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Author: Jordan Rhodes

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The Membership of a Particular Social Group: Forging a Space for Victims of Female Genital Mutilation

Jordan Rhodes

ABSTRACT – The United Nations Refugee Convention remains the centrepiece of international refugee law. Yet, its key text omits a Convention ground to accommodate gender-specific asylum claims. As a result, victims of female genital mutilation (FGM) have traditionally experienced grave difficulties in receiving international protection in the UK. Arguably, since the House of Lords' landmark *Fornah* judgment, a space for FGM claims has been forged through the particular social group (PSG) channel. This article provides a critical analysis of these developments and submits that in light of the Conntion's failure to accommodate gender-specific claims, the substantive protections afforded to FGM victims are a product of judicial activism and policy initiatives. It will be argued that this reflects the malleability of the Convention as a 'living instrument', as well as the male-centric paradigm underpinning international human rights legislation.

I. Introduction

> The world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society.[1]

Fatima was ten years old when she was ushered out of her primary school and into the bushes to be circumcised.[2] She describes lying on the ground, her legs pinned down by two others, and the cutting taking place in one motion: "The pain is the worst. It is even more painful than giving birth, because you have to live with it for the rest of your life".[3] As an adult, Fatima left her native Gambia to seek asylum in the UK, hoping to protect her three-year-old daughter from enduring the same inevitable fate, but her application was unsuccessful. In Fatima's village of Sohm, the practice of FGM is an entrenched tradition, performed for generations, and providing thousands of women with employment as 'inherited' circumcisers. Fatima is far from alone in her experience. At least 200 million girls and women have been subject to FGM in 30 countries.[4] The practice is concentrated in a swath of African states, spanning from the Atlantic Coast to the Horn of Africa.[5] In Somalia, Guinea, Djibouti and Egypt, the FGM

[1] *Secretary of State for the Home Department* v *K; Fornah* v *Secretary of State for the Home Department* [2006] UKHL 46, 86, per Baroness Hale.
[2] S. Lloyd-Roberts, 'BBC Our World – Gambia, FGM, 2013', available at: https://www.youtube.com/watch?v=pVCgC6Lucwc (last accessed 22 October 2017).
[3] *Ibid.*
[4] UNICEF, 'Female Genital Mutilation/Cutting: A Global Concern' (2016) 5.
[5] UNICEF, 'Female Genital Mutilation/Cutting: A Statistical Overview and Exploration of the Dynamics of Change' (2013), 26.

prevalence rates for girls and women between 15 and 49 years old are near universal (98 per cent, 96 per cent, 93 per cent and 91 per cent, respectively).[6]

Despite extensive efforts to outlaw the practice in numerous nations, FGM continues to be widely performed in remoter areas such as villages and in private context. This renders governmental efforts to be redundant and prompts actual or potential victims to flee their countries of origin.[7] In the first three quarters of 2014, over 25,000 girls and women from FGM-practicing countries sought asylum in EU countries, with an estimated 71 per cent being survivors of mutilation.[8] In the UK, the Home Office has published decision-making guidance recognising that gender-specific persecution, such as FGM, *may* inform an assessment as to whether refugee status is to be granted.[9] The position was not always so. The 1951 UN Convention Relating to the Status of Refugees[10] remains the "centrepiece of international refugee protection today",[11] and yet fails to provide gender-based asylum claims – those being related to the applicant's identity as a woman and the persecution faced for reasons of that identity[12] – with any specific statutory footing.

As such, this article aims to provide a critical analysis of the development of FGM claims in the UK asylum determination process. The discussion also seeks to map how asylum applications made by victims of FGM currently stand in the wider substantive refugee framework.[13] Firstly, in order to lay down the contextual foundations of the pertinent issues, an account of the practice of FGM will be provided. In particular, the discussion will consider FGM from both a medical, and a human rights perspective. A further exploration into the matter (as this paper seeks to provide) demonstrates that practice of FGM is a violation of a woman's fundamental rights and amounts to inhumane and degrading treatment. The fact that it has taken decades of global jurisprudence to recognise FGM as a legitimate basis for international protection is testament to how human rights conventions have emerged – with the specific gender-based concerns of asylum-seeking women being mostly invisible.[14] Secondly, the substantive criteria pertaining to refugee status under the Convention will be outlined to

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[6] *Ibid.*

[7] "Women and young girls in these countries are frequently subjected to FGM without their consent since those performing the ritual do not fear the consequences of their actions." *See* R. Zaman, 'Female Genital Mutilation: Membership in a Particular Social Group and Past vs. Future Persecution: A Comparative Look at Asylum Laws for Women Who Have Been Subjected to FGM in the United States and the United Kingdom' (2010) 16 *New England Journal of International and Comparative Law* 225, 232.

[8] Refugee Studies Centre, 'FGM and Asylum in Europe' (2015) 49 *Forced Migration Review* 2, 2. Although, note that this does not mean that all applications were made *for the reason* of FGM – these statistics concern the recorded countries of origin and the physical intactness of such asylum-seekers as regards FGM.

[9] Home Office, 'Guidance: Gender Issues in Asylum Claims' (29 September 2010), 5.

[10] As amended by the 1967 Protocol Relating to the Status of Refugees.

[11] UNHCR, 'Introductory Note' to the Refugee Convention (2010), 2.

[12] The 'gender-based asylum claim' as used in this article does not encompass LGBTQ+ identity. *See* M. Casey, 'Refugee Women as Cultural Others: Constructing Social Group and Nexus for FGM, Sex Trafficking, and Domestic Violence Asylum Claims in the United States', (2012), 10 *Seattle Journal for Social Justice* 2, 981, 987, *see* footnote 9.

[13] Therefore, procedural matters fall beyond the remit of this paper, except insofar as they inform the discussion pertaining to the substantive law.

