

**CASE COMMENTARY**

**FEMALE GENITAL MUTILATION – VIOLENCE  
AGAINST GIRLS AND WOMEN AS A PARTICULAR  
SOCIAL GROUP**

***Fornah v Secretary of State for the Home Department, House of  
Lords [2006] UKHL 46, [2006] 3 FCR 381, [2007] 1 All ER 671***

*Susan Edwards\**

**FACTS**

Zainab Esther Fornah was fifteen years old when on 15<sup>th</sup> March 2003, as an unaccompanied minor, she arrived at UK's Gatwick airport claiming asylum. As she was a child she was taken into the care of West Sussex Social Services Child Asylum Team.<sup>1</sup> She had fled Sierra Leone where she had been captured by rebels, who had killed her family, and was repeatedly raped. She did not want to return to her uncle's village fearing that she would be forcibly genitally mutilated, as was customary practice. Whilst her father was alive he was able to protect her from this practice. Female genital mutilation, has variously been described as female circumcision and as clitoridectomy, as if to render benign this very specific inhumane habituated practice against females. It involves cutting away the clitoris, labia minora, labia majora and vulva of a female. The area remaining is then sewn together leaving a small aperture to allow for menstruation and urination. This maiming is often perpetrated without anaesthetic and some children do not survive. The World Health Organisation defines this particular form of torture, somewhat blandly, as "the partial or complete removal of the external female genitalia or other

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<sup>1</sup> According to the children's charity Barnardo's, "the majority of authorities have no specific policies to work with Unaccompanied children (72%), they have not included them in their Management Action Plans under the Quality Protects initiative (62%) or in the Department of Health's 'new assessment frameworks'" (74%). More than a third of authorities place unaccompanied children outside the responsible borough with very varied levels of support then available. See:

<http://www.harpraweb.org.uk/content.php?section=children&sub=ch19>

injury to the female genital organs whether for cultural or any other non-therapeutic reason.”<sup>2</sup>

Under the (Convention and Protocol relating to the Status of Refugees (1951)<sup>3</sup> refugees claiming asylum must fulfil the conditions set out in paragraph 2. “(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 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; 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.”

Zainab’s case was taken up by Brighton Housing Trust<sup>4</sup> and an application made for asylum.<sup>5</sup> The Secretary of State accepted her application but refused her claim giving two reasons for this decision. First, that the practice of ‘female circumcision’ did not come within the definition of ‘persecution’ under the Convention, and second, girls at risk of ‘circumcision’ in Sierra Leone did not form a ‘particular social group’ within art 1A(2). (Although he had since granted her leave to enter on humanitarian grounds under art 3<sup>6</sup> of the European Convention on Human Rights (ECHR) which entitled her to remain for three years in the UK). Mr M R Oliver, the adjudicator, disagreed. He found first, that female genital mutilation amounted to persecution and that the claimant had a well-founded fear of it. And second, he found that the feared persecution was because of her membership of a ‘particular social group’ of “young, single Sierra Leonean women, who are clearly at considerable risk of enforced . . . [female genital mutilation].”<sup>7</sup> The Secretary of State then appealed to the Immigration Appeal Tribunal (IAT) (Mr Richard Chalkley, chairman, Mr M J Griffiths

<sup>2</sup> WHO definition, see <http://www.who.int/mediacentre/factsheets/fs241/en/>

<sup>3</sup> (Cmd 9171) and (1967) (Cmnd 3906).

<sup>4</sup> Dedicated to addressing the problem of homelessness and associated problems in Brighton and Hove. (Brighton Housing Trust immigration legal service, solicitor for Zainab Fornah, Ms Jen Henwood).

<sup>5</sup> ‘Free from abuse’ Jean Calder for the *Morning Star*, November 10, 2006.

<sup>6</sup> Right to be free from inhuman and degrading treatment.

<sup>7</sup> *Fornah v Secretary of State for the Home Department* Court of Appeal [2005] EWCA Civ 680, [2005] 3 FCR 449, quoted by Lord Justice Auld, para 5.

and Mrs G Greenwood), who reversed the decision of Mr Oliver, the adjudicator. The claimant appealed to the Court of Appeal which upheld the decision of the IAT. The claimant then appealed to the House of Lords. The House were unanimous in their decision to overturn the decision of the Court of Appeal and reinstate the original decision of the adjudicator.

