the attitudes towards marriage. In the Arab world, marriage is traditionally a joining of two families, rather than of two individuals: Sana al-Khayyat, *op cit* 58. In the appellant's society, the marriage tradition is still that of arranged marriages and it is very common for cousins to marry. Thus marriage as an institution is controlled by men and based on power rather than equality, which results in the subordination of women to men within the family: Sana al-Khayyat, *op cit* 186.

The appellant spoke strongly at the appeal hearing of her unqualified opposition to the rules governing social organisation and conduct in Arab society, and, in particular, the employment of those rules to subordinate women to men. She described a process of self-awareness which began in her early teenage years which led her to question the way in which all decisions as to her future (including her education) were made by her father (and subsequent to his death, by her elder brother). She was able to observe from the example of her mother and two of her sisters the consequences of little or no education, the implications of arranged marriages, and was particularly offended by the rigid insistence by her extended family or tribal group on marriage between cousins. She identified this as unhealthy inbreeding. She was particularly close to her elder sister, K, and the tragedy which befell her following the arranged marriage with AAN had a considerable impact on the appellant.

Additionally, the appellant was severely affected by the tragic fate which befell two of her female relatives:

(a) A cousin of hers married a "foreigner" (i.e. somebody outside the AN family). The AN family promised to kill her for doing this. Six years later when the cousin and her husband separated, one of the cousin's brothers and four of her cousins stabbed her to death. These events pre-dated the 1979 Revolution. Following the overthrow of the Shah, all of those responsible for the murder were released from prison.

(b) In 1990, another cousin married within the "family". On the wedding night, it was discovered that she not was a virgin. The mother of the cousin begged the bridegroom to keep her daughter

as a servant and not to say anything to anybody. It turned out, however, that she was approximately three months pregnant, and when she reached full term, it became obvious to all that she had not been a virgin at the time of her marriage. The husband declared that he was not the father of the child. Two days after the birth of the child (a male), while the cousin was still in hospital, her brother decapitated her in order to restore the family's honour and took her head to the police station. He was released after six months' imprisonment and the whole family was very proud of him.

Since her arrival in New Zealand, the appellant has learnt of another tragedy which has befallen a female member of her extended family. The woman (a grandmother) became involved in an argument as to whether her granddaughter should be permitted to attend college. The three male cousins of the granddaughter did not wish her to attend college and struck the grandmother on the head with the result that two weeks later she died in hospital. The granddaughter had been "engaged" by way of arrangement to one of the assailants and he believed it was his decision as to whether his future wife received an education. The three assailants have been arrested, but the appellant believes that were it not for the fact that each of the three have political problems, the government would have released them by now.

The appellant also spoke with some feeling on polygamous marriages and was able to describe the impact of polygamy on the first wife, citing the example of one of her sisters whose husband later took a second wife.

In her evidence, the appellant finally disclosed that in April 1994, she found that she was pregnant as a result of a relationship she had formed subsequent to her arrival in New Zealand. The pregnancy had not been planned. After considerable anguish, she decided to terminate the pregnancy because of the danger she and her child would face were she to be unsuccessful in obtaining refugee status and forcibly returned to Iran. She would present as a person who had brought dishonour and shame on the family. In the result, were she to now marry in Iran, it would be discovered on the wedding night that she was not a virgin. It would be unlikely that she would escape with her life.

## THE OPPRESSION OF WOMEN IN IRANIAN SOCIETY

The appellant's case is that, in addition to suffering oppression within their family or tribal group, Arab women in Iran face also, in the "public" sphere, oppression in society as a whole and that, at both the private and public levels, Islamic dogmas are used to support the patriarchal social structure. Her case is that she finds this oppression intolerable.

The literature on this subject is considerable. The appellant relied upon the two volume paper by R P G Haines and Ngaire Woods, *Oppression of Iranian Women and Refugee Status* (Two Volumes) (September 1986). As one of the authors of that paper is now also a member of the Panel hearing this appeal, it would be inappropriate to employ it in support of this decision other than noting that the paper does contain a useful review of the then available literature and is cited in *Namitabar v Canada (Minister of Employment and Immigration)* [1994] 2 FC 42, 47 (FC:TD).

There are other specific papers dealing with the position of women in Iran and include David L Neal, "Women as a Social Group: Recognising Sex-based Persecution as Grounds for Asylum" (1988) 20 Columbia Human Rights Law Review, 203, Shahrzab Mojab, "Women from Iran", a paper delivered at the CRDD Workshop of Women Refugee Claimants, Toronto, June 21, 1990 as part of a study entitled "The Socio- Cultural Context to Refugee Claims made by Women - Case Studies: Iran, Somalia and Latin America", and the paper by the Research Directorate, Documentation, Information and Research Branch of the Immigration and Refugee Board, Canada, "Women in the Islamic Republic of Iran" (June 1994).

The appellant is as opposed to the oppression of women in Iranian society as she is to the oppression of women within her own family or tribal group, and little point would be served by

traversing her evidence in that regard. It is sufficient to note that the appellant is an intelligent and perceptive woman whose experiences and mature years have led her to an awareness of the value of human rights (particularly the principle of non- discrimination), the inherent worth of the individual, and the pressing need in her own life to be free of the dictates of others and to be able to make her own choices on fundamental aspects of existence such as marriage, child rearing, education, employment and personal expression, including her dress, appearance and relationships with others. We have already mentioned the process of self-awareness described in her evidence which led her to question the basic assumptions underlying the relationship between male and female in both her family setting and within Iranian society at large.

## THE ISSUES

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

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

In the context of this case the four principal issues are:

1 Is the appellant genuinely in fear?

2 Is it a fear of persecution?

3 Is that fear well-founded?

4 Is the persecution he fears persecution for a Convention reason?

In this regard we refer to our decision in Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB (11 July 1991).

In the same decision this Authority held that in relation to issue (3) the proper test is whether there is a real chance of persecution.

## CREDIBILITY ASSESSMENT

The appellant impressed as a credible witness and we accept the facts adduced by her in support of her four principal grounds, namely:

1 Her race and religion.

2 Her family background and the political activities of family members.

3 The oppression of female members of her family by male family members.

4 The oppression of women in Iranian society.

Although the appellant's case is advanced on all of these grounds, it is not essential to the success of her case that all four be established. Indeed, even if none of the grounds ***separately*** carries the Authority sufficiently to the conclusion that the appellant is a refugee, the cumulative effect of the evidence may nevertheless establish a well-founded fear of persecution for a Convention reason.

We will address first the issue of persecution.

## PERSECUTION

Persecution is not defined by Article 1A(2) of the Refugee Convention and no good purpose would be served by attempting a definition of what is itself a definition. Articles 31 and 33 of the Convention refer to those whose life or freedom may be threatened and there is general acceptance that a threat to life or freedom can amount to persecution: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 399 (Dawson J); Professor Guy S Goodwin-Gill, *The Refugee in International Law* (1983) 38. But the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution" for the purpose of the Convention: *Chan* 430 per McHugh J. Measures in disregard of human dignity may, in appropriate cases, constitute persecution.

In *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 733 (SC:Can) there is the important acknowledgement that anti-discrimination notions underlie the Convention:

"Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination."

The Court quoted with approval Professor Hathaway's discussion of the concept of persecution in *The Law of Refugee Status* (1991) at 104:

"... persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection."

And at 108:

"... refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard."

New Zealand refugee jurisprudence accepts that refugee law ought to concern itself with actions which deny human dignity in any key way and that the sustained or systemic denial of core human rights is the appropriate standard: *Refugee Appeal No. 1039/93 Re HBS and LBY* (13 February 1995) 19-20.

We recognize that the determination whether the treatment feared in any particular case amounts to persecution will involve normative judgments going beyond mere fact-finding: *Damouni v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 97, 101 (FC:French J), a point to which we will return.

While anti-discrimination notions underlie the Convention, it is important to bear in mind that discrimination *per se* is not enough to establish a case for refugee status. A distinction must be drawn between a breach of human rights and persecution, a distinction we have drawn previously in other contexts. See, for example, *Refugee Appeal No. 37/91 Re MAU* (3 May 1992); *Refugee Appeal No. 72/92 Re MB* (12 August 1992) and *Refugee Appeal No. 1613/93 Re BR* (25 May 1995). Not every breach of a claimant's human rights constitutes persecution: UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* para 54:

"Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g., serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities."

