



3. As was found by the Adjudicator, the Appellant's third child, a son, became separated from her and her daughters in the course of the journey from Afghanistan to the UK. He is \_\_\_\_\_, whose date of birth is given as 10 November 1988. He is therefore fifteen years old now. The Appellant has made enquiries of the Red Cross as to his whereabouts, but with no news as yet.
4. The Appellant's appeal to the Immigration Adjudicator was by a Notice of Appeal lodged on 28 November 2002. Her Statement of Additional Grounds pleaded that the Respondent erred in that he failed to have regard to the provisions of the European Convention on Human Rights and Fundamental Freedoms of 1950 (ECHR) as incorporated into UK domestic law by the Human Rights Act 1998, and that to return the Appellant to Afghanistan would result in the United Kingdom breaching its obligations under the ECHR, in particular Articles 2, 3, and 5.
5. The Appellant's case before the Adjudicator was that she had been and would be persecuted in Afghanistan, by members of the Jamiat-e-Islami, who had already killed other members of her family, by reason of a political opinion imputed to her because her family was viewed as Communist.
6. Further or in the alternative, it was submitted that the Appellant was a member of a particular social group of lone Afghan women who have suffered sexual assault, have female children and are without social or family protection.
7. The Adjudicator found that the Appellant's account as to past events, including ill-treatment, was credible and that the fears she expressed were genuinely held. The Adjudicator found that the Appellant had been persecuted in the past in Takhar in Afghanistan, and that there was a real risk that she would be so persecuted again on return, at the hands of non-state agents, albeit that those agents were in de facto control of the Province, but that the ill-treatment had not been for one of the five reasons enumerated in the 1951 Convention relating to the Status of Refugees (the Refugee Convention).
8. The Adjudicator then considered the allegations under Section 65 of the 1999 Act, and found that there was a real risk of a breach of the Appellant's right to freedom from torture, cruel, inhuman and degrading treatment, should she return to her home area of Takhar in Afghanistan. The Adjudicator found that the Appellant could return to live in Kabul without such a breach, although she went on to state that this was a finely balanced issue because of the evidence that lone women may be at risk, as was acknowledged by the Home Office.
9. At the outset of the hearing before the Tribunal, we drew the attention of the parties to the fact that there had been a grant of exceptional leave to remain to the Appellant until 1 July 2003, (it is not known whether she has applied for any extension of that leave), and that the appeal was pursuant to section 69(3) of the 1999 Act. There being no extant removal directions and therefore no imminent threat of removal to Afghanistan where any alleged breach might occur, it was put to the parties, who agreed, that it was difficult to argue that any allegation of breach of human rights pursuant to Section 65 of the 1999 Act could succeed, (as has been stated, for example, by the Tribunal in **RA (Appeals Procedure-Immigration**

**and Asylum Act 1999) Eritrea [2003] UKIAT 00063)**. The understanding of the parties was that in the event that the Respondent should issue removal directions in respect of the Appellant at some future date, she would have the opportunity to raise human rights allegations at that stage, and, if unsuccessful, to lodge an appeal in that regard.

### **The Grounds of Appeal**

10. The Grounds of Appeal first raised points in relation to the Adjudicator's assessment and findings in relation to Article 3 ECHR. It was agreed by the parties that allegations as to breaches of human rights pursuant to the Human Rights Act 1998 are not pursued within the ambit of this appeal, for the reasons, and on the basis set out in paragraph 9 above.
11. The Grounds of Appeal then went on to submit that the Adjudicator had erred in her assessment of the risk to the Appellant in Kabul, including having failed to consider the full range of factors that would render return unduly harsh, and in particular that she would return as a lone woman with two young daughters, aged 9 and 7 years. Therefore the Adjudicator had not correctly applied the test as laid down by the Court of Appeal in the case of **Robinson – v – SSHD [1997] Imm AR 554.**
12. Thirdly, it was submitted that the Adjudicator had erred in law in finding that the Appellant was not a member of a particular social group, having misinterpreted the Appellant's case when applying the principles laid down by the House of Lords in the case of **Islam and Shah [1999] INLR 144.**
13. Permission to appeal was granted generally. The Vice President, His Honour Judge Ainley took the view that the application of the case of **Robinson** should be considered, and that the matter should be determined at Tribunal level.
14. We remind ourselves that by the provisions of the Nationality, Immigration and Asylum Act 2002 (Commencement No 4) (Amendment) (No 2) Order 2003, any Adjudicator's determination promulgated after 9 June 2003 may be appealed to the Tribunal only pursuant to Section 101(1) of the Nationality, Immigration and Asylum Act 2002 ( the 2002 Act). Section 101(1) provides:

“(1) A party to an appeal to an Adjudicator under Section 82 or 83 may, with the permission of the Immigration Appeal Tribunal, appeal to the Tribunal against the Adjudicator's determination on a point of law.”
15. Following the judgment of the Court of Appeal in **CA [2004] EWCA Civ 1165 20 July 2004.** it is clear that when hearing an appeal in respect of a determination of an Adjudicator that was promulgated after 9 June 2003, the Tribunal must first decide whether or not that determination discloses a material error of law. It is only where that question is answered in the affirmative that it is open to the Tribunal to go on to consider what relief, if any, should be granted, and whether or not fresh evidence, if any, should be admitted.
16. We find that the Adjudicator fell into material errors of law in arriving at her determination. We find that the Adjudicator erred in finding that the only reason for

the rape of the Appellant in Takhar was because her assailant found her attractive, and therefore that the attack was a purely personal one, and no more than a common crime, as that finding was not based on the evidence before her and was therefore not open to her. We find that the Adjudicator further erred in law in that she misdirected herself in her consideration of the law in relation to membership of a particular social group, not least because she proceeded on the basis of the findings referred to earlier in this paragraph, which in turn caused her to fail to consider and direct herself according to the law in relation to this aspect of the interpretation of Article 1A (2) of the 1951 Convention relating to the Status of Refugees. In particular, she erred in her application of the principles set out by the House of Lords in **Islam and Shah**, (above).

17. Her extremely brief consideration of the question whether the Appellant was a member of a particular social group is dealt with in two sentences at paragraph 46 of her determination. Here the Adjudicator erred in her analysis and conclusion that the Appellant was not a member of a particular social group because she imposed the wrong test, namely that the Appellant had to show that she had only absolutely identical characteristics to all the other women in the group contended for, and that they did not possess any different characteristics, even if they shared common features. As a consequence of these errors, the Adjudicator then made the further erroneous finding that the Appellant's well-founded fear of persecution in Afghanistan was not for one or more of the reasons set out in Article 1A (2) of the Refugee Convention.

### **The Documentary Evidence**

18. Section 102 (2) of the 2002 Act permits the Tribunal to consider evidence about any matter thought relevant to the Adjudicator's decision, including evidence which concerns a matter arising after the Adjudicator's decision. The Appellant sought to produce evidence additional to that which was before the Adjudicator, in the form of background reports; news items, and the expert report of Dr Martin Lau, all of which had come into existence after the Adjudicator's decision. Taking the view that the evidence was relevant, bearing in mind the provisions of Rule 21 of the Immigration and Asylum Appeals (Procedure) Rules 2003 (the 2003 Rules), and noting that there was no objection from Mr Morris, who himself wished to lodge a new country report, we decided that the evidence would assist the Tribunal in deciding what, if any, relief should be granted to the Appellant and the additional evidence was therefore admitted, applying the principles set out in the judgment of the Court of Appeal in CA (above).
19. We have before us, therefore, all the evidence that was before the Adjudicator, including the Respondent's explanatory statement and attachments; the Appellant's bundle Part A : statement, chronology, skeleton argument and medical and psychiatric reports, and Part B, background reports : US State; Human Rights Watch ;Danish Immigration Service, and various media reports.
20. Before us the parties were permitted to lodge further evidence in order to bring the background evidence up to date. The Presenting Officer lodged the April 2004 CIPU Country Assessment and a copy of a UN map of the Afghanistan Region dated January 2002. The Appellant lodged a bundle of documentary evidence,

including skeleton arguments, various country reports, and various news items, as well as the expert opinion of Dr Martin Lao, as contained in his report dated 14 September 2004. The items in the Appellant's bundle of up to date evidence include but are not limited to:

- a. Afghanistan: Out of Sight Out of Mind – The Fate of Afghan Returnees, Amnesty International 2003;
- b. Rule of the Rapists , The Guardian February 12, 2004;
- c. Afghanistan: Women said still oppressed in Herat , Integrated Regional Information Networks News (IRIN), 11 March 2004;
- d. Afghanistan: 'No one listens to us and no one treats us as human beings': Justice Denied to Women, Amnesty International, December 2003;
- e. Warlords, Crimes : Secrets of an Afghan Grave, Hefferman and Leaning, 9 February 2004, International Herald Tribune;
- f. "Comment: The New Mullah Omars" Institute for War and Peace Reporting, 11 March 2004;
- g. Losing the Peace in Afghanistan, Human Rights Watch March 2004
- h. Situation of Women and Girls in Afghanistan, UN General Assembly, 6 October 2003;
- i. Afghanistan Could Implode: British Parliamentary Committee, 29 July 2004;
- j. Medecins Sans Frontieres Pull out of War Torn Country, [www.rawafalse.net](http://www.rawafalse.net), 29 July 2004;
- k. Danish Immigration Service Report March 2003;
- l. Afghanistan, Amnesty International Report May 2004;
- m. Expert Report of Dr Martin Lau, Head of Law Department, School of Oriental and African Studies, University of London, 14 September 2004.

