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Title	Muslim women's claims to refugee status within the context of child custody upon divorce under Islamic law
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Publication Date	2010
Publication Information	Yahyaoui Krivenko,Ekaterina (2010) 'Muslim Women's Claims to Refugee Status Within the Context of Child Custody Upon Divorce Under Islamic Law'. International Journal of Refugee Law, 22 (1):48-71.
Publisher	Oxford University Press
Link to publisher's version	<a href="http://ijrl.oxfordjournals.org/content/22/1/48.abstract">http://ijrl.oxfordjournals.org/content/22/1/48.abstract</a>
Item record	<a href="http://hdl.handle.net/10379/5735">http://hdl.handle.net/10379/5735</a>
DOI	<a href="http://dx.doi.org/10.1093/ijrl/eep032">http://dx.doi.org/10.1093/ijrl/eep032</a>

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## Divorced Muslim Women's Claims to Refugee Status Within the Context of Child Custody upon Divorce under Islamic Law

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### 1. Introduction

As the title indicates, the article deals with claims to refugee status made by divorced Muslim women on the basis of automatic deprivation of custody of their children upon divorce in countries where legislation attempts to preserve in this regard application of allegedly unchangeable Islamic law. Muslim women applying for refugee status in these situations would like to escape application of this in their view arbitrary and discriminatory rule, preserve a meaningful relationship to their children, but also protect their children from possible negative consequences.

Through analysis of case law and attitude of decision making authorities in UK, New Zealand and Canada, I attempt to formulate some suggestions as to the appropriate ways in which refugee status determination authorities could approach such claims.

The claim of women to the recognition of refugee status in all cases discussed in this article is situated at the intersection of gender related claims (principle of non-discrimination) and implementation of the best interests of the child principle. The fundamental basis for these refugee status claims is the application in the country of origin of an allegedly Islamic and thus unchangeable rule which automatically deprives divorced mothers of the custody of their children when the latter reach certain age or the mother remarries. Thus, from a more general point of view, this article also contributes to a better understanding of gender related persecution.

Integration of gender related claims into refugee law is regarded as well established and the issue of gender related persecution attracts far less attention today as it was the case a decade or two ago. As a matter of principle, gender-related claims are recognized as valid in refugee status determination procedures of the majority of Western states.<sup>1</sup> Concrete interpretations can differ, but a number of national gender related

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<sup>1</sup> For an overview of different situations in some countries see B. Ankenbrand, 'Refugee Women Under German Asylum Law' 14 *IJRL* 45 (2002); J. Freedman, 'Women Seeking Asylum' (2008) 10 *International Feminist Journal of Politics* 154-172 (situation in France); H. Crawley, T. Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe* (Geneva: UNHCR, 2004); N. Laviolette, 'Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines' 19 *IJRL* 169 (2007).

persecution guidelines<sup>2</sup> as well as the United Nations High Commissioner's for Refugees (hereinafter UNHCR) position on the issue<sup>3</sup> represent a clear evidence in favor of general recognition of the fundamental validity of such claims. However, as this article will attempt to demonstrate, we are still far away from an adequate recognition of specificity of women's experiences of persecution, as by the way of many other non traditional forms which persecution can take. Particularly alarming in this context is the use of several notions contained in the definition of a refugee as formulated in the Convention Relating to the Status of Refugees,<sup>4</sup> with a particular social group being at the center of the analysis.

The article will start with a brief presentation of the rule concerning the issue of children's custody upon dissolution of marriage in countries applying in this regard religion-based and thus allegedly unchangeable Islamic law. As a next step, some aspects of the general theoretical framework in terms of refugee status determination and human rights law will be highlighted followed by an analysis of several cases where the issue of custody was central to the claim. Finally, some conclusions and suggestions as to appropriate ways of dealing with such claims in refugee status determination procedures are formulated.

## 2. Custody of children under Islamic law

Many countries with Muslim majority population declare Islam to be their official religion and the source of legislation.<sup>5</sup> However, in many of these countries the only area of law which is really closely linked to religious interpretations remains personal status and family law. Several countries with significant Muslim minorities also maintain separate religious laws and court systems for personal status and family law issues of these minorities.<sup>6</sup>

As traditionally presented in conservative Islamic discourses, the issue of custody upon dissolution of marriage or the death of the father is regulated in the following way. The physical custody (provision of care) of a young child is attributed to the mother, while the legal representation (or guardianship) is always a father's prerogative.<sup>7</sup> Thus, even if the child can actually reside with his mother till certain age, she is regarded as no

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<sup>2</sup> See for example United Kingdom (UK), Asylum and Immigration Tribunal, Asylum Gender Guidelines (1 Nov. 2000) available at: <<http://www.unhcr.org/refworld/docid/3ae6b3414.html>>; Canada, Immigration and Refugee Board, Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (13 Nov. 1996) available at: <<http://www.unhcr.org/refworld/docid/3ae6b31c98.html>>; United States, Bureau of Citizenship and Immigration Services, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (26 May 1995) available at: <<http://www.unhcr.org/refworld/docid/3ae6b31e7.html>>.

<sup>3</sup> UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (7 May 2002) HCR/GIP/02/01, available at: <<http://www.unhcr.org/refworld/docid/3d36f1c64.html>>.

<sup>4</sup> United Nations Convention Relating to the Status of Refugees (28 July 1951), 189 UNTS 137. Hereinafter the Refugee Convention or the Convention.

<sup>5</sup> Usually this proclamation is made in the Constitution of the concerned states. See, for example, the Constitution of Afghanistan art. 2; the Constitution of the People's Republic of Bangladesh art. 2A; the Constitution of the Kingdom of Bahrain art. 2; the Constitution of Morocco art. 6; the Constitution of Malaysia art. 3 (1).

<sup>6</sup> The most well known examples are India and Israel.

<sup>7</sup> For a general overview of this distinction and its application in a selected number of modern Muslim states see Women Living Under Muslim Laws (WLUML), *Knowing Our Right: Women, Family, Laws and Customs in the Muslim World* (2006), 337-341.

more than a care-giver, whereas the father maintains decision making power over all matters relating to the child. It is obvious that in this situation the father will always be able, if he is willing to do so, to control the life not only of the child, but also of the mother. Upon the child reaching certain age which vary significantly from one school of Islamic law to another,<sup>8</sup> or the mother's remarriage, the custody is also attributed to the father.<sup>9</sup> The mother is deprived of custody automatically upon one of these events and traditionally courts or judges have no discretion in this issue. Moreover, the father is also able to challenge even this limited custody right of the mother on such grounds as for example 'immoral' behavior of the mother or her insufficient religiosity. Another important consideration in deciding custody issue is the earning potential of the mother, her ability to materially support her child. This ability in turn is often significantly limited or impeded by various legal and social norms regulating women's behavior.<sup>10</sup> If for whatever reason the father is deemed unfit as a parent, the guardianship could be attributed to another male member of the father's family, but never to the mother or any member of her family.<sup>11</sup>

This general framework being criticized and recognized as inadequate by many Muslims themselves, modern legislation of several Muslim countries reinterpreted this inflexible and arbitrary rule, in the first place, in order to ensure the respect of the principle of the best interests of the child.<sup>12</sup> In many countries the age limit at which the custody passes to the father is fixed as high as possible, including the age of majority or marriage, as for example in Algeria for girls, in Morocco for boys and girls.<sup>13</sup> According to the legislation of many Muslim states, when the judge has to decide custody issues, he shall take into account the principle of the best interests of the child. This opens a possibility for women to maintain custody of their children after the age limit.<sup>14</sup> Other

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<sup>8</sup> According to some most conservative interpretations the age at which the mother loses custody of her children is fixed at as low as two years, as for example for boys in Iran. This is linked to the requirement of breastfeeding of children which according to religious interpretations should be continued till the child reaches the age of two. This rule, therefore, demonstrates once more that the relationship between the mother and the child is reduced to the simple physical function and thus perpetuates a clearly degrading vision of women. Other interpretations allow women to take care of their children till the age of majority. For a general overview of various rulings see J. J. Nasir, *The Islamic Law of Personal Status* (2<sup>nd</sup> ed., 1990), at 187-189.

