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Recommended Citation

Stephen M. Knight, *Reflections on Khawar: Recognizing the Refugee from Family Violence*, 14 Hastings Women's L. R. 27 (2003). Available at: [http://repository.uchastings.edu/hwlj/vol14/iss1/3](http://repository.uchastings.edu/hwlj/vol14/iss1/3)
Reflections on Khawar: Recognizing the Refugee from Family Violence

Stephen M. Knight

The progressive development of refugee law to recognize family violence and other forms of gender violence as a basis for asylum took a major step forward in April 2002 with the decision by the High Court of Australia in the Khawar case. For more than fifteen years, advocates, scholars, and activists have been working to keep refugee law in pace with the recognition of gender violence in international law as a human rights concern. With the Khawar decision, Australia's highest court has joined a growing body of jurisprudence among state parties to the international Refugee Convention establishing asylum as a recognized protection for women fleeing gender abuses such as domestic violence, honor killing, and prostitution.

The central building blocks of this progress have been statements by the United Nations High Commissioner for Refugees (UNHCR), non-binding guidelines issued by governments, and decisions by individual asylum adjudicators and administrative appeals boards. Standing on this foundation, more and more courts are issuing precedent-setting decisions that can be then relied on at all levels in deciding future asylum cases. The issuance of new supportive guidelines for gender-related claims by the

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UNHCR in May 2002 has buttressed this progress. Moreover, since refugee law is based on an international treaty, decisions of other countries are persuasive authority in interpreting the core asylum definition in the United States.

With Khawar, Australia now stands with the United Kingdom, Canada, New Zealand, and other countries in recognizing gender violence as a proper basis for a grant of asylum. However, as more countries follow suit, resistance to this line of authority in the U.S. continues to gather steam, seeking to undermine the progress made in the 1990s. Often, it is the complex issue of the link, or “nexus,” to one of the five Convention grounds for granting asylum that is seized upon to deny gender asylum cases. The Khawar decision provides a strong example of a way out of this dilemma, one that should be welcomed by adjudicators in the U.S.

I. BACKGROUND

Pursuant to the Refugee Convention, and under U.S. and Australian law, a refugee is defined as a person who

owing to a well-founded fear of being persecuted for reasons of [1] race, [2] religion, [3] nationality, membership of a particular [4] social group or [5] 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.


5. Refugee Convention, supra note 3, art. 1 § A, para. 2, 189 U.N.T.S. at 184 (illustrating the five Convention grounds for asylum).

Australian law provides for the granting of a “protection visa” to individuals “to whom ... Australia has protection obligations under the Refugee Convention as amended by the Refugees Protocol.” Khawar (2002), 187 A.L.R. 574, at para. 1.

Under U.S. law, the language varies only slightly. The Immigration and Nationality Act defines a refugee as,

Any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

While refugee claims from women fleeing gender-related persecution can be linked to any ground of asylum, they are most often made under the political opinion, religion, or particular social group grounds.

In recent decades, violence against women and girls – which often occurs in the private rather than public sphere, is carried out by family or community members rather than by the government or its agents, and is justified by reference to culture or religion – has come to be viewed as an important human rights concern. Parallel progress has been made regarding the rights of women under international refugee law. In 1985, the UNHCR Executive Committee encouraged parties to the Refugee Convention to consider asylum claims from women based on membership in gender-based social groups. Throughout the late 1980s and early 1990s, the UNHCR Executive Committee adopted a series of conclusions aimed at affording more meaningful protection to women fleeing persecution in their home countries. Canada, the United States, and other countries responded in the 1990s with relevant policy guidelines.


The Beijing Platform for Action, contained in the Report of the Fourth World Conference on Women, defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.” REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, supra note 2, at para. 113 (1995). The Declaration on the Elimination of Violence against Women specifically provides that States have a responsibility whether the acts are carried out by the state or private persons, and declares that neither “custom, tradition, or religious consideration” can be invoked to justify acts of violence against women. G.A. Res. 48/104, supra note 2, at 217.


