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Persecution Based on Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany

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ARTICLES

PERSECUTION DUE TO MEMBERSHIP IN A PARTICULAR SOCIAL GROUP: JURISPRUDENCE IN THE FEDERAL REPUBLIC OF GERMANY

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INTRODUCTION

The 1951 Geneva Convention Relating to the Status of Refugees¹ con-

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1. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Refugees Convention]. The scope of protection of the Geneva Convention was considerably broadened by the Protocol of 1967 Relating to the Status of Refugees, *opened for signature* January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791 [hereinafter Protocol].

Article 1 of the 1951 Refugee Convention expressly refers only to refugees resulting from events that occurred prior to January 1, 1951. The Protocol was drafted to protect persons who became refugees as a result of events occurring after January 1, 1951. Protocol, Jan. 31,

tains the most widely accepted legal definition of refugee status.² The Convention definition includes individuals who face a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, and political opinion.³ Persecution based on membership in a particular social group is perhaps the most obscure concept in the refugee definition. Scholars, practitioners, and jurists have been puzzled by its meaning. The commentary on this term is sparse. There are relatively few judicial opinions dealing with social group based persecution; only a minuscule number of the opinions attempt to analyze the meaning of particular social group in this context. Consequently, this portion of the Convention refugee definition is underutilized.

This examination of the legal developments in Europe concerning persecution based on membership in a social group clarifies this category for the use of practitioners in the future. The research uncovered a body of judicial decisions in the Federal Republic of Germany that are of interest to scholars and refugee advocates in the United States and elsewhere. Many of these cases present compelling factual bases and novel legal claims. Beyond that, the opinions are illuminating because they reveal the issues that interest the judges and the facts that engage their sympathy. In addition, the attempts by several courts to articulate a definition

1967, art. 1. See G.A. Res. 2198, 21 U.N. GAOR Supp. (No. 16) at 48, U.N. Doc. A/6316 (1966). The Protocol changes the 1951 time deadline in Article 1 and incorporates Articles 2 through 34 of the 1951 Refugees Convention.

2. Four nations, Madagascar, Monaco, Mozambique, and Samoa, have signed the 1951 Refugees Convention only. Four nations, Cape Verde, Swaziland, the United States, and Venezuela, have signed the 1967 Protocol only. Ninety-seven other nations have signed both the Protocol and the 1951 Refugees Convention. UNHCR Manual, Annex I (rev. January 4, 1989).

3. Article 1(A)(2) of the 1951 Refugees Convention states:

The term "refugee" shall apply to any person who [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Organization of African Unity (OAU) Convention Governing The Specific Aspects of Refugee Problems in Africa, in contrast, has set forth a broader definition of the term "refugee." *Opened for signature* Sept. 10, 1969. Thus, in addition to the Geneva Convention definition, Art. I (2) of the OAU Convention states that:

The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The OAU's definition, however, has met with limited acceptance. Though drafted to alleviate the refugee problem on the African continent and signed by 25 African countries (as of Dec. 31, 1982), no action has been taken elsewhere to adopt this definition. G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 305 (1983).

of a particular social group for purposes of the refugee definition suggest some new ways of approaching this legal issue.

I. REFUGEE LAW RESEARCH IN EUROPE: FOCUS ON THE FEDERAL REPUBLIC OF GERMANY

A. *Western European Refugee Law*

In Western European countries, the social group concept of persecution is even less developed than it is in the United States.⁴ For example, in the Netherlands there are only three decisions that explicitly mention a claim of persecution based on membership in a particular social group.⁵ In Denmark, refugee advocates consider cases granting asylum to stateless Kurdish asylum-seekers to fall within the social group provision of the refugee definition, but the Refugee Board has neither identified the Kurds as a particular social group nor attempted to define persecution based on social group.⁶ In Belgium there are no published decisions examining claims of persecution based on race, religion, nationality, or political opinion, much less social group.⁷ The situation is similar in

4. In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees, *supra* note 1, and thereby agreed to recognize as refugees those individuals with a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. 19 U.S.T. 6223, T.I.A.S. No. 6577. This refugee definition was added by amendment to the Immigration and Naturalization Act of 1952. 8 U.S.C. § 1101(a)(42), *as amended by* The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

There have been a few, but not many, judicial decisions interpreting the particular social group aspect of the refugee definition. *See, e.g.,* Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987); Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); Ananch-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985); Lopez-Chavez v. INS, 723 F.2d 1431 (9th Cir. 1984); *see also In re Acosta*, Int. Dec. 2986 (BIA 1985).

5. In the Netherlands, the Council of State, the highest court in which cases concerning refugee status can be brought, indicated that in certain societies homosexuals could be viewed as a particular social group for purposes of the Geneva Convention refugee definition. Judgment of Aug. 13, 1981, Afdeling Rechtspraak van de Raad van State [RvSt.] [Judicial Division of State] (Supreme Administrative Court), Neth. In a case concerning a Rumanian man married to a Polish woman, the Council of State mentioned that the group of citizens married to foreigners might constitute a particular social group. Judgment of Feb. 2, 1984, RvSt. In addition to these two decisions, the president of the district court of Haarlem ruled that in certain instances women may constitute a particular social group. The court concluded that the asylum-seeker in the instant case, a woman from Iran whose insufficiently traditional demeanor had led to her expulsion from the university and to intimidating visits from members of the revolutionary guard to her home, had failed to submit sufficient evidence to warrant a grant of asylum. Judgment of Nov. 19, 1985, RvSt., President Rechtbank [Pres. Rb.] Haarlem (court of first instance).

6. Letter from Gunnar Homann, Attorney (Aug. 18, 1988) (absence of Refugee Board identification indicates lack of definition) (copy on file at author's office).

7. Until 1988 the Representative to Belgium from the Office of the United Nations High Commissioner for Refugees (UNHCR) decided the claims to refugee status filed by asylum-seekers in Belgium. *Arrêté ministériel du 22 février 1954 relatif à la compétence du délégué en Belgique du Haut Commissaire des Nations-Unies pour les réfugiés pour déterminer la qualité de réfugié* [Ministerial Decree of Feb. 22, 1954 Relating to the Competence to Determine Refugee Status of the Representative in Belgium of the United Nations High Commissioner for Refugees], 1954 *Moniteur Belge* 3124. Under the prior law, *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* [Law of Dec. 15, 1980 on Access to the Territory, Sojourn, Establishment, and Removal of Aliens], 1980

many other European countries.⁸

In large part the lack of developed case law is due to the government systems established to review applications for asylum. An administrative process with little or no judicial review is the norm. In Denmark, for example, judicial review of a decision denying refugee status is completely unavailable.⁹ The same is true in Sweden,¹⁰ and was the case in Belgium.¹¹ In England, judicial review of asylum claims occurs only in the exceptional situation.¹² In the Netherlands the asylum process is

Moniteur Belge 14,584, there was no requirement that the UNHCR decisions on refugee status provide reasons for their conclusions and the decisions were not subject to judicial review. European Consultation on Refugees and Exiles, *Asylum in Europe*, 69, ¶ 18, 1983. In 1987 new legislation, *Loi du 14 juillet 1987 apportant des modifications, en ce qui concerne notamment les réfugiés, à la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* [Law of July 14, 1987 Modifying, with Particular Regard to Refugees, the Law of Dec. 15, 1980 Concerning Access to the Territory, Sojourn, Establishment and Removal of Aliens], 1987 *Moniteur Belge*, 11,111, totally revamped the process (originally reported as the Law of July 15, 1987, the date of the legislation was subsequently corrected to Law of July 14, 1987). The newly created Office for Refugees and Stateless Persons must explain the reasons it fails to recognize refugee status. *Id.* art. 57/6. Administrative and judicial review is now available. *Id.* art. 57/11-57/23. The refugee determination procedures outlined by the 1987 legislation did not go into effect until 1988. *Id.* art. 25 (consequently, the new system has not yet had time to result in opinions analyzing membership in a particular social group). See Fullerton, *Restricting the Flow of Asylum-Seekers*, 29 VA. J. INTL. L. 33, 39-54 (1988).

8. For example, in France the Office for the Protection of Refugees and Stateless Persons, [*Office français de protection des réfugiés et apatrides (OFPRA)*] has interpreted membership in a particular social group to refer to membership in a racial or ethnic group. Accordingly, the social group category does not stand on its own as an independent basis for refugee status; rather, persecution based on race or nationality subsumes persecution based on social group. F. Julien-Laferriere, Country Report on France, European Lawyers Workshop on the Implementation of Article 1A of the Geneva Convention, 11, 13 (July 1985). In Sweden decisions on refugee status are made by the Immigration Board [*Statens Invandrarverk*], an administrative agency. The Board's proceedings are secret and it provides no reasons for its decisions. P. Nobel, Country Report on Sweden, European Lawyers Workshop on the Implementation of Article 1A of the Geneva Convention, 30-31 (July 1985). As a result, the refugee law jurisprudence concerning the bases for persecution is undeveloped.

9. *Udlaendingeloven* [The Aliens Act], Act No. 226 (as amended by Act No. 232, June 6, 1985; Act No. 574, Dec. 19, 1985; and Act No. 686, Oct. 17, 1986). Section 46(2) provides that decisions of the Directorate for Aliens may generally be appealed to the Minister of Justice. Section 48(2) of the Act further specifies that decisions concerning denial of entry to asylum-seekers shall be appealed to the Minister of Justice from the Directorate for Aliens to another administrative body known as the Refugee Board. Appeals pertaining to residence permits and travel documents for refugees, not denial of entry, may be brought. *Id.* § 53a(1). See M. KJAERUM, AN ASYLUM SEEKER'S WAY THROUGH THE SYSTEM 10-14 (H. Fischer trans. 1988). See generally Fullerton, *supra* note 7, at 59-63.

10. Nobel, *supra* note 8, at 30-31; *Asylum in Europe*, *supra* note 7, at 316, ¶¶ 35-38.

11. *Supra* note 7.

12. Individuals who arrive in the United Kingdom without visas and other travel documents are generally refused entry. *Asylum in Europe*, *supra* note 7, at 366-367, ¶¶ 14, 19. Asylum-seekers lacking proper travel documents who claim refugee status generally are interviewed by an immigration officer. *Id.* at 368, ¶ 27. The transcript of the interview is sent to the Refugee Unit of the Immigration and Nationality Department of the Home Office. *Id.* Decisions by the Refugee Unit denying refugee status are subject to administrative review by the Immigration Appeals Adjudicator. *Id.* at 368, ¶ 26. Only those who are properly documented and legally present in the United Kingdom can appeal before being removed from the United Kingdom. *Id.* at ¶ 25. All others, which include the vast majority of asylum-seekers, must leave the United Kingdom before an appeal will be heard. *Id.* In narrow circumstances, decisions by the Immigration Appeals Adjudicator can be appealed to the Immigration Ap-

handled by the Ministry of Justice;¹³ one judicial challenge to the final decision of the Minister of Justice may be filed in the highest court, the Council of State.¹⁴

B. *Refugee Law in the Federal Republic of Germany*

The most elaborate jurisprudence concerning refugees in Europe is in the Federal Republic of Germany. In the Federal Republic there is an elaborate system of judicial review of refugee decisions.¹⁵ Not surprisingly, there are more German opinions examining claims of persecution based on social group than there are combined French, Dutch, Belgian, and English cases. As in the United States,¹⁶ the German judicial opinions reviewing social group claims to refugee status seem to be a phenomenon of the 1980's. From 1982 to 1985 thirteen German courts issued decisions involving persecution based on membership in a particular social group. In addition, in 1985 the central administrative agency reviewing refugee claims issued an opinion involving a social group claim.

peals Tribunal, another administrative body. *Id.* at ¶ 26. *See generally* Avery, *Refugee Status Decision-Making: The Systems of Ten Countries*, 19 STANFORD J. INT'L. L. 319-325. Theoretically, judicial review of Immigration Appeals Tribunal decisions is available, but in practice this rarely occurs. Very few refugee cases ever reach the Immigration Appeals Tribunal; any that do can only seek judicial review on points of law. *Id.* at 324-325.

13. Officials of the Ministry of Justice generally hold the initial interview with an asylum-seeker. Interview with Lex Takkenberg, Chief Legal Advisor, Dutch Refugee Council [*VluchtelingenWerk*], Amsterdam (June 22, 1987). The asylum seeker's interview reports are summarized and sent to the Ministry of Justice, *Asylum in Europe*, *supra* note 7, at 251 ¶ 18. If the Ministry determines that there may be legitimate grounds for an asylum request, the asylum-seeker is allowed to enter the country. *Id.* at ¶ 19. An asylum-seeker can ask the Minister of Justice to reconsider a negative decision. *Id.* at ¶ 32. Before issuing a reconsidered decision, the Minister of Justice requests the advice of the Advisory Commission for Aliens Affairs [*Adviescommissie voor Vreemdelingenzaken*]. *Id.* at ¶ 35. If the Minister of Justice again issues a negative decision, the asylum-seeker can appeal to the Council of State Judicial Department [*Raad van State Afdeling Rechtspraak*], the highest court to hear challenges to action taken by government officials. *Id.* at ¶ 36. *See generally* *Asylum in Europe*, *supra* note 7, at 74-82, 250-254, ¶¶ 14-37.

14. *Asylum in Europe*, *supra* note 7, at 254, ¶ 36. Asylum-seekers denied entry to the Netherlands can also on occasion invoke the *kort geding*, a special summary judicial proceeding governed by informal action. *Asylum in Europe*, *supra* note 7, at 251, ¶¶ 20, 34 and 253. The Aliens Act contains no provision for judicial review of a decision to refuse entry at the border. The courts, however, have ruled that judicial review is available to consider whether the state's action refusing entry constitutes a tort. In so holding, the courts have applied the general principles of Dutch administrative law, which, in the absence of legislative provisions authorizing administrative or judicial review, allow parties to challenge government action by filing tort actions in the civil courts. Letter from Lex Takkenberg, Chief Legal Advisor, Dutch Refugee Council, Amsterdam (Sept. 28, 1988). More than 90% of the cases submitted to the courts via the *kort geding* procedure result in negative decisions for the asylum-seekers. Interview with Virginia Korte Van Hemel, Secretary of State for Justice, The Netherlands, *reported in Refugees*, Oct. 1988, at 43. Asylum-seekers can appeal negative decisions, but filing an appeal does not stay the decision. *Asylum in Europe*, *supra* note 7, at 253, ¶ 34. *See generally* Fullerton, *supra* note 7, at 76-77, 81-82. Thus, asylum-seekers who avail themselves of the *kort geding* procedure manage to delay their departure from the Netherlands for a few days, but then generally are forced to leave.

