Upper Tribunal
(Immigration and Asylum Chamber)

DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 00223 (IAC)

THE IMMIGRATION ACTS

Hearing on	**Decision promulgated**
on 29 May 2020	

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DH

(BY HIS LITIGATION FRIEND SALLY PRESTT)

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr Bandegani instructed by Duncan Lewis Solicitors

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer.

1. The Geneva Convention relating to the Status of Refugees 1951 provides greater protection than the minimum standards imposed by a literal interpretation) of Article 10(1)(d) of the Qualification Directive (Particular Social Group). Article 10 (d) should be interpreted by replacing the word “and” between Article 10(1)(d)(i) and (ii) with the word “or”, creating an alternative rather than cumulative test.

2. Depending on the facts, a ‘person living with disability or mental ill health’ may qualify as a member of a Particular Social Group (“PSG”) either as (i) sharing an innate characteristic or a common background that cannot be changed, or (ii) because they may be perceived as being different by the surrounding society and thus have a distinct identity in their country of origin.

3. A person unable to secure a firm diagnosis of the nature of their mental health issues is not denied the right to international protection just because a label cannot be given to his or her condition, especially in a case where there is a satisfactory explanation for why this is so (e.g. the symptoms are too severe for accurate diagnosis).

4. The assessment of whether a person living with disability or mental illness constitutes a member of a PSG is fact specific to be decided at the date of decision or hearing. The key issue is how an

individual is viewed in the eyes of a potential persecutor making it possible that those suffering no, or a lesser degree of, disability or illness may also qualify as a PSG.

5. SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 0002 and AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) not followed.

DECISION AND REASONS

1.
The appellant is a citizen of Afghanistan born on 23 January 1993. He appealed the decision of the Secretary of State dated 30 August 2017 to refuse his human rights claim, and a further decision of 26 February 2018 refusing his protection claim and a further human rights claim.

2.
On 8 November 2017 at Central London Magistrates Court the appellant was convicted of committing an act outraging public decency and exposure. The appellant was sentenced to 12 weeks imprisonment on 13 February 2017 and placed on the Sex Offenders Register for 7 years. The District Judge (Magistrates Courts) notes the appellant had intentionally exposed his penis and was considered to have met the criteria for deportation on conducive grounds.

3.
A judge of the First-tier Tribunal dismissed the appeal against the refusal of the asylum claim and entitlement to a grant of Humanitarian Protection but allowed the appeal on Article 3 ECHR grounds, which has not been challenged by the Secretary of State.

4.
Error of law was found in the decision of the First-tier Tribunal. Mr Bandegani identified the issue in this matter in the following terms:

This appeal raises a single issue which is did the Judge materially err in law by failing to determine whether A is at real risk of serious harm for a refugee Convention reason? This in turn raises an issue of principle. If a person is subject to prohibited treatment due to their mental ill-health, are they being persecuted by reason of their membership of a particular social group (PSG)?

5.
Mr Bandegani submitted that this issue had been raised before the Judge both in his skeleton argument and oral submissions which was not disputed by Mr Diwnycz. As it was a point at large before the Judge which the Judge failed to deal with, which may have made a material difference to the dismissal of the appeal on asylum grounds, it was found the Judge has erred in law in a manner material to the decision to dismiss this aspect of the appeal; such that the decision in relation to the asylum ground was set aside.

6.
In this decision the Upper Tribunal will consider the outstanding issue with a view to substituting a decision to either allow or dismiss the asylum appeal.

The Law

7.
Paragraph 334 of the Immigration Rules states that:

An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;

(ii) he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;

(iv) he does not, having been convicted by a final judgment of a particularly serious crime, he does not constitute danger to the community of the United Kingdom; and

(v) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Geneva Convention, to a country in which his life or freedom would threatened on account of his race, religion, nationality, political opinion or membership of a particular social group".

8.
Regulation 2 of the Person in Need of International Protection (Qualification) Regulations 2006 defines a refugee as a person who falls within Article 1(A) of the Geneva Convention and to whom regulation 7 does not apply.

9.
Article 1(A) of the Refugee Convention as originally approved reads:

A.
For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1)
Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of para-graph 2 of this section;

(2)
As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

10.
The Convention relating to the Status of Refugees ("the Geneva Convention") therefore initially applied only to those who became refugees as a result of events occurring before 1 January 1951. It came into force on 22 April 1954. The 1967 Protocol relating to the Status of Refugees amended the

Geneva Convention so that it also applies to those who become refugees as a result of events occurring on or after 1st January 1951. This came into force on 4 October 1967.

11.
The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 in part implement Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the Qualification Directive). Regulation 6 states:

(1) In deciding whether a person is a refugee….

(d) a group shall be considered to form a particular social group where, for example:

(i)
members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

(ii)
that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

(e) a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom;

Background

12.
The First-tier Tribunal allowed the appellant's appeal under Article 3 ECHR on the basis that the manifestation of the appellant's mental illness created a strong likelihood of sexually disinhibited behaviour that in Afghanistan would lead to serious harm, making the following finding:

103. There is a real risk he would behave in a disinhibited fashion. The risk must increase in proportion to the deterioration in his mental state. His convictions relate to incidents taking place some years ago. However, the evidence of Ms Underhill and Dr Wootton shows that he continues to act inappropriately towards females. His mental health is very likely to deteriorate if he were returned. It is reasonable to infer from this that the risk of the appellant behaving in an unacceptable way would also increase.

104. Even if the strict letter of the law will not be applied to him, the consequence of the appellant behaving inappropriately towards a woman or touching himself in public would be to enrage onlookers. There is a real risk of mob violence. The risk is more than fanciful. The appellant's risky behaviours have endured in the UK for several years now.

Submissions

13.
The term 'Particular Social Group' is, at times, abbreviated below as 'PSG'.

14.

Following the Initial Hearing at Bradford before the Upper Tribunal on 29 October 2019 Mr Bandegani was given leave to provide further written submissions and details of authorities he sought to rely upon but had not provided copies of.

15.
Those further submissions are dated 15 November 2019 in which it is submitted, inter alia, that to identify a social group, one must first identify the society of which it forms part; a particular social group may be recognisable as such in one country, but not in another: K & Fornah [2006] UKHL 46 at [13] (Lord Bingham).

16.
In relation to the approach to be taken to assessing whether a person with mental health issues such as DH is entitled to be recognised as a refugee as a member of a PSG, Mr Bandegani submits:

11. The following key principles inform the approach to the 1951 Convention ("the Convention"):

11.1 The Convention is concerned with international protection i.e. surrogate protection. See e.g. Horvath v Secretary of State for the Home Department [2001] 1 AC 498, 496C (Lord Hope), 509A (Lord Clyde);

11.2 The proper approach to construction – in accordance with Article 31 of the Vienna Convention on the Law of Treaties – is to ascertain the " ordinary meaning " of the relevant provisions " in their context and in light of " the object and purpose of the Convention, taking account of the factors identified in Article 31(3) (namely, subsequent agreement and subsequent State practice). Thus context, object and purpose should be treated as integral to the identification of " ordinary meaning ". As noted by Lord Bingham in R v Asfaw [2008] 1 AC 1061, at [11] while it is " true that in construing any document the literal meaning of the words used must be the starting-point ", those words " must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims " (see also [56] per Lord Hope);

11.3 The Convention should be interpreted as a living instrument with an autonomous meaning based on its object and purpose, as well as its humanitarian underpinnings. These humanitarian principles call for a " large and liberal spirit " when " a court is asked to say what the convention means ": See e.g. Re B; R (Hoxha) v Special Adjudicator [2005] 1 WLR 1063 at [7-8] (Lord Hope); " It is well-established that the Convention must be interpreted in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms " See Fornah at [10] (Lord Bingham). See also Shah and Islam at 638H-639D and 643E (Lord Steyn), 650H-A (Lord Hoffmann), 656E (Lord Hope);

11.4 " Since the Convention is an international instrument which no supra-national court has the ultimate authority to interpret, the construction put upon it by other states, while not determinative (R v Secretary of State for the Home Department, Ex p Adan [2001] 2 AC 477, 508-509, 515-518, 524-527, 528-531), is of importance, and in case of doubt articles 31-33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964) may be invoked to aid the process of interpretation: see Januzi v Secretary of State for the Home Department [2006] UKHL 5, [2006] 2 WLR 397, para 4, and the cases there cited " See e.g. Fornah at [10] (Lord Bingham);

11.5 The PSG ground is interpreted in the light of the other four enumerated opinion ”. This is the ejusdem generis approach. See Shah and Islam at 640H and 643C (Lord Steyn), 651F (Lord Hoffmann), 656F (Lord Hope);

11.6 Viewed in these ways the focus of PSG is on groups who are discriminated against. That allows for the inclusion (a) of groups coming within the Convention’s anti- discriminatory purpose and objects, and (b) of grounds on which a person may be discriminated against by society. See Shah and Islam at 639C (Lord Steyn), 651D (Lord Hoffmann), 656F (Lord Hope).

17.
Mr Bandegani further submits:

12.6 Two approaches may be taken in regard to defining a PSG.

(1) First, the “ protected characteristics approach ”. In order to identify the PSG, it is helpful to ask whether members of the PSG share a common characteristic which unite the group. It may be (a) “ immutable ”, which the individual cannot, or (b) “ fundamental ”, which the individual ought not to be required to, forsake
because the characteristic is closely linked to the identity of the person or is an expression of fundamental human rights. This approach is associated with the analysis of the US Board of Immigration Appeals in In re Acosta (1985) 19 I.&N. 211(US), reflected in the Supreme Court of Canada’s “ good working rule ”
in Ward v Attorney General of Canada (1993) 103 DLR (4th) 1 at 33h. See Shah and Islam at 644D (Lord Steyn), 651E (Lord Hoffmann), 658E-F (Lord Hope);

(2) The second approach is the “ social perception ” approach. The question to be established is whether the PSG is “ cognisable ” as a group, viewed objectively in terms of the relevant society. It may be cognisable “ objectively ” having regard to the circumstances considered by a Court. It may be seen to be “ set apart ”, for cultural, social, religious or legal factors . This approach is associated with Applicant A , where McHugh J said PSG would generally involve external perception (1997) 142 A.L.R 331 at 359 and Dawson J described a cognisable group set apart within society (at 341). See also Shah and Islam at 657D-H (Lord Hope); Applicant S [2004] HCA 25 at [27], [30], [34], [62-63], [69], [76]; Liu v Secretary of State for the Home Department [2005] 1 WLR 2858 at [26, 30] (Rix LJ);

12.7 On the one hand although there is no “ legal litmus test ”, there must be “ a global appraisal in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose ”: Fornah at [107] (Lady Hale); on the other hand “ [T]he need to establish a particular social group should not become an obstacle course in which the postulated group undergoes constant redefinition ”. Cases should “ not degenerate into nitpicking around the margins of definition ”: Liu at [8] (Maurice Kay LJ);

12.8 Causation: “ The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention ground on which the claimant relies. The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason. The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple “but for” test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and

taking account of all the facts and
circumstances relevant to the particular case ”: Fornah at [17] and [18] (Lord Bingham).

18.
In his reply dated the 28 November 2019, Mr Diwnycz observed that the appellant, if he does not succeed in relation to the 1951 Convention ground, will be granted status by way of Article 15(c) protection as a result of the appeal being allowed on Article 3 grounds.

19.
Mr Diwnycz accepted the principles arising from the cases relied on by Mr Bandegani from other jurisdictions which, whilst not binding on the Upper Tribunal, were welcomed for the light they shed on matters of interpreting issues before the Upper Tribunal.

20.
In relation to the key issue Mr Diwnycz writes:

3) It is R’s response to A’s arguments, that this matter hinges solely on membership of a ‘Particular Social Group’, as argued in the error-in-law hearing. All the authorities produced, and the eloquent discussion of them by A’s counsel all point to A being a member of a ‘PSG’ by virtue of his mental health. R argues that in order for that to qualify A as a member of a PSG, his mental health characteristics, at the date of the FTT hearing, must have been and must remain immutable. The expertise of the medical experts is not disputed, but it is painfully trite to observe that they have not been able to come to a specific diagnosis as to what exactly it is which affects A. This is not to disparage the seriousness of his illness, far from it. R politely reminds the Upper Tribunal that she has mounted no challenge to the findings of the FTT and will implement humanitarian protection status on A in due course. It is the basis upon which any putative findings of immutability of the condition affecting A is made which is the point of contention. R argues that, notwithstanding the persuasiveness of any of the authorities relied upon by A, the sample legal basis upon which the matter immutably rests must start with a definite and reliable diagnosis. Immutability cannot flow from uncertainty. If A’s condition cannot be accurately named, or diagnosed, then nothing concrete can be made of it, even to the lower standard of proof required of an asylum decision. Any assessment of how he might be treated upon a now theoretical return to Afghanistan can only be at best, a sterile exercise.

4) The nature of any illness at the date of the hearing is dependent upon its own characteristics and pathology. The analogy of an accurately-diagnosed, incurable illness may assist. At the date of the hearing, such an incurable illness would logically be accepted as immutable, as it could only continue in that state. The same cannot, be postulated for the condition affecting A. At the date (s) of any hearing(s), it could not be accepted as immutable, as the lack of an accurate diagnosis roots the illnesses own capricious nature at any point in time. It may be incurable, it may not worsen over time, it may spontaneously go into remission, or it may be capable of being treated and managed effectively. All of which render it indistinct in terms of immutability. The only thing which has been stated with certainty by the expert medical opinions is that they have no concrete diagnosis for it. That must by definition, render it to be not immutable.

This was the stance taken by R’s Senior Presenting Officer at the error-in-law hearing, and essentially remains so. A cannot “.. **Share a common immutable characteristic over which he has no control..”** , (my paraphrase and ellipses) as stated by Steyn LJ in Shah and Islam. He is afflicted by a serious condition, the exact diagnosis of which has not been able to be made. Psychiatric illnesses span a wide spectrum, and it cannot be taken without more telling detail, that the point on the

spectrum at which A's illness might be fixed can be taken to be the core of an immutable characteristic.