However, discrimination can affect gender-based groups to different degrees. It is as well to bear in mind the statement by this Authority in *Refugee Appeal No. 1039/93 Re HBS and LBY* (13 February 1995) 26 that:

"The Authority should ... consciously strive both to recognise and to give proper weight to the impact of discriminatory measures on women.".

As the facts of that case show, various acts of discrimination, in their cumulative effect, can deny human dignity in key ways and should properly be recognised as persecution for the purposes of the Convention.

## AGENTS OF PERSECUTION - STATE COMPLICITY

Because the appellant's rests to a degree on her fear of non-state agents of persecution (male family members), it is necessary to refer briefly to certain aspects of persecution and state complicity.

Within months of the Authority's first hearings in June 1991, it accepted in *Refugee Appeal No. 11/91 Re S* (5 September 1991) 14-19 that there are four situations in which there can be said to be a failure of state protection:

1 Persecution committed by the state concerned.

2 Persecution condoned by the state concerned.

3 Persecution tolerated by the state concerned.

4 Persecution not condoned or not tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.

This decision has been followed and applied in an unbroken line of cases. See, for example, the following leading decisions:

Refugee Appeal No. 18/92 Re JS (5 August 1992;

Refugee Appeal No. 135/92 Re RS (18 June 1993);

Refugee Appeal No. 523/92 Re RS (17 March 1995).

In so holding, the Authority concurred with the opinion expressed in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* para 65 and followed and applied a line of Canadian decisions including *Rajudeen v Minister of Employment and Immigration* (1984) 55 NR 129 (FC:CA) and *Surujpal v Minister of Employment and Immigration* (1985) 60 NR 73 (FC:CA). Since then, both of these cases, as well as para 65 of the *Handbook* have been specifically approved by the Supreme Court of Canada in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 709- 721 (SC:Can).

As the *Ward* decision makes clear, the conclusion that state complicity in persecution is not a prerequisite to a valid refugee claim is supported by the drafting history of Article 1A(2), the prevailing authorities and academic commentary. In this regard, to the jurisprudence of the United States discussed in *Ward*, may be added the United Kingdom cases of *R v Secretary of State for the Home Department, Ex parte Jeyakumaran* (1985) [1994] Imm AR 45 (QBD) and *R v Secretary of State for the Home Department, Ex parte Chahal* [1995] 1 WLR 526, 536 (CA) per Staughton LJ.

The reason for our digression into the issue of state complicity is that a number of Western European countries have, in recent years, narrowed their interpretation of the Convention Refugee definition. Three countries in particular (Germany, Sweden and France) have restricted the application of the concept of agents of persecution to the extent that refugee status is only granted to victims of persecution by state authorities or by other actors encouraged or tolerated by the state. Inability of the state to afford adequate protection does not lead to refugee status: UNHCR *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR* European Series Vol 1, No. 3, September 1995, 27-30. We can find no justification for such restrictive interpretation, leading as it does to the exclusion of asylum seekers from countries affected by civil war, such as Angola, Liberia, Somalia and former Yugoslavia. We agree with the UNHCR position as stated at *op cit* 28-30 which is largely in accord with the *Ward* analysis.

## PERSECUTION - BY WHAT STANDARD

It has been recognised that the determination whether the treatment feared in any particular case amounts to persecution will involve normative judgments going beyond mere fact finding: *Damouni v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 87 ALR 97, 101 (French J), *Refugee Appeal No. 1039/93 Re HBS and LBY* (13 February 1995) 19 and Aleinikoff, Martin & Motomura, *Immigration: Process and Policy* 3rd ed (1995) 807-808. It is best therefore for an adjudication process to reveal and openly discuss the norms on which those judgments are based: Carolyn Patty Blum, "Political Assumptions in Asylum-Decision Making: The Example of Refugees from Armed Conflict" in Howard Adelman ed, *Refugee Policy: Canada and the United States* (1991) 282, 283.

The issue to be addressed is the criteria or standards to be applied in assessing whether the punishment anticipated by a refugee claimant can properly be described as persecutorial for the purposes of the Refugee Convention.

One approach is to apply the domestic standards of the country of asylum. This is possibly exemplified in the passage which follows from *Osaghae v INS* 942 F. 2d 1160, 1163 (7th cir. 1991):

" 'Persecution' means, in immigration law, punishment for political, religious, or other reasons that ***our country*** does not recognise as legitimate. "

[Emphasis added]

Another approach is to apply a common international standard.

The disadvantage of a domestic standard is that it simultaneously allows too easily the intrusion of ideology and also the implication of censure of the state of origin. The following explanatory passage is taken from the text by Professor James C Hathaway, *The Law of Refugee Status* (1991) 100-101:

"Our continuing reliance on the persecution-based standard in an age where refugee states of origin and destination are frequently politically compatible has compromised the ability of refugee law to afford broadly based protection. In contrast to the cold war assumption of valid reasons for departure, refugee recognition today may be denied for reasons of foreign policy, or at least be conditioned by an unspoken view that an allied state is unlikely to act in a persecutory way. As Goran Melander has noted, '[r]ather than expose itself to the disapproval of the country of origin, a government may deny a person the status of refugee'. The challenge is to recast the notion of 'persecution' in a manner which is consonant with modern political realities, and which genuinely enables governments to conceive of refugee protection as a humanitarian act which ought not to be a cause of tension between states. "

Professor Hathaway's response to this challenge is to advance at *op cit* 101-124 what has been described as "an elegant and comprehensive" theory of persecution based on international human rights instruments. It is this approach, based on the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966 and the associated hierarchy of rights which has largely informed the New Zealand law of refugee status. See, for example:

*Refugee Appeal No. 10/91 Re CPY* (27 August 1991) (torture; thought; opinion)

*Refugee Appeal No. 14/91 Re JS* (5 September 1991) (derogation)

*Refugee Appeal No. 29/91 Re SK* (17 February 1992) (life; liberty; equality)

*Refugee Appeal No. 150/92 Re SS* (9 December 1992) 9 (work)

*Refugee Appeal No. 135/92 Re RS* (18 June 1993) 23 (torture)

*Refugee Appeal No. 265/92 Re SA* (29 June 1994) 12 (opinion; expression and information)

*Refugee Appeal No. 732/92 Re CZZ* (5 August 1994) 13-17 (education; work)

*Refugee Appeal No. 1222/93 Re KN* (5 August 1994) (life; torture; liberty and security of person; privacy; thought; conscience and religion; opinion)

*Refugee Appeal No. 1039/93 Re HBS and LBY* (13 February 1995) 20-25 (thought, conscience, religion and belief; privacy and family; marriage and family)

*Refugee Appeal No. 1312/93 Re GJ* (30 August 1995) 34 (sexual orientation)

In applying the hierarchy of rights discussed by Professor Hathaway at *op cit* 108-112, we have also been assisted by Professor Guy S Goodwin-Gill's observation in *The Refugee in International Law* (1983) 38, 39 that in deciding whether acts amount to persecution, it is very much a question of degree and proportion:

"Whether such restrictions amount to persecution within the 1951 Convention will again turn on an assessment of a complex of factors, including (a) the nature of the freedom threatened, (b) the nature of the restriction, and (c) the likelihood of the restriction eventuating in the individual case. ".

See, for example, *Refugee Appeal No. 308/92 Re UR* (28 March 1994) 13.

These complexities aside, the advantage of an international human rights standard are self-evident, particularly when contrasted with indigenous "domestic" standards. The point is made by Professor Hathaway at *op cit* 106-107 in the following terms:

"... the international community has recognised that there are certain basic rights, including both freedoms from interference and entitlements to resources, which all states are bound to respect as a minimum condition of legitimacy. This recognition led to the adoption of common international standards of acceptable behaviour, which governments have agreed to accept as limitations on claims of cultural heterogeneity and autonomy of action. While it is true that international law binds sovereign states only to the extent that they agree to be bound, the breadth of the emerging international law of human rights is unquestionably impressive.

