Female Genital Mutilation: Grounds for Grant of an Australian Protection Visa? The Ramifications of *Applicant A.*

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INTRODUCTION

Fauziya Kasinga was a 17-year old member of the Tchamba-Kunsuntu Tribe of northern Togo when she fled her homeland. Ms Kasinga's tribe traditionally practiced female genital mutilation ('FGM') but her father had protected her from it. When he died, Ms Kasinga's aunt sold her into a polygamous marriage with a 40-year old man. Preparation for the marriage was to have included FGM but Ms Kasinga escaped before it could be carried out. She fled to the United States and sought asylum as a refugee. In its majority opinion,[1] the United States Board of Immigration Appeals ('the BIA') considered the major issue to be whether the practice of FGM could be the basis of a grant of asylum under the relevant US legislation incorporating the United Nations *Convention Relating to the Status of Refugees* ('the Convention').[2] They decided that it could. Although urged to do so by the US Immigration and Naturalization Service ('INS'), the BIA refused to speculate or set guidelines for future cases, saying that that was a matter for the Administration and the Congress.[3] Inevitably however this decision will be the basis for much speculation about the broadening of the grounds for determination of refugee status under US law.[4]

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1 *In Re Fauziya Kasinga*, 1996 Westlaw 379826 (BIA). Page references are to the Westlaw transcript.

2 *Immigration and Nationality Act*, s 101(a)(42)(A), 8 USC s 1101(a)(42)(A) (1982). The *Convention Relating to the Status of Refugees*, Geneva, 28 July 1951 (189 UNTS 150), as amended by the *Protocol Relating to the Status of Refugees*, New York, 31 January 1967 (606 UNTS 267). The Convention provides, for the relevant purposes of this paper, that a refugee is a person who: '... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...' Australia acceded to the Convention and Protocol on 22 January 1954 and 13 December 1973 respectively.

3 Although BIA Member Lory D Rosenberg, in her concurring opinion, called the decision a 'road map' for this sort of case, saying that '[it might] easily be extrapolated and applied in upcoming adjudications, not only of gender-based asylum claims, but in many other asylum applications'. *In Re Fauziya Kasinga*, 1996 Westlaw 379826 (BIA), p25.

4 See eg M Coyle, 'A young woman's fear of being mutilated could pave way for gender-based petitions' *National Law Journal* May 6, 1996 (vol 18, no 36) A10, col 1; 'Asylum ruling on genital mutilation hailed' *Reuter Information Service*, June 14, 1996.

If Fauziya Kasinga had sought an Australian protection visa,[5] she would, as in the US, have to demonstrate a well founded fear of persecution on the basis of one of the five Convention 'reasons' — race, religion, nationality, membership of a particular social group or political opinion. As 'membership of a particular social group' is the 'reason' which is most likely to be utilised by someone in a situation like that of Ms Kasinga,[6] this article will give it particular consideration, and especially as to whether women *per se* are encompassed within its meaning by Australian courts and tribunals, or whether something more is needed in order to satisfy the criterion.

In order to determine whether a grant of an Australian protection visa should be made, it is necessary for an applicant to satisfactorily address three crucial issues: is there a 'well founded fear' of harm? does the harm feared constitute 'persecution' under the Convention? and is persecution feared for a Convention reason? This article will discuss each question in turn and postulate the likely outcome of a 'Fauziya Kasinga-type' application in an Australian court.

WELL FOUNDED FEAR

'Well founded fear of persecution' was considered by the High Court in *Chan Yee Kin* v *The Minister for Immigration and Ethnic Affairs* ('*Chan's* case').[7] The Court said that the term involves a strong subjective element and it is not enough that the applicant personally fears persecution in his or her country of nationality. For the fear to be well founded there must also be a 'real chance' that the applicant will be persecuted on his or her return to the country of nationality. A 'real chance' is one that is not remote or insubstantial.[8] In *MIEA* v *Che Guang Xiang,*[9] the Full Federal Court said that, 'a real chance that persecution may occur includes the reasonable possibility of such an occurrence but not a remote possibility which, properly, may be ignored. It is not necessary to show that it is *probable* that persecution will occur [my

[5] The criteria for a grant of a protection visa pursuant to s 36(2) of the *Migration Act* 1958 (Cth) ('the Act') are that 'the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the [Refugee Convention] as amended by the [Refugee Protocol].'

[6] Gender-specific claims which involve fear of persecution for transgressing religious or social norms could also be determined on grounds of religion or political opinion. The Canadian Guidelines, for example, say that 'Such women may be seen by the governing authorities or private citizens as having made a religious or political statement in transgressing the norms of their society, even though UNHCR Conclusion No 39 (XXXVI), Refugee Women and International Protection, 1985, contemplates the use of "particular social group" as an appropriate ground'. Canada. Immigration and Refugee Board. *Guidelines Issued by the Chairperson pursuant to section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution*, 1993,'the Canadian Guidelines'.

[7] (1989) 169 CLR 379.

[8] This formulation was suggested by Atle Grahl-Madsen in *The Status of Refugees in International Law* (Leyden, A W Sijthoff, 1966), pp 173, 175, 181.

[9] Unreported, Full Federal Court, 12 August 1994.

emphasis]'.[10] In another Federal Court decision, *Mok* v *MIEA*,[11] Keely J found that the question of whether there is a real chance of persecution requires the decision-maker to look to the future, 'in so far as it is reasonably foreseeable at the time the decision is made'.[12]

The Refugee Review Tribunal ('RRT') has considered 'well founded fear' in numerous instances. The RRT has found, for example, that a married Iranian woman satisfied the 'real chance' test of persecution (of continued maltreatment at the hands of her husband if she returned to Iran), because of the attitude and norms enforced by Iranian society and officialdom.[13] A Turkish woman was likewise held to have satisfied the test (also of continued abuse by her husband) because of the laws and morals governing the role and expectations of married women in Turkey, and which made it unlikely that anyone would either stop him or come to her assistance.[14]

In *Kasinga*, the BIA, although not applying the Australian 'real chance' test, held that Fauziya Kasinga had a well founded fear of persecution, if returned to Togo, because her 'husband' was a prominent man, and a friend of the Togolese police who would have handed her over to him; that there was nowhere in the small country that she could hide.[15] It is submitted that the circumstances of a Fauziya Kasinga-type case would also satisfy the Australian 'real chance' test even though, on the face of it, the Australian test is likely to be harder to satisfy than the requirement of US courts that there be only a 'reasonable possibility' of persecution. [16]