<sup>9</sup> Ibid. 178-180.

<sup>10</sup> Examples include legal impediments, such as prohibitions from certain professions, restrictions on residence and free movement without a male relative, but also social barriers, as for example difficulty with finding day-care arrangements for children if there is no family support.

<sup>11</sup> J.J. Nasir, above n. 8, 205-211.

<sup>12</sup> It should be emphasized in this connection that all Islamic states are parties to the United Nations Convention on the Rights of the Child (20 Nov. 1989), 1577 UNTS 3 (hereinafter CRC). Although many of these states accompanied their accession to the CRC by reservations, as such, the principle of the best interests of the child was never questioned. Moreover, the two countries from which come the claimants in all cases considered below, namely Iran and Lebanon have not formulated any reservations to this convention.

<sup>13</sup> See art. 65 of Algerian Family Code promulgated by law No 84-11 of 9 June 1984, French text available at <<http://20ansbarakat.free.fr/codedelafamille.htm>> and art. 166 of Moroccan Family Code (Moudawana) dahir No 1-04-22 of 12 hijra 1424 (2 Feb. 2004) promulgating law No 70-03, Bulletin Officiel No 5358 of 2 ramadan 1426, 667, available at <<https://hrea.org/moudawana.html>>.

<sup>14</sup> Among states with either legislation or jurisprudence referring to the principle of the best interests of the child when deciding the issue of custody are, for example, Egypt, Iraq, the Maldives, Mauritania, Morocco, Pakistan, Tunisia, Syria. The most well known examples from jurisprudence include Bangladesh: *Abu*

states include the obligation to consult the child about his preference for remaining with the mother or with the father.<sup>15</sup> Taking Moroccan case as an example,<sup>16</sup> we will find that not only is it possible for the child to remain with his mother, but the mother can even be attributed both the custody as well as the guardianship of the child.<sup>17</sup> Of course, women will still face many difficulties; in particular of bringing the necessary evidence. Furthermore, in some cases even in these more liberal conditions women will be subjected to treatment which could amount to persecution.<sup>18</sup> Moreover, the introduction of the best interests of the child principle alone will not necessarily mean more respect for the mother-child relationship. If the country has a very strong tradition of patriarchy, judges faced with cases of fathers unfit as parents will rather favor other male members of the family but not the mother.

Despite all these positive developments which take place in some parts of the Muslim world, situation in other Muslim states remains disastrous not only for women, but also for children; both having no choice at all but to be separated upon the child reaching certain age. This occurs automatically even if there is a complete absence of child-father (or other male member of his family) relationship or the father being unable to fulfill his parental duties. In such countries mothers can eventually obtain only very limited visitation rights which are unenforceable, especially because of the fact that the father having both custody and guardianship of the child, has in all matters related to the child a full freedom of decision and can change residence without consulting or even informing the mother who will thus be unable to locate her child. In contrast, mothers who move with their children both during the custody period and after its termination can be accused by fathers of kidnapping and become subject to severe sentences reaching to imprisonment.

### 3. Refugee law's theoretical framework for dealing with claims involving custody issues

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*Baker Siddique v. S.M.A. Bakar and others* 38 Dhaka Law Reports (AD) 1986; and Pakistan: *Mst. Zohra Begum v. Sh. Latif Ahmed Munawar*, Pakistan Legal Decisions 1965 Lah. 695.

<sup>15</sup> Such is for example the practice in Indonesia and so requires art. 166 of the Moroccan Family Code, above n. 13.

<sup>16</sup> Morocco is selected not because it has the best legislation or the best practice in this respect, but for the reason of its recent reforms which while significantly improving the situation of women still contain several gaps and call for attention and sensitivity of decision makers faced with claims for recognition of refugee status by women from Morocco. See for example, the evaluation of this new legislation as less option-giving in the document prepared by NGO WLUML, n. 7 above, 346 as well as the case described below n. 18.

<sup>17</sup> See generally art. 231 of Moroccan Family Code, above n. 13, which mentions the father as the first legal representative of the child and the mother as the second in case of father's absence or inability to exercise legal representation. Important is also art. 175 which allows mothers to retain custody of their children in case of remarriage in several instances, including the case when the mother is the legal guardian of her child.

<sup>18</sup> For an example of recognition of refugee status to a Moroccan woman who fled her violent husband with two children to Canada see RPD file No AA3-00181/00185/00186, 2004 CanLII 56670 (I.R.B.), 21 May 2004. Although the case was decided shortly before the official entry into force of the legislative changes which significantly improved the position of women in family matters, the decision takes them into account and still recognizes the refugee status of the claimant paying due attention not only to the particular situation of the claimant, but also to all still remaining gaps in the new legislation, and insufficiency of enforcement mechanisms.

It is easy to imagine what kind of suffering and hardship can be imposed on mothers and children when there is a conflict between a woman and her former (or even still) husband. The fundamental difference between custody disputes arising for example in Western states and those occurring in Muslim countries applying conservative version of Islamic law in this regard is the arbitrary character of the applicable rule. This rule not only neglects to take into account fundamental interests of the child, but also imposes a kind of punishment on divorced women or women wishing to divorce who are thus subjugated to and made dependant on their husbands whatever the reason for divorce.

How could refugee status determination authorities approach claims made by women fearing to lose the custody and at the final end any meaningful relationship to their child? In order to be able to give an answer to this question and articulated its larger implications as suggested in the introduction, it is important to recall some fundamental features of the refugee definition considering their relevance to the type of claims analyzed before presenting the attitude adopted by national authorities of the three countries under consideration.

One particular feature of the refugee definition contained in article 1A(2) of the Convention relates to its legal articulation and application. It can be described as a dismembering or segmentation of refugee experience according to each of the terms of the definition and even beyond them. Although this way of approaching legal concepts and definitions is common legal and judicial attitude, if applied too strictly by decision makers it can lead to essentialization of some aspects of the refugee experience. This will obviously be done at the expense of other aspects of his or her experience which can result in misrepresentation of the story and ultimately in rejection of the application and return back to persecution. Although both the UNHCR and several national authorities dealing with refugee status determination emphasize the importance of a holistic approach,<sup>19</sup> the elaboration of various aspects of refugee definition by the very same authorities leads to an unwitting reinstatement of the fragmentation and disintegration mentioned above.<sup>20</sup>

Several issues relating to the articulation of the international refugee law can be distinguished in this relation. The first and foremost, does the treatment of women in such situations amount to persecution? Lawyers will also enquire about particular Convention grounds with women as a particular social group coming to their mind before any other. At certain instances they will examine also the issue of the agent of persecution and availability of state protection. Apart from these issues belonging to the narrowly defined area of refugee law, more general questions of human rights protection especially in countries operating some system of complementary or subsidiary protection also deserve to be addressed. It is equally important to be attentive to the situation, fate and claims of children in any proceedings where the issue of custody is in play.