21. Mr Morris also lodged the determination of the Tribunal: **L (Afghanistan) [2003] UKIAT 00092**, heard on 24 September 2003. However, he did not, in the event, seek to rely on it, as it was now a year old, the situation had changed, and the facts of the Appellant's case were not on all fours with those in the case of L.

### **The Facts of the Appellant's Case**

22. As we have stated, the credibility of the Appellant and her claim are not in issue. Before turning to consider the grounds of appeal, it will be helpful at this stage to set

out the relevant primary facts of the Appellant's case, as drawn from all the evidence that was before the Adjudicator, and which is also before us.

23. In summary the Appellant's case is this. She was born on 5 June 1968 in Badakshan, Afghanistan. Her father spent 22 years working in the Pamar Department in Makroyan, Kabul, as an engineer. In 1990 he became chief of the construction department in Arayana, remaining until the Najibullah government was overthrown in 1992. In 1987 she married. Both she and her husband are of Uzbek origin and of the Sunni Muslim faith. There are three children of the marriage, one son and two daughters: Qasim, born on 10 November 1988; Bahishta, born on 24 July 1994, and Sherwer, born on 3 January 1996. As indicated, Qasim's whereabouts are unknown since he became separated from the Appellant and his sisters en route from Afghanistan to the UK. The Appellant read Persian Literature at Kabul University, completing her studies in 1989. She then worked as a teacher in Kabul for over two years, until the war started. After the war, schools were shut and women were not permitted to work.
24. The Appellant's husband's family also had strong connections to the Najibullah government. He was educated in the former USSR. His father was chief of the counsel of elders in Takhar during the time of Najibullah, and a nephew was Chief of the Intelligence Service during that period. The Appellant's husband worked as an economist for the Bank of Afghanistan and the family had a home in the Makroyan district of Kabul, near the airport.
25. The family remained in Kabul for about a year after the Najibullah government was overthrown in 1992. Fighting in Kabul and the destruction of the family home by rocket attack, caused them to leave for Takhar in the north of the country where the family originated from and where they felt it would be more peaceful. They stayed in a house belonging to the Appellant's father-in-law. Her husband managed his father's landed estate and received income from tenant farmers.
26. It was not as peaceful in Takhar as the family had hoped. There were those in the area who were opposed to the communist regime of Najibullah and those who had been involved with it or supported it. Those opposed to the communist regime included a warlord named Mamoor Hassan. About three years after the Appellant and her family arrived in Takhar, Mamoor Hassan's men killed the Appellant's husband's uncle, on the direct orders of Ahmed Shah Masood, who regarded the Appellant's husband's family as supporters of Najibullah and therefore as his enemies, who were to be destroyed. The Appellant thought that the fact that she and her husband were of Uzbek origin also played a part in the reasons for targeting them, as well as their connections to the Communist party (the PDPA).
27. Mamoor Hassan would send his men to the Appellant's home regularly. They would harass the family, demand money and claim that they were seeking members of her husband's family. On one occasion, in about 1999, these men came and demanded money from the Appellant's husband. When he told them that he did not have such a sum, he and the Appellant were beaten, the Appellant sustaining a broken arm.
28. The militia took the Appellant's husband away and he was detained in prison at Dasht-E-Ghalah. The Appellant remained at home, in the hope that he would be

released. Following his detention, the Appellant's parents came to stay with her so that she would not be alone in the house with the children. Her sister, who worked as a doctor with a Swedish medical organization, also lived in the house with her. For about six months she was able to send clean clothing to the prison with friends, who would bring her husband's dirty clothes to her to be washed. Then his friends told her that he was to be moved from that prison. Since then, she does not know his whereabouts although she made enquiries when in Afghanistan.

29. On 28 June 2000, two of Mamoor Hassan's Mujahidin militia men arrived at the Appellant's house. They demanded that the Appellant's sister marry one of them. She refused. The Mujahidin then shot her in the legs. The Appellant was present. Her sister pleaded for her life but they took her aside and shot her several times before leaving. The Appellant found her sister dead in the next room. Her brains were stuck to the wall.
30. Following this incident, her parents were in a very distressed state and decided that they could not stay in the house any longer. They left, and a frail uncle came to stay with the Appellant and her children. A few months later, Mamoor Hassan's nephew, Qasim, decided that he wished to marry the Appellant and sent women to the house to inform her of this. She was angry and deeply offended that he should do this knowing that she was a married woman with three children whose husband was detained, but still alive. She said no.
31. Some time in 2002, Qasim himself came to the house, with a number of his people, and demanded that the Appellant become his fourth wife. She again refused, saying that she did not wish to marry another man and was a married woman with three children. Qasim then raped and beat the Appellant. Her frail uncle tried to defend her and was killed by Qasim and his people, who also beat the Appellant. She suffered injury to her face as well as injury in the course of the rape. After the rape, Qasim told her that she must now marry him or he would kill her wherever she went. He left her house and later that day she tried to kill herself but was prevented by her neighbours who told her that she must think of her children and protect them as there was no one else to do that.
32. Shortly after the incident, a friend of the Appellant's husband advised her to leave the country and assisted her to find an agent who brought her and the children to the UK, travelling by various methods of transport over a period of months. The family was economically comfortable and she was able to pay the agent herself. The journey took about two and a half months and the family arrived in the UK, although without Qasim, on 1 May 2002, the Appellant claiming asylum shortly thereafter.
33. The Appellant's daughters are attending school in the West Midlands where the family now lives. The Appellant's uncle, \_\_\_\_\_, who worked for the Najibullah government is also in the UK, where he has been recognized as a refugee and granted status.
34. The Appellant states that being raped is a disgrace and she fears return to Afghanistan where she would be regarded as an 'infidel'. She fears that as a single

woman she would be stoned to death as she has seen this happen to single women who have children as it is assumed that they are committing adultery.

35. A report dated 11 April 2003 from Mrs Sunanda, Consultant Obstetrician and Gynaecologist, states that the Appellant is to undergo surgery to remove a vaginal tag and cervical ectropion on 10 June 2003.
36. A report dated 19 May 2003 from Dr Heather McKee, Consultant Psychiatrist, finds that the Appellant is suffering from chronic Post Traumatic Stress Disorder (PTSD) (as a result of the series of disturbing events set out above). She should be assessed by a psychiatrist or psychologist who is experienced in PTSD and any co-morbid disorder such as depression should be treated. PTSD can be treated psychologically or with medication such as selective serotonin reuptake inhibitors, or both. The doctor states that these resources will probably not be available in Afghanistan and (it) may require a significant amount of time to achieve improvement. She adds that the Appellant would also benefit if her son were reunited with her. (We note that there is no up to date evidence in relation to the Appellant's mental health.)
37. The report records that the Appellant is the eldest of six children. Next came her sister who had been murdered, then a brother who had been studying medicine but whose studies had been interrupted, then three younger siblings who had been at school, but unable to complete their schooling due to events. The Appellant believes that her parents are alive but has not been able to have contact with them.
38. We note that the Appellant also regards her husband as still being alive, although she has had no news of him since he was moved from the prison where he was initially held by the Jamiat-e-Islami, a predominantly Tajik militia.
39. The Adjudicator found that although the Appellant may have male relatives in Afghanistan (presumably her husband, father and brother), the situation was unclear, given that there had been no contact. The Adjudicator proceeded on the basis, and it is important to both note and bear in mind; that the Appellant was without male or family protection. That, of course, must also be the basis of our consideration of her case.
40. The Adjudicator also found that the Appellant had suffered the sexual assault as explained and could be vulnerable to such an attack again in the Takhar area as the evidence did not show that the government police force functioned in that province. She considered whether the Appellant, a single woman with two children, could live elsewhere, given that she could not return to the Takhar area in safety. She found that the only possible alternative place to which the Appellant and her two daughters might relocate is Kabul. Again, these findings must form the basis of the Tribunal's consideration of her case.

## **Submissions**

41. In his submission, Mr Vokes indicated that the Appellant did not pursue her case on the basis that she had a well-founded fear of persecution by reason of an imputed political opinion. Indeed he went so far as to concede that she did not. Nor is it said

that she would be persecuted by reason of her Uzbek origin. Rather, he said, she relied upon her membership of a particular social group, which he defined as follows:

“ Women in Afghanistan without male family or tribal support.”