15. *See infra* text accompanying notes 52-73.

16. In the United States all the social group decisions have been rendered since the enactment of the Refugee Act of 1980. *See supra* note 4.

This German case law is a valuable potential resource, but unfortunately these social group decisions have been inaccessible to most American lawyers. Two barriers stand in the way. The first problem is identifying the pertinent case law. Locating decisions concerning refugee status is no easy task. There is no centralized reporting system of lower court opinions in the Federal Republic.¹⁷ However, armed with the date and case number, one can obtain a copy of the opinion from the court that issued it. Unfortunately, identifying the date and case number can be tricky. There are several sources of helpful information, including periodicals that examine refugee issues,¹⁸ and certain courts have a particularly good library of information on refugees.¹⁹ Moreover, the Central Refugee Documentation Center²⁰ in Bonn makes a major effort to collect and publicize all opinions dealing with refugees. To an American lawyer accustomed to all the federal, regional, and specialty reporters, the legal research situation in the Federal Republic is unsettling. The overlapping reporting systems share a common weakness: they rely on the interested lawyer or judge to notify them of a decision. Because no group monitors all the decisions issued by each court, a researcher in this area lacks the sense of completeness that comes with combing all the published opinions on a particular topic in the United States. Nonetheless, by thoroughly reviewing the known sources, it is possible to develop a fairly comprehensive picture of the developing refugee law in West Germany.

The second impediment is language. The decisions are available only

17. The collected decisions of the highest courts are published. For example, the decisions of the *Bundesverfassungsgericht*, the Federal Constitutional Court, are collected in a reporter called the *Bundesverfassungsgerichtsentscheidungen (BVerfGE)*. Similarly, the decisions of the *Bundesverwaltungsgericht*, the highest administrative court, are collected and published in the *Bundesverwaltungsgerichtsentscheidungen (BVerwGE)*. However, identifying lower court opinions about refugees is catch as catch can. Cases challenging action taken by a government official must be filed in the administrative court system. The administrative court of first instance, or trial court, is the *Verwaltungsgericht*. The Administrative Appeals Court [*Oberverwaltungsgericht* or *Verwaltungsgerichtshof* in Baden-Württemberg, Bavaria, and Hesse] hears appeals from the *Verwaltungsgericht*. Each state in the Federal Republic has an Administrative Court and an Administrative Appeals Court. The judges of both courts generally convene in panels of five (three professional judges and two lay judges) to hear a case. Appeals from the Administrative Appeals Court may be filed in some instances with the *Bundesverwaltungsgericht* (the highest administrative court), which convenes in panels of five professional judges. N. HORN, H. KÖTZ, & H.G. LESER, GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION 33 (1982). See *infra* text accompanying notes 57-78 for a description of judicial review of agency decisions granting or denying refugee status.

18. For example, *ZAR, Zeitschrift für Ausländerrecht und Ausländerpolitik* [J. OF ALIENS L. & POL'Y], a West German quarterly legal journal which summarizes recent court opinions in its *Rechtsprechung* [Judicial Decisions] section.

19. The Administrative Court in Wiesbaden [*Verwaltungsgericht Wiesbaden*] maintains an extensive information center on refugee matters. Avery, *supra* note 12, at 282-283.

20. *Die Zentrale Dokumentationsstelle der Freien Wohlfahrtspflege für Flüchtlinge* [ZDWF] (Central Documentation Center of the Voluntary Agencies for Assistance to Refugees) is located at Hans-Böckler-Strasse 3, 5300 Bonn 3. ZDWF receives funding from voluntary agencies and the federal government. It maintains extensive files on refugee law and policy in the Federal Republic and in other countries. Avery, *supra* note 12, at 283-284.

in German. As a result, discovering the existence of this case law does nothing more than tantalize the non-German speaking refugee advocate. To resolve this problem the English translations are available through the author.²¹

C. *Differences and Similarities of the Asylum Process in the U.S. and the Federal Republic: An Overview*

The social group cases arising in the Federal Republic contain obvious differences from social group cases in the United States. The most striking difference lies in the asylum-seekers' countries of origin. Most of the cases in the Federal Republic involve refugees from Eastern Europe, Africa, and South Asia.²² Asylum-seekers from the Americas and from South East Asia are not common.²³

The American lawyer will also be struck by the role of expert opinion. In refugee cases the courts in the Federal Republic appear to give greater deference to expert opinion than do courts in the United States.²⁴ Deference is granted both to expert opinion from the Foreign Ministry and to non-government experts. This stems from the German practice of having the courts, rather than the parties, select experts who consequently owe a duty of impartiality to the courts.²⁵ Finally, the right of the gov-

21. The author translated the opinions, assisted by Deborah Vester, James Cleary, Nancy Cagar, and Annette Hasapidis, research assistants proficient in German.

22. In 1986, 99,650 asylum applications were filed with the *Bundestamt für die Anerkennung Ausländischer Flüchtlinge* [Federal Office for Recognition of Foreign Refugees], see *infra* text accompanying notes 48-50. Of these applications, 25,164 were from Europe; 56,575 were from Asia; and 9,486 were from Africa. Annual Statistics, Federal Office for the Recognition of Foreign Refugees, January-December 1986 [hereinafter Statistics, 1986]. In 1988 the number of asylum-seekers had decreased to 39,885, but the regions of origin remained similar: 27,114 from Europe, 9,630 from Asia, and 2,205 from Africa. Annual Statistics, Federal Office for the Recognition of Foreign Refugees, January-December 1988 [hereinafter Statistics, 1988]. In 1989, there was a large increase with 121,318 asylum applications filed. Again, the three major regions of origin were the same: 73,387 from Europe, 32,718 from Asia, and 12,479 from Africa. Federal Office for the Recognition of Foreign Refugees, January-December 1989 [hereinafter Statistics, 1989].

23. Of the 99,650 asylum applications filed with the Federal Office for Recognition of Foreign Refugees in 1986, 142 were from Central and South America. In 1989, only 320 of the 121,318 applications were from the Americas. The 1989 applicants from Asia, totalling 32,718, included 3,137 from India, 2,673 from Pakistan, 7,758 from Sri Lanka, 3,656 from Afghanistan; 5,768 from Iran, 1,332 from Syria, 6,240 from Lebanon, 354 from Iraq. There were 984 applicants from Vietnam, and so few asylum-seekers from Cambodia, Laos and China that they were not listed in the statistics. Statistics 1989. In both 1986 and 1988 there were so few asylum-seekers from Vietnam that Vietnam did not appear as a separate category in the statistics. Statistics, 1986, *supra* note 22; Statistics, 1988, *supra* note 22.

24. For example, in a case involving an asylum-seeker from India who alleged persecution based on her membership in a women's rights organization and on her marriage to a man of a lower caste, see *infra* text accompanying notes 120-134, the Administrative Court of Ansbach sent questions about the situation in India to the India correspondent for a German newsweekly (Dr. Gabriele Vensky, correspondent for *Die Zeit*). Judgment of Jan. 4, 1985, No. AN 1269-XII/79, *Verwaltungsgericht Ansbach* [VGA], 3. The court gave great deference to the correspondent's written response to its questions. *Id.*, see *infra* notes 128-129 and accompanying text.

25. HORN, *supra* note 17, at 49.

ernment to seek judicial review of a decision recognizing refugee status and granting asylum will be surprising to the American advocate.²⁶

The most striking similarity of the two systems is the greater chance of success for asylum-seekers who flee countries dominated by a communist regime.²⁷ Other similarities and differences are apparent in the discussion of cases that follows.

II. THE REFUGEE DETERMINATION PROCEDURE IN THE FEDERAL REPUBLIC OF GERMANY

A. *Refugee Law in the Federal Republic of Germany*

In order to appreciate the context in which the German courts examine claims of refugee status based on membership in a particular social group, it is necessary to understand the basic refugee law in the Federal Republic. The German Constitution guarantees a right of asylum to political refugees.²⁸ In addition, the Federal Republic is a signatory to the 1951 Geneva Convention.²⁹ Although the Constitution refers only to

26. *Gesetz über das Asylverfahren vom 16 Juli 1982* [Law of July 16, 1982 on Asylum Procedure], 1982 *Bundesgesetzblatt* [BGB1] I 946, § 5(2) (authorizing appeals by the *Bundesbeauftragter für Asylangelegenheiten* [Federal Commissioner for Asylum Affairs] of decisions by Federal Refugee Office). The *Asylverfahrensgesetz* (AsylVfG) [Asylum Procedure Law] is the basic legislative act regulating the procedures by which asylum-seekers may enter and seek refugee status in the Federal Republic of Germany. It is roughly analogous to the Refugee Act of 1980 in the United States. The Asylum Procedure Law of July 16, 1982 was modified by legislation passed on July 11, 1984. See *Gesetz vom 11 Juli 1984*, 1984 BGB1.I 874. It was further modified on January 6, 1987. See *Gesetz zur Änderung asylverfahrensrechtlicher und ausländerrechtlicher Vorschriften vom 6 Januar 1987* [Law of January 6, 1987 to Amend the Process Governing Asylum, Work Permits, and Aliens], 1987 BGB1.I 89 [hereinafter *Asylum Law of 1987*].

27. From June 1983 - September 1989, the U.S. Immigration and Naturalization Service approved 27% of all asylum cases filed with District Directors in the United States. Seventy percent of applicants from Rumania were approved, as were 47% of applicants from Czechoslovakia, and 38% from Poland. In contrast, only 9.5% from Lebanon, 2.5% from El Salvador, 2% from Guatemala, and 2% from Haiti were approved. *Refugee Reports* 14 (December 29, 1989). The 1986 statistics from the Federal Office for the Recognition of Foreign Refugees show that 691 Czechs were recognized as refugees and 197 rejected. Of Rumanian applicants 158 were recognized, 251 rejected. In contrast, 254 Turks were recognized, 4,872 rejected. Similar results occurred with African and Asian nations: 140 Ethiopians recognized and 1,044 rejected; 11 Ghanaians recognized and 4,315 rejected; but 1,481 Afghans recognized and only 384 rejected; and 1,937 Sri Lankans recognized and 6,164 rejected. Statistics 1986, *supra* note 22. See generally Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J. L. REF. 183, 205-206 (1984).

The political change occurring in Europe in 1989 and 1990, in which many communist governments fell from power or entered into coalition governments with non-Communist parties, have led to a recent downturn in the number of asylum-seekers from Eastern Europe recognized as refugees in the Federal Republic. For example, in 1989 only 236 Czechs were granted asylum; 845 were denied. Only 46 Rumanians were granted asylum; 2,701 were denied. Statistics, 1989, *supra* note 22. Nonetheless, this phenomenon does not contradict the central issue. It underscores the correlation between asylum-seekers from communist countries and refugee status in the Federal Republic of Germany.

28. GRUNDGESETZ [GG], art. 79, § 2 ("The politically persecuted shall enjoy the right of asylum.").

29. The Federal Republic of Germany formally signed the Convention on November 19, 1951 and ratified it on December 1, 1953. Multilateral Treaties Deposited With the Secretary-

political persecution, the courts have interpreted the constitutional right to asylum to include those persecuted for racial, religious, nationality, and social group reasons, as well as those punished for their political opinion.³⁰ Thus, most asylum-seekers in Germany have a constitutional claim in addition to their Geneva Convention claim.

1. *The Asylum-Seeker*

An asylum-seeker who enters the Federal Republic to seek refugee status is assigned to one of the communal living facilities³¹ for those claiming refugee status.³² Asylum-seekers are assigned to refugee facilities throughout West Germany. The eleven states that comprise the Federal Republic hammered out a political agreement³³ committing each state to take a certain percentage of asylum-seekers.³⁴ The states, in turn, assign

General U.N. Doc. ST/LEG/SER.E/6, 181 (1987). According to the enabling legislation, Gesetz vom 1.9. 1953 [Law of September 1, 1953] *Bundesgesetzblatt* [BGBI] II 559, the terms of the 1951 Refugee Convention came into force on April 22, 1954 pursuant to the official notice given on April 25, 1954, BGBI.II 619 by the Federal Minister of Foreign Affairs. R. MARX, G. STRATE, & V. PFAFF, *Kommentar zum Asylverfahrensgesetz* 15 (2d ed. 1987).

30. *E.g.*, Judgment of March 29, 1983, No. AN 419-I/78, *Verwaltungsgericht Ansbach* [VGA], 6; see *infra* notes 163-175 and accompanying text. Judgment of Dec. 10, 1982, No. 10 K 115/80, *Verwaltungsgericht Saarland* [VGS], 9; see *infra* notes 184-197 and accompanying text. See Nicolaus & Klever, *The Notion of the Term "Refugee" in the Laws of the Federal Republic of Germany*, European Lawyers Workshop on the Implementation of Article 1A (of the Geneva Convention 16-17 (July 1985) (arguing that the German courts too narrowly interpret the constitutional right to asylum by equating the constitutional refugee definition with the Geneva Convention refugee definition). See generally KÖFNER & NICOLAUS, *Grundlagen des Asylrechts in der Bundesrepublik Deutschland* [Fundamentals of the Law of Asylum in the Federal Republic of Germany] § 6.4.1 (1986).

31. Collective housing is referred to as *Gemeinschaftsunterkünften*. See generally Aleinikoff, *supra* note 27, at 202-203.

32. AsylVfG § 23 provides that asylum-seekers generally shall be housed in collective accommodations [*Gemeinschaftsunterkünften*]. Different states and local communities have various kinds of communal housing, ranging from central camps [*Sammellager*] to smaller boarding houses to accommodations in private homes. Wolken, *Country Report for Federal Republic of Germany*, European Legal Network on Asylum (ELENA) Workshop, Hamburg, 6-7 (November 1986). Although asylum-seekers technically are free to leave the collective accommodations, they receive free meals and free lodging only if they remain; Aleinikoff, *supra* note 27, at 203. The new refugee legislation passed on January 6, 1987, grants more flexibility to asylum-seekers by allowing them to live elsewhere rather than in the group accommodations if they can show their alternative housing arrangements will not require a greater expenditure of public funds. Asylum Law of 1987, art. 1, § 13, *supra* note 26, at 91.

33. The 16 states are Baden-Württemberg, Bavaria, Berlin, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, the Saar, and Schleswig-Holstein. Article 23 of the Constitution [*Grundgesetz*] of the Federal Republic of Germany includes Berlin as one of the states that comprise the Federal Republic. The legal effect of this provision is unclear since the allied forces occupying Berlin at that time, registered an official objection to the inclusion of Berlin as a state. For practical purposes Berlin functions as one of the constituent states of the Federal Republic, although as a matter of political theory and legal technicality, Berlin's status is somewhat murky. See generally C. Lush, *The Relationship Between Berlin and the Federal Republic of Germany*, 14 INT'L. & COMP. L.Q. 742 (1965).