[14] N. Honkala, 'She, of Course, Holds No Political Opinions: Gendered Political Opinion Ground in Women's Forced Marriage Asylum Claims' (2017) 26 *Social and Legal Studies* 2 166, 167.

establish the general mandate under the instrument. All asylum applications must satisfy the Convention's definition of 'refugee' before the state can grant protection. Understanding the requirements under the Convention is, therefore, key if their application in the context of FGM applications is to be criticised. The third section of the paper will examine the volatile status of FGM claims within this substantive framework, tracing developments in several jurisdictions to offer a comparative analysis, though the focus of this paper rests primarily with the UK position. Importantly, the UK's position derives from the internationally agreed 'refugee' definition. Thus, domestic developments do not exist in a vacuum. Indeed, the UK was notably late in settling the debate on the status of FGM claims, with foreign developments forming the international backdrop. Consequently, the seminal *Fornah*[15] decision handed down by the House of Lords will be reviewed, which lays down the current legal position of FGM claims in the UK. *Fornah* marks the UK's formal acceptance of FGM asylum applications from the highest judicial authority, dismantling the definitional obstacles that once denied such asylum seekers protection. The paper will conclude with the assertion that the current substantive protections afforded to FGM claimants are a product of judicial activism and policy initiatives, rather than statute. These developments have reacted to the protection gaps left by the Refugee Convention. The reality of these gaps tell two tales: on the one hand, these reflect the Convention's mutability in its interpretation and application, and on the other hand, it exposes the male-centric paradigm from which international human rights legislation has emerged and has continued to develop.

II. Female Genital Mutilation

FGM involves the intentional physical alteration or injury to the female genital organs for non-medical purposes. Alternative terms include 'Female Genital Cutting' and 'Female Genital Circumcision'. Advocates of such terminology are of the view that the more objective designation reflects the importance of assuming non-judgemental language.[16] This paper will use the word 'mutilation', in line with the World Health Organization (WHO)'s use of the term, and emphasising the gravity of the practice as an act warranting condemnation.[17]

In 1997, WHO, the United Nations Children's Fund (UNICEF), and the United Nations Fund for Population Activities (UNFPA) issued a joint statement providing an agreed definition of FGM as comprising 'all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons'.[18] Four distinct methods of FGM have been recognised: "Type 1", which involves the excision of the prepuce with or without excision of the clitoris, "Type 2", comprising the excision of the clitoris with the excision of the labia minora, "Type 3", concerning excision of part or all of the external genitalia and the stitching or narrowing of the vaginal opening, and "Type 4", a catch-all category, which refers to various "unclassified" methods, such as pricking, piercing and

[15] [2006] UKHL 46.
[16] Casey (n12) 987-8.
[17] WHO, 'Eliminating Female Genital Mutilation: An Interagency Statement' (2008), 3.
[18] WHO, 'Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement' (1997), 3.

stretching.[19] The practice is often undertaken with crude, unsterile instruments, and without anaesthetic.[20] Broken glass and unclean blades are typically used.[21]

FGM has a number of recognised complications, both physical and psychological. In the short-term, the clearest immediate consequence physically is that of excruciating pain. "A piercing pain shot up between my legs, indescribable, and I howled", recalls one survivor; [22] "Then came the sewing: the long, blunt needle clumsily pushed into my bleeding outer labia, my loud and anguished protests." [23] Beyond the experience of physical pain, FGM can lead to haemorrhage, injury to neighbouring organs, inflammation around the wound and subsequent urine retention, and infection – particularly where unsterilised tools are used.[24] Variables germane to the implications include the extent of the cutting, the operator's skill or experience in the procedure, the sanitation of equipment utilised, and the physical condition of the victim.[25] Long-term complications can include the development of dermoid cysts, keloids (the excessive growth of scar tissue), stenosis (the closing of the artificially altered vaginal opening), and dyspareunia (pain during intercourse).[26] In 2006, WHO conducted a study which concluded that women subject to FGM have a significantly heightened exposure to adverse obstetric risks.[27] In the most extreme cases, the practice can result in death, resulting from haemorrhage or various infections.

The experience also generates a barrage of psychological consequences. Ayaan Hirsi Ali, a Somalian FGM survivor and refugee in the Netherlands, explains that her sister Haweya has never been the same since: "She had nightmares, and during the day began stomping off to be alone. My once cheerful, playful little sister changed."[28] Behavioural disturbances, loss of trust and confidence, anxiety, depression, chronic irritability and frigidity, are all viable complications stemming from the lasting mark left on girls and women who are mutilated.[29] Psychosomatic symptoms can include sleeplessness, nightmares, loss of appetite, weight loss or excessive weight gain, panic attacks, concentration and learning difficulties, and post-traumatic stress.[30]

Internationally, FGM has been condemned as a violation of fundamental human rights. The practice is incompatible with a woman's right to health, security, physical integrity, to be free

[19] *Ibid.*
[20] *Ibid*, 3-4. Although see the challenges posed by the recent trend of 'medicalised' FGM. *See* L. Robertson, M. Szaraz, 'The Medicalisation of FGM' (2016).
[21] L. Frydman and K. Seelinger, 'Kasinga's Protection Undermined? Recent Developments in Female Genital Cutting Jurisprudence' (2008) 13 *Bender's Immigration Bulletin* 1073, 1074.
[22] UNHCR, 'Too Much Pain: Female Genital Mutilation & Asylum in the European Union: A Statistical Overview' (2013), 9.
[23] *Ibid.*
[24] WHO, 'Female Genital Mutilation: An Overview' (1998), 25-27
[25] *Ibid*, 25.
[26] *Ibid*, 27-31.
[27] WHO, 'Female Genital Mutilation and Obstetric Outcome: WHO Collaborative Prospective Study in Six African Countries' (2006) 367 *The Lancet* 1835.
[28] UNHCR (n22) 9.
[29] WHO (n18) 8.
[30] WHO, 'Female Genital Mutilation; Integrating the Prevention and the Management of the Health Complications into the Curricula of Nursing and Midwifery: A Student's Manual' (2001).