21.
In his reply Mr Bandegani submits the respondent explicitly or implicitly accepts:

i.
The PSG assessment must be made at the date of the hearing.

ii.
That the appellant has a "serious illness" or a "serious condition" and that whatever else is stated by the respondent it should not be taken as disparaging the seriousness of his illness. The respondent has not at any stage disputed the appellant lacks capacity at the present time and has lacked capacity for years.

iii.
That the expertise of the medical expert is not disputed.

iv.
That the respondent has mounted no challenge to the findings of the First-Tier Tribunal

v.
That the respondent does not dispute that in principle, mental illness may constitute a PSG, she accepts that " an incurable illness would logically be accepted as immutable". Rather "It is the basis upon which any putative finding of immutability of the condition affecting the appellant is made which is the point of contention".

vi.
The respondent does not dispute any of the submissions made on law in the appellant's written submissions dated 15 November 2019 as summarised at Section I, other than those points referred to immediately below.

22.
Specifically responding to Mr Diwnycz' submissions Mr Bandegani writes:

(a)
<u>Diagnoses</u>

16. Further to the above, R submits " psychiatric illnesses span a wide spectrum, and it cannot be taken without more telling detail, that the point on that spectrum at which A's illness might be fixed can be taken to be the core of an immutable characteristic". In response A submits:

16.1 First, A does have a diagnosis. A has been diagnosed with a mental disability and/or disorder. R's submission is predicated on a false premise;

16.2 Second, even if there were no diagnosis, or sufficiently certain diagnosis, in this case, R's submission asks the UTIAC to look only at form and to ignore substance. Just because the exact category of illness cannot be definitively labelled (i.e. with "certainty") that does not mean there is any "uncertainty" about whether A has an underlying mental health illness. The doctors have consistently labelled him with a serious and debilitating illness and so there is no uncertainty or dispute that A has a "serious illness" or " condition" . That is an established fact, and R rightly accepts it.

16.3 Third, it is the symptoms that count (i.e. the substance). There is in R;s language, sufficient “telling detail” about A’s symptoms. Everyone accepts A is “ afflicted” by the symptoms set out above which constitutes the “serious illness” or “condition”. The reason there can be no diagnosis is, according to Dr Thomas, because of the degree of incoherence with which [DH] presents…”. It is the doctors view “… That this incoherence in itself is indicative of mental ill health”.

16.4 Fourth, even where there is doubt about exactly which category of mental illness A falls into, there is in this jurisdiction a “more positive role for uncertainty” which must be resolved in his favour: Karanakaran v SSHD [2000] EWCA Civ 11. For example, it is unthinkable that the appellant in LQ, who was accepted to be a child, would have failed to demonstrate his membership of the particular social group “children” because there existed uncertainty as to whether he was 11, 12 or 13 years of age;

16.5 Fifth, those with a political opinion may be persecuted in their home country by reason of their membership of a PSG even if their political opinion does not exist. Art 10(2) of the QD is reflective of the Refugee Convention jurisprudence on this issue. The QD provides: “when assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the appellant actually possesses the racial, religious, national, social or political characteristics which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution”. If the person’s “ characteristic” need not exist, it is hard to see why the label attached to the “characteristic” (here, the label to be attached to A’s serious mental illness, is legally determinative of the existence of the characteristic in the first place. In other words, on R’s case , the political neutrality in the Supreme Court authority RT (Zimbabwe) v SSHD [2012] UKSC 38 not engage the Convention because no political label could be attached to him.

(a)
<u>The illness must be (a) permanent and (b) constant</u>

17. In response, A submits:

17.1 First, the decision-maker cannot enter into speculation or into a hypothetical assessment about “ spontaneous remission” and the like. R’s submission this respect is speculative. It is neither based on any diagnosed scientific learning, the evidence in this particular case. In fact R’s submissions amount counter the evidence (some of which is) set out above;

17.2 Second, the fact a person receives treatment in the UK can only rationally be evidence that there is a serious illness to be treated in the first place. If the evidence demonstrates that a person’s illness can be “treated and managed effectively” in the home country that is not a matter that bears upon the question whether - <u>at the date of decision</u> – A’s mental illness is immutable (i.e. it is something he cannot change at that time) although it the issue may be relevant to the question of risk and conversation including for the reasons explained at [28.1] of A’s skeleton argument, dated 15 November 2019;

17.3 Third, R’s submission is directly contrary to the ejusdem generis principle as well as the principal that there being no hierarchies of protection amounts the Convention reasons for persecution (the well-founded fear of persecution test set out in the Convention is no change according to which Convention reason was engaged). There is no requirement that a political activist, for example, claims that his political opinions shall remain the same, that whatever his political opinion is, it shall last forever. Similarly, there is no requirement that an adherent to the precepts of a persecuted religious minority must satisfy the decision-maker that her faith will not lapse sometime in the future;

17.4 Third, R's approach contravenes the antidiscrimination and humanitarian purpose object of the Convention. Compare (A), a person with a learning disability (which is permanent and constant) with (B) a person suffering from fluctuating paranoid schizophrenia. Bearing in mind the objectives and purpose of the Convention there is no principled basis to distinguish between (A) and (B), but on R's analysis, even though both (A) and (B) suffer a mental impairment at the date of the hearing, and even if the country evidence demonstrates people with conditions identical to (A) and (B) been systematically persecuted by the state, only (A) will be protected by the Convention. That will be flatly inconsistent with the object and purpose of the Convention.

D. CONCLUSION

18. On the accepted facts and evidence in this matter, further to the reasons above and those provided in A's recent case, it is not disputed A has a serious mental illness. Applying the rule, he satisfies the 'protected characteristics' approach and/or the 'social perception' approach to membership PSG. A is a refugee.

Case law

23.
Mr Bandegani refers to the decisions in SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 0002, PO (Trafficked women) Nigeria CG [2009] UKAIT 00046 at [69] and [72], and AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) which are criticized for adopting what he considers to be an incorrect approach to assessing whether a person is a member of a PSG.

24.
SB (Moldova) : This case was the first application of Art 10 of the Qualification Directive in the UK to a case involving human trafficking in which the Tribunal found that trafficking victims are capable of being members of a Particular Social Group.

In relation to Regulation 6(1)(d) and Article 10(d) of the Qualification Directive the Tribunal in SB concluded that the word 'and' linking the subparagraphs in Regulation 6(1)(d) should be given its natural meaning. This means that an applicant must satisfy both subparagraphs. This was held to be in accordance with the general interpretation that a PSG should always be considered against the context of the society in question. A possible issue as to whether the Qualification Directive properly reflected the Refugee Convention was sidestepped.

25.
The Tribunal accepted that, if it could be shown that the harm feared "related' to the Convention reason, then causation was shown. In this case the background evidence and the facts already accepted by the Secretary of State together satisfied the Tribunal that there was a causal nexus between the applicant's membership of a social group and the risk of future persecution.

26.
PO (Nigeria) – I need not comment on this case as this decision was set aside on appeal by the Court of Appeal in PO (Nigeria) v Secretary of State for the Home Department [2011] EWCA Civ 132.

27.
AZ(Thailand): The Tribunal stated:

133. The European Union Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons

who otherwise need international protection and the content of the protection granted (the EU Qualification Directive) expressly permits member states to apply standards more favourable to the applicant than the minimum laid down. Article 10(1)(d) deals with the issue of a PSG but, as was noted in SB the only difference between Article 10 (1)(d) and the corresponding Regulation 6 (1)(d) of the Qualification Regulations (cited above) is that the words ‘in particular’ (in the first line) have been replaced by ‘for example’. In its comments on the Directive, the UNHCR advised that to avoid any protection gaps, member states should reconcile the two approaches to permit alternative rather than cumulative application of the two concepts. This is referred to in Fornah and K at paragraph 15 where UNHCR’s definition of a PSG is set out.

134. Although we were urged by Ms Brewer to find that the two sub sections should be read as alternative concepts, we are unable to accept that. The matter was considered at length in SB where the judgment of Fornah and K was addressed. It was noted by the Tribunal that the remarks of their Lordships were obiter. After lengthy submissions on the point the Tribunal found that the two sections had to be read together and that any other interpretation would only “do violence” to the adjunctive “and” (paragraph 71). The Tribunal found:

It would also be inconsistent with the insistence in the Jurisprudence we have considered that the question as to whether the group is a particular social group for the purposes of the Geneva Convention must always be considered in the context of the society in question…. if sub paragraphs (i) and (ii) are alternatives, then it may be said that it is possible to identify a particular social group without reference to evidence relating to any particular country. For example, it may be said that as ‘former victims of trafficking' or 'former victims of trafficking for sexual exploitation' are, per se, members of a particular social group without the need to consider the evidence relating to the society in question, which does not seem to us to make sense. It is possible that former victims of trafficking for sexual exploitation may be members of a particular social group in one country, but not in another (paragraphs 71 and 72).

135. Ms Brewer, in her skeleton argument, referred us to several judgments which give guidance on how the Refugee Convention and the provisions regarding social groups should be applied.

136. We were referred to Lord Bingham’s observation in Fornah and K (at paragraph 10) that:

It is well-established that the Convention must be interpreted in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms….

137. The following observation by Sedley J in Shah [1997] Imm.A.R.145,153, commenting on the complexity of such issues, was cited by Lord Steyn in Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, [1999] UKHL 20:

Its adjudication is not a conventional lawyer's exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.

138. These views were echoed by Lord Hope in Hoxha when he spoke about the “broad humanitarian principles which underlie the Convention” (paragraph 6), the “large and liberal spirit” that needs to

be called for “when a court is asked to say what the Convention means” (paragraph 8) and of the Convention and the Protocol as “living instruments, to which the broadest effect must be given to ensure that they continue to serve the humanitarian principles for whose purpose the Convention was entered into” (paragraph 7).

28.
Of those decisions considered by Mr Bandegani to be more favourable to the appellant’s argument: in FM (Sudan) [2007] UKAIT 60 it is written:

(4) Nature of Particular Social Group in relation to FGM

144. In the present case, the respondent accepted that, if there were a real risk of the third and fourth appellants being subjected to FGM, the Refugee Convention would be engaged, having regard to the opinions of the House of Lords in K and Fornah. It is nevertheless necessary to categorise the nature of the particular social group into which the appellants fall. Although the position of women in Sudan appears to have markedly improved in recent years, the evidence as a whole shows that they are the subject of societal discrimination (see paragraphs 119 and 120 above). Such a conclusion also flows from the evidence of Ms Maguire to the Tribunal in HGMO, as analysed in paragraph 305 of the determination in that case. The reason why Ms Maguire in effect did not consider that a Sudanese female returnee would be at real risk of persecution on return, was that such a returnee would be regarded by the authorities merely as an adjunct of her husband. If that husband was a person in whom the authorities had a significant adverse interest, then the female returnee would suffer serious harm.

145. For present purposes, the Tribunal considers that women in Sudan constitute a particular social group and, for the reasons given by the House of Lords in K and Fornah, the infliction of FGM on a Sudanese woman would be persecution for a Refugee Convention reason.

29.
In SK (Liberia) [2007] UKAIT 1 it is written:

52. Although the Tribunal, at the reconsideration hearing on 13 February 2006, did not consider refugee status to be relevant, the position has changed since the delivery of the opinions of the House of Lords in K and Fornah. Those opinions lay to rest the difficulties that had beset the jurisprudence relating to membership of a particular social group, in the context of the Geneva Convention, which arose from what was perceived to be a definition of such a group that was arguably not independent of the feared persecution. A group that could only be defined by reference to the persecution of its members was thought not to be capable of being a particular social group for the purposes of Article 1A(2) of that Convention. But as Baroness Hale stated:-

‘113. This is a peculiarly cruel version of Catch 22: if not all the group are at risk, then the persecution cannot be caused by their membership of the group; if the group is reduced to those who are at risk, it is then defined by the persecution alone. But the reasoning is fallacious at a number of levels. It is the persecution, not the fear, which has to be “by reason of” membership of the group. Even if the group is reduced to those who are currently intact, its members share many characteristics which are independent of the persecution – their gender, their nationality, their ethnicity. It is those characteristics which lead to the persecution, not the persecution itself which

leads to those characteristics. But there is no need to reduce the group to those at risk. It is well settled that not all members of the group need be at risk. There is nothing in the Convention to say that all members have to be susceptible. It should not matter why they are not at risk. If the authorities of a particular state have a policy of mutilating all male members of a particular tribe or sect by cutting off their right hands, we would still say that intact members of the tribe or sect face persecution because of their membership of the tribal sect rather than because of their intactness. …

114. For these reasons, the particular social group might best be defined as Sierra Leonean women belonging to those ethnic groups where FGM is practised: then it is quite clear that the reason for the persecution is the membership of that group. But it matters not whether the group is stated more widely, as all Sierra Leonean women, or more narrowly, as intact Sierra Leonean women from those ethnic groups. For all of them, the group has an existence independent of the persecution.'

53. As we have already indicated, in the present case, Mr Saunders for the respondent did not seek to suggest that, if the appellant could show that she was at real risk of FGM in Liberia, she would not fall within a particular social group analogous to one of those identified by their Lordships in K and Fornah, in the context of FGM in Sierra Leone. Whilst the position of women in Liberia is, we find, improving in many respects, in particular as regards the action being taken to punish those who commit rape, there is nevertheless sufficient evidence of societal discrimination against women to make them a particular social group in Liberia. The Tribunal, however, prefers to categorise the particular social group in the present case in the way in which Baroness Hale did at paragraph 114 of the opinions: namely, women in Liberia belonging to those ethnic groups where FGM is practised. Either way, however, the appellant has to show that she faces a reasonable likelihood or real risk of having to undergo FGM, if returned.

30.
FK (Kenya) [2007] UKAIT 41 was overturned on appeal in FY (Kenya) [2008] EWCA Civ 119 and I make no comment upon it.

31.
In VM (Kenya) [2008] UKAIT 49 it is written:

203. 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.