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<sup>19</sup> For a UNHCR position see, for example, the emphasis made in Gender Guidelines, above n. 3, para. 7 ('In attempting to apply the criteria of the refugee definition in the course of refugee status determination procedures, it is important to approach the assessment holistically, and have regard to all the relevant circumstances of the case.'). For an example from a national jurisdiction see emphasis made in UK case *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.

<sup>20</sup> The division according to particular terms of the definition (persecution, Convention grounds whereby particular social group is treated more extensively and separately, state protection etc.) used in national gender guidelines is illustrative of this disintegration of several aspects of the claim. See for example the very detailed table of contents of the UK Guidelines, above n. 2, 2.

Although the holistic approach which does not disintegrate all these aspects of the claim is more productive and even favored by the UNHCR as has been mentioned above, for the purposes of this study it is more useful to attempt to shed more light on each of the aspects separately. The main reason for this preference is that it will also be very helpful in demonstrating the effect of this fragmentation on women's claims. These claims are presented in a brief but holistic form below, before consideration of some legal aspects.

#### 4. Overview of women's claims relating to custody issue

The presentation will start with two UK cases. The negative approach of the UK authorities will be compared to the open and positive attitude of decision makers in New Zealand and Canada in very similar cases.

##### 4.1 *EM* case

In the most recent UK case,<sup>21</sup> the appellant, a citizen of Lebanon was married in her country of origin to a man who according to the facts accepted to be true by judges married her just because of her money. He did not want children and was violent towards his wife. Thus, due to a hit into her stomach her first pregnancy was interrupted and she lost the first child. When the second child was born in 1996, the father came to the hospital just to take the son away from the mother and to bring him to another country. He was prevented from doing so, and became even more violent and never cared for his wife or his child. The appellant succeeded in obtaining divorce from Lebanese courts. As a result of divorce procedure the custody of the child was attributed to the mother until the child reaches the ages of seven. After that date the custody is automatically transmitted to the father or another male relative of the father's family. The mother could only hope to obtain occasional and supervised visitation rights in a place designated by court, but not at her home. The father and the child had no relationships; neither did the child know any other member of father's family.

On the approach of the seventh birthday of her son in order to avoid losing her son the appellant first left the place of her habitual residence and in December 2004 managed to come to the UK with the child, where she applied for asylum.

Her asylum application was rejected. As was initially her application to remain in the country on humanitarian grounds. Although her final appeal to the House of Lords with regard to the permission to stay on humanitarian grounds was successful, the entire history of the case as well as the very fact of rejection of her claim to recognition of refugee status raises many questions.

The consideration of the application for refugee status is very brief. It refuses both the fact that women in Lebanon constitute a particular social group for the purposes of

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<sup>21</sup> The procedural history of the case as considered in this essay starts with the decision of the Asylum and Immigration Tribunal (hereinafter the AIT) which is a result of the appeal lodged against the negative decision of an immigration judge: Asylum and Immigration Tribunal, Appeal No AS/04832/2005, 11 Nov. 2005. This decision was followed by a judgment of the Court of Appeal of England and Wales (hereinafter the Court of Appeal) which dealt only with the application to stay on humanitarian grounds: *EM (Lebanon) and Secretary of State for the Home Department* (21 Nov. 2006) [2006] EWCA Civ 1531. The judgment refused to grant her this right to stay which was only granted at the final appeal by the House of Lords: *EM (Lebanon) (FC) (Appellant) (FC) v. Secretary of State for the Home Department (Respondent)* (22 Oct. 2008) [2008] UKHL 64. Generally, the case is referred to as the *EM* case. I discussed this case from a different perspective and in a different context in 'Feminism, Modern Philosophy and the Future of Legitimacy of International Constitutionalism' (2009) *International Community Law Review* 11, 232-237.

refugee definition as well as the fact of existence of such a treatment as might amount to persecution upon her return to Lebanon. In the applicant's request for permission to stay on humanitarian grounds which relied on the possible violation of article 8 (right to family life) of the European Convention on Human Rights (hereinafter the ECHR)<sup>22</sup> the reasoning of judges evolved around the notion of a foreign case which required evidence of a flagrant violation of the right to family life. Judges of the Court of Appeal motivating their rejection stated that no such flagrant violation of the applicant's right to family life would occur in Lebanon since there is a possibility for her to obtain occasional visitation rights.<sup>23</sup> The members of the House of Lords while granting permission to stay on humanitarian grounds emphasized highly exceptional circumstances of the case as a basis for their decision thus distancing themselves from passing any judgment on the Lebanese legal regulation of custody issue.<sup>24</sup> Position adopted by both the House of Lords and the Court of Appeal is very questionable from the point of view of human rights protection. However, this aspect of the case will not be discussed further because it does not directly relate to the granting of refugee status as such.<sup>25</sup>

#### **4.2 ZH case**

Another UK case which is relevant to our analysis arose out of the application for recognition of refugee status by an Iranian national who arrived in the UK with her daughter.<sup>26</sup> In Iran, she suffered verbal and physical abuse from her alcohol and drug addict husband to whom she remained officially married. To support her asylum application, she invoked difficulties faced by women in Iran when attempting to initiate a divorce procedure, including subsequent difficulties with finding an employment, a residence, possible accusation of adultery and the prospect of losing custody of her daughter. She also mentioned that her daughter feared her father and wished no contact with him.

Her initially accepted application for refugee status was subsequently rejected on the appeal of the Secretary of State for the Home Department by the Immigration Appeal Tribunal (hereinafter the IAT). The central argument evolved around the situation of women in Iran which according to the IAT could not be compared to the situation of women in Pakistan as described in *Shah and Islam*<sup>27</sup> so that it was not possible to affirm that women in Iran constitute a particular social group for the purposes of refugee status determination.<sup>28</sup>

Although the issue of women as a particular social group in Iran is discussed quite in detail, the consideration of human rights claims is very brief. One could say even excessively brief taking into account the fact that the refugee claim is rejected.

#### **4.3 New Zealand's cases**

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<sup>22</sup> Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe on 4 Nov. 1950, in force since 3 Sept. 1951. The official text is available at the Council of Europe web-site: <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>>.

<sup>23</sup> *EM* case, Court of Appeal, above n. 21, para. 35.

<sup>24</sup> *EM* case, House of Lords, above n. 21, para. 60.

<sup>25</sup> I discussed some of the issues arising in this connection in my previously mentioned article above n. 21, 232-237.

<sup>26</sup> *ZH (Women as Particular Social Group) Iran* CG [2003] UKIAT 00207 (6 June 2003). Hereinafter the *ZH* case.