Courts of numerous state parties to the Refugee Convention have granted refugee protection to women fleeing gender-related harm, including family violence. Domestic violence as a ground for refugee protection is well established in Canadian case law. In 1999, the House of Lords – the United Kingdom’s highest court – ruled that Pakistani women survivors of domestic violence were eligible for refugee status.

Refugees in Australia have been requesting, and in some cases receiving, asylum based on fear of domestic violence since the mid-1990s. Some twenty-five percent of the small number of asylum cases brought in the middle part of the 1990s were granted. In a 1994 case involving domestic violence, the Australian Refugee Review Tribunal noted that, in addition to sharing the immutable characteristic of gender, women have “shared common social characteristics” that make them cognizable as a social group:

That domestic violence ... is regarded in many countries as a private problem rather than a public crime, can be directly attributed to women’s social status; to the fact that historically, in many societies, women have been, and in many instances still are, regarded as being the private property of firstly their fathers then their husbands. That women face differential treatment within the legal system, arising from their social status, is evident from the focus given to women and violence against women, in for example,


the U.S. Department of State Country Reports.... That women share a common social status is further evidenced by the establishment of the United Nations Commission on the Status of Women and other formal mechanisms for the advancement of women's status including the U.N. Decade for Women from 1975 to 1985.\textsuperscript{15}

But several cases decided by the Refugee Review Tribunal have denied asylum to petitioners who sought relief on the basis of family violence,\textsuperscript{16} and few such cases had made their way to federal court. It appears that no such case had been upheld prior to \textit{Khawar}.\textsuperscript{17}

The United States has played a mixed role in this international progress. Advocates for women's rights and refugees successfully lobbied for gender guidelines for judges making refugee status determinations and, as noted above, in 1995 the United States became, after Canada, the second country to publish such guidelines. In 1996, the \textit{Kasinga} decision recognized fear of female genital mutilation as a basis for asylum in the United States.\textsuperscript{18} Building on those two developments, many women fleeing gender-based harms have been granted asylum.\textsuperscript{19} But there remains a dearth of precedent since the two important decisions since 1999 – one positive and one negative – have been erased from the books.\textsuperscript{20} Progress has been further stymied by ongoing opposition to the granting of asylum in such cases from within the Immigration and Naturalization Service (INS) and among many asylum adjudicators.\textsuperscript{21}

Adjudicators in the United States often have particular difficulty finding a legal "nexus" between the persecution and one of the five


\textsuperscript{20} Aguirre-Cervantes v. INS, 242 F.3d 1169 (9th Cir. 2001), \textit{vacated}, 273 F.3d 1220 (9th Cir. 2001); \textit{In re R-A.-}, Interim Dec. 3403 (B.I.A. 1999), \textit{vacated} (AG 2001). For more on the legal and political struggles leading to the overturning of these cases, see Knight, \textit{supra} note 19, at 690-91; Karen Musalo & Stephen Knight, \textit{Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-based Claims in the United States}, 13 INT'L. J. OF REFUGEE L. 51, 52-58 (2001).

\textsuperscript{21} See Knight, \textit{supra} note 19, at 695-96.
requisite Convention grounds for asylum. This article will take a close look at the Khawar decision and at the developing international consensus towards a way out of this confused and unnecessarily complex legal quandary.

II. FACTS

Ms. Naima Khawar is a Pakistani woman who fled her native country after years of escalating physical abuse at the hands of her husband. She and her husband were married in 1980 against the wishes of his family, who had arranged for him to marry a relative. Without his parents' approval, her parents also disapproved. After a period of separation, Ms. Khawar's husband began to see his family again in the mid-1980s. His family remained highly critical of her, and her husband began to take their point of view. He was unhappy when they had a second daughter, instead of a male child. The abuse from the husband and his family escalated to physical violence. At the same time, Ms. Khawar's own family became less able to protect her. She knew that if she left her husband, he would take the children away. This threat frightened her into staying with him, despite the ongoing persecution.