204.
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.

205.
In the light of all the evidence that is before us, in particular, but not limited to that to which we have specifically referred, bearing in mind that the question whether a person is a member of a particular social group is a mixed question of fact and law, we find that women (and girls) in Kenya have the innate characteristic of being female and that the background evidence to which we have referred, in particular at paras 168-179 above, shows that women and girls in Kenya are discriminated against in the law of the country and in the enforcement of such laws as do exist, in particular in relation to protection from sexual and other violence including rape, FGM and domestic violence. We recall the extremely rare event of a prosecution relating to FGM, and the sentence of a probation order in respect of the offence of performing FGM on a girl of 15 years (Amnesty International). Whilst male circumcision does take place in Kenya, the evidence does not show that either the act or its consequences may be properly regarded as inflicting serious harm comparable to that which is inflicted by FGM. We find that neither the criminal law nor the civil law provides effective protection to women and girls in this regard.

32.
In MD (Ivory Coast) [2010] UKUT 215 it is written:

Particular Social Group (PSG)

15. In Fornah [2006] UKHL 46 their Lordships held that in seeking to establish refugee status under the Refugee Convention, where a well-founded fear of persecution was based on membership of a particular social group, a claimant had to show that the relevant group consisted of persons who shared, other than their risk of persecution, a common characteristic that was innate or otherwise fundamental to identity, conscience or the exercise of human rights or who were perceived by society as a group.

16. Lord Bingham who gave the leading judgment, in particular, gave approval to the UNHCR’s Guidelines on International Protection, issued in May 2002 and set out his proposed definition of a particular social group, as a group of persons who shared a common characteristic that would often be one which was innate, unchangeable and which was otherwise fundamental to identity, conscience or the exercise of one’s human rights. That definition included characteristics which were historical and therefore could not be changed and those which, although possible to change, ought not to be

required to be changed because they were so closely linked to the identity of the person or were an expression of fundamental human rights.

33.
Permission was granted in this case to permit the appellant to rely upon the unreported decision of Upper Tribunal Judge Grubb in DZ - AA/ 02249/2011 in which he dealt with the issue in Section 3 of the determination in the following terms:

3. PSG

48. There remains the issue of whether, in relation to the risk arising from the prosecution and punishment for his illicit relationship that would be for a Convention reason such as to engage the Refugee Convention and entitle the appellant to asylum. It is not suggested that the risk arising from his prosecution and punishment for murder engages the Refugee Convention. I now turn to that issue.

……

56. On the basis of this evidence, I accept that the appellant forms part of a PSG as propounded by Ms Akinbolu in her submissions. I am persuaded that he shares “an innate characteristic” with others in his position or together with others who have, or are perceived to have, transgressed Iranian social mores; he shares “a common background which cannot be changed”. The appellant (and any other person in his position) cannot change the fact that they have offended the moral code even if they are subsequently prosecuted and convicted for their behaviour. The persecution through the criminal justice system does not define the group – which would be fatal to it being a PSG (see Shah and Islam and K v SSHD; Fornah v SSHD [2006] UKHL 46) - it merely reflects the potential response of the state to some who are in that group. It is the individual’s behaviour and its disapprobation by reference to the moral codes of Iranian society which defines the group.

57. The evidence in this appeal echoes and provides an analogy with the PSG accepted in Shah and Islam by Lord Steyn (at page 645 and with whom Lord Hutton agreed at pp.658-9) of women who had offended the social mores of Pakistan. Having accepted the ‘wider’ PSG of “women in Pakistan” recognised by Lords Hope and Hoffman, Lord Steyn said this in acknowledging that there was also a ‘narrower’ PSG established on the evidence (at page 654):

“If I had not accepted that women in Pakistan are a "particular social group," I would have held that the appellants are members of a more narrowly circumscribed group as defined by counsel for the appellants. I will explain the basis of this reasoning briefly. It depends on the coincidence of three factors: the gender of the appellants, the suspicion of adultery, and their unprotected position in Pakistan. The Court of Appeal held (and counsel for the Secretary of State argued) that this argument falls foul of the principle that the group must exist independently of the persecution. In my view this reasoning is not valid. The unifying characteristics of gender, suspicion of adultery, and lack of protection, do not involve an assertion of persecution. The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by a state. Conceptually such a group does not in a relevant sense depend for its existence on persecution. The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands. In A. v. Minister for Immigration and Ethnic Affairs 142 A.L.R. 331, 359 McHugh J. explained the limits of the principle. He said:

"Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group."

The same view is articulated by Goodwin-Gill, The Refugee in International Law, 2nd ed., (1996) at p. 362. I am in respectful agreement with this qualification of the general principle. I would hold that the general principle does not defeat the argument of counsel for the appellants.

My Lords, it is unchallenged that the women in Pakistan are unprotected by state and public authorities if a suspicion of adultery falls on them. The reasoning in Acosta , which has been followed in Canada and Australia, is applicable. There are unifying characteristics which justify the conclusion that women such as the appellants are members of a relevant social group. On this additional ground I would hold that the women fall within the scope of the words "particular social group."

58 Here too the group shares a unifying characteristic and lack of protection from the State. Indeed, thorough the criminal justice system there is actual persecution by the State.

59 On its face, Art 10.1(d) indent 2 would also appear to require that the group have “a distinct identity” in Iran “because it is perceived as being different by the surrounding society”. To the extent this might be thought to impose an additional definitional requirement to that in indent 1, it has been doubted by Lord Bingham in K and Fornah at [16] as it would propound “a test more stringent than is warranted by international authority”. Likewise, Lord Brown in K and Fornah considered that the definition in Art 10.1(d) would have to be interpreted “consistently” with the definition of PSG in the UNHCR Guidelines on International Protection (7 May 2002) which defines a PSG either by reference to a shared, common (often innate) characteristic or a group that is “cognizable” in the society despite its members not sharing such a characteristic (set out at [15] of Lord Bingham’s speech in K and Fornah). Had I been pressed to do so, I would have interpreted the Qualification Directive (and the 2006 Regulations) consistently with the doubts expressed in the House of Lords as those provisions were, undoubtedly, intended to give effect to the law as it was understood and adopted in a number of jurisdictions in the world applying the Refugee Convention. However, it is not necessary for me to do so. In this appeal, in any event, I am satisfied that the group to which the appellant belongs is one which, on the evidence, Iranian society recognises as “setting them apart” and “different” by others in society.

60 For these reasons, I am satisfied that the appellant meets the requirements of Art 10.1(d) and is part of a PSG. Further, the persecution that he fears, namely prosecution, conviction and punishment for his illicit relationship with F, is “for reasons of” his membership of that PSG.

34.
Mr Bandegani also seeks to rely upon a more recent example in the form of an order of the Court of Appeal in AA (Sierra Leone) C5/2019/0347 in which that appellant’s appeal against a decision of the Upper Tribunal in PA/11805/2017 was allowed by consent without determination of the merits of the appeal with the Court being satisfied the Statement of Reasons provided good and sufficient reason for allowing the appeal. The Statement of Reasons reads:

i.

The Appellant has appealed against the determination dated 23 October 2018 of the Upper Tribunal (Immigration and Asylum Chamber) ("the UT"), in which the UT dismissed the Appellant's appeal against the Respondent's decision dated 26 October 2017.

ii.
Permission to appeal was granted by order of the Court of Appeal on 1 August 2019 on all five grounds of appeal advanced by the Appellant. The Court of Appeal identified as a particularly important point as " whether those who are severely mentally ill constitute a particular social group for the purpose of the Refugee Convention".

iii.
The Respondent accepts that the UT erred in law in dismissing the Appellant's appeal and by setting aside the determination of the First-Tier Tribunal (Immigration & Asylum Chamber) ("the FTT") dated 5 July 2018. In particular, the Respondent accepts that the FTT was correct in finding that the Appellant is a member of a particular social group on account of his incurable mental illness and that he would face ill-treatment amounting to persecution if he is returned to Sierra Leone.

iv.
On that basis the Respondent has agreed to implement the FTT's decision and grant the Appellant refugee status, subject to satisfactory checks.

v.
For those reasons the parties agree that the appeal should be allowed on the basis set out in the order.

Discussion

35.
Earlier directions provided for the parties to set out their case in writing, but the appellant's representative sought the right to further address the Tribunal. Accordingly, in accordance with the Covid – 19 protocol and with the agreement of the parties, a hearing took place on Friday, 22 May 2020.

36.
At that hearing Mr Diwnycz confirmed that Mr Bandegani's assessment of the respondent's concessions set out above is correct, namely that:

i.
The PSG assessment must be made at the date of the hearing.

ii.
That the appellant has a "serious illness" or a "serious condition" and that whatever else is stated by the respondent it should not be taken as disparaging the seriousness of his illness. The respondent has not at any stage disputed the appellant lacks capacity at the present time and has lacked capacity for years.

iii.
That the expertise of the medical expert is not disputed.

iv.
That the respondent has mounted no challenge to the findings of the First-Tier Tribunal

v.
That the respondent does not dispute that in principle, mental illness may constitute a PSG, she accepts that " an incurable illness would logically be accepted as immutable". Rather "It is the basis upon which any putative finding of immutability of the condition affecting the appellant is made which is the point of contention".

vi.
The respondent does not dispute any of the submissions made on law in the appellant's written submissions dated 15 November 2019 as summarised at Section I, other than those points referred to.

37.
Although Mr Diwnycz confirmed that the appellant is to be granted leave to remain on Humanitarian Protection grounds, even if this challenge fails, meaning this may be seen by some to be a sterile exercise, it is not. Whilst both Refugee status and Humanitarian Protection are a form of international protection granted to a person in need which result in a grant of five years of limited leave to remain in the UK on a path to settlement after that, and give most of the same rights to work, study and access benefits, refugee status is superior to a grant of humanitarian protection in a number of ways. A person claiming an entitlement to Refugee status is therefore entitled to have the merits of that claim properly considered as recognised in K & Fornah.

38.
The five Convention reasons set out above, race, religion, nationality, social group, and political opinion, are crucial as without showing that the future risk is because of one of these reasons, a claim to refugee status will fail. The first, third and fifth categories are relatively self-explanatory. The Convention reason most open to interpretation is membership of a particular social group [PSG].

39.
The Refugee Convention binds signatory States, of which there are approximately 148 throughout the world. The Qualification Directive is binding upon the Member States of the European Union and has the express objective of establishing minimum standards for the granting of international protection to third country nationals and stateless persons by those Member States, which includes the United Kingdom at this time despite no longer being a Member State and where the Regulations are the law in any event. All signatories to the Qualification Directive are also signatories to the Refugee Convention and are therefore bound by the terms of both.

Mental health and membership of a PSG

40.
Whether a person with mental health issues falls within a PSG is a complex question of fact and law. It is not disputed that the burden of proving an entitlement to refugee protection rest with the person making that claim.

41.
Of importance is the terminology used. The phrase 'mental disability' now commonly used in this area of work is taken to encompass both mental ill health, learning disabilities/developmental disorders/ neurodiverse conditions, and brain damage, but there are fundamental differences between these conditions and they should not be confused. There is also a range of mental health conditions, e.g. depression / anxiety, post-traumatic stress syndrome, obsessive compulsive disorder, personality disorders, eating disorders, schizophrenia, bipolar disorder. Other mental impairments or

neurodiverse conditions include autism, learnings disabilities, and ‘specific learning difficulties’ such as dyslexia.

42.
Similarly, the degree of disability in each individual’s case will vary enormously and only in a small number of cases will it mean there is lack of mental capacity or behavioural traits that may expose that person to a real risk of harm as a result of their illness in their home state. That requires a fact specific assessment.

43.
If an appellant is claiming to belong to a PSG based upon their mental health there must be sufficient cogent evidence to enable a clear finding to be made that such a person is suffering from serious mental illness. I use the term ‘serious mental illness’ as there are a number of mental health issues which can in themselves vary in degree, but which enable a person to function without any obvious external indicators or risk factors, as noted above.

44.
‘Serious mental illness’ includes diagnoses which typically involve psychosis (losing touch with reality or experiencing delusions) or high levels of care, and which may require hospital treatment, the most common of which are schizophrenia and bipolar disorder (or manic depression). It is a fact sensitive question in every case and the identification of the PSG as ‘those suffering serious mental illness’ was not in dispute before me.

45.
It is also not in dispute that the assessment must be made at the date of the decision or, on appeal, at the date of the hearing: see TN & MA (Afghanistan) v SSHD [2014] UKSC 40 at [77] “the Ravichandran principle applies on the hearing of asylum appeals without exception” and LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005 (“LQ”) at [6] “… At the date when the appellant’s status has to be assessed he is a child and although, assuming he survives, he will in due course cease to be a child, he is immutably a child at the time of assessment”. This applies to both the existence of serious mental illness, the risk of persecution arising as a result in the person’s home country, and the existence, accessibility, and effectiveness of treatment for the same in an appellant’s home country, and any other related protection issues.

The correct test for membership of a PSG.

46.
The proper understanding of the term PSG, as used in the Refugee Convention, is set out above. The Qualification Directive follows the same wording to a point but inserts the word ‘and’ between Articles 1(d)(i) and (ii) making them conjunctive rather than disjunctive. In a statute items are generally joined either by the term "and" or the term "or." If they are joined by "and," the statute is conjunctive. If they are joined by "or," the statute is disjunctive. “The Refugee Convention itself contains no definition but, as we have seen, in K & Fornah , the House of Lords would not have interpreted the term PSG in the RC consistently with the definition in the QD, in particular requiring the “and” and, therefore, conjunctive construction of Art 1(d).”

47.
In relation to the Qualification Directive it is only Council Directive 2004/83/EC that is under consideration as the UK is not bound by the recast Directive, 2011/95/EU, albeit that in both documents the test for membership of a PSG is defined in similar terms.

