Contemporary Comments

Fleeting Refuge: Women, Domestic Violence and Refugee Status in The Minister for Immigration and Multicultural Affairs v Khawar

A woman in Pakistan married for love, against the wishes of her parents and those of her husband. In time, the husband for whom she had defied her family began to abuse her, beat her brutally enough to hospitalise her, and tried to set her on fire. When she went to the police they told her 'if [the police] had to do something about all the similar complaints it would take all their time' (at 97).

In April this year, the Full Federal Court decided that the Refugee Review Tribunal erred in denying this woman, Mrs Khawar, refugee status. The case centred around the question of persecution and under what circumstances women are entitled to protection either from their own state or from the international community, particularly those states which operate re-settlement programs for refugees. To date, domestic violence has not been considered an issue from which the state had an obligation to protect its citizens.

The Refugee Review Tribunal did not accept Mrs Khawar's initial claim for refugee status on the grounds that 'the applicant's difficulties with her husband were of a private and personal nature and are not related to the Convention ground of particular social group, nor any other Convention reason. The Convention was not intended to provide protection to people involved in personal disputes' (at 105).

The arguments put forward by Mrs Khawar were that she was unable to obtain police protection, that as such she was denied the rights offered to other citizens, and that this represented selectively applied discrimination that amounted to persecution. The argument put forward by Mrs Khawar was that the discriminatory application of the law in Pakistan entitled her to protection as a refugee. The majority decision of the Full Federal Court supported the view that 'Persecution = Serious Harm + The Failure of State Protection'.[1] Significantly, it suggests a nexus can be found between persecution and a Convention reason if the abuse suffered was severe enough to constitute persecution (regardless of whether the abuse was committed by state or non-state actors), and where the state fails to offer effective protection against the persecution suffered.

The failure of the state to offer protection from persecution is much easier to establish when the persecution suffered is perpetrated or sanctioned by the state itself. Unfortunately, many forms of persecution faced by women are perpetrated by non-state actors, or not considered to be perpetrated for a Convention reason.

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1 At 118: 'Lord Hoffmann in *Shah* [1999] 2 AC 629 at 653 attributed the source of the formula to the *Gender Guidelines for the Determination of Asylum Cases in the UK* (published by the Refugee Women's Legal Group in July 1998) at 5.'

Women experience violence differently to men. Ethnic cleansing, sexual assault, domestic violence, FGM, dowry burnings, punishment for violation of social mores and rape are often blurred between individual acts and systemic abuse. 'Too often the rape or sexual abuse of women is seen as the isolated aberrant behaviour of individual men wanting sex rather than anything to do with Governments'(Crawley 2001).

Gendered societies are characteristically delineated between public and private spaces, with men occupying the sphere of political and public life, while women's lives take place largely in the 'private' domain. The abuse suffered by women, particularly when it is *by virtue* of being women, is all too often seen by legislators and administrators as a private act, rather than falling within a Convention reason. As Lucy Bonnerjea (1985:30) asks:

> ... whose criteria defines legitimate fear for refugee recognition purposes? Why is it decided that persecution on the grounds of race or religion may lead to a 'well-grounded fear' followed by international assistance, while women who are burnt to death have no rights of protection? Why is a girl who is threatened by violence and who attempts to escape by fleeing from her country, not part of UNHCR's responsibility?

Domestic violence is the most 'private' of all violations. The UNHCR estimates that between one quarter and one half of all women have experienced domestic violence at the hands of a partner. Only 44 countries specifically protect women against it (UNHCR 2002:7). Yet, it is consistently difficult for women asylum seekers all over the world to convince decision-makers that the absence of state protection in cases of domestic violence can be seen as Convention-related persecution.

Australia is no exception. It has been extremely rare to successfully claim refugee status on the grounds of domestic violence, and the Minister for Immigration has fought hard to have this particular case denied. This reflects the immigration agenda of the current government, which has enacted legislation and policy that consistently narrows the legitimate grounds claiming refugee status. The 'Minister' is an expression of Australia's current immigration policy — its legislation, its intention and its philosophy.

Over the last ten years or so, we have been witnessing a steady change in the way we are treating those who come to Australia seeking asylum. The latest of these changes was the swag of bills to amend the migration legislation, which tightens the definition of who is entitled to refugee status, the grounds on which they can apply for asylum, the manner in which they can arrive in the country, and their judicial entitlements once they are here.

They were passed virtually unnoticed and unannounced on 26 September 2001 in the slipstream of the United States' (and therefore also Australia's) tragedy and outrage, curtailing a Senate Committee Inquiry which was taking public submissions into the impact of the proposed changes, and silencing public debate on the issues.