PERSECUTION

Persecution is not precisely defined in Australian law, nor in international law. According to the *United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status* (1979) ('UNHCR', 'The Handbook') there is no universally accepted definition of 'persecution'.[17] *Chan's* case, however, indicates that it involves serious harm or discrimination inflicted as part of a course of sustained and systematic conduct against an individual or a group.[18] The term clearly covers threats to life and freedom, but may also include serious forms of social, political and

[10] Id 18.
[11] (1993) 47 FCR 1
[12] Id 66.
[13] RRT decision V95/03448, September 1995. RRT decisions are available via the WWW on *AUSTLII* (www.austlii.edu.au).
[14] RRT decision V95/03574, 24 April 1996.
[15] 1996 Westlaw 379826 (BIA), p 12.
[16] The US standard has been settled by the Supreme Court in *INS* v *Cardoza-Fonseca* 467 US 407 (1987) as one of 'reasonable possibility' — 'so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.' (at 483 per Stevens J). Cf the House of Lords in *Reg* v *Home Secretary; Ex parte Sirakumaran* [1988] AC 958, which required a 'reasonable degree of likelihood' of persecution.
[17] *United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status* (1979) para 51.
[18] (1989) 169 CLR 379, 430.

economic discrimination, abuses of human rights and measures in disregard of human dignity.[19] The High Court has also said that a single act of oppression may suffice to constitute persecution.[20]

It is important to note that while the threat of persecution must be 'official',[21] it need not be sanctioned. It is enough that the persecution is 'officially' tolerated by the Government of the person's country of nationality. It is also enough that the government is unable to protect the person in question from persecution.[22] For example, the government of a particular country may not be able to *afford* the police resources to enforce laws outlawing FGM.

Some writers are of the opinion that the 'official' toleration of persecution is capable of wider definition. Catherine MacKinnon, for example, says that the state is deeply implicated in the sex-based torture of women, despite the fact that it occurs in private, '... the cover-up, the legitimization, and the legalization of the abuse is [official]. It is done with official impunity and legalized disregard. The abuse is systematic and known, the disregard is official and organized, and the effective governmental tolerance is a matter of policy.'[23]

Is Female Genital Mutilation Persecution?

FGM is also known as female circumcision or more 'scientifically' as infibulation or female genital surgery. There are various 'degrees' of FGM practiced in different communities which have been described in detail by other commentators.[24] It is sufficient for the purposes of this article to note that FGM can involve practices ranging from the excision of the clitoral prepuce, the entire clitoris and part of the labia minor or the whole of the mons veneris as well as the entire labia and the closure of most of the vaginal orifice. In some societies this may be done with a knife or razor blade and the 'closure' performed with acacia tree thorns and cat gut.[25]

The BIA accepted that FGM leads to permanent disfigurement of the female genitalia, and, 'exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus. It can result in permanent loss of genital sensation and can adversely affect sexual and erotic functions.'[26]

[19] Ibid.
[20] Ibid.
[21] *Applicant A* v *MIEA* (1997) 142 ALR 331, 334 per Brennan CJ.
[22] Ibid; *In re Fauziya Kasinga* 1996 Westlaw 379826 (BIA), 14.
[23] K Mahoney and P Mahoney (eds), *Human Rights in the Twenty-First Century* (Dordrecht, M.Nijhoff, 1993), 'On torture: a feminist perspective on human rights', 21, 29.
[24] The literature on FGM is extensive. See eg. the WWW 'FGM Research Home Page' which provides, inter alia, a link to an excellent bibliography, 'FGM and Women's Reproduction Bibliography', which is regularly up-dated. The Home Page also provides links to full-text articles, news updates and other WWW resources, including an FGM discussion list. The URL is http://www.hollyfeld.org/xastur/index.html
[25] M-R Liverani, 'Law Society unequivocal on female genital mutilation' (1994) 32 (5) *Law Society Journal* 68.
[26] *In re Fauziya Kasinga* 1996 Westlaw 379826 (BIA), 6.

The Family Law Council estimates that some 74 million women in Africa today have been subjected to the rite,[27] which is also, according to some, practiced by the Muslim population of Malaysia and Indonesia.[28] The practice is not supported by African governments but few have legislated against FGM and where there is legislation it is largely ineffective.[29] It is often associated with Islam but it apparently has no official basis in that religion, although this, as Fraser notes, is a complex issue.[30]

FGM is widely, almost universally, condemned. Governments, specialist agencies and NGOs as well as numerous law reform agencies and assorted political, community and religious groups of many cultures, races and religious persuasions deplore the practice. International instruments lend support to this condemnation either expressly, or by implication. Chief among them are the Convention on the Elimination of All Forms of Discrimination against Women ('the Women's Convention')[31] and the Declaration on the Elimination of Violence Against Women ('the Declaration').[32]

The Declaration defines 'violence against women', in Article 1, to include 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women . . . .'. Article 2(a) further provides that violence against women encompasses, 'sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women . . .'.

Recommendations of the United Nations Human Rights Committee, the Committee on the Elimination of Discrimination Against Women ('CEDAW') and the other human rights-related 'convention committees' provide further support.[33] Some of these recommendations form part of comments upon the reports submitted by the state parties to the convention committees.[34] In each case, where criticism is made of the continued existence

[27] Australia, Family Law Council, *Female Genital Mutilation*, Discussion Paper, 1994.

[28] J Seddon, 'Possible or impossible? A tale of two worlds in one country' (1993) 5 *Yale Journal of Law and Feminism* 266. But cf 'Men's traditional culture' *The Economist*, 10 August 1996, 33, which says that the practice of FGM is confined to Africa.

[29] INS Resource Information Center, Alert Series-Women-Female Genital Mutilation, Ref No AL/NGA/94.001 (July 1994), cited in *In Re Fauziya Kasinga*, 1996 Westlaw 379826 (BIA), 6.

[30] D Fraser, 'The first cut is (not) the deepest: deconstructing "female genital mutilation" and the criminalization of the other' (1995) 18 *Dalhousie Law Journal* 310.

[31] Adopted 18 December 1979, entered into force 3 September 1981, G A Res 34/180, 34 UN GAOR, Supp (No 46), UN Doc A/34/46, 193 (1979).

[32] G A Res 48/104, 48 UN GAOR Supp (No 49) at 217, UN Doc A/48/49 (1993).

[33] Eg CEDAW Recommendation 14, Female circumcision, (Ninth session, 1990), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc.HRI/GEN/1/Rev.1, 79 (1994), CEDAW Recommendation 19, Violence against women, (Eleventh session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc.HRI/GEN/1/Rev.1, 84 (1994).

