Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in *Minister for Immigration and Multicultural Affairs v Khawar*

RACHEL BACON AND KATE BOOTH*

1. *Introduction*

> [Firstly, domestic violence] 'is a personal affair, directed against [women] as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this.'[1]

The Australian High Court's recent decision in *Minister for Immigration and Multicultural Affairs v Khawar*[2] confirms that 'persecution' within the meaning of Article 1A(2) of the Convention Relating to the Status of Refugees 1951 (hereinafter 'the Convention') can be constituted by serious harm in combination with state failure to protect an individual, where that failure to protect is Convention-related. The High Court held in this case that the Refugee Review Tribunal (RRT) erred in not considering whether Pakistan's failure to protect Mrs Khawar from domestic violence constituted persecution within the meaning of the Convention. As such, the Khawar litigation[3] has significantly clarified the parameters of the concept of 'persecution' and the circumstances in which it should be applied. In particular, the decision signals the courts' willingness to reconceptualise notions of 'private harm' and to explicitly extend Australia's international protection obligations to those whose countries of nationality tacitly accept harm perpetrated against them by private individuals.

This is not to say that *Khawar* is necessarily a 'floodgates' case.[4] However, the decision paves the way for broader, more flexible consideration of the role of non-state actors and the state in refugee status determinations. In doing so, the High Court's decision is in concert with similar developments in the United Kingdom[5] and New Zealand.[6]

---

* Rachel Bacon BA (Hons) LLB (Hons) is a Principal Legal Officer in the Native Title Division at the Commonwealth Attorney General's Department. Kate Booth BA LLB (Hons) is a solicitor at Blake Dawson Waldron. The views expressed in this paper are those of the authors and do not necessarily reflect the views of either employer.

1 *Islam v Secretary for the Home Department; R v Immigration Appeal Tribunal and Another; Ex parte Shah* [1999] 2 WLR 1015 (hereinafter *Islam; Ex parte Shah*) at 1034–1035 (Lord Hoffman).

2 *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14 (hereinafter *Khawar*).

3 *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190; *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 101 FCR 501, [2000] FCA 1130; ibid.

4 The term 'floodgates case' refers to a case that would 'open the floodgates' on successful refugee applications, in other words, a case that would enable many more applicants to succeed than do at present.

5 Above n1 at 1025 (Lord Steyn).

6 *Refugee Status Appeals Authority Reference* 71427/99 (New Zealand Refugee Status Appeals Authority, R Haines QC & L Tremewan, 16 August 2000).

This paper focuses on two key issues arising from the *Khawar* decision:

1. the way in which the High Court elucidates the concept of persecution under the Convention as incorporated into Australian law through the *Migration Act* 1958 (Cth); and
2. the implications of this decision for matters where applicants for refugee status claim to fear persecution from private individuals in a context where their state of nationality fails to provide protection for a Convention reason.

2. *Facts of the Case and the Refugee Review Tribunal's Decision*

A. *Facts of the Case*

Mrs Khawar and her three children travelled to Australia in 1997 where they filed applications for protection visas. Mrs Khawar claimed to have been the victim of domestic violence inflicted by her husband and his family in Pakistan. She claimed that when instances of violence were reported to the police on four occasions, no assistance was forthcoming. The police refused to take the complaints seriously or document Mrs Khawar's claims. Where police did record details, they did so inaccurately.

In a further incident, her husband and brother-in-law doused her in petrol and threatened to set her alight. The police officer's response to her complaint was that women were the cause of the problem, and that she should 'go and do her own work'.[7] Mrs Khawar realised that she would never receive help from the police.

A delegate of the Minister for Immigration and Multicultural Affairs refused the applications for protection visas, finding that the applicants were not persons to whom Australia owed protection obligations in accordance with Article 33(1) of the Convention. Article 33(1) prescribes that:

> No Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 1A(2) of the Convention defines a refugee as any person who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[8]

---

7 *Khawar v Minister for Immigration and Multicultural Affairs*, above n3 at 192 (Branson J).

8 The protection obligations owed under the Convention, and the definition of 'refugee', are incorporated into Australian domestic law through the operation of *Migration Act* 1958 (Cth) s36(2).

B. The RRT's Decision

When the application came before the RRT for merits review, the RRT accepted that Mrs Khawar had been a victim of domestic violence. However, it found that the motivation behind the violence was attributable to 'the particular dynamics of the family into which she was married and the circumstances of her marriage'.[9] The Tribunal found that, because the violence arose out of their personal relationship, it was not Convention-related. That is, the applicant did not fear harm for one of the five Convention reasons set out in Article 1A(2), namely, 'race, religion, nationality, membership of a particular social group or political opinion'.

Although the applicant put evidence before the RRT of Pakistan's discriminatory treatment of women, the RRT determined that because the violence she feared was motivated by private, family considerations, any further consideration of the state's failure to protect Mrs Khawar as a member of a particular social group was irrelevant. The RRT affirmed the decision to refuse protection visas on the basis that the harm feared by the applicants was not Convention-related.

The applicant appealed this decision to the Federal Court under s476 of the *Migration Act* 1958 (Cth).[10]

3. Review by the Federal Court

The applicant argued before the Federal Court that harm inflicted by a private individual could constitute Convention-related persecution even though the individual had no discriminatory motive, provided that the state withheld protection for a Convention reason.[11] The substance of Mrs Khawar's complaint was that:

---

9 *Khawar v Minister for Immigration and Multicultural Affairs*, above n3 at 192–193 (Branson J).