Among the myriad treaties, declarations, rules and other standards adopted by states, the International Bill of Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, is central. More than any other gauge, the International Bill of Rights is essential to an understanding of the minimum duty owed by a state to its nationals. Its place derives from the extraordinary consensus achieved on the soundness of its standards, its regular invocation by states, and its role as the progenitor for the many more specific human rights accords. Reference to the International Bill of Rights in deciding whether or not a state has failed to provide basic protection in relation to core, universally recognised values is moreover consistent with the Convention's own Preamble and General Assembly Resolution 2399 (XXIII).".

## PERSECUTION AND CULTURAL RELATIVITY

The **international** recognition of certain basic rights is especially significant when a claimant fears persecution at the hands of an avowedly Islamic state, more particularly when the claim involves gender based discrimination. In such cases, it is necessary to avoid two common misconceptions. The first is the belief that it is wrong to judge "Islamic" states by "Western standards". The claim is that there are distinct, historically constituted cultures of equal ethical and political worth. The second is the claim that somehow "Islam" itself is irreconcilable with human rights. See further Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 8 and Fred Halliday, "Relativism and Universalism in Human Rights: the Case of the Islamic Middle East" *Political Studies* (1995) 43, 152, 154-155, 162.

There is possibly a suggestion of the first claim in the decision of the Authority in *Refugee Appeal No. 915/92 Re SY* (29 August 1994) 9-10:

"Gender based claims of persecution give rise to important considerations. It is vital not to lose sight of the central fact that the Convention provides protection only to refugees who can claim that they have a well-founded fear of persecution on one of the five stated Convention grounds. A decision-maker must guard against allowing the Convention ground of 'social group' to become a means of extending the protection offered by the Convention into new fields. There can be no doubt at all that women constitute a social group. Their gender is immutable (see *Matter of Acosta*; and Hathaway, *The Law of Refugee Status* 160).

However, that simple fact does not mean that gender based discrimination, which is pervasive throughout the world, should be permitted by western liberal democracies to constitute a valid basis for refugee claims on the grounds of membership of a social group. The social status of women in many countries in Asia, Africa, and even South America, is very different from that which pertains in countries such as New Zealand, Canada, United States, and much of Europe. Few countries have legislation prohibiting discrimination against women. Attitudes which in New Zealand are regarded as 'sexist' a (sic) widespread throughout the globe. In many countries, these unenlightened attitudes have some form of religious sanction. For women to have careers; control their fertility; have a social life independent from their husbands; to be treated on an equal footing with men; to pursue a tertiary education; to expect or receive help with domestic or child-rearing routines - in many countries in the world these concepts are unknown or unthinkable. That is not to say, however, that the existence of those conditions constitutes gender based persecution against women on the ground of membership of a social group. "

The decision does, however, go on to recognise that the motivation for the strict enforcement of the dress code in Iran is primarily political. With this we agree and it is a point to which we will return to later.

Addressing for the moment the first misconception, the comparison of rights across cultures is addressed at some length by Ann Mayer in *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995). Her vigorous justification of the use of international rights standards cannot be adequately summarised. However, the following passage at 7-8 bears quotation:

"Western specialists in the Muslim world and Islam are predisposed to attack scholarly projects that appear to be inspired by neocolonialist attitudes and designed to rehabilitate the imperialist enterprise retroactively. Their sensibilities in this regard have been exacerbated by the pervasive influence of Edward Said's seminal book, *Orientalism*. In this book Said argued that much of Western scholarship on the orient, meaning the Islamic Middle East, is not conducted in a spirit of scientific research but is based on a racist assumption of fundamental Western superiority and Oriental inferiority. By positing ineradicable distinctions between the West and the Orient, Orientalist scholarship, in Said's view, obscures the common humanity of people in the West and the Orient and thereby dehumanizes Orientals in a way that serves the goals of Western imperialism.

Although Said is not a lawyer and did not analyse legal scholarship, people influenced by his arguments tend to expand them to include legal scholarship, and although Said did not assert that all critical examination of Islamic institutions is infected by Orientalist biases, his disciples seem inclined to draw this inference from his book. In consequence, they may perceive projects for comparative legal analysis of Islamic law and international law - the latter being identified with the West - as Orientalist in a pejorative sense, particularly in cases where they anticipate that the analysis will expose disparities between Islamic and international law. This perception is unjustified.

The use of international rights standards as norms in critical examinations of Islamic human rights schemes and restrictions on human rights imposed by governments in the Muslim world does not necessarily reflect a racist assumption of Western superiority. Rather, such use may rest on the premise that peoples in the West and the East share a common humanity, which

means that they are equally deserving of rights and freedoms. To maintain that human rights norms are inapplicable in Islamic milieus is to accept the quintessentially Orientalist notion that the concepts and categories employed in the West to understand societies and cultures are irrelevant and inapplicable in the East. To believe that Islam precludes Orientals from claiming the same rights and freedoms as people in the West is to commit oneself to perpetuating the Orientalist tenet that Islam is a static, uniform system that dominates Oriental society, the coherence and continuity of which should not be imperiled by foreign intrusions like democratic ideas and human rights principles disseminated by 'Westernized' intellectuals. Those who charge that comparisons of international and Islamic law on human rights issues are Orientalist implicitly endorse the same elitist stance as the cultural relativists, discussed below - that international human rights are the sole prerogative of members of Western societies. Therefore, they are distorting Said's message, which was, ultimately, that categories like 'Islam' and 'Oriental' should not be allowed to obscure the common humanity of people's in the East and in the West.".

At *op cit* 8, Ann Mayer's discussion of cultural relativism begins with the following observation:

"At the core of most efforts to delegitimize comparisons of Islamic and international law is the conviction that they violate the principles of cultural relativism. Not all cultural relativists approach questions in an identical fashion, but in general they are inclined to condemn the notion that there are universal standards by which all cultures may be judged and to deny the legitimacy of using values taken from Western culture to judge institutions of non-Western cultures. They also tend to oppose the idea that human rights norms are universal. To impose on Third World societies norms taken from the Universal Declaration of Human Rights involves, according to this perspective, 'moral chauvinism and ethnocentric bias'. For strong cultural relativists, evaluative comparisons of Islamic rights concepts and international ones are impermissible because such comparisons are believed to involve judging Islamic norms by the criteria of international law, which relativists view as an alien, Western system. ".

As Ann Mayer observes at *op cit* 9, taking a cultural relativist stance to deny the universality of human rights and to challenge the validity of comparative examination of international and Islamic versions of rights is problematic for several reasons, which she then goes on to discuss. Importantly, in the present context, she points out that there is ample evidence to justify the conclusion that the international human rights standards developed in the United Nations are regarded as compatible with Islamic law by the very actors - governments - whose conduct is subject to regulation by international human rights principles. See Ann Mayer, *op cit* 11-12:

"Having formally accepted international human rights norms, governments of Muslim countries are bound by these norms and are also subject to being judged under them. Furthermore, support is growing for the notion that at least some principles of international human rights have been subsumed over time as features of customary international law and hence are binding on all states regardless of their ratification of individual conventions. International law does not cease to bind states when their representatives formally comment, as Saudi Arabia's and Iran's have done, that adherence to Islamic law justifies diverging from the standards of international law. Countries are not permitted to opt out of their international legal obligations at will or on pretexts of their own devising. Derogation from international human rights standards is permitted only under specific, narrow conditions, which do not include denying people human rights by appeal to the standards of any particular religion. "

And at *op cit* 64, she points out that:

"There is no theory in international law that supports the notion that fundamental human rights may be curtailed - much less permanently curtailed - by reference to the requirements of a particular religion. Under international law, non-Muslims cannot legally be deprived of their rights by the use of Islamic standards. There is also no warrant under international law for Muslims being deprived of their rights due to governmental application of restrictions taken from Islamic law. Thus, relying on the *shari'a* to limit and water down human rights means that the rights that are established under international law are being qualified by standards that are not recognised

in international law as legitimate bases for curtailing rights. Not only does the use of the *shari'a* to restrict human rights have no justification in international law, but given the vagueness of the formulations of the qualifications, it ultimately means that the rights involved became illusory.".

The same point is made in the Preliminary Report by the Special Representative of the Commission on Human Rights on the Human Rights Situation in the Islamic Republic of Iran, UN Doc.E/CN.4/1985/20 (1985) para 18. The Special Representative concluded that Iran's practice of amputations and lashings of criminals could not be justified by Islamic law or the right of nations to determine the value of their own culture, finding that:

"... no State can claim to be allowed to disrespect basic, entrenched rights such as the right to life, freedom from torture, freedom of thought, conscience and religion and the right to a fair trial which are provided for under the Universal Declaration and the International Covenants on Human Rights, on the ground that departure from these standards might be permitted under national or religious law.".