from torture and inhuman or degrading treatment, and even to life, when the procedure results in death.[31] FGM will virtually always amount to violation of the European Convention on Human Rights, Art.3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art.s 1 or 16, International Covenant on Civil and Political Rights, Art.7, and United Nations Convention on the Rights of the Child, Art.37(a).[32] Moreover, the right to be free from torture and cruel treatment is generally accepted as *jus cogens.*[33] In other words, the principle is an overriding norm of international law binding on all states, irrespective of whether they have signed and ratified an international instrument on the matter. As such, a report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment identified that, even if the domestic law of a state authorised the practice, "*any* act of FGM would amount to torture and the existence of the law by itself would constitute consent or acquiescence by the State".[34]

Finally, the entire premise of FGM is inherently discriminatory and unjust. Mutilation is often justified on cultural, moral, religious and social norms, and undergoing the procedure has been seen as a pre-requisite for marriage, economic security and social acceptance.[35] The acquiescence to FGM is, therefore, demonstrative of the inferior status accorded to women for reasons of their gender, reflecting the deep-rooted inequality that exists between women and men in these practicing societies. Thus, it is vital that refugee law provides adequate remedies to grant victims of FGM international protection. A failure to create a gender-sensitive approach, and therefore to grant protection to FGM victims, would circumvent the whole purpose of the Refugee Convention, namely "to give protection to certain classes of people who have fled from countries in which their human rights have not been respected".[36]

III. The Convention's Mandate

Qualifying for international protection in the UK involves proving, to a reasonable degree of likelihood, that the applicant falls within the internationally agreed definition of 'refugee', expressed in Art.1A of the 1951 Refugee Convention.[37] Generally, the Convention's test demands satisfaction of three criteria. First, the applicant must establish that they possess a well-founded fear of being persecuted. There is a duality expressed in this requirement, which

[31] UNHCR, 'Too Much Pain: Female Genital Mutilation & Asylum in the European Union: A Statistical Update (2014), 1.
[32] *Fornah*, 94 per Baroness Hale.
[33] R. Coomaraswamy, 'UN Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences', (E/CN.4/2002/83, 31 January 2002), 6.
[34] M. Nowak, 'UN Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (A/HRC/7/3, 15 January 2008), 53, *emphasis added.*
[35]K. Fisaha, 'Female Genital Mutilation: A Violation of Human Rights' (2016) 4 *Journal of Political Sciences and Public Affairs* 2,1.
[36]*Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, Ex parte Shah* [1999] 2 AC 629, 654 per Lord Hoffmann. *See also* the preamble of the Convention; "*Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, *Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms."
[37]*R* v *Secretary of State for the Home Department, Ex parte Sivakumaran* [1988] AC 958, 994 per Lord Keith.

sets both objective ('well-founded') and subjective ('fear') benchmarks.[38] The persecution need not emanate from the state itself – it is enough that the applicant fears being persecuted by a non-state actor, from which the state is incapable or unwilling to offer sufficient protection.[39] The point is clarified in *Shah and Islam*,[41] where the hypothetical example of a Jewish citizen who is violently attacked by an Aryan gang in early Nazi Germany was used. The citizen was unable to avail himself, because he could not receive protection or remedial relief by the state. The second criterion for protection is that the applicant must establish that the well-founded fear is 'for reasons of', and therefore causally linked to, an enumerated Convention ground. In other words, the fear of persecution must bear a 'nexus' to a finite list of personal attributes. In this sense, protection under the Convention is inexorably intertwined with principles of anti-discrimination legislation.[40] In the words of Lord Hoffmann himself: "The concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention".[41] The final ground the applicant must satisfy is that he/she does not have an internal flight alternative. They must require substitute international protection because they cannot escape the fear of persecution by relocating internally – the 'principle of surrogacy'.[42]

Before delving any further into the detail of satisfying the definition, it is worth briefly highlighting the outcome of claiming asylum under the Refugee Convention. Failure to recognise the result of a successful application undermines the importance of obtaining refugee status for victims of FGM. The 'cornerstone' of international refugee law is the Convention's principle of non-*refoulment.*[43] Art.33(1) provides that no contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of the said Convention ground. An individual who successfully jumps through the substantive (and procedural) hoops of making an asylum application is entitled to not be returned to their country of origin.[44]

The Convention sketches five grounds for which the fear of persecution must be, namely for reasons of: race, religion, nationality, membership of a particular social group, or political opinion. Thus, the Convention is not concerned with *all* forms of persecution, only those that can be traced back to one or more of the five Convention reasons, hence its anti-discrimination

[38] UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention And the 1967 Protocol Relating to the Status of Refugees' (1992), 38.
[39] In *Svazas* v *Secretary of State for the Home Department* [2002] 1 WLR 1891, the Court of Appeal rejected distinguishing between state-led persecution and persecution committed by non-state actors; "The question to be addressed is whether or not the state can properly be said to be providing sufficient...protection", para 55 per Simon Brown LJ.
[41] *Shah and Islam*, paras. 653-654 per Lord Hoffmann.
[40] J. Hathaway, M. Foster, *The Law of Refugee Status* (Cambridge: Cambridge University Press 2014), 391.
[41] *Shah and Islam*, para. 651 per Lord Hoffmann.
[42] *Horvath* v *Secretary of State for the Home Department* [2001] 1 AC 489.
[43] H Faruk Al Imran, 'An Overview of Development of Gender Based Persecution in Refugee Law Under Membership of a Particular Social Group: A Study of Comparative Jurisprudence of Canada, UK & USA' (2015) 39 *Journal of Law, Policy and Globalization* 258, 259.
[44] Subject to the Convention's exceptions, there are reasonable grounds for regarding the refugee as a danger to the security of the protecting state, where the refugee has been convicted for a particularly serious crime or constitutes a danger to the community: Art 33(2), Refugee Convention.