42. In support of this submission, Mr Vokes submitted that the Appellant should not be forced to find a male protector through marriage. He submitted that, although it could not be said that it would not have happened had she a husband or other effective male protector at home with her; the fact that she had not had an effective male protector in her frail uncle had been a significant factor in the course of events that had led to the sexual assault. Given the mores in Afghanistan, the level of risk to her as a lone woman with two young daughters, was significant enough to constitute a real risk that she would experience a similar assault on return to the Takhar area of Afghanistan now.
43. Mr Vokes further submitted that the Appellant should not be obliged to enter into a marriage, whether the forced marriage to Qasim, or any other marriage to which she did not freely consent in order to obtain male protection, whether in Takhar or elsewhere. This, he said would be to breach a primary right of freedom of conscience. He submitted that a rights based analysis, applying the hierarchical approach, was an appropriate approach in refugee appeals. Forced marriage was something that occurred quite frequently to women and young girls in Afghanistan. It would, he submitted amount to persecution. It would be a form of sexual slavery. The Appellant had a right to marry the person of her choice. The Adjudicator had found that the Appellant could not return in safety to Takhar where she would be persecuted or even killed. It could not be right that she be forced to breach her own human rights by being forced into a relationship in Kabul in order that she be able to pursue her own life in safety. That brought the argument full circle to the issue of discrimination against women. She should not in conscience be required to change the characteristic of her single or lone status.
44. Mr Vokes did not seek to argue that the basis of the discrimination was absolutely identical to that found in Pakistan as identified by the House of Lords in *Islam and Shah*. He submitted that in the case of this Appellant, in Afghanistan, there was both an inability and an unwillingness to protect her. There was a difference between what was on the statute book in Pakistan and the fragmented state of law and order in Afghanistan. It was not submitted that all women in the group contended for would be subjected to persecution, in the same way that it was not the case that all women in Pakistan were persecuted, as was found by the House of Lords in *Islam and Shah*, on which case he relied to support the Appellant's claim to be a member of a particular social group.
45. Turning to the background evidence, Mr Vokes accepted that there was more stability, comparatively speaking, in Kabul city, as opposed to the provinces outside the city. He also accepted that as a product of some twenty three years of war, there were many single women in Afghanistan. The key, he submitted to the question whether the Appellant could return in safety to Kabul was the issue of the existence or otherwise of family networks. It was the case that women were beginning to re-emerge in daily life in Kabul and that some of them were again

taking up work as teachers. However, they were enabled to do so only because of the presence of a supportive family network, including at least one close adult male. Also of importance insofar as the characteristics of this Appellant were concerned, was the fact that she is the mother of three children, two of whom are girl children, who will return to Afghanistan with her. Her daughters are themselves extremely vulnerable to being forced into marriage, as they approach puberty, and vulnerable to other sexual assault and abuse. In turn, their vulnerability placed the Appellant at increased risk as the sole protector of the girls. Although this aspect of the matter had been raised before the Adjudicator she had not taken it into consideration. Or if she had, she had made no findings. He referred us to the Country Assessment, the Danish Immigration Report, the Amnesty International Reports and the report of Dr Lau in particular.

46. Mr Morris accepted that the Adjudicator had concluded at paragraph 65 of her determination that the Appellant's case was to be considered on the basis that she was without male or family protection in Afghanistan. He further accepted that as the Respondent had not lodged any cross appeal, the Tribunal would take that finding as a starting point.
47. Mr Morris submitted that the Adjudicator had correctly found that the persecution experienced by the Appellant in Takhar was a personal attack upon her in her home area, for personal reasons particular to her, by or at the behest of a commander who would not have influence in Kabul, and that women in Afghanistan who have experienced a sexual assault do not qualify as a social group.
48. Mr Morris agreed that the security situation was poor outside Kabul city. However, this Appellant had lived in Kabul before the Taliban came to power, and she had been a teacher there, albeit that it was over ten years ago and when she had the support of her husband. He submitted that the background evidence in relation to security within Kabul was contradictory and that it was difficult to take a firm view on safety on return. He noted that the background evidence showed that a support network was essential to a woman such as the Appellant in order for her to be able to live an ordinary daily life in safety. He said that this evidence spoke for itself, including the report of Dr Lau, which was very recent. He conceded that the Appellant would need a male support network in order to survive in safety in Kabul. He further accepted that the Appellant had a well-founded fear of persecution in Takhar, on return there today, at the hands of what he described as non-state agents, albeit that he did not accept that such persecution would be for one or more of the reasons set out in the Refugee Convention, as had been found by the Adjudicator at paragraph 41 of her determination. He submitted that the discrimination and harassment that the Appellant would, it was accepted, experience in Kabul, would not amount to persecution. Other human rights were not in issue before the Tribunal now, and therefore the appeal should be dismissed.
49. Mr Vokes in reply, submitted that the Appellant had shown a well-founded fear of persecution, as a member of a particular social group, throughout the whole of Afghanistan. In the alternative, she had a well-founded fear of persecution in Takhar and elsewhere outside Kabul city, and it would be unreasonable in the sense that it would be unduly harsh to require her to go to Kabul city.

## Consideration and Findings

50. Article 1(A)(2) of the Refugee Convention states that the term 'refugee' shall apply to any person who owing to a 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.

## Convention Reason

51. In a determination issued on 6 June 2003, the President of the Tribunal, Ouseley J, conducted a review of the law in relation to membership of a particular social group. This was the case of **ZH (Women as a Particular Social Group) Iran CG [2003] UKIAT 00207.**

52. The President, in starting with a consideration of the case of **Islam and Shah** (above), begins with a caution which we consider worth repeating here:

“ We emphasise what both Lord Steyn and Lord Hoffmann said: everything depends on the evidence and findings of fact in the particular case: ‘ generalisations as to the place of women in particular countries are out of place when dealing with issues of refugee status’”.

53. Membership of a social group is a concept that has been the subject of considerable litigation. The characteristics of a particular social group can be identified both in negative and positive form. As extracted from the leading case law (including **Ward v Canada[1993] 2 SCR 689; Shah and Islam [1999] INLR 144, Montoya – v – SSHD [2002] EWCA Civ 620, and SSHD –v- Skenderaj [2002] EWCA Civ 567**) these can be summarised as follows:

- a. There is no requirement for there to be a voluntary, associational relationship
- b. Members need not be homogenous nor does the group have to exhibit any particular degree of internal cohesion
- c. A particular social group may include large numbers of persons.
- d. The group may not be defined simply on basis of a shared fear of being persecuted. The persecution must exist independently of and not be used to define the social group.

54. Following this three categories of the “particular social group concept” can be identified:

- a. Groups defined by an innate or unchangeable characteristic; whatever the common characteristic that defines the group it must be one that the

members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or conscience.

b. Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association

and

c. Groups associated by a former voluntary status, unalterable due to historical permanence.

55. The appellant is a woman – an innate and unchangeable characteristic. She is an Uzbek, Afghani (woman), also innate and unchangeable characteristics. She does not pursue her claim on the basis of a fear by reason of her Uzbek origin.

56. Mr Vokes submits in relation to the Appellant's civil status as a lone, or single woman, or as a widow; that however that status may be regarded in Afghan society, she should not be required to marry in order to provide protection for herself. She is, as the Adjudicator found, a lone Afghani woman without male or family protection.

57. Whilst noting that the Appellant is of the Muslim faith and that polygamy is practised, within Islamic law, in Afghanistan, it is not submitted by Mr Vokes that her Muslim faith or Islamic law requires her to submit to a marriage against her will.

58. We find that there are difficulties with the definition of the group contended for by Mr Vokes, namely :

“Women in Afghanistan who are without male family or tribal support.” This is because her being without male family or tribal support, are wholly contingent factors. In addition, the argument advanced that to require the Appellant to marry would be to breach a fundamental human right was insufficiently developed before us and we were therefore not persuaded that it had been shown that these non-innate characteristics of being without male family or tribal support were to be regarded as characteristics beyond that power of the individual to change except at the cost of renunciation of core human rights entitlements. (See **Montoya**, above). The question whether the broader group, “women in Afghanistan”, can qualify as a particular social group remains to be considered.

## **Background Evidence Relating to the Situation of Women in Afghanistan**

59. We turn now to examine the background evidence, to include that relating to the situation of women in Afghanistan.

### **The Constitution**

From the Country Assessment of April 2004 we note that the Bonn Agreement of 5 December 2001 restored the Constitution of 1964 to the extent that its provisions were not inconsistent with those of the Bonn Agreement and with the exception of those provisions relating to the monarchy and to the executive and legislative bodies provided for in the Constitution. The Bonn agreement stated that “A Constitutional Loya Jirga shall be convened within eighteen months of the establishment of the Transitional Authority, in order to adopt a new constitution for Afghanistan.” The preamble of the

adopted constitution states as one of its aims “For creation of a civil society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, protection of human rights, and dignity, and ensuring the fundamental rights and freedoms of the people.”