34. AsylVfG § 22(3) provides that the Federal Commissioner for the Distribution of Asylum-seekers will allocate asylum applicants according to the following schedule unless the states come to an alternative agreement: 15.1% to Baden-Württemberg; 17.4% to Bavaria; 2.6% to Berlin; 1.3% to Bremen; 3.3% to Hamburg; 9.2% to Hesse; 11.5% to Lower Saxony; 27.9% to North Rhine-Westphalia; 5.8% to Rhineland-Palatinate; 1.8% to the Saar; 4.1% to

asylum-seekers to various local communities.³⁵ The asylum-seekers receive a residence permit for the assigned community,³⁶ but must seek prior permission from the aliens police before leaving that community.³⁷ Although they are subject to the geographical restrictions of the residence permit, asylum-seekers may freely enter and leave their group housing.³⁸ They are not allowed to seek employment, however.³⁹ Five years after filing their asylum applications they can apply for a work permit.⁴⁰ Even after five years a work permit is not assured. Before issuing work permits the Labor Department reviews the unemployment situation in the Federal Republic to ascertain the impact of adding more workers to the labor force.⁴¹ When the unemployment rate is high, as it has remained in recent years,⁴² asylum-seekers rarely receive permission to work.⁴³

Schleswig-Holstein. *Id.* § 22(2). This formula is roughly based on the resources and population of the states. Aleinikoff, *supra* note 27, at 202.

35. AsylVfG § 22(9) *cited in* Wolken, *supra* note 32, at 5.

36. AsylVfG § 20(2). The residence permit [*Aufenthaltsgestattung*] can be restricted to a particular community or to a particular housing accommodation. It is always limited to the geographical jurisdiction of the pertinent aliens authority. AsylVfG § 20(1). Wolken, *supra* note 32, at 4.

37. AsylVfG § 25(1). An asylum-seeker who wishes to leave his assigned district temporarily must show compelling reasons to leave. *Id.* Permission is not needed to appear in court or before other government authorities. *Id.* § 25(3). Permission shall be granted to allow an asylum-seeker to meet with representatives of UNHCR and other refugee organizations. *Id.* § 25(2). See Wolken, *supra* note 32, at 5 for a discussion of "compelling" reasons to leave the assigned district.

38. Although asylum-seekers may be ordered to live in a particular dwelling, the maximum geographical restriction that the government can impose on an asylum-seeker is to a particular community. Wolken, *supra* note 32, at 4 (citing AsylVfG § 20(2)).

39. The Asylum Law of 1987, *supra* note 26, amended the *Arbeitsförderungsgesetz vom 25 Juni 1969* [Law of June 25, 1969 to Promote Employment], 1969 BGBI.I 582 and the *Arbeitsurlaubsverordnung vom 12 September 1980* [Regulation of Sept. 12, 1980 on Work Permits], 1980 BGBI.I 1754, to increase significantly (from two to five years) the prohibition against employment pending resolution of an asylum claim. The prohibition against employment forces most asylum-seekers to remain in group facilities where free food and lodging are provided. This prohibition has, of course, led to an underground labor market for asylum-seekers awaiting recognition of their refugee status. See Aleinikoff, *supra* note 27, at 201-202.

40. The Asylum Law of 1987, *supra* note 26, amends § 19 of the Law of June 25, 1969 to promote employment and extends the prohibition against work to five years. Asylum-seekers whose asylum applications have been rejected but who have not been ordered to depart face a one-year waiting period before they can apply for work authorization. Amendment of Jan. 6, 1987 to Laws of Asylum, Work Permits and Aliens, art. 2, § 1, 1987 BGBI.I at 92. Spouses of rejected asylum-seekers who have not been ordered to leave have a four-year waiting period; their children have a two-year wait. *Id.* § 19, ¶ 1(b). Prior to the 1987 amendment the legislation required a two-year waiting period for non-European applicants and a one year wait for Eastern European applicants. *Verordnung zur Änderung der Arbeitsverordnung* [Regulation Amending the Regulation on Work Permits] art. 1, sec. 2, 1981 BGBI. I 1042.

41. Letter from Rudolf Klever, Member, Steering Committee, European Legal Network on Asylum, to Maryellen Fullerton (Sep. 3, 1988) (discussing draft article on Persecution in Jurisprudence in the Federal Republic of Germany) [hereinafter Klever Letter].

42. The unemployment rate in the 1980's has generally exceeded 7%. U.S. Dept. of Labor Bureau of Labor Statistics, *Handbook of Labor Statistics* 554 (Table 143), August 1989.

43. Klever Letter, *supra* note 41.

2. *The Refugee Determination Process*

Asylum-seekers begin the formal refugee determination process by filing an application with the local aliens police.⁴⁴

a. Local Aliens Police

The aliens police then interview the applicant to identify the outlines of the claim.⁴⁵ If the aliens police determine that the asylum-seeker has previously filed an asylum claim in the Federal Republic and been rejected, the aliens police deny this new application.⁴⁶ The aliens police will also deny the application if they discover that the asylum-seeker received protection from persecution in another country prior to arriving in the Federal Republic.⁴⁷ In all other cases the aliens police send the asylum application and the preliminary interview to the Federal Office for the Recognition of Foreign Refugees.⁴⁸

b. The Federal Refugee Office

The staff of the Federal Refugee Office, which is headquartered in Zirndorf in Bavaria and has satellite offices around the country,⁴⁹ makes all the refugee determinations for the entire country.⁵⁰ Staff members interview the applicants extensively.⁵¹ Asylum-seekers have the right to bring an attorney and an interpreter to the interview.⁵² Asylum applicants may submit documentary evidence to support their claim to refugee status.⁵³ In addition, staff members have access to the Office's extensive collection of reports on refugee conditions compiled from government sources, human rights groups, non-government voluntary agencies, and press accounts.⁵⁴ The refugee's documentary evidence, expert opinion about the conditions of the country from which the asylum-

44. AsylVfG § 8(1). Each state has its own aliens police [*Ausländerbehörde*]. Asylum-seekers must file their applications with the appropriate aliens police for the district in which the asylum-seekers reside. *Id.* For a general overview of the asylum process, see generally *Asylum in Europe*, *supra* note 7, at 154-159, ¶¶ 15-39.

45. AsylVfG § 8(2).

46. *Id.* at § 14.

47. *Id.* at § 7(2) (asylum applications must be disregarded if obvious that applicant already found protection elsewhere).

48. *Id.* at § 8(3). Section 4 establishes the Federal Office for Recognition of Foreign Refugees (*Bundesamt für die Anerkennung Ausländischer Flüchtlinge*). The Federal Office for Recognition of Foreign Refugees [hereinafter Federal Refugee Office] does not consider claims by "national refugees," individuals of German descent entitled by the Constitution of the Federal Republic [GG art. 11, 116] to live in Germany. *Asylum in Europe*, *supra* note 7, at 154, ¶ 10.

49. There are eight satellite offices. Aleinikoff, *supra* note 27, at 204.

50. AsylVfG § 4(1).

51. *Id.* at § 12(1).

52. *Id.* at § 12(2) (incorporating into the Federal Refugee Office procedures the provisions regarding counsel and interpreter assistance contained in § 8 (4) regarding the interview by the aliens police).

53. *Id.* at § 12(1).

54. Avery, *supra* note 12, at 280; Aleinikoff, *supra* note 27, at 204-205.

seeker is fleeing, the aliens police interview report, and the report of the interview by the Federal Refugee Office staff comprise the record.⁵⁵ After reviewing the record the Federal Refugee Office staff issues a written opinion granting or denying the applicant's claim.⁵⁶

c. Judicial Review in The Federal Republic of Germany

The asylum applicant can seek judicial review of a decision denying asylum by challenging the decision in the Administrative Court in the state in which the asylum-seeker resides.⁵⁷ In addition, the Federal Commissioner for Asylum Affairs⁵⁸ can appeal a decision granting asylum.⁵⁹ Although in the past the Federal Commissioner, an official appointed by the Federal Minister of the Interior, did not frequently file appeals,⁶⁰ the more recent practice of the Commissioner is to appeal most of the decisions granting asylum to applicants from non-European countries.⁶¹

Filing an appeal generally stays government action to expel the applicant.⁶² A decision by the Administrative Court denying refugee status can be appealed to the state's Administrative Appeals Court⁶³ in cases that present important issues of law or that conflict with higher court decisions.⁶⁴ The court of first instance, the state Administrative Court, determines whether the circumstances of the case entitle the parties to appeal, but a decision denying a right to appeal can itself be appealed to the Administrative Appeals Court.⁶⁵ A decision by the Administrative

55. Aleinikoff, *supra* note 27, at 204-205.

56. AsylVfG § 12(6).

57. *Asylum in Europe*, *supra* note 7, at 158, ¶ 33.

58. AsylVfG § 5(1) establishes the position of *Bundesbeauftragter für Asylangelegenheiten* [Federal Commissioner for Asylum Affairs]. The Minister of the Interior appoints the Federal Commissioner. *Id.* at § 5(3). The Federal Commissioner represents the federal government's position in cases before the Federal Office and before the courts. *Id.* at § 5(2).

59. Asylum Law of 1987, *supra* note 26, at § 5(2), at 946 (authorizing the *Bundesbeauftragter für Asylangelegenheiten* [Federal Commissioner for Asylum Affairs] to appeal decisions by the Federal Office); *Asylum in Europe*, *supra* note 7, at 157, ¶ 29.

60. Decisions granting asylum to applicants from Eastern European countries were rarely appealed by the Federal Commissioner. Telephone Interview with Rudolf Klever, Member, Steering Committee, European Legal Network on Asylum (Feb. 8, 1989) [hereinafter Klever Interview]. See also Aleinikoff, *supra* note 27, at 206.

61. The vast majority of decisions granting asylum to applicants from non-Eastern European countries are now appealed by the Federal Commissioner. Klever Interview, *supra* note 60.

62. AsylVfG § 30, 1982 BGBI.I at 951; *Asylum in Europe*, *supra* note 7, at 158, ¶ 38. Section 11(2) provides, however, that an appeal of the Federal Office's decision that an application is manifestly unfounded does not suspend expulsion. AsylVfG § 11(2), 1982 BGBI.I at 948. Similarly, an appeal of a denial of asylum based on a finding of protection elsewhere, see *supra* note 47 and accompanying text, or subsequent submission of a previously rejected asylum application without new evidence, see *supra* note 47 and accompanying text, did not suspend expulsion. AsylVfG § 10(3), 1982 BGBI.I at 947.

63. For a brief description of the court system, see *supra* note 17.

64. AsylVfG § 32(2), 1982 BGBI.I at 952; see also *Asylum in Europe*, *supra* note 7, at 158, ¶ 35.

65. AsylVfG § 32(4), 1982 BGBI.I at 952; *Asylum in Europe*, *supra* note 7, at 158, ¶ 36;

Appeals Court denying refugee status can be appealed to the Federal Administrative Court,⁶⁶ the highest court that hears suits challenging government action.⁶⁷ Again, the right to appeal is conditioned on the presence of an important issue of law or a conflict with a higher court decision.⁶⁸ Lastly, cases can be filed with the highest court in the country, the Federal Constitutional Court,⁶⁹ based on the assertion that the constitutional guarantee of asylum has been violated.⁷⁰

Special rules apply, however, if the Federal Refugee Office not only rejects the application but also declares it manifestly unfounded. In that situation the applicant must challenge this decision within one month in a special summary proceeding at the state Administrative Court.⁷¹ Filing this challenge does not stay a deportation order.⁷² In order to prevent government deportation efforts the asylum-seeker must within one week of the negative decision by the Federal Refugee Office file a separate application asking the court to suspend the effect of the Federal Refugee Office's decision.⁷³ If the court finds that the application is manifestly unfounded, no further appeal is allowed.⁷⁴ If the court upholds the Federal Refugee Office decision denying the claim but concludes that it is not manifestly unfounded, the court will authorize the asylum-seeker to pursue an appeal to the Administrative Appeals Court if the court concludes that the case presents an important issue of law or conflicts with a higher court decision.⁷⁵ Those applicants to whom the courts deny the right to appeal have one last chance within the court system. They may seek an injunction from the Federal Constitutional Court, arguing that the denial of their claims violates the constitutional guarantee of protection to vic-

see generally id. at 157-58, ¶¶ 32-37; Aleinikoff, *supra* note 27, at 209-11. To challenge the denial of the right to appeal the asylum-seeker files a *Beschwerde* (summary proceeding) in the Administrative Appeals Court.

66. *Bundesverwaltungsgericht* (BVerwG). For a brief description of the court system, see *supra* note 18.

67. *Asylum in Europe*, *supra* note 7, at 158, ¶ 37. HORN, *supra* note 17, at 33.

68. *Asylum in Europe*, *supra* note 7, at 158, ¶ 37.

69. The *Bundesverfassungsgericht* (BVerfG) [Federal Constitutional Court] sits in Karlsruhe. Sixteen judges comprise the court, which meets in panels of eight. HORN, *supra* note 17, at 21.

70. *Asylum in Europe*, *supra* note 7, at 158, ¶ 37.

71. AsylVfG § 11(3) (providing a 30 day limit). The asylum-seeker files a *Beschwerde*. *Asylum in Europe*, *supra* note 7, at 155, ¶ 19.

72. AsylVfG § 11(2) (overriding § 10(3), which grants suspensive effect).

73. *Verwaltungsgerichtsordnung* (VWGO) [Rules of the Administrative Courts], § 80, § V, 1986 BGBI.1 219. If the asylum-seeker does not seek a stay of the Federal Office's decision, the aliens police may deport him or her despite the fact that the one month deadline for seeking review of the decision may not yet have expired. Indeed, the aliens police may deport an asylum-seeker who has already sought review of the decision, despite the fact that a challenge is pending, if the asylum-seeker has not sought a stay.

74. AsylVfG § 32(6), 1982 BGBI.1 at 952; *Asylum in Europe*, *supra* note 7, at 157-58, ¶¶ 32-33; *see also id.* at 155-56, ¶ 19.