spirit.[45] However, the drafters failed to legislate for a justification specifically geared towards persecution for reasons of gender or sex. Consequently, membership of a particular social group (PSG) has been the most litigated category for gender-based claims, including those where FGM is the feared persecution.[46] The *travaux préparatoires* of the Convention assist very little in the interpretation of membership of a PSG. It appears that these grounds were introduced to the draft at the last minute by the Swedish delegate as an "afterthought",[47] advocating that such cases did indeed exist, and should therefore be explicitly recognised by the Convection.[48] At first glance, the category appears to be almost wholly open-ended. Indeed, membership of a PSG *is* the most malleable of the Convention grounds, attracting the most judicial scrutiny.[49] It is also deemed to be among the thorniest of interpretive issues in international refugee law.[50] And yet, although commentators such as Helton aver that membership of a PSG was designed to function as a 'catch-all' field, capturing "all the bases for and types of persecution which an imaginative despot might conjure up"[51], a 'safety net' interpretation has been firmly rebuked in the UK.[52]

A rejection of the 'catch-all' method indeed makes logical sense on a correct interpretation of the instrument. Firstly, an all-encompassing, residual interpretation lacks fidelity to the original text. There is a limitation in the words "*particular* social group"[53] which must be taken into account.[54] Secondly, if membership of a PSG was fashioned to address all applications not already covered by the preceding four categories, then the inclusion of specifically identified grounds would be superfluous in the first place.[55] Thus, a correct interpretation necessitates a search for a firmly grounded, principled approach.

From the international jurisprudence, two key models of interpreting membership of a PSG have been forged: the 'protected characteristic'/'immutability' approach, and the 'social

[45] *Fornah*, para. 13 per Lord Bingham.
[46] M. Foster, 'Why We Are Not There Yet: The Particular Challenge of 'Particular Social Group'' in E. Arbel et al, *Gender in Refugee Law: From the Margins to the Centre* (2014) 17; "It remains undoubtedly the case that the PSG ground is, in most jurisdictions, the only available Convention ground where gender-based persecution is at issue".
[47] In *Re Acosta* [1985] 19 I & N 211 (US Board of Immigration Appeals), 232.
[48] Hathaway and Foster (n40), 423-4.
[49] *Ibid*, 424.
[50] K. Musalo, 'Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence', (2003) 52 *Depaul Law Review* 777, 777. *See also* L. Rivas-Tiemann, 'Asylum to a Particular Social Group: New Developments and Its Future for Gang Violence', (2013) 47 *Tulsa Law Review* 477; "Sadly, due to the legislature's vagueness and unclear intent, the courts have produced a 'wide-rang[e]' of inconsistent rulings on what constitutes a particular social group", citing: S. Siddiqui, 'Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify', (2010) 52 *Arizona Law Review* 505, 506.
[51] 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. *See also* N. Brooks, 'In Praise of Creativity: Gang-Based 'Social Group' Claims in Asylum Cases', (2009) *The Federal Lawyer* 26 (February), 26, who describes membership of a PSG as the 'catchall' category of the Refugee Convention.
[52] *Shah and Islam*, para. 643 per Lord Steyn.
[53] *Emphasis added.*
[54] *Shah and Islam*, para. 643 per Lord Steyn.
[55] Hathaway and Foster (n40) 424; *Applicant A* v *Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 (Australian High Court), 260 per McHugh J – "…it would have been simple for the drafters of the Convention to have deleted altogether the particular categories of persecution".

perception' test.[56] The former finds its prevalence in common law jurisdictions and emanates from the *ejusdem generis* mode of statutory interpretation. Literally meaning 'of the same kind', this theory holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.[57] In the context of the Convention, this would involve analysing the elements common to the four other Convention grounds in order to identify principles pertaining to the PSG ground. The US Board of Immigration Appeals (BIA) is held as paving the way for the protected characteristic method in the seminal *In re Acosta*[58] decision. The BIA concluded that each of the Convention grounds preceding membership of a PSG 'describes persecution aimed at an immutable characteristic: a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed'.[59] Accordingly, membership of a PSG would encompass innate characteristics, such as sex, colour or kinship ties, as well as past experiences such as former military leadership or land ownership.[60] A further development came from the Canadian Supreme Court in its *Ward* judgement.[61] The 'working rule' identified by the Court was that a PSG will consist of either: (i) groups defined by an innate, unchangeable characteristic, (ii) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake that association, and (iii) groups associated by a former voluntary status, unalterable due to its historical permanence.[62]

By contrast, the 'social perception' theory was developed primarily in Australia. *Morato v MILGEA*[63], the first Australian judicial decision of 'precedential value' to interpret the PSG ground,[64] suggested that members of a PSG feared persecution not because of who they were as members of a social group, but because of the results that stemmed from that membership.[65] Persecution for reasons of membership of a PSG involved not only physical suffering, but also "an element of attitude on the part of those who persecute".[66] In *Ram v MIEA*[67], Burchett J highlighted that "people are persecuted for something *perceived* about them or *attributed to them* by their persecutors".[68] The thread of Australian case law culminated in the 1997 judgement of *Applicant A.*[69] In this case, the High Court considered that a PSG is a collection of persons who are recognisable as a group in society, such that its members share a certain characteristic or element which unites them and *sets them apart from society at large.*[70] In the

[56] Baroness Hale outlines both tests in her judgment in *Fornah* at para. 99.
[57] In *Re Acosta*, para. 233.
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*
[61] *Canada (Attorney General) v Ward* [1993] 2 SCR 689.
[62] *Ibid*, 692.
[63] *Morato* v *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 111 ALR 417.
[64] S. Taylor, 'The Meaning of 'Social Group': The Federal Court's Failure to Think Beyond Social Significance' (1993), 19 *Monash University Law Review* 307.
[65] n62.
[66] *Ram v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 314, 317 per Burchett J.
[67] *Ibid.*
[68] *Ibid*, emphasis added.
[69] *Applicant A* v *Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.
[70] *Ibid.*, 241.