[34] Eg the Committee on Economic, Social and Cultural Rights ('CESCR'), in its observations on the report of Mali, said that it 'expresses its profound concern about the prevalence of the traditional practice of female genital mutilation, to which . . . as many as 75 per cent of girls and women in Mali are being subjected . . . legislation in effect for 30 years prohibiting such practices has never been enforced.' [UN Doc E/C.12/1994/17

of the rite, the relevant committee calls upon the country concerned to adopt more effective legal sanctions and to implement education and health programs to combat the practice.

In addition to the evident world-wide opposition to FGM, the growth in the number of immigrants and refugees to Australia from Africa has raised public awareness of the issue and led to condemnation and expressions of outrage by politicians and the media.[35] New South Wales and Victoria have legislated specifically to criminalise the practice,[36] although according to some, FGM is, in any case, criminal assault.[37] Other countries have also introduced or are considering introducing anti-FGM legislation.[38] As a direct result of the *Kasinga* case, the US Congress has introduced legislation which requires the Attorney-General to promulgate regulations holding that 'persecution' includes gender-related persecution and female genital mutilation and to interpret persecution consistently with international law and recent decisions of the BIA.[39]

Further evidence of a widespread anti-FGM stance can be ascertained from the practice of countries as reflected in government-issued guidelines to refugee-determination authorities,[40] from government reports and recommendations[41] and from the UNHCR Handbook which many countries utilise to assist in determination of refugee status.[42] It can be posited that there is now sufficient weight of evidence of world opinion condemnatory of FGM to hold that it is outlawed by customary international law.[43]

The BIA in *Kasinga* had no difficulty in finding that FGM was

(1994)]. The same Committee, in its observations on the report of The Gambia said that it '. . . deplores the practice of [FGM] which is still prevalent in The Gambia'. [UN Doc E/C.12/1994/9 (1994)]. The Committee on the Rights of the Child said in its observations on the report of Burkina Faso that it was 'seriously concerned' about the continuing practice of FGM. [UN Doc CRC/C/15/Add.19 (Sixth session, 1994)].

35 Fraser (fn 30), 354 *et seq.*

36 *Crimes (Female Genital Mutilation) Amendment Act* 1994 (NSW); *Crimes (Female Genital Mutilation) Act* 1996 (Vic).

37 M-J Ierodiaconou, 'Listen to us! Female genital mutilation, feminism and the law in Australia' (1995) 20 *Melbourne University Law Review*, 562, 565.

38 Eg *Prohibition of Female Circumcision Act* 1985 (UK), *Prohibition of Female Genital Mutilation Act* 1996 (US).

39 A Bill to require the Attorney General to promulgate regulations relating to gender-related persecution, including female genital mutilation, for use in determining an alien's eligibility for asylum or withholding of deportation. 1997 HR 825; 105 HR 825. Introduced February 25, 1997.

40 Australia. Department of Immigration and Multicultural Affairs. *Refugee and Humanitarian Visa Applicants. Guidelines on Gender Issues for Decision Makers* ('the Australian Guidelines') (July 1996); US INS *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* ('INS Gender Guidelines') (1995); Canadian Guidelines, (fn 6).

41 For example, the recent reports of the Australian Family Law Council, *Female Genital Mutilation: a report to the Attorney-General*, 1994 and the Queensland Law Reform Commission, *Female Genital Mutilation*, 1994.

42 The UNHCR has also issued *Guidelines on the Protection of Refugee Women* which aim to identify the specific protection issues, problems and risks faced by refugee women.

43 For a discussion of the formation of customary law through the generalization of State practice see eg the opinion of Read J in the *Fisheries* case, ICJ Reports (1951), 191.

'persecution', consistently with their past definitions of that term.[44] And so has our own RRT. In a decision which, unlike *Kasinga*, has attracted no publicity, probably because the application for a protection visa was rejected,[45] Ms Roslyn Smidt said that, 'The Tribunal has no difficulty accepting that female circumcision, such as that practised amongst some groups in Ghana, is serious harm amounting to persecution under the Convention.'[46] The matter was not appealed and there has been no Australian judicial consideration of the issue, although guidelines on gender issues in determination of refugee status, issued last year by the Department of Immigration and Multicultural Affairs, state that, inter alia, female genital mutilation 'may constitute persecution in particular circumstances'.[47]

MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

Membership of a Convention category is at the crux of determination of refugee status. It does not matter how serious the persecution unless it is for one of the Convention reasons.

In *Kasinga*, the BIA defined the particular social group as 'young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.'[48] The BIA referred to its earlier decision in *Acosta*,[49] where it held that 'particular social group' is defined by common characteristics that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities. The BIA said that the characteristics of Fauziya Kasinga of being a young woman of the Tchamba-Kunsuntu Tribe could not be changed. And the characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be *required* to change it.[50]

The most authoritative Australian statement on the meaning of 'membership of a particular social group' is that of the High Court in *Applicant A* v *MIEA ('Applicant A')*.[51] A couple with one child from the People's Republic of China ('PRC') applied for recognition as persons who had a well-founded fear of being persecuted for reasons of membership of a particular social group. They did not accept the PRC one child policy and feared forcible sterilisation and abortion if returned. The Minister rejected their application but his decision was set aside by the RRT.[52] The finding of the RRT was upheld by

[44] 1996 Westlaw 779826 (BIA), 10.
[45] Because the applicant's story was found to be a fabrication.
[46] RRT decision N93/02141, 8 September 1995.
[47] The Australian Guidelines (fn 40), para 4.10.
[48] 1996 Westlaw 779826 (BIA), 14.
[49] *Matter of Acosta* (1985) 19 I&N Dec 211, 233.
[50] 1996 Westlaw 779826 (BIA), 11.
[51] (1997) 142 ALR 331.
[52] The RRT found the Chinese couple to be members of a particular social group identified as follows, '"those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised" . . . The group exists by virtue of government policy and government action and is thereby cognisable. The persecution

Sackville J in the Federal Court,[53] but the Full Federal Court allowed the Minister's appeal,[54] and that decision was upheld by the High Court.

