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# Violence, women and the state in Papua New Guinea: A case note

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## Introduction

This paper examines the case of a Papua New Guinean refugee to Australia. Her case, heard in early 2004, embodies a number of key themes in contemporary Pacific studies, namely, violence against women and the gendered nature of the state. In examining her case, I aim to provide preliminary insights into a little-explored dimension of these themes within the context of Papua New Guinea (PNG). I offer these preliminary thoughts not from a legal perspective, but rather from the perspective of an anthropologist whose views on law and order in PNG have been sought for the purposes of expert testimony. It is hoped that the presentation of this case will draw attention to the ongoing problem of gender violence in PNG.

## Background

Despite PNG's constitutional commitment to equal human rights, women in PNG enjoy neither freedom of movement nor equal protection by the law. Security of the person is denied to women, 70 per cent of whom experience domestic violence (PNG LRC 1992, Bradley and Kesno 2001) and many of whom fear basic tasks such as shopping, due to the prevalence of rape and physical assault. Gender equality is enshrined in the constitution and PNG is signatory to the Convention on the Elimination of All Forms of Violence against Women (CEDAW). However, law enforcement agencies are dominated by men (McLeod 2003), many of whom possess culturally entrenched assumptions about male superiority and women's ensuing status. Consequently, women are disadvantaged at all levels of the legal system. Police persistently fail to act upon complaints of domestic and sexual violence (Bradley and Kesno 2001). Village courts demonstrate 'excess traditionalism' when dealing with cases of violence against women (Paliwala 1982; Garap 2000) and the feminine face of poverty renders the national court system financially inaccessible to female complainants.

While individual Papua New Guinean women exercise agency in a variety of ways, women in PNG frequently characterise themselves as 'second rate citizens'. The implications of this status are many and well documented, including ongoing subjugation to violence (physical, psychological and structural) (Bradley and Kesno 2001), under representation in decision-making positions (McLeod 2002), lack of equality before the law, and, ultimately, lack of integral human development. In recent times, this inequality has resulted in a relatively unexplored phenomenon, namely, Papua New Guinean women seeking asylum in Australia, to which we shall now turn.

## Australian refugee law

To obtain refugee status in Australia, applicants must apply for a protection visa through the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). In the event that a protection visa is not granted, applicants have right of appeal to the Refugee Review Tribunal (RRT) and to the higher courts.



Australia has protection obligations under the 1951 Convention relating to the Status of Refugees and the amending Protocol relating to the Status of Refugees (1967), to a 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 residence as a result of such events, is unable or, owing to such fear, unwilling to return to it (UN 1951:Article 1(2)).

While gender-related claims are not explicitly provided for in the convention, the United Nations High Commissioner for Refugees (UNHCR) has recently called for gender-sensitive interpretation of the Convention (Hunter 2002:3), resulting in the development of guidelines by the UNHCR and individual states for the assessment of gender-related refugee claims (Hunter 2002:7; see DIMA 1996). In Australia, as in other jurisdictions, assessments of claims in which gender is the sole basis of persecution have focused primarily upon two issues. Firstly, the precise meaning of the term 'persecution', and, secondly, whether or not 'women' or certain groups of women constitute a 'particular social group' for the purposes of the convention.

In April 2002, on appeal from the Refugee Review Tribunal, the High Court of Australia, in *MIMA v Khawar* ([2002] HCA 14), ruled that the failure of the applicant's state to protect her from domestic violence rendered her a refugee, as defined by the convention. Ms Khawar, a citizen of Pakistan, alleged that both her husband and his family had repeatedly perpetrated violence against her. Moreover, she claimed that on four occasions, the police failed to enforce the law or offer her protection. This, she argued, constituted state toleration and sanctioning of violence against women, a single aspect of the state's systematic discrimination against women in Pakistan.

Gender-based claims are complicated by the clause that persecution must be 'for reasons of race, religion, nationality, membership of a particular social group or political opinion' because it can be readily held that a husband's violence against his wife is for personal rather than convention reasons. However, in *MIMA v Khawar*, the High Court concluded that:

Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state (Gleeson CJ, para 31).

Simply put, the High Court accepted the formula presented in the English case of *Shah* ([1999] 2 AC 629), that 'Persecution = Serious Harm + The Failure of State Protection' (Kirby J, para 118).

In the case of *Khawar*, it was held that the state's failure to protect Ms Khawar was a result of her membership of a particular social group, namely 'women in Pakistan'. While many commentators contest the characterisation of 'women' as a social group on the basis that the sheer number of persons involved in such a group precludes cohesiveness, in *MIMA v Khawar* the High Court concluded that, 'women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments' (Gleeson CJ, para 35).

### **Papua New Guinean refugees to Australia**

Given the classified nature of DIMIA records and the limitations of available statistics, researching the prevalence and causes of refugee movement from PNG to Australia is difficult. Since 1993, 23 Papua New Guineans have appealed to the Refugee Review Tribunal against DIMIA decisions denying them protection visas. Of these appeals, only one was raised by a person in detention (RRT c2004), with all others being made by Papua New Guineans who had entered the Australian community via legitimate immigration processes. As the Refugee Review Tribunal publishes only 20 per cent of its decisions, it is not possible to obtain detailed information about non-published cases (including the gender of appellants), with only six cases since 1994 being publicly accessible. Of those six cases, four were women, one whose case details were not fully published in order to preserve her anonymity.