Ms. Khawar went to the police on several occasions over a number of years. Her first complaint was dismissed with the comment that domestic violence was widespread and that "if [the police] had to do something about all the similar complaints it would take all their time." When she returned to the police more than a year later to report that her husband had threatened to burn her alive, she brought her sister's husband in hope that a man's presence would lead the police to act. But the police failed to accurately record her complaint. Her fourth and final trip to the police, after she had been doused with petrol, ended with a dismissive comment by a police officer that women always seek to blame their husbands for their own problems. She returned home to find that her husband had left; he stayed away for two to three weeks, during which time Ms. Khawar


24. Id. at para. 97.


26. Id.
decided to flee Pakistan.27

III. THE DECISIONS BELOW

A. THE REFUGEE REVIEW TRIBUNAL

With her three children, Ms. Khawar entered Australia in June 1997 and applied for asylum in September of that year. Her case was rejected in February 1998 by an administrative officer, and she appealed to the Refugee Review Tribunal (hereinafter Tribunal).28 Ms. Khawar proposed that she was a member of a number of particular social groups, including, among others, "women," "married women in Pakistan without the protection of a male relative," and "women who have transgressed the mores of Pakistani society."29

Ms. Khawar submitted substantial material in her attempt to show that there is "a systematic failure by police authorities in Pakistan" with respect to efforts by victims of domestic violence to gain protection,30 including substantial documentation "concerning the negative attitude of the Pakistani authorities to complaints by women in [her] position."31

In January 1999, the Tribunal issued its decision denying her claim for asylum.32 Although the Tribunal noted that there was an anonymous allegation in the record that Ms. Khawar had fabricated her story in collaboration with her husband, the court accepted as credible her allegations of abuse,33 and held that the treatment Ms. Khawar was subjected to did amount to persecution.34 However, the Tribunal ruled that she failed to make out a case for asylum because the court did not see any link between the persecution and a ground for asylum.

It is clear to the Tribunal that the problems which the applicant faced with her husband were problems peculiar to their relationship. There is nothing in the evidence before the Tribunal to suggest that the applicant was being targeted by her husband or his family for a Convention reason. She was being harmed and harassed because of the particular dynamics of the family into

28. Id. at para. 86.
30. Id. at para. 53.
31. Id. at paras. 95, 97. As summarized by Justice Kirby, these materials included reports from Amnesty International and the U.S. Department of State, a human rights brief by the Canadian Immigration and Refugee Board, and a cable from the Australian Department of Foreign Affairs and Trade. Id.
32. Id. at para. 7.
33. Id. at para. 51.
34. Id. at para. 99.
which she married and the circumstances of her marriage.\textsuperscript{35}

The Tribunal did not make a ruling regarding any of the social groups to which Ms. Khawar alleged she belonged, nor did it suggest an alternative group. Instead, it rested its denial on the basis that there was no nexus to a Convention ground and that Ms. Khawar had been harmed for solely personal reasons because her husband’s family members “were angry or shamed by the fact that he married her for love when he was already engaged to a relative and because she brought no dowry to the family. She was also seen as being responsible for her husband being estranged from his family for five years.”\textsuperscript{36} “The Convention,” declared the Tribunal, “was not intended to provide protection to people involved in personal disputes.”\textsuperscript{37}

Regarding Ms. Khawar’s submissions pertaining to the police and the failure of governmental protection in Pakistan, the Tribunal made no factual findings.\textsuperscript{38}

\section*{B. \textbf{THE FEDERAL COURT DECISIONS}}

\subsection*{1. The First Appeal}

Ms. Khawar appealed the denial of her asylum claim to the Federal Court. She asserted that the Tribunal’s failure to make factual findings on her efforts to gain police protection from her husband amounted to an error of law.\textsuperscript{39}

A Federal Court judge reversed the denial of asylum to Ms. Khawar.\textsuperscript{40} Relying in part on a U.K. decision by the House of Lords in the \textit{Shah} case,\textsuperscript{41} the judge found that the Tribunal had erred in failing to make findings of fact regarding Ms. Khawar’s efforts to gain protection from the State. In addition, the Federal Court ruled that the Tribunal’s failure to determine whether Ms. Khawar was a member of any particular social group was a legal error: “[T]he tribunal reached a conclusion on the question of whether [the applicant’s] fear of persecution was for reason of her membership of a particular social group without first identifying the

\begin{thebibliography}{12}
\bibitem{36} Id. at para. 104.
\bibitem{37} Id. at para. 105.
\bibitem{38} Id. at para. 107.
\bibitem{41} Regina v. Immigration Appeal Tribunal, \textit{ex parte} Shah, 2 A.C. 629 (H.L. 1999) (U.K.). For more on this decision see Anker et al., \textit{supra} note 12.
\end{thebibliography}
relevant social group, if any, of which [the applicant] was a member.\textsuperscript{42} The judge cited to \textit{ex parte Shah}, noting that the U.K. House of Lords had found married women in Pakistan to be a social group.\textsuperscript{43}