The High Court in a narrow 3:2 decision largely approved the reasoning of Respondent A and also in what had, until then, been the most authorative Australian statement on the meaning of 'particular social group', in *Morato* v *MILGEA*.[55] The High Court majority in *Applicant A* (Dawson, McHugh and Gummow JJ), like others before them, contrived disparate, although similar 'definitions' of 'membership of a particular social group', none of which are to be considered exhaustive, but rather, a guide to interpretation. That provided by Dawson J, which is supported by the like comments of McHugh and Gummow JJ, is a fair summation of the current state of this 'guide'. It reflects similar statements by the Federal Court in *Respondent A* and *Morato*:

> [It] is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large . . . not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.[56]

Dawson J was also of the view that there is 'no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group.'[57] McHugh J however, was of the opinion that the group should be large, like the other Convention categories.[58] Dawson J said that the uniting particular need not be voluntary,[59] and that, 'The significance of the element as a uniting factor may be attributed to the group by members of the group or by those outside it or by both.'[60] These issues were not the subject of comment by the other majority Justices.

It is simply not possible to contrive a definition of 'membership of a particular social group' which will satisfy all possible situations. Attempting to define 'particular social group' in more than broad terms risks importing a strong element of subjectivity into the examination of any purported group. McHugh J himself acknowledged the impossibility and pointlessness of

feared is precisely because the [appellants are] defined into the group by government policy.' RRT Reference: N94/3000 (20 May 1994). *AUSTLII* transcript, 12.

53 (1994) 54 FCR 333. The Keating Labor Government introduced a Bill to overcome the effect of Sackville J's decision (*Migration Legislation Amendment Bill (No 3)* 1995 (Cth)). The explanatory memorandum for the Bill explicitly acknowledges that its purpose is to override the effect of the decision of Sackville J in *Respondent A*. The Bill lapsed on the prorogation of Parliament. Although the Labor Government was defeated in the 1996 Federal Election, the Government's actions with respect to that decision raise obvious questions about the likely response to similar findings with respect to broad categories such as women. Statements by members of the then Liberal Party Opposition, now members of the Government, leave no doubt that they were in full agreement with the Labor Government move to overturn Sackville J's decision.

54 *Respondent A* v *MIEA* (1995) 57 FCR 309.

55 (1992) 39 FCR 401.

56 *Applicant A* (1997) 142 ALR 331, 341.

57 Ibid.

58 Id 360–1.

59 Id 341.

60 Ibid.

attempting to define particular social group,[61] and Kirby J, in the minority, said that it was 'impossible to delimit it by precise definition'.[62]

What *Applicant A*, *Respondent A* and *Morato* all emphasise, however, is that 'the characteristic or element which unites the group cannot be a common fear of persecution. The particular social group cannot be defined *by the persecution*. The particular social group must exist first.'[63] This formulation is of vital importance. It contrasts with the decisions of the BIA in *Kasinga* and of Sackville J in *Respondent A*,[64] at first instance in the Federal Court, which accepted the respective applicants for refugee status as members of a particular social group, *defined and created by reference to the relevant persecution.*

Current Australian jurisprudence on the meaning of 'membership of a particular social group' holds that there must be a pre-existing, recognised social group which exists *outside* of any persecution. The persecution cannot, by itself, be allowed to define the social group, however horrendous that persecution may seem. The High Court in *Applicant A* approved the rejection in a line of US cases of the argument which runs, 'that because X fears persecution by reason of circumstances A, B and C which are applicable to him or her therefore X is a member of a particular social group constituted by all persons to whom circumstances A, B and C are applicable'.[65] This 'circular' argument was rejected by Dawson J who said, 'A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group ... "completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not *vice versa*)" '.[66]

This dismissal of the argument that a group can be defined by persecution is too easy. It was not accepted by Brennan CJ or Kirby J in *Applicant A* and is rejected by leading academic writers.[67] Statements like this give the impression that the line between a social group defined by society and one defined by its persecution is a clear one, easy of definition. It is not, as a simple review of the judgments comprising the *Applicant A* saga demonstrates. It is clear that even members of the majority might have a hard time sticking to their definition in all circumstances. The persecution of 'left-handed men' described by McHugh J in *Applicant A* is a good example of the difficulty and artificiality which surrounds any such determination.[68] Not normally considered to be a particular social group, if continuing persecution of

[61] Id 355.
[62] Id 390.
[63] Id 341.
[64] *MIEA* v *Respondent A* (1994) 127 ALR 383.
[65] (1997) 142 ALR 331, 347 per Dawson J.
[66] Id 341.
[67] Eg A Helton, 'Persecution on account of membership in a social group as a basis for refugee status' (1983) 15 *Columbia Human Rights Law Review* 39, 45; G Goodwin-Gill, *The Refugee in International Law* (2nd ed, Oxford, Clarendon, 1996), 30; A Grahl-Madsen, *The Status of Refugees in International Law* (Leyden, A W Sijthoff, 1966), 219.
[68] (1997) 142 ALR 331, 359.

left-handed men gave rise to a perception by society that they *were* such a group then the requirements of the definition might be fulfilled.

Although the High Court found against definition of particular social group by persecution, McHugh J did say that practice, over time, *can* give rise to the creation of a particular social group, through the actions of persecutors and the perceptions of society.[69] His Honour's left-handed men being one example. 'Their persecution for being left-handed would create a public perception that they were a particular social group.'[70] And with reference to the Chinese couple in *Applicant A*, McHugh J said that such a group could constitute a particular social group in some situations — 'If, for example, a large number of people with one child who wished to have another had publicly demonstrated against the government's policy, they may have gained sufficient notoriety in China to be perceived as a particular social group.'[71] This acceptance by at least one member of the High Court majority in *Applicant A*, that a particular social group may be 'created' by persecution over time, is clear demonstration that drawing lines in the sand on this issue is likely to be susceptible to erasure on the next tide.

The reasoning which says that a particular social group should not be defined by persecution has many opponents — who argue that indeed it *is* very often persecution that binds groups together and identifies them. People who would not otherwise be identified as a group become so identified simply *because* of that persecution — as with McHugh J's left-handed men. Brennan CJ, in the minority in *Applicant A*, said that particular social group should be interpreted widely, that 'the term should be understood simply to connote a group constituted by those who share a common distinguishing characteristic which is the 'reason' for persecution that is feared.'[72] His Honour said, with reference to the Chinese couple, that the 'characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that shares that characteristic. It is their membership of that group that makes them liable to sterilisation if they return . . .'.[73]

Savitri Taylor says, likewise, that 'any group of persons with a common immutable characteristic that causes them to be a target of persecution should be considered a social group, regardless of whether persons other than the persecutors would consider such persons to be anything more than a statistical group . . . Whether or not members of such a persecuted group have an awareness of collective identity should be irrelevant.' Taylor also argues that 'particular social group' was to have been a catch-all category to plug any gaps in the coverage of the other, more specific grounds of persecution.[74]