10 The *Migration Act* 1958 (Cth) has been amended since this appeal was lodged. On 27 September 2001 Parliament passed a number of Bills amending, among other statutes, the *Migration Act* 1958 (Cth) (the 'Migration Amendment Package'). The Acts forming this package are the *Migration Legislation Amendment Act (No. 1)* 2001 (Cth) (No. 129 of 2001), the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) (No. 134 of 2001), the *Migration Legislation Amendment Act (No. 6)* 2001 (Cth) (No. 131 of 2001), the *Migration Legislation Amendment Act (No. 5)* 2001 (Cth) (No. 130 of 2001), the *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth) (No. 127 of 2001), the *Border Protection (Validation and Enforcement Powers) Act* 2001 (Cth) (No. 126 of 2001) and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth) (No. 128 of 2001). Two of these Acts, the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) and the *Migration Legislation Amendment Act (No. 1)* 2001 (Cth) significantly alter the availability of judicial review of RRT decisions by insertion of a privative clause, s474. The validity of this clause is currently the subject of litigation before the High Court. Essentially, the effect of the reforms is to limit judicial review of protection visa decisions to applications to the Federal Court under s39B of the *Judiciary Act* 1903 (Cth) for writs of mandamus, prohibition or certiorari, or an injunction or declaration: ss475A, 476 and 477 of the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth). Judicial review by the High Court under s75(v) of the *Constitution* also remains available. The revised provisions are not referred to in this paper, as this matter was appealed and decided under the principal Act as it stood in 1999.

11 Rachel Bacon & Kate Booth, 'The Intersection of Refugee Law and Gender: Private Harm and Public Responsibility — *Islam; Ex parte Shah* Examined' (2000) 23(3) *UNSWLJ* 135 at 158.

1. she was unable to get police protection in respect of domestic violence she suffered;
2. this represented a denial of fundamental rights otherwise available to nationals of Pakistan; and
3. the non-enforcement of those laws constituted a form of selective or discriminatory treatment amounting to persecution.[12]

A. *The Federal Court at First Instance*

Justice Branson set aside the RRT's decision,[13] holding that the RRT had erred by failing to make necessary findings of fact, which prevented it from properly applying the law. Justice Branson found that state failure to protect victims of domestic violence, where that failure is Convention-related, is capable of constituting persecution under the Convention. It was therefore open to the RRT to find harm amounting to persecution if the state's refusal to protect was motivated by a Convention reason. Justice Branson concluded that the RRT erred in failing to make findings about whether 'women' or 'married women' constituted a particular social group in Pakistani society, and whether the state had withdrawn its protection for related reasons.

B. *Decision by the Full Federal Court*

On the Minister's appeal to the Full Federal Court[14] the majority (Lindgren and Mathews JJ, Hill J dissenting) agreed with, and expanded upon, the reasoning of Branson J. Justice Lindgren expressly endorsed the reasoning of the House of Lords in *Islam; Ex parte Shah* on the question of causation. The majority of the House of Lords had held that causation may be 'satisfied by a pattern of violence for which the immediate motivation was personal, combined with denial of state protection'.[15] The Full Federal Court majority accepted that 'persecution may consist of the effect of the conduct of two or more persons, only one of whom may be moved by a Convention reason'.[16]

In exploring the nature of the persecution feared by Mrs Khawar, Lindgren J identified two possible approaches to the question of persecution:

(a) persecution consisting of the conduct of the state alone; and

(b) persecution consisting of a combination of the serious harm committed by her husband and the state's failure to protect her from that harm.

His Honour found that, taking either approach, the Tribunal had erred when it decided that the state's lack of protection was irrelevant. According to the first approach, Mrs Khawar feared violence from her family in the context of a lack of state protection. Alternatively, Mrs Khawar feared violence from her husband and his brother for 'personal' reasons combined with 'the husband's and brother's knowledge that the state would not protect her from them for reason of her

12 Above n2 at para 79 (McHugh & Gummow JJ).
13 *Khawar v Minister for Immigration and Multicultural Affairs*, above n3.
14 *Minister for Immigration and Multicultural Affairs v Khawar*, above n3.
15 Id at 535 (Lindgren J).
16 Id at 536 (Lindgren J).

membership of a particular social group'.[17] In Lindgren J's view, the husband's motivation would be irrelevant, while his violence would be relevant 'only as providing the occasion of an instance of persecution by the state'.[18]

In dissent, Hill J concluded that there was not a sufficient nexus between the physical harm feared by Mrs Khawar from her husband and a Convention reason. His Honour saw a difficulty in characterising the persecution suffered by the appellant as anything other than personal, private harm. While Hill J acknowledged that the fact the applicant was a woman had a part to play in the alleged persecution, he held it was not correct to say that her persecution was by reason of her membership of any particular social group, however defined.[19]

His Honour also expressed doubt over whether 'women in Pakistan' were capable of constituting a particular social group within the meaning of the Convention, such that the harm feared by Mrs Khawar could be said to be because of her membership of the group.

4. *High Court's Decision*

The Minister's case on appeal to the High Court focused upon the issue of persecution, arguing that both of the approaches outlined by Lindgren J should be rejected. The Minister submitted that:

1. the failure of a state to provide effective police protection to members of a particular social group is not capable of amounting to persecution where the violence feared is not Convention-related; and
2. fear of non-Convention related harm together with failure of state protection to members of a particular social group is not capable of giving rise to protection obligations under the Convention.[20]

The Minister acknowledged that, if the majority in the Court below and Branson J were right in their construction of the term 'persecution', then the matter must be remitted to the Tribunal for reconsideration.[21]

In reply, the respondents argued that there is nothing in the concept of 'persecution' to suggest that it does not include harm inflicted by private individuals, the state or any combination of these. They argued, in effect, that the Tribunal erred in failing to recognise that an omission or failure by the state to protect is capable of amounting to persecution, and that the matter must therefore be remitted to the RRT for reconsideration.