<sup>27</sup> *R v. IAT ex parte Shah and Islam* [1999] 2 AC 629.

<sup>28</sup> *ZH* case, above n. 26, para. 74 in particular.

Contrasting with the attitude of UK authorities is the position adopted by New Zealand Refugee Status Appeal Authority (hereinafter the RSAA) and even more strikingly, the approach of Canadian authorities. As far as the situation in New Zealand is concerned, I will refer to two cases dealing with situations of Iranian women who fear among others losing custody of their children subsequent to divorce in one case and family breakdown in the other.

In the first case,<sup>29</sup> the applicant, an Iranian woman, came to New Zealand with her son aged eight at the time of arrival. In Iran she was married to a violent and indifferent man who held her almost like a prisoner at his house. When she gave birth to her son, she was not able to see her child and was told that the child is sick and few days after that the boy had died. She discovered that her child was alive only a year later, at the final stage of divorce procedure during which the husband was attributed the custody of the child.

By chance she discovered first that the father sold his child to a couple and that subsequently to the attribution of custody to the father, the child did not reside with his father. Although she knew that she will never be awarded custody of her child, she decided to seek intervention from an Iranian court in order to protect her child. After a long sequence of judicial proceedings she was first granted one day per week visitation right which she was not able to exercise because the father hid the child. Subsequently, while leaving the formal custody with the father, a court in Iran gave her the responsibility of caring for the child on a full-time basis provided she will not move from the place of residence of her former husband to allow him to exercise visitation rights and provided she will not remarry. If she does not comply with one of these conditions, not only does she lose her son, but will also be subject to punishment by imprisonment.

The father was very angry about what he regarded as a defeat to him as a man and as a state official and continued to threaten his former spouse among others with kidnapping the child. Being afraid for her own safety and the safety of her son, the appellant departs first to another town and later leaves Iran with her child. In addition to fearing the attitude of her former husband and punishment upon return, she also faced an imminent loss of her son because before her departure she entered into a temporary marriage which also constituted a breach of one of the conditions of the court order authorizing her to take care of her son.

The refugee status was granted to the woman only upon appeal. But the decision taken by the RSAA is exemplary in several regards. Not only it adopts a multifaceted and nuanced approach in the analysis of the country of origin information, but the entire consideration of the case is one of the best examples of the holistic approach, whereby all aspects of this woman's experience are accorded a necessary consideration. The RSAA fully apprehended the arbitrary and discriminatory nature of the legal system in place. The decision makers did not overemphasize her occasional 'success' before Iranian courts and accorded a full weight to her freely made choices.

The second case from New Zealand also decided by the RSAA demonstrates similar sensitivity and understanding.<sup>30</sup> In this case the appellant came to New Zealand with her husband and her daughter who was aged three at the time when decision was

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<sup>29</sup> Refugee Appeal No. 71427/99, New Zealand: RSAA (16 Aug. 2000) available at: <<http://www.unhcr.org/refworld/docid/3ae6b7400.html>>.

<sup>30</sup> Refugee Appeal Nos. 76226 and 76227, New Zealand: RSAA (12 Jan. 2009) available at: <<http://www.unhcr.org/refworld/docid/49a6ac0e2.html>>.

taken. Initially, the entire family applied for refugee status, however unsuccessfully. As a consequence, the husband who was already violent and very possessive in Iran became even more hostile towards his wife who refused to be fully submissive to him. Her encounter with a more liberal style of life in New Zealand reinforced her determination not to follow her husband and not to return to Iran. Therefore, she lodged a separate appeal for recognition of a refugee status for herself and her daughter and was this time successful. The RSAA took into account all difficulties she could face upon her return to Iran, including the possible divorce in Iran and its consequences, such as difficulty in finding employment and housing, as well as the real chance of arbitrary denial of custody rights. Decision makers also gave due weight to the situation of the child who had no real relationship with her father on a day-to-day basis.

#### 4.4 Canadian cases

Several cases having custody as a central issue of refugee claims can be found in Canadian case law. The consideration of cases is usually very brief and leads to positive outcomes already in first instance. Three cases are considered here. One of them is a case of a divorced woman from Lebanon whose situation is very similar to that of the appellant in the *EM* case. Two remaining cases are claims presented by women from Iran one of whom became widow prior to arriving to Canada, the other although divorced in Canada, was considered as married by her Iranian husband and was in a situation very similar to that of the Iranian claimant in the *ZH* case.

The case from Lebanon<sup>31</sup> concerns a woman who fled to Canada with her minor child to escape application to her of the very same custody rule as that invoked in the UK case. As in the *EM* case, she was married to an indifferent husband who never took care either of her or of the child. The divorce occurred at the initiative of the husband who married another woman while he was still married to the applicant and moved to Saudi Arabia. At the approach of the seventh birthday of the child, the ex-husband initiated proceedings to take custody of the child. Since he was still residing in Saudi Arabia, he acted through his brothers and other family members involved in the Syrian Baath Party and thus having powerful position. The claimant also stated that although she is a faithful follower of Islam and fully aware of the custody rule, she did not want her husband to take the custody of the child because of his violent activities and the absence of any relationship between the father and the son. Furthermore, mental health problems (chronic low grade depression) of both the mother and the child were also invoked in the case.

In the first Iranian case,<sup>32</sup> a woman and her son fled to Canada when after a death of her husband and her son reaching the age of seven, her in-laws went to court and obtained custody of the child mainly on the basis of her non-compliance with the dress code and thus immorality.

In the second Iranian case,<sup>33</sup> the woman arrived in Canada with her two minor sons to join her husband and the father of children who already applied for refugee status. The claims of the family were joined. However, upon refusal of refugee claims and the husband's desire to return to Iran, the woman who suffered domestic violence and divorced in Canada on that ground filed a new application for refugee status. This

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<sup>31</sup> *L. (H.X.) (Re)* [1993] C.R.D.D. No 259 (31 Dec. 1993).

<sup>32</sup> *A.I.P. (Re)* [1999] C.R.D.D. No 12 (28 May 1999).

<sup>33</sup> *X (Re)* 2000 CanLII 21385 (I.R.B.) (29 May 2000).

application invoked all the difficulties she and her children would face upon return, taking into account the non recognition of the Canadian divorce by the husband and by Iranian authorities. She stressed that upon their return in Iran the father of her children would divorce her according to Iranian laws and would be granted custody of children. Moreover, taking into account her engagement with another man, her husband and his family would accuse her of adultery and she would face death by stoning.

In all cases Canadian authorities in taking positive decisions approach cases in a holistic way not separating artificially experience and demands of women and children. In all Canadian cases the issue of mental health of both mothers and children is accorded a due weight.