[69] Id 39–40. See also *Morato* v *MILGEA* (1992) 39 FCR 401, 406.
[70] (1997) 142 ALR 331, 359.
[71] Id 363.
[72] Id 337.
[73] Id 338.
[74] S Taylor, 'The meaning of "particular social group": the Federal Court's failure to think beyond social significance' (1993) 19 *Mon L R* 307, 318. The *travaux preparatoires* are singularly unhelpful in providing guidance on 'particular social group'. The Swedish delegate proposed the insertion of the words because, 'experience had shown that refu-

The 'catch-all' or 'safety-net' approach has many well-known proponents, including leading academic writers.[75] The argument was dismissed, however, by La Forest J in the leading Canadian decision on 'membership of a particular social group' — *Canada (AG)* v *Ward*.[76] His Lordship considered that characterisation as a particular social group of an association of people by virtue of their common victimisation as objects of persecution goes too far. He considered that the category was likely to have been intended to cover 'Cold War' refugees fleeing the 'Iron Curtain', and said that if it was really intended to cover *all* possible groups then *none* need have been enumerated, the definition could simply have been 'all individuals with a well founded fear of persecution' and nothing more.

In *Applicant A*, Dawson and McHugh JJ argued likewise against the adoption of the 'safety net' approach, saying that if a particular social group could be constituted by persecution, then it would render at least three of the four other Convention reasons superfluous.[77] Brennan CJ disagreed with this argument, saying that there are limiting factors which prevent too wide an interpretation, that persecution must be officially practiced or tolerated, and that the words 'for reasons of' further limit the grounds. The Chief Justice said that 'particular social group' was intended to include groups that would not be identified by any of the other categories of discrimination — that it was *intended* to be a safety net.[78] The Chief Justice also points out that the preamble to the Convention itself notes the unduly heavy burden that the grant of asylum may place on some countries.[79]

It should be clear from this brief survey of the attitudes to this ill-defined Convention 'reason' that both any attempt at definition of membership of particular social group *per se* and also as to trying to draw a clear line between groups deemed to be persecuted, *as perceived by society*, and those *created* by persecution is highly artificial, susceptible to the changing circumstances thrown up by individual cases. Because of this, it is submitted that Kirby J's contention, that membership of a particular social group should be considered on a case by case basis, is the more realistic approach to the problem. His Honour notes that this is the approach of the German courts and a somewhat similar approach has been followed, on occasion, by US and Canadian courts. In at least two instances they have held, without deciding on the correctness of the definition arrived at, that it was open for their respective immigration review tribunals to make findings about the nature of particular

gees had been persecuted because they belong to particular social groups. The draft convention made no provision for such cases, and one designed to cover them should accordingly be included.' There is nothing more. UN Doc A/CONF.2/SR.3, at 14, November 19, 1951; and UN Doc.A/Conf.2/SR.19, 14, November 26, 1951. The Swedish amendment (incorporated in UN Doc.A/CONF.2/9) was adopted without discussion.

[75] See supra fn 67.

[76] [1993] 2 SCR 689, 728 *et seq.*

[77] (1997) 142 ALR 331, 336, 356.

[78] Id 336.

[79] Id 333.

social group.[80] It is surely more appropriate to leave the consideration of these matters to those who are experienced in dealing with them. As Kirby J said, 'The development and expression of such categories ... is the province of administrators and review tribunals with experience of refugee claims. It is not the task of appellate courts to whom these cases are but occasional visitors.[81]

ARE WOMEN A PARTICULAR SOCIAL GROUP IN AUSTRALIA?

The BIA, in its decision in *Kasinga*, held women who opposed FGM and were fearful of persecution because of that stance, to be members of a particular social group. According to the High Court's reasoning in *Applicant A*, adoption of the *Kasinga* approach would broaden the definition of refugee beyond what was intended by the Convention. What should happen, according to the High Court, is *first* to define the particular social group and *then* determine whether the members of it are persecuted *because* of that status. Following *Applicant A*, it would be necessary to identify the particular social group of an applicant in the position of Fauziya Kasinga and then establish whether she had a well founded fear of persecution *because* of that fact, in the circumstances of her case. Following the *Applicant A* majority, the relevant social group must be women. This would result in the same finding as the BIA — but not by defining the applicant as a young woman fearing and objecting to female genital mutilation (defining her by the persecution).

Our courts have not yet considered the issue of women as a particular social group; the compass of this Convention 'reason' has been arrived at with respect to other purported groups. In *Morato*, a Bolivian drug dealer who turned Queen's evidence feared returning to Bolivia because of the harsh treatment he was likely to face from his former associates. The Court found that drug-dealers-turned informants were not a recognisable or cognisable social group.

In *Ram* v *MIEA*,[82] the Full Federal Court found that wealthy persons in the Punjab had no sufficiently identifying characteristic or common element such as to constitute a cognisable or recognisable group. And in *Applicant A*, the High Court majority found that fear of a government policy of forced sterilisation was not for reason of membership of a particular social group. Dawson J said that the 'association', of the Chinese couples opposing the one-child policy was concerned with what people *did*, not with what they *are*.[83] The Chinese couple in *Applicant A* feared or objected to the result of a policy

[80] *Mayers* v *Canada (MEI)* (1992) 97 DLR (4th) 729; *Fatin* v *INS* 12 F4d 1233 (3rd Cir 1993).

[81] (1997) 142 ALR 331, 394.

[82] (1995) 57 FLR 565.

[83] (1997) 142 ALR 331, 344, per Dawson J. His Honour did recognise though, that such distinctions can sometimes be 'unreal' (at 342). Kirby J, in the minority, rejected this argument, saying that such distinctions are artificial. 'What people *have done* contributes to making them who they *are*' (at 393).

of general application with which they had come into conflict and could not, therefore, be brought within the definition. Dawson J said that, 'Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms.'[84] His Honour instanced persons who commit contempt of court or break traffic laws. A law which 'persecuted' such people would not be one that did so because of their membership of a particular social group.[85] And McHugh J said likewise that:

> ... there is nothing to link the couples [ie. those couples who believe that they should be able to have more than one child notwithstanding the government's policy] so as to create a perception that they constitute a particular social group. There is simply a disparate collection of couples throughout China who want to have more than one child contrary to the one child policy ... There is no *social* attribute or characteristic linking the couples, nothing external that would allow them to be perceived as a particular *social* group for Convention purposes. To classify such couples as a 'particular social group' is to create an artificial constuct that bears no resemblance to a social group as that term is ordinarily understood.[86]

In the absence of clear judicial guidance it is necessary to attempt an extrapolation from those decisions which have considered the meaning of 'membership of a particular social group'. In considering whether Bolivian informers, wealthy Punjabis and Chinese couples with one child are members of a particular social group the courts have marked out some boundaries.