48.
In May 2002, the UNHCR issued Guidelines on International Protection: Membership of a Particular Social Group (“ PSG Guidelines ”) in an attempt to unify divergent approaches (the ‘protected characteristics’ approach, and the ‘social perception’ approach) to the meaning of the phrase ‘ particular social group’ at the international level. See Appendix A below for the full text. The UNHCR provide the following definition:

UNHCR’s Definition:

Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable nor fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognisable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognised as a group which sets them apart.”

49.
This definition was considered by the House of Lords in Secretary of State for the Home Department (Respondent) v. K(FC) (Appellant) Fornah(FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2006] UKHL 46 (‘ K & Fornah ‘) in which their Lordships noted the UNHCR accepted that a particular social group could not be defined exclusively by the persecution members suffer or fear, but also accepted the view advanced in the case of Applicant A and accepted by some members of the House in Islam (A.P.) v. Secretary of State for the Home Department; Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals) [1999] UKHL 20; [1999] Imm AR 283; [1999] 2 AC 629 (‘ Shah and Islam’) that persecutory action towards a group may be a relevant factor in determining the visibility of a group in a particular society.

50.
The difficulties created by the use of the word “and” can give rise to protection gaps which is contrary to the obligations of signatories to the Refugee Convention.

51.
In SB when discussing K & Fornah the Tribunal wrote:

70. We turn now to consider the wording of regulation 6(1)(d) itself. The words “for example” which introduce sub-paragraphs (i) and (ii) of regulation 6(1)(d) may cast some light on the meaning to be given to the word “and” between sub-paragraphs (i) and (ii) of regulation 6(1)(d). There are two possible interpretations of the words “for example”, as follows:

(a) that sub-paragraphs (i) and (ii) of regulation 6(1)(d) are separate examples of situations in which a group shall be considered to form part of a particular social group and that the reason for the use of the adjunctive “and” between sub-paragraphs (i) and (ii) of regulation 6(1)(d) is that it was intended to provide the reader with two separate examples, each of which would qualify as social groups under the Protection Regulations; and

(b)that the adjunctive “and”, as well as the words “for example”, were used advisedly and intentionally, to mean that any particular social group must satisfy two criteria, the second of which (i.e. sub-paragraph (ii) of regulation 6(1)(d)) is always necessary whereas the first would be satisfied if an individual falls within any one or more of the five examples of particular social groups given in sub-paragraph (i) of regulations 6(1)(d). On this interpretation, given that the five examples are only examples, a particular social group may be shown to exist in other circumstances subject to eiusdem generis principle of interpretation, by reference to the five examples given in sub-paragraph (i) of regulation 6(1)(d).

71. Interpretation (a) would be supported by the obiter remarks of their Lordships in Fornah and K concerning Article 10 of the Qualification Directive. However, it would not only do violence to the adjunctive “and” (this was not an argument which weighed heavily with us) but it would also be inconsistent with the insistence in the jurisprudence we have considered that the question as to whether a group is a particular social group for the purposes of the Geneva Convention must always be considered in the context of the society in question (this argument did weigh heavily with us). On the other hand, interpretation (b) would give meaning not only to the words “for example” and to the adjunctive “and”, it would also be consistent with the insistence that the question whether a particular social group exists must be considered in the context of the society in question.

72. In the end, we decided that the fact that it was emphasised in Shah and Islam and also Fornah and K that the question as to whether a group is a particular social group for the purposes of the Geneva Convention must be decided in the context of the society in question is decisive. If sub-paragraphs (i) and (ii) are alternatives, then it may be said that it is possible to identify a particular social group without reference to evidence relating to any particular country. For example, it may be said that “former victims of trafficking” or “former victims of trafficking for sexual exploitation” are, per se, members of a particular social group without the need to consider the evidence relating to the society in question, which does not seem to us to make sense. It is possible that “former victims of trafficking for sexual exploitation” may be members of a particular social group in one country, but not in another. If it is necessary to conduct any examination of the evidence relating to the society in which a social group is said to exist, it is difficult to see how anything short of satisfying the requirement in sub-paragraph (ii) of regulation 6(1)(d) would be consistent with the jurisprudence we have considered. Another example which supports our conclusion is the example of the left-handed men used by McHugh J in Applicant A v. Minister for Immigration and Ethnic Affairs 71 A.L.J.R. 381, 402 , to explain the limits of the principle that a particular social group must exist independently of the persecution feared. We can use the same example, to support our conclusion as to the correct

interpretation of regulation 6(1)(d). In many societies, the attribute of being left-handed does not lead to any persecutory action. However, if in any particular society, left-handed people are persecuted because they are left-handed, then (and here we borrow from, and quote, the words of McHugh J himself, see paragraph 79 of the judgment in Fornah and K):

“…..they would no doubt be quickly recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group.”

73. Whilst an application of interpretation (b) would lead to this conclusion, an application of interpretation (a) could lead to the conclusion that left-handed people may be a particular social group without any need to examine the evidence relating to the society in question. In our view, that cannot be correct.

74. Accordingly, and not without a great deal of hesitation having regard to the observations of Lord Bingham, Lord Hope and Lord Brown in Fornah and K , we concluded that the adjunctive “and” between sub-paragraphs (i) and (ii) of regulation 6(1)(d) means what it says: for a particular social group to exist, sub-paragraph (ii) of regulation 6(1)(d) must always be satisfied. In order for a particular social group to exist, the group must have a distinct identity in the relevant society because it is perceived as being different by the surrounding society. We emphasise both that the particular social group must have a distinct identity as well as the requirement that the distinct identity of the group must arise because the group is perceived as being different by the surrounding society. Although it would not be necessary for the whole of a given society to perceive the group to be different from it, it is not necessary for us to lay any guidelines in this respect in this case.

52.
A summary of the judgments in K & Fornah reveals the following:

LORD BINGHAM OF CORNHILL

The meaning of "a particular social group"

11. The four Convention grounds most commonly relied on (race, religion, nationality and political opinion), whatever the difficulty of applying them in a given case, leave little room for doubt about their meaning. By contrast, the meaning of "a particular social group", for all the apparent simplicity and intelligibility of that expression, has been the subject of much consideration and analysis.

12. The leading domestic authority is the decision of the House in R v Immigration Appeal Tribunal, Ex p Shah and Islam [1999] 2 AC 629. The appellants were married Pakistani women who had been forced to leave their homes and feared that, if they were returned to Pakistan, they would be at risk of being falsely accused of adultery, which could lead to extreme social and penal consequences against which the state would offer no effective protection. Their claim for asylum was based on the "membership of a particular social group" ground, but different definitions were advanced at different stages of the social group in question: pp 632, 644, 649-650. By differing majorities the House accepted, on the evidence adduced in the case, that the appellants' claim should succeed, either on the basis of their membership of a wider social group, that of women in Pakistan (pp 645, 652, 655, 658), or of a narrower social group, that of women who had offended against social mores or against whom there were imputations of sexual misconduct (pp 645, 655, 658-659). Lord Millett dissented, not as I understand because he did not consider the appellants to be members of a particular social

group, but because he did not consider that the feared persecution would be for reasons of such membership (pp 664-665).

13. Certain important points of principle relevant to these appeals are to be derived from the opinions of the House. First, the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being: pp 651, 656. Secondly, to identify a social group one must first identify the society of which it forms part; a particular social group may be recognisable as such in one country but not in another: pp 652, 657. Thirdly, a social group need not be cohesive to be recognised as such: pp 643, 651, 657. Fourthly, applying Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 263, there can only be a particular social group if it exists independently of the persecution to which it is subject: pp 639-640, 656-657, 658.

14. In Shah and Islam, the House cited and relied strongly on In re Acosta (1985) 19 I&N 211, a relatively early American decision given by the Board of Immigration Appeals. Construing "membership of a particular social group" ejusdem generis with the other grounds of persecution recognised by the Convention, the Board held the expression to refer to a group of persons all of whom share a common characteristic, which may be one the members cannot change or may be one that they should not be required to change because it is fundamental to their individual identities or consciences. The Supreme Court of Canada relied on and elaborated this approach in Attorney-General of Canada v Ward [1993] 2 SCR 689, 738-739, and La Forest J reverted to it in his dissent in Chan v Canada (Minister of Employment and Immigration) [1995] 3 SCR 593, 642-644. The trend of authority in New Zealand has been generally in accord with Acosta and Ward: T A Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" UNHCR's Global Consultations on International Protection, ed Feller, Türk and Nicholson, (2003), pp 263, 280. The leading Canadian authorities were considered by the High Court of Australia in Applicant A, above, where the court was divided as to the outcome but the judgments yield valuable insights. Brennan CJ, at p 234, observed:

"By the ordinary meaning of the words used, a 'particular group' is a group identifiable by any characteristic common to the members of the group and a 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large. The characteristic may consist in any attribute, including attributes of non-criminal conduct or family life, which distinguish the member of the group from society at large. The persons possessing any such characteristic form a particular social group".

Dawson J (p 241) saw no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions might each be a particular social group. Gummow J (p 285) did not regard numerous individuals with similar characteristics or aspirations as comprising a particular social group of which they were members: there must be a common unifying element binding the members together before there would be a social group of this kind.

15. Increased reliance on membership of a particular social group as a ground for claiming asylum prompted the UNHCR to convene an expert meeting at San Remo in September 2001, which was followed on 7 May 2002 by the issue of Guidelines on International Protection directed to clarifying this ground of claim. Having identified what it called the "protected characteristics" or "immutability" and "social perception" approaches, which it suggested would usually, but not always, converge, the UNHCR proposed:

"B. UNHCR's Definition

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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

12. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart."

The UNHCR accepted that a particular social group could not be defined exclusively by the persecution members suffer or fear, but also accepted the view advanced in Applicant A and accepted by some members of the House in Shah and Islam that persecutory action towards a group may be a relevant factor in determining the visibility of a group in a particular society. It appears to me that the UNHCR Guidelines, clearly based on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect.

16. EU Council Directive 2004/83/EC of 29 April 2004, effective as of 10 October 2006, is directed to the setting of minimum standards among member states for the qualification and status of third country nationals or stateless persons as refugees, or as persons who otherwise need international protection, and setting minimum standards for the content of the protection granted. The recitals recognise the need for minimum standards and common criteria in the recognition of refugees, and for a common concept of "membership of a particular social group as a persecution ground". The Directive expressly permits member states to apply standards more favourable to the applicant than the minimum laid down. Article 10 provides (with Roman numerals added to the text):

"Reasons for persecution

I Member States shall take the following elements into account when assessing the reasons for persecution ...

(d) a group shall be considered to form a particular social group where in particular:

[(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

[(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

[(iii)] depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article."

Read literally, this provision is in no way inconsistent with the trend of international authority. When assessing a claim based on membership of a particular social group national authorities should certainly take the matters listed into account. I do not doubt that a group should be considered to form a particular social group where, in particular, the criteria in sub-paragraphs (i) and (ii) are both satisfied. Sub-paragraph (iii) is not wholly clear to me, but appears in part to address a different aspect. If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published Comments on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met.

LORD HOPE OF CRAIGHEAD

34. In agreement with all of your Lordships, I would allow these appeals and make the orders proposed by my noble and learned friend Lord Bingham of Cornhill. I should like however to add a few comments on the issues raised as to what constitutes a "particular social group" within the meaning of article 1A(2) of the Refugee Convention of 1951. I do not wish to depart from anything that I said about the meaning of these words, or about the definition of which they form part, in Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah [1999] 2 AC 629. But there are some additional points that may be worth making in the light of developments following that judgment and on the facts of these appeals.

35. The question whether or not the appellants have refugee status is not just of theoretical importance to the appellants. They have been given leave to enter the United Kingdom because article 3 of the European Convention on Human Rights forbids their return to their home countries for so long as they are at risk of torture or inhuman or degrading treatment or punishment there. So far so good. But leave to enter does not give them a right to remain in this country. If their claims for asylum are recognised, however, all the benefits of the Refugee Convention will then be available to them. The uncertainty that attaches to their present lack of status will be replaced by the status which the Contracting States have undertaken to accord to a refugee and by all the rights that attach to it. This is a very substantial additional benefit which is well worth arguing for.

…

37. The issue in Zainab Fornah's case is essentially one of definition. It is accepted that the appellant has a well-founded fear of being subjected to female genital mutilation were she to be returned to Sierra Leone. This is because she is an intact, or uninitiated, young woman who does not belong to the only ethic group in that country, the Krio of the old Sierra Leone colony, which does not participate in this practice. The question is whether a particular social group can be identified, for reasons of her membership of which she has a well founded fear of being persecuted in Sierra Leone. Female genital mutilation is practised on intact girls and young women who are indigenous to Sierra Leone. But it is in the nature of the process that it can be inflicted only once in any female's lifetime. So the question is whether, for the purposes of this case, females in Sierra Leone generally can be said to constitute "a particular social group" within the meaning of article 1A(2). If this definition is too wide, it would be possible to define the group so as to confine it to those within that broader group who are at risk of persecution. But the more qualifications the definition contains the more grounds there may be for objection. This gives rise to the further question as to how the balance is to be struck between definitions that are unnecessarily precise and those that are unnecessarily wide.

38. Miss Fornah's case, then, raises again the point that was discussed but did not have to be decided in Shah and Islam as to how precise the definition must be to satisfy the requirements of that article. The Secretary of State maintains that it is not possible, for reasons of principle, to identify a particular social group the appellant's membership of which gives rise to her well-founded fear. He says that a group which consists of females in Sierra Leone generally is too widely drawn because many of its members no longer fear female genital mutilation as they have already been initiated. He objects to a group which is defined more precisely so as to include only those females who are still at risk. He says that if this is done it is the fact of persecution alone that defines the group, and that the definition of it is therefore circular. He has other objections which apply however wide or precise the definition is, which I would reject for the reasons given by Lord Bingham and Lord Rodger.