75. AsylVfG § 32(2), 1982 BGBI.1 at 951; *see also Asylum in Europe*, *supra* note 7, at 158, ¶ 35.

tims of political persecution.⁷⁶ The Federal Constitutional Court rarely provides relief in asylum cases, but the asylum-seeker is in a "tolerated" status and will not be deported during the two or three months that the case is pending.⁷⁷ This option is not risk-free, however; the Federal Constitutional Court has fined asylum-seekers for filing frivolous claims.⁷⁸

d. Deportation from the Federal Republic of Germany

Those asylum-seekers whose claims for refugee status are rejected by the courts do not necessarily face deportation. The refugee system is bifurcated; a central federal agency makes all decisions about refugee status, but deportation is left up to the individual states. Each state sets its own deportation policy. Often a state will decide on humanitarian grounds to allow certain groups of asylum-seekers to remain despite the Federal Refugee Office's rejection of their claims to refugee status. For example, all of the states except Baden-Württemberg and Bavaria have issued directives allowing Tamils to remain.⁷⁹

e. The Judicial System in the Federal Republic of Germany

To appreciate the opinions described below, it is helpful to know that an asylum-seeker's hearing before the state Administrative Court is quite different from the immigration court or federal district court hearing familiar to American practitioners. Judgeships are career positions in the Federal Republic.⁸⁰ Students who have recently completed their law studies qualify for judgeships through their performance on two rigorous state exams and their work during an internship in the judicial service.⁸¹ The Minister of Justice of the state selects the judges for the state, assigning the new judges to the lowest-ranked courts.⁸² Once appointed, judges generally have positions for life and can be dismissed, transferred, or involuntarily retired only in exceptional circumstances.⁸³ The judges are independent of the administrative branch of government, and see themselves as a check on government administrators.⁸⁴ They do, however, advance based on the evaluation of senior judges; therefore, there is a significant pressure toward conformity.⁸⁵

In theory, judges of the state administrative courts sit in panels of

76. *Asylum in Europe*, *supra* note 7, at 158, ¶ 37.

77. Klever Interview, *supra* note 60.

78. Aleinikoff, *supra* note 27, at 208 n. 87.

79. Klever Interview, *supra* note 60.

80. HORN, *supra* note 17, at 37.

81. *Id.* at 36.

82. *Id.* at 38.

83. *Id.* at 39.

84. Aleinikoff, *supra* note 27, at 207; *but see* Horn, *supra* note 18, at 39 (threat to judicial independence).

85. HORN, *supra* note 17, at 39-40.

five,⁸⁶ but often a single judge will hear an asylum case.⁸⁷ The court is not bound by the record created below, but sits as an independent fact-finder.⁸⁸ The role of the attorney at the hearing is minimal. Rather than the ritual direct examination and cross examination presented by the attorneys in an American courtroom, the German judges actively question the asylum-seeker in a quest to determine the applicant's credibility and the other facts of the case.⁸⁹

B. *A Case Study*

Describing one hearing in the Administrative Court in Hamburg may provide a little of the flavor of the first German judicial proceeding an asylum-seeker experiences.⁹⁰ The asylum-seeker was a young Iranian man of military age; the Federal Refugee Office had rejected his claim of persecution based on political opinion. Dr. Hohberger, Judge of the Administrative Court, convened the hearing. The asylum-seeker and his attorney were present; no representative of the government appeared. A translator was present. There were no witnesses, no other court personnel, and, no observers other than the author and the lawyer guiding her through the courts. After preliminary introductions the judge, who obviously had read the Federal Refugee Office's decision, began questioning the asylum-seeker about the details of his claim. She asked him several series of questions establishing the locale of his family's home and his initial troubles with the authorities. After perhaps ten minutes of questions and answers, the judge paused and switched on a tape recorder. She dictated — in the first person and in a chronological narrative — the asylum-seeker's story. After she finished dictating, she turned off the tape recorder and launched into another series of questions, which the applicant answered. Another pause, another dictation in narrative form, and another round of questions. And so on. The judge built a very thorough factual picture of the applicant's claim. Only rarely did the asylum-seeker's attorney intervene. For example, only after the judge asked the same question several times and seemed dissatisfied with the answers, would the asylum-seeker's attorney interject. After exhausting her questions about the case, the judge asked if the asylum-seeker wished to add anything. The attorney made a short statement on his behalf and the hearing ended. The judge said she would render a decision later, after considering information compiled by the court about conditions in Iran,

86. *Id.* at 33 (three career judges, two private citizens or "lay" judges).

87. AsylVfG § 31(1) (permitting one judge to hear cases that do not raise difficult legal and factual issues or issues of fundamental legal significance). See *infra* text accompanying notes 90-91.

88. Aleinikoff, *supra* note 27, at 207.

89. See HORN, *supra* note 17, at 48.

90. The author attended this hearing on July 9, 1987.

the factual record established in court, and the record compiled below by the Federal Refugee Office.

The judge had studied and lived in the Middle East. She was extremely knowledgeable about the culture and the history of the region. Because of her expertise, the court assigned many Iranian cases to her. The judge observed that she examines applicants closely to determine the geographical locale of their lives. She thought this enabled her to evaluate better the specific incidents alleged by the asylum-seekers to have triggered their fear of persecution. She seemed to search for details that indicated that the asylum-seekers' beliefs or actions had likely come to the attention of people who could and would threaten persecution.⁹¹

The extensive knowledge of conditions in the asylum-seeker's country that this judge possessed is not the norm in asylum cases. The Administrative Courts in the Federal Republic, on occasion, encourage judges hearing asylum cases to develop an expertise in certain refugee-producing countries and regions.⁹² The judges also place great emphasis on expert opinion concerning conditions in distant countries.⁹³ This attempt to educate the judges beyond the evidence in the record may lead to a greater awareness by the judge of danger spots within a region, and of safe alternatives within his own country that might be available to an asylum-seeker. Certainly, it means that the judge may have more tools with which to evaluate the asylum-seeker's credibility than a judge who lacks expertise about the refugee's homeland.

III. PERSECUTION BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

A. *Introduction*

During the 1980's the German courts issued thirteen opinions responding to applications for refugee status based on membership in a particular social group. The cases subdivide into two rough categories: (1) those whose social group is broadly defined; and (2) those whose social group is their immediate family.

1. *The Immediate Family as a Social Group*

The second category contains claims by wives that they will be persecuted due to the political activity or opinion of their husbands. The law of the Federal Republic requires every applicant for refugee status to show that he or she will be *personally* persecuted.⁹⁴ There is no presump-

91. Conversation with Dr. Hohberger, Judge of the Administrative Court of Hamburg, July 9, 1987.

92. Aleinikoff, *supra* note 27, at 208.

93. See *supra* text accompanying note 24.

94. There is a great debate as to the extent to which asylum-seekers must show objective,

tion that the spouse of someone who is persecuted will also face persecution.⁹⁵ Moreover, even if the agency or the courts conclude that a spouse of a prominent political figure is likely to face persecution, they will distinguish between persecution based on the spouse's own political activity and persecution based on the relationship to a political figure. The former qualifies as persecution based on political opinion; the latter does not. Accordingly, the politically inactive spouse characterizes her situation as persecution based on membership in a particular social group. Her family, in particular her marriage, comprises her social group.

It is not unusual for the spouse of a person granted asylum in the Federal Republic to be denied refugee status. This result generally occurs when the agency or the courts conclude that the spouse is unlikely to face persecution in her homeland. The inability to prove persecution, as opposed to the inability to show that persecution will be based on membership in a particular social group, is often the stumbling block. The denial of refugee status to spouses of individuals recognized by the Federal Republic as refugees is less draconian than it seems. The refusal to grant refugee status does not mean the government will deport the unsuccessful applicant. Rather, as the spouse of an individual lawfully residing in the Federal Republic, she will be eligible for an ordinary residence permit, which allows her to remain in the Federal Republic but confers fewer benefits than refugee status.⁹⁶

These spouse-of-political-opponent social group claims present an interesting look at the application of the refugee definition in the Federal Republic, and at the specific factors that assume importance in deciding when a marriage is likely to lead to persecution. In terms of refugee law in the United States, however, these decisions are of less significance to American refugee advocates than the other social group cases. By statute, United States law recognizes that the spouse and children of an indi-

rather than subjective, grounds for their fear of persecution. See generally Nicolaus & Klever, *supra* note 30, at 22. There is a consensus, however, that German law has interpreted persecution broadly, to encompass "violations of human dignity" as well as threats to life or liberty. *Id.* at 21.

95. *Bundesverfassungsgericht (BVerfG), Beschluss vom 19.12.84* (# 2 BVR 1517/84) [Federal Constitutional Court, Decision of December 19, 1984]; *Bundesverwaltungsgericht (BVerwG), Urteil vom 02.07.85* (# 9C 35.84), at 6 [Federal Administrative Court, Decision of July 2, 1985]. In 1985 the Federal Administrative Court reiterated that there was no presumption that the spouse of a victim of political persecution would also be persecuted. The Court stated, though, that relationship to a victim of persecution is a significant factor in evaluating an applicant's claimed fear of persecution. *Id.* at 6. The Federal Republic is unique among European signatories to the 1951 Geneva Convention in not automatically extending to members of the immediate family of a recognized refugee all the rights of refugee status. Nicolaus & Klever, *supra* note 30, at 22. In the Federal Republic this automatic status is afforded only to family members of "quota" refugees, a small subset of refugees in the Federal Republic. *Asylum in Europe, supra* note 7, at 160-161, ¶ 52.

96. See *Asylum in Europe, supra* note 7, at 161, ¶ 53. Klever Interview, *supra* note 60. See generally Gusy, *Das "grosse" und die "kleinen" Asyle* [The "Large" and the "Small" Asylum], 4/1988 ZAR, *Zeitschrift für Ausländerrecht und Ausländerpolitik* [J. OF ALIENS L. & POL'Y] 158, 159-60.

vidual who qualifies as a refugee are also entitled to refugee status.⁹⁷ Consequently, there is no need to examine or identify the basis of the likely persecution of the spouse or children.

2. *Broadly Defined Social Groups*

The non-spouse social group cases present a wide variety of factual settings. The asylum-seekers come from Poland, India, Ghana, Iran, Uganda, Rumania, and the People's Republic of China. Most are men. They claim persecution based on their economic activity, their sexual orientation, their tribe, their social class, and their physical attributes. In six out of nine cases the courts agreed with their claims that they were likely to face persecution based on their membership in a particular social group.

B. *Broadly Defined Social Group Cases*

1. *Polish Entrepreneurs – Approved*

A recent reported social group opinion was issued by the Administrative Court in Gelsenkirchen.⁹⁸ The court reversed the negative decision made by the Federal Refugee Office⁹⁹ concerning an asylum-seeker from Poland. The claimant and his wife, who fled Poland in 1980 at ages fifty-five and fifty-three respectively, had run a private (not state-owned) funeral home in Breslau. They told a tale of extortion, arrest, confiscation, and harassment by government tax officials and militiamen.¹⁰⁰ This pattern persisted from 1955 on, intensified in 1966 when the government opened a competing business in Breslau, and again in 1975 when they lost their lease. It culminated in 1979 when the husband was arrested

97. Section 207(c)(2) of the Immigration and Nationality Act, 8 USC § 1157(c)(2) provides in part:

A spouse or child (as defined in section 101(b)(1) (A), (B), (C), (D), or (E)) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 101(a)(42), be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under the Act.

Section 208(c) of the Immigration and Nationality Act, 8 USC § 1158(c), the relevant section pertaining to asylum-seekers who present themselves at the borders or within the United States, provides:

A spouse or child (as defined in section 101(b)(1) (A), (B), (C), (D), or (E)) of an alien who is granted asylum under subsection (a) may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

98. Judgment of March 29, 1985, No. 17 k 10.343/83, *Verwaltungsgericht Gelsenkirchen* [VGG].

99. For a description of the role of the Federal Office for the Recognition of Foreign Refugees and the system of judicial review, see *supra* text accompanying notes 48-78.

100. Judgment of March 29, 1985, VGG at 3-5. The court found the claimants' testimony credible as to these facts. *Id.* at 11.

and charged with bribing government officials, and all their cash was confiscated from their office and home. As a result of the 1979 events, this couple, whose income had earlier dropped by fifty percent due to the government's refusal to renew their license for burial services, lost both their savings and their ability to earn a living from their business. Criminal proceedings were initiated against them for bribes extorted by government officials, more of their property was confiscated in January 1980, and the husband suffered a heart attack that prevented him from working at all. Concluding that there was no future at all for them in Poland, they decided to go to the Federal Republic of Germany where two of their daughters lived.¹⁰¹ They requested passports, received them promptly,¹⁰² and left Poland.

In their asylum petition to the court, the applicants argued that Polish government authorities had ruined them financially and had seriously threatened their lives by literally depriving them of the means of existence. They asserted that this pattern of harassment by psychological, financial, and legal methods occurred to others who tried to run their own businesses. It amounted to persecution of people engaged in private enterprises.¹⁰³ Thus, they based their asylum application on claims of persecution as members of the social group of entrepreneurs.

The government responded to the applicants' argument by emphasizing that the Polish regime officially frowned on private enterprise and believed that businesses should be state-owned.¹⁰⁴ Consequently, any Pole running his own business, such as the applicants, would likely face pressure and penalties from the government. The pressure and penalties thus experienced would be due to their defiance of the official economic

101. Another daughter lived in Sweden, where these claimants first stopped en route to Germany. Based on medical advice concerning the husband's heart condition, the claimants remained in Sweden for seven months. Their stay in Sweden raised the issue of whether the applicants had already found refuge in Sweden before they arrived in Germany, thus disqualifying them from the right to asylum in Germany. See AsylVfG § 2, (excluding from recognition as refugee those who, prior to entering Germany, had already found protection from persecution); AsylVfG § 7(2) (asylum applications must be disregarded if obvious that applicant already found protection elsewhere); see *supra* notes 44-48 and accompanying text. The court ruled in their favor, reasoning that refugees with more than one asylum possibility, e.g., Sweden as well as Germany, could choose the asylum country they preferred, and that a short stay in another country en route did not indicate they had in fact chosen as their place of asylum the first country they entered. Judgment of March 29, VGG at 5, 7-9.

102. They received the passports in four weeks, without paying bribes. The passport office official told them to make good use of the passports, which they interpreted as a warning to leave Poland and not return. Judgment of March 29, 1985, VGG at 4.