This finding was subsequently endorsed by the Human Rights Committee itself when it examined in 1992-1993 Iran's second report under the ICCPR. See, in particular, paragraphs 33, 37, 39 and 47 of the *Human Rights Committee, Summary Record of the 1196th Meeting* UN Doc.CCPR/C/SR.1196 (1993) and *Human Rights Committee, Summary Record of the 1230th Meeting* UN Doc.CCPR/C/SR.1230 (1993) paras 19 and 20. Reference should also be made in this regard to the *Final Report on the Situation of Human Rights in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Mr Reynaldo Galindo Pohl*, UN Doc.E/CN.4/1993/41, at 56-57 para 319 (1993).

Ann Mayer accepts that respect for international human rights law does not require that every culture use an identical approach to human rights: *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 17:

"... but it does require that human rights be defined and protected in a manner consonant with international principles. One Muslim scholar who has offered a thoughtful critique of typical misuses of cultural relativism in the rights sphere suggests that a proper respect for cultural relativism means that we should accept 'the right of all people to choose among alternatives equally respectful of human rights', and that the latter must include the rights of life, liberty, and dignity for every person or group of people. "

The points we have been endeavouring to make are eloquently expressed by Professor Rosalyn Higgins in *Problems and Process: International Law And How We Use It* (1994) 96-97:

"Human rights are rights held simply by virtue of being a human person. They are part and parcel of the integrity and dignity of the human being. They are thus rights that cannot be given or withdrawn at will by any domestic legal system....

It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view, this is a point advanced mostly by states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are *human* rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or state of development. They are as keenly felt by the African tribesman as

by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment."

We do not hesitate, therefore, to assess the appellant's case and Iran's human rights record according to the so-called International Bill of Rights.

## PERSECUTION - GENERAL FINDINGS

We have no wish to add to this already lengthy decision a summary of the human rights abuses in Iran, particularly as they affect women. A small fragment of the literature on the subject has been alluded to under the earlier heading "The Oppression of Women in Iranian Society". The article by David L Neal, "Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum" (1988) 20 Columbia Human Rights Law Review 203 is particularly helpful. It is cited frequently in *Fisher v INS* 37 F. 3d 1371 (9th Cir. 1994).

Broadly speaking, developments in Iran post-1979 have returned Iranian women to a domestic role after decades in which they had made progress in education, employment, entering the professions, and gaining a role in public life. The emphasis on the family has become a code for programmes designed to keep women in the home and out of cultural, economic and political life. We believe that Ann Mayer's description of Muslim conservative ideas on the status of women in Islam is an accurate exposition of the position of the women in Iran. See Ann Mayer, *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 99:

"It is assumed that all women will marry, so the primary determinant of an adult woman's life will be her relationship with her husband. In this relationship, she is required to submit to her husband's authority and follow his wishes. It is expected that her life will be passed at home fulfilling domestic duties, and women's involvement in politics is seen as inappropriate. There is no concern for protecting women's rights to develop as individual persons with distinct identities and abilities, to become educated in ways that fit their specific talents and interests or that enable them to become productive members of society, or to ensure that they play a part in the social, economic, or political institutions that shape their destinies. Women are seen not as actors but as passive, dependent beings - all of whom are basically fungible, not diverging in personality and capacity as males do. Furthermore, women are assigned the burden of preserving morality: It is their responsibility to stay secluded and enshrouded so that they do not provoke sexual excitement in men. Sexual importunings or advances on the part of men are attributed to the floutings of norms of modesty by women, not to any lack of morality or to any blameworthy, lascivious attitudes among the male population.".

We will return later to women's burden of preserving morality, which, as will be seen, also has strong political connotations.

Speaking specifically on the position of women in Iran, Ann Mayer states at *op cit* 111- 112:

"With the abrogation of the Family Protection Act by the Khomeini regime, *shari'a* rules were again in force. Since the revolution the regime has supported the idea of early marriages for girls, lowering the minimum age for marriage from eighteen to thirteen. Marriages of such young girls naturally create obstacles to their pursuing higher educations. The regime has also given strong encouragement to the traditional Twelver Shi'i institution of temporary marriage, in which a man can contract for a woman's sexual services for a limited period of time. This is an institution that has been widely condemned by Iranian feminists as degrading for women and that is regarded by most Sunni Muslims as a form of prostitution.

In addition to stripping women of legal protections in the area of family law, the regime has interpreted the application of Islamic standards to require drastic curtailment of women's activities outside the home. Women's educational opportunities have been restricted through a variety of devices, they have been fired and excluded from a wide spectrum of prestigious jobs, and they have been practically eliminated from politics and government. Women were barred from serving as attorneys in court and as judges. They have been quite deliberately excluded

from having a say in the legal order that assigns them an inferior status or from assuming positions where they might challenge the Islamic pedigree of the regime's discriminatory laws. They have been virtually eliminated from employment in the media and the entertainment industry. Their ability to participate in sports activities has been curbed or eliminated by the imposition of requirements that recreational areas be sexually segregated and that women wear cumbersome, baggy, concealing clothing - even while swimming or skiing. Generally, they have been forced to wear all-enveloping chadors or similar covering in dull colors and have been subjected to harsh criminal penalties for offenses such as not covering every strand of hair or wearing make up. Revolutionary Guards associated with the regime have engaged in systematic intimidation and harassment designed to discourage women from appearing in public unaccompanied by male relatives. The attempts that women have made to protest the dismantling of the many rights and freedoms that Iranian women had won by the 1970s have been met with the same kind of ruthless repression that the government has meted out to its other opponents."

Her conclusion at *op cit* 112 is that:

"The record ... overwhelmingly establishes that 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."

Overall, one observes the absence of any willingness (indeed, the refusal) to recognise women as full, equal human beings who deserve the same rights and freedoms as men. The denial of the right of a woman to function as an autonomous and independent individual has enormous implications at every level. Looking briefly only at the political level, which is particularly relevant in the refugee context, there is considerable force to the observation made by Fred Halliday in "Relativism and Universalism in Human Rights: the Case of the Islamic Middle East" *Political Studies* (1995) 43, 152, 161 that:

"... what we have, behind claims to transhistorical and divinely sanctioned legitimacy, are projects for the acquisition and maintenance of political power in the late twentieth century."

Looking at the domestic or family level, we see a mirror image, a point succinctly made by Liesbeth Lijnzaad, *Reservations to UN-related Human Rights Treaties: Ratify and Ruin?* (1995) 324:

"The impact of religiously inspired discrimination within the family is by no means of lesser importance than overt discrimination in society. Rather, there is a causal connection between discrimination in the private sphere and the existence of a formalized discrimination in public life."

Having determined that the appellant's case and Iran's human rights record fall to be determined according to the International Bill of Rights, we must now identify, in terms of the Universal Declaration of Human Rights in the International Covenant on Civil and Political Rights, the fundamental human rights denied to the appellant.

## PERSECUTION FEARED BY THE APPELLANT - HUMAN RIGHTS

## FRAMEWORK

We do not intend an exhaustive examination of the relevant human rights instruments. It is sufficient to note the appellant's principal claims. We have ordered them according to the hierarchy of rights in the International Covenant on Civil and Political Rights (the "ICCPR").

As to first level rights, the appellant, pointing to the concept of honour and shame discussed earlier, fears the arbitrary deprivation of her life at the hands of male family members, a violation

of ICCPR Article 6. Alternatively, she fears at their hands torture or cruel, inhuman or degrading treatment or punishment (ICCPR Article 7). She also relies on the fact that breach of the dress code is visited by the State with disproportionately severe penalties - the least of which is 74 lashes, administered immediately and without formal review: David L Neal, "Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum" (1988) 20 Columbia Human Rights Law Review 203, 217-222. This is also a violation of ICCPR Article 7. Also among the first level rights is the right to freedom of thought and conscience (Article 18). This Article is directly relevant to the appellant's deeply held views of her right to function as an autonomous and independent individual, to her passionate opposition, both to the patriarchal society comprising her extended Arab family, and to the male domination of women in Iranian society at large. Additionally, as noted by Manfred Nowak in *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 314 para 10, the right under ICCPR Article 18 of spiritual and moral existence is closely associated with the right to privacy in ICCPR Article 17, as well as (private) freedom of opinion in ICCPR Article 19(1). But the right to freedom of thought and conscience under Article 18 means the right to develop autonomously thoughts and a conscience free from impermissible external influence:

"... Art 18(1) obligates the States Parties to refrain from interfering with an individual's spiritual and moral existence - whether this be through indoctrination, "brain washing", influence of the conscious or sub-conscious mind with psychoactive drugs or other means of manipulation - and to prevent private parties from doing so ... Influencing is, in any event, impermissible when it is performed by way of coercion, threat or some other unallowed means against the will of the person concerned or without at least his implicit approval.