---

17 Ibid.

18 Id at 533 (Lindgren J). See also above n11 at 159–161.

19 *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 101 FCR 501 at 504.

20 Above n2 at paras 58–59 (McHugh & Gummow JJ).

21 Transcript of the hearing before the High Court (13 November 2001) at 3.

A. *Persecution*

By a majority of four to one the High Court held that the RRT had misconstrued the definition of persecution. The Tribunal therefore erred in law by failing to make relevant findings about Pakistan's alleged failure to protect the applicant. Justice Kirby noted that '[w]ithout identifying the relevant acts claimed to be persecution it was impossible to consider their causative effects.'[22]

(i) Reiterating Existing Principles — Persecution by Non-State Agents

In giving their reasons for decision the High Court reiterated and clarified a number of existing principles. For instance, a number of judges noted that selective harassment and discrimination, including denial of fundamental rights and freedoms, may amount to persecution,[23] and that persecution need not be carried out with enmity and malignity.[24] Justices McHugh and Gummow endorsed the reasoning of Mason CJ in *Chan*,[25] where his Honour defined 'persecution' broadly as 'some serious punishment or penalty or some significant detriment or disadvantage'.[26]

Both Gleeson CJ and Kirby J stated explicitly that the kind of 'persecution' with which the Convention is concerned is not limited to persecution by state agents. Persecution by non-state agents may fall within the definition.[27] Similarly, Gleeson J could see no reason why the term 'persecution' cannot be used to refer to the combined effect of conduct of two or more agents.[28]

(ii) The Relationship Between Protection and Persecution

The Minister did not dispute that non-state agents may inflict persecution within the meaning of the Convention. However, the Minister argued that the Federal Court, in setting aside the RRT's decision, had impermissibly broadened the concept of persecution by using the reasons for an absence of state protection to inappropriately 'colour' findings about whether the husband's violence was Convention-related.[29] It was argued that it would be an error to seek to elevate the nature of the persecution feared (in this case violence from Mrs Khawar's husband) to the character of 'Convention-related' persecution in light of the reasons behind the state's failure to provide protection.[30]

---

22 Above n2 at para 117 (Kirby J).

23 Justices McHugh and Gummow confirmed that selective and discriminatory treatment may amount to persecution if the treatment constitutes 'denial of a fundamental right otherwise enjoyed by Pakistani nationals, namely access to law enforcement authorities to secure a measure of protection against violence to the person': above n2 at paras 76, 85 (McHugh & Gummow JJ). See also *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388 (Mason CJ).

24 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 (hereinafter *Chen*).

25 *Chan Yee Kin*, above n23.

26 Ibid.

27 Above n2 at para 112 (Kirby J), referring to the Canadian decision in *Canada (Attorney General) v Ward* [1993] 2 SCR 689.

28 Above n2 at paras 27, 30 (Gleeson CJ).

29 Transcript of the hearing before the High Court (13 November 2001) at 2.

In dissent, Callinan J agreed with this submission when characterising the harm feared by the respondent as the physical violence exacted upon Mrs Khawar by her family alone. His Honour stated that 'that cause [the husband's private motivation], coupled with reluctance, rather than deliberate abstention, by the police, still could not amount to a Convention reason'.[31]

Justice Kirby implicitly rejected the Minister's approach by emphasising the importance of interpreting the elements of the Convention definition in a holistic way, having regard to its humanitarian objects.[32] The majority clearly rejected the Minister's argument in holding that, as a matter of principle, a state's failure to provide protection is at least capable of amounting to persecution within the meaning of Article 1A(2).[33]

(iii) Can Omission Constitute Persecution?

On this point the Minister argued that the failure of a state to provide protection against private harm can never amount to Convention-related persecution, either by itself or in combination with the private harm feared. The Minister asserted in oral argument that:

> Omission to act can never amount to persecution. The mere failure to provide protection in circumstances where, absent the intervention of private individuals, the claimant does not fear harm, is not of itself persecution.[34]

In support of this argument the Minister noted that the meanings of persecution in the dictionary all involve activity. None refer to inactivity.[35] The Minister submitted that the concept of persecution requires some form of incitement to harm on the part of the state, as distinct from a failure to protect from harm, or even tacit acceptance of harm.[36]

In addition, the Minister sought to distinguish the circumstances in *Khawar* from those in *Chen Shi Hai v MIMA*.[37] In *Chen*, the High Court found that the state's withdrawal of services such as housing, education and employment, on the basis that the applicant was a 'black child' (that is, a child born in contravention of

30 Id at 16.

31 Above n2 at para 156 (Callinan J).

32 See, for instance, above n2 at para 111 (Kirby J).

33 In exploring the meaning of 'protection' in Article 1A(2) Gleeson CJ focused upon a debate surrounding the broader versus the narrower meaning of the term 'protection'. His Honour concluded that Article 1A(2) refers to protection in the narrower sense, that is, diplomatic or consular protection outside the country of nationality: above n2 at para 21 (Gleeson CJ). See also id at paras 62, 73 (McHugh & Gummow JJ). However, as Gleeson CJ points out, this is not to say that the broader sense in which the term 'protection' is used is not relevant. On the contrary, an inability or unwillingness to seek diplomatic protection abroad may be caused by a state's failure to provide protection against ill-treatment within the country of nationality: above n2 at para 22 (Gleeson CJ).