103. See *id.* at 3-4. The asylum-seekers pointed out that many of their acquaintances who had private businesses had been driven out of business; many had fled abroad. *Id.*

104. The Polish government's hostile attitude and harassing actions toward privately-owned businesses in the 1950's, 1960's, and 1970's, when the applicants lived and worked in Breslau, were confirmed by information from the Federal Republic's Foreign Ministry. *Id.* at 12, 14. This attitude obviously differs drastically from that of the current Polish government, formed in 1989 by Solidarity in coalition with the Communist Party, the Peasants' Party, and the Democratic Party. *Watershed in Warsaw*, Economist, Aug. 19, 1989, at 33-34; see also N.Y. Times, Sept. 26, 1989, at A17, col. 1.

system of the country, not due to membership in any particular social group.¹⁰⁵ With regard to the "means of existence" argument, the government asserted that the applicants had only been deprived of earning their livelihood from a private business.¹⁰⁶ No evidence had been presented that they were refused the right to earn a living in a state-owned enterprise. Furthermore, the government emphasized that the applicants received a pension, thus undercutting their claim that they had been denied the means of existence.¹⁰⁷ They received passports as soon as they requested them in 1980, and had also obtained passports in 1979 for a trip to the Federal Republic of Germany to visit family members.¹⁰⁸

In essence, the government argued that the background, habits, and social status of the applicants did not trigger their persecution. Rather their "anti-social" private enterprise was the trigger. The government did not seriously contest that the asylum-seekers were persecuted, but challenged the idea that they were persecuted merely for belonging to a group. The government asserted that these individuals were not persecuted for believing in private enterprise, for formerly having participated in private enterprise, for being the children of entrepreneurs, or for socializing with other entrepreneurs, but only for carrying on certain socially disapproved acts.¹⁰⁹

The court rejected the government's arguments. Finding the applicants credible,¹¹⁰ the court concluded that attempts by Polish officials to ruin the applicants financially had succeeded in leaving them destitute. The court stated that the husband's physical condition, which had been brought on by official harassment, made it impossible for him to go out at this point in his life and begin working as a salaried employee.¹¹¹ The court also concluded that the wife, though not physically impaired, had no viable options for earning a living. When the business was confiscated she was fifty-three years old, and her only skills were those developed while working in her husband's business for twenty-five years. Having been harassed by the authorities for years, she could not expect them to help her find a new job. In addition, she had to care for her sick husband. In light of these circumstances, the court concluded it was unrealistic to expect her to go out and search for a new job to support the family.¹¹² The court dismissed the significance of the pension, pointing out that it would only cover the barest essentials and, more significantly, that the applicants would somehow have to survive a twelve to eighteen

105. See Judgment of March 29, 1985, VGG at 6.

106. *Id.*

107. *Id.*

108. They had visited the Federal Republic from September 8-29, 1979. *Id.* at 4.

109. See *id.* at 6.

110. *Id.* at 11.

111. *Id.* at 14-15.

112. *Id.* at 15-16.

month delay before receiving the first payment. Examining the facts that led to the applicants' financial situation, the court concluded that the Polish authorities had ultimately attempted to deprive the applicants of the ability to earn any living at all. This treatment, according to the court, constituted persecution.¹¹³

With regard to the passports, the court believed it obvious that the Polish authorities, having ruined the applicants, now wanted to be rid of them. The authorities could easily exile them via a "voluntary" departure because their children had already left Poland and established themselves elsewhere.¹¹⁴ Thus, obtaining passports did not undercut the applicants' persecution claim.

Turning to the basis for the persecution, the court noted that the applicants had presented in great detail uncontradicted testimony, corroborated by documentary evidence, concerning the official attempts to drive them out of business. The court emphasized that information from the Federal Republic's Foreign Ministry further corroborated the applicants' claim. The Foreign Ministry's opinion indicated that Polish authorities made a practice of harassing and taxing private businesses, and that an appeal to the authorities by those in private enterprise for assistance against extortion attempts by local officials would likely have been futile.¹¹⁵

The court noted that historically, in analyzing the motive for the persecution suffered by applicants, persecution has been directed against those who think and act differently from the authorities.¹¹⁶ According to the court, the planners of a socialized economy, such as existed in Poland, often view private enterprise as an alien element and attempt to destroy it. In doing so, they frequently direct discriminatory actions against those involved in private enterprise, allow corrupt officials to take advantage of them, and do not attempt to protect the victims from criminal acts such as extortion and unwarranted confiscation of their means of a livelihood.¹¹⁷ The court concluded that exactly such a scenario existed in the case at hand. The applicants and others like them had suffered greatly. They had been targeted because their activity in establishing private businesses showed them to be members of a group insufficiently controlled by and disloyal to the regime. Thus, their persecution was due to

113. *Id.* at 16-17.

114. *Id.* at 16.

115. *Id.* at 11-12, 18. Consequently, persecution by private citizens or low-level officials in Breslau could be imputed to the Polish government, thus satisfying the refugee definition requirement of persecution by the government or by groups the government is unable or unwilling to control. Office of the United Nations High Commissioner For Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, [hereinafter Handbook] at 17, ¶ 65 (1979).

116. Judgment of March 29, 1985, VGG at 18.

117. *See id.* at 19.

their membership in the particular social group comprised of owners of private businesses. Accordingly, they fell within the refugee definition of the 1951 Geneva Convention and were entitled to asylum in the Federal Republic.¹¹⁸

In reaching this conclusion the court focused on the systematic efforts to root out from Polish society a defined group of people, who might be described as the entrepreneurs or the *petit bourgeoisie*. The government argued that the Polish authorities attempted to proscribe certain economic activity that conflicted with the state-controlled economy, but did not prevent people engaged in this proscribed activity from working in the state-controlled economy, and did not discriminate against them based on their background or beliefs so long as they refrained from carrying on their private businesses.

The court did not directly address the government's attempt to distinguish between proscribed economic activity and social group. It ignored this activity/background distinction, and emphasized the fact that similarly situated individuals were persecuted. The court appeared to believe that the fact of persecution was undisputed and did not analyze the basis for finding that there had been persecution. Rather once the court determined that persecution of private business existed in Poland, it concluded that this ill-treatment sufficiently triggered the protection extended to those persecuted based on membership in a particular social group.

Many interpretations of what constitutes a "particular social group" can be read into this opinion, but the court did not explain its reasoning. This is unfortunate because the attempt to proscribe certain activity — here private enterprise — raises the complex prosecution versus persecution issue familiar to refugee law. In a nutshell, individuals fleeing punishment for committing a criminal act generally do not qualify as refugees. The ill-treatment they fear is deemed prosecution, not persecution.¹¹⁹ Unless the particular criminal law is an illegitimate one, such as a law proscribing religious education to children,¹²⁰ or the accused is subject to excessive punishment,¹²¹ the individuals are deemed fugitives from justice rather than refugees. There is no indication here that the court recognized the prosecution versus persecution analogy that could be made to the facts of this case. Perhaps this is because the court implicitly viewed the private business activity of the applicants as a fundamental right, which the Polish authorities could not legitimately deny. Under this view the court could have perceived the applicants as members of the social group exercising the fundamental right of owning one's

118. *Id.* at 19-20. For a description of the Federal Republic's laws on asylum, see *supra* notes 28-30 and accompanying text.

119. Handbook, *supra* note 115, at ¶ 56.

120. *Id.* at ¶ 57.

121. *Id.*

own business. Perhaps the court believed that so long as private businesses were not unlawful — during twenty-five years of openly owning their own business the applicants faced only one arrest and that was based on a bribery charge — the activity/background distinction was irrelevant. If so, the court may have been impressed that one group of apparently law-abiding people — the owners of private businesses — was singled out and persecuted. Or perhaps the court, as its reference to historical persecution of those who think and act differently suggests, simply viewed the discrimination suffered by these applicants as so similar to traditional political persecution that the applicants warranted protection. In any event, the court's reliance on "particular social group" in this case indicates that the social group may be based on economic activity or career goals rather than on social origins, habits, or background. Moreover, the court's lack of explanation of the appropriateness of applying the "particular social group" term to this case leaves the door open for future judicial development of this aspect of the refugee definition.

2. *Indian Women's Rights Activists Who Marry Out of Caste – Denied*

In 1985, the Administrative Court in Ansbach also decided a claim involving persecution based on membership in a particular social group.¹²² On this occasion the court upheld the Federal Refugee Office's denial of the claim. The applicant was an Indian woman who fled to Germany in 1978 at the age of thirty-one.¹²³ In India she had been an active member of a women's rights organization,¹²⁴ one of whose goals was overcoming the oppression of women caused by the caste system. This goal was keenly sought by the applicant who had violated the caste system by marrying a man of another (and lower) caste and had suffered greatly for her marriage.¹²⁵ The applicant had been disowned by her family. She was defamed and threatened with death by stoning or fire. On one occasion she and her small daughter were forced to escape from physical attack by fleeing through the window of her house. Her family offered no help or protection.¹²⁶

In 1978 the applicant took part in a conference of her women's rights organization.¹²⁷ Protests against the conference erupted into riots and attacks on the participants. After giving a speech at the conference, the applicant was arrested by the police. Fearing for her life, she fled India several days later.

122. Judgment of Jan. 4, 1985, No. AN 1269-XII/79, *Verwaltungsgericht Ansbach* [VGA].

123. *Id.* at 2.

124. *Id.* The women's rights organization, Nari Serek Sangh, had been founded in the mid-1960's. *Id.*

125. *Id.* She belonged to the Maratha caste; her husband belonged to the Mudiraj caste. *Id.*

126. *Id.* The family disowned her. *Id.*

127. *Id.* The conference took place in Patna in April 1978. *Id.*

Expert testimony submitted to the court indicated that meetings of women's rights organizations in India were often dangerous affairs.¹²⁸ Police swinging riot sticks frequently ended demonstrations by the participants, arresting women who had dared to become unruly. Consequently, women attending these meetings had to anticipate violence and arrest by the police, as well as threats by their families and neighbors. Moreover, the expert testimony indicated that women who do not wait for marriages arranged by their families, but rather choose to marry a member of a lower caste are likely to face death threats, stoning, and burning, particularly if they live in rural areas. They cannot expect to be protected by the police, other authorities, or courts.

In examining the applicant's claim, the court found her representations credible in almost all details.¹²⁹ The court noted that at her hearing she had answered all questions clearly and directly, and that her description of the social situation in India corresponded with that of the expert opinion. With regard to the applicant's membership in a women's rights organization, the court concluded that members of this group at times had been subjected to insults, rejection, verbal attacks, and even physical assaults. The court also credited reports of death threats and instances of arson at the organization's offices. The court pointed out, however, that it was undisputed that the applicant's organization was a legal one, that its activities were lawful, and that the authorities had not forbidden the 1978 meeting.¹³⁰ Further, the court stated that the applicant had acknowledged that she had not violated any criminal laws in India.¹³¹ In light of these facts, the court concluded that the applicant's arrest was not a matter of concern, for surely she would not be convicted of criminal activity if she returned to India and defended herself against any outstanding charges.

With regard to the applicant's marriage "out of caste," the court believed the woman's story of the social ostracism, the death threats, and the physical attacks visited upon the applicant and her daughter. Indeed, the court noted that the applicant's situation upon return to India would likely be even worse than before she fled because her husband had deserted her in Germany.¹³² Consequently, she would be unable to turn to him or his family for even a small measure of help or security. The court also noted that the applicant had no vocational skills or training. The

128. *Id.* at 3. The court sent a written inquiry to the expert, Dr. Gabriele Vensky, the India correspondent for *Die Zeit*, the German news weekly. Dr. Vensky filed a written response to the court's question. *Id.* at 3-4 (summarizing Dr. Vensky's report). For further discussion of the role of expert opinion in German courts, see *supra* notes 24, 25 and accompanying text.

129. Judgment of Jan. 4, 1985, VGA at 9. *But see id.* at 8 (where the court commented that some of the claimant's assertions about the police may have been somewhat overstated).

130. *Id.* at 9.

131. *Id.* at 8.

132. *Id.* at 10.

money she had earned in the past through her women's rights organization would be insufficient to support the applicant and her daughter.¹³³ Thus, the court said, if the applicant returned to India she would surely face a precarious financial situation and considerable difficulties in existing at the most minimal level.

Nonetheless, the court denied this application for asylum in Germany. The court appeared to agree that the applicant could properly be characterized as a member of two social groups, the group of women belonging to activist women's rights organizations and the group of women who had married men of another caste. The court also appeared to agree that the discrimination and assaults the applicant had suffered as a member of these groups amounted to persecution. But, the court stated, this terrible treatment occurred at the hands of portions of the population who disagreed with the applicant regarding the position of women in society and the importance of maintaining the caste system, and could not be attributed to the government.¹³⁴ The court acknowledged that many police and other authorities agree with the conservative social attitudes about women and the caste system, and do not discourage those who protest against women like the applicant. The court, however, stated that the authorities have no duty to intervene unless the criminal laws are violated, and, for example, these women are assaulted or threatened with physical attack. The court acknowledged that the police often fail to protect the women from attack, but concluded that this lack of police protection is more likely due to laziness, poor training, and corruption on the part of the police rather than to any intent to discriminate against members of women's rights organizations.¹³⁵ The court stressed that the applicant had offered no contrary evidence concerning the motives of the police. Therefore, the court characterized the persecution as actions undertaken by private individuals and refused to attribute it in any way to the government. Instead, after acknowledging that the government authorities failed to prevent and energetically combat assaults against members of the particular social groups described in this case, the court simply attributed the government inaction to inefficiency and mismanagement.¹³⁶ The court then rejected the applicant's claim because she could not prove that the government inaction was due to the victim's membership in a particular social group.¹³⁷

Comparing this decision to the prior one is illuminating. In both cases there was some degree of harassment by private individuals, thus raising

133. *Id.*

134. The court here relies on the refugee definition requirement that the asylum-seeker demonstrate persecution by the government or by groups the government is unwilling or unable to control. Handbook, *supra* note 115.

135. Judgment of Jan. 4, 1985, VGA at 11-12.

136. *Id.* at 12.

137. *Id.*

the issue of whether the objectionable treatment could be attributed to the government. In the Polish case officials carried out most of the harassment, but they appeared to be low-level officials and militia men, and the bribes they demanded might well have been an expression of personal greed rather than of official policy. Nonetheless, the court stated that the government's toleration of harassment by private individuals and of official corruption at the expense of the private businessmen meant that this persecution could be attributed to the government. In the Indian case private individuals carried out almost all of the harassment, although the police sometimes used excessive force against women's rights demonstrators. The reluctance of the Indian police to protect women from private attacks can be compared to the indifference of the Polish authorities to acts of extortion against owners of private businesses. The lack of police protection in India was not deemed to constitute government complicity in the persecution, however, whereas the lack of protection in Poland was deemed evidence of government tolerance of persecution. Moreover, the Ansbach court ignored the principle that severe ill-treatment by private individuals constitutes persecution if the government tolerates that activity or is unable or unwilling to protect the victims against the offensive acts.¹³⁸

Furthermore, in both cases the asylum-seekers had actually been arrested by the police for activities connected with their particular social groups. In both instances the authorities filed charges against the applicants alleging violations of standard criminal laws. In the Polish case the arrest was considered further evidence of government persecution, whereas in the Indian case the court ignored the arrest as possible evidence of government persecution and merely asserted that the applicant had nothing to worry about because she had done nothing illegal.