2. The Second Appeal

The government appealed this ruling to the full Federal Court, which, on August 23, 2000, affirmed the judge’s decision overturning the Tribunal, by a split vote of two to one.\textsuperscript{44}

Writing for the majority (one judge concurred without opinion), Judge Lindgren relied in part on \textit{ex parte Shah}, as well as on the decision of the Australian High Court in \textit{Chen}, which ruled that persecution under the Refugee Convention does not require “enmity” by the persecutor.\textsuperscript{45} \textit{Chen} stands for the concept that “persecution” can take the form of a discriminatory withholding by the state from the members of a particular social group of goods or services that the state provides to other persons.\textsuperscript{46}

The decision described two alternative legal theories under which Ms. Khawar’s claim to asylum can be viewed. Under one view, the conduct of the Pakistani authorities in withholding police protection against violence from members of a particular social group \textit{alone} stands as persecution “on account of” membership in that group.\textsuperscript{47} By the other view, it is the conduct of the husband and the state together that links the persecution to the social group of which she is a member.\textsuperscript{48}

In support of this latter view, the court quoted Lord Hoffman’s powerful example, from \textit{ex parte Shah}, of the Jewish shopkeeper; it is worth quoting at length.

Suppose oneself in Germany in 1935 . . . . [S]uppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities

\textsuperscript{43} Id.
\textsuperscript{47} Id. at paras. 124-29.
\textsuperscript{48} Id. at paras. 130-36.
would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question “Why was he attacked?” would be “because a competitor wanted to drive him out of business.” But another answer, and in my view the right answer in the context of the Convention, would be “he was attacked by a competitor who knew that he would receive no protection because he was a Jew.”

This analysis is clearly applicable to the situation of much violence against women, which occurs in an atmosphere of impunity because of official discrimination, repression, and neglect. Judge Lindgren also noted the following equation applied by Lord Hoffman (in Shah): “Persecution = Serious Harm + The Failure of State Protection.” Under this equation, the required nexus can be found based on a failure or absence of state protection that itself is linked to a Convention ground.

Concluding its analysis, the Australian federal judge ruled that the requisite nexus to a Convention ground was to be found in the social context in which the domestic violence took place.

I would hold that a state perception of a particular social group as “inferior,” “less deserving” or “second class” by reference to the rest of society, and, in particular, a view of members of the group as not possessing the same human rights as the rest of society or, if possessing them, as not entitled to have them enforced and protected to the same extent as the rest of society, would constitute a motivation that would be entirely consonant with the Convention’s definition and preamble. In the present case, there was evidence before the [Refugee Review Tribunal] on which it might have found that “women in Pakistan” or “married women in Pakistan” are so regarded and also that such a view of Ms. Khawar formed part of the attitude of her husband and his family and the police, that caused them to act towards her as they did.

The government again appealed against this decision, this time to Australia’s highest court.

49. Id. at para. 133 (quoting Regina v. Immigration Appeal Tribunal, ex parte Shah, 2 A.C. 629, paras. 653-54 (H.L. 1999) (U.K.) (emphasis added)).
50. Id. at para. 132 (quoting ex parte Shah, 2 A.C. 629, at para. 653; citing REFUGEE WOMEN’S LEGAL GROUP, GENDER GUIDELINES FOR THE DETERMINATION OF ASYLUM CLAIMS IN THE U.K. 5 (1998)).
51. Id. at para. 141.
IV. KHAWAR: THE HIGH COURT'S OPINION

On April 11, 2002, the Australian High Court rejected the government's appeal and affirmed the Federal Court's reversal of the Tribunal's decision. The High Court sat in a panel of five justices; four justices voted in the majority, writing three separate decisions. There was one dissent.