34 Transcript of the hearing before the High Court (13 November 2001) at 3.

35 Id at 6.

36 Id at 4.

37 Above n24.

China's one child policy), could constitute persecution for reasons of membership of a particular social group. Counsel pointed out that the denial of services in *Chen* operated 'directly of itself' to have a persecutory effect on the applicant. In *Khawar*, on the other hand, the absence of state protection of itself — that is, without the intervention of others — did not have a harmful effect capable of amounting to persecution.[38]

In reply, the respondents argued that in order to demonstrate Convention-related persecution, the Khawars need to establish a discriminatory withdrawal of service, which demonstrates the state's tolerance or condonation of what is being done by others.[39]

The High Court held that omission to protect a citizen can constitute persecution by the state, where that omission is motivated by a Convention reason. Justice Kirby stated that, on its own, a failure of state protection is not capable of amounting to persecution. There must also be a threat or the actuality of serious harm. However, his Honour went on to say that if either the failure to protect or the actual harm itself is motivated by a Convention reason, that will be sufficient to bring the circumstances within the bounds of the Convention.[40] In Kirby J's view, the persecution in this case lay in the discriminatory inactivity of state authorities in not responding to the violence of non-state actors. Justices McHugh and Gummow endorsed a similar approach, their focus being the selective or discriminatory withdrawal of state protection:

> the persecution in question lies in the discriminatory inactivity of State authorities in not responding to the violence of non-State actors. Thus, the harm is related to, but not constituted by, the violence.[41]

These views accord in substance with the view expressed by Gleeson CJ, that the combination of two harms constitutes the persecution.[42] In his Honour's view, there is no reason why conduct amounting to persecution may not involve the combined effect of conduct by one or more actors, nor why it may not include inaction.[43]

Chief Justice Gleeson went on to note that whether failure to act amounts to conduct will often depend upon whether there is a duty to act; the existence of such a duty will, in turn, depend on the circumstances of the particular case.[44] His Honour also referred to the responsibility of a country of nationality as the primary

38 Above n2 at para 15.

39 Id at para 44.

40 Id at para 122 (Kirby J).

41 Id at para 87 (McHugh & Gummow JJ).

42 See also *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 497–498 (Lord Hope), cited by Gleeson CJ in above n2 at para 19.

43 Above n2 at para 27 (Gleeson CJ).

44 Id at para 28. However, Gleeson CJ did not elaborate upon this point as a matter of legal principle, or the circumstances in which it might be applied.

protector of fundamental rights and freedoms.[45] Thus, a relevant form of state conduct may be tolerance or condonation of the infliction of serious harm in circumstances where the state has a duty to provide protection.[46]

This approach is consistent with the position under international law, namely, that there is an obligation on states to investigate and prosecute human rights violations by non-state agents.[47] In particular, the United Nations Special Rapporteur on Violence Against Women has concluded that states 'have an obligation to take preventative and punitive steps where human rights violations by private actors occur'.[48] The state's failure to intervene could be said to constitute a violation of human rights at international law and, on the flight of the victim to another state, persecution pursuant to the Convention.[49]

In Callinan J's dissenting view, a state's omission to protect cannot amount to persecution. In his Honour's words:

> inactivity or inertia of itself does not constitute persecution. ... There needs to be, for persecution to have occurred, elements of deliberation and intention on the part of the State, which involve, at the very least, a decision not to intervene or act.[50]

Justice Callinan sought to distinguish the inaction of the police in Pakistan from the circumstances in *Chen Shi Hai* on the basis that *Chen* involved positive action on behalf of the Chinese authorities — that is, a deliberate abstention by the state from the provision of necessities which were routinely provided to others.[51] His Honour characterised the harm feared by the respondent as the physical

45 For discussion of this concept as it arises in international human rights law, see Robert McCorquodale & Rebecca La Forgia, 'Taking off the Blindfolds: Torture by Non-State Actors' (2001) 1 (2) *Human Rights LR* 189 at 200, 201, describing an international law duty on states to protect citizens. In the context of gender issues in refugee law, see Dinah L Shelton, 'Private Violence, Public Wrongs, and the Responsibility of States' (1990) 13 *Fordham International LJ* 1 at 21–26; R Cook, 'Accountability in International Law for Violations of Women's Rights by Non-State Actors' in Dorinda G Dallmeyer (ed), *Reconceiving Reality: Women and International Law* (1993); Deborah Anker, Lauren Gilbert & Nancy Kelly, 'Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection From Domestic Violence May Qualify as Refugees Under United States Asylum Law' (1997) 11 *Georgetown Immigration LJ* 709 at 730–737.

46 Above n2 at para 30 (Gleeson CJ).

47 McCorquodale & La Forgia, above n45 at 201; United Nations General Assembly, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Resolution 44/162 (15 December 1989), E.S.C. res 1989/65, annex, 1989 U.N. ESCOR Supp. (No 1) at 52, U.N. Coc. E/1989/89 (1989); Inter-American Convention on the Forced Disappearance of Persons 1994, 33 ILM 1529 (1994).

48 United Nations Economic and Social Council, *Report of the Special Rapporteur on Violence Against Women its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85*, Doc E/CN.4/1996/53 (1996) at para 31.

49 For discussion of recent developments regarding the role of non-state actors in international law of human rights, see generally McCorquodale & La Forgia, above n45.

50 Above n2 at para 155 (Callinan J).

51 Id at para 150.

violence exacted upon Mrs Khawar by her family. His Honour stated that 'that cause [the husband's private motivation], coupled with reluctance, rather than deliberate abstention, by the police, still could not amount to a Convention reason'.[52]

Thus, Callinan J agreed with Hill J in the court below that the word 'persecution' should not be applied to a failure by police to protect a victim of domestic violence. Justice Hill said that it would be incorrect to use the term 'persecution' in this way, at least where the law, if enforced, provides adequate protection and there is no government policy that police ignore calls for help. Indeed, Hill J noted there is a lack of enthusiasm by Australian authorities for protecting victims of domestic violence. Similarly, Callinan J commented on the fact that domestic violence occurs from time to time everywhere and that there will always be questions as to the efficacy and availability of local measures to prevent the abuse.[53] It seems both dissenting judges shared a 'floodgates' concern — that is, that if such a finding were open in principle, it would be difficult to know in what circumstances to accept that failure of police protection constituted persecution.[54]

(iv) What Degree of Failure of Protection is Required?