Before coming to consideration of some legal aspects of these claims, it is important to emphasize significant common features of the cases presented above. First of all, in all cases applicability of a very similar allegedly Islamic rule on custody upon divorce arbitrarily depriving mothers of any meaningful relationship to their children is central to the refugee claim. Even if other factors intervene, as for example domestic violence or possible accusation of adultery upon return in Iranian cases, the formulation of claims by women demonstrates that the final decision to ask for a refugee status is dominated by their concern for the future of their children. In all these cases women do not simply attempt to continue a quarrel over custody by other means. They are not simply concerned with their own well-being. In all these cases the suffering of the mother is contingent upon the suffering of the child and vice versa. If the child will be obliged to separate from the mother his or her well being will be affected significantly. On the other hand, the mother is placed in such a situation that she can not any more bear the burden of remaining married (or the separation occurred on the initiative of the husband). Since mothers see no other way to protect their children while remaining separated from their husbands, they are contesting a state-established patriarchal hierarchy which harms in first place their children who if remaining with the father will be seriously threatened.

#### 5. Consideration of relevant refugee claim's aspects by national authorities

The presentation of legal analysis concentrates on three issues which are most extensively discussed in all the decisions presented above: whether the treatment women could receive upon return amounts to persecution, whether sufficient state protection is available, and finally whether women constitute a particular social group. Despite the fact that it would be more logical to start with the discussion about existence of persecution, the issue of women as a particular social group is addresses first because it forms the core of negative UK decisions.

##### **5.1 Women as a particular social group and other Convention grounds**

In the *EM* case, the applicant's lawyer formulated her claim for recognition of refugee status as based on the membership in a particular social group, namely women in Lebanon and essentially argued that 'there is clearly no regard for woman's rights in Lebanon'.<sup>34</sup> The judges of the AIT rejected this thesis relying mainly on two arguments. Firstly, since the appellant was able to obtain divorce despite her husband's hostile behavior, women are not completely deprived of all rights.<sup>35</sup> Secondly, it refers to the Freedom House report which although recognizing existence of some discriminatory

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<sup>34</sup> *EM* case, AIT decision, above n. 21, para. 6

<sup>35</sup> *Ibid.* para. 7.

practices against women in family and personal status matters, states that ‘women enjoy most of the same rights as men’.<sup>36</sup>

In this connection AIT judges observed that

Muslims in Lebanon are governed, in family matters, by Muslim law. The fact that the rules of Muslim law operate in a way which some Western societies might regard as discriminatory does not show that all women are deprived of standing before the law.<sup>37</sup>

The judges do not explain why existence of discrimination in family and personal status matters cannot be considered as sufficient for the purposes of refugee status claim of the appellant. The AIT rejects that women in Lebanon can be regarded as constituting a particular social group for the purposes of refugee status determination in very brief five paragraphs. The fact that women are arbitrarily denied such a fundamental right as right to family life, to relationship with their children, is not seriously considered by the AIT. Moreover, the above quotation suggests that the very fact that family matters are governed by Muslim law is sufficient to justify at least some forms of discrimination without any regard to the fact that there exists in Muslim law a variety of interpretative possibilities which allow establishment of family law systems eliminating discrimination against women at least to some degree in the matter of guardianship and custody of children upon divorce.<sup>38</sup> Furthermore, one just remains puzzled what the judges think about the freedom of religion of Muslim women who refuse to submit to this particular interpretation of Islam. Once again, is it just because one interpretation of a particular religion is adopted as state’s law that this state is authorized to disregard and violate rights of its citizens and the freedom of religion can be violated?

The AIT judged it necessary to add that even if there would be ill-treatment on one of the Refugee Convention grounds, it would not amount to persecution. This statement implies that an eventual prison term which the mother could have to suffer upon return to Lebanon for attempting to defend her right to maintain a meaningful relationship with her child and ultimately perhaps to protect her child from father’s abuse is not a persecution.<sup>39</sup> The very fact that such a regulation on guardianship upon divorce places women in a highly dependent position and subjects them to whimsical will of their former husbands sometimes putting them in a slave like position either does not seem to be important to judges or does not appear to them at all. We will discuss the issue of persecution in relation to all the cases under consideration few paragraphs later.

Moreover, the use of the country of origin information appears uninformed and biased. Firstly, the very mandate of Freedom House to whose report the AIT refers emphasizes the privilege accorded to civil and political rights.<sup>40</sup> Other types of rights, in

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<sup>36</sup> Ibid. para. 8

<sup>37</sup> Ibid. para. 9.

<sup>38</sup> As mentioned before, the analysis of legislation of states incorporating in one way or another Islamic law in their family law legislation reveals that in many such states the guiding principle in deciding on the guardianship and custody of children upon dissolution of marriage are best interests of the child and not the sex of the parents. See above . 14.

<sup>39</sup> The fact that she most probably will have to serve a prison sentence by return to Lebanon is recognized by the AIT. See *EM* case, AIT decision, above n. 21, para. 14.

<sup>40</sup> For the mission statement see <<http://www.freedomhouse.org/template.cfm?page=2>>. Although it mentions women’s rights, it keeps them in its general framework which is focused on freedom and democracy.

particular those which are relevant to the present case, are considered only marginally. In this light, the use of the Freedom House's report as the only documentary source for country of origin information is highly inadequate. Secondly, the decision makers should at least make apparent their awareness of the criticism on impartiality and methods of work of this organization.<sup>41</sup>

The choice itself, the choice of judges to discuss the issue of women as a particular social group before addressing the question of persecution, is highly symbolic. It is a sign of a predetermined outcome. The judges do not take the case seriously; they simply look for arguments to motivate their prejudicial vision of the case. It is particularly striking to see how the analysis confuses the notion of persecution with that of a particular social group. Despite the fact that it is commonly recognized today, including in the UK jurisprudence, that a particular social group cannot be defined exclusively by the persecution - although persecution may be a factor determining the visibility of the group<sup>42</sup> - what judges in reality assess, is the gravity of ill-treatment. The very similar pattern is visible in the *ZH* case where the issue of women in Iran constituting a particular social group is discussed in more detail.

In the *ZH* case the question of women in Iran constituting a particular social group was again at the centre of analysis. The use of country of origin information is very biased. Although sources mentioned are more numerous and diverse, judges constantly make emphasis on the parts of documents which support their vision of the situation (rejecting the existence of a particular social group of women in Iran) and pass over contrary information very briefly without any substantial consideration.

Let us consider the following argument used by judges to reject the existence of a particular social group of women in Iran: When comparing the situation of women in Iran to that of women in Pakistan, the judges emphasize the fact that the position of women in Iran is not so lowly,<sup>43</sup> that they have educational and employment opportunities,<sup>44</sup> that some laws allowing women to divorce and seek state protection against domestic violence exist.<sup>45</sup> The judges do not really evaluate or give a due weight to numerous references found in country of origin documents as to the difficulties faced by women. Thus, with regard to divorce, the judges affirm: 'It may be difficult to obtain, but the legislative provision exist, they are not simply ignored by courts or made impractical for *all* to use...'<sup>46</sup> They seem to overlook the fundamental principle according to which the fact that some members of the group are able to find protection does not mean that a group as such does not exist.<sup>47</sup> Finally, it is clear that what judges in reality assess, is the gravity and extent of ill-treatment as well as availability of state protection.

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<sup>41</sup> For an example see G. L. Munck, J. Verkuilen, 'Conceptualizing and Measuring Democracy: Evaluating Alternative Indices' (2002) 35 *Comparative Political Studies* 5-34, at 20-21 and 25-26 in particular.