On 15 January 2004, the UN Secretary-General stated that “The Constitution, which has now entered into force, provides a permanent foundation for re-establishing the rule of law in Afghanistan. It defines a political order through a strong Presidential system of government with a bicameral legislature. It establishes a judicial system in compliance with Islam. And it includes provisions aimed at ensuring full respect for fundamental human rights, including equal rights for women...Of course, the Constitution will not, by itself, guarantee peace and stability. Afghans - with the necessary support from the international community – must now go on to address the impediments to the peace process that existed before the Loya Jirga. That means tackling the deeply troubling security situation, ensuring an inclusive and broadly representative Government, and quickening the pace of reconstruction. Indeed, if the next step in the Bonn process – elections – is to be credibly achieved, these key challenges demand immediate action.”

Commenting on the new constitution in January 2004, Human Rights Watch stated that “Despite the democratic shortcomings of the Constitutional Loya Jirga, the new Afghan constitution it approved in January 2004 included significant provisions, notably on women's rights. The constitution guarantees women a substantial number of seats in Afghanistan's bicameral National Assembly. Approximately 25 percent of seats in the Wolesi Jirga (House of the People) are reserved for women; the president is obligated to appoint additional women in the Meshrano Jirga (House of Elders). Another provision of the constitution specifically guarantees equality between men and women under law.”

According to the HRW report, “The document contains several provisions enunciating basic political, civil, economic, and social rights, but little strong language empowering institutions to uphold them. The Afghan Independent Human Rights Commission is given a mandate, but lacks many of the powers necessary for it to credibly protect basic rights. The constitution fails to adequately address the role of Islamic law and its relationship to human rights protections. Human Rights Watch is concerned that extremist factions could use appointments to the new judiciary to implement laws that violate human rights standards. The issue of accountability for past atrocities is also not addressed in the document. Despite Afghanistan's recent history, the charter does not directly address issues of past war crimes and serious human rights abuses. The AIHRC may be able to delve further into this area, but it lacks any specific constitutional mandate to do so.”

The US Department of State reported on 8 January 2004 that “The new Constitution [approved on 4 January 2004] affords all “citizens of Afghanistan - men and women - equal rights and duties before the law.” The new Constitution also reserves 25% of its seats in the lower house of Parliament for women. More than 200 women participated in the 2002 Constitutional Loya Jirga that establishes the current government. Two of the nine members of the Constitutional Drafting committee and seven of the 35 members of the Constitutional Review Commission are women. Afghan women will have the right to vote and run for office in the Summer 2004 elections.” According to the US Department of State “The Minister of Foreign Affairs has created an Office of Human Rights, Health and Women's Affairs in the Ministry of Foreign Affairs to monitor women's programs. The Ministry of Commerce set up a department to help women establish their own businesses.”

In January 2004, the Institute for War and Peace Reporting (IWPR) reported that “The final constitution produced by the Loya Jirga provides for better political representation for women in Afghanistan than they have had in the past. The document was amended to state explicitly that the term “citizen” in the phrase “The citizens of Afghanistan have equal rights and duties before the law” applies to both men and women, an important revision in a country where women have in the past been denied civic rights.” According to IWPR it is hoped that the new constitution will safeguard women against a number of controversial traditional practices.

A UN Commission on the Status of Women report dated January 2003 reported that “Afghanistan's emergence from 24 years of conflict has led to significant achievements and progress for women who went from complete marginalization and denial of rights to participation in several key institutions for the reconstruction of their country, including the emergency Loya Jirga, the Afghan Transitional Administration, the Ministry for Women's Affairs, the Afghan Independent Human Rights

Commission and Judicial and Constitutional Drafting Commissions. One of the major changes has been the re-emergence of women in urban areas with relatively better access to employment, healthcare, and education.”

The UN Secretary-General pointed out, however, that women’s progress was determined by the post-conflict characteristics and complexities of Afghan society with its patriarchal values and traditions which are deeply ingrained. Women were reported to have restricted their participation in public life to avoid being targets of violence by armed factions and elements seeking to enforce the repressive edicts of the previous regime. The report stated that “Despite positive developments regarding women’s rights, intimidation and violence by regional and local commanders continue unabated. In rural areas, especially the more conservative tribal belt, the situation of women has not changed to any great extent since the removal of the Taliban. The prevalence of conservative attitudes limits the full, equal and effective participation of women in civil, cultural, economic, political and social life throughout the country at all levels of society.”

### **Legal Rights/Detention**

Efforts are currently underway to reassemble the legal codes in effect prior to Soviet and Taliban rule. The International Crisis Group reported in July 2002 that in Afghanistan no semblance of a functioning national judicial system remains. Three decades of regime change have led to massive alterations of the legal system in content and implementation. Afghanistan’s few experts are uncertain which laws are actually in force. In October 2002 UN Special Rapporteur Asma Jahangir reported that the judicial system did not seem to follow any uniform legal system. The Law Ministry and Attorney General’s office had distributed law books to the judiciary and public prosecutors in the entire country. It appears that some courts are following traditional or customary law while others follow different interpretations of Sharia law without any form of consistency.

Amnesty International reported in August 2003 that long-term financial assistance is required to ensure the re-establishment of the rule of law in Afghanistan. Despite the political and security problems undermining the rule of law, courts are operating in some urban centres in Afghanistan but with limited capacity. However, in rural areas the judicial system is barely functioning. The report noted that at present the judiciary does not receive the support necessary to ensure that it is free from outside influences. Consequently, the independence of the judiciary is being undermined by political interference from certain armed groups, persons holding public office and private individuals. Furthermore, economic influences have led to a widespread problem of corruption.

In a report on land issues published in September 2003, UNHCR advised that “There is a strong and evident lack of faith in the effectiveness of the existing judicial system. As such, returnees, similar to other Afghans, hardly resort to the local courts when exploring solutions to land disputes... In the few cases where returnees have accessed the legal channel, they have had to wait for many years before their cases were processed.

In February 2004, a spokesman for UNAMA announced that “In April reform of the Afghan Judicial system will receive another boost as work will begin to refurbish judicial facilities at the district level and train judicial functionaries on gender-sensitive adjudication, prosecution and case handling. Public awareness campaigns will also be launched focusing on the rights of vulnerable groups. The projects will begin in Herat, Balkh, Bamyan and Nangarhar and will be implemented by the United Nations Development Programme (UNDP) through a pledge of six million Euros from the European Commission for justice sector reform. The aim is to improve access to justice by women, children and other vulnerable groups such as returnees. The project is expected to expand throughout the country. From 10-29 January this year [2004] the European Commission and UNDP visited the four provinces to ascertain the state of the justice system in those areas.”

### **Death Penalty**

In August 2003, Amnesty International reported that the Criminal Code and the Criminal Procedure Code currently provided for the imposition of the death penalty in certain circumstances. However, President Karzai had imposed a moratorium on the death penalty. But on 28 April 2004, BBC News

reported that the first state execution since the fall of the Taliban had been carried out on 20 April 2004.

## **Police and Prisons**

As local militias are dismantled a reformed national police force will have to provide the foundation of law and order in Afghanistan. The Minister of the Interior Ali Ahmad Jalali appointed on 28 January 2003 has displayed a readiness to reform the police. In a report issued in March 2003 on police reconstruction Amnesty International reported on the need to rebuild an effective police force in Afghanistan. Amnesty documented a widespread pattern of human rights violations committed by members of the police, including torture and arbitrary arrest. Extortion is commonly practiced by police officers. Much of the current police force consists of former Mujahideen, who have extensive military experience but little or no professional police training or experience. Their loyalties rest with the powerful regional commanders who have been able to assert control in the provinces.

The Amnesty International report of July 2003 noted that "Hundreds of women and girls are being held in prisons across the country, the majority for violating social, behavioural and religious codes. Girls from 13 years of age are being held in prison with adults alongside elderly women of approximately 70 years of age. The majority of women prisoners are from 18 to 25 years of age. Like men and children, they are being held for months in prisons across the country before having the legality of their detention determined by a judge. Women are being held often within a compound in the main prison area rather than in a separate compound." Some of these women and girls appear to have been released subsequently by decree of Karzai.

According to Amnesty International in March 2004, "Conditions in prisons and detention facilities in Kabul have seen an improvement but there remains an urgent need for the rehabilitation and reconstruction of detention facilities elsewhere. Furthermore, prison conditions (sanitation, food, overcrowding) and legal rights of prisoners fall far short of international standards as laid out in the UN Body of Principles for All Persons under Any Forms of Detention or Imprisonment and the UN Standard Minimum Rules for the Treatment of Prisoners... Prisons in the provinces remain non-existent. To date, the central government has responsibility to administer provincial prisons but in reality they remain under the control of various armed groups and human rights violations continue to be reported. The prison service continues to be plagued by insufficient personnel, inadequate training facilities for officers, inconsistent payment of salaries and a marked lack of donor interest. Despite a plan drawn up by Italy, the lead donor government for justice reform, to tackle this, lack of resources hamper reform and development."