Given the majority's conclusion that an omission or failure to protect may constitute persecution, the next question becomes what degree of failure or omission is required in order to establish the existence of Convention persecution. Justice Kirby clarified the question by setting out the different types of scenarios where persecution could be alleged:[55]

1. where persecution is committed by the state;
2. where persecution is condoned by the state;
3. where persecution is tolerated by the state; and
4. where persecution is not condoned or tolerated by the state but nonetheless present because the state either refuses or is unable to offer adequate protection.[56]

The majority's analysis of Mrs Khawar's circumstances indicates that the requisite 'degree of failure' will depend on the facts in each case. Chief Justice Gleeson held that Mrs Khawar needed to show state tolerance or condonation of domestic violence and systematic discriminatory implementation of the law in order to demonstrate Convention persecution.[57] Similarly, in accordance with established principles, McHugh and Gummow JJ observed that there must be

52 Id at para 156 (Callinan J).

53 Id at para 154.

54 This issue is explored in more detail below.

55 This analysis drew on the four part distinction presented by the New Zealand Refugee Status Appeals Authority in *Refugee Status Appeals Authority Reference 71427/99*, above n6 at para 60.

56 The applicant claimed to fall within category 4, or perhaps even 3 or 2. Above n2 at paras 114–115 (Kirby J).

57 Above n2 at para 26 (Gleeson CJ).

selective and discriminatory treatment such as to amount to persecution.[58] Justice Kirby's analysis was that:

> It is sufficient that there is both a risk of serious harm to the applicant from human sources and a failure on the part of the state to afford protection that is adequate to uphold the basic human rights and dignity of the person concerned.[59]

As Gleeson CJ points out, *Khawar* was not a case in which it was necessary to deal with mere inability to provide protection; it was a case of alleged tolerance and condonation of violence.[60] Overall, it seems clear that the majority accepts that persecution within the meaning of the Convention may arise in circumstances where the harm is committed, condoned or tolerated by the state. There are several indications that it will be insufficient to establish persecution where the state refuses or is unable to offer adequate protection, in the absence of motivation. For instance, McHugh and Gummow JJ suggest that, if the reason for the systematic failure of enforcement of criminal law was shortage of resources, this would not be selective and discriminatory treatment such as to amount to persecution.[61] Victims of domestic violence would meet the Convention definition only by showing more than the harm of which they complain.[62] Chief Justice Gleeson stated that:

> it would not be sufficient for Ms Khawar to show maladministration, incompetence, or ineptitude, by the local police. That would not convert personally motivated domestic violence into persecution on one of the grounds set out in Art 1A(2). But if she could show state tolerance or condonation of domestic violence, and systematic discriminatory implementation of the law, then it would not be an answer to her case to say that such a state of affairs resulted from entrenched cultural attitudes.[63]

B. Convention Nexus Issue — 'For reasons of'

A nexus to the Convention is essential in order to establish that a state's omission or failure to protect its citizens from private harm constitutes persecution. Domestic violence alone, while a sufficiently serious harm, is not enough to constitute persecution.[64] Where persecution consists of two elements — criminal conduct and tolerance by the state or withholding of state protection — the

---

58 Id at para 84 (McHugh & Gummow JJ). See also *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*, above n23 at 388 (Mason CJ).

59 Above n2 at para 115 (Kirby J). This is consistent with Lindgren J's view in *Minister for Immigration and Multicultural Affairs v Khawar*, above n3 at 535, 536.

60 An apt example of this scenario, set out in *Islam; Ex parte Shah*, above n1, and referred to by both Gleeson CJ and Kirby J in *Khawar*, above n2, is the situation of a Jewish shopkeeper in Nazi Germany, set upon by non-state agents whose violent and discriminatory conduct occurs in the knowledge they can do so with impunity. See above n1 at 1035 (Lord Hoffman), cited by Gleeson CJ in above n2 at para 30. See also above n11 at 152.

61 Above n2 at para 84 (McHugh & Gummow JJ).

62 That is, a Convention nexus must be established. Above n2 at para 86 (McHugh & Gummow JJ).

63 Above n2 at para 26 (Gleeson CJ).

64 Id at para 86 (Kirby J).

requirement that persecution be for a Convention reason may be satisfied by the motivation of either the criminals or the state.[65] The Convention ground at issue in this case was that of particular social group.

(i) Particular Social Group

Interestingly, the Minister did not argue that 'women' or some subset of the group 'women' could not constitute a particular social group within the meaning of the Convention. Counsel acknowledged in oral submissions that women in Pakistan may be cognisable as a social group by reason of the state religion, and that there may be general discrimination against women. Moreover, it was conceded that the size of a particular social group should not of itself be a bar to an applicant who claims to fear persecution by reason of membership of the group.[66] However, the Minister went on to argue that the size of the group may make it more difficult to show that the persecution feared is for reasons of membership.