The freedom to live and act in harmony with one's conscience enjoys the absolute protection of (private) freedom of conscience so long as these actions do not affect the rights and freedoms of others."

Moving now to second level rights, reference has already been made to the right to freedom of opinion and expression (ICCPR Article 19), but to this should be added ICCPR Article 17 which provides:

"1. No-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

As noted by Manfred Nowak at *op cit* 288 para 2:

"... privacy guarantees the respect for the *individual existence* of the human being. Every person has a right not only to exist physically, spiritually and legally but also to respect for his or her peculiar, individual nature, appearance, honour and reputation."

The importance of "privacy" to individual existence and autonomy is highlighted in the following passage from Manfred Nowak *op cit* 294 para 17:

"With respect to the area of ***individual existence***, the protection of privacy is conditioned on a number of other rights of existence or closely associated with these. The protection of individual existence presupposes the protection of life, physical and mental integrity, freedom of thought and conscience and, in a State governed by the rule of law, also recognition of legal personality. Moreover, privacy protects the special, individual qualities of human existence, a person's manner of appearance, his or her identity. Identity includes, in addition to one's name, also one's appearance, clothing, hair and beard style, one's gender, feelings and thoughts, one's specific past, as well as confession to a belief or some other conviction, i.e., passive freedom of religion and belief. Mandatory clothing or hairstyle rules therefore represent as much interference with a person's privacy as the forced changing of a name or religious belief or this forceful influencing of thoughts and feelings (e.g., by way of mandatory treatment with psychoactive drugs that change personalities, by way of "brainwashing" or other manipulation of the subconscious without the awareness of the person concerned)."

Given the facts of the present case, these observations are particularly relevant and, as pointed out by Manfred Nowak at *op cit* 295 para 18, the examples just given serve to illustrate a second manifestation of individual existence that is covered by respect for privacy: the protection of personal integrity.

While mention should be made of ICCPR Article 23 (marriage and family), especially paras (3) and (4) (no marriage without free and full consent; equality of rights), more emphasis should be given to the principal provisions of the ICCPR which address the issue of non-discrimination, namely, Articles 2, 3 and 26. Of these, the principal provision is Article 26, for reasons which we will now explain.

Article 2(1) and (3)(a) of the ICCPR provides:

"1 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2

3 Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b)

(c)"

Article 3 of the ICCPR provides:

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Article 26 of the ICCPR provides:

"All parties are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The duties placed on States Parties by ICCPR Article 2, in particular, the right not to be discriminated against and to have an effective remedy, have an ***accessory*** character. This means that a violation of Article 2 can occur only in conjunction with the concrete exercise (but not necessarily violation) of one of the substantive rights ensured by the ICCPR: Manfred Nowak *op cit* 28 para 3; 34 para 15.

Under Article 3, the obligation of States Parties to ensure the equal right of men and women refers only to the rights in the ICCPR. Article 3's scope of application is therefore more narrow than that of Article 26, which ensures a general claim to equal protection of the law against discrimination. Discrimination of women in the field of labour or social law thus does not violate Article 3, but rather only Article 26: Nowak *op cit* 68 para 5. It is in this sense that the primary non-discrimination provision is that contained in ICCPR Article 26.

While it is appropriate to acknowledge the importance of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), we do not believe that its provisions add very much to the appellant's case. First, the ICCPR itself stresses gender equality in various places: in the general, accessory prohibition of discrimination in Article 2(1), in the specific prohibitions of discrimination in Articles 4(1), 24(1) and 25, in the specific requirement of equality between

spouses in Article 23(4), and in the general right of equality and prohibition of discrimination in Article 26.

Second, unlike the ICCPR, CEDAW does not contain rights which are in immediately binding form, nor are any rights made non-derogable. Indeed, CEDAW is entirely silent on the issue of derogation. Additionally, CEDAW, in many of its provisions, implies gradual or programmatic implementation of its terms and the Committee on the Elimination of Discrimination Against Women has relatively little power.

Third, there is the problem of reservations (some based on the *shari'a* law) which, on one view, seem to have turned CEDAW into a weak instrument: Liesbeth Lijnzaad, *Reservations to UN-related Human Rights Treaties: Ratify and Ruin?* (1995) 4-5, 304 In identifying the "object and purpose" of CEDAW for the purpose of assessing the validity of various reservations against Article 19 of the Vienna Convention on the Law of Treaties, Ms Lijnzaad concludes at *op cit* 304 that only a very limited number of provisions of CEDAW can be termed core obligations identifying the object and purpose of CEDAW:

"On the whole, there would seem to be a communis opinio on the core value of articles 2, 9, 11, 15 and 16. While article 2 presents the goals of the Convention in a nutshell, the other articles deal with discrimination in the fields of nationality, labour, equality before the law and equality in family matters. It may be suggested that these are the fields in which discrimination is most detrimental to the achievement of women's equal rights."

In the circumstances of the present case, we take the view that the ICCPR adds greater strength to the appellant's claim than CEDAW.

The relationship between the ICCPR and CEDAW is not, however, an issue which falls for resolution within the confines of the present case. Because of the breadth of the appellant's case and its cumulative weight, we are satisfied that the consequences feared by her upon her return to Iran are of such severity that they are properly stigmatised as persecution.

In arriving at our conclusion on the persecution issue, we have been helped by the holding of the United States 9th Circuit Court of Appeals in *Fisher v INS* 37 F.3d 1371, 1379- 1381 (9th Cir. 1994) that persecution cannot be evaluated solely on the basis of physical sanction (for instance, prolonged imprisonment, lashes with a whip, etc.). In so holding, the 9th Circuit gave explicit recognition to that which hitherto had only been implicit in US jurisprudence (see *Fatin v INS* 12 F. 3d 1233 (3rd Cir. 1993)), namely, that when a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with, laws that are fundamentally abhorrent to that person's deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in persecutorial conduct. Express approval was given by the 9th Circuit to the 3rd Circuit's elaboration of persecution in *Fatin*:

"[T]he concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs."

The 9th Circuit in Fisher also drew on its earlier decision in *Canas-Segovia v INS* (Canas-Segovia I), 902 F.2d 717 (9th Cir. 1990), *vacated on other grounds*, - US - , 112 S.Ct. 1152, 117 L.Ed. 2d 401 (1992) (vacated and remanded in light of *Elias-Zacarias*), aff'd (*Canas-Segovia II*), 970 F.2d 599 (9th Cir. 1992)). *Canas-Segovia* involved asylum claims by two Jehovahs Witnesses who contended that their refusal to endure conscription into the El Salvadoran armed forces would result in political or religious persecution. In a portion of the opinion affirmed after remand from the Supreme Court (see *Canas-Segovia II*, 970 F.2d at 601-602), the 9th Circuit concluded that "disproportionately severe punishment" amounting to persecution would result if the Petitioners' forced service in the military would "cause them to sacrifice their religion's fundamental principle of pacifism", *Canas-Segovia I*, 902 F.2d at 728. Applying *Canas-Segovia* in *Fisher*, the 9th Circuit stated at 1381:

"If the Jehovahs Witnesses in *Canas-Segovia* would suffer persecution when forced to sacrifice their belief in pacifism, we think it clear that being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that fundamentally is at odds with one's own also can rise to the level of persecution ... Indeed, when a member of a religion is forced to comply with an interpretation of her faith with which she disagrees, the case for persecution may be even stronger than it was is *Canas-Segovia*: the individual may suffer not only the general 'torture' of conscience described by the 3rd Circuit in *Fatin* but also the *additional* consequence of having imposed upon her a particular conception of the dictates of her own religion."