…

41. I agree with my noble and learned friend Lord Rodger of Earlsferry (see para 75 of his speech) that it is not necessary to show that all members of the social group in question are persecuted before one can say that people are persecuted for reasons of their membership of that group. But does the fact that the group must be identifiable by a characteristic or attribute common to all members of the group (see Gleeson CJ, Gummow and Kirby JJ in Applicant S v Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387, para 36) mean, as he suggests, that it is necessary that all members of the group should be susceptible to the persecution in question? If so, this requirement is likely to severely limit the utility of the family as a particular social group. It has not been satisfied in K's case. There is no evidence that any other member of her family is susceptible to the persecution of which she has a well founded fear.

…

44. I do not agree with the approach that the Court of Appeal took to this issue in Quijano. It is, of course, well established that the persecution which is feared cannot be used to define a particular social group: Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 264 per McHugh J. But this simply means that there must be some characteristic other than the persecution itself, or the fear of persecution, that sets the group apart from the rest of society. This may be because its members share a common characteristic other than their risk of being persecuted, or because they are perceived as a group by society. It is the latter approach that defines the family as a particular social group. Each family is set apart as a social group from the rest of society because of

the ties that link its members to each other, which have nothing to do with the actions of the persecutor.

45. It is universally accepted that the family is a socially cognisable group in society: UNHCR position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud, 17 March 2006, p 5. Article 23(1) of the 1966 International Covenant on Civil and Political Rights states that the family "is the natural and fundamental group unit of society and is entitled to protection by society and the State." The ties that bind members of a family together, whether by blood or by marriage, define the group. It is those ties that set it apart from the rest of society. Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the Refugee Convention

extends its protection.

46. In Applicant S v Minister for Immigration and Multicultural Affairs, paras 67-69 McHugh J was at pains to emphasise that it was a mistake to say that a particular social group does not exist unless it is always perceived as such by the society in which it exists. He said that it was not necessary that society itself must recognise the particular social group as a group that is set apart from the rest of that society, or that the persecutor or persecutors must actually perceive the group as constituting a particular social group. As he put it in para 69:

"It is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a 'uniting' feature or attribute, and the persons in that class are cognisable objectively as a particular social group."

In their judgment in paras 17-18 Gleeson CJ, Gummow and Kirby JJ appear to disagree with McHugh J in requiring recognition within the society subjectively that the collection of individuals is a group that is set apart from the rest of the community. My own preference, with respect, is for the more cautious approach of McHugh J that it would be a mistake to insist that such recognition is always necessary. I agree with him that it is sufficient that the asylum-seeker can be seen objectively to have been singled out by the persecutor or persecutors for reasons of his or her membership of a particular social group whose defining characteristics exist independently of the words or actions of the persecutor. That is as true in cases where the family is identified as the particular social group, as it was in that case where it was contended that the particular social group comprised young, able-bodied Afghan men.

47. The reasoning of the Court of Appeal in Quijano requires more of an asylum seeker who claims that the particular social group of which he or she is a member is the family than is required of those who claim that the persecution of which they have a well-founded fear is for reasons of race, religion, nationality or political opinion. It is, of course, critical to identify what lies at the root of the threat of persecution. But it is not necessary to show that everyone else of the same race, for example, or every other member of the particular social group, is subject to the same threat. All that needs to be shown is that there is a causative link between his or her race or his or her membership of the particular social group and the threat of the persecution of which there is a well-founded fear. The fact that other members of the group are not under the same threat may be relevant to an assessment of the question whether the causative link has actually been established. Especially in a case such as the present, where it is not suggested that any other member of the family is at risk of being persecuted for reasons of membership of the family, the evidence of causation will need to be scrutinised very carefully. But the mere fact that no other member of the family is in that position is not determinative.

...

51. For these reasons I would answer the questions which I posed earlier (see para 40) in this way. It is not necessary to prove that the primary member of the family of which the asylum seeker is also a member is being persecuted for a Convention reason. Nor need it be proved that all other members of the family are at risk of being persecuted for reasons of their membership of the family, or that they are susceptible of being persecuted for that reason. This approach has the advantage that it is unnecessary to identify all those who are, and those who are not, to be treated as members of the family for the purposes of article 1A(2). Questions as to whether it includes not only the asylum seeker's sisters but his cousins and his aunts too are avoided. It avoids the circularity that arises where what is said to unite persons into a particular social group is their common fear of persecution: see Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 per Dawson J at p 242, McHugh J at p 263.

52. In my opinion the UNHCR Guidelines on International Protection of 7 May 2002 state the position accurately in para 17:

"An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group."

Care is needed in applying this guideline to cases such as K's where it is contended that the family is a particular social group and the applicant is the only family member who is said to be at risk of persecution for reasons of his or her membership of the family. The question of causation in such cases is likely to be critical. In this case however the adjudicator was entitled to hold that the causative link had been proved by the facts which he found to have been established by the evidence.

...

58. I agree with this approach. I would avoid attempting to define the class so as to confine it to the persons who are likely to be persecuted. It is enough that it should identify the shared characteristic - the common denominator - within the wider group that reflects the reason why membership of it gives rise to the well founded fear. In Miss Fornah's case one can say that the wider group is composed of females in Sierra Leone. But it is the fact that she is an uninitiated indigenous female that would make her a member of a particular social group in Sierra Leone, for reasons of her membership of which she would be exposed to the risk of female genital mutilation if she were to be returned to that country.

LORD RODGER OF EARLSFERRY

73. A convenient summary of the approach which the case law suggests should be followed in identifying a particular social group for the purposes of the Geneva Convention is to be found in the opinion of Gleeson CJ, Gummow and Kirby JJ in Applicant S v Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387, 400, para 36:

"First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large."

BARONESS HALE OF RICHMOND

Particular social group

97. Not all persecution gives rise to a valid asylum claim. Very bad things happen to a great many people but the international community has not committed itself to giving them all a safe haven. People fleeing national and international wars, famine or other natural disasters are referred to as refugees, and offered humanitarian aid by the international community, but they do not generally fall within the definition in the 1951 Convention. Asylum can only be claimed by people who have a well-founded fear of persecution "for reasons of race, religion, nationality, membership of a particular social group or political opinion". Of these, "membership of a particular social group" has proved the most difficult to define, but is increasingly being used to push the boundaries of refugee law into gender-related areas such as domestic violence, enforced family planning policies, and FGM: see T. Alexander Aleinikoff, "Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group'" in UNHCR's Global Consultations on International Protection, ed Feller, Turk and Nicholson (2003), pp 263-311.

98. As the UNHCR Guidelines on Membership of a Particular Social Group (published on 7 May 2002, the same day as the Guidelines on Gender-Related Persecution) point out in paragraph 2,

"While the ground needs delimiting - that is, it cannot be interpreted to render the other four Convention grounds superfluous - a proper interpretation must be consistent with the object and purpose of the Convention. Consistent with the language of the Convention, this ground cannot be interpreted as a 'catch all' that applies to all persons fearing persecution. Thus, to preserve the structure and integrity of the Convention's definition of a refugee, a social group cannot be defined exclusively by the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group)."

The UNHCR's own Handbook is not particularly helpful. It says, at paragraph 77, that a particular social group "normally comprises persons of similar background, habits or social status". This reflects the understanding in 1951 that certain regimes might persecute former members of the landowning, capitalist or bourgeois classes. The recognition that gender may constitute a particular social group is more recent.

99. The 2002 Guidelines, drawn from the conclusions of the San Remo Expert Roundtable, which themselves drew heavily on a previous paper by Professor Aleinikoff, identify the two approaches which have dominated decision-making in common law countries. First is the "protected characteristics" approach, which identifies a group by reference to a uniting characteristic which is either immutable or so fundamental to human dignity that a person should not be compelled to change it: this stems from the approach taken in the United States in In re Acosta (1985) 19 I & N 211 and in Canada in Attorney General of Canada v Ward [1993] 2 SCR 689. Second is the "social perception" approach, which identifies a group by reference to a common characteristic which makes them a recognisable group and sets them apart from society as a whole: this stems from the Australian case of Applicant A v Minister of Immigration and Ethnic Affairs (1997) 190 CLR 225. Not surprisingly, of course, women, families and homosexuals can qualify as particular social groups under either approach; but the social perception approach might identify "set apart" groups based on a common characteristic which is neither immutable nor fundamental.

100. The UNHCR believes that the two approaches can be reconciled, and proposes the following definition in paragraph 11 of the Guidelines:

"A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be

one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."

The Guidelines go on to comment in paragraph 12 that

"It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men."

This is repeated in paragraph 30 of the contemporaneous UNHCR Guidelines on Gender-Related Persecution, also resulting from the conclusions of the San Remo Expert Roundtable, which in turn drew heavily upon a paper on "Gender-related Persecution" by Rodger Haines QC, Chairman of the New Zealand Refugee Status Appeals Authority. Paragraphs 30 and 31 continue:

". . . . Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries . . .

The size of the group has sometimes been used as a basis for refusing to recognise 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution. It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context."

101. Thus, while the Guidelines stop short of saying directly that women are always a particular social group, they do make it clear that if a woman is persecuted because she is a woman and women generally are assigned an inferior status in the society, she should qualify for recognition as a refugee.

102. Of course, much of the harm feared by women, including FGM, is perpetrated, not directly by the State, but by non-State agents. In paragraph 21, the Guidelines make another important point about the causal link ("by reason of") and the ground for the persecution:

"In cases where there is a risk of being persecuted at the hands of a non-State actor (eg husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established."

103. My Lords, each of the guidelines quoted above is consistent with, and in some cases directly derived from, the decision of this House in Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah [1999] UKHL 20; [1999] 2 AC 629. I believe that they represent the correct approach.

LORD BROWN OF EATON-UNDER-HEYWOOD

116. These two appeals raise questions as to the proper interpretation and application of just six words in an international treaty: six words (italicised below for convenience) in the definition of "refugee" in article 1A (2) of the 1951 Refugee Convention as someone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social

group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . ".

117. If someone fears persecution because of race, or religion, or nationality, or political opinion, he is entitled to asylum. All these concepts have been fully explored in the jurisprudence and widely interpreted as appropriate in an international treaty drawn up with broad humanitarian aims in mind. So too a person is entitled to asylum if he fears persecution because of his "membership of a particular social group". (It is only in relation to this category that reference to "membership" is necessary: in relation to religion, for example, the persecutor may be acting because of his own religious beliefs; his victim may have none.) What, then, is "a particular social group"? Notwithstanding that this too has been the subject of a very great deal of juridical and academic discussion around the world I was, I confess, intent at the conclusion of argument on these appeals on writing a full judgment of my own. Having now, however, had the advantage of reading the detailed opinions of each of my noble and learned friends (with all of whom I am in substantial agreement) I really cannot think that a fifth fully reasoned speech would contribute anything of value to an understanding of this issue. I content myself, therefore, with but four comments.

118. First, I entirely accept the definition of a particular social group contained in paragraph 11 of the UNHCR 2002 Guidelines as set out in para 15 of Lord Bingham's speech. The EU Council Directive 2004/83/EC (the Asylum Qualification Directive) and any Regulations brought into force under it will, I conclude, have to be interpreted consistently with this definition.

53.
In summary, in K & Fornah Lord Bingham derived the following principles from the legal authorities, including the Qualification Directive. (1) The Refugee Convention was not concerned with all cases of discrimination, only with persecution based on discrimination, the making of distinctions which principles of fundamental human rights regarded as inconsistent with the right of every human being. (2) To identify a social group the society of which it formed part had to first be identified; a particular social group might be recognized as such in one country but not in another. (3) A social group need not be cohesive to be recognized as such. (4) There could only be a particular social group if it existed independently of the persecution to which it was subject.

54.
Lord Bingham indicated that a particular social group may be formed either because its members share a characteristic which cannot or should not be changed (the protected characteristics approach) or because they are perceived as having a distinct identity by the surrounding society (the social perception approach). Lord Bingham noted EU Council Directive 2004/83/EC Article 10(d)(i) and (ii) which are effectively reproduced at Regulation 6(d)(i) and (ii) of the Qualification Regulations but said that if (i) and (ii) both had to be satisfied then the test in the Regulations was more stringent than was warranted by international authorities. He said that t he Qualification Directive should not be read as requiring both features to be present in order for there to be a social group for the purposes of the Refugee Convention. Either will do. I note that Lord Brown agreed with this approach. Lord Hope’s definition at [44] is also in line with this interpretation. Lady Hale cites the UNHCR guidelines at [100] and expresses no disagreement. Only Lord Rodger, in the passages cited, appears to require both an immutable characteristic and the need for society identity as a dual requirement by reference to the majority decision in the Australian High Court case of Applicant S . I t appears therefore that this decision goes beyond what the House of Lords said in Shah and Islam .

55.

Lord Bingham also noted the UNHCR's view that, whilst a social group could not be defined by the persecution, persecutory action towards a group might be a relevant factor in determining the visibility of the group in a particular society.

56.
Lord Rodger of Earlsferry adopted an Australian proposition that, while it is not necessary for all the members of a social group be persecuted before one can say that people are being persecuted for reasons of their membership of that group, it is generally necessary that all the members of the group should be susceptible to persecution. It was also said that that there was no requirement that the persecution be carried out by persons who were not members of the social group.