The majority dealt succinctly with this issue, holding that the RRT was not precluded from finding that there was a specific and identifiable social group in the circumstances of this case, and that Mrs Khawar may have been persecuted by reason of her membership of that group. The majority reiterated that the size of the claimed group is not a barrier to a successful claim.[67] Chief Justice Gleeson stated, 'It is power, not number, that creates the conditions in which persecution may occur'.[68] Nor did his Honour consider that the group 'women' was impermissibly defined by the persecution feared;[69] he noted that 'women would still constitute a social group if such violence were to disappear entirely.'[70] As his Honour pointed out, 'cohesiveness may assist to define a group; but it is not an essential attribute of a group.'[71]

Members of the Court in *obiter* referred to the breadth of categories of social group potentially available in this case — at the narrow end of the scale, 'married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household';[72] in the broadest characterisation, 'women'.[73] The Court was nevertheless careful to emphasise that factual questions such as these are for the RRT to determine on reconsideration of the matter.[74]

In dissent, Callinan J held that 'some measure of precision must exist as to the criteria' by which a social group is defined. His Honour doubted whether any 'characteristic, attribute, activity, belief, interest or goal' enabling a collection of

65 Id at para 31 (Gleeson CJ).

66 Id at para 127 (Kirby J).

67 Id at para 33 (Gleeson CJ), at para 82 (McHugh & Gummow JJ), and at para 127 (Kirby J).

68 Id at para 33 (Gleeson CJ).

69 *Applicant A and Another v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 263 (McHugh J).

70 Above n2 at para 35 (Gleeson CJ).

71 Id at para 33 (Gleeson CJ).

72 Id at para 81 (McHugh & Gummow JJ).

73 Id at para 35 (Gleeson CJ).

74 Id at para 81 (McHugh & Gummow JJ).

people to be identified as a social unit, independently of the persecution claimed, existed in this case: '[t]o regard half of the humankind of a country, classified by their sex, as a particular social group strikes me as a somewhat unlikely proposition.'[75] According to Hill J in the court below, with whom Callinan J agreed, '[a]ll women in Pakistan are not potentially subject to the violence which can constitute persecution. This has only to be stated to be accepted.'[76] Justice Callinan was of the view that:

> [T]he situation in which the first respondent found herself was a situation which arose from the personal characteristics of her relationship with her husband and his family, albeit that her vulnerability as a woman in an abusive relationship may have contributed to the reluctance of the police to assist her.[77]

This characterisation of the harm feared by Mrs Khawar as purely private harm echoes Lord Millett's comments in *Islam; ex parte Shah*, that 'it is difficult to imagine a society in which women are actually subjected to serious harm simply because they are women'.[78] Such an approach implies that gender-based harm, even if recognised as harm, will not be regarded as the type of harm which should be addressed by the international community alongside long-recognised forms of 'public' harm, such as imprisonment of individuals because of their political opinion, religion or race.[79] The majority's decision in *Khawar* takes an alternative path.

C. *The High Court's Orders*

The majority dismissed the Minister's appeal and reinstated Branson J's order that the matter be remitted to the Tribunal for it to make further findings of fact, in particular, on two questions: whether Mrs Khawar was unable to secure state protection from the harm feared and, if so, whether this inability was by reason of her membership of a particular social group.

As remarked by Kirby J:

> The Tribunal might still conclude that the respondent did not fall within the Convention definition. But it could scarcely do so lawfully without considering, and making essential findings of fact about, the case that the respondent had propounded to bring herself within the Convention definition.[80]

75 Id at para 153 (Callinan J).
76 *Minister for Immigration and Multicultural Affairs v Khawar* (2000), above n3 at 517 (Hill J).
77 Above n2 at para 152 (Callinan J).
78 Above n1 at 1042 (Lord Millett).
79 See above n11 at 153.
80 Above n2 at para 100 (Kirby J). See also id at paras 10–11 (Gleeson CJ).

5. *Implications of this Case*

The High Court's decision in *Khawar* is an important development in Australian refugee law for a number of reasons. First, it brings Australian case law on the meaning of the concept of 'persecution' within the Convention into line with case law in the United Kingdom and New Zealand as it relates to state responsibility for harm perpetrated by non-state actors. Secondly, it signals that Australian decision-makers and courts should be prepared to apply the terms of the Convention in a way that emphasises its broad humanitarian purpose. The High Court's confirmation that a country's failure to protect its nationals is capable of amounting to persecution has potential application in a number of different factual contexts. However, as outlined below, it would be misconceived to label *Khawar* a 'floodgates' case.

A. *International Consistency*

A number of recent cases in overseas jurisdictions have explored the application of the concepts of 'persecution' and 'Convention nexus' in the context of refugee claims by women fearing domestic violence in their countries of origin.

Most notable among these is the 1999 decision of the UK House of Lords in *Islam; ex parte Shah.* The central issues in that case were whether the appellants, women victims of domestic violence, could claim to be members of a particular social group, and whether the harm they feared amounted to persecution within the meaning of Article 1A(2) of the Convention.[81] Evidence brought, illustrated the poor social and economic status of women in Pakistan and the prevalence, indeed state tolerance, of domestic violence and abuse of women in that society. The majority of the Law Lords held that women in Pakistan could constitute a particular social group and that, while the violence feared from the applicants' husbands was personal, the failure of the state of Pakistan to assist them because they were women amounted to persecution for a Convention reason.

The key reasoning in *Islam; Ex Parte Shah* is best summarised by Lord Hoffman:

> [Firstly, domestic violence] is a personal affair, directed against [women] as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence that it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention. As the *Gender Guidelines for the Determination of Asylum Claims in the UK* (published by the Refugee Women's Legal Group in July 1998) succinctly puts it ... 'Persecution = Serious Harm + The Failure of State Protection.'[82]

---

81 For further discussion of this aspect of *Islam; Ex parte Shah*, see Colin Harvey, 'Mainstreaming Gender in the Refugee Protection Process' (1999) 149 *New LJ* 534; I Hager, 'The Current and Future Viability of a Social Group Argument in Gender-Based Asylum Claims' (1998) 12 (4) *Immigration and Nationality Law and Practice* 132 (concerning the cases at the Court of Appeal level); see also the case note by Penelope Mathew concerning 'Islam: Ex parte Shah' (2001) 95 *The Amercian Journal of International Law* 671.