## COURT OF APPEAL

In the Court of Appeal, Lord Justice Auld, Lord Justice Chadwick and Lady Justice Arden (dissenting)<sup>8</sup> agreed unanimously that female genital mutilation was “an evil practice internationally condemned.”<sup>9</sup> They then considered first, whether there was a well-founded fear of persecution and second, whether that fear fell within one of the five reasons listed in article 1A(2). In consideration of the first question, the court found that there was a well-founded fear. In consideration of the second question, whilst Lord Justice Auld recognised that the concept of ‘particular social group’ was ‘elusive,’ the court concluded that Zainab Fornah was not a member of a particular social group because the practice of FGM was accepted, and also that women undergoing such a practice were accepted into the society because of it. Lord Justice Auld said, “To confine the grouping to young, single girls who, for the time being, have not been circumcised, though logical, would be contrary to the general rule that it is impermissible to define the group solely by reference to the threat of the persecution.”<sup>10</sup> Lord Justice Chadwick concurred and in his interrogation of the meaning and application of ‘particular social group’ said, “The unifying characteristic of the social group in the present context is not gender alone; it is gender coupled with what Arden LJ (whose judgment I have had the advantage of reading in draft) refers to as ‘intactness’- that is to say, absence of the particular form of FGM practised by women on women in Sierra Leone.”<sup>11</sup> Lady Justice Arden (dissenting) argued that it was the intactness (perhaps an inapt expression) that defined the group and on that basis held that Miss Fornah was a member of a particular social group. She stated:

2The fact that members of the group lose their common characteristic of intactness as a result of persecution must be discounted. To take account of that factor and conclude that this characteristic is not immutable for the purposes of the Acosta test, would be to conclude, in the case of persecuted

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid, per Lord Justice Auld, para 1.

<sup>10</sup> Ibid, para 44.4.

<sup>11</sup> Ibid, Lord Justice Chadwick, para 52.

left-handed people, that they could not constitute a particular social group for the purposes of the Refugee Convention because, when the persecution succeeds, they no longer have their left hands.”<sup>12</sup>

The Court of Appeal held that FGM was not a practice that fell within the definition of persecution under the Convention because girls at risk of circumcision in Sierra Leone did not form a particular social group within article 1A(2). The Court also took the view that the authorities in Sierra Leone would protect the claimant. Although the Court recognised that “this was not an area for rigid application of principle to infinitely variable national and social contexts in which fear of persecution was put forward as a claim for asylum.”<sup>13</sup> The claimant then appealed to the House of Lords.

## HOUSE OF LORDS

The House of Lords (Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Brown of Eaton-Under-Heywood) were unanimous in condemning the practice, as had the Court of Appeal.

But most importantly the House of Lords were unanimous in finding that Sierra Leonean women were members of a particular social group on the basis of gender. As Lord Bingham identified, “the very limited issue between the parties is whether the ... appellant was a member of a particular social group, however defined.”<sup>14</sup>

### *Persecution on the basis of gender first, and intact women in the alternative*

Lord Bingham and Lord Hope held that Sierra Leonean women were members of a social group of women who were perceived by society as inferior and that it was not necessary to define the group with reference to the persecution. Lord Bingham concluded, as did Lord Hope of Craighead that gender per sé fell within the definition of ‘particular social group.’

“I think it clear that ... women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely

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<sup>12</sup> Ibid, Lady Justice Arden, para 67.

<sup>13</sup> Ibid, Lord Justice Auld, para 15.

<sup>14</sup> (*Fornah v Secretary of State for the Home Department*), *K v Secretary of State for the Home Department*; *Fornah v Secretary of State for the Home Department* House of Lords [2006] UKHL 46, [2006] 3 FCR 381, [2007] 1 All ER 671, para 25.

a position of social inferiority as compared with men. They are perceived by society as inferior. That is true of all women, those who accept or willingly embrace their inferior position and those who do not. To define the group in this way is not to define it by reference to the persecution complained of: it is a characteristic, which would exist even if FGM were not practised..... FGM is an extreme expression of the discrimination to which all women in Sierra Leone are subject, as much those who have already undergone the process as those who have not. ...I find no difficulty in recognising women in Sierra Leone as a particular social group for purposes of art 1A(2). Had this submission been at the forefront of the second appellant's case in the Court of Appeal, and had that court had the benefit of the UNHCR's very articulate argument, it might, I think, have reached the same conclusion. If, however, that wider social group were thought to fall outside the established jurisprudence, a view I do not share, I would accept the alternative and less favoured definition advanced by the second appellant and the UNHCR of the particular social group to which the second appellant belonged: intact women in Sierra Leone. This was the solution favoured by Arden LJ, and in my opinion it meets the Convention tests."<sup>15</sup>

Lord Hope said, "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."<sup>16</sup>

*A preference for the Lady Justice Arden solution*

Lord Rodger and Lord Brown preferred the Arden solution, that 'particular social group' was satisfied by being a member of a group of girls/young women who had not undergone the practice of FGM and were facing that inevitability. Lord Rodger said, "The harm is 'gender-specific.' So, being a woman is a *causa sine qua non* of being a victim: in other words, 'but for' being a woman, the persons concerned could not be selected as victims of the practice although accepted that that may well be an oversimplification."<sup>17</sup> And then went on to say, "... I am satisfied that the appellant belongs to the

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<sup>15</sup> Ibid, para 31.

<sup>16</sup> Ibid, para 58, per Lord Hope.