The *Applicant A* majority formulation holds that 'particular social group' includes persons who share a certain characteristic or element which unites them or sets them apart from society at large. This element must unite the members of the group and have the effect of making them a cognisable group within society. What is not certain is whether the element which unites the group may be voluntary or involuntary and whether it may be attributed to the group by the group or by those outside it or both. Size of the group may or may not be a relevant factor. It is also clear from the judgments and their review of case law from a number of jurisdictions that none of these elements should be regarded as exhaustive, but rather as a guide.

The category of particular social group is undoubtedly a wide one. Lockhart J in *Morato* gives examples of 'particular social group' that may have interests in common, 'as diverse as education, morality and sexual preference ... [they include] the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies.'[87] The High Court did not disagree with this reasoning.[88]

Women obviously share characteristics or elements which unite them and set them apart from society at large. They are a cognisable group within society. The principal factor which unites women, their gender, is involuntary

[84] Id 342.
[85] Ibid.
[86] Id 363 per McHugh J.
[87] (1992) 39 FCR 401, 406. The examples given are those formulated by A Grahl-Madsen (n 8).
[88] (1997) 142 ALR 331, 340–1, per Dawson J.

and they are a very large group — factors which may or may not be relevant. There is nothing on the face of the Court's reasoning in *Applicant A* to gainsay the acceptance of women as a particular social group.

In *Morato*, however, the Full Federal Court cited a US decision with apparent approval to the effect that, inter alia, 'Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group.'[89] Gummow J, in *Applicant A*, appears to approve of this narrow formulation.[90] And in *Lek* v *MILGEA*,[91] handed down a year after *Morato*, Wilcox J, whilst following that decision, held, in obiter, that, 'young single women is too broad a category to fall within the Convention'. He said that there was no 'common or binding element' among people within the group nor was there 'sharing of common social characteristics' that might attract persecution.[92] Wilcox J did say that it did not matter that people within a claimed group have different lifestyles, cultures or political leanings. Beyond that he gives no justification for his finding that the claimed group is too broad except that '*Morato* vindicates this view'.[93] And McHugh J in *Applicant A*, in obiter, criticises the finding of the Canadian Court of Appeal, that a Refugee Tribunal could hold that 'Trinidadian women subject to wife abuse' was a particular social group. The Canadian Court, in *Mayers* v *Canada (MEI)*[94] appears to hold that 'women' or even 'Trinidadian women' are too wide to be defined as particular social groups but that 'women subject to wife abuse' *is* permissible — defining the group by the persecution. McHugh J says that the decision must 'clearly be wrong even if the definition of refugee is given a very liberal interpretation'.[95] What is not clear is whether he is indicating that women *per se* is too broad or whether the group defined by the nature of the persecution is wrong, consistent with his reasoning in *Applicant A*.

Although foreign jurisprudence is far from consistent, it is evident that the major jurisdictions are grappling with the issue of gender-based persecution. The US and Canadian Governments have also issued guidelines which state that membership of a particular social group can be interpreted to include gender, and the UNHCR is also pushing governments in that direction. It has said that States *may* interpret social group to include women who face harsh or inhuman treatment for having transgressed the social mores of their community.[96] Our own Australian Guidelines are more equivocal. They state that, 'these guidelines do not advocate gender as an additional ground in the Refugee Convention definition.'[97] But later, that, 'While gender of

[89] *Gomez* v *INS* 947 F2d 660 (2nd Cir, 1991).
[90] (1997) 142 ALR 331, 372.
[91] (1993) 45 FCR 418.
[92] Id 432
[93] Ibid.
[94] (1992) 97 DLR (4th) 729.
[95] (1997) 142 ALR 331, 358 (n 120).
[96] UNHCR Executive Committee Conclusion No 39 (1985).
[97] The Australian Guidelines (n 40), para 2.15

itself is not a Convention ground, it may be a significant factor in identifying characteristics of such a group.'[98]

The Canadian Supreme Court, in *Ward*, [99] seems to have taken the lead in designating gender as a particular social group. The Court said that there are three possible categories of social group, the first of which they defined as, 'those defined by an innate or unchangeable characteristic, for example, individuals fearing persecution by reasons of gender, linguistic background and sexual orientation'. Although the Supreme Court dismisses the wider 'safety-net' analysis of particular social group it would surely find it difficult, having formulated this definition, to exclude women from it.

The situation in the United States has been less clear and there are conflicting decisions. A number of US Court of Appeal decisions have defined social group quite narrowly and it appears that gender or 'women' would not currently be encompassed within the meaning of particular social group:

> Like the traits which distinguishes the other four enumerated categories . . . the attributes of a particular social group must be recognisable and discrete. Possession of broadly based characteristics such as youth and gender will not, by itself, endow individuals with membership in a particular social group.[100]

The US Third Circuit, however, upheld a decision of the BIA in *Fatin* v *INS*,[101] which accepted that women *are* a particular social group, saying that, absent statutory or congressional guidance on the issue, the only question was whether the BIA's interpretation was a permissible construction of the statute. They held that it was. The INS is shortly to issue a policy memorandum that will agree with *Fatin*, and provide additional guidance for adjudicating gender-based claims.[102]

In *Applicant A*, Kirby J notes that German courts have refused to define 'membership of a particular social group',[103] but in at least two instances Germany has recognised women as a social group and granted asylum,[104] although European Union interpretation of 'particular social group' is generally restrictive and no EU countries have guidelines as to the treatment of women refugees fearing gender-based persecution.[105]

The RRT, lacking an authoritative statement by the federal courts, has

[98] Id para 4.33.

[99] [1993] 2 SCR 689, 739 per La Forest J.

[100] *Gomez* v *INS* 947 F2d 660, 664 (2nd Cir 1991), following *Sanchez-Trujillo* v *INS* 801 F2d 1571 (9th Cir 1986), *DeValle* v *INS* 901 F2d 787 (9th Cir 1990).

[101] 12 F3d 1233 (3rd Cir 1993).

[102] United States. INS. *Basic Law Manual of the INS: US law and INS Refugee/Asylum*, 1994. It should also be noted that the US Attorney-General designated *Matter of Tobosco-Alfonso* Int Dec 3222 (BIA 1990) as a precedent decision on June 161994. That decision effectively found that homosexuals could constitute a 'particular social group'.