82 Above n1 at 1034–1035 (Lord Hoffman).

This formulation has been adopted in New Zealand by the Refugee Status Appeals Authority,[83] and by Kirby J in the present case. Subsequent cases in the United Kingdom have clarified the circumstances in which a failure to protect may constitute persecution within the meaning of the Convention.[84]

Thus, the High Court's decision in *Khawar* forms part of a broader trend in common law countries to break down the conceptual barriers created by the public/private dichotomy between the role of the state and non-state actors in the context of refugee law.[85] This is achieved by acknowledging that responsibility for types of harm traditionally dismissed as 'private' may, in certain circumstances, be attributed to the state.[86]

B. Cultural Relativism in Applying the Convention

The difficulties inherent in making judgments about another state's cultural values are referred to at several instances in the decision.[87] Ultimately, however, the majority recognises that it would be unrealistic to expect Australian decision-makers to make refugee status decisions without any reference to their own values. While decision-makers are directed to start with an assumption that countries protect their nationals,[88] Gleeson CJ rejects the notion that another country's behaviour cannot be judged to be persecutory by Australian courts and tribunals,[89] an approach that reflects the Convention's broad humanitarian purpose.[90]

---

83 Above n6 at paras 67, 112.

84 See, in particular, *Horvath v Secretary of State for the Home Department*, Case No IATRF 99/0197/4 (Supreme Court of Judicature Court of Appeal (Civil Division), Stuart-Smith LJ, Hale LJ, Ward LJ, 2 December 1999). In the *Horvath* case, Slovakian Roma Milan Horvath and his family claimed to have been victims of racial violence. The Court dismissed the appeal, concluding that *Islam; Ex parte Shah* required either some degree of connivance or collusion by the state, or proof that the state was unable to provide protection before victims of violence at the hands of a non-state actor could be granted refugee status. Clearly no state can guarantee the complete safety of its citizens, so state protection will be deemed adequate where an existing criminal justice system affords a degree of protection proportionate to the threat. Asylum cannot be claimed on the basis that the system failed to protect an individual applicant from harm. The House of Lords dismissed Horvath's subsequent appeal, stating that if it can be shown that the state tried to provide protection, a claim for asylum is unlikely to be successful. See *Horvath v Secretary of State for the Home Department* [2000] UKHL 37 (6 July 2000); Alan Travis, 'Lords dismiss Roma Asylum test case' *The Guardian* (7 July 2000). *Horvath* was distinguished in the Full Federal Court decision of *Minister for Immigration and Multicultural Affairs v Khawar*, above n3 at 538 (Lindgren J).

85 In the United States of America the Board of Immigration Appeals has dealt with similar issues in relation to non-state actors in the context of female genital mutilation threatened by family members. See *In re Fauziya Kasinga* (Board of Immigration Appeals, Interim Decision 3278, 13 June 1996).

86 Above n11 at 154.

87 Mr Basten for the Khawars acknowledged that when we say there is persecution if 70% of women in custody are raped, whether it is culturally acceptable in that country or not, we are in a sense imposing upon that society an external view of what is and what is not acceptable: transcript of the hearing before the High Court, 13 November 2001 at 46. See also above n2 at para 155 (Callinan J).

88 Above n2 at para 115 (Kirby J) citing *Canada (Attorney General) v Ward*, above n27 at 724–726.

89 Above n2 at para 26 (Gleeson CJ).

C. Potential Application of the High Court's Decision

Over time, the majority's decision in *Khawar* has the potential to encourage a more consistent approach to matters involving gender-based harm. In particular, the statement that discriminatory withdrawal of protection may constitute persecution may better enable decision-makers to recognise and address issues that arise when female applicants seek asylum from situations where oppression of, and violence against, women is commonplace and condoned by the state.[91]

More immediately, there is potential for the principles in *Khawar* to be applied in other fact scenarios commonly before the RRT. For example, there have been a number of applications for refugee status involving the violent treatment of Romany gypsies or ethnic Russians in Eastern European countries by non-state neo-Nazi or nationalist groups. On the basis of the reasoning in *Khawar*, these applicants may argue that the state was motivated to withhold protection from such violence for a Convention reason.[92] The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) have noted that, if the Court's logic is followed, even state failure to protect a person for a Convention reason against a natural disaster could amount to persecution, provided the group to which the person belongs exists independently of the claimed persecution.[93]

D. Floodgates

However, it would be misconceived to label *Khawar* a 'floodgates' case. As in all refugee status determinations, once applicants are within the system they face a high evidentiary burden in seeking to satisfy the decision-maker that all relevant components of the Convention definition are met.

As pointed out by Lord Steyn in *Islam; ex parte Shah*, '[g]eneralisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case',[94] a view reiterated by each of the majority judgments in *Khawar*.[95] As noted by Gummow and McHugh JJ, Mrs Khawar may yet fail to make good her claim of police inaction motivated by systematic discrimination against women.[96] In Gleeson CJ's words:

---

90 Id at paras 110–111 (Kirby J), referring to *Islam; Ex parte Shah*, above n1 at 1028 (Lord Steyn), 1031 (Lord Hoffmann).

91 Above n11 at 163.

92 Similarly, Christian Indonesian applicants before the RRT claiming to fear violence by Muslim extremists in Ambon could put equivalent arguments, as could Colombian homosexuals fearing harm from private individuals with no expectation of protection from the state, or HIV positive patients fearing the discriminatory denial of medical care by physicians with no redress.