57.
The Upper Tribunal would, of course, be bound to follow the ratio of the House of Lords' decision in K & Fornah applying the well-recognised doctrine of judicial precedent. The views expressed in the House of Lords were not, however, part of the ratio of the decision; they were only obiter dicta. As obiter that doctrine does not apply but the Upper Tribunal (or indeed any other court) would, and should, be very reluctant not to follow the thought-out (but obiter) views of a majority of the House of Lords even though not bound by stare decisis to do so. I find there is clear, highly persuasive support in the majority's views in the House of Lords in K & Fornah and the clarification provided by the UNHCR to establish that the test for a PSG under the Refugee Convention is a disjunctive test:

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

58.
In relation to the Qualification Directive, in its comments on the proposed amendments to the Qualification Directive published as part of the consultation process, entitled ' UNHCR Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)', it is written:

6. Membership of a Particular Social Group (Article 10)

In determining whether an applicant can be considered a member of a "particular social group" for the purposes of the refugee definition, UNHCR welcomes the added requirement in Article 10 (1) (d) for gender-related aspects to be "given due consideration", combined with the deletion of the present statement that gender creates no presumption of membership of a group. This will strengthen the protection of women and girls in particular. In 2009, women and girls constituted 47% of the world's 983,000 asylum-seekers and 15.2 million refugees, [24] and 30.5% of all applicants in EU Member States. [25]

Nevertheless, the Article should further be amended to clarify the term "particular social group". Members of a particular social group may be subject to persecution for either real or ascribed characteristics: it is not necessary for the attributed characteristics to be factual. The term should also be interpreted in a manner open to the diverse and changing nature of groups in various societies and to evolving international human rights norms. [26] Two main schools of thought in international refugee law theory have emerged as to what constitutes a particular social group within the meaning

of the 1951 Convention and are reflected in the Directive. The “protected characteristics approach” is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to forsake it. The “social perception approach” is based on a common characteristic which creates a cognizable group that sets it apart from society at large. This means that people may require protection because they are perceived to belong to a group irrespective of whether they actually possess the group’s characteristics. While the results under the two approaches may frequently converge, this is not always the case. To avoid any protection gaps, UNHCR therefore recommends that the Directive permit the alternative, rather than cumulative, application of the two concepts.

Recommendation: UNHCR recommends amending Article 10 (1) (d) to replace “and” at the end of the first subsection with “or”. This will clarify that a person requires protection both in cases where he or she is a member of a particular group and in cases where he or she is perceived to be such.

24 UNHCR, 2009 Global Trends Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless

Persons , Division of Programme Support and Management, 15 June 2010, at: http://www.unhcr.org/4c11f0be9.html .

25 Eurostat, 2009.

[26] See also UNHCR, Guidelines on International Protection: Membership of a Particular Social Group Within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02, para. 12, at: http://www.unhcr.org/refworld/docid/3d36f23f4.html .’

59.
The difficulties created by the use of “and” are therefore not mere semantics but can give rise to protection gaps which is contrary to the obligations of signatories to the Convention. Lord Bingham in K & Fornah also stated in reference to Article 10(1)(d) of the Qualification Directive “ If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority. In its published Comments on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met”.

60.
In 2009 the European Commission published a report entitled “DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted”, in which it is identified as a main problem that the original minimum standards adopted are vague and ambiguous and as a result they are insufficient to secure full compatibility with the evolving human rights and refugee law standards, they have not achieved a sufficient level of harmonisation, and they impact negatively on the quality and efficiency of decision-making.

61.

The same conclusion was drawn with respect to the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status ("Asylum Procedures Directive").

62.
At paragraph 3 of the report it is written:

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Summary of the proposed action

The main objective of this proposal is to ensure

– **higher protection standards** regarding both the grounds and the content of the protection in line with international standards, and in particular in order to ensure the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967 ("Geneva Convention") and full respect for ECHR and the EU Charter of Fundamental Rights ("EU Charter"); and

– **further harmonisation of protection standards** in order to reduce secondary movements in so far as these are due to the diversity of national legal frameworks and decision-making practices and to different levels of rights provided in different Member States.

63.
The 'main objective' was equally as applicable to Council Directive 2004/83/EC and the introduction of an additional requirement into Article 10(1)(d) of the Qualification Directive is arguably an introduction of a barrier to protection and an act contrary to the full inclusive application of the Refugee Convention.

64.
In relation to Mr Diwnycz's submission in relation to the immutable characteristic argument, there is merit in a submission this will restrict the potential scope of this PSG if such issue becomes determinative, as the effect of limiting refugee protection to persons with an innate or immutable disability and the likely limiting of the group of mentally disabled who may qualify for refugee status, may only reflect the protected characteristics approach . To be 'immutable' the mental health issue would have to be one where members of the PSG share a common characteristic which an applicant for protection cannot change.

65.
The difference is highlighted in the approaches adopted. As currently drawn, the Qualification Directive requires a decision maker to first consider whether there is a common characteristic which can be an innate characteristic, or a common background that cannot be changed, or a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. If this is found to exist on the facts the decision maker is then required to consider whether the person or persons in that group possessing the common characteristic has a distinct identity in the relevant country perceived as being different by the surrounding society. It is only if both elements are taken together that a person's claim may constitute one of the five grounds for international protection; belonging to a PSG. The cumulative approach means that the two criteria outlined above, respectively 'common characteristics' and 'distinct identity', both need to be met. In other words, it is not sufficient to establish that the group share certain characteristics or background or beliefs, this must, at the level of the group, also be visible for others so that the group is identified

as being different. As noted above UNHCR does not apply a ‘cumulative approach’ as their policy is that one of the two elements is sufficient.

66.
The CJEU in X,Y,Z v Minister voor Immigratie en Asiel (C-201/12), intervening parties:

Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen (C-199/12 to C-201/12), at [44-45] note:

44 Article 10(1) of the Directive gives a definition of a particular social group, membership of which may give rise to a genuine fear of persecution.

45 According to that definition, a group is regarded as a ‘particular social group’ where, inter alia, two conditions are met. First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

67.
Whilst the above correctly recites the text of Article 10, which is not in dispute, there is no discussion of whether the same is compatible with the Refugee Convention. In reality the approach to the definition of membership of a PSG in the Qualification Directive does not accurately reflect international refugee law at least as understood by the majority of the House of Lords in their obiter comments.

68.
In accordance with the objective of the Refugee Convention, the concept of a PSG should be interpreted in an inclusive manner by determining that it exists on the basis of either an innate or common characteristic of fundamental importance i.e. the protected characteristics approach (‘ejusdem generis’) or social perception, rather than requiring both.

69.
The European Council on Refugees and Exiles (ecre) also recommends that Member States for the purpose of defining a PSG apply the protection characteristics approach and social perception test alternatively instead of cumulatively.

70.
There is a fundamental need for consistency and clarity in decision making when dealing with the question of international protection. Signatories to the Refugee Convention are prohibited from applying stricter criteria but can grant more generous terms. The Qualification Direction also repeats this restriction which specifically enforces the fact that the purpose of the Directive is to set minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Although the European Union can make its own provisions in relation to granting international protection those provisions, such as those in the Directive, cannot provide less protection than that recognised in the Refugee Convention as clarified by the UNHCR.

71.
The Directive also recognises that consultation with the UNHCR may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention,

that minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention and that it is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention, all suggesting a close relationship and common approach to the test to be applied to ascertain if a person is entitled to refugee protection.

72.
Despite this there is a clear impermissible divergence. I find that the correct manner in which Article 10(1)(d) and related Regulations should be interpreted is by replacing the word “and” appearing between Article 10(1)(d)(i) and (ii) with the word “or”, creating an alternative rather than cumulative test.

73.
Care also needs to be taken in relation to both the Refugee Convention and Qualification Directive not to lose sight of the main purpose of the two provisions which is to protect persons from being persecuted.

74.
Even if a person is able to satisfy the ‘alternative’ definition they will not, without more, be entitled to a grant of international protection. The mere fact of being a member of a PSG is not sufficient to qualify for refugee status. Once membership of a PSG has been established, the next step is to examine the existence of a nexus between such membership and the individual’s fear of persecution, or absence of protection. The nexus between the membership of a PSG and the fear of persecution coming from either the acts of persecution or absence of protection is essential and is a question of fact in each case.

75.
Whilst some argue persecution is the key and not what constitutes a protected ground, such as being a member of a PSG, the Refugee Convention and Qualification Directive require a person claiming the benefit of the same to establish a causal link between a protected characteristic and the persecutory acts. In this way the category of those entitled to relief is limited to those said to be most in need. Not all those who face serious harm are entitled to be recognised as a refugee.

Mental Health and membership of a PSG

76.
Although the Refugee Convention does not specifically make reference to people with mental disabilities there is merit in the submission the “social group” category is a broad and flexible concept that should be read expansively and which can include a category of person who faces a real risk of treatment sufficient to amount to persecution as a result of their suffering serious mental health issues for which it is proved the returning state is unable to provide adequate facilities to manage the health issues in a way which reduces any such risk of persecutory treatment to below the Horvath standard, to which the applicant will have access.

77.
If those with a mental disability, as a community, share a common characteristic or are perceived as a distinct group by society, they should qualify as a PSG under the Refugee Convention. The fact such can be included is not disputed by Mr Diwnycz, in principle.

78.

People with mental disabilities can be said to share a common uniting characteristic that sets them apart from those within society who have no such concerns. People diagnosed as having a mental disability, such as schizophrenia, for example, form a cognisable group in terms of their particular social and medical status. Whether they are treated as a cognisable group is a question of a fact in each case. In many societies a person with a mental disability will suffer no adverse reaction from the society in which they live unless their behaviour, brought about as a result of their mental illness, causes them to transgress social norms or accepted rules of social conduct. In this appeal it is the appellant's disinhibited behaviour as a result of his mental health issues which give rise to a real risk on return to Afghanistan.

79.
Whilst I refer above to 'serious mental illness' I accept the key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering a lesser degree of illness may also face a real risk. This requires a fact specific assessment depending upon the nature of the illness, how it manifests itself, and country conditions. It is also the case that many problems experienced by those suffering mental health issues are as a result of ignorance grounded in a lack of understanding of an individual's mental health problems and how the same will, ordinarily, manifest themselves.

80.
The evidence made available fails to establish there is a clear consensus regarding the cause of mental disabilities. There are five recognised models of mental health being behaviourism, biological, psychodynamic, cognitive, and humanistic. The medical model is a model of health which suggests that disease is detected and identified through a systematic process of observation, description, and differentiation, in accordance with standard accepted procedures, such as medical examinations, tests, or a set of symptom descriptions. Such a model enables a clear diagnosis of the nature of a person's mental illness by reference to established norms, treating mental disabilities as illnesses in the same manner that physical disabilities are illnesses.

81.
The biomedical model assumes that depression originates from a physiological abnormality within the brain and there is no significant dissimilarity between mental and physical diseases (Andreasen, 1985). This model may make it more difficult to precisely 'label' the cause of a person's presentation even though they are clearly suffering mental illness.

82.
The medical model is more in line with the "immutable characteristics" approach to refugee determination. The essential element of the psychosocial model is the cumulative effect of environmental stressors on the individual in question and not a particular "innate" biological quality. This, arguably, makes it more difficult to identify an immutable characteristic. The issue is further complicated in that some mental disabilities may have a genetic or biological cause which makes the disability in question "immutable."

83.
The UN Convention on the Rights of People with Disabilities 2006 tends towards the social model with this definition:

'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

84.
A person may suffer serious mental illness which is innate, i.e. a characteristic already present when they are born, or which has been developed since. That illness may also be immutable.

85.
There is nothing fundamentally wrong in law in the Secretary of State asking for proof of the existence of the mental health issues of an individual who is claiming a right to international protection as a result of facing a real risk as a result of their mental health problems, and any resultant persecution. Proceedings before the Immigration Tribunals in the UK are adversarial by nature in which a party claiming an entitlement to international protection is, as a general rule, required to prove such entitlement.

86.
Depending on personal circumstances there is nothing preventing a finding being made that persons living with disabilities, including mental health issues, can be considered as either sharing an innate characteristic, or as sharing a common background that cannot be changed. This is a fact specific question. A person unable to secure a firm diagnosis of the nature of their mental health issues cannot be denied the right to international protection just because a label cannot be given to his or her condition, especially in a case where there is a satisfactory explanation for why this is so, as in this case. Most treatments in the mental health sector require a medical diagnosis to enable a doctor to prescribe a course of treatment to enable that person to function as best they can. If no treatment is available the condition remains present and cannot be changed and is likely therefore to be immutable.

87.
Mr Bandegani submitted that whilst the issue of possible future treatment may be thought relevant to the question how people with mental or physical disabilities are perceived or treated by society in their home countries, it must always be noted (a) the existence of a healthcare system will usually say very little about how society views or treats the PSG, and/or whether the state discriminates against them generally and/or is willing to protect them i.e. there may still be deeply-embedded institutional and social stigma and discrimination against the group regardless of, for example, the existence of a hospital; (b) the specific treatment required may not in fact be available, accessible, affordable, or adequate in any event; (c) the form that treatment takes in the country in question may itself give rise to a real risk of persecution, serious harm, or other human rights breaches (including flagrant breaches) such as being detained, isolated, chained, caged, beaten, or experimented upon. As general observations this must be correct but whether such factors exist and their impact is, again, fact specific.

88.
Depending on the specific context in the country of origin and on personal circumstances, persons living with a serious mental illness may be perceived as being different by the surrounding society and thus, have a distinct identity in their country of origin. This is a fact specific assessment.

89.
It is also the case that an appellant needs to establish that members of a PSG of ‘persons living with a disability/mental health issues’ will be exposed to acts of persecution, including severe violations of human rights from which there is no effective protection.

90.

In relation to the Actors of Protection, under The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, Regulation 4 states:

(3)
In deciding whether a person is a refugee or a person eligible for humanitarian protection, protection from persecution or serious harm can be provided by:

(a) the State; or

(b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.

(4)
Protection shall be regarded as generally provided when the actors mentioned in paragraph (1)(a) and (b) take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the person mentioned in paragraph (1) has access to such protection.

(5)
In deciding whether a person is a refugee or a person eligible for humanitarian protection the Secretary of State may assess whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph (2).

91.
Of particular relevance to a person with mental health issues is the assessment of additional risks. In AW (sufficiency of protection) Pakistan [2011] UKUT 31(IAC) the Tribunal held that (i) At paragraph 55 of Auld LJ's summary in Bagdanavicius [2005] EWCA Civ.1605 it is made clear that the test set out in Horvath [2001] 1 AC 489 was intended to deal with the ability of a state to afford protection to the generality of its citizens; (ii) Notwithstanding systemic sufficiency of state protection, a claimant may still have a well-founded fear of persecution if authorities know or ought to know of circumstances particular to his/her case giving rise to the fear, but are unlikely to provide the additional protection the particular circumstances reasonably require (per Auld LJ at paragraph 55(vi)); (iii) In considering whether an appellant's particular circumstances give rise to a need for additional protection, particular account must be taken of past persecution (if any) so as to ensure the question posed is whether there are good reasons to consider that such persecution (and past lack of sufficient protection) will not be repeated.