## **Legal Provisions Relating to Women**

A UN Commission on the Status of Women report dated 28 January 2002 stated that "In January 2002, the Head of the Interim Administration, Mr. Karzai, demonstrated his support for women's rights by signing the "Declaration of the Essential Human Rights of Afghan Women", which affirmed the right to equality between Afghan men and women." The US Department of State Report on Human Rights Practices 2003 reported that "In 2002 President Karzai decreed that women have the right to choose whether to wear the burqa. However, credible sources reported that women and older girls could not go out alone and that, when they did go out, they wore a burqa for fear of harassment or violence."

On 18 March 2003, the Secretary-General reported to the UN General Assembly Security Council that on 5 March 2003 Afghanistan had ratified the Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]. According to the United Nations Division for the Advancement of Women in March 2003, "Consisting of a preamble and 30 articles, it [the Convention] defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination... Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations."

In a report published in October 2003, Amnesty International noted that "The ratification of CEDAW was a major development. Afghanistan has made a specific commitment to address women's rights in law

and practice; in public, political, social and cultural life; as well as in personal status laws, education, health and work. The ATIA has also ratified the Rome Statute for the International Criminal Court (ICC), which contains gender sensitive definitions of crimes and procedures to protect vulnerable victims and witnesses. This constitutes a model for domestic legal reform. Amnesty International recognizes the difficulties facing Afghanistan as it seeks to recover from over 23 years of conflict. However, it is vital that measures to protect the rights of women are built into legal and constitutional reform, and integrated into policing and criminal justice processes.”

In November 2002, the International Commission of Jurists (ICJ) reported that “There appears to exist a large degree of confusion over the exact rights of women and their legal status. In June 2002 there were about 30 women confined in Kabul jail. Some of them were accused of criminal offences but the majority were, according to the Law Section of the Ministry of Women’s Affairs...detained for a variety of offences related to family law such as refusing to live with their husbands, refusing to marry a husband chosen by their parents, or for having run away from either the parental or the matrimonial home. It appears that these women have no access to lawyers, have no information on their rights, if any, and are generally left in jail until their respective relatives intervene.” The ICG noted that the most surprising finding of their report was the profound uncertainty regarding the legality of the detention of these women.

In July 2003, Amnesty International reported that “President Karzai issued the first of several Presidential decrees providing for the release of women in November 2002. According to the decree, 20 women were ordered to be released as part of religious celebrations. However, this raised concern amongst members of the international community. Many of these women were imprisoned for running away from home and could not return to their home on release. As a result of the release, one woman was killed by a family member and another had nowhere to go to. One woman identified to be released as part of President Karzai’s decree in November 2002 was somehow overlooked and remained in detention. This underlines the need for safe shelter for women.”

In March 2004, Amnesty International reported that “Despite ratification of United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by the government, Afghanistan’s obligations under the treaty are not yet reflected in domestic legislation. Rape is not yet criminalized nor is the giving of girls in marriage as means of dispute resolution or the... forcing [of] women and girls to marry against their consent. In the absence of effective mechanisms to investigate gender related violence, the vast majority of all such violations continue to not be reported to the criminal justice system and almost none are subject to investigation or prosecution... Legal provisions to protect the rights of women remain inadequate. Legal protection despite signing CEDAW is not yet reflected in law or practice.”

UNHCR also reported in July 2003 that, despite the encouraging developments, the persistence of discrimination and conservative cultural practices, at times leading to acts of violence including death (honour killing), meant that the following categories of women should be considered to be at risk and exposed to possible persecution, if they returned to Afghanistan:

- a) “Women without effective male and/or community support; and
- b) Women perceived as or actually transgressing prevailing social mores. This latter group may include 1) Afghan women who have married foreign nationals in countries of asylum; this would particularly concern women who have married non-Muslims and are perceived as having thus violated tenets of Islam; and 2) Afghan women who have adopted a Westernised behaviour or way of life which (i) would be perceived as transgressing social mores in Afghanistan and (ii) has become so fundamental a part of their identity that it would be persecutory for them to have to suppress it.” The UNHCR report also included women’s associations in the category of vulnerable groups who may be particularly exposed to acts of political intimidation.

Men and women told Human Rights Watch, as reported in July 2003, that women and older girls could not go out alone and that when they did go out they had to wear a burqa for fear of harassment or violence, regardless of whether they would otherwise choose to wear it. And in Jalalabad and Laghman, certain government officials have threatened to beat or kill women who do not wear it.”

The UN Secretary-General pointed out, however, that women's progress was determined by the post-conflict characteristics and complexities of Afghan society with its patriarchal values and traditions which are deeply ingrained. Women were reported to have restricted their participation in public life to avoid being targets of violence by armed factions and elements seeking to enforce the repressive edicts of the previous regime. The report stated that "Despite positive developments regarding women's rights, intimidation and violence by regional and local commanders continue unabated. In rural areas, especially the more conservative tribal belt, the situation of women has not changed to any great extent since the removal of the Taliban. The prevalence of conservative attitudes limits the full, equal and effective participation of women in civil, cultural, economic, political and social life throughout the country at all levels of society."

In April 2003 a Swedish fact finding mission to Afghanistan in November 2002 reported that "Most of the sources interviewed [including the Deputy Minister of Women's Affairs and the UNAMA Human Rights Team] confirmed that the security situation for women is difficult. Women that are single head of household without extended families to care for them, are vulnerable. Women who are single heads of households are at risk because they have no family protection, no money and no employment. If they have children, the risk is extended to the child." In June 2003, Amnesty International reported that "Many unaccompanied returnee women have been forced to beg on the streets of Kabul as their only means of survival." Amnesty International advised that they had received reports of verbal and physical harassment of women returnees to Kabul.

At year's end, [2003] local custom and practices generally prevailed in much of the country. Discrimination against women was widespread. However, its severity varied from area to area, depending on the local leadership's attitude toward education for girls and employment for women and on local attitudes."

The US Dept of State reported that "Most in the international and domestic community noted improvement in the status of women since the Taliban's fall from power, despite the persistence of certain areas of concern. The central Government named several women to cabinet positions and other areas of responsibility. The Ministers of Health and Women's Affairs, as well as the Chairwoman of the Afghan Independent Human Rights Commission were women. Women in a number of places regained some measure of access to public life, education, health care, and employment; however, the lack of education perpetuated during the Taliban years and limited employment possibilities continued to impede the ability of many women to improve their situation."

In October 2003, Amnesty International (AI) published a paper on women in Afghanistan, which stated that "Two years after the ending of the Taleban regime, the international community and the Afghan Transitional Administration (ATA), led by President Hamid Karzai, have proved unable to protect women. Amnesty International is gravely concerned by the extent of violence faced by women and girls in Afghanistan. The risk of rape and sexual violence by members of armed factions and former combatants is still high. Forced marriage, particularly of girl children, and violence against women in the family are widespread in many areas of the country. These crimes of violence continue with the active support or passive complicity of state agents, armed groups, families and communities. This continuing violence against women in Afghanistan causes untold suffering and denies women their fundamental human rights."

The Amnesty International report continued, "The criminal justice system is too weak to offer effective protection of women's right to life and physical security, and itself subjects them to discrimination and abuse. Prosecution for violence against women, and protection for women at acute risk of violence is virtually absent. Those women who overcome powerful barriers and seek redress are unlikely to have their complaints considered, or their rights defended." According to AI "Significant numbers of underage marriages, incidents of physical abuse in the family and other forms of violence were reported to Amnesty International. The vast majority had not been reported to the criminal justice system, and almost none had been subject to investigation or prosecution. Women were largely unsupported when suffering violence, and had very few means to leave violent situations. Amnesty International's research indicates impunity for such violence on a vast scale. Such impunity perpetuates violence since perpetrators are free to consider their actions as normal and acceptable."

According to the October 2003 report, "Amnesty International research indicates a failure on the part of the state to investigate fully serious crimes against women and to protect women at risk.

Prosecution for crimes of violence against women including rape and domestic violence is extremely rare. Amnesty International was not informed of any instances of prosecution for either forced marriage or the exchange of women or girls... Some judges interviewed by Amnesty International delegates stated that the practice of using any form of physical violence against a woman, violated the Shari'a. However, the failure to criminalize the practice or offer any form of support to women victims of violence makes it almost impossible for women to bring cases before the courts."

In a report to the UN Economic and Social Council on 19 December 2003, the Secretary-General advised that "In the two years since the fall of the Taliban regime, the Afghan Transitional Administration supported by the international community has focused considerable attention on the plight of Afghan women and girls. Despite many obstacles, women are playing a crucial role in building a new Afghanistan both politically and economically. They have participated throughout the country in the consultative process in drafting the new constitution. Women continue to return to the workforce in modest numbers, gain access to education and health services and...are being chosen in significant numbers to represent their concerns and interests in the Constitutional Loya Jirga."