context of gender-based claims, the social perception test would regard the 'unifying characteristic' as sex, and that it is that sex which sets the group apart from society at large.[71]

The two competing methods of interpretation have been reconciled in the UK by the House of Lords.[72] Accordingly, satisfaction of either the protected characteristic test or the social perception test will lead to a finding of a PSG. Indeed, this follows the recommendation made by the UNHCR and is in line with the spirit of the Convention.[73] Whilst there has been inconsistency in the lower tiers, with the Tribunal in *SB (Moldova)*[74] ruling that the two limbs are cumulative and not alternative tests,[75] such an approach must be rejected. Firstly, the approach falls foul of guidance delivered by the highest judicial authority in the land.[76] Secondly, *SB (Moldova)* conflicts with the international jurisprudence. *In re Acosta* and *Applicant A* – two heavily cited and relied upon cases – required purification of only the protected characteristic (*In re Acosta*) or social perception (*Applicant A*) tests, but neither both. Thirdly, a cumulative set of criteria would in itself generate discrimination against, inter alia, women. To adopt an *SB (Moldova)* method would be to propound a more demanding threshold for gender-based claims and therefore conflict with the anti-discrimination thrust of the Convention.[77]

Further substantive principles pertaining to the PSG category are worth noting at this stage. First of all, international refugee law does not demand that there be a degree of cohesiveness, co-operation, homogeneity or interdependence between the members of the group in order for them to qualify as a PSG.[78] Second, there is no requirement for there to be a voluntary, associational relationship between the group members.[79] Third, the group can be widely defined because not all members of the PSG need to be persecuted.[80] Fourth, and most critically for FGM claims, it is well-established that the unifying characteristic cannot in itself be the feared persecution.[81] In other words, relying on the feared persecution to establish the group

[71] P. Mathew, 'Applicant A v. Minister for Immigration and Ethnic Affairs', (1997) 21 *Melbourne University Law Review* 1 277, 325.
[72] *Fornah*, para. 15 per Lord Bingham, paras.100-103 per Baroness Hale, para.118 per Lord Brown.
[73] UNHCR, 'Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees' (HCR/GIP/02/02, 7 May 2002), 11.
[74] *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002.
[75] *Ibid*. The confusion stems from Art.10(1)(d) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('Qualification Directive'), which defines a PSG with the two tests but with the wording 'and' in between. Art.(1)(d) Qualification Directive was transposed into UK law by Reg.6(1)(d) The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI No 2525).
[76] *Fornah*.
[77] The preamble of the Convention narrates that human beings shall enjoy fundamental rights and freedoms 'without discrimination'. Note however, that Art 3 ('Non-Discrimination') only refers to applying the Convention's operative provisions without discrimination 'as to race, religion or country of origin'.
[78] Their Lordships in *Shah and Islam* were unanimous on this point: para. 643 per Lord Steyn, para.651 per Lord Hoffmann, para. 657 per Lord Hope, para. 661 per Lord Millett.
[79] *NS (Social Group – Women – Forced marriage) Afghanistan CG* [2004] UKIAT 00328 [53], adopting the Canadian Supreme Court's *Ward* judgment.
[80] *Fornah*, para. 113 per Baroness Hale.
[81] *Shah and Islam*, para. 656 per Lord Hope.

would implicate total circularity. As will be demonstrated below, it is this rule of interpretation that has often blocked applications founded on fear of FGM from proceeding through the asylum determination pipeline.

IV. Pre-2006 Developments

Having established the Convention's requirements in general terms, it is worth noting how FGM cases have developed within that framework. Prior to the *Fornah* judgment, there was a budding global consensus that women fleeing FGM could be granted international protection. The first judiciary to make this formal recognition was the French Commission of Refugee Appeals in 1991. In *Aminata Diop*,[82] the applicant was part of the Senufo ethnic group in Mali, and claimed asylum due to family pressures to submit to excision, as well as the prevalent discrimination that would flow from her said refusal. Miss Diop's claim failed on credibility grounds; the applicant's allegations were only supported by a purported letter from her mother, which the Commission deemed to lack probative value. Notwithstanding the outcome of the case, the decision is significant in its recognition that the practice of FGM *would* represent a persecution of women who intended to evade it.[83] Similarly, in Canada, FGM was deemed a form of persecution within the meaning of the Convention in the 1994 case of *Farah.*[84] The Immigration and Refugee Board of Canada found the applicants to be members of two PSGs, namely 'women' and 'minors': "It is by reason of the fact that she is a female and a minor that the claimant fears persecution in the form of female genital mutilation in Somalia today".[85] The Australian breakthrough came in 1997, where the Refugee Review Tribunal defined 'Yoruba women in Nigeria' as an appropriate PSG for an FGM claim,[86] and in Austria, the PSG of 'Cameroonian women subject to mutilation' was identified in 2002.[87]

The seminal US case *In re Kasinga*[88] was 'hailed as a breakthrough' insofar as explicitly recognising gender as a component of the PSG ground.[89] Fauziya Kasinga claimed asylum on the basis that, were she to return to her native Togo, she would be forced to submit to her local tribe's practice of excision. The BIA accepted that FGM amounted to persecution, and granted Kasinga international protection on the basis that she was a member of a PSG, namely "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice".[90] Although *Kasinga* set a landmark precedent for FGM claims – and