That the protection of the Refugee Convention extends to individuals persecuted by non-State actors was not contested. On its appeal to the High Court, the Minister for Immigration and Multicultural Affairs framed the case as raising two issues:

[W]hether the failure of the country of nationality of an applicant for a protection visa to provide effective police protection against domestic violence to members of a particular social group is capable itself of constituting persecution for reasons of a [Convention] ground... [and] whether fear of harm directed at the applicant by a non-State agent for non-Convention reasons, together with or in the knowledge of the failure of the state of nationality to provide effective police protection against such harm to members of a particular social group to which the applicant belongs, "is capable of giving rise to protection obligations" to the applicant.

For his part, Chief Justice Gleeson presented the question before the High Court as follows:

The first issue is whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art. IA(2) of the Convention.

The second issue is whether women (or, for present purposes, women in Pakistan) may constitute a particular social group within the meaning of the Convention.

Thus the High Court was squarely presented with the purely legal question of whether domestic violence could be a basis for Refugee Convention protection in Australia.

53. Id. at paras. 133, 157.
54. Id. at para. 114.
55. Id. at paras. 58-59.
56. Id. at paras. 5-6.
57. Much space is devoted, in two of the three affirming opinions, to a discussion of the original understanding of "state protection" under the Convention, the result of the
A. THE STANDARD OF REVIEW

The opinion of Justice Michael Donald Kirby dealt at greatest length with the most relevant issues. At the outset, Justice Kirby directly addressed a core question regarding the nature of the objection to the Tribunal’s decision: Was the Tribunal’s error factual or legal? This can be a critical question because of the differing standard of review for legal versus factual questions on appeal. Justice Kirby extensively detailed certain factual material presented by Ms. Khawar, including her repeated complaints to the police and her evidentiary submissions regarding the rights and status of women in Pakistan. Justice Kirby ruled that the Tribunal committed a legal error when it failed to consider this evidence, apparently deeming it irrelevant once it had ruled that Ms. Khawar was not persecuted “for reasons of” her membership in any social group.

Taken in isolation such a finding might seem to be one of fact – assigning the harm that was accepted to have been proved to a cause based on a particular family’s domestic disputes. If that were all, the decision would have to be affirmed by the courts, confined as they are in this respect to correcting errors of law on the part of administrative decision-makers. But when the significant factual material tendered by the respondent is taken into account, the material before the Tribunal arguably takes on a different character. It is then possible, indeed essential, to consider the family dispute concerning the respondent in the light of the material about the serious legal, social and practical disadvantages suffered by the respondent and women in her position which she presented to the Tribunal. The Tribunal might still conclude that the respondent did not fall within the Convention definition. But it

government’s urging the High Court to find that “persecution and protection are distinct concepts” under refugee law. This historical discussion is of limited relevance here, and I will not go into it in detail. To briefly summarize, a question arose around the significance of part of the phrasing of the definition of refugee by the Refugee Convention, as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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.” Minister for Immigration and Multicultural Affairs v. Khawar (2002) 187 A.L.R. 574, para. 60, 2002 WL 532474 (HCA), available at http://www.austlii.edu.au/au/cases/cthlhigh_ctl20021l4.html ([2002] HCA 14) (emphasis added). Suffice it to say that, while it appears that the “original intent” of the emphasized language may have referred literally to external protection – in the sense of the refugee seeking out the embassy or consulate of her country of origin – “there now exists jurisprudence that has attributed considerable importance in refugee status determination to the availability of state protection inside the country of origin . . . .” Id. at para. 72 (quoting UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, paras. 35-36 (April 2001)) (emphasis added).

58. Id. at paras. 94-98.
59. Id. at paras. 99-100.
could scarcely do so lawfully without considering, and making essential findings of fact about, the case that the respondent had propounded to bring herself within the Convention definition. In short . . . it was not open to the Tribunal to ignore the respondent's claim that her case was a paradigm instance of the discrimination of Pakistani law and official practice against women in her position, which amounted to persecution, justifying her fear about returning to Pakistan.60

Thus the High Court reviewed the Tribunal's decision as an error of law.

