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Project presentation

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Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, ex parte Shah [1999] UKHL 20, 25 March 1999 (UK House of Lords)

The main facts of the case

This case is a significant decision in UK asylum law, specifically regarding gender-based persecution. It addressed the issue of whether women who faced persecution for not conforming to social norms in their home countries could qualify for asylum as members of a "particular social group". It revolved around the interpretation of the 1951 Refugee Convention and its definition of "refugee" in Article 1(A)(2). and ; the meaning of the words "membership of a particular social group." Section 8(2) of the Asylum and Immigration Appeals Act 1999.

- Syeda Shah was 43 and pregnant when she was turned out of her marital home. She arrived in the United Kingdom in 1992 and gave birth to a child shortly thereafter. In June 1993 she claimed asylum. She was afraid that her violent husband may accuse her of adultery and may assault her or denounce her under Sharia law for the offence of sexual immorality

- Shahana Islam was 45 and was a teacher in Pakistan where she lived with her husband and two children. Her husband was often violent towards her, he assaulted her. She arrived with her children in the United Kingdom in 1991. In the same year she claimed asylum. Just prior to her leaving she had intervened in a fight at her school between two rival political factions. One of the factions subsequently made allegations of adultery against her to her husband who was a supporter of the same faction. She stayed briefly at her brother's house. Unknown men threatened her brother. She could not remain with him. After a brief stay in a temporary refugee she came to the United Kingdom.

- Both women had suffered severe violence at the hands of their husbands in Pakistan (Islam was twice admitted to hospital).

- In Pakistan, adultery could lead to severe social stigma and violence, Both women argued that they had suffered persecution due to their gender and their societal roles as women in Pakistan, which placed them in a vulnerable position. The punishment upon a court's finding of sexual immorality includes flogging or stoning to death.

- Both women appealed to the Court of Appeal. The appeals were held together. In separate and careful judgments the Court of Appeal dismissed both appeals. They rejected the women's claim stating— their fear of persecution, while well- founded, was not (as required under the Convention) for reasons of their membership of a PSG as this was excluded from the categories in Article 1A(2)).
- The initial asylum claims of Mrs. Islam and Mrs. Shah were rejected by immigration authorities. It was argued that they were not persecuted because they belonged to a "particular social group," as gender alone was not traditionally seen as qualifying for this category.
 - The case eventually reached the House of Lords (now the Supreme Court)

The reasoning of the court, explaining the approach followed to define 'particular social group'

1. Article 1A(2) of the 1951 Refugee Convention: This defines a refugee as someone who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. The central question was whether the claimants (women in Pakistan) could be recognized as members of a "particular social group" under this article.

2. UNHCR Guidelines: The United Nations High Commissioner for Refugees (UNHCR) has interpreted "particular social group" broadly, considering groups whose members share a common characteristic that is either immutable (such as gender or sexual orientation) or fundamental to their identity (e.g., political beliefs). This was reflected in the court's analysis when it identified Pakistani women facing societal discrimination as a "particular social group".

3. Immutability and Social Visibility: The concept of a "particular social group" under international refugee law includes groups defined by immutable characteristics—those that cannot or should not be changed. These can include gender, ethnicity, sexual orientation, or family ties. The court in *Islam v. SSHD* emphasized that such characteristics existed independently of persecution and rejected any requirement for cohesion or internal cooperation within the group.

4. Non-Circular Definition: The international standard, reflected in cases from Canada, the U.S., and Australia, maintains that a social group must exist independently of the persecution. This prevents circular reasoning—where persecution itself would define the group. The Islam case applied this principle to women in Pakistan, recognizing them as a social group based on their gender and the discrimination they face.

5. Gender as a Basis for Asylum: The case supports the growing recognition within international refugee law that gender-based claims, particularly those involving societal norms that perpetuate violence or discrimination against women, can form the basis of asylum claims. This has been upheld in multiple international jurisdictions, and the UK court's decision reflected this trend.

Consequences for the Claimants

1. Definition of Persecution: The House of Lords emphasized that persecution must involve serious harm or the threat of serious harm. This definition was crucial in assessing the claimants' experiences and fears.
2. Burden of Proof: Claimants were required to demonstrate a well-founded fear of persecution. The decision clarified that this does not necessitate absolute certainty, but rather a reasonable likelihood of suffering serious harm due to their race, religion, nationality, membership of a particular social group, or political opinion.
3. Subjectivity and Objectivity: The ruling highlighted the importance of both subjective beliefs (the claimants' personal experiences and fears) and objective evidence (country conditions, reports, etc.). This dual approach impacted the burden on claimants to present comprehensive evidence of their circumstances.
4. Potential for Asylum: The outcomes established clearer pathways for certain groups (like women facing gender-based violence, as seen in Shah) to claim asylum, as the court recognized that persecution can take many forms, including cultural or social discrimination.
5. Impact on Appeal Rights: The case affirmed the right to appeal against decisions where the definition of persecution was not properly applied. This reinforced the importance of ensuring that the correct legal standards were upheld in immigration appeals.

Implications

- The Gender Guidelines for Determination of Asylum Claims in UK were published in 1998
- PSG shares a common and immutable characteristic but under Article 1A(2) of the Convention, it was not required that a PSG cohesive
- UNHCR GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. The guidelines recognise that gender related claims typically encompass family and domestic violence. The guidelines recognise that discrimination amounts to persecution in cases where state does not accord certain rights or protections from serious abuse, then the discrimination in extending protection amounts to persecution, an example of which is domestic violence.

The decision of Islam and Shah has been followed in foreign jurisdiction including New Zealand and Australia where the court found that domestic violence was, once again, 'personally motivated' and not, therefore, for a Convention reason. Nonetheless, an absence of protection from such violence, a context of 'systematic discrimination against women', could satisfy the nexus requirement

Conclusion:

The question which was answered in the *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL 20, 25 March 1999 (UK House of Lords) was regarding the interpretation of the article 1A(2) of the convention relating to the Status of Refugees 1951 which provides that the refugee can apply owing to well founded fears for the reasons of race, religion, nationality, membership of a particular social or religious group. In the present judgement, article 1A(2) of the convention was interpreted to include gender related protection claims. That in 2002 UNHCR published guidelines specifically addressing gender related persecution.