[82] *Miss Diop Aminata* CRR Decision No.164078 (17 July 1991).
[83] Since *Diop*, the Commission has granted international protection to FGM victims in *Kinda* CRR Decision No.366892 (19 March 2001) and CCR Decision No.369766 (7 December 2001). See UNHCR, 'UNHCR Intervention Before the House of Lords in the Case of *Zainab Esther Fornah (Appellant) v Secretary of State for the Home Department (Respondent)*' (2006).
[84] *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh* IRB Decision T93-12198 (10 May 1994).
[85] Note the generality of the PSGs adopted by the Canadian Board, relative to the more restrictive definitions used in other jurisdictions.
[86] RRT N97/19046, unreported, 16 October 1997. *See Fornah*, para. 27 per Lord Bingham.
[87] *Ibid* and *GZ* 220.268/0-XI/33/00, unreported, 21 March 2002. *See Fornah*, para27 per Lord Bingham.
[88] In *Re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (13 June 1996).
[89] M. Randall, 'Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution' (2002) 25 *Harvard Women's Law Journal* 281, 295.
[90] In *Re Kasgina*, 368.

for gender-specific persecution more widely – the BIA's arrival at its decision has not been immune from criticism. Despite the desirability of this result, the BIA's overly-restrictive analysis – which incorporates (i) the applicant's escape from the practice, (ii) her 'intact' status, and (iii) her opposition to FGM – situated the claim in a more narrowly defined PSG, thus failing to grapple with gender as a category in its own right.[91] The decision therefore fails to address the fact that Kasinga feared persecution "for reasons of" her gender, and at risk is the ability "to create legal categories which can most appropriately accommodate the facts".[92] The point is made abundantly clear in Randall's argument, stating that:

> Despite the fact that FGM is a gender-specific practice imposed upon all girls in the society precisely because they are female, the BIA did not find that the group subject to persecution was comprised of the tribe's female members.[93]

Post-*Kasinga*, the US courts have demonstrated inconsistency in their analysis of FGM cases. For example, in *Bah v Mukasey*[94] the Second Circuit held that FGM could be used to establish grounds for continuing persecution for reasons of membership of a PSG.[95] By contrast, the Third, Fifth and Seventh Circuits have all held that as FGM cannot be repeated on victims, it does not implicate continued or future persecution and therefore women who have already been subjected to the practice do not qualify for asylum.[96]

The UK landscape pre-*Fornah* is somewhat fragmented. Whilst Canada and Australia had formally granted international protection to FGM victims by the 1990s, the UK lagged severely behind. In a similar vein with the US, decision-makers in the UK demonstrated restrictive interpretations to membership of a PSG and delivered conflicting judgements. In *RM (Sierra Leone, Female genital mutilation, Membership of a particular social group)*[97], refugee status was denied because the Tribunal refused to recognise 'young intact females' as a PSG.[98] The reasoning is particularly disturbing. The Tribunal rationalised its decision on the basis that due to the extremely prevalent FGM rates in Sierra Leone, 'there is always that lingering fear' of being subjected to the procedure.[99] Accordingly, the Tribunal refused to identify a PSG independent of that fear.[100] The Court of Session in *Petition of Helen Johnson (AP) For Judicial Review*[101] has also maintained that position. In *RM (Sufficiency of protection, Internal flight alternative, FGM)*[102], refugee status was denied in a FGM case because the Tribunal refused to recognise 'Kenyan or Kikuyu women under the age of sixty-five' as a PSG. By

[91] Randall (n89), 295-6.
[92] *Ibid*, 296.
[93] M. Randall, 'Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States' (2015) 23 *American University Journal of Gender, Social Policy and the Law* 529, 554.
[94] *Bah* v *Mukasey* 529 F.3d 99 (2d Cir. 2008).
[95] *Ibid.*
[96] Zaman (n7), 240-241.
[97] *RM (Sierra Leone, Female genital mutilation, Membership of a particular social group)* [2004] UKIAT 00108.
[98] *Ibid*, 15.
[99] *Ibid.*
[100] *Ibid.*
[101] *Petition of Helen Johnson (AP) For Judicial Review* P340/04 (3 December 2004).
[102] *RM (Sufficiency of protection, Internal flight alternative, FGM)* [2004] UKIAT 00022.

contrast, the Tribunal in *Yake v SSHD*[103] allowed a finding of "Yopougun women who may be subjected to FGM" to form a PSG.[104] The Court of Appeal in *P and M v SSHD*[105] also had no issue in overturning the Tribunal's findings and reinstating the decision of the Adjudicator.[106] The Adjudicator in that case concluded that "women in Kenya" *did* form a PSG, particularly "Kikuyu women under the age of 65". The immutable characteristics were age and sex, which existed independently of the persecution and could be identified – but not defined – by reference to their being compelled to undergo FGM.[107]

Accordingly, the pre-*Fornah* position in the UK represents a patchwork of conflicting authority pertaining to FGM claims – particularly whether such applications sufficiently fell within the PSG nexus. The question was therefore ripe for review when Ms. Zainab Fornah appealed the Court of Appeal's findings against her to the highest court in the land.

V. The *Fornah* Decision: 'Blindingly Obvious'[108]

Zainab Esther Fornah arrived in the UK on 15 March 2003, where she claimed asylum at Gatwick airport. Fornah had fled her native Sierra Leone at age 15. She ran away from her home village after overhearing discussions about her "initiation into womanhood" and the resultant undergoing of FGM. She sought international protection on the basis that, if she were to be returned to Sierra Leone, she would have nowhere to live but her home village, where she would inexorably be subjected to circumcision. The Secretary of State, whilst granting Fornah humanitarian leave for a temporary period of three years due to FGM's clear violation of Art.3 ECHR, declined her application for international protection. Two reasons for refusal underpinned the decision, the important one for our purposes being that he did not consider girls at risk of being subjected to FGM to form a PSG within the aforementioned Convention framework.[109]