[103] (1997) 142 ALR 331, 393.

[104] K Bower, 'Recognising violence against women as persecution on the basis of membership in a particular social group' (1993) 7 *Georgetown Immigration Law Journal* 173, 200. See also H Lambert, 'Seeking asylum on gender grounds' (1995) 1 *International Journal of Discrimination and the Law* 153, 169 *et seq* on EU jurisprudence.

[105] I Daoust and K Folkelius, 'UNHCR symposium on gender-based persecution' (1996) 8 *International Journal of Refugee Law* 180.

already held that women *are* a 'particular social group', and has relied on the Full Federal Court decision in *Morato* for so finding. Ms Lesley Hunt allowed a protection visa to a Filipino woman fearful of continued violence from her husband, holding that women are a particular social group. In a finding followed in later RRT decisions, Ms Hunt said that, '. . . it is directly because of her membership of this particular social group [women] that she has suffered a sustained violation of her basic human rights . . .'[106]

Ms Hunt referred to the remarks of Wilcox J in *Lek,* but disagreed with his view that 'young single women' is too broad a category to come within the criterion. Ms Hunt argued that there is nothing 'broader' about young single women than the nobility or farmers or lawyers, etc referred to in *Morato*, and says that the other Convention reasons of race, religion, etc are certainly as broad.[107] The judgment of at least one member of the majority in *Applicant A* would seem to support this view, at least in so far as size not being an obstacle to acceptance as a particular social group is concerned.[108]

Ms Hunt gave consideration to defining a group such as 'women subjected to domestic violence', as in *Mayers* v *Canada (MEI),* but rejected it because that would have the effect of defining the group by the nature of the persecution rather than their common social characteristics and said that, 'as is stated in *Morato*, the Convention reason must pre-exist the persecution . . . to argue that someone is persecuted for the reason that she is persecuted is tautological.'[109]

Following Ms Hunt's reasoning, and now that of the High Court in *Applicant A*, to define a social group of women opposed to and fearing FGM, as in *Kasinga*, would be incorrect. Fauziya Kasinga is a woman. Women are a particular social group. As long as there is a well founded fear of persecution *because* of that reason, then the Convention criteria are satisfied.

SHOULD WOMEN BE A PARTICULAR SOCIAL GROUP IN AUSTRALIA?

Ms Lesley Hunt offers cogent reasons for accepting that women are indeed a particular social group, noting that the obvious immutable characteristic is that of gender, quoting Hathaway who says that, '*because* it is an innate and immutable characteristic . . . whilst gender is not an independent enumerated ground for Convention protection, it is properly within the ambit of the social group category [my emphasis]'.[110]

Ms Hunt said, in support of her finding that women form a cognisable group in society that:

> The shared social characteristics common to all women, relate to their gender and either emanate from, or are generally perceived to emanate from,

[106] RRT decision N93/00656 (3 August 1994), 10.
[107] Id 11.
[108] (1997) 142 ALR 331, 341, per Dawson J.
[109] RRT decision N93/00656, 10.
[110] Ibid. J Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991).

> gender. They include the ability to give birth, the role of principal child-rearers, nurturers, keepers of the family home, supportive partners in a relationship. And . . . it is commonly expected throughout most societies that it is characteristic of women to remain loyal to their husbands, to keep marriages together, regardless of their treatment within that marriage.[111]

The fear of being subjected to male violence is, according to Ms Hunt, a further element binding all women together. 'Whether that fear relates to violence in the form of rape, domestic violence, incest, sexual harassment, sexual exploitation, or female genital mutilation, it is all located within the context of male violence'. Ms Hunt cites crime statistics, laws aimed at protecting women and an ample literature in support of this claim.[112]

In support of her claim that women are a well-recognised social group, both in Australia and internationally, Ms Hunt points to the establishment of numerous Commonwealth and State government bodies, including the Office of Status of Women and the National Committee on Violence Against Women, the National Agenda for Women, affirmative action programs aimed principally at women and anti-discrimination legislation, that women earn on average less than men, that they are under-represented at senior levels in government, industry and private enterprise.

On the international level, Ms Hunt cites the establishment of the UN Commission on the Status of Women, the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Political Rights of Women and the Convention on the Nationality of Married Women. She notes that, 'The UNHCR has repeatedly pointed out that refugee women have special needs in the area of protection', and cites the UNHCR Guidelines on the Protection of Refugee Women which state that women 'fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status.'

In concluding Ms Hunt says that,

> There is ample evidence indicating that 'women' are a particular social group as, in spite of being a broad group, they are a cognisable group in that they share common fundamental and social characteristics . . . Whilst there does exist separation in lifestyles, values, political leanings etc., women share a defined social status and as such are differentially dealt with by society as a group. . . . women can face harm based on who they are as women, and therefore for their membership of this particular social group. It is women's social status that often leads to the failure of state protection, and this is particularly so with regard to domestic violence.[113]

In that decision, the RRT granted the Filipino applicant a protection visa because she had a well founded fear of persecution if she returned home. There was a 'real chance' that her husband would continue his pattern of domestic violence and all of the evidence presented indicated that the woman would receive little if any support from the Filipino authorities. The fact that

[111] Ibid.
[112] Id 13.
[113] N93/00656, 14.

the applicant was a married woman meant that she would receive differential treatment; that she would be discriminated against by 'the system', which treated her essentially as her husband's property, and would not interfere with his rights. There is no Philippines domestic violence legislation and proposals for such have been rejected by their legislature.[114]

In RRT decision V96/04080[115] (Tongan woman fearing continued domestic violence), Mr Calabro adopted the reasoning of Ms Hunt in finding that women are a particular social group. At least two other RRT decisions have also found women to be particular social group. In decision V95/03574, Mr Brewer found simply that, following *Morato*, married women fall within the meaning of the phrase particular social group. He said that, 'it is apparent that women in Turkey (and elsewhere) are differentially treated on the basis of their gender alone and that certain Turkish laws, reflective of entrenched social beliefs, enshrine in certain key respects the role and behaviour of women . . .'.[116]

And in RRT decision V95/03448, Mr Vrachnas also followed Ms Hunt's formulation and said that it is clear:

> That through religious and legal precepts and traditional social mores, women in Iran are treated differentially on the basis of their gender, and, more particularly, there is a set of 'rules' as to how married women are to act and how the rest of society views women in marriage . . . Laws relating to marriage, divorce and custody of children, as well as policies relating to work and education and matrimonial 'obligations', together with traditional views that tacitly condone domestic violence, all lead to a conclusion that married women in Iran are a cognisable group whose members share many characteristics in the eyes of Iranian society.[117]