In addition, both cases raised the issue of economic survival. The courts viewed both applicants as victims of persecution and as members of a persecuted social group, and acknowledged that the persecution that had occurred had driven the victims to the brink of starvation. The desperate financial straits of the Polish applicants constituted further evidence of persecution, however, whereas the precarious economic position of the Indian applicant was an unfortunate fact of life. The court ignored the role played by the past persecution of this married-out-of-caste woman in pushing her to her desperate financial situation.

Perhaps one could attempt to distinguish the cases by the official government policies involved. Whereas the official Polish policy is against private enterprise,¹³⁹ the official Indian policy favors equal rights for wo-

138. Handbook, *supra* note 115, ¶ 65.

139. With the advent of the new Solidarity government in September 1989, the Polish government's attitude toward private enterprise has changed dramatically. N.Y. Times, *supra* note 104; see also *Watershed in Warsaw*, *supra* note 104.

men.¹⁴⁰ Thus, one could more easily attribute government complicity in the private harassment in the Polish case than in the Indian case. There are two reasons why the stated official policy should not be dispositive, however. First, many government practices differ from their government's stated philosophy. If government proclamations in favor of fair treatment can absolve governments of all persecution within their borders carried out by private citizens, protection of victims of persecution will be truly vitiated. Second, and more significant for this case, in neither Poland nor India does the official government policy permit private individuals or low-level officials to assault citizens who are not accused of criminal activity. As a consequence, if government inaction in the face of repeated extortion constitutes persecution by the government, so should government inaction in the face of repeated physical attacks.

Indeed, the court's reluctance to attribute serious and recurrent harassment to the government in the case from India contrasts so markedly with the ease with which it imputes misconduct to the government from Poland that one must suspect that other factors influenced the court's decisions. Political bias and social bias come to mind. It may well be that the German courts have prejudged the Polish government as bad and the Indian government as good, and as a consequence interpret similar facts differently if they occur in Poland or in India. Additionally, or alternatively, the courts may feel that Polish refugees are more desirable — more similar to the German population in terms of culture, religion, and education — than Indian refugees. Neither of these types of bias is an acceptable element in applying the legal definition of refugee set forth by the 1951 Geneva Convention.¹⁴¹ Nor does the Constitution of the Federal Republic limit its guarantee of asylum to people who look European and flee from Communist countries.¹⁴² Therefore, if these unstated distinctions are in fact the basis for distinguishing between the two asy-

140. Judgment of Jan. 4, 1985, VGA at 11-12.

141. The 1951 Refugees Convention, *supra* note 1, attempts to protect refugees by requiring the signatory nations to accord significant rights to those individuals within their borders who satisfy the Convention definition of refugee. The Convention does not require that the signatory nations grant asylum to individuals recognized as refugees. Moreover, many nations that accept refugees for resettlement, such as Canada, France, and the United States, choose among the millions of eligible individuals by giving preference to those who have linguistic, cultural, or family ties with the country of resettlement. Thus, similarity of culture may play a role in the resettlement process, but is a totally unwarranted factor to consider in the process of deciding whether someone has indeed suffered or has a well-founded fear of suffering persecution. Because a country does not have to grant asylum to a refugee, it is important, as a legal matter, to distinguish between recognition of refugee status and the grant of asylum. Although there is no *res judicata* effect to a decision recognizing an individual as a refugee within the meaning of the Geneva Convention, as a practical matter someone recognized as a refugee has a much better chance of resettlement elsewhere.

142. In the Federal Republic the distinction between refugee recognition and grant of asylum, *see id.*, is in practice less important because the Constitution actually guarantees asylum to those persecuted for political reasons. *See GG, supra* note 28. The constitutional guarantee has been interpreted to apply to people fleeing any country, no matter what color their skin or what cultural background they possess.

lum-seekers described above, they undermine the rule of law in the refugee process.

3. *Iranian Homosexuals: The Social Condemnation Test – Approved*

In 1983 the Administrative Court in Wiesbaden reviewed a social group claim with some resemblance to the marriage-out-of-caste case.¹⁴³ The applicant's sexual orientation was the central issue. The applicant was a thirty-five year old man from Iran who had lived in the Federal Republic from 1976 to 1978.¹⁴⁴ He was back in Iran when the Shah was overthrown. Shortly thereafter, he requested and received a passport from the authorities in Teheran, and promptly went back to the Federal Republic where he applied for asylum.¹⁴⁵

In his application he stated that he could not live in a theocratic state such as Iran had become. Although he had been raised in the Islamic tradition, he did not believe that religious precepts should be applied literally to society and feared that he would be imprisoned for ignoring religious laws. In particular, he feared that as a homosexual he would be punished and perhaps even executed.¹⁴⁶

The applicant pointed out that the Iranian government had not interfered with his departure from Iran nor his return to Iran.¹⁴⁷ The Federal Refugee Office used this as evidence that he had not faced persecution in the past. Further, the applicant conceded that the regime did not know he was a homosexual.¹⁴⁸ According to the Federal Refugee Office, the applicant could conceal his homosexuality from the Iranian government and live peacefully in Iran, avoiding persecution in the future. Therefore, his fear of persecution was not well-founded, and his claim for asylum should be denied.¹⁴⁹

The court resoundingly disagreed and reversed the Federal Refugee Office's denial of asylum.¹⁵⁰ First, the court said, it is undisputed that homosexuals can be and are executed in Iran. The court cited press reports of executions of homosexuals, quoted from the *Koran*, referred to the applicability of Islamic law to the general population, and concluded that there is systematic punishment of homosexuals in Iran.¹⁵¹ Second, the court found credible the applicant's claim that he had been a homosexual for many years and rejected the view that the applicant may have

143. Judgment of Apr. 26, 1983, No. IV/I E 06244/81, *Verwaltungsgericht Wiesbaden* [VGW].

144. *Id.* at 3-4 (summarizing the facts).

145. *Id.* at 3.

146. *Id.*

147. *Id.* at 4.

148. *Id.*

149. *Id.*

150. *Id.* at 5.

151. *Id.* at 6-9.

merely alleged homosexuality for purposes of obtaining asylum.¹⁵² The court noted that admission of homosexuality involves certain social stigma.¹⁵³ Moreover, the applicant had had no assurance that such an admission would yield a countervailing benefit in the asylum process because no decisions by any of the appellate courts had granted asylum based on persecution against homosexuals.¹⁵⁴ Third, the court objected to the government's view that the applicant should be told simply to refrain from homosexual activity and live inconspicuously in Iran.¹⁵⁵ The court stated that although conflicting theories about homosexuality exist, there is general agreement that homosexuality is not a mere preference that can be turned on or off at will.¹⁵⁶ The court believed that telling a homosexual asylum-seeker that he can avoid persecution by being careful to live a hidden, inconspicuous life is as unacceptable as suggesting that someone deny and hide his religious beliefs or try to change his skin color.¹⁵⁷

Having concluded that homosexuals are severely persecuted in Iran and that the applicant, as a homosexual, would likely face persecution there, the court then analyzed whether homosexuals constitute a particular social group within the meaning of the Geneva Convention.¹⁵⁸ The court declared that it is irrelevant if group members know each other or are members of an organization. Rather, the court said that for purposes of the Geneva Convention, the key to determining the existence of a particular social group is whether the general population views this collection of people as an unacceptable group.¹⁵⁹ Thus, according to the court, it is useful to ask how an objective observer of society would assess the treatment of the group.¹⁶⁰ The court ruled that the society in Iran treats homosexuals as an undesirable group. Based on the pejorative labels attached to homosexuals, the prejudice expressed against them, and the destructive treatment they are subject to in Iran and in many other societies, the court concluded that homosexuals constitute a particular social group within the Geneva Convention. As such they are entitled to protection from persecution.¹⁶¹ The court added that in many cases it may be difficult to decide whether the mistreatment of homosexuals constitutes discrimination or rises to the level of persecution, but that this distinction was easy to make in Iran where homosexuals are "crushed like

152. *Id.* at 9.

153. *Id.* at 7.

154. *Id.*

155. *Id.* at 14.

156. *Id.* at 9.

157. *Id.*

158. *Id.* at 13-14.

159. *Id.* at 13.

160. *Id.*

161. *Id.*

vermin."¹⁶²

Beyond its impact on the applicant in this case and potentially on many other Iranian asylum-seekers, this decision is a helpful addition to the jurisprudence because it attempts to analyze the social group term and to suggest ways of identifying other particular social groups. The "objective observer" approach to "undesirable groups" brings a realistic flexibility to the legal analysis. Persecution of newly emerging despised social groups can be recognized under this approach, as well as persecution of individuals who comprise traditional social groups.

Had the courts applied this analysis in the two cases previously discussed, the courts might have reached different results. In the Indian case, it appears clear that a significant portion of the general population considers it unacceptable for women to marry men from lower castes. These women are the targets of discrimination, persecution, and worse. Whether the women know each other or not, they share a common lot and suffer because of their common social characteristic. An objective observer of Indian society would conclude that the population views these women as an undesirable group.

In the Polish case the view the general population has of private entrepreneurs is less clear. It is apparent, however, that the official view of owners of private business is that they are an undesirable element in society. Because the government has the power and desire to persecute this unacceptable group, an objective observer of society would likely consider that private business owners were an undesirable group.

4. *Chinese Landowner – Approved*

Issues involving family relationships and economic status figured in the 1983 decision of the Administrative Court in Ansbach concerning the asylum application of a young man who had fled the People's Republic of China.¹⁶³ The court reversed the Federal Refugee Office's negative decision and affirmed the applicant's right to asylum.¹⁶⁴ The applicant, born in 1950, claimed that his family had been prosperous in pre-revolution-

162. *Id.* at 14. The court also asserted that whereas a government might have a legitimate interest in criminalizing homosexual activity, the issue here was whether the Federal Republic should send someone back to Iran to face execution for his homosexual tendencies. *Id.* at 10.

163. Judgment of March 29, 1983, No. AN 419-I/78 (XVI), *Verwaltungsgericht Ansbach* [VGA].

164. *Id.* at 1. The procedural history of the case was somewhat unusual. The applicant arrived by ship in the Federal Republic in December 1974. He left the ship in Hamburg. After working for his meals at a Chinese restaurant for some time, he left Hamburg for Düsseldorf. Having run out of money, and with no working papers, he turned himself in to the police. He filed an asylum application on February 11, 1975. On September 9, 1976, he was granted refugee status. On November 24, 1976, the Federal Commissioner for Asylum Affairs, *see supra* notes 26, 58-59 and accompanying text, lodged an objection, pointing out that the asylum-seeker had produced no corroborative evidence whatsoever. On April 27, 1978, the Federal Commissioner's objection prevailed and the Federal Refugee Office rejected the applicant's claim for asylum. The asylum applicant then filed the current appeal in the Administra-

ary China.¹⁶⁵ After the Revolution in 1949, their rice fields were seized and they were harassed and persecuted as class enemies. Both of the applicant's parents died before he was five; nevertheless, he was criticized and discriminated against as the child of class enemies. After he had finished his schooling at age eighteen, he worked on an agricultural collective. He was criticized and on occasion beaten. At the age of twenty-five he fled by foot to the coast and swam to Hong Kong. There he worked on the docks for two months and eventually sailed on a ship that landed in Hamburg.¹⁶⁶

The court perceived credibility as the central issue of this case. The court ruled that it was undisputed that the prosperous families who had owned large land holdings prior to the Revolution had suffered persecution after 1949, and that children of these families continued to be targets of harassment. Consequently, the court concluded that there was persecution of members of the social group of prosperous landowners.¹⁶⁷ The legal issues were not in dispute. Rather, the contested issue was a factual one: did the applicant in fact belong to this particular social group?

The government argued that the applicant was not a member of the large landholding class, and emphasized that he had presented no evidence at all to corroborate his story. The government also asserted that there was no evidence that the applicant feared persecution in 1975 when he fled and that any punishment he suffered for his flight could legitimately be characterized as prosecution.¹⁶⁸ Indeed, the evidentiary support for the asylum claim was skimpy. There was no evidence other than the applicant's own testimony to show that he had even been born in the People's Republic of China.¹⁶⁹ Nonetheless, the court noted that the applicant had recounted his experience in great detail and that his story corresponded to other reports of similar persecution and flight.¹⁷⁰ In the light of this correspondence, the evidence from other sources concerning

tive Court of Wiesbaden, asking the court to rescind the April 1978 decision of the Federal Refugee Office. Judgment of March 29, 1983, VGA at 3-6.

165. *Id.* at 7. Other than his own testimony, the applicant had no evidence at all to corroborate his story or even to prove that he had come from the People's Republic of China. There were certain gaps in his description of his life in and flight from China, but the court found his testimony credible. *Id.* at 8-9. See also *id.* at 2-5 (summary of facts).

166. *Id.* at 4. There was contradictory testimony as to whether the applicant had been a stowaway aboard this ship. The court believed the applicant's assertion that he had not stowed away, and discounted the contradictions as errors in translation. *Id.*

167. *Id.* at 7-8.

168. *Id.* at 8-9. Based on information received from the Foreign Ministry of the Federal Republic, the court believed that illegal departure violated § 176 of the Criminal Code of the People's Republic of China and was punishable by a maximum prison term of one year. *Id.* at 9.

169. *Id.* at 7. Noting that there was no corroborative evidence concerning his homeland, the court accepted that the interpreter could help to verify that the applicant was from the Province of Canton. *Id.*

170. *Id.* at 7-8. The court appeared to conclude that the applicant's story was truthful because it was similar to the stories told by so many others. This, of course, is not the only conclusion that can be drawn from the similarity. The court could have concluded that the

persecution in China of children of formerly wealthy families, and the lack of any evidence that cast doubt on the applicant's credibility, the court declared that he had presented sufficient proof to establish his right to asylum in the Federal Republic.¹⁷¹

The court quickly disposed of the government's other two arguments. In response to the contention that the applicant may have faced mistreatment in earlier times but not in 1975 when he left China, the court characterized the applicant's life from 1968 to 1975 as years of mistreatment.¹⁷² The court noted that the applicant had long ago decided to flee because he found his life unbearable. By the 1968 to 1975 period, he simply expected discriminatory treatment. His resignation to low-intensity harassment did not mean that persecution had ceased.¹⁷³ Moreover, the court stated, it was unnecessary to decide precisely what mistreatment the applicant had suffered after he left school in 1968, because his illegal departure itself gave rise to a new ground of political persecution.¹⁷⁴

By crossing the border and leaving China without permission, the applicant had violated a criminal law with a potential penalty of one year imprisonment.¹⁷⁵ Although this is a fairly mild punishment, the court stated that this punishment is political in nature and, therefore, constitutes persecution, not prosecution.¹⁷⁶ Because the law was not merely a measure to keep order but rather an attempt to force people to stay and live under a political system with which they disagreed, the court concluded that this law has a political aim.¹⁷⁷ In addition, the court noted that people convicted of illegal departure are sent to a re-education camp,¹⁷⁸ demonstrating that the government's objective is political rather than penal. The mildness of the penalty does not change its political nature, according to the court.¹⁷⁹ Nor was the court influenced by the fact that the law regarding illegal departure had become effective after the applicant had left the People's Republic.¹⁸⁰ The possibility of punishment under the law existed.

applicant's claim was invented out of whole cloth based on the standard prosecution story. *Id.* at 8.