B. PERSECUTION AND STATE PROTECTION

Justices Michael McHugh and William Gummow, writing jointly, accepted the following propositions put forward by Ms. Khawar:

[T]hat (a) she was unable to obtain police protection in respect of the domestic violence she suffered; (b) that state of affairs represented a denial of fundamental rights otherwise enjoyed by nationals in Pakistan; and (c) it was a form of selective or discriminatory treatment which amounted to persecution by the State authorities.61

The justices ruled that "the persecution in question lies in the discriminatory inactivity of State authorities in not responding to the violence of non-State actors."62 The justices explained that the legal difficulty for the High Court in making a final decision in the case arose because the Tribunal itself made "no findings of fact upon Mrs. Khawar's allegation that she could not obtain police protection in respect of the domestic violence she suffered."63

For his part, Justice Kirby ruled that it is "sufficient that there is both a risk of serious harm to the applicant from human sources and a failure on the part of the state to afford protection that is adequate to uphold the basic human rights and dignity of the person concerned."64 Relying on a well-known if unreported decision from the New Zealand Refugee Status Appeals Authority,65 Justice Kirby presented the following classification of cases based on the level of State involvement:

60. Id. at para. 100.
61. Id. at para. 79.
62. Id. at para. 87.
64. Id. at para. 115.
a. Persecution committed by the state concerned.
b. Persecution condoned by the state concerned.
c. Persecution tolerated by the state concerned.
d. Persecution not condoned or not tolerated by the state concerned nevertheless present because the state either refuses or is unable to offer adequate protection. 66

Justice Kirby quoted the New Zealand court’s reasoning at length for the proposition that the nexus requirement is satisfied where there is a showing of a link between a Convention ground and either the harm amounting to persecution, or to the failure of protection by the state. He restated the equation referenced by the court below: “Persecution = Serious Harm + The Failure of State Protection.” 67 The Tribunal’s decision must be reversed, explained Justice Kirby, because that body’s failure to make factual findings with respect to State protection constituted “a failure to address one of two grounds where the respondent was entitled to succeed if she made either of them good.” 68 “This is because ‘persecution’ is a construct of [these] two separate but essential elements . . . . Logically, if either of the two constitutive elements is ‘for reason of’ a Convention ground, the summative construct is itself for reason of a Convention ground.” 69

To illustrate the impact of the Tribunal’s error in failing to consider the evidence pertaining to the status of women in Pakistan, Justice Kirby pointed out that the dousing of Ms. Khawar with gasoline by her husband took place in a context of prior threats of violence and was substantiated by corroborating country conditions. “It is impossible to believe that a similar act directed to the husband or another male victim would have been treated by police in Pakistan in such a dismissive fashion.” 70

In his brief comments, the chief justice agreed that persecution can be found based on the “combined effect” of multiple agents. 71

C. SOCIAL GROUP ANALYSIS

The definition of the relevant social group — and specifically its exact breadth — was an issue that concerned all the Khawar justices. Justices McHugh and Gummow ruled that the evidence supported a social group comprising, “at its narrowest, married women living in a household which did not include a male blood relation to whom the woman might look for

67. Id. at para. 118; see also supra note 50 and accompanying text.
70. Id. at para. 115.
71. Id. at para. 27.
protection against violence by the members of the household.”72 But they added that the specific nature of the social group was a legal matter for the Tribunal on remand.73

Justice Kirby noted the government argument that categories encompassing large numbers of people, such as “women in Pakistan,” could never satisfy the legal requirements under the Convention.74 He suggested that a legal focus on the failure of state protection, rather than on the “domestic conflict,” would allow an adjudicator to define a particular social group “in a principled manner, specifically by reference to the ground upon which the state concerned has withdrawn the protection of the law and its agencies.”75