<sup>42</sup> For UNHCR position see generally UNHCR, Guidelines on International Protection No. 2: 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 (7 May 2002) HCR/GIP/02/02, para. 2, 14, available at: <<http://www.unhcr.org/refworld/docid/3d36f23f4.html>>; for the UK position see *Shah and Islam*, above n. 27.

<sup>43</sup> *ZH* case, above n. 26, para. 82.

<sup>44</sup> *Ibid.* para. 74.

<sup>45</sup> *Ibid.* paras. 91, 92.

<sup>46</sup> *Ibid.* para. 92, emphasis added.

<sup>47</sup> T.A. Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"' in E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection*

Furthermore, the judges of the IAT often mention insufficiency of motivation provided by the Adjudicator who in first instance decision accepted arguments of the applicant, including the issue of women in Iran constituting a particular social group. However, in my view, the decision of the IAT itself cannot be regarded as motivated, it rather appears as a strange construction made out of two parts (one containing quotations from the country of origin information documents, the other developed around the IAT own arguments and vision of the situation) which do not entertain any logical relationship with each other.

Contrasting with the attitude of UK authorities in these two cases is the detailed and nuanced realistic approach in two New Zealand cases selected for consideration. Documents that were used for evaluation of the country of origin information are quite different in nature. They include a variety of sources reaching from more traditional background documents, newspaper articles to critical scholarly research.<sup>48</sup> The decision, although in a very concentrated form presents a nuanced vision of the situation of women in Iran. The issue of persecution and availability of state protection is analyzed before consideration of applicability of some of the Convention grounds.

The New Zealand authorities stress the centrality and depth of the state-sanctioned gender discrimination to the construction of the theocratic political regime in Iran.<sup>49</sup> This is a very significant point as it allows at the following stage to affirm that among Convention grounds for persecution in this particular case there are not only particular social group of women, but also religion and political opinion.<sup>50</sup>

Similarly, the recognition of women as a particular social group in Canadian cases occurs without any difficulty with the emphasis of the fact that the arbitrary differential treatment is imposed on claimants simply because they are women.<sup>51</sup>

Before coming to the analysis of other legal aspects of the cases, as a concluding remark on this issue it is important to understand that in determining the existence of a particular social group it is not necessary to evaluate the gravity of ill-treatment and even less for this treatment to amount to persecution. Whether courts adopt a 'protected characteristics' approach or 'social perception approach' in determining the existence of a social group,<sup>52</sup> it is difficult to find a country where women do not constitute a particular social group. For example, at least the issue of equal payment for work of equal value remains problematic in all countries thus reflecting inadequate appreciation of the value of women's work as compared to the men's. Obviously, the unequal treatment of women will not always amount to persecution. However, as minor and insignificant as the effects of the different treatment of women might appear, if this treatment is

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*in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), 263-311, at 288 and 274 with a particular reference to the position of UK authorities in *Shah*.

<sup>48</sup> Consider for example the references made in Appeal No 71427/99, above n. 29, paras. 1-11 to A.E. Mayer, *Islam and Human Rights: Traditions and Politics* (3d ed. 1999), articles from M. Afkhami, E. Friedl (eds.) *In the Eye of the Storm: Women in Post-Revolutionary Iran* (Taurus, 1994), P. Paidar, *Women and the Political Process in Twentieth-Century Iran* (Cambridge University Press, 1995) as well as Human Rights Watch and WLUML reports and other governmental documents.

<sup>49</sup> Appeal No 71427/99, above n. 29, para. 5-7.

<sup>50</sup> *Ibid.* paras. 86-89.

<sup>51</sup> See *L. (H.X.)* case, above n. 31, 7 and *A.I.P.* case, above n. 32, paras. 8-13.

<sup>52</sup> For an overview of these approaches and their definition see generally Aleinikoff, above n. 47, at 294-301. For UNHCR position on the matter see Guidelines, above n. 42, paras 6 and 7 in particular.

motivated exclusively by the gender, women will constitute a particular social group. Moreover, from the doctrinal point of view, taking into account the specificity of gender as a characteristic, there is no reason to fear that other Convention grounds will become superfluous.

With regard to the particular case of women facing the arbitrary rule depriving them of the custody of their children without any regard either to the interests of the child or the maintenance of a meaningful relationship between mother and child, the conclusion is straightforward. Women do indeed constitute a particular social group because the arbitrary treatment they receive is for the reason of them being women. Moreover, it is important to consider other Convention grounds because in states with theocratic patriarchal regimes as Iran an attempt to escape this arbitrary custody rule can also defy the political and religious regime in place and thus bring other Convention grounds such as political opinion and religion into play. If the vary basis of the political regime in place is some form of patriarchy, as for example in Iran or Saudi Arabia, not paying attention to women's actions in the private sphere reinforces the regime in place and fails to recognize the significance and impact if these women's behavior. Furthermore, refugee status determination authorities usually do not hesitate to describe some features of a legal system in place in certain countries as inadequate or discriminatory. Why then is it impossible to pass a judgment on a legal system which claims to be based on one or another religion as suggest UK authorities? Women by their behavior do contest this particular vision of their religion. This was particularly clear in the Canadian case of a woman from Lebanon who stated that despite her being a faithful follower of Islam, she could not accept application to her and her child of this religiously motivated arbitrary rule. I do not see any reason to deny this right of women to question and disregard the majoritarian male interpretation of Islam.

## **5.2 Agent of persecution and standard of state protection**

The RSAA stressed an important difference in the approach adopted by UK and New Zealand authorities towards the question of the standard of state protection in cases where the agent of persecution is a non state agent.

The UK standard as formulated in the *Horvath v. Secretary of State for the Home Department*<sup>53</sup> requires only a reasonable willingness of the state of origin to operate a system of protection. The absence of a requirement of effectiveness of such a system of protection leads to the possibility 'that an individual can be returned to his or her country of origin notwithstanding the fact that the person holds a well-founded fear of persecution for a Convention reason'<sup>54</sup> as was rightly pointed out by the RSAA. To put it more straightforward, such a standard leaves some refugees unprotected, so that they can be send back to a country where their life may be in danger. Thus, the UK has in place a system of refugee status determination which is in violation of its obligations under the Convention. As always with regard to such abstract notion as 'reasonableness' we have to be aware of who and how measures this reasonableness. Is it reasonable to affirm that a state shows reasonable willingness to operate protection if the battered woman should

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<sup>53</sup> *Horvath* case, above n. 19.

<sup>54</sup> Refugee Appeal No. 71427/99, above n. 29, para. 62.

have suffered a permanent injury or produce a medical report of repeated injuries in order to obtain a divorce?<sup>55</sup> The judges in the *ZH* case implicitly give an affirmative answer.

It is also important to keep in mind that since the issue relates to the standard of protection in cases of persecution by non-state actors, women will inevitably be affected more than men. Continue theorizing and applying this approach will thus in addition constitute violation by UK authorities of the substance of the principle of non-discrimination.