171. *Id.* at 7-9.

172. *Id.* at 8-9. The court gives a detailed discussion of the applicant's years of mistreatment, which triggered his decision to flee. *Id.*

173. *Id.*

174. *Id.* at 9-10.

175. *Id.*

176. The jurisprudence in the Federal Republic regarding *Republikflucht* [illegal departure] is extensive. Criminal prosecution for leaving one's homeland without authorization is deemed persecution based on a political conviction. *Asylum in Europe*, *supra* note 7, at 156-157, ¶ 26. See generally R. MARX, *Asylrecht* [ASYLUM LAW] § 87 (4th ed. 1984) (containing extensive annotations of judicial opinions concerning *Republikflucht*).

177. Judgment of March 29, 1983, VGA at 9-10.

178. *Id.*

179. *Id.*

180. *Id.*

As the summary of the opinion indicates, the court credited all of the applicant's factual assertions and legal arguments. The court was not disturbed by the lack of corroborative evidence of even the most basic facts. Moreover, the court credited the applicant's story because it was similar to reports of persecution and flight made by other Chinese asylum-seekers. Although the applicant's testimony may have been truthful, it is easy to imagine a more skeptical court discounting a totally unverified account that corresponds to the known persecution and flight pattern as a tale created for the asylum process. Instead, the Ansbach court accepted the applicant's claims at face value and required the government to produce evidence to disprove the applicant's claim.¹⁸¹

Perhaps this generosity to the asylum-seeker was due in part to the fact that his claim of persecution based on his family's former prosperity recounts an experience often observed in post-revolutionary societies. Thus, the court was familiar with this type of claim and recognized the impact that family membership in an overthrown class was likely to have. Perhaps the court's lack of skepticism was due in part to the fact that the applicant had fled a communist country, and thus benefitted from a presumption of persecution.¹⁸² The court did not mention either consideration, but the friendly reception it gave this applicant's claim contrasted strongly with the reception received by asylum applicants from non-communist countries such as India.¹⁸³ At the very least, this decision demonstrates that applicants relying on persecution based on membership in a particular social group receive a favorable review if their social group is class-based.

5. *Rumanian Landowners with Emmigré Family Members – Approved*

Family membership and economic status again played a role in the 1982 decision of the Administrative Court of the Saarland reviewing a social group claim presented by an asylum-seeker from Rumania.¹⁸⁴ The applicant, born in 1914, came from a prosperous family. Her father was the deputy director of the National Bank, her husband was a doctor in the royal army. After the revolution, the government not only confiscated her parents' land and houses, but it discharged her husband from the army, and sent him to the countryside where there was a shortage of doctors.¹⁸⁵ Her husband died in 1970. In 1976, her son emigrated to Israel with his wife, who was of Jewish descent. After her son and daughter-in-law's criticism of the persecution they had suffered in Ruma-

181. *See id.* at 6-7.

182. *See supra* notes 27, 139-41 and accompanying text.

183. *See supra* notes 122-142 and accompanying text.

184. Judgment of Dec. 10, 1982, No. 10 K 115/80, *Verwaltungsgericht Saarland* [VGS].

185. *Id.* at 3.

nia was broadcast on Radio Free Europe,¹⁸⁶ the Rumanian authorities made the applicant's life very difficult. State security agents interrogated her, often at night. They mistreated her and demanded that she force her son to keep silent in the future. They threatened to put her into a psychiatric hospital if she did not prevail upon her son. They took away her four-room apartment and assigned her to one room. They organized her neighbors and acquaintances into so vicious a harassment campaign against her that she almost had a nervous breakdown.¹⁸⁷ In 1977 she decided that life in Rumania was unbearable, but the authorities repeatedly denied her requests to leave. Finally, after paying a bribe,¹⁸⁸ she got a passport in 1979, and went to the Federal Republic.¹⁸⁹

The applicant explicitly argued that she had been persecuted as a member of the particular social group comprised of wealthy landowning families.¹⁹⁰ She asserted that the authorities perceived this group as politically unreliable and treated members of the group as suspicious characters. In addition, the applicant based her asylum claim on the persecution she had suffered as a member of the family of someone who had been publicly critical of Rumania. Although one might characterize this claim as persecution based on the political opinion of her son,¹⁹¹ it is possible to view it as persecution based on family relationship. So viewed, the family would constitute the particular social group.

The Federal Refugee Office credited the allegations the applicant made, but concluded that she had not established a right to asylum.¹⁹² With regard to the confiscation of her father's property and the dismissal of her husband, the agency stated that these measures had only indirectly affected the applicant.¹⁹³ With regard to the interrogations and other mistreatment she received after her son's public criticism of Rumania, the agency ruled that these were not sufficiently severe to constitute persecution.¹⁹⁴ With regard to the difficulties of obtaining permission to leave, the agency asserted that the applicant should have no fear of punishment if she returned to Rumania because she had left with a valid passport and exit permission.¹⁹⁵

186. This criticism was also published in an American newsweekly, which the court did not identify. *Id.* at 3-4.

187. *Id.* at 4.

188. She paid more than 10,000 Leu as a bribe. *Id.* at 4. In October 1989, the exchange rate was 8.695 Leu for \$1 (U.S.). Telephone Interview with Ingalill Carlson, New York Foreign Exchange, (Oct. 6, 1989).

189. She left Rumania on June 30, 1979, and flew directly to the Federal Republic. She filed a written application for asylum on July 18, 1979. Judgment of Dec. 10, 1982, VGS at 3.

190. The court refers to her membership in the wealthy propertied class *Grossbürgertum*. *Id.* at 6.

191. See *supra* notes 95-97 and accompanying text.

192. Judgment of Dec. 10, 1982, VGS at 5.

193. *Id.*

194. *Id.*

195. *Id.*

In reversing the Federal Refugee Office's negative decision, the court noted that the applicant had suffered repressive measures far in excess of the normal treatment accorded the general population in Rumania. The court ruled that this mistreatment was sufficiently severe and injurious to constitute persecution.¹⁹⁶ Further, the court was not convinced that the applicant's use of a passport procured through bribery to leave Rumania would enable her to escape prosecution under the Rumanian criminal laws regarding unlawful departure.¹⁹⁷ In addition, the court stated that by filing an asylum request, the applicant was liable for criminal prosecution in Rumania for slandering the state.¹⁹⁸ Accordingly, based on all these considerations, the court concluded that the applicant had a well-founded fear of persecution if she returned to Rumania.

Unfortunately, the court focused solely on the likelihood of persecution and not on the basis for the persecution. It lumped all the claims together — the past mistreatment, the potential criminal prosecutions for illegal departure and for filing an asylum request — and concluded that the applicant was entitled to asylum. The court did not analyze either the landowning class social group claim or the family-of-emigré social group claim. Nor did it analyze the political opinion claim inherent in prosecutions for unlawful departure and for slandering the state. Necessarily, the court must have concluded that the applicant had a well-founded fear of persecution based on social group or political opinion or a combination of the two, but the opinion does not disclose the court's reasoning.¹⁹⁹

Viewed in light of the analysis proffered by the Wiesbaden court in the case of the homosexual asylum-seeker from Iran, both the Chinese and the Rumanian cases appear to qualify as persecution based on membership in a particular social group. In both cases the pertinent social group is a class-based one: pre-revolutionary prosperous landowners. In both cases the evidence demonstrated that the children of the former landed gentry received rough treatment directly due to their family heritage. In both cases the evidence indicated that an objective observer would con-

196. *Id.* at 10.

197. *Id.* at 10-11. The court therefore considered the issue of illegal departure [*Republik-flucht*], discussed *supra* note 180, and examined the text of the pertinent criminal laws of Rumania. *Id.*

198. *Id.* at 11. Whether the filing of an application for asylum in itself is a sufficient post-flight basis for persecution is a topic frequently addressed by the German courts. See generally Marx, *supra* note 180, § 70 (extensive annotations concerning post-flight grounds [*Nachfluchtgründe*] for asylum, of which applications for asylum [*Beantragung von Asylrecht*] comprise a large subset). The Saar court examined the Rumanian laws criminalizing "slander of state organs" that might be applied to the applicant, and relied on Foreign Ministry information concerning the likelihood of prosecution under these statutes in concluding that the applicant would likely be punished in Rumania for filing an asylum claim in Germany. *Id.*

199. Possibly, the persecution of the applicant could be described as religious in nature, in that her daughter-in-law was Jewish and had emigrated to Israel. The court did not mention persecution based on religion.

clude that powerful segments of society viewed the children of landowning families as class enemies. In both cases the persecution of a social group led members of that group to take actions in defiance of the regime, thus resulting in persecution based on political opinion as well as based on membership in the social group.

6. *Selected Corrupt Government Ghanaian Officials – Denied: The Homogeneity and Inner Structure Tests*

Although economic activity and relative prosperity were important in the Chinese and Rumanian cases, these factors in themselves are not sufficient to constitute a social group according to the Administrative Court of Hannover. In 1984 the court issued a lengthy opinion sustaining the Federal Refugee Office's denial of asylum to a former government official from Ghana.²⁰⁰ The applicant, a low-level official dealing with agriculture, had acted in conjunction with his supervisor to sell government-owned fertilizer to farmers at inflated prices.²⁰¹ After complaints from farmers the police arrested him, but his supervisor intervened and managed to get him released after three days in jail.²⁰² Approximately one month later a coup occurred.²⁰³ Within days it appeared that officials of the prior government were being investigated; the applicant fled to Togo and then to the Federal Republic.²⁰⁴

In his application the asylum-seeker emphasized that the new regime explicitly vowed to wage a "holy war" against government corruption²⁰⁵ and had established special tribunals to exercise "revolutionary justice."²⁰⁶ He claimed that the government had categorized as enemies of the regime corrupt officials, the particular social group to which the applicant belonged. He asserted that the government of Ghana mistreated and even tortured prisoners deemed enemies of the regime, and applied the death penalty to corruption cases. Thus, sending him back to Ghana was sending him to certain death.²⁰⁷

200. Judgment of June 6, 1984, No. 1 OVGA 91/82 As, *Verwaltungsgericht Hannover* [VGH].

201. The court had serious doubts about the applicant's credibility. *Id.* at 6-7. However, the court did not specify which aspects of his testimony it believed and which aspects it did not believe. In terms of the legal analysis, the court proceeded as if the applicant's assertions were true, and concluded that nonetheless he did not qualify as a refugee. *Id.* at 3-5.

202. After being reported to the police on May 10, 1979, the applicant spent three days in jail. *Id.* at 3.

203. Flight Lieutenant Jerry Rawlings, the current leader of Ghana, first came to power in a coup on June 4, 1979. *See id.* at 3. Rawlings remained in power for three months after the 1979 coup. He returned to power in a coup on December 31, 1981. *See id.* at 113. He has remained in power since that time. 1990 WORLD ALMANAC.

204. The applicant arrived in the Federal Republic as a stowaway on a ship, on September 20, 1979, approximately three and one-half months after the coup. Judgment of June 6, 1984, VGH at 3-4.

205. *Id.* at 4.

206. *Id.*

207. *Id.* at 3.

At first blush, describing corrupt government officials as a particular social group seems a desperate and brazen assertion. This case bears closer examination, however. The applicant did not argue that prosecution of criminals in general constitutes persecution nor argue that criminals prosecuted and punished for violating the penal laws are sufficiently similar to one another that they can be classified as a particular social group that needs protection from persecution. Rather he argued that the government had selected a relatively harmless group of offenders, denied them proper legal proceedings, and subjected them to disproportionate penalties. He asserted that the government took this action for political reasons. The applicant conceded that corrupt government activity is illegal and deserves to be punished, but claimed that the disproportionality of the punishment revealed that the goal of the government is political, not penal. In essence, he argued that the irregular judicial proceedings and the application of the death penalty to economic crimes, which in the past had not been treated harshly, undermine the view that the Ghanaian government is merely prosecuting rather than persecuting individuals.²⁰⁸ He further argued that the government had targeted a fairly small group of people for this persecution. This group consisted of officials who had served the former government, who were educated, and had through their positions committed non-violent, economic crimes.²⁰⁹

With regard to the social group claim, the court was skeptical. The court stated that to qualify as a particular social group within the meaning of the Geneva Convention refugee definition, an array of individuals needed both a certain degree of homogeneity and some degree of inner structure.²¹⁰ The court doubted that individuals whose similarity to each other was only that they had committed economic crimes satisfied either element.²¹¹ The court did, however, expressly state that in certain circumstances a group of criminal offenders could constitute a particular social group for purposes of the refugee definition. If the government selected a group of comparatively insignificant and harmless law-breakers, treated them in a flagrantly illegal manner, and subjected them to greatly disproportionate punishment in order to divert the citizenry's hostility from the government to this scapegoated group, then one could say that certain criminals were being persecuted as members of a particular social group.²¹²

After setting forth these conditions in which criminals could be deemed members of a particular social group, the court determined that

208. *Id.* at 9.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

officials accused of public corruption in Ghana did not constitute such a group. The infrequent imposition of the death penalty indicated that corrupt officials did not suffer greatly disproportionate punishment.²¹³ The judicial process accorded these defendants, though summary, was not flagrantly illegal.²¹⁴ The criminal offense at issue was not insignificant and harmless.²¹⁵ Thus, the corrupt officials classification failed on all the indicia the court had outlined regarding the persecution of criminal offenders as a social group. Although the court examined at some length the facts pertinent to viewing criminal offenders as a persecuted social group, it did not explain further its initial comment that it was necessary to prove homogeneity of members and an internal group structure in order to establish a particular social group within the meaning of the Convention refugee definition.