While the appellant has not advanced her case on the *Fisher* basis (i.e., that the moral codes imposed on Iranian women are persecutory because they represent a conception of Islam that she finds abhorrent and because the regime is attempting to suppress her beliefs through sanctioning her for non-compliance with the moral codes), the *Fisher* decision is nevertheless important for the recognition it has given to the significance of being required to comply with codes and requirements fundamentally at odds with one's own conscience and beliefs or deeply held convictions, or to engage in conduct that is abhorrent to one's own beliefs.

The 9th Circuit in *Fisher* is also helpful for the manner in which it distinguished the implicit holding in *Fatin* at 1241-42 that not only must the woman establish that there is "persecution" in Iran, but also that there is a real risk of ***her*** being subjected to persecution. In this regard, the woman would have two options if she returned to Iran: comply with the Iranian laws or suffer severe consequences. Thus, while the 3rd Circuit in Fatin agreed that the indicated consequences of non-compliance would constitute persecution, it was still necessary to enquire whether Ms Fatin's other option - compliance with the Islamic laws - would also constitute persecution. It held at 1242 that on the evidence adduced by Ms Fatin, she had not shown that compliance with the gender-specific laws would be, for her "profoundly abhorrent" and thus aptly called persecution. The 9th Circuit in *Fisher*, addressing this issue, held that the refugee claimant did not have to show that she *would* take conscious steps to violate the moral codes to discharge this burden. Recognition had to be given to the fact that violation of the codes could occur inadvertently. Furthermore, it was not necessary for a claimant *to intend* to make her views known to the Iranian regime. Martyrdom is not required (1383):

"Because Fisher's claim is premised on the enforcement of the moral codes, demonstrating that her future non-compliance is likely is necessary in order to establish that she has a well-founded fear of persecution for that reason.

Fisher does not have to show, however, that she will take conscious steps to violate the moral codes in order to meet her burden in this regard. Although the 3rd Circuit implied recently that Iranians have a simple choice with respect to the moral codes, either to comply or not to comply and face the consequences, *see Fatin*, 12 F. 3d at 1241-42; *accord Safaie*, 25 F. 3d at 640, we think that this position ignores the realities of Iran. Clearly, one can violate the moral codes inadvertently. *Cf Hartooni*, 21 F. 3d at 341; *Iran Cracks Down on Dress Code*, Chicago Trib., July 11, 1993 at 11 (reporting an incident in which a female journalist had her car impounded because, she speculated, her "sunglasses" were the problem). Consequently, the Board should consider not only the possibility that Fisher intentionally would flout the moral codes, but also whether she might be sanctioned for inadvertent non-compliance."

And at 1383:

"Of course just as Fisher need not show that she purposely will fail to comply with the moral codes, *see supra* pp.1381-82, it is not necessary for her to intend to make her views known to the Iranian regime. As the 5th Circuit noted recently, to require 'martyrdom' is to 'ignore reality in general and reasonable human behaviour in particular'. *Rivas-Martinez*, 997 F. 2d 1147."

As to the facts of the present case, there are two points:

(a) On the evidence, we agree with Counsel's submission (para 25) that:

"The appellant impresses as a woman of extraordinary courage and integrity. She is not the sort of person who would simply go back to Iran and kow-tow to the family, to the ideological section at the hospital (if she got her job back) and indeed to the Iranian authorities. It is only therefore a matter of time before the appellant finds herself in the same position or worse than she was in prior to her departure."

(b) There is a real risk of inadvertent non-compliance with Islamic requirements. Over a period of years, the appellant has been driven to breaking point and, as previously mentioned, the physician who led her "team" described her as a "timebomb, likely to explode at the slightest provocation".

## WHETHER FEAR OF PERSECUTION WELL-FOUNDED

In this context, we turn to the requirement that the appellant not only establish a fear of persecution, but also that her fear is well-founded in the sense that there is a "real chance" of persecutorial conduct occurring were she to return to Iran.

Earlier in this decision we have described how the relentless pressure and harassment to which the appellant was subjected drove her to breaking point and led others to observe that she was likely to explode at the slightest provocation. Given who she is and given her deeply held beliefs, we find it would be highly likely that before long she would be driven to the same point. A likely loss of control will bring her directly into conflict with both her family and the state either intentionally or through inadvertence. As to the state authorities, her Arab ethnicity and family background will increase both the "chance" of her behaviour being viewed seriously as well as the severity of the punishment. As to her family, it is not possible to quantify with any certainty the risk of the appellant being forced into an arranged marriage (it is to be remembered that her sister K was, after all, 36 years of age when she was compelled by the appellant's father to enter into an arranged marriage). However, it is possible to predict with some certainty that were the appellant to so marry, it will be discovered that she is not a virgin. Bearing in mind the history of violence to female members of the appellant's extended family, there is more than a real chance of the appellant meeting a truly terrible fate at the hands of her male relatives.

On both limbs of her case (persecution at the hands of the state and at the hands of male family members), the appellant has established a real chance of persecution.

We examine next whether there are Convention grounds to the feared persecution.

## CONVENTION GROUNDS

The appellant must establish that her fear of persecution is for reason of race, religion, nationality, membership of a particular social group or political opinion.

### Race

It is to be recalled that the appellant is of Arab descent. Her ethnicity, combined with her family background, is a contributing factor to the interest the authorities have in her. The appellant's family background will be addressed separately. It is necessary, however, to record that in so far as the appellant's case turns on her Arab racial or ethnic background, there is a Convention reason. See, in particular, the broad and non-technical interpretation of "race" adopted by this Authority in its principal decision in this area, namely, *Refugee Appeal No. 1222/93 Re KN* (5 August 1994) 23-27.

### Religion and Political Opinion

Given the theocratic nature of the current regime in Iran, the appellant's opposition, both to the patriarchal society comprising her extended Arab family and to the male domination of women in Iranian society at large, is conveniently addressed under both the "religion" and "political opinion" grounds.

At first instance, the Refugee Status Section did not even remotely come to grips with this aspect of the appellant's case. In the interview report her case was summarised in the following few lines:

"She states that being an Arabic woman also results in deprivation. She was not married because no body would risk the problems involved in marrying into her family. She states that Arabic women are treated as an instrument by men to have sex with and carry children. She states that she had no future left in Iran and could not bear it there any longer.".

In the Refugee Status Section decline letter dated 20 October 1993 declining refugee status, it was concluded:

"We also do not accept that this harassment combined with the discriminatory practices against woman (sic) in Iran cumulatively amounts to persecution.

While it is accepted that woman (sic) in Iran, and particularly Arabic woman (sic) face discrimination and harassment. These violations of their human rights are not considered to be serious violations amounting to persecution.".

These paragraphs fail to engage the real issues of the case and, in particular, the use of tribal social values as well as Islamic ideology to control women. It has been noted by Linda Cipriani in "Gender and Persecution: Protecting Women Under International Refugee Law" (1993) 7 Geo. Immigra. L.J. 511, 514 that the status of women in the *Qur'an* is exemplified by such passages as:

"Men are the managers of the affairs of women because Allah has made the one superior to the other and because men spend of their wealth on women .... As for those women whose defiance you have cause to fear, admonish them, and keep them apart from your bed and beat them."

The extrapolation of dictates of this nature is explained by Shahrzad Mojab in "Women from Iran", *op cit* 14:

"While inequality between women and men exists in all societies and in all religious traditions, it is important to realise that Islamic teachings on the physical, emotional and intellectual inferiority of women are no longer filed away in the Holy Book Koran or in other religious texts. We must remember that the Islamic principle of inferiority of women is now the basis of the policy of a despotic state that uses extreme forms of violence in order to regulate male/female relations on the basis of Islamic dogmas. The Islamic state uses without any restraint the enormous state power in order to regulate the life of women from the moment they are born to the last stage in the burial ceremonies. Every moment in the life of women is regulated in one way or another by the powerful state machinery." .

