

House of Lords - 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)

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HOUSE OF LORDS Lord Steyn Lord Hoffmann Lord Hope of Craighead
Lord Hutton Lord Millett **OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN
THE CAUSE ISLAM (A.P.)
(APPELLANT) v. SECRETARY OF STATE FOR THE HOME DEPARTMENT
(RESPONDENT) REGINA v. IMMIGRATION APPEAL TRIBUNAL AND ANOTHER
(RESPONDENTS)
EX PARTE SHAH (A.P.)
(CONJOINED APPEALS) ON 25 MARCH 1999
LORD STEYN**

My Lords,

The two appeals before the House raise important questions about the interpretation of article 1A(2) of the Convention Relating to the Status of Refugees, 1951, and in particular the meaning of the words "membership of a particular social group." Section 8(2) of the Asylum and Immigration Appeals Act 1993, provides that a person who has limited leave to enter the United Kingdom may appeal to a special adjudicator against a refusal to vary leave "on the ground that it would be contrary to the United Kingdom's obligations under the Convention for him to be required to leave the United Kingdom after the time limited by the leave." The common features of the two appeals are as follows. Both appeals involve married Pakistani women, who were forced by their husbands to leave their homes. They are at risk of being falsely accused of adultery in Pakistan. They are presently in England. They seek asylum in this country as refugees. They contend that, if they are forced to return to Pakistan, they would be unprotected by the state and would be subject to a risk of criminal proceedings for sexual immorality. If found guilty the punishment may be flogging or stoning to death. In these circumstances both women claim refugee status on a ground specified in article 1A(2) of the Convention, namely that they have a well founded fear of being persecuted for reasons of "membership of a particular social group." The Court of Appeal rejected these claims: *Reg. v. Immigration Appeal Tribunal, Ex-parte Shah* [1998] 1 W.L.R. 74. Both women have been granted exceptional leave to remain in the United Kingdom. But both women still seek refugee status. The principal question of law is whether the appellants are members of a particular social group within the meaning of article 1A(2) of the Convention. This question can only be considered against a close and particular focus on the facts of the case.

Women in the Islamic Republic of Pakistan

Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case. On the findings of fact and unchallenged evidence in the present case, the

position of women in Pakistan is as follows. Notwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman's place in society in Pakistan is low. Domestic abuse of women and violence towards women is prevalent in Pakistan. That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state. Married women are subordinate to the will of their husbands. There is strong discrimination against married women, who have been forced to leave the matrimonial home or have simply decided to leave. Husbands and others frequently bring charges of adultery against such wives. Faced with such a charge the woman is in a perilous position. Similarly, a woman who makes an accusation of rape is at great risk. Even Pakistan statute law discriminate against such women. The position is described in a report of Amnesty International dated 6 December 1995 on Women in Pakistan. The report states, at pp. 5-7:

". . . several Pakistani laws explicitly discriminate against women. In some cases they allow only the evidence of men to be heard, not of women. In particular, the Evidence Act and the *Zina* Ordinance, one of four *Hudood* Ordinances promulgated in 1979, have eroded women's rights and denied them equal protection by the law.

Women are also disadvantaged generally in the criminal justice system because of their position in society. . . . Women are particularly liable to be punished under the *Zina* Ordinance which deals with extramarital sexual intercourse. . . . Offences under this law attract different punishments according to the evidence on which the conviction is based. In cases where the most severe (*hadd*) punishments may be imposed, the evidence of women is not admissible.

"In a rape case the onus of proof falls on the victim. If a woman fails to prove that she did not give her consent to intercourse, the court may convict her of illicit sexual intercourse. . . .

"The majority of cases tried under the *Hudood* laws result in convictions carrying the less severe (*ta'zir*) punishments, but there are also some acquittals and a few convictions involving the most severe (*hadd*) punishments. . .

"About half the women prisoners in Pakistan are held on charges of *Zina*; . . . Arrests under the *Zina* Ordinance can be made without a magistrate first investigating whether there is any basis for the charge and issuing a warrant. As a result, women in Pakistan are often held under the *Zina* Ordinance for years although no evidence has ever been produced that they have committed any offence. Men frequently bring charges against their former wives, their daughters or their sisters in order to prevent them marrying or remarrying against the man's wishes. . .

"Most women remain in jail for two to three years before their cases are decided, often on the basis of no evidence of any offence."

For what may be a small minority, who are convicted of sexual immorality, there is the spectre of 100 lashes in public or stoning to death in public. This brief description of the discrimination against women, which is tolerated and sanctioned by the state in Pakistan, is the defining factual framework of this case.

The Shah case

The appellant is 43. Her husband turned her out of the marital home in Pakistan. She arrived in the United Kingdom in 1992 and gave birth to a child shortly thereafter. In June 1993 she claimed asylum. She is afraid that her violent husband may accuse her of adultery and may assault her or denounce her under Sharia law for the offence of sexual immorality. In her case the evidence of state toleration and sanctioning of discrimination against women was sketchy.

This claim was rejected on the ground that the appellant does not come within "a particular social group" under article 1A(2). The appellant appealed to the special adjudicator. On 25 July 1995 the special adjudicator found that the appellant's fear of persecution was well founded. But she concluded that the appellant does not fall within "a particular social group", being the only conceivable ground for her Convention claim. On 7 August 1995 the Immigration Appeal Tribunal refused leave to appeal on the ground "that the adjudicator gave clear adverse findings of fact, after giving to each element on the evidence the weight she considered appropriate." The appellant sought judicial review of the refusal of leave. The substantive hearing took place before Sedley J. (now Sedley L.J.). The Secretary of State conceded that the I.A.T. had misdirected itself but contended that relief should be denied because the claim to refugee status is as a matter of law unsustainable. Sedley J. held that the appellant's case is arguable. He granted an order directing the I.A.T. to grant leave and to hear and determine the appeal: *Reg. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, Ex parte Shah* [1997] Imm.A.R. 145.

The Islam case

The appellant is 45 and has two children. She arrived with her children in the United Kingdom in 1991. In the same year she claimed asylum. She is a teacher. She married her husband in 1971. He was often violent towards her. But the marriage endured. In 1990 a fight broke out in the school where she was teaching. The fight was between young supporters of two rival political factions. She intervened. One faction became hostile towards her. They made allegations of infidelity against her. These allegations were made, inter alia, to her husband who was a supporter of the same faction. Her husband assaulted her and she was twice admitted to hospital. She left her husband. She stayed briefly at her brother's house. Unknown men threatened her brother. She could not remain with him. After a brief stay in a temporary refuge she came to the United Kingdom. In claiming asylum she relied on two Convention grounds under article 1A(2), namely a well founded fear of persecution for reasons of (1) membership of a particular social group and (2) political opinion.

The claim was rejected. By a determination dated 7 December 1995 the special adjudicator accepted the evidence of the appellant. She found that the appellant had been persecuted in Pakistan. She also found that the authorities in Pakistan are both unable and unwilling to

protect the appellant. But she held that as a matter of law the appellant was not a member of a "particular social group" because the group could not exist independently of the feared persecution. Moreover, she found that on the facts neither the particular political faction nor the appellant's husband persecuted her because of an actual or perceived political opinion. By a determination of 2 October 1996 the I.A.T. dismissed the appeal. The I.A.T. found that the appellant cannot be said to belong to a particular social group because the "sub-group does not . . . have any innate or unchangeable characteristic, nor is it a cohesive homogeneous group whose members are in close voluntary association." The I.A.T. further concluded that on the facts the appellant's persecution was motivated neither by an actual nor attributed political opinion.