The materials presented by the respondent to the Tribunal suggest that there may be a particularly vulnerable group of married women in Pakistan, in dispute with their husbands and their husbands’ families, unable to call on male support and subjected to, or threatened by, stove burnings at home as a means of getting rid of them yet incapable of securing effective protection from the police or agencies of the law. In the present case, because of the approach which it took, the Tribunal did not embark upon a consideration of whether there was a specific, and thus identifiable, “social group” of such a “particular” character and, if so, whether the respondent was a member of it.76

The chief justice observed, again in brief, that “In my view, it would be open to the Tribunal, on the material before it, to conclude that women in Pakistan are a particular social group.”77

D. NEXUS

Chief Justice Anthony Gleeson ruled that the nexus requirement is

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72. Id. at para. 81.
73. Id.
76. Id. at para. 129. In the United States, cases have been decided on narrowly tailored social groups. See In re Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996) (noting that recognized social groups often encompass within their definition many of the elements of an asylum seeker’s burden of proof, which must be proven in order to be granted asylum); Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, supra note 4, at para. 19 (“A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria.”); Knight, supra note 19, at 691-92.
satisfied where at least one agent of persecution is motivated by a Convention reason.

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.78

This is a crucial line of reasoning that, as with Lord Hoffman’s powerful example of the Jewish shopkeeper in Shah, recognizes the nature of the persecution and the context in which it takes place.

E. A DISSENT

Justice Ian Callinan dissented. He would have ruled that the Tribunal was correct in holding that there was no nexus between the violence suffered by Ms. Khawar at her husband’s hand and any ground for asylum in the Refugee Convention.

I cannot regard it as erroneous for the Tribunal . . . to approach the case upon the basis that, however the social group might be defined, another cause was identified, and in my opinion correctly identified, as the reason for the abuse. What the Tribunal did was to identify the actual cause of the violence. Once it had done so, it was apparent that it was a different cause, or, that it occurred for a different reason, from any Convention reason. And that cause, coupled with reluctance, rather than deliberate abstention, by the police, still could not amount to a Convention reason.79

Justice Callinan also questioned whether Ms. Khawar had been persecuted, quoting from the opinion of the dissenting judge below:

It would, in my mind, be an incorrect use of the word ‘persecution’ to apply it to a failure or lack of interest by the police to come to the aid of a person who has been beaten at least where the law provides, if enforced, adequate protection and there is no government policy that police ignore calls for help. . . . Persecution involves the doing of a deliberate act, rather than inaction.80

In his opinion, the chief justice responded to this point by noting that the question of governmental protection cannot easily be put aside by simply

78. Id. at para. 31.
79. Id. at para. 156.
80. Id. at para. 149.
characterizing the government’s position as one of inaction: “Whether failure to act amounts to conduct often depends upon whether there is a duty to act . . . .”\(^{81}\)

Justice Callinan conceded that Ms. Khawar’s “vulnerability as a woman in an abusive relationship may have contributed to the reluctance of the police to assist her.”\(^{82}\) But Justice Callinan questioned the definition of the particular social group with reference to gender. “To regard half of the humankind of a country, classified by their sex, as a particular social group strikes me as a somewhat unlikely proposition. A group must be part of something less than a whole . . . . [T]here needs to be a clear linkage or common thread between the people said to constitute the particular social group.”\(^{83}\)

F. CONCLUDING HIGH COURT GUIDANCE

Two of the High Court opinions set out some guiding parameters for judges to consider in hearing asylum claims based on family violence. They were responding perhaps to concerns raised in the dissent, as well as seeking to provide some guidance for lower courts adjudicating these cases in the future. In a central paragraph, Chief Justice Gleeson made explicit his response to certain concerns surrounding the making of a legal judgment that a domestic violence survivor should not be returned to a particular country. He cautioned that,

\[
\text{[I]t would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art. 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes. An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.}^{84}\]

A similar note was struck by Justice Kirby:

\(^{81}\) Id. at para. 28.
\(^{82}\) Id. at para. 152.
\(^{84}\) Id. at para. 26.
Many countries (including, at least until quite recently, Australia) have afforded imperfect protection to women who suffer domestic violence. It does not follow that it is impossible to distinguish those countries that, however imperfectly, provide agencies of the law and non-discriminatory legal rules to address the problem from those countries that, for supposed religious, cultural, political or other reasons, consciously withdraw the protection of the law from a particularly vulnerable group within their society.85