The Secretary-General also noted, however, that "In spite of this progress, the fact that women in many parts of the country continue to face gross violations of their rights, is a matter of concern." The Secretary-General said that "The insecurity and increasing incidence of sexual violence threaten to reverse the gains made especially for girls and women as many are afraid to venture out of their homes to attend school or go to work for fear of abduction or rape by armed groups." The Secretary-General noted reports of a wide range of violations against women and girls in the name of social norms, traditions and protection. These included domestic violence, early and forced marriages, death threats against women activists, intimidation, restrictions on movement, honour killings and "protective" incarceration, particularly in rural areas, where conservative social attitudes prevailed. In rural areas women were threatened by local commanders who violated women's rights and committed sexual abuse with impunity. It was also noted that "Refugee women and widows also face specific risks associated with lack of security, as well as physical and psychological hardship."

On 19 December 2003, the UN Secretary-General reported to the Economic and Social Council that the Gender Advisory Group, which was established in December 2002 as a support structure to the Ministry of Women's Affairs, had established two working groups to assist in coordinating women's participation in the on-going constitutional reform process and in ensuring that gender perspectives are integrated into the 2004 National Development Budget public investment programmes. According to the report "It is envisaged to establish a policy unit in the Ministry of Women's affairs, with both international and national experts. The unit will work closely with the gender focal point of the policy management unit in the Office of the President."

According to Amnesty International in March 2004, "Women and girls in Afghanistan continue to be threatened with violence in many aspects of their lives both in public and private. Violations of the rights of women and girls, including physical abuse, underage marriage, exchange of girls to settle feuds were widely reported to Amnesty International during the recent visit. Amnesty International also received reports of several women burning themselves in order to avoid forced marriages and physical violence, especially in Herat province... Protection for women and girls who have suffered violence to date remains extremely limited. In Kabul, the numbers of shelters for victims of violence are limited but such facilities do not exist in most areas outside the capital. The scale of the problem in the provinces remains largely unknown. Despite some international resources being donated to the growth of women's civil society groups attempting to combat violence against women, women remain largely unsupported with very few means to seek community and state support. A select number of both Afghan and international non governmental organisations (NGOS) are working to address this issue but they remain in need of further international and Afghan government support."

60. This evidence, viewed as a whole, does, we find, show that the rule of law has yet to be effectively re-established in Afghanistan. Whilst there is clearly willingness on the part of the ATIA, which is very much to be welcomed, to take steps to effectively establish the rule of law, and the new Constitution may be regarded as a foundation for re-establishing the rule of law, it must be borne in mind that it only came into force earlier in 2004 and the aspirations contained within it to create a society free from oppression, violence and discrimination, which protects human rights and

fundamental freedoms, are at the present time just that. They have yet to be become justiciable rights, whether through incorporation into domestic legislation or otherwise.

61. As a consequence, this is a period of transition. Many women are able to enjoy greater freedoms since the fall of the Taliban, but it is necessary to recall the nature and degree of the oppression of women under the Taliban, and to bear in mind that the changes are relative. This is a period characterized by both welcome steps such as the signing by the ATIA of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on the one hand, and the regrettable failure, on the other, of the authorities to take steps necessary to provide protection to women and girl children by enacting in domestic legislation, laws to protect women and girls, including laws to criminalize rape and the practice of forced marriage.
62. Whilst it is right that training for the police, including human rights and gender awareness training is underway or to begin very shortly, the evidence does not yet show that in fact police services are available to women without discrimination. Such discrimination can, at present, include exposing them to actual physical violence at police stations.
63. It is plain that without a properly trained and accountable police and security service, without appropriate legislation, and without equality of access to the legal process, including non-discriminatory access to trained, independent, fair and impartial judges, none of which has as yet been achieved, women in Afghanistan must, in this way, be regarded at this point in history as exposed to serious discrimination within the legal system.
64. Further, the evidence also shows that women in Afghanistan are exposed to serious levels of societal discrimination which is condoned by the authorities or which the authorities do nothing to protect them from. Restrictions on freedom of movement, education, employment and generally in relation to participation in public life, for women and girls continue to be imposed by members of the population, in general by adult males, but also by some local officials, such as enforcement of particular dress codes. Whilst some women are enjoying greater levels of freedom to participate more fully in society than they did under what has been called the apartheid regime of the Taliban, these benefits are not available to all women. Even where some women find paid employment outside the home, they are able to do so only when they have the support of at least one adult male. Even in Kabul, women do not walk the streets alone. To do so would be to bring themselves into disrepute, lay themselves open to threats, accusation, assault including sexual assault, and even being charged with an offence or imprisoned 'for their own safety'. It is also the case that although some officials do take some steps to seek to prevent forced marriages of women or girl children, where the families in question persist, then the officials do not prevent the forced marriage from taking place.
65. In the light of all the evidence, we find that the discrimination experienced by women in Afghanistan does include discrimination in law, despite the constitution that has recently come into force, not least through a lack of protective legislation, and discrimination in access to an impartial, fair and independent police and judicial

service. We further find that the discrimination also includes societal discrimination by members of the population, from which the authorities either cannot or will not provide protection. As it was put by the President in the case of ZH, the lack of state protection is inherent in the discrimination relied on.

## Nexus

66. Mere membership of a particular social group is not sufficient to enable a successful claim under the Refugee Convention. There must be some nexus between the persecution and the reason for persecution, that is, the persecution is for reasons of....membership of a particular social group.
67. In **Shah and Islam** Lord Hoffman said *“what is the reason for the persecution which the appellants fear?...important to notice that it is made up of two elements. First there is the threat of violence. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not protect them because they were women.”*
68. We find that the evidence in the case before us tends to show that the attacks and harassment of the Appellant and her family by the Jamiat-e-Islami militia, took place because of the family’s involvement with, and connections to the Communist Najibullah regime. The credible evidence of the Appellant was that the warlords and their militia wished to destroy her family because of its connections to the former communist regime. The Appellant was a woman alone and exposed to the persecutory harm because the Jamiat-e-Islami had detained her husband. The Afghani authorities in Takhar, who were, and are, those same warlords and their militias, would not protect her because she was an unprotected woman from that family. Indeed they attacked and raped her for the very same reasons.
69. As earlier indicated, the Adjudicator’s finding that the rape of the Appellant took place only because the man in question found her attractive is not based in the evidence that was before her. In addition, having made that finding, which was not evidence based, and having found that it was the only reason for the rape, the Adjudicator then went on to make a judgment, again not evidence based, that the rape was perpetrated in order to intimidate or shame her into becoming his wife. Or, in the alternative, to punish her for refusing him, or for personal gratification. Whilst it is possible that all or any of these other motives may have played a part in the totality of the motivation of Qasim, it cannot be said to be reasonably likely that the rape would have occurred had it not been for the harassment and persecution of the family by reason of its connections to the former communist regime, including the detention of the Appellant’s husband, thereby exposing her to further persecutory harm as a woman without effective male or tribal protection. To take as a wife, by force, the wife of one’s enemy, after first imprisoning him, is not an uncommon act in the course of war or other conflict, as an act of aggression against the enemy.
70. Collins J said, in the case of **R-v-IAT ex-parte Yogashanthi Subramaniam (CO/3885/97, February 1999)** (as referred to in the **Asylum Gender Guidelines IAA, November 2000**):

“..... I entirely accept that rape is capable of falling within the Convention. It would be a question of deciding in any given circumstances whether it does, just as rape is capable of amounting to torture; again it would depend on the circumstances of any given case whether it is.”

71. As was stated by the Tribunal in Montoya, and subsequently approved by the Court of Appeal in that case (above), “the words ‘for reasons of’ require a causal nexus between actual or perceived membership of the particular social group and a well-founded fear of persecution. Caution should be exercised against applying a set theory of causation. In Islam and Shah, no final choice was made between the ‘but for’ and the ‘effective cause’ tests, but the ‘but for’ test was said to require a taking into account of the context in which the causal question was raised and of the broad policy of the (Refugee) Convention .”
72. Whether ill-treatment amounts to persecution depends upon the degree of ill-treatment. A single incident of ill-treatment in the past may constitute persecution, and past persecution is probative of a future risk of persecution unless there has been a major change of circumstances in the feared country making future persecution unlikely. (see e.g. : Haci Demirkaya-v-SSHD, [1999] INLR 441, CA).
73. We refer to the facts in the case of this particular Appellant as summarized at paragraphs 22-39 of our determination, and remind ourselves that the Adjudicator found that the Appellant was a lone woman with two young girl children, without adult male protection, who had experienced serious harm and trauma, both physical and psychological, including attempts to force her into marriage against her will. The Adjudicator found that the Appellant had experienced persecutory harm in Takhar and that she had a well-founded fear of again experiencing such serious harm on return to Takhar or elsewhere outside Kabul.
74. On the evidence that was before the Adjudicator, we find that the harassment, ill-treatment, and serious harm that was meted out to the Appellant and her family , was not simply common crime, but was motivated, to a significant degree, by animosity due to the family’s connections to the former communist regime, and that it is to be regarded as a form of intentional destruction of the family, as political enemies who are vulnerable to such harm, after the fall from power of the communist regime and the rise in power of the warlords once more. Those warlords were, and are, the authorities in the area of Takhar, and indeed in most of Afghanistan outside Kabul city.
75. Whilst she does not now pursue her case that she was persecuted by reason of an imputed political opinion, and we do not, therefore, seek to examine this aspect of the matter further, we nevertheless find that the evidence does show that the ill-treatment of the Appellant and her family was not merely personal, and that political opinion, imputed political opinion as far as the Appellant was concerned as opposed to her husband, was at least an effective cause of the serious harm to which she was subjected. We further find that after her husband had been detained, it may be said that there were at that stage at least two Refugee Convention reasons to which a causal nexus has been demonstrated in respect of the serious harm meted out to the Appellant. The first is the imputed political opinion, as before. The second is her status as a woman who, at that stage, was forcibly separated from her husband and

without effective protection from the warlords. Whilst it cannot be said that none of the events that took place after her husband was detained would have occurred had there been at least one adult male to protect her, who was not frail or otherwise unable to protect her, as were her father and uncle; it can be said that the lack of effective protection from an adult male or males was at least an effective cause of the serious harm that she experienced by reason of her status as a woman in Afghanistan.