92.
Mr Bandegani argues the Tribunal should adopt the "social perception" test which requires the decision maker to establish whether the PSG is "cognisable" as a group, viewed objectively in terms of the relevant society, i.e. that the PSG is defined by external perceptions and is set aside from society, which requires an objective assessment in light of country conditions and attitudes and that a person's mental or physical disability may meet either limb of Article 10 of the Qualification Directive or both, which I accept must be correct in principle. Whether it does is a question of fact.

93.
I find therefore, to the extent that a person with a serious mental disability can prove that there is a real risk of mistreatment, sufficient to constitute "persecution," that they are being "persecuted" on account of their mental disability, and that their country of origin is either the agent of persecution or

is unwilling or unable to offer protection. States who are a party to the Refugee Convention or Qualification Directive should recognize that the mentally disabled qualify for refugee protection.

94.
In Fornah at [13] Lord Bingham reiterated, by reference to the decision of their Lordships in Shah and Islam at [pp 651, 656], that:

“the Convention is concerned not with all cases of persecution but with persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being”

95.
Mr Bandegani summaries his position in his written submissions when asserting that persons with mental or physical disabilities can in principle form a particular social group by reference to:

i.
The correct approach to interpreting the Refugee Convention;

ii.
The principles controlling how to define a PSG;

iii.
The recognition of disability as a protected characteristic in international law;

iv.
The correct approach to the question of what is a PSG applying binding authority i.e. Fornah, specifically that (a) there can be no objection based on group size: (b) a PSG can exist, albeit not all members are at risk; (c) the principle that the PSG cannot be defined solely by reference to the feared persecution is subject to the important qualification that acts of persecutors can be relevant and can create a (societally-recognised) PSG, provided that the PSG is not defined exclusively by reference to the persecution, and (d) cohesiveness is not a requirement for the existence of the group; see also the UNHCR PSG Guidelines;

v.
The approach taken by common law countries including: South Africa, New Zealand, Canada, the USA, and Australia;

vi.
The question (a) whether the person with mental or physical disabilities faces a real risk of persecution, and/or (b) whether the real risk of persecution is “by reason of” is membership of the PSG are distinct questions that form part of the decision maker’s overall assessment of whether the person is a refugee, not whether the person is a member of a PSG; see also the UNHCR PG Guidelines;

vii.
Binding authority (Fornah) to the effect that Art 10 of the Qualification Directive must be read disjunctively not conjunctively (or not necessarily so) in order to give effect to the autonomous meaning and humanitarian underpinning of the Convention. That is buttressed by (a) the position of the UNHCR; and (b) the line of UTIAC cases applying Fornah ; and (c) the UTIAC decision of DZ. By corollary, those UTIAC decisions that depart from precedent through a literal textual analysis of the Qualification Directive are wrong and should not be followed.

and more specifically:

As Lady Hale emphasised in Fornah at [107], this is “a global appraisal in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose”.

96.
Decisions arising within other common law jurisdictions include:

South Africa: A ‘particular social group’ is defined in the Refugees Act 1998 (South Africa), ch. 1, s. 1(xxi). Social group “includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste’;

New Zealand: The Immigration and Protection Tribunal held that albinism is an characteristic which is beyond the power of the appellant to change. It is an internal defining characteristic which serves to define the group independently of the persecution: AC (Egypt) [2011] NZIPT 800015 (25 November 2011), [111]. Whilst albinism is not necessarily a disability, the point is that it is treated as such in some countries. Albinos are properly considered a particular social group in Egypt;

The United Kingdom: Albinism is also treated as a PSG too: JA (child - risk of persecution) Nigeria [2016] UKUT 00560 (IAC);

Canada: In Canada, PSGs based on physical and mental disability have been easily recognised. In Ampong v Canada (Minister of Citizenship and Immigration) 2010 FC 35, 87 Imm LR (3d) 279 at [43]19 the court held the executive decision to be unreasonable as: “The 2007 Survey on Health in Ghana says that persons with a disability are estimated to make up approximately 10% of the population of Ghana. As a result, it is certainly possible that the Applicant may belong to a particular social group in Ghana which is discriminated against to the point of persecution, either based on discrimination in the delivery of health care, or the cumulative effects of other sorts of discrimination, including “multiple discrimination, from the home, the community and society at large and in terms of allocation of resources and opportunities”;

In Liaqat v Canada (Minister of Citizenship and Immigration) 2005 FC 893,20 the appellant was diagnosed with schizophrenia and depression. At [13] he submitted mental illness is an innate and unchangeable characteristic. The Federal Court of Canada at [29] accepted the applicant’s submission that: “mental illness is an innate and unchangeable characteristic’, and that ‘even though its severity may fluctuate with treatment, the psychotic depression is a fundamental underlying feature of the Applicant’s psychological condition’. In Liaqat , the court noted that the Canadian Government: ‘appears to concede that the Applicant is a member of a particular social group because of his mental illness and I am in agreement with the Respondent’; Liaqat was followed by the Immigration and Refugee Board (Refugee Protection Division), in TA5-11242, 9 March 2007, at [8], [11]. It was also followed in X (Re), 2010 Can LII 97274 (CA IRB). At [12], the panel accepted: “that people who are diagnosed with schizophrenia form a particular social group”21;

The USA: Several circuit courts have recognised disability as a PSG. In Tchoukhrova v Gonzales , 404 F. 3d 1181, 1189 (9th Cir., 2005),22 the Ninth Circuit noted, at [2] and [3], that: “persons with disabilities are precisely the kind of individuals that our asylum law contemplates by the words “members of a particular social group. While not all disabilities are “innate” or “inherent,” in the sense that they may be acquired, they are usually, unfortunately, “immutable.” Id. at 1087, 1093; see also Americans with Disabilities Act of 1990, Pub. L. No. 101-336 § 2(a)(7) codified at 42 U.S.C. §

12101(a)(7) (“[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness ... based on characteristics that are beyond the control of such individuals ....”). Because disability constitutes precisely the sort of “immutable characteristic” that an individual “cannot change,” as contemplated by our law, we have no trouble concluding that persons with disabilities can constitute a “particular social group” for purposes of asylum and withholding of removal law;

Similarly, in Kholyavskiy v Mukasey , 540 F. 3d 555, 573 (7th Cir., 2008), the Seventh Circuit accepted that the applicant’s mental illness was an immutable characteristic and hence capable of constituting a PSG:23. As noted above, the IJ and the BIA determined that Mr. Kholyavskiy's mental illness did not place him in a particular social group because his mental illness was not an "immutable" trait—a conclusion which finds no support in the record. The BIA did not consider whether, if the illness were "immutable," Mr. Kholyavskiy's condition would qualify him for membership in a particular social group”;

Further, the INS (as it then was) has recognized that ‘[i]n certain circumstances (…) persons with HIV or AIDS may constitute a particular social group under refugee law’ (Karouni, 399 F. 3d 1163, 1171 (9th Cir., 2005));

Australia: Based on the ‘social perception’ test the Refugee Review Tribunal in 0807028 [2009] RRTA 720 (11 August 2009) held at [116]:24 “The Tribunal accepts that people with a psychological or mental illness comprise a group which is identifiable by a characteristic or attribute common to all members of the group. That common attribute or characteristic is the condition of psychological or mental illness. The possession of this characteristic is capable of distinguishing the group from society at large. It follows, with reference to the judgment in Applicant S extracted above, that people with a psychological illness may comprise a particular social group within the meaning of the Convention. It remains for the

Tribunal to consider whether the applicant has a well-founded fear of persecution for reason of his membership of the particular social group of people with a psychological or mental illness”;

Disability was accepted as the basis of a PSG in Tonga: 1001704 [2010] RRTA 407 (19 May 2010).

97.
The observations of Lord Brown in Fornah at [121] are apposite: “It would be most unfortunate if the jurisprudence of the United Kingdom (out of step with that of most enlightened countries) were available to support a narrow view of the Convention’s protective reach.”

The appeal of DH

98.
It is not disputed that the appellant in this appeal suffers from serious mental health issues and lacks litigation capacity.

99.
The appellant produced for the purposes of the appeal hearing a number of medical reports including an addendum report written by Dr Thomas, a Consultant Clinical Psychologist, dated 28 April 2019 in which the ‘Summary and Conclusion’ section reads:

90. [DH] remains at re-examination a manner presenting in a significantly chaotic and disturbed manner. Whilst at substantive assessment in 2015 it was impossible to ascertain clearly whether this was merely due to his external situation of street homelessness, reassessment when he is no longer homeless and in the context of further documentary evidence, makes it clear that his concrete preoccupations with money, property, a girlfriend etc. forms more a picture of psychiatric disturbance than mere environmental privatisation.

91. Whilst the precise nature of [DH] psychiatric disorder cannot, in my view, be accurately described currently due to his considerable capacity issues, I consider it clear that he is suffering from a number of psychotic as well as manic symptoms. His symptoms of Thought Disorder and Delusional Beliefs I consider were particularly prominent in this assessment. I also consider that [DH] continues to manifest with significant dissociative defensive phenomena to avoid facing the pain of his past and current situation.

92. I again consider [DH] psychiatric presentation in this assessment to be plausible, consistent with psychological research evidence and the Istanbul Protocol and that it would have been extremely difficult to fabricate to a trained mental health professional.

93. I do not consider that [DH] currently has capacity according to the Mental Capacity Act of 2005 and concluded that he lacks the capacity to litigate currently in addition to lacking capacity to manage many aspects of his daily life and functioning. He requires both mental health treatment and medication and a litigation friend to manage his current legal proceedings. He does not have capacity to give evidence.

94. In the event [DH] is removed from the UK now, I anticipate that he will be at risk of further psychiatric deterioration for a number of reasons, largely relating to lack of capacity (e.g. to work, find accommodation, be self-supporting, seek social support). I also anticipate that, based on information I have been given, he may be at increased risk in Afghanistan, if this information is correct, due to his disinhibition and likelihood of presenting himself as being westernised.

100.
A further addendum report has been provided written by Dr Lisa Wootton, a Consultant Forensic Psychiatrist, dated 1 February 2019. In Section 9 of that report, headed “Opinion and Recommendations”, Dr Wootton writes:

I have been instructed to address the following questions:

Q1 The questions I have been instructed to answer is whether [DH] has capacity to instruct solicitors in his asylum appeal, bearing in mind the high threshold and taking into account:

•
He was found during his recent inpatient admission to have no diagnosable mental illness.

•
He has some practical abilities, such as being able to travel from Leeds to London alone (with tickets booked for him and telephone guidance and his success was on the second attempt).

a)

I remain firmly of the view that [DH] does have a mental illness. In addition to the evidence and concerns from various professionals which I have listed in my previous reports I think there is also evidence from his recent admission that he has a mental illness.

b)
I have gone through the notes from his admission in section 4 and include some footnotes there. I would like to highlight:

i)
12 September 2018, he was referred by Tracey Webb (social worker/AMHP/Adult Social Care) who thought his presentation was abnormal, she noted thought disorder and pressure of speech as well as other abnormalities in his presentation. She thought he might have schizoaffective disorder. She was concerned about risk and she thought he needed assessment by the Community Mental Health Team.

ii)
20 September 2018, Dr Robinson (Section 12 Doctor) noted pressured speech and formal thought disordered and wondered if he had hallucinations. Their working diagnosis was " psychotic illness" and she completed a recommendation for admission under Section 2 of the Mental Health Act 1983 (as amended).

iii)
22 September 2018, Ms Gregory (Approved Mental Health Professional) carried out a joint assessment with Dr Alderson (Section 12 Doctor) and they concluded he had thought disorder and should be admitted under Section 2 for assessment. They also assessed him as "clearly" lacking capacity to consent to admission. (The same document indicates that his public protection officer does not think he understands the police's role and his solicitor does not think he understands her role.) On admission he was documented to be thought disordered and preoccupied. Dr Ahmed (Foundation Year 2) also documented pressured speech and thought disorder.

iv)
23 September 2018, he was thought to be responding to hallucinations.

v)
24 September 2018, he was thought to be responding to hallucinations. He was seen by two doctors who thought he was thought disordered and had limited insight.

vi)
25 September he was thought to be responding to hallucinations. He thought he was admitted because he was taking cigarettes from the bin.

vii)
29 September he was thought to be responding to hallucinations.

viii)
2 October 2018, it remained difficult to follow his train of thought but this was now put down to language problems, his speech was described as pressured and he was described as agitated.

c)
I would like to take this opportunity to review some of what was written about [DH] in his social service notes as I think this highlights the ways in which his presentation has changed:

i)

“[DH] described as an active and sociable young person who has built up friendships with other residents and local people.”

He is now completely isolated with no friends or support network.

ii)
“[DH]” is described as being polite and has a desire to learn new things and is willing to listen to advice. He presents as being a well balanced and mature young person, who is realistic about what support is available to him.”

He is now disinhibited, difficult to interrupt and I do not think anyone would describe him as polite. He does not listen to others or show an ability to learn and he does not listen to advice or take in advice he is given. He is not able to understand the roles of those helping him and the support they are offering.

iii)
“He has ambitions to go on to university and is a diligent student.”

It is impossible to imagine him as capable of going to university at the current time and his cognitive assessment put him in the learning disability range.

iv)
“[DH] is coping well with the change of culture and has friends who share his culture. He does not need an advocate.”

He does not have any friends now either from his own cultural background or from other cultural backgrounds. He has been assessed in lacking incapacity.

v)
“[DH] has demonstrated that he has good budgeting skills and can look after his own needs independently.”