If we consider the analysis made of the issue of agent of persecution in the *ZH* case in the light of the standard of state protection as described above, the significance of the very restrictive attitude of UK authorities becomes apparent. The issue of agent of persecution is not discussed in the *EM* case at all. In the *ZH* case, the IAT judges made some comments on this subject despite their refusal to recognize that women constitute a particular social group in Iran. When considering the availability of state protection in cases of domestic violence, the decision makers adopt an attitude which in my view is inadequate from two points of view. Firstly, they disintegrate the situation in considering the issue of availability and possibility of divorce as a means to escape domestic violence separately and independently from the issue of attribution of custody and guardianship upon divorce. Therefore, the decision makers ignore important influence which husbands can exercise on their wives through powers granted to them with regard to their children. This remains true even in the very improbable case when the mother is authorized to take care of the child beyond the age limit. In all cases Iranian courts will grant fathers very generous visitation rights and restrict mother's rights limiting her freedom of movement (and thus her ability to escape violence) as well as her right to marry (and thus her ability to find a protection from her former husband in a new relationship).<sup>56</sup> Furthermore, by advising women to separate from their husbands without considering the issue of custody of children, the UK authorities make a choice for this woman who according to their logic should be able to abandon her child even to an indifferent father in order to escape domestic violence. In doing so decision makers establish a hierarchy of values which they impose in women: escape from violence is more important than care for and relationship to children. They also disintegrate the experience of women who in such situations have to face difficult dilemmas sometimes preferring to remain married to violent husbands in order not to be separated from their children as long as they consider it more appropriate for the well being of their children. Finally, the authorities adopting such an attitude disregard the principle of the best interests of the child which as I attempt to demonstrate is closely linked to the refugee status claim of women. Secondly, the consideration of country of origin information in this case is again very one-sided. The IAT selects statements which support its own vision of the situation without motivating this preference and without explaining why the remaining evidence, which favors the appellant is considered as non-relevant.<sup>57</sup> This in turn places an excessive burden on the

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<sup>55</sup> Such is the situation in Iran as reflected in the country of origin information quoted in the *ZH* case, above n. 26, paras 41, 44.

<sup>56</sup> These are the conditions imposed upon the appellant in one of the cases from New Zealand when she was permitted to take care of her child after the age limit. Appeal No 71427/99, above n. 29, para. 26.

<sup>57</sup> See for example, the statement made by the IAT in para. 91 (*ZH* case, above n. 26) according to which the police is willing to intervene in cases of domestic violence if the husband is alcohol or drug addict and the following statement on the availability of divorce (Ibid. para. 92) which is presented as a logical consequence of the first and compare them to the quotation from the document 'Divorce in Iran' in para. 41

appellant and her daughter who are thus forced to return back to Iran and suffer persecution merely to demonstrate insufficiency of state protection.

### 5.3 The issue of persecution

The current doctrinal and judicial vision of existence of persecution is closely linked to violation of applicant's basic human rights. The authoritative UNHCR Handbook recognizes this link in following terms:

a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.<sup>58</sup>

The introduction of this intimate relationship between existence of persecution and establishment of human rights violations as a formal criterion in refugee status determination is attributed to the works of James Hathaway<sup>59</sup> and his writings are often referred to by many national refugee status determination authorities.<sup>60</sup> Despite all positive impact Hathaway's analysis might have on refugee protection, it had a negative impact of reinforcement of so much criticized division between civil and political rights as opposed to economic social and cultural rights. The central thesis of the approach proposed by Hathaway, namely that 'refugee law ought to concern itself with actions which deny human dignity in a key way',<sup>61</sup> I believe, is not contested and as such deserves to be supported. However, his definition of the core of human dignity is closely linked to the distinction between derogable and non-derogable human rights on the one hand and between civil and political as opposed to economic and social rights. According to him the standard of protection in the latter case is 'less absolute'.<sup>62</sup> This very classification creates in the minds of decision makers a hierarchy of rights and values attached to them reinforcing the so much criticized public/private distinction in human rights law.<sup>63</sup> It also creates an impression that civil and political rights are more important to the protection to the core of human dignity than economic and social rights. This in turn places an additional burden on many nontraditional claimants including women. The

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which states that 'the husband's drug addiction is not cause for divorce on the grounds of harm, unless it is shown that his consumption of opium has economically ruined him and made it impossible to support the family.' The IAT does not at all consider the economic situation of the family, but a family which is able to travel to Europe will very certainly not be considered as economically ruined by Iranian authorities.

<sup>58</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 (Reedited, Geneva, Jan. 1992), para. 51.

<sup>59</sup> The main reference remains J. C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991). However, his later works which added some human rights standards are equally important. See for example J. C. Hathaway, 'The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute' in *The Realities of Refugee Determination on the Eve of a new Millennium: The Role of the Judiciary* (Proceedings of the 1998 Conference of the International Association of Refugee Law Judges, Oct. 1998) 80-90.

<sup>60</sup> For a detailed description of the influence exercised by his work see generally M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, 2007), 27-33 with further references.

<sup>61</sup> Hathaway, *The Law of Refugee Status*, above n. 59, p. 108.

<sup>62</sup> *Ibid.* p. 111.

<sup>63</sup> For an example of analysis of this public/private distinction see e.g. C. Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87-125.

UK cases are a perfect illustration of this paradox. In both cases the authorities refuse to recognize that the ill-treatment the women will receive upon return amounts to persecution. Although this statement is made only at the margins of the decisions, as already mentioned above, the analysis of women as a particular social group helps to understand the motivation behind this conclusion.

Firstly, it is necessary to recall the basis for claims discussed: the desire to avoid applicability of a rule arbitrarily depriving mothers of custody of their children upon children reaching certain age or mothers remarrying. Although the application of this rule shall not be considered in isolation from other factors of each case, it is necessary to give its assessment as such.

In the UK cases the fundamental question of custody is not seen at all as relevant to the issue of refugee status: ‘We do not accept that the different approach to the award of custody means that there is no relevant court protection.’<sup>64</sup> In the *ZH* case the IAT also states: ‘If the fear was that the child would be put into the father’s custody on divorce or separation, the Iranian custody laws are not so inhuman as to constitute a breach of Article 3 [of the ECHR] – there is no assertion or evidence of child abuse.’<sup>65</sup> This statement assumes without any justification or motivation that Iranian custody laws will take into account the principle of the best interests of the child. The motives of the IAT do not mention at all, and thus ignore the absence of a stable relationship between the child and the father as well as child’s fear of the father. In so doing they disregard all the consequences for the child’s well-being not only of the imminent separation from the mother, but also of a very certain proximity to a drug and alcohol addict father. At this point, some would object affirming that the claim to refugee status is presented only by the mother, the child making no separate claim in the *ZH* case. This argument would be an additional evidence of a dismembering of the case because it is simply impossible to fully apprehend and evaluate mother’s claim without taking into account her child’s fate. The major preoccupation of the mother is not the separation from her child as such, but the fact that this separation is arbitrary and will impose on her child an unbearable suffering which the mother fully shares. She feels herself responsible for her child despite Iranian law’s refusal of this responsibility to the mother. She just cannot stand by and watch at her child being subject to a treatment which can lead to severe physical and psychological harm. A report by an NGO states, for example, that ‘often women do not initiate divorce until they feel their children are old enough to handle this traumatic change in care arrangements.’<sup>66</sup> It is important to mention that the success of the *EM* case before the House of Lords can be attributed to a very large extent to the fact that the child finally was permitted to intervene in the proceedings. This gave the Lords an opportunity to fully comprehend the situation in all its aspects and to have a vision of the case which is very close to the holistic approach advocated here.<sup>67</sup>

UK authorities when refusing application for refugee status do not consider at all that the mother can never be fully responsible for her child and remains always dependant

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<sup>64</sup> *ZH* case, above n. 26, para. 94.