76. We find that the past persecution experienced by the Appellant was for mixed reasons. As is stated in the IAA Asylum Gender Guidelines of November 2000, (the Gender Guidelines), (at page 3), certain forms of harm are more frequently, or only, used against women or affect women in a manner which is different to men. These include, but are not limited to, for example, sexual violence, societal and legal discrimination, forced prostitution, trafficking, refusal of access to contraception, bride burning, forced marriage, forced sterilization, forced abortion, (forced) female genital mutilation, enforced nakedness/sexual humiliation.
77. It follows that to a significant degree, the attempt to force the Appellant into marriage against her will, including the attendant abuse, can properly be regarded as having been motivated by circumstances demonstrating a nexus to both an imputed political opinion, as the wife of a man who was regarded as a political enemy of the persecutors (as the Adjudicator found them to be), and to the Appellant's status as a woman, and therefore a member of a particular social group. We are reinforced in our findings in this regard by the expert opinion of Dr Lau, to which we refer in detail below, in particular at paragraphs 10, 11 and 12 of his report.
78. In order to show that she is a member of the particular social group of women in Afghanistan, it is not enough for the Appellant to show that she can apparently bring herself into the necessary categories as defined by the case law, as referred to at paragraphs 77 and 78 above, namely that she is a member of a group defined by an innate or unchangeable characteristic, that of being a woman, and that she can show a causal nexus between her membership of that social group and her well-founded fear of persecution. She must also show, as it was put by the President in **ZH** (above), at paragraph 63 :

“that the situation of women in (Afghani) society is such that there is discrimination which includes legislative, judicial and police discrimination, in the way in which women could obtain, and indeed suffer from seeking, state protection. The lack of state protection is inherent in the discrimination relied on.”

79. For all the reasons that we have given, we find that the Appellant has shown that she is a member of a particular social group for the purposes of the Refugee Convention. She has shown that she has an immutable characteristic, namely that she is a woman. She has shown causal nexus of both political opinion and her status as an unprotected woman, and she has shown that women in Afghanistan are exposed to discrimination of the nature referred to by the House of Lords in the case of **Islam and Shah**. That social group is “women in Afghanistan.”

## Risk on Return

80. Mr Vokes submitted that the Adjudicator had found that the Appellant would be persecuted in the Takhar area and could not return there in safety. If we were to find that she was a member of a particular social group, then it would be for her to show that she would also be persecuted for the same reason in Kabul, or that it would be unduly harsh, in accordance with the test laid down in the case of **Robinson**, to require her to return to Kabul.
81. For the reasons set out above, we find that the Appellant is a member of a particular social group, “women in Afghanistan”. We also find that she has a present well-founded fear of persecution for that reason, if returned to Takhar today (see e.g **Demirkaya**). It is reasonably likely that she would again experience similar ill-treatment to that which she experienced in the past, at the hands of the warlords, who are the de facto authorities in that area, from whom the ATIA authorities cannot or will not protect her. We are reinforced in our findings in this regard by the support derived from the expert opinion of Dr Lau, to which we refer fully below. Here we mention simply an extract.
82. Dr Lau in his report of September 2004, noted at paragraph 8 that the Appellant may be treated as being available for marriage. This would be so even though she continues to regard herself as married, committed to her husband, whom she still believes to be alive, and even though she does not wish to marry another man. As Dr Lau explains, this would be because it is unusual for an adult woman to live without her husband. The customary practice of polygamous marriage endorsed by Islam is justified on the ground that in times of war, widows need to be looked after by a new husband, who however, may already be married. Further, Islamic law regards the abandonment of a wife as a termination of her marriage which enables her to re-marry. He is of the expert opinion that given the detention of her husband, it is quite plausible that she is regarded as available for marriage. He is of the expert opinion that the Appellant’s account in this regard is plausible and her fears of persecution well-founded.
83. We therefore turn next to the question whether she has a well-founded fear of persecution in Kabul city, which is the place to which she would physically be returned. We remind ourselves that the Adjudicator found that Kabul was the only possible alternative place to which the Appellant and her daughters might relocate. Or whether, in the alternative, it would be unreasonable in the sense that it would be unduly harsh to require her to relocate in Kabul city, applying the principles set out in the case of **Robinson** (above).
84. Mr Vokes did not draw our attention to evidence to support a contention that the influence of the particular Jamiat-e-Islami warlords who were persecuting the Appellant in Takhar would also extend to Kabul. He made no reference to such evidence. It was not argued that the evidence showed that Qasim or Hassan or other militia members acting specifically on their orders, would come to know that the Appellant was in Kabul and pursue her there or cause her to be pursued there, for the purpose of seeking to force her into a marriage or otherwise. Nor did he identify any other specific prospective persecutor, the recent decision of the Tribunal in **AF (“warlords/commanders”-evidence expected) Afghanistan CG**

**[2004]** refers. We therefore find that the Appellant has not shown that her fear of persecution, which is well-founded in Takhar, extends to Kabul city, and we move to consider whether it is reasonable to require her to relocate there.

- 85.** In coming to our determination we have been mindful of the reported determination of the Tribunal in the case of **K (Risk-Sikh Women) Afghanistan CG [2003] UKIAT 00057**, in which it was found that there was in general no real risk of serious harm on return to Kabul and that the Appellant in that case, a Sikh woman, could return in safety. Mr Morris did not rely on this case before us. Perhaps that was because the background evidence has since changed; because the Tribunal did not have the benefit of the expert evidence of Dr Lau which is before us; because the content of the April 2003 Country Assessment is now out of date in relevant aspects and perhaps because the Sikh woman in that case was regarded as having a Sikh community to turn to for protection and a Sikh temple in which to reside, whereas the Appellant before us has no family and no specific community group to turn to. For these reasons we consider that K is to be distinguished from this appeal.
- 86.** In relation to the expert evidence of Dr Lau, we note that the Tribunal in the case of RS (Hezbe Islami – expert evidence) Afghanistan [2004] UKIAT 00278, had the benefit of receiving evidence from Dr Lau, who attended the hearing to give oral evidence. The Tribunal, a legal panel, said this: “Having read his report, noted his qualifications, and heard him give evidence we find Dr Lau to be an impressive, authoritative and careful expert witness. We give considerable weight to his opinions. Indeed, except for one point where Mr Parker suggested we should prefer the Danish Report, he did not suggest we should give any less weight to Dr Lau's opinions.”
- 87.** Before us, Mr Morris did not make any such suggestion either, and he raised no criticism of or challenge to the expert opinions expressed by Dr Lau in his report in relation to this Appellant. Accordingly, we find that it is appropriate to also accord considerable weight to his opinions.
- 88.** For completeness we set out Dr Lau’s credentials:

“Qualifications

I am a Barrister and the Head of the Law Department of the School of Oriental and African Studies, University of London, where I teach courses on South Asian law at both postgraduate and undergraduate level. I hold academic qualifications in law and in South Asian history from the University of Heidelberg and the University of London. I am the Deputy Secretary of the British Association of Pakistan Studies and was the Director of the Centre of Islamic and Middle Eastern Law from April 1995 to March 1998. I am the Chief Examiner for Islamic Law of the External LLB of the University of London. My current position involves intensive research on modern Afghan and Pakistani law.

I have visited Afghanistan five times in the past two years. In January of this year I visited Herat and Kabul on behalf of the German office in connection with consultations on Afghanistan's new constitution. In July 2003 I held a series of workshops on the reform of Afghanistan's criminal procedure law on behalf of the US Institute of Peace and the International Resources Group. The governmental partners in Afghanistan were the Ministry of Interior, the Office of the State Prosecutor and the Supreme Court. On previous occasions I carried out an evaluation of Afghanistan's legal system on behalf of the International Commission of Jurists, Geneva. In the course of my visits to Afghanistan I have met with many judges, police officers, prosecutors and lawyers as well as with NGOs, UN officials and government officials.