The adjudicator disagreed, finding that the applicant feared persecution, namely performance of FGM, for reasons of her membership of a PSG, defined as "young, single Sierra Leonean women, who are clearly at considerable risk of enforced…[FGM]", and in respect of which the State provided them with no protection.[110] The Home Office appealed to the Immigration Appeal Tribunal (IAT), which reversed the adjudicator's findings. It held that the group of which Fornah was part of was not merely "young Sierra Leonean women", but "young Sierra Leonean women who [had] not undergone female genital mutilation".[111] Therefore, this fell foul of the rule that a PSG cannot competently be defined by reference to the feared persecution

[103] *Yake* [2000] 00/TH/00493 (unreported).
[104] *Ibid.*, referred to in *RM*, n102, 9.
[105] *P and M* v *Secretary of State for the Home Department* [2004] EWCA Civ 1640.
[106] *Ibid*, 49.
[107] *Ibid*. The Adjudicator's decision was referred to at 41 of the Court of Appeal's judgment.
[108] *Fornah*, 83 per Baroness Hale.
[109] The second was that the Sierra Leonean authorities had a will to challenge the practice should Fornah turn to them for protection on her return to the country. In other words, as the state was willing to provide protection, surrogate protection from the UK was not necessary. *See Zainab Esther Fornah* v *Secretary of State for the Home Department* [2005] EWCA Civ 680, para.4 per Auld LJ.
[110] *Ibid.*, 5.
[111] *Ibid.*, 6.

itself – in this case, FGM. The same line of reasoning was essentially reinstated when the case subsequently climbed the next tier of the judicial ladder. In the Court of Appeal, a bench of three heard the appeal, and the majority upheld the IAT's decision.[112] Lord Justice Auld held that the nearest candidate for the PSG was "young single women who have not been circumcised and who are, therefore, at risk of circumcision".[113] This formulation engaged the independent existence rule because once members of the group had been subjected to the practice, they were no longer deemed to be under such a threat of persecution by way of being women.[114] Ms. Fornah appealed, and the UNHCR intervened when the case proceeded to the House of Lords.[115]

In the House of Lords, the 'very limited issue' on appeal was whether Fornah was a member of a PSG, however defined.[116] Their Lordships were unanimous in allowing Fornah's appeal, albeit offering various articulations of the relevant PSG. Lord Hope was satisfied that 'females in Sierra Leone' was a PSG, but qualified this that with greater precision – the PSG composed of "uninitiated indigenous females in Sierra Leone".[117] The deeply entrenched patriarchy in Sierra Leone had set females apart from their male counterparts, thus forging a PSG worthy of protection under the Convention. Lord Rodger similarly found that the appellant was part of a PSG of "uninitiated intact women who face persecution by enforced mutilation".[118] Taking a far wider view, Lord Bingham found "no difficulty" in recognising "women in Sierra Leone" as a PSG, but continued to state that even if the group ought to be narrowly defined, the PSG could be framed as "intact women in Sierra Leone".[119] In the former definition, the unifying characteristic was a "position of social inferiority as compared with men", and in the latter formulation, intactness could be construed as a shared attribute. In either instance, identification of the group's distinguishing feature/s was not premised on the feared persecution itself – the performance of FGM, being the feared persecution, was an expression of the group's institutional inferiority. Echoing this sentiment, Baroness Hale opined that it could not be seriously doubted that the persecution occurred as the victims were members of a PSG; "It is only done to them because they are female members of the tribes within Sierra Leone which practise FGM." [120] Lord Brown's preferred definition was the narrower 'uninitiated indigenous females in Sierra Leone' provided by Lady Justice Arden, but his Lordship did not disagree with the broader formulations offered by Lord Bingham and Baroness Hale.[121] Despite projecting an element of heterogeneity in their Lordships' judgments, the fundamental point in *Fornah* is that an asylum-seeking woman who feared being subjected to FGM in her country of origin successfully claimed international protection from the highest judicial authority in the land.

[112] *Ibid.*, Arden LJ dissenting.
[113] *Ibid,* para. 30 per Auld LJ.
[114] *Ibid.*
[115] The UNHCR's intervention can be read at UNHCR (n83).
[116] *Fornah*, para.25 per Lord Bingham.
[117] *Ibid.*, para. 54 per Lord Hope.
[118] *Ibid.*, para. 80 per Lord Rodger.
[119] *Ibid.*, para. 31 per Lord Bingham.
[120] *Ibid.*, para. 111 per Baroness Hale.
[121] *Ibid.*, para. 119 per Lord Brown.

Mullally and Ni Mhuirthule opine that the House of Lords "effectively overturned the UK Immigration & Asylum Tribunal's long line of restrictive authority" pertaining to FGM applications.[122] Indeed, the Tribunals were particularly resilient to granting victims of FGM refugee status because of the inherent circularity in narrowly formulating the PSG by reference to the mutilation. Concurrently, decision-makers have displayed overwhelming reluctance to frame the PSG as simply "women".[123] Yet as Baroness Hale explains:

> 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.[124]

Their Lordships' decision in *Fornah* breaks away from this phenomenon because it is explicitly recognised that not all of the members of the group need to be at risk, and therefore there is no need to distil the group so narrowly as to only define it by reference to the feared persecution.[125] Thus, *Fornah* represents a fundamental development in affording victims of FGM sufficient international protection in the UK. Consequently, it is to be lauded that, in subsequent case law, the Tribunal has correctly followed *Fornah* in interpreting the PSG Convention ground in claims concerning FGM.[126] The judgment has also been cited in subsequent guidance notes issued by the UNHCR – the international agency mandated to ensure respect for the rights of those fleeing persecution.[127]

VI. Conclusion

Worldwide, the routine practice of FGM on women and girls has come to be recognised as a human rights violation warranting total condemnation from the international community. The consequences and implications of FGM do not halt at the physical and psychological – in the words of Lord Bingham himself: "The practice of FGM powerfully reinforces and expresses the inferior status of women as compared with men".[128] FGM's continued prevalence has resulted in actual or potential victims to flee their practicing countries of origin to seek surrogate protection from nation states. The UN Refugee Convention forms the heart of the substantive asylum determination process of any state, its Art.1A 'refugee' definition bearing the status of customary public international law. The Convention's failure to enumerate a specific ground for reasons of gender or sex has led to the PSG category becoming the vehicle by which gender-based asylum claims proceed. The reconciliation of on the one hand, the principles informing the interpretation of membership of a PSG, and on the other hand applications concerning FGM, has been and continues to prove a testing process. In particular,