In this context, it can be readily understood that the rejection by a woman of such teachings and of the state power used to enforce those teachings will have consequences at both the religious as well as the political levels. This is the almost inevitable consequence of any challenge to the fundamental tenants of a theocratic regime, a matter remarked upon by this Authority in several decisions including *Refugee Appeal No. 58/91 Re ZAR* (27 March 1992) 11-12; *Refugee Appeal No. 300/92 Re MSM* (1 March 1994) 14-15; *Refugee Appeal No. 265/92 Re SA* (29 June 1994) 14; and *Refugee Appeal No. 936/92 Re BB* (8 February 1995) 9.

The point made by Ann Mayer in *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 69 is that even at the more abstract constitutional level:

"In the Iranian Constitution, Islam is conceived of, not as offering the basis for protecting rights, but solely as the basis for limiting or denying the rights that people could claim under secular constitutional principals or international human rights standards.".

And at *op cit* 70, she adds:

"Iran's post revolutionary ruling elite became dominated by conservative clerics, who were eager to exploit their newly won political power to achieve clerical domination of society and whose lack of sympathy for human rights principles has been abundantly manifested by subsequent events. Both the conduct and the statements of the clerical members of Iran's ruling elite reveal that they see the official version of Islam as a tool of reverse social engineering for combatting the social changes that have accompanied Iran's modernization. In such circumstances, it is natural that Islamic qualifications of human rights embody retrograde interpretations of *shari'a* requirements and are used as instruments of repressive government policies.".

As observed by Fred Halliday in "Relativism and Universalism in Human Rights: the Case of the Islamic Middle East" *Political Studies* (1995) 43, 152, 161:

"... what we have, behind claims to transhistorical and divinely sanctioned legitimacy, are projects for the acquisition and maintenance of political power in the late twentieth century.".

To similar effect, see the following passages from Reza Afshari, "An Essay on Islamic Cultural Relativism and the Discourse of Human Rights" *Human Rights Quarterly* 16 (1994) 235, 249:

"For a Muslim country, as for all complex state societies, the most pressing human rights issue is not local cultural preferences or religious-cultural authenticity; it is the protection of individuals from a state that violates human rights, regardless of its cultural-ideological facade.

... Under Islamist dictatorship in Iran, the drive for Islamization of culture has become a considerable smokescreen for the exclusionary (political and economic) strategy of the state.".

And at *op cit* 255:

"Martha Nussbaum argues that 'one of the most central capabilities, without which one cannot consider a life as a human life, is 'the capability of choosing itself, which is made among the most fundamental elements of the human essence'. The state should not block access to information that enable citizens to examine alternative ways of life and to make informed choices among the possibilities open to them. Nor should it permit organized political groups to engage in violent actions which eliminate people's options. The angry young men of fundamentalism have turned the streets of Tehran into a veritable cultural war zone, harassing and attacking women in modern dresses. The situation in Cairo is only less drastic. Thus, women are at the centre of the debate over culture and authenticity. They are also central to the issue of the control and exercise of power in Muslim societies."

These comments are particularly relevant given the earlier discussion in this decision of state protection, that is, the significance of the inability of the state, or its unwillingness, to afford adequate protection to individuals. The paper by Reza Afshari is also valuable for highlighting the political need in Iran for the continuing imperative to fulfill "Islamic" principles on women. The following quote is taken from *op cit* 257-258:

"The hegemony of the dominant Islamist polity places women at the centre of Islamist discourse. Manipulating the sacred symbolism, the Islamist discourse claims an extrapolitical sanctity, while its consecrated language empowers its speakers. I am referring to the Foucauldian sense of discourse, designating a materialization of language through which Islamist views have been positioned in absolute opposition to those of secularists. The Iranian Islamists trumpet their political legitimacy, playing Islamic tones no one else is said to be qualified to play. Their religious idiom is no longer as effective as when it was delivered from outside as a language of political dissent and discontent. In today's political marketplace, however, the issues for which the Islamist discourse could claim exclusive Islamist priorities and solutions have been diminished, as the hard-pressed ruling elite falls back on the familiar secular

formulas of the past for administration and economic growth. As the state's dominant discourse, Islamism is left with only one major mark of distinction: its drive against moral impurities resulting from the 'un-Islamic' appearance and behaviour of women in public. Being placed on the edge of what seems to be the sole slippery terrain for deviation from the true path of Islam, women have become the *raison d'être* of Islamism, the reluctant bestowers of its legitimacy. The sight of a bare-headed woman is a challenge to that legitimacy. Other vices like alcohol, Western and Iranian popular music, videos, and films are produced locally, smuggled, distributed, and consumed in homes whose morality the Islamic Republic has failed to 'Islamitize'. Unlike women's dress, these are hidden vices in which men, Islamist or otherwise, partake without feeling threatened in their public domination.

After more than a decade, Iran's Islamist regime has failed to bring about any fundamental change in the economic direction, in Iran's entrammelment in the global economy, and in its position as consumer of the developed world's goods and services. The new rulers have learned that there is no Islamic way to build and run an industrial plant, produce goods and services, or create monetary stability. What has remained of the Islamic version of the dependency theory is a skeleton of cultural rhetoric that will increasingly sound cranky to the swelling middle and lower-middle classes. As the Islamists have increasingly entangled themselves in other discourses (capitalist market economy, state capitalism, socialism, etc), over which they can lay no exclusive, divinely-sanctioned claims, they will feel compelled to wage their power struggle in cultural terms. Thus, women have become the signifier of the anti-Western credentials of the Islamists, the veiled ones as a positive testimony and the badly-veiled ones as the evidence for Islamist vigilance against the collaborators of the West. At the same time, reinforcing the *hijab* is not only a vocation for Islamist men who are sent out to the streets in sorties but an avocation for some of them who seem to enjoy the new opportunity to abuse women in 'bad' *hijab* and gain satisfaction for their frustrated sexual fantasies."

Reference should also be made to Jacqueline Bhabha & Sue Shutter, *Women's Movement: Women Under Immigration, Nationality and Refugee Law* (1994) 248-251.

We are satisfied on the evidence that a very substantial element of the appellant's case, namely, the fear of harm at the hands of state agents, falls within the "religion" and "political opinion" categories of the Convention. For the avoidance of doubt, we stress that in New Zealand refugee jurisprudence it is well-established that an imputed political opinion is sufficient to satisfy Convention requirements.

We are also satisfied that the same must be concluded in respect of the equally substantial element of the appellant's case which rests on her fear of harm at the hands of non-state agents of persecution, namely, male members of her extended family. The reasons are to be found in the earlier section 'Persecution - General Findings' and there is no need to repeat what is said there. It is sufficient to note only that we agree with the conclusion reached by Ann Mayer in *Islam and Human Rights: Tradition and Politics* (2nd ed, 1995) 112 that the evidence overwhelmingly establishes that 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. Because the religious and political imperatives which operate at state level are intended to operate and in fact operate at the domestic or family level as well, we see no distinction on these facts between persecution by the state and persecution by male family members.

## Religion and Political Opinion - Conclusions

It follows from what we have said that the appellant has established that the persecution feared by her is not only well-founded, it is also "for reason of" the Convention grounds of religion and political opinion. Given these findings, she is entitled to recognition as a refugee and she is so recognised.

But before concluding this decision, we wish to compare our findings on the political opinion issue with overseas case law. We also wish to separately address the appellant's case in so far as it is based on the social group Convention ground.

## Political Opinion - Overseas Comparisons

Our conclusion as to the political opinion ground of the appellant's case is in accord with Canadian and United States jurisprudence. See *Namitabar v Canada (Minister of Employment and Immigration)* [1994] 2 FC 42 (FC:TD) and *Fisher v INS* 37 F. 3d 1371 (9th Cir. 1994), both of which cases also adequately dispose of the "law of general application" argument.

It has been said that the jurisprudence of the Federal Republic of Germany is slowly changing to give women-specific problems increasing recognition and, in particular, in a number of judgments it has been acknowledged that breaking moral norms and values is considered political resistance by the persecuting authorities, particularly in the case of Iran. See Anne Leiss & Ruby Boesjes, *Female Asylum Seekers: A comparative study concerning Policy and Jurisprudence in the Netherlands, Germany, France, the United Kingdom, also dealing summarily with Belgium and Canada* (Dutch Refugee Council, April 1994) pp 55-61. In this same study, it is noted (at p 35) after citing specific case examples, that a positive change of policy can be discerned with respect to Iranian women who have broken the norms and values in their country. In 1992, such women were recognised as refugees several times. Unfortunately, such decisions were issued without reasoning. The ground on which refugee status was granted can therefore only be guessed at.