He has become homeless and needs support with attending appointments and is not able to find his way around easily or proficiently.

d)
While I accept that his presentation may be atypical, I do not accept that he does not have a mental illness. I have outlined his symptoms and the concerns of other professionals in my previous reports. A total of four psychiatrists were of the view that he needed admission under the Mental Health Act 1983 (amended) for assessment: Dr Aikaterini Papaspirou (Consultant Forensic Psychiatrist), Dr Robinson (Section 12 Doctor) Dr Alderton (Section 12 Doctor) and me. I have gone through the notes from that admission (when he was deemed not to have a “diagnosable mental illness”) carefully in section 4. It appears clear to me that he did present with symptoms during that admission which were documented by a multitude of professionals including doctors. His symptoms during the admission included thought disorder, pressured speech and hallucinations which would support a diagnosis of mental illness. Dr Mahmood (Consultant Psychiatrist) concluded he did not have a mental illness. However, Dr Mahmood does not appear to have had/considered all of the relevant information. In particular he does not appear to have been aware of the reports of him being observed to appear to be responding to hallucinations. In addition he does not appear to have considered what could have caused the marked decline in [DH] mental state from the time of the social services notes to the time of his admission. Of more concern, he appears to have attributed [DH] admission to [DH] seeking

secondary gain in the form of avoiding attending court and getting help with his legal and financial problems (see entry on 01 October 2018). This seems a ludicrous suggestion given [DH] did not want to be admitted to hospital and had to be detained under the Mental Health Act 1983 (as amended) in order to enable his admission. In addition it is well established that [DH] asks everyone to help with his legal and financial problems and has been concluded to be reflection of his lack of understanding and disorganised thinking. I think he would now benefit from a trial of treatment with antipsychotic medication (which he has never had) in order to assess his response to treatment.

e)
Irrespective of whether he has a "diagnosable mental illness", he can still lack capacity. The criteria for the Mental Capacity Act (2005) is an impairment of all disturbance in the functioning of, the person's mind or brain. In this case this could be due to individual symptoms such as thought disorder as indicated on the capacity assessment compiled by Dr Alderton (22 September 2018).

f)
Capacity is also decision specific and therefore, it is possible to have capacity in one area but not in another. Therefore, he may have capacity to make decisions about travel and where to live but not in relation to his asylum appeal case. I accept that he does have some practical abilities. However, I do not think these should be overestimated. I note that he is no longer managing to live independently and is currently homeless. The reasons for this are unclear and therefore I cannot comment on them. He is able to travel to London but he is not able to travel by the most direct route. He was able to explain about his September 2018 offence and punishment. He was able to tell me his daily routine, in which she accesses services from a couple of places. Despite these abilities, a number of people have expressed concern about his capacity in a number of other areas (for example his capacity to consent to admission to hospital capacity to understand his obligations in relation to the Sex Offenders Register). I cannot comment on his ability to participate in a criminal hearing that took place in or around 13 September 2018 as I do not have the details of this.

g)
When I assessed him on 23 January 2018, I found his mental state to be grossly abnormal. He was overfamiliar (trying to give me a hug), he had pressure of speech and he was extremely thought disordered. I also think he had auditory hallucinations although he does not describe them as such (because he lacks insight).

h)
In terms of the specific assessment of his capacity to conduct these proceedings (and bearing in mind the high threshold):

i) is there an impairment of all disturbance in the functioning of, the person's mind or brain?

Yes, there is a disturbance in the functioning of his mind. He has been assessed as being cognitively impaired. He has pressure of speech, thought disorder, disinhibition and likely hallucinations. I still think this is most likely to be schizoaffective disorder.

ii) [DH] was not able to explain to me the details of his asylum appeal case. He did not appear to have retained information he had previously been given about his case. Although I tried to discuss his case with him and give him information, he remained focused on a limited range (of sometimes irrelevant) subjects and was repetitive in relation to these. He was often unable to provide coherent and relevant answers to my questions. It was very difficult/impossible to have a reciprocal and meaningful dialogue

with him. He was not able to take in any new/relevant information and weigh it against his own preoccupations.

iii) It is therefore my opinion that [DH] is unable to understand the necessary information about these proceedings in order to make decisions. He does not appear to have retained the information he has been given about the proceedings. He is not able to weigh this information. He also has significant difficulties with communication (due to his pressured speech and thought disorder). His problems were so significant when I saw him that I did not think he could give any meaningful instructions. With assistance he is able to be consulted but only in a very limited capacity and not the necessary extent.

iv) I conclude he lacks capacity to conduct of these proceedings.

v)
Irrespective of him lacking capacity effort should be made to involve him in the process and to establish his wishes as much as possible.

101.
In a case such as this where there is no specific diagnosis but in which the appellant clearly has a serious mental illness it will be contrary to the purpose of the Refugee Convention to say this defeats his claim. The reason the medical experts have been unable to engage with the appellant and conclude such a diagnosis is as a result of his mental health problems. The above UNHCR definition makes the innate immutable characteristic test part of the assessment but does not exclude a person from the benefit of protection if, for understandable reasons, an immutable characteristic cannot be established but they are able to satisfy other aspects of the test.

102.
Persons with mental disabilities can fall within the “social group” category and, thus, should qualify for refugee protection if they face a real risk of “persecution” on account of their disability from which the state cannot or will not provide protection. This is a fact sensitive question.

103.
The appellant also relied on the written opinions of three country experts. According to the country expert, Dr Mehdi Hakim:

7.1 A’s mental health challenges and history of sexual disinhibition and alcohol/drug abuse raise the likelihood of A being charged. The kind of sexually inappropriate behaviour which led to his convictions in 2016 and 2018 in the UK means he could be imprisoned for six months. Whilst the penal code contains provisions limiting criminal responsibility in the case of people who lack mental capacity [94], practice may be different. There is a reasonable degree of likelihood of A being beaten up [95];

7.2 Some transgressions such as drinking alcohol are dealt with according to interpretations of Islamic law which can result in floggings [95];

7.3 There is strong social stigma attached to mental illness and it is sometimes attributed to being possessed by demons, leading to individuals being chained up or locked in a cage [95];

8. According to the expert report of Dr. Ritu Mahendru:

7.1 Afghan society holds deeply-embedded stigma and discrimination against individuals with mental health problems [96];

7.2 There is a lack of institutional protection [96];

7.3 From her experience of working in Afghanistan men who perform any kind of

sexual act in public, including masturbation and fondling of body parts, would be at high risk of physical violence from mob mentality [96]; In Afghanistan, she witnessed men with mental health problems being pelted with stones in broad daylight [96].

104.
In this appeal as a result of DH's mental health, the acceptance by Mr Diwnycz of the manner in which that manifests itself in his actions, country guidance case law for Afghanistan, acceptance of the consequences for DH if he acts in the manner he has in the UK on return to Afghanistan (where his mental health will deteriorate further), the acceptance that the ill treatment DH is likely to experience will satisfy the definition of persecution from which there is a lack of effective protection or treatment for the appellant in Afghanistan, I find the answer to the question posed by Mr Bandegani, whether the appellant is a member of a PSG as a result of his mental health who is the subject of prohibited treatment due to the same, who will face a real risk of encountering such treatment on return to Afghanistan, such as to entitle him to be recognised as a refugee, is "yes". Accordingly the appeal is allowed on asylum grounds.

Decision

105.
I remake the decision as follows. This appeal is allowed.

Anonymity.

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……

Upper Tribunal Judge Hanson

Dated the 3 June 2020

Annex A

Distr.

UNHCR
The UN Refugee Agency GENERAL

HCR/GIP/02/02
7 May 2002

Original: ENGLISH

GUIDELINES ON INTERNATIONAL PROTECTION:

"Membership of a particular social group" within the context

of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees , and Article 35 of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol . These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992). They further supersede IOM/132/1989 – FOM/110/1989 Membership of a Particular Social Group (UNHCR, Geneva, 12 December 1989), and result from the Second Track of the Global Consultations on International Protection process which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field.

“Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees

I. INTRODUCTION

1. “Membership of a particular social group” is one of the five grounds enumerated in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (“1951 Convention”). It is the ground with the least clarity and it is not defined by the 1951 Convention itself. It is being invoked with increasing frequency in refugee status determinations, with States
having recognised women, families, tribes, occupational groups, and homosexuals, as constituting a particular social group for the purposes of the 1951 Convention. The evolution of this ground has advanced the understanding of the refugee definition as a whole. These Guidelines provide legal interpretative guidance on assessing claims which assert that a claimant has a well-founded fear of being persecuted for reasons of his or
her membership of a particular social group.

2. While the ground needs delimiting—that is, it cannot be interpreted to render the other four Convention grounds superfluous—a proper interpretation must be consistent with the object and purpose of the Convention. [1] Consistent with the language of the Convention, this category cannot be interpreted as a “catch all” that applies to all persons fearing persecution. Thus, to preserve the structure and integrity of the Convention’s definition of a refugee, a social group cannot be defined exclusively by the fact that it is targeted for persecution (although, as discussed below, persecution may be a relevant element in determining the visibility of a particular social group).

3. There is no “closed list” of what groups may constitute a “particular social group” within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of
groups in various societies and evolving international human rights norms.

4. The Convention grounds are not mutually exclusive. An applicant may be eligible for refugee status under more than one of the grounds identified in Article 1A(2). [2] For example, a claimant may allege that she is at risk of persecution because of her refusal to wear traditional clothing. Depending on the

particular circumstances of the society, she may be able to establish a claim based on political opinion (if her conduct is viewed by the
State as a political statement that it seeks to suppress), religion (if her conduct is based on a religious conviction opposed by the State) or membership in a particular social group.

II. SUBSTANTIVE ANALYSIS

A. Summary of State Practice

5. Judicial decisions, regulations, policies, and practices have utilized varying interpretations of what constitutes a social group within the meaning of the 1951 Convention. Two approaches have dominated decision-making in common law jurisdictions.

6. The first, the “protected characteristics” approach (sometimes referred to as an “immutability” approach), examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status). Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them. A decision-maker adopting this approach would examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it. Applying this approach, courts and administrative bodies in a number of jurisdictions have concluded that women, homosexuals, and families, for example, can constitute a particular social group within the meaning of Article 1A(2).

7. The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. This has been referred to as the “social perception” approach. Again, women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist.

8. In civil law jurisdictions, the particular social group ground is generally less well developed. Most decision-makers place more emphasis on whether or not a risk of persecution exists than on the standard for defining a particular social group. Nonetheless, both the protected characteristics and the social perception approaches have received mention.

9. Analyses under the two approaches may frequently converge. This is so because groups whose members are targeted based on a common immutable or fundamental characteristic are also often perceived as a social group in their societies. But at times the approaches may reach different results. For example, the social perception standard

1 See Summary Conclusions – Membership of a Particular Social Group, Global Consultations on

International Protection, San Remo Expert Roundtable, 6-8 September 2001, no.2 (“Summary Conclusions – Membership of a Particular Social Group”).

2 See UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992), paragraphs 66-67, 77; and see also Summary Conclusions – Membership of a Particular Social

Group, no.3. might recognize as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class.

B. UNHCR's Definition

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

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

12. This definition includes characteristics which are historical and t herefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated
differently to men. [3]

13. If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

The role of persecution

14. As noted above, a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society. [4] To use an example from a widely cited decision, "[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left- handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group." [5]

No requirement of cohesiveness

15. It is widely accepted in State practice that an applicant need not show that the members of a particular group know each other or associate with each other as a group. That is, there is no requirement that the group be "cohesive." [6] The relevant inquiry is whether there is a common

element that group members share. This is similar to the analysis adopted for the other Convention grounds, where there is no requirement that members
of a religion or holders of a political opinion associate together, or belong to a “cohesive” group. Thus women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.

16. In addition, mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution. [7]

3 For more information on gender-related claims, see UNHCR’s 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 (HCR/GIP/02/01, 10 May 2002), as well as Summary

Not all members of the group must be at risk of being persecuted

17. An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. [8] As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.

Relevance of size

18. The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2). This is true as well for cases arising under the other Convention grounds. For example, States may seek to suppress religious or political ideologies that are widely shared among members of a
particular society—perhaps even by a majority of the population; the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.

19. Cases in a number of jurisdictions have recognized “women” as a particular social group. This does not mean that all women in the society qualify for refugee status. A claimant must still demonstrate a well-founded fear of being persecuted based on her membership in the particular social group, not be within one of the exclusion grounds, and meet other relevant criteria.

Non-State actors and the causal link (“for reasons of”)

20. Cases asserting refugee status based on membership of a particular social group frequently involve claimants who face risks of harm at the hands of non-State actors, and which have involved an analysis of the causal link. For example, homosexuals may be victims of violence from private groups; women may risk abuse from their husbands or partners. Under the Convention a person must have a well-founded fear of being persecuted and that fear of being persecuted must be based on one (or more) of the
Convention grounds. There is no requirement that the persecutor be a State actor. Where serious discriminatory or other offensive acts committed by the local populace, they can be considered as

persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection. [9]

21. Normally, an applicant will allege that the person inflicting or threatening the harm is acting for one of the reasons identified in the Convention. So, if a non-State actor inflicts or threatens persecution based on a Convention ground and the State is unwilling or unable to protect the claimant, then the causal link has been established. That is, the harm is being visited upon the victim for reasons of a Convention ground.

22. There may also arise situations where a claimant may be unable to show that the harm inflicted or threatened by the non-State actor is related to one of the five grounds. For example, in the situation of domestic abuse, a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend
protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State's unwillingness to protect her for reasons of a Convention ground.

23. This reasoning may be summarized as follows. The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being
persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.

Conclusions of the Expert Roundtable on Gender-Related Persecution, San Remo, 6-8 September

2001, no.5.

4 See Summary Conclusions – Membership of a Particular Social Group, no.6.

5 McHugh, J., in Applicant A v. Minister for Immigration and Ethnic Affairs , (1997) 190 CLR 225, 264,
142 ALR 331.

6 See Summary Conclusions – Membership of a Particular Social Group, no.4.

7 See UNHCR's Handbook, paragraph79.

8 See Summary Conclusions – Membership of a Particular Social Group, no.7.

9 See UNHCR's Handbook, paragraph 65.