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[122] S. Mullally T. Mhuirthule, 'Reforming Laws on Female Genital mutilation in Ireland: Responding to Gaps in Protection', (2010) 32 *Dublin University Law Journal* 243, 259.
[123] Foster (n48), 28.
[124] *Fornah*, para.113 per Baroness Hale.
[125] *Ibid.*
[126] *See SK (FGM – ethnic groups) Liberia CG* [2007] UKAIT 00001 ('women in Liberia belonging to those ethnic groups where FGM is practised'); *VM (FGM-risks-Mungiki-Kikuyu/Gikuyu) Kenya CG* [2008] UKAIT 00049 ('women (and girls) in Kenya'); and *FM (FGM) Sudan CG* [2007] UKAIT00060 ('women in Sudan').
[127] UNHCR, 'Guidance Note on Refugee Claims Relating to Female Genital Mutilation' (2009), 7.
[128] *Fornah*, para. 7 per Lord Bingham.

courts have traditionally failed to grapple with the 'independent existence' working rule on circularity, which denies the existence of a PSG where the social group is defined solely by reference to the feared persecution. In the UK, the Tribunal's tendencies to deny FGM victims protection by virtue of the independent existence principle were overturned in the seminal *Fornah* decision. Despite somewhat deviating approaches as to the exact formulation, their Lordships were unanimous in granting the applicant protection for reasons of her membership of a PSG. Thus, the legacy of *Fornah* is a judicial recognition – a precedent, in fact – that victims of FGM satisfy the Art.1A definition of the Refugee Convention. The effect has therefore been a closing of the substantive protection gaps left by the black letter of the legislation. In this author's view, the implications of this are not to be understated, and are dual-pronged.

Firstly, the development of FGM asylum cases that this article has tracked is illustrative of a key feature of the Refugee Convention. As the UNHCR has noted, treaties of a humanitarian character are not static instruments, and consequently must be interpreted in more 'evolutionary' terms [129]. As a clear rights protection instrument, decision-makers ought to apply the Convention in a manner that proactively takes into account the changing legal and social context within which it operates.[130] To this effect, Lord Bingham has authoritatively designated the treaty a 'living instrument'.[131] In other words, whilst its meaning does not change over time, its application certainly will.[132] Unless the Convention is adopted by nation states for a humanitarian end which is "constant in motive but mutable in form", it will eventually become an "anachronism".[133] In this sense, the position is comparable with the Strasbourg jurisprudence's regard for the European Convention on Human Rights.[134] Gender-based asylum claims, and particularly those pertaining to FGM, are the quintessential case where the Convention's malleability becomes essential. By failing to promulgate a gender-specific Convention ground, only by adopting an intertemporal approach of statutory interpretation can the instrument fulfil its overarching purpose of assuring refugees – including those fleeing FGM – the widest possible exercise of fundamental rights and freedoms.[135]

The second proposition that this paper advances is that -whilst it is all and well to regard the Refugee Convention a living instrument - this appraisal cannot lose sight of the discrimination the treaty arguably perpetuates. "Absent" still is a specific ground of protection for victims of gender-based persecution. Musalo notes that the contemporary international refugee definition emerged in a post-Second World War backdrop.[136] As such, the paradigmatic refugee was 'the

[129] UNHCR, 'Challenges to the 1951 Convention in its 50th Anniversary Year: Statement by Ms. Erika Feller, Director, Department of International Protection, UNHCR, at the Seminar on 'International Protection within one single asylum procedure'', Norrkoping, Sweden, 23-24 April 2001, 24 April 2001.
[130] Arts 31 & 32, Vienna Convention on the Law of Treaties.
[131] *Sepet (FC) and Another (FC)* v *Secretary of State for the Home Department* [2003] UKHL 15, para 6 per Lord Bingham.
[132] *Ibid.*
[133] *Ibid.*., citing with approval Sedley J's analysis in *R* v *Immigration Appeal Tribunal, Ex p Shah* [1997] Imm AR 145 (Queen's Bench Division), 152.
[134] *R* v *Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 500 per Laws LJ.
[135] Preamble Refugee Convention.
[136] K. Musalo, 'A Tale of Two Women: The Claims for Asylum of Fauziya Kassindja, Who Fled FGC, and Rody Alvarado, a Survivor of Partner (Domestic) Violence' in Arbel (n46), 75.

brave male political activist' or 'religious adherent', persecuted by the state for exercising his civil or political rights.[137] Indeed, refugee rights at the time were nothing more than 'refugee men's rights'.[138] The omission of gender has systematically disadvantaged female asylum-seekers since the Convention's inception, and cases concerning FGM expose that truism. Despite the fact that victims are subject to FGM *for reasons of their gender*, and despite the fact that FGM amounts to *gendered-specific violence*, until the turn of the millennium it was almost impossible for mutilated women to succeed in their asylum applications. Whilst decision-makers taking an evolutionary approach have gradually closed the protection gaps left by the Convention's drafting, the problem is that such closing is indeed gradual. Only with jurisprudential developments in all four corners of the map have we managed to reach a point where, at least substantively, a space for FGM asylum claims has been forged. In the opening words of Baroness Hale's passage in *Fornah*: "The answer in each case is so blindingly obvious that it must be a mystery to some why either of them had to reach this House".[139]

[137] *Ibid.*
[138] A. Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010', (2010) 29 *Refugee Survey Quarterly* 2, 21, 22.
[139] *Fornah*, 83 per Baroness Hale.