With these instructions, the Australian High Court reversed the Tribunal’s denial of asylum to Ms. Khawar and remanded the case for further proceedings.86

V. NEXUS: A WAY OUT

With its decision in Khawar, the High Court of Australia has added its powerful voice to a growing wave of precedent favoring asylum from domestic violence and further solidified the foundation for progress in recognizing other forms of gender-based violence, such as trafficking for prostitution, sexual slavery, and honor killing. Because it is interpreting the same refugee definition, Khawar is persuasive authority in the United States on the subject of the breadth of that definition, and U.S. courts should consider its reasoning.

The Khawar decision was issued at almost the same time as UNHCR’s new guidelines on gender-related persecution,87 and it is consistent with the UNHCR’s affirmation “that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status.”88 On the subject of nexus, the gender guidelines are simple and straightforward:

In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the

85. Id. at para. 130.
86. Id. at paras. 37, 90, 132.
87. Guidelines on International Protection: Gender-Related Persecution Within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, supra note 4; Guidelines on International Protection: “Membership of a particular social group” Within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, supra note 4. These guidelines are a product of the UNHCR’s process of “Global Consultations” marking the fiftieth anniversary of the Refugee Convention in 2001. The guidelines reflect in part the work of Rodger Haines, whose paper on gender-related persecution was presented at the Expert Roundtable on Gender Persecution in San Remo, Italy, Sept. 6-8, 2001, and who is among the experts who contributed to the Michigan Guidelines. See Hathaway, supra note 22.
88. Guidelines on International Protection: Gender-Related Persecution Within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, supra note 4, at para. 2.
causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established. 89

UNHCR thus adopts the formula that Persecution = Serious Harm + The Failure of State Protection, and subscribes to the notion that the nexus requirement is satisfied by proof of a causal link between either. This formulation has also been embraced by leading international scholars in the field, 90 who emphasize that the focus of the nexus inquiry is properly on the reasons for the asylum seekers’ fear, “and not on the personal motivations of potential persecutors.” 91

The UNHCR has stated that,

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights. 92

Additionally, the Australian chief justice’s suggestion that “women in Pakistan” be recognized as a particular social group is in conformity with UNHCR’s observation that some jurisdictions have recognized “women” as a social group, 93 and points out that the size of a group “is not a relevant criterion in determining whether a particular social group exists.” 94

The Khawar case presents an interesting comparison to the leading domestic violence asylum case in the United States, In re R-A-. 95 Unlike that negative decision, which has been extensively written about

89. Id. at para. 21.
90. As stated in the Michigan Guidelines:
The causal link between the applicant’s predicament and a Convention ground will be revealed by evidence of the reasons which led either to the infliction or threat of a relevant harm, or which cause the applicant’s country of origin to withhold effective protection in the face of a privately inflicted risk. Attribution of the Convention ground to the applicant by the state or non-governmental agent of persecution is sufficient to establish the required causal connection.

Hathaway, supra note 22, at 215, para. 8.
91. Foster, supra note 22, at 338.
92. Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, supra note 4, at para. 11.
93. Id. at para. 18.
94. Id. at para. 19.
elsewhere, Khawar arose in a setting where there was limited factual development of the claim, and even unresolved allegations in the record that the applicant’s entire story was fabricated. Yet, rather than struggle to reshape the law to avoid granting her asylum, as the majority attempted in Matter of R-A-, the Khawar court made a straightforward positive legal ruling on her eligibility under the existing law.

As Justice Kirby pointed out, Ms. Khawar’s application for asylum from domestic violence is consistent with case law in Canada, the United Kingdom, and New Zealand. With its decision in Khawar, Australia now stands with these and other countries in recognizing gender violence as a proper basis for a grant of asylum. With the addition of the well-reasoned Khawar decision, there now exists a “substantial body of international practice" interpreting the Refugee Convention to include protection from gender-based violence as a basis for asylum. In this regard, the United States increasingly stands alone in its resistance to recognizing the refugee from domestic violence.

98. Id. at para. 124.
99. Id. at para. 125.