These changes are occurring in the context of a broader retreat by the Australian government from the United Nations treaty system. In a letter responding to requests to sign the Optional Protocol to CEDAW, Amanda Vanstone replied: 'The Coalition's policy is that it would be inappropriate to sign the Optional Protocol to CEDAW while shortcomings with the UN treaty body system remain. Australia has already established a world class regime of legislation and institutional mechanisms to protect women against discrimination.'[2]

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2 Correspondence to Women's Rights Action Network Australia, October 2000.

Despite this assurance, the new changes to the Migration Legislation have exactly the opposite effect. The Migration Legislation Amendment Bill No 6 (2001) states that a convention reason must be 'the essential and significant reason for the persecution' (DIMA 2001). This provision would imply that cases such as Mrs Khawar's may not be allowable in Australia any longer, as its success hinged on the fact that even though the harm she suffered was at the hands of her husband, the state's failure to offer adequate protection entailed that the persecution she suffered was for a Convention reason.

In a press release justifying the new legislation, Mr Ruddock stated that the Refugee Convention '... has become so widely interpreted that it is in danger of failing the very people that it was designed to protect' (Ruddock 2001). If you consider that the Refugee Convention was written in 1951, long before there was an acknowledgement that women's rights are human rights, then the argument might have some merit. However, law (ideally) is not monolithic. To continue to be relevant it needs to adapt and reflect the changing social environment it regulates. By narrowing the definition of a particular social group, women are being effectively denied one of the few avenues available to them to seek asylum for gender-based persecution claims.

It would take the emergence of a feminist consciousness before it was recognised that gender could constitute a legitimate reason for persecution. It is tempting to argue for the Convention to be rewritten to reflect this, but the compassion that followed in the wake of WWII's atrocities and created the Refugee Convention has been replaced by a resurgence of patriotism and national self-protectionism that is more likely to see it removed altogether than amended. As a result, women in such situations have had to mount complex legal arguments as to why they constitute 'membership of a particular social group' to fit within the current definitions.

In the current climate, it is common for the Minister to appeal decisions such as this one, particularly when they threaten to broaden the interpretation of 'social group'. Certainly we need due process and transparency with our administrative and judicial decisions, but there appears to be a fear embedded in our migration legislation that recognising 'women' as a legitimate social group (or various sub-sets of women) would broaden the Convention interpretation so far as to make it meaningless.

This fear is patently ridiculous. Consider the other Convention grounds for persecution — race, religion, political opinion, and nationality: the vast majority of people in the world have a religion, nearly all (bar a few stateless people) have a nationality, and every single individual has a race. It does not follow, as Callinan, J suggested in his findings, that 'To regard half of the humankind of a country, classified by their sex, as a particular social group strikes me as a somewhat unlikely proposition' (at 153).

Women *are* persecuted because they are women. This may be stating the obvious, but sometimes the obvious has to be stated. It is difficult to argue that women are not raped (at least on some level) because they are *women*. As with religion, race, political opinion and nationality, persecution can only occur when there is a power imbalance between the persecutors and the persecuted. Where women are structurally marginalised and discriminated against, and where there are social, cultural, religious and/or legal obstacles to equality — as there are in many countries — abuse against women can take place with virtual impunity. As Kirby pointed out in his findings, 'It is impossible to believe that a similar act directed to the husband or another male victim would have been treated by police in Pakistan in such a dismissive fashion' (at 115).

The attitudes of the decision-makers themselves may colour the light with which they view acts of violence against women. In a recent case before the RRT, a member commented that 'While sexual harassment can sometimes be of a character which would constitute harm amounting to persecution, I consider that mostly it is irritating and tiresome'. I doubt many women who have been subjected to sexual harassment would see it in this light. Callinan J, the only judge to allow the case, was of the opinion that 'What there is here is what sadly occurs from time to time everywhere, as any experienced lawyer knows: violent family discord of which the unfortunate first respondent is the victim and in respect of which the police are reluctant interveners' (at 154).

In *MIMA vs Khawar*, 4 out of 5 judges considered that a nexus can be found between persecution and a state's *failure* to act; that persecution can result as surely from 'inaction' as from deliberate intent. Likewise, our refugee determination process — both in law and in practice — is guilty of inaction in addressing the gendered biases of refugee determination. It is no longer 1951. This decision recognises that violence against women is structurally and systematically tolerated or condoned, and that states must be held responsible for protecting all its citizens, not just half of them.

Australia's immigration legislation has a long and ignoble history of selective exclusion. The White Australia policy which marred most of the last century is now named as racist. The most recent manifestation of exclusionary migration policy, the current migration legislation, is in effect denying the way that women overwhelmingly experience persecution. Perhaps the future will name this as sexist.

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LIST OF CASES

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