<sup>17</sup> Ibid, para 74.

group of uninitiated intact women who face persecution by enforced mutilation. If I am wrong in choosing that more limited group, then I would, of course, accept that the appellant falls within the larger social group of women and girls who face enforced mutilation.”<sup>18</sup> Similarly, Lord Brown stated, “... I myself would prefer to define the relevant group (in line with Arden LJ’s dissenting judgment in the Court of Appeal) as ‘uninitiated indigenous females in Sierra Leone’ (as formulated by Lord Hope of Craighead at [56], above and proposed by Lord Rodger of Earlsferry at [74], above, and essentially for the reasons they give-principally to exclude the majority of women who have already been initiated and are plainly no longer at risk). That said, I do not disagree with Lord Bingham and Baroness Hale of Richmond that the group could if necessary be more widely defined to include even the initiated on the basis that all Sierra Leonean...”<sup>19</sup>

*Gender persecution – in its own right - ‘blindingly obvious’*

Baroness Hale considered the issue of whether Miss Fornah belonged to a particular social group ‘blindingly obvious’. She took a more robust stance finding that gender in itself was sufficient to engage the ‘particular social group’ within the Convention. She said, “The stumbling block seems to have been the fact that FGM is a once and for all event. Once done, it can neither be undone nor repeated. Thus, it was argued, if many members of the group are no longer at risk, because they have already suffered, it can no longer constitute a group for this purpose. But if the group has to be defined only to include those at risk, it then looks as if the group is defined solely by the risk of persecution and nothing more. 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.”<sup>20</sup>

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<sup>18</sup> Ibid, para 80.

<sup>19</sup> Ibid, para 119.

<sup>20</sup> Ibid, paras 112-113.

## DISCUSSION

International human rights law, like law itself, has been impervious to women's rights. There has been a failure to create a nexus between violence against women<sup>21</sup> and international human rights because a masculinist notion of human rights<sup>22</sup> has set the agenda. In addition, the Convention is legally and linguistically limited. One may have fear for all sorts of reasons but the fear must fall within the convention because of one of the reasons in the categories. That element was identified by Lord Hoffmann in *Shah* as being a question of causation. Zainab's case is ground breaking in recognising and making visible gender based persecution.<sup>23</sup> Baroness Hale said that this case was 'blindingly obvious' and yet it had to reach the House of Lords for what was also obvious to the adjudicator to be conceded. Asylum decisions are not determined in a legal vacuum, the courts are not hermetically sealed from the wider discussions, theoretical, philosophical and in the public domain. Presently asylum applications have been declining in the UK<sup>24</sup> which perhaps is more a reflection not of a diminution in persecution but an increasing global awareness of the UK's tough asylum regime with regard to adults and also as this case demonstrates unaccompanied minors.<sup>25</sup> This momentous ruling owes

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<sup>21</sup> Violence against women takes many forms including domestic violence, rape, female circumcision, forced marriage amongst others. Sexual and physical violence against women is the most global, historic and recalcitrant dimension of women's oppression.

<sup>22</sup> H Charlesworth, 'Internal Relations Theory, International Law, and the Regime governing atrocities in internal conflicts' *AJIL* [1999] Vol 93, No 2, p 361 at 382.

<sup>23</sup> Per Lord Hoffman in *R v Immigration Appeal Tribunal, ex p Shah (United Nations High Comr for Refugees intervening)*, *Islam v Secretary of State for the Home Dept (United Nations High Comr for Refugees intervening)* [1999] 2 All ER 545, [1999] 2 AC 629, at 653A/655.

<sup>24</sup> The total number of applications for asylum (excluding dependants) fell to 5,275 in the quarter, and to 23,520 for 2006, down 9% on the previous year. Top applicant nationalities in the last quarter were Iran, Afghanistan, Eritrea, China.

<sup>25</sup> 'In 2005, 2,965 unaccompanied asylum seeking children (UASCs) aged 17 or under applied for asylum in the United Kingdom, 1 per cent less than in 2004 (2,990). Of these, 445 were made at port and 2,520 in-country. The main countries of origin were Afghanistan 530 (18 per cent), Iran 450 (15 per cent), Somalia 235 (8 per cent), Eritrea 195 (7 per cent), Iraq 170 (6 per cent), China 170 (6 per cent), Dem Rep of Congo 145 (5 per cent), Vietnam 2,560 initial decisions were made in 2005 on UASCs who were aged 17 or under at the time of the initial decision. Of these, 140 (5 per cent) were granted asylum, 20 (1 per cent) were granted humanitarian protection, 1,960 (69 per cent) were granted discretionary leave and 440 (15 per cent) were refused'. *Asylum Statistics United Kingdom 2005*, Tina Heath, Richard Jeffries and Sara Pearce, 10/06, Home Office Statistical Bulletin, p 10. See also A long way to go

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much to the indefatigability of the legal team who had to fight ‘tooth and nail.’

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- Young refugees and asylum seekers in the UK Eleanor Stringer and Tris Lumley, April 2007. (Research supported by the City Parochial Foundation and the Esmée Fairburn Foundation) New Philanthropy Capital.