In the beginning of May 2003 I organized a conference on legal education in Afghanistan on behalf of the German government and was able to meet inter alia the Chief Justice of Afghanistan and the country's Minister of Justice.

The opinions expressed in this report are based on my experience of working on Afghan legal issues including human rights and the assessment of the dynamics of law enforcement.

I am aware of the Civil Procedure Rules relating to expert evidence (SI 1998 No. 3131) and I understand that as an expert witness I owe an overriding duty to this Court rather than to those instructing me.

89. It is noted that he has both academic knowledge and experience and first hand knowledge and experience, of Afghanistan, having visited that country five times in the past two years. He was there most recently, it seems, in July 2003, after the Adjudicator's determination was issued on 16 June 2003.

### **Internal relocation**

90. Dr Lau does not think that the ATIA itself would have an adverse interest in the Appellant should she return to Kabul now, by reason of her connections to the former communist regime, although he is of the opinion that she would be regarded as a communist by the warlords and their militia in places such as Takhar. He regards the Appellant as a woman who would not be prevented from re-establishing herself as a teacher now in Kabul, by reason of her links to the communist regime. He is personally aware of several women who were trained and employed in the public service under Najibullah, who have now been able to return to their respective positions in Kabul. Although the Taleban is still active in the country as are warlords belonging to various Mujahedin factions, to his knowledge, there have not been attacks upon women in Kabul, on account of their association with the former communist regime.

91. However, Dr Lau goes on to express the opinion, which is supported by the other generic background evidence that is before us, and to which we have referred above, that the fact that the Appellant is a single woman, without male protection, would expose her to considerable risks including a real risk of serious physical harm from which she would be unable to seek or obtain protection. Whilst the security situation in Afghanistan is such that no reliable statistics on the position of women in society and incidents of harassment are available, he is of the opinion that there is little doubt that the state is unable to protect women, and that the task of protection of women falls to the male members of her family, especially their husbands. Women who find themselves without the effective protection of their families are in a very vulnerable and dangerous position. It is most unusual for a woman to leave the house unaccompanied by a close male relative, and a woman who has not such protection of close male relatives is likely to be threatened and harassed.

92. In a report published in January 2004, Human Rights Watch (HRW) observed that "There is no question that ISAF has been modestly successful in increasing security in Kabul, hence helping support the remarkable economic development that the city has witnessed over the last two years, and demonstrating how quickly Afghans can and will work toward creating a civil society if given the space to do so. But even in Kabul and its immediate environs ISAF did not (or could not) carry out one of its central missions, which was to rid Kabul of factional militias. Armed men, particularly those associated with the forces of Defense Minister Marshall Fahim and fundamentalist warlord Abdul Rasul Sayyaf, still roam the streets by day and engage in robbery and banditry by night."

- 93.** We find that it follows that this Appellant would not be in a position to seek re-establish her teaching or other career in Kabul without exposing herself to a real risk of threats, harassment and even physical assault. It is also to be remembered that she has not worked as a teacher since about 1991, at which time she had a husband to support and protect her and did not have the sole responsibility of having to care for and protect two young girls. She had only about two years experience of teaching before she and her family were obliged to flee Kabul. The fact that she would also need to find and pay for child care to enable her to be in a position to begin to seek work is an added obstacle.
- 94.** Although her husband had established a home for the family in the Makroyan area of Kabul, it is highly unlikely that the house is empty. It is possible that it will have been destroyed. If it is still habitable, it is reasonably likely that it will have been occupied by others. Even assuming that the Appellant has any legal right to own or occupy the house in question, which has not been shown, the background evidence shows that the procedures for seeking restoration of land or other property are beset by very long delays, a corrupt and unfair system, and very poor success rates. It follows that the Appellant and her two daughters, as homeless returnees, are reasonably likely to find themselves in serious difficulties, as a lone woman and two female children, in finding accommodation and they may have to reside in tents or other temporary accommodation, in poor conditions, as winter approaches. We note from Dr Lau's report that there are no women's shelters in Afghanistan and that a single woman would be at very real and serious risk of sexual assault.
- 95.** It is noted that Dr Lau visited the women's wing of Kabul prison in July 2003. There he observed that many women appeared to be in the prison for their own protection rather than because they had committed any offence recognized by Afghan law. According to Dr Lau, women avoid coming into contact with the police since the largely untrained and uneducated force is unlikely to protect a single woman against harassment. For a lone woman to be seen, even in the company of a policeman, tarnishes her reputation and exposes her to allegations of immorality. It is further noted that an unaccompanied woman presenting herself at a police station at night would risk harassment or worse from the police themselves. We find that the Appellant would effectively be prevented from even reporting any alleged crime.
- 96.** We remind ourselves that the Appellant before us has not only herself to protect, but also her two young daughters. We find that it is reasonably likely that she would be exposed to further risk to herself in efforts to protect them from sexual and other assaults and harassment, and her efforts to provide for their needs generally. The difficulties that she would face in seeking to provide shelter and food and clothing, for herself and her children, all of which affect her ability to protect them and herself from serious harm such as sexual assault, and forced marriage, must not be underestimated. It follows that the Appellant's two daughters are themselves exposed to similar risks and that as they approach puberty, they too may face the risk of forced marriage. The Appellant faces the task of trying to protect them from that fate as well as the other forms of harm already referred to. We remind ourselves that neither serious sexual assault nor forced marriage have been placed on the statute book as criminal offences and that the Appellant would not even

have a mechanism by which to seek redress for herself or her daughters in the event that they or any of them should experience such serious harm.

97. We also note that her mental health has been seriously compromised. The evidence shows that she was suffering from chronic PTSD at the time of the hearing before the Adjudicator. She was found to be in need of treatment in the form of medication and / or psychologically, which would probably not be available in Afghanistan. Dr McKee was of the expert opinion that it may require a significant amount of time to achieve improvement. As indicated, there is no up to date evidence before us in relation to the Appellant's mental health, but even supposing that she has by now achieved the improvement anticipated by Dr McKee, she must nevertheless be regarded as an individual whose mental health is not robust, because of the series of traumatic events that she experienced in the past in Afghanistan. Her compromised mental health is a further factor to be taken into consideration, which increases the difficulties faced by her, on return to Kabul, and which renders her less able than a woman who is not recovering from PTSD, to withstand the demands of daily life in Kabul city, in seeking to protect herself and her children.

98. It was submitted by Mr Vokes and accepted by Mr Morris that the Appellant needed a protective support network in order to be able to live in Kabul in safety and dignity (Mrs Roosevelt, USA 4UNGAOR (264<sup>th</sup> plen,mtg.) at 473, December 2, 1949), and that the Appellant did not have such a network. Dr Lau refers to accounts given to him by women during his visits to Afghanistan indicating that many women will eventually agree to a marriage just in order to gain male protection even if this does not accord with their desires. Whilst it may be the case that this Appellant would be able to re-establish herself in Kabul with her two young daughters, and find work again as a teacher, if she had the protection of a husband, she should not be expected to find a man and marry, in Kabul.

99. In the light of all the circumstances we have referred to above, viewed cumulatively, it is, we find, unreasonable, within the meaning given to that term by the court in the case of **Robinson**, to require her to return to Kabul city.

## Summary

100. For all the foregoing reasons, we disagree with the Adjudicator in that we find that the Appellant has shown that she had in the past and continues to have to day, a well-founded fear of persecution in Takhar and elsewhere in Afghanistan outside Kabul city, at the hands of warlords and their militia of the Jamiat-e-Islami, against whom the authorities of the ATIA did not and will not protect her. She has shown that her claim is grounded in one of the reasons adumbrated in Article 1 A2 of the Refugee Convention, namely, her membership of a particular social group. That group is "women in Afghanistan."

101. We find that the Appellant has not shown that her fear of that persecution for the reasons given, is well-founded to day, should she return to Kabul city. In order to be recognized as a refugee it must be shown that there is no part of Afghanistan to which the Appellant could go where she could live without such a well-founded fear. We do find, however, that the evidence before us, viewed in its totality, shows,

for all the reasons given, that it would be unreasonable, and unduly harsh, to require this Appellant to go to Kabul city. It is not to be regarded as an alternative place of safety for her. We disagree with the Adjudicator in this respect also. The Appellant has therefore made good her claim and we find that she is a refugee.

102. We report this decision given our findings in relation to the Appellant's membership of a particular social group. It is important to note that the finding that women in Afghanistan are a particular social group is based on the situation in that country as it now is, in its state of transition, and upon the intensity and nature of the discrimination faced by women at this point in history. It is possible, and we look forward to that time, that there will be material, durable change for the better, not only for women but for all the people of Afghanistan. It is also important to note that the facts of the Appellant's case which are personal to her are just that, and that each case is to be considered on its facts, and those facts applied to the relevant law at the time in question.

103. For all the foregoing reasons Appellant's appeal is allowed.

**Catriona Jarvis**  
**Vice President**