The situation pertaining in France is problematical largely because decisions made at first instance by the Office Français de Protection des Réfugiés et Apatrides are only made public in case of negative decisions. Moreover, most judgments on appeal by the Commission des Recours des Réfugiés are published with very concise reasons only: Anne Leiss & Ruby Boesjes *op cit* 64. In their study, only one single judgment of the Commission des Recours was found in which a woman breaking the norms and values of society was recognised as a refugee, and the Convention ground on which refugee status was granted is not immediately apparent.

The Leiss & Boesjes study found that in the United Kingdom, in an unreported decision of the Immigration Appeal Tribunal delivered in 1987, refugee status was denied to a woman who participated in a demonstration against the compulsory wearing of the chador. At work, she was spoken to on several occasions by the revolutionary guards because she did not comply with the dress regulations. She was told that the next time she did not wear her chador, she would be treated as a prostitute and taken to prison. There a sentence could be imposed on her ranging from lashing to capital punishment. As a consequence of these threats, the woman had a nervous breakdown followed by a skin disease. The case turned on a finding by the Tribunal that Westernised, middle class women in Iran who refuse to conform to Islamic dress codes did not constitute a social group within the meaning of the Convention, even though the Tribunal conceded that the evidence established that, in certain cases, there were "horrendous penalties administered". This case is discussed, not only by Anne Leiss & Ruby Boesjes at *op cit* 83, but also by Jacqueline Bhabha & Sue Shutter in *Women's Movement: Women Under Immigration, Nationality and Refugee Law* (1994) 249-250. The Immigration Appeal Tribunal does not appear to have considered the political dimension of the facts.

The treatment by Anne Leiss & Ruby Boesjes of Belgium in their text at *op cit* 88-90 is inconclusive. However, after observing that no general conclusions can be drawn from the Belgian research, it was possible to observe that there is a growing awareness by Belgian authorities regarding female-specific persecution.

In Canada, of course, there are now the guidelines entitled "Women Refugee Claimants Fearing Gender-Related Persecution" (March 1993) and which are reproduced in (1993) 5 International Journal of Refugee Law 278. These guidelines explicitly recognise that a woman who opposes institutionalised discrimination of women, or expresses views of independence from male

social/cultural dominance in her society, may be found to fear persecution for reasons of imputed political opinion (i.e. she is perceived by the established political/social structure as expressing politically antagonistic views).

In the United States, the INS *Gender Persecution Guidelines* published on May 26, 1995 and reported in 72 *Interpreter Releases* 771-772; 781-790 (June 5, 1995) largely incorporate the jurisprudence developed in *Fatin* and *Fisher* discussed earlier in this decision. Although they pre-date the INS *Guidelines*, reference should also be made to the proposals advanced by Nancy Kelly in "Guidelines for Women's Asylum Claims" (Women Refugees Project of Cambridge and Somerville Legal Services and Harvard Immigration and Refugee Program) reproduced (albeit incompletely) in 71 Interpreter Releases 813, 817-818 (June 27, 1994) and Pamela Goldberg, "Asylum Law and Gender- based Persecution Claims" 94-9 *Immigration Briefings* (September 1994) 10-12.

We turn now to address the remaining Convention ground, namely, "membership of a particular social group".

## PARTICULAR SOCIAL GROUP

The appellant has succeeded in securing recognition as a refugee under the religion and political opinion grounds of her case, reinforced by the race element as explained earlier. Strictly speaking, therefore, it is not necessary for us to address the social group limb of her case.

However, this is not an area free from difficulty. Ordinarily, in a common law jurisdiction such as New Zealand where jurisprudence is developed on a case by case basis (cf. the "Guidelines" approach recently adopted by both Canada and the United States of America), decision-makers are inclined to be wary of deciding issues which do not directly fall for consideration. However, as the growing literature on gender-based persecution shows, too often gender issues are deliberately, but unjustifiably, avoided in the refugee context. This may on occasion be due to a lack of awareness on the part of decision-makers of gender issues, or to insensitivity or to a feeling that the issue is just too difficult. Furthermore, there is a very real issue as to whether it is appropriate for refugee determination to focus on political opinion to the exclusion of the social group element when gender issues are raised. An approach to refugee determination which unjustifiably favours the political opinion ground to the exclusion of the social group ground will tend to reinforce the male gender bias often complained of by female asylum seekers, and inhibit the development of a refugee jurisprudence which properly recognises and accommodates gender issues within the legitimate bounds of the Refugee Convention.

The problem faced by female claimants is compounded by the fact that very often individuals may fear persecution for more than one reason and, as Maryellen Fullerton points out in "A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group" 26 Cornell Int'l L.J. 505, 550 (1993), it is not surprising that persecution for political opinion and for membership of a social group overlap. Indeed, that is often likely to be the case. As she points out at *op cit* 550, it is in these circumstances just as important to prevent a claim of persecution based on political opinion to masquerade as persecution based on social group, as it is to prevent a social group claim to masquerade as a political opinion case.

The task of the decision-maker is not made any easier by the fact that persecution focused on membership of a social group is also likely to involve a political opinion, but proving that the group faces persecution for the political opinion of its members might be difficult. As Maryellen Fullerton points out at *op cit* 552, the concept of a social group is therefore a needed one; it fills a noticeable gap in the categories of victims of persecution.

With these observations in mind, we have decided that the appellant is at least entitled to an indication of the Authority's preliminary views as to the social group aspect of her case.

The interpretation of the "particular social group" Convention ground was recently examined at some length by the Authority in *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995) 23-34, 56-58 and we do not intend repeating what is said there. But given that so much of this present case (as is common in gender-related claims) is based on discrimination, nothing is lost by explicitly recalling that in distilling the contents of the head of "particular social group", it is appropriate to find inspiration in discrimination concepts. The manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law. In short, the meaning assigned to "particular social group" should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative: *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 734, 735, 739 (SC:Can) adopted and applied by the Authority in *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995) 25-26. The particular social group limb of the Convention may, therefore (depending on the facts), be particularly relevant to gender-related asylum claims.

The appellant's case is that the punishment, disproportionately severe penalties and intense discrimination faced by her in Iran are the result of her holding deeply held values, beliefs and convictions fundamentally at odds with the power structure in Iran. But is she a member of a particular social group?

On the evidence we have heard and upon an extensive survey of the literature and case law, we are satisfied that there are a number of women in Iran who share the appellant's values, beliefs and convictions. They are characteristics which they ought not be required to change. We are of the opinion that it would be profoundly abhorrent to require of the appellant that she surrender these values, beliefs and convictions, going as they do to her fundamental civil and political rights, her very identity, her dignity and existence as a human being.

Our preliminary view is that the group is clearly cognisable as a social group and is perceived as such by the authorities and Iranian society in general. On this analysis, it would be possible to say that the appellant belongs to a particular social group which, loosely defined, comprises women who, as a result of their deeply held values, beliefs, and convictions, reject or oppose the way in which they are treated in Iran, and the attendant power structure which perpetuates and reinforces the so-called "Islamist" justification for this state of affairs. We are satisfied that the appellant is at risk of harm for this reason both at the hands of the state and at the hands of male family members.

On this preliminary analysis, the appellant's fear of harm at the hands of both state and non-state agents would satisfy the particular social group category of the Convention. However, because there is a considerable political dimension to the definition of the group, the definition may have to be refined in the future to avoid the criticism that it is a claim of persecution based on political opinion masquerading as persecution based on social group.

## OVERALL CONCLUSION

In summary, our conclusions are as follows:

1 The appellant holds a *bona fide* subjective fear of returning to Iran.

2 The harm feared by her, both at the hands of male family members and at the hands of state authorities in Iran, is of sufficient gravity to constitute persecution.

3 Her fear of persecution is well-founded in relation to both the above limbs of her case.

4 The persecution she fears is persecution for a Convention reason, namely, her race, religion and political opinion.

While we have arrived at these conclusions by the orthodox application of principle to fact, we note the happy result that our decision sustains *Excom Conclusion No. 39 (XXXVI) Refugee*

*Women and International Protection* (1985) para (k) in which the Executive Committee of the UNHCR:

"*Recognized* 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 Refugee Convention."

We find that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

"R P G Haines"