THE 'FLOODGATES' ARGUMENT

One of the concerns likely to be raised, and indeed expressed by Kirby J in the *Applicant A* appeal hearing in the High Court,[118] is that of 'opening the floodgates'. His Honour expressed this concern with respect to the potential millions of Chinese couples seeking more than one child who might be accepted as refugees if the wider definition of particular social group argued were to be accepted.[119] Hathaway responds to this argument, equally applicable to women, with the common sense that, 'race, religion, nationality and political opinion are also characteristics shared by very large groups, and that

[114] Id 13.
[115] 5 August 1996.
[116] V95/03574 (24 April 1996) 6.
[117] V95/03448 (4 September 1995) 10.
[118] *Applicant A*. Transcript of High Court appeal hearing. 6 March 1996, 17, 21, 32, 33.
[119] Kirby J did not persevere with this argument in his judgment; in fact he agreed with Brennan CJ in the minority, finding that the Chinese couple were members of a particular social group.

adherence to the principle of *ejusdem generis*[120] means that 'particular social group' should be interpreted in the same way as the other Convention reasons.[121] Although, as Fullerton notes, women, forming approximately 50% of the population of every country, are potentially the largest group of all.[122] Dawson J, for one though, discounts size as a relevant factor.[123]

Bower says that narrowing the definition because of these fears would amount to a discriminatory application of the asylum laws and that this would be an inappropriate action on the part of the judiciary — that should be left for the legislature to determine.[124] The Canadian Guidelines also dismiss the floodgates argument, saying that it is irrelevant — 'race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people'.[125] In any case, the floodgates argument is misleading. Whatever category is included within the meaning of particular social group, an applicant for a protection visa would still have to show persecution *on that basis.* It would have to be official persecution and it would have to be viewed within the societal context of the country from which refuge is being sought. A court or tribunal would have to consider the position of women in the particular society, the attitude of the society to, for example, domestic violence, the availability of women's shelters, effective policing and other support services. These matters would have to be considered in each claim.[126]

A good example is found in RRT decision V95/03639.[127] A Polish woman fearing continued violence from her husband was refused a protection visa. The RRT had no difficulty in finding that women are a 'particular social group', however in that case there was no 'real chance' of persecution. Poland has satisfactory domestic violence legislation, a police force which enforces the law and support services which are able to assist women in the position of the applicant.

CONCLUSION

It is submitted that there is more than sufficient justification for the view that female genital mutilation is indeed 'persecution' under any definition of the term, and that an Australian court, like the BIA, would certainly find that such

[120] Meaning literally, 'of the same kind'. The doctrine holds that general words used in an enumeration with specific words should be construed in a like manner with the specific words.

[121] J C Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991), 163.

[122] M Fullerton 'A comparative look at refugee status based on persecution due to membership in a particular social group' (1993) 26 *Cornell International Law Journal*, 505, 520.

[123] *Applicant A* (1997) 142 ALR 331, 341.

[124] K Bower, 'Recognising violence against women as persecution on the basis of membership in a particular social group' (1993) 7 *Georgetown Immigration Law Journal* 173, 205 — an argument adopted by counsel for Applicant A in the High Court appeal hearing.

[125] See supra fn 6.

[126] R Wallace, 'Ward v Canada: a glimmer of hope for victims of domestic violence?' (1995) 4 *Juridical Review* 390, 393

[127] 2 May 1996.

persecution, in the circumstances of Fauziya Kasinga, was officially tolerated, if not sanctioned. It is further submitted that Fauziya Kasinga, if an applicant for an Australian protection visa, would satisfy the test that she faced a 'real chance' of persecution if returned to Togo.

As to 'membership of a particular social group', the RRT has held in a number of decisions that women *are* a particular social group and would undoubtedly grant Fauziya Kasinga a protection visa. But this finding has not been challenged in the courts and the few inconclusive remarks, in obiter, provide negative indicia. The decision to grant a protection visa relies solely on interpretation of the Convention 'reasons' by our responsible ministers, courts and tribunals. These bodies must have regard to *Applicant A* where the High Court said that treaties are to be interpreted with reference to their text and to their contextual documents.[128] The Convention and its *travaux preparatoire,* however, offer no guidance on 'membership of a particular social group',[129] and it should be remembered that these interpretations are not binding upon Australian courts in construing the elements enacted by the Act, for the determination of who should be considered a refugee is ultimately left by the Protocol to each State in whose territory a refugee finds herself.[130]

The High Court, in developing a test for 'membership of a particular social group', has said that it is not correct to establish persecution or 'transgression' before establishing whether a group exists — that should come after, as the final link in satisfaction of the criterion. There is, as noted above, ample support for the view that 'women' are members of a particular social group and it is submitted that there is no doubt that a woman in Fauziya Kasinga's position would certainly be able to show a well founded fear of persecution, because of membership of that group.

It is possible, that in any such consideration the High Court could adopt the view of Wilcox J in *Lek* — who held that, despite the presence of recognisable, cognisable groups with interest and experience in common, etc., that 'women' is simply too broad a category because, 'there is no common or binding element'.[131] It is submitted, however, that the High Court is more likely to follow its own reasoning in *Applicant A*, note the presence of all the appropriate elements and acknowledge that women certainly fall within the meaning of 'particular social group'. In the event that the minority view gained the ascendancy, that a group might be defined by the persecution, then the result would be the same. Given that the 'floodgates' argument was not pursued in *Applicant A*, it is unlikely that it would be raised with respect to women. It is more likely that the High Court would note that that is more appropriately a concern for the legislature and that, in any case, the argument is irrelevant given that applicants still need to show a well founded fear of persecution.

[128] *Applicant A* (1997) 142 ALR 331, 349 *et seq* per McHugh J.
[129] See supra fn 74.
[130] See eg *Matter of Acosta* (1985) 19 I&N Dec, 211, 220 and the references there cited.
[131] (1993) 45 FCR 418, 432.

Irrespective of the attitude of the Courts however, the position of the Government must remain a concern, given the reaction to the decision of Sackville J in *Respondent A*.[132] It should be pointed out though that the Government has made no moves to overturn the several decisions of the RRT which have held unequivocally that women *are* a particular social group. The political cost of doing so would also undoubtedly be much higher than taking action to forestall applications for protection visas from PRC couples with one child.

[132] See supra fn 52.