The claims of four of the five applicants whose hearings are published may be briefly described as follows (the fifth applicant's case will be described at length). Two of the applicants were Bougainvillean women (RRT 1994; RRT 1995), both of whom feared persecution in Bougainville and mainland PNG on the basis of their known support of the Bougainville Revolutionary Army (BRA). Both were granted protection visas on the grounds of membership of a particular social group (BRA supporters), with gender being a relevant factor in only one case. Specifically, it was determined that given the prevalence of violence against women in PNG, a single Bougainvillean woman would be unable to relocate to other areas of PNG on the basis that she had no 'male protector'.

Of the five fully detailed RRT cases, two involved male appellants. In September 1997 a man who had been raised in PNG sought refuge on the basis that he had received several death threats to which the police had failed to respond on the

basis of his foreign ethnicity. The RRT found no evidence to suggest that law enforcement agents treat foreigners differently and it was concluded that the threats were of a personal nature. Consequently, refugee status was not granted (RRT 1997). Two years later, in December 1999, a mixed-race male sought refuge on the basis that he and his mother had been bashed in Port Moresby because of their ethnicity. The RRT found that the bashing had been a criminal act rather than a racially motivated attack and concurred with the decision of DIMIA that the applicant was ineligible for a protection visa (RRT 1999).

The aforementioned cases were relatively uncomplicated. In the case of the Bougainvillean women, significant research was available to demonstrate the existence of persecution of various sectors of the Bougainville community, hence their eligibility for protection visas. Contrarily, in the cases of both male applicants, it was evident that the violence that they had suffered was for reasons of a personal or criminal nature, rather than for a convention reason, hence their ineligibility for protection visas. However, the 2004 case of a Papua New Guinean rape victim who was denied adequate protection by the state is rendered complicated by the fact that gender is the sole basis of her claim to persecution (RRT 2004). Her case is presented as follows.

The applicant, a single Papuan woman, lived in Port Moresby, where she had witnessed several incidents of violence since the late 1990s. On one occasion men with knives threatened her at the market, while, in an unrelated incident, men with knives teased her while travelling on a bus. Some months later, the applicant was travelling on a bus that was ambushed by men armed with knives and was subsequently raped by a number of men (alongside other female passengers). The applicant and the other women attended the Port Moresby hospital, however, while the other victims reported the rape to the police, the applicant did not do so and was never contacted by the police. The applicant was impregnated during the rape and visited a relative in Australia in order to receive appropriate care and support. The applicant's mother and close female relatives were deceased and she received no support from her father and brothers, hence she did not tell them of her ordeal. The applicant claimed inability to return to PNG due to the lack of effective protection against crime towards women.

In reviewing the applicant's case, as in *MIMA v Khawar*, the tribunal focused primarily upon the notion of 'women' as a social group and considered whether or not state failure to protect the members of such a group constituted persecution. The tribunal found that:

'women in PNG' are cognisable as a group in society and that its members share something that unites them and sets them apart from society at large, namely their inferior, second class status and the severe restriction of their freedom of movement.

The Tribunal finds that 'women in PNG' are cognisable by both custom and practice. The Tribunal accepts that the applicant is a member of a particular social group 'women in PNG' and that she was gang raped and persecuted for the essential and significant reason of her membership of this particular social group (RRT 2004).

Furthermore, it was concluded that women are 'also vulnerable because their persecutors know that effective state protection is denied to them' (RRT 2004). On the basis of country reports and expert testimony, the tribunal accepted that the state's tolerance of violence against the social group 'women in PNG' constituted persecution for convention purposes.

## Conclusion

The High Court decision in *MIMA v Khawar* established a benchmark for women from countries in which women's inequality is demonstrated via state toleration of violence against them. Moreover, in 2004, the aforementioned case established a precedent for the female victims of violence in PNG seeking refugee status in Australia. While not publicly recorded, migration agents attest that other Papua New Guinean women have sought refugee status in Australia on the basis of claims that similarly establish a nexus between being 'women in PNG' and state neglect, amounting to persecution.

The case in question, being the first of its kind, poses questions rather than answers. It is necessary to consider the ways in which this precedent will impact upon other Papua New Guinean women in similar situations. Given the broad parameters of the social group 'women in PNG', the recorded prevalence of violence against them and the documented failure of the police to address female victims' concerns adequately, the 2004 case provides precedent for many Papua New Guinean women to seek refuge in Australia. However, as the opportunity to seek refuge in Australia may depend upon the applicant's economic capacity to travel to Australia, such an outcome is highly unlikely. Australian protection visas may, however, become an option for wealthier Papua New Guinean women who have faced ongoing violence and who can show that the state has failed to protect them.

Ultimately, the case in question primarily demonstrates the severe state of contemporary gender relations in PNG. While one cannot ignore the multiple attempts of women to employ agency, many PNG women see themselves as second-class citizens. The state sees women as second-class citizens and the Australian Refugee Review Tribunal sees Papua New Guinean women as the victims of state persecution.

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