93 DIMIA described the implications of the Full Federal Court's decision, ultimately affirmed by the High Court, as 'potentially substantial'. See DIMIA, *Australian Contribution to UNHCR Expert Roundtable Series*: <http://www.immi.gov.au/refugee/publications/unhcr/psg4.htm> (18 July 2002) at n82.

94 Above n1 at 1018 (Lord Steyn), cited in above n2 at para 11 (Gleeson CJ).

95 Above n2 at para 26 (Gleeson CJ), paras 88–89 (McHugh & Gummow JJ), para 100 (Kirby J).

96 Id at para 80 (McHugh & Gummow JJ), para 25 (Gleeson CJ).

> An Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behaviour of private individuals; but if, after due care, such a conclusion is reached, then there is no reason for hesitating to give effect to it.[97]

Indeed, without suitable evidence, 'decision-makers are entitled to assume (unless the contrary is proved) that the state is capable within its jurisdiction of protecting an applicant.'[98]

In each case applicants will be required to bring evidence sufficient to establish that a state had the relevant motivation to satisfy the element of Convention nexus. This evidentiary burden would not be expected to be made out in many cases, particularly in matters where applicants do not have English language skills, legal representation or access to research resources.

While this situation may ease with increased availability of reliable documentation,[99] there are several further elements of the Convention definition that must be satisfied if an applicant is to succeed. For instance, as the reasoning of the majority in *Khawar* demonstrates, there are numerous possible permutations of the particular social group 'women'. Applicants claiming to fear harm by reason of their membership of a broadly defined group may face difficulty satisfying the decision-maker that the harm they fear is motivated by their membership of that group. On the other hand, applicants who describe the relevant group more narrowly risk a finding that the group is impermissibly defined by the harm feared.[100] In addition, applicants must establish that the harm they fear is well-founded, that they cannot relocate within their country of nationality to avoid the harm feared, and that there is no safe third country of asylum.[101]

Clearly, the High Court's decision in *Khawar* does not mean that women in any country are automatically able to access refugee status where they are victims of domestic violence.[102] While violence against women may exist in most if not all cultures, its prevalence is not uniformly spread across all cultures, and certainly does not always receive the tacit acceptance of the state. As noted by Kirby J, it is not an impossibility to distinguish between those countries who, however imperfectly, attempt to provide agencies and generally applicable laws to protect women victims of domestic violence, from those countries who for cultural, religious, political or other reasons, consciously withdraw protection from

97 Id at para 26 (Gleeson CJ).

98 Id at para 115 (Kirby J) citing *Canada (Attorney General) v Ward*, above n27 at 724–726.

99 Ninette Kelley, 'The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress' (2001) 13(4) *International Journal of Refugee Law* 559 at 567–568.

100 Above n69 at 263 (McHugh J).

101 These would relieve Australia of its protection obligations under the Convention: see *Migration Act* 1958 (Cth) s36(3)-(5).

102 See, for example, Janet Albrechtsen, 'Emotionalism Triumphs over the Law' *The Australian* (12 June 2002) at 11.

vulnerable groups in society.[103] As counsel for the respondents in the High Court pointed out, a decision in their favour:

> does not mean that all women in Pakistan are subject to persecution because the withdrawal of protection does not bite except in relation to women who themselves have a well-founded fear that they will be abused.[104]

A floodgates claim is further refuted by the obvious social, physical and financial barriers impacting upon a woman's ability to seek asylum in another country. As many commentators have pointed out, while the majority of the world's refugees are women and children, their poverty and lack of mobility mean a disproportionately small number have the possibility of leaving their home countries and finding asylum elsewhere.[105]

6. *Conclusions*

The *Khawar* litigation has clarified the meaning of the term 'persecution' within Article 1A(2) of the Convention. Most significantly, the High Court has confirmed that persecution can include a state's omission or failure to protect its citizens against harm perpetrated by non-state agents, where that failure is motivated by a Convention reason. In addition, it remains open to decision-makers to find that 'women' or some subset of the group 'women' constitutes a particular social group within the meaning of the Convention — the potential size of the group will not preclude this finding. Thus, the High Court has brought Australian law into line with jurisprudence in the United Kingdom and New Zealand, and international human rights law more generally. This is not to say that *Khawar* represents a dramatic shift in Australian refugee law. Rather, this case represents a logical development in the law which stems from a contextualised approach to the interpretation of the Convention.[106]

---

103 Above n2 at para 130 (Kirby J).

104 Transcript of the hearing before the High Court, 13 November 2001 at 52.

105 Anker, Gilbert & Kelly, above n45 at 716.

106 For instance, the majority's reasoning builds upon decisions such as *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*, above n23 which defined persecution broadly and able to encompass a wide range of circumstances, and *Chen*, above n24 which confirmed that discriminatory denial of fundamental rights and freedoms could amount to persecution. The majority built on the law relating to motivation drawn from *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 and *Chen*, neither enmity, malignity nor antipathy are essential elements of motivation of the persecutor, and that the persecutory conduct must be motivated by the persecutor's perception of a trait or characteristic belonging to a group and its members. In addition, this development is consistent with para 65 of the 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) which states that: 'Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection'.

The principles set out in *Khawar* have the potential to assist decision-makers who are confronted with complex claims of gender-based persecution. More generally, the recognition that states can be held responsible for private harm should better enable decision-makers to negotiate the difficult factual matrices which arise when issues cut across both public and private spheres of human activity. As such, the reasoning in *Khawar* has potential application in a range of factual scenarios.

Khawar is not, however, a floodgates case. Women face numerous evidentiary, legal and socio-economic barriers in seeking refuge from gender-based harm, and it remains to be seen what kinds of fact situations will satisfy the legal tests laid down by the High Court in *Khawar*. Needless to say, the way in which decision-makers apply these principles in future cases will be watched with interest by those concerned with developments in this area of law.