<sup>65</sup> *Ibid.* para. 98.

<sup>66</sup> *WLUML*, above n. 7, 340.

<sup>67</sup> See for example the following statement by Lord Hope of Craighead: ‘(T)he case for allowing the appellant and her son to remain in this country on humanitarian grounds is compelling. *This is particularly so when the effects on the child are taken into account.*’ *EM* case, House of Lords, above n. 21, para. 18 (emphasis added.)

on her husband even if he is violent. We have to recall here again that in the *ZH* case the father is presumed alcohol and drug addicted person, which formed a premise allowing judges to conclude that the claimant will be able to get separation or divorce from her husband. The premise itself is very questionable given the country of origin information quoted in the decision.<sup>68</sup> In considering the non-existence of a breach of article 3 ECHR, they refer only to the absence of evidence relating to child abuse, but do not consider the situation of the mother, her possible suffering and mistreatment, nor do they seem to care for possible mental health problems of the child forced to remain with the father whom the child fears and separated from the mother who is the only person the child really depends on..

The consideration of rules relating to the attribution of custody in Iran by the RSAA is in a sharp contrast to the previously discussed UK cases. The RSAA emphasizes the fundamental division between roles of men and women in relation to children. Men are legal guardians (decision makers) and women simply care givers and only for a limited period of time which in Iran is fixed for boys as low as at the age of two years! This distinction goes completely unmentioned by UK authorities. The implication of this rule is that women, even if they can sometimes be allowed to take care of their children, are entirely dependent on their former husbands who always remain decision makers in relation to everything relating to the child. If a woman does not follow her former husband's instructions she can immediately lose her child.

Very interesting is evaluation of the issue of persecution in relation to this custody rule in the Canadian *A.I.P.* case. The decision concludes that 'her [claimant] having to separate from her only son after the death of a husband is cruel and inhumane.'<sup>69</sup> The general application of the rule of Iranian Civil Code on custody which is almost identical to that applicable in Lebanon is called a 'Draconian measure', violating prohibition of torture or cruel, inhuman or degrading treatment or punishment.<sup>70</sup> The decision expressly refers to this prohibition as formulated in article 5 of the Universal Declaration of Human Rights.<sup>71</sup> What this suggests is a shift in framing the issue of custody from belonging exclusively to social and economic sphere to civil and political domain. This shift is particularly justified if we consider previously mentioned remark of New Zealand's decision makers about the nature of Iranian regime in place.

Both Canadian as well as New Zealand's decisions in evaluating persecution and gravity of harm enumerate several human rights instruments. Thus, in the *L.(H.X.)* case Canadian authorities mention following provisions: articles 7 (equality before law), 16 (equal rights in relation to marriage), 25 (motherhood and childhood protection) of the Universal Declaration of Human Rights, article 15 (equality before the law) and 16 (discrimination in relation to marriage and family matters) of the Convention on the Elimination of all Forms of Discrimination Against Women, article 3 (best interests of the child principle), 9 (right of children not to be separated from their parents), and article 12 (right to be heard of the child) of the CRC.<sup>72</sup> Although Canada is a dualist country, as UK, in considering refugee status issues, it takes full account of international human

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<sup>68</sup> See information provided above in n. 57.

<sup>69</sup> *A.I.P.* case, above n. 32, para. 21.

<sup>70</sup> *Ibid*, para. 13.

<sup>71</sup> *Ibid*, para. 12.

<sup>72</sup> *L. (H.X.)* case, above n. 31.

rights obligations. In this case when assessing the harm suffered by both claimants, the panel viewed it through the prism of commonly recognized international standards and thus emphasized the seriousness of discrimination suffered by mothers, simply on the basis of their gender. In contrast, the UK authorities although making no reference to international standards, clearly demonstrate their framing of cases in terms of less important to them economic and social rights relegating women's experiences to the so-called private sphere thus making women's suffering less important and almost invisible.

## 6. Conclusions

The above analysis of case law clearly demonstrates the negative impact of disintegration and fragmentation of women's situation on the outcome of their refugee status claims. This approach, adopted in the UK decisions considered above essentializes and simplifies women's experiences. Although gender related persecution is generally recognized as a valid for purposes of refugee status determination, the vision of the kind of persecution which is 'acceptable' according to UK authorities is still too simplistic. It is still too far away from some notions central to the feminist legal scholarship and developed precisely in order to bring more visibility to specificity of some women's experiences and situations: substantive equality, systemic discrimination, intersectionality.

The UK attitude appears even more troubling if considered in the light of the cases from other jurisdictions, which are able to accommodate and integrate specificity of some women's experiences. Moreover, such attitude of the UK authorities which tends to disintegrate women's claims essentializing only one aspect of their experience also stands in contrast to the approach of the European Court of Human Rights in one of its most recent judgments concerning states' obligation to protect women from domestic violence.<sup>73</sup> In the *Opuz v. Turkey* the applicant brought a complaint against Turkish government for not protecting herself and her mother from domestic violence. Despite the existence in Turkey of laws intended to protect victims of domestic violence and despite the fact of condemnation of the aggressor, the Court still found that Turkey failed to protect the applicant and her mother because these laws and condemnations being inadequate and insufficient, they did not have necessary effect. From the legal point of view the Court affirmed that applicant's rights under articles 2 (right to life), 3 (prohibition of torture and other cruel and inhuman or degrading punishment or treatment) and most importantly 14 (prohibition of discrimination) have been violated.

Legal theory might affirm that law is always only a response to developments taking place in a society, considering law as being always too late, after violence, after crime which thus determines law's nature.<sup>74</sup> In terms of refugee law, refugee protection and thus recognition of certain forms of persecution comes only after the persecution and lawyers have constantly to adapt their understanding of what it means to be persecuted to a multitude of forms persecution takes. Unfortunately, this adaptation often takes too long a time and differs from one state to another despite the Refugee Convention being a common denominator. However, more worrying is the fact that sometimes one has an

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<sup>73</sup> *Opuz v. Turkey*, (Application No 33401/22) Judgement 9 June 2009, available at <<http://www.unhcr.org/refworld/pdfid/4a2f84392.pdf>>.

<sup>74</sup> See e.g. this vision of law by Sigmund Freud in 'Why War?' in James Strachey (ed.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Vol. 22 (London, 1985), 203-215 at 204-206 and its analysis by Costas Druzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000), 298-300.

impression that certain decision makers intentionally hinder law's development in order to promote their government's priorities in terms of migration control and identity politics. As pointed out by Lord Hope of Craighead in the *EM* case: 'On a purely *pragmatic* basis the Contracting States cannot be expected to return aliens only to a country whose family law is compatible with the principle of non-discrimination assumed by the Convention.'<sup>75</sup>

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<sup>75</sup> *EM* case, House of Lords, above n. 21, para. 15 (emphasis added).