The potential death penalty (the Federal Republic of Germany has none) and the irregularities in the post-coup judicial system were two aspects of the applicant's claim that appeared to trouble the court, however. In analyzing the capital punishment claim, the court relied on expert testimony. The court stated that the death penalty in Ghana was imposed only rarely, only if the crime was particularly heinous, and only if unanimously voted by the tribunal.²¹⁶ Acknowledging that the potential punishment for corruption included the death penalty, the court concluded that it was unlikely in any but the most extreme case.²¹⁷ Noting that Ghanaian asylum-seekers often overstate their cases and claim that they face a death sentence for an insignificant economic crime,²¹⁸ the court implied that was what this particular applicant had done. Moreover, the court recognized that meting out severe penalties for economic crimes might help get a nation's economy back in order, in addition to deterring criminal activity.²¹⁹ Thus, the court implied that even if the applicant was a likely candidate for the death penalty, capital punishment might be legitimate in his case.²²⁰

The court discussed in much greater detail the modifications of the judicial system since the 1979 coup.²²¹ The court conceded that the judicial system in Ghana had been under great attack in the early 1980's, raising serious questions about its impartiality and independence.²²² These excesses had now ceased, according to the court, and the judicial

213. *Id.* at 22.

214. *Id.* at 10.

215. *Id.* at 9.

216. *Id.* at 22.

217. *Id.* at 24-25.

218. *Id.*

219. *Id.*

220. *See id.*

221. *Id.* at 10-21.

222. Judges were beaten; a few courts were closed; three Supreme Court judges were murdered; other Supreme Court judges fled the country. In the summer of 1983 a mob occupied

system was no longer in disarray and under siege.²²³ The system, however, had clearly changed since the coup. These changes included expedited trials,²²⁴ admissibility of hearsay evidence,²²⁵ defendant bore the burden of proof,²²⁶ no guaranteed life tenure for judges,²²⁷ and no right to appeal.²²⁸ The court concluded that these changes in the legal tradition in Ghana did not delegitimize the modified system.²²⁹ According to the court, some of the changes had corrected defects in the common law tradition as compared to the civil law system.²³⁰ Even those changes that were questionable did not prevent the new system from according trials that meet the minimum standards of fairness.²³¹

Furthermore, the court emphasized, there was no evidence that the new judicial system was established to attack members of a particular social group.²³² To the extent that the government's objective in creating new tribunals was to root out corruption, the court concluded that this was a legitimate goal, not persecution.²³³ Thus, in light of the basic fairness of the legal system, the court ruled that the government's call for a holy war on corruption, unhindered by legal technicalities, could be dismissed as mere rhetoric.²³⁴

In sum, this case established that in certain circumstances the treatment of criminal offenders may constitute persecution of a particular social group.²³⁵ The court concluded, however, that in the circumstances present in Ghana in 1984, government officials prosecuted for corruption did not constitute such a group. Furthermore, the court posed a two-part analysis for social group claims: homogeneity and inner structure.²³⁶ By rejecting the refugee claim in this case the court implicitly decided that corrupt government officials lacked the requisite degree of inner structure and homogeneity to meet the social group definition.

7. *Ugandan Member of Bagandan People – Approved*

Although the Ghanaian official's claim foundered on the Hannover court's two-part approach, the next two social group claims fit quite

the Supreme Court with the goal of abolishing the regular administration of justice. *Id.* at 11-12.

223. *Id.* at 12.

224. *Id.*

225. *Id.* at 20.

226. *Id.* at 20-21.

227. *See id.* at 17-18.

228. *Id.* at 16-17.

229. *Id.*

230. *Id.* at 11.

231. *Id.* at 10.

232. *Id.* at 16.

233. *Id.* at 9, 16.

234. *Id.* at 24-25.

235. *See id.* at 27.

236. *Id.* at 9.

comfortably into that analysis. Both involved asylum-seekers from Uganda.

In the earlier case, decided in 1983 by the Administrative Court in Cologne, the court reversed the Federal Refugee Office's rejection of the asylum claim.²³⁷ The applicant, a citizen of Uganda, arrived in the Federal Republic in late 1978 at the age of eighteen.²³⁸ He traveled on a Ugandan passport that had been issued in 1974. Shortly after his arrival he applied for asylum, listing three grounds on which his family had been, and would continue to be, persecuted. His claim rested on membership in three social groups: the group comprised of large landowners, the group of skilled professionals, and the Baganda group.²³⁹ His father, an architect and prosperous landowner, was a member of the Baganda, who largely live in the southern part of Uganda.²⁴⁰ Because the Baganda in general opposed the government led by Idi Amin, they were often persecuted.²⁴¹ The applicant testified that his father's land had been confiscated by the Amin regime. His house had been ransacked. The father went into hiding and later disappeared, likely murdered by the government. Friends of his father sent the applicant to live in the frontier territory; from there he was sent to the Federal Republic to join his sister in Bonn.²⁴²

In early 1979, after the applicant had arrived in Germany, Idi Amin was overthrown.²⁴³ Based on the changed circumstances in Uganda, the Federal Refugee Office rejected the applicant's request for asylum.²⁴⁴ The applicant promptly challenged the decision in court, alleging the same three social group grounds. In addition, he submitted reports that the Baganda were suffering terribly under Obote, Amin's successor.²⁴⁵

The government argued that the applicant had not proven that he himself would be persecuted, and pointed out that previous judicial decisions had concluded that membership in the Baganda people in itself is an in-

237. Judgment of Apr. 1, 1983, No. 15 k 15316/80, *Verwaltungsgericht Köln* [VGK].

238. *Id.* at 2-3 (summary of the facts).

239. *Id.* at 2.

240. *Id.* at 6.

241. The Baganda number approximately three million; they comprise one quarter of the population of Uganda. *N.Y. Times*, Oct. 19, 1986, at A3, col. 5. Historically, they have been the dominant group. *Id.* The Baganda also had well-established feudal kingdoms. *Wash. Post*, December 15, 1980, at A22. The Baganda people live in the southern part of Uganda. *Id.*

242. Judgment of Apr. 1, 1983, VGK at 2-3.

243. Tanzanian military forces overthrew Amin in April 1979. *Wash. Post*, April 12, 1979, at A16.

244. Judgment of Apr. 1, 1983, VGK at 3 (citing Judgment of Oct. 1, 1980, *Bundesamt für die Anerkennung Ausländischer Flüchtlinge*, (Federal Refugee Office)).

245. Apollo Milton Obote was a leading government figure in Uganda after independence from Great Britain in 1962. First he was prime minister; he cancelled elections in 1967 and named himself president. Idi Amin, his military chief of staff, overthrew Obote in 1971. After Amin was deposed by Tanzanian troops in 1979, *see supra* note 243, Obote returned to Uganda and campaigned for the presidency, which he won in a disputed election in December 1980. *Wash. Post*, *supra* note 241; *N.Y. Times*, *supra* note 241. See further discussion *infra* note 253.

sufficient basis for asylum.²⁴⁶ Moreover, the government argued, the applicant did not need asylum in another country. He could ensure his own safety by simply moving from the southern part of Uganda to another region of the country.²⁴⁷

In response to the government's first argument, the court acknowledged that a grant of asylum must be predicated on a threat of persecution to the individual applicant.²⁴⁸ If, however, it is clear that a particular social group is persecuted, then an applicant need only prove membership in that social group.²⁴⁹ The fact that the social group is a target means that individual members of the group are in jeopardy. Thus, based on their group identity, individuals have a well-founded fear of persecution to themselves.²⁵⁰ To rule otherwise, said the court, would require each member of a group targeted for persecution to remain in his homeland and expose himself to the persecution.²⁵¹

There was no doubt, according to the court, that the applicant was a member of the Baganda people.²⁵² Further, said the court, the evidence indicated that the Baganda continued to suffer terribly under the Obote regime. Obote and most of the army came from the northern part of Uganda,²⁵³ a much poorer area than the southern region inhabited by the Baganda.²⁵⁴ Guerilla activity was concentrated in the south.²⁵⁵ The longstanding resentment of the prosperous Baganda by other Ugandans, plus the military goal of eliminating the guerrillas made a murderous combination, concluded the court.²⁵⁶ The army suspected the civilian population of supporting the guerrillas; therefore, the army reacted by arbitrarily imprisoning, torturing, and murdering members of the

246. Judgment of Apr. 7, 1983, VGK at 7-8.

247. *Id.* at 9. This is the so-called "internal flight" principle. An individual who has a well-founded fear of persecution in one region of his homeland is not entitled to asylum in the Federal Republic if he can live securely in some other part of his homeland.

248. *Id.* at 8.

249. *Id.* at 8-9.

250. *Id.* at 8.

251. *Id.* at 9.

252. *Id.* at 6.

253. *Id.* at 6-7. Apollo Milton Obote is the grandson of a chief of the Lango tribe in the north. His followers are in the north; his opponents in the south, particularly the Baganda region. Wash. Post, *supra* note 241. The rivalry between the two northern tribes that dominated the Ugandan army, the Acholi and the Lango, led to the overthrow of Obote in July 1985 by Gen. Okello of the Acholi group. N.Y. Times, August 11, 1985, at E5, col. 1. Christian Science Monitor, July 30, 1985, at 15. Okello's government was deposed in January 1986 by Yoweri Museveni, a southerner. Christian Science Monitor, December 29, 1988, at 7. Ironically, the army under President Museveni was later accused of being dominated by the southern Baganda. Though generally considered well-disciplined, the post-1985 army is feared by people in the north who supported the previous government. Christian Science Monitor, January 26, 1987, at 10.

254. The Baganda have historically dominated Uganda. They bitterly opposed Obote's efforts to destroy their feudal kingdoms. The Baganda seek to establish an independent monarchy. Wash. Post, *supra* note 241; N.Y. Times, *supra* note 253.

255. Judgment of Apr. 7, 1983, VGK at 6.

256. *Id.* at 6-7.

Baganda group.²⁵⁷ The soldiers also terrorized the Baganda because they perceived the Baganda people to be enemies of the regime.²⁵⁸ The court decided that this treatment occurred based on membership in the Baganda people, and constituted persecution of a particular social group.²⁵⁹

The court also dismissed the government's argument that the applicant could be safe by simply moving to another region of Uganda.²⁶⁰ If the applicant were forced to live in other areas of Uganda, according to the court, he would be unsafe because people would view him as a member of the "enemy" Baganda.²⁶¹ Moreover, the army would likely press him into service and force him to fight against the Baganda in the south.²⁶² As a result, his situation elsewhere in Uganda would be untenable.

In sum, the court stated that the applicant must be granted asylum because the evidence supported an affirmative answer to the two significant factual questions presented by the case. Those questions were: (1) Was the applicant a Baganda? (2) Did the Ugandan government persecute the Baganda? The court accepted, without analysis, the assertion that the Baganda constitute a particular social group within the meaning of the Geneva Convention.²⁶³ Such a conclusion was essential to the court's reasoning, much of which focused on the mistreatment individuals had received merely because they belonged to the Baganda people. The fact that the Baganda are a well-known African group with a specific group identity and a complex internal structure undoubtedly influenced the court.²⁶⁴ This asserted social group was not a conglomeration of strangers accused of violating a legitimate law, but a cohesive group with a common ethnic heritage.

8. *Ugandan Member of Bagandan People II – Approved*

Later in 1983, the Administrative Court in Ansbach reached a similar conclusion about another asylum-seeker from Uganda.²⁶⁵ This applicant, also a Baganda, was twenty-nine years old in 1977 when he came to the Federal Republic and claimed asylum.²⁶⁶ He alleged that he feared

257. *Id.*

258. *Id.* at 7.

259. *Id.* at 8.

260. *Id.* at 9.

261. *Id.* at 10.

262. *Id.*

263. *Id.* at 8.

264. Historically a strong group, the Baganda society included a well-developed system of feudal kingdoms. See *supra* note 241.

265. Judgment of Nov. 29, 1983, No. AN 185 XIII/79 (XIX), *Verwaltungsgericht Ansbach* [VGA].

266. *Id.* at 2-3 (summary of facts).

persecution on religious, political, and social group grounds.²⁶⁷ He was Protestant; he had been involved in political demonstrations; he was a member of the Baganda people.²⁶⁸ The applicant stated that from 1970 to 1975 he had studied in Hungary, where his refusal to take courses in Marxism and Leninism created difficulties. After returning to Uganda in 1975 he began medical studies, but was arrested and jailed for several weeks for participating in a student demonstration. Shortly thereafter, he left Uganda by foot for Kenya. He resorted to a bribe to get a passport and visa and after a year in Kenya he managed to fly to Germany.²⁶⁹

The applicant also alleged that his family had been persecuted by the Amin regime. He said that while he was in Hungary his father had been murdered, his uncle and brother-in-law had been executed, another uncle had been abducted, his mother had been placed under house arrest, and four of his siblings had fled the country after protesting their father's death.²⁷⁰ He attributed these events to the Amin regime's resentment of and violence against the Baganda.

The Federal Refugee Office rejected the applicant's request for asylum.²⁷¹ Noting that there were inconsistencies in his statements concerning his own arrest and his father's death, the agency concluded that the applicant was not credible.²⁷² Furthermore, the government noted that although information from the Federal Republic's Foreign Ministry confirmed that the Ugandan army terrorized the civilian population, the Foreign Ministry attributed this to lack of training, discipline, and pay rather than to any particular animosity toward the Baganda.²⁷³ The Foreign Ministry explained the high incidence of terror among the Baganda to the coincidence that the army happened to be concentrated where the Baganda live.²⁷⁴

The court acknowledged that the applicant had made contradictory and unsubstantiated allegations.²⁷⁵ Moreover, because the Amin regime had fallen from power in the interim between the filing of the claim and judicial review of the agency's decision, the court held that the changed political conditions meant there was no longer a basis for many of the

267. *Id.* at 2-4.

268. He alleged that Idi Amin, who was Moslem, persecuted members of other religions. *Id.* at 2. Amin's violence toward the Christian majority in Uganda was well known. Wash. Post, February 27, 1977, at A14.

269. Judgment of Nov. 29, 1983, VGA at 3.

270. *Id.* at 2-3.

271. *Id.* at 4.

272. *Id.*

273. *Id.* at 9. In 1984 the State Department of the United States reported that the Ugandan army was underfed, underpaid, undisciplined, and in desperate need of military training assistance. N.Y. Times, Aug. 10, 1984, at A2, col. 3.

274. Judgment of Nov. 29, 1983, VGA at 9.

275. *Id.* at 5-6.

fears the applicant had expressed.²⁷⁶ Nonetheless, the court concluded that the applicant still had a well-founded fear of persecution.²⁷⁷ Despite reservations about the applicant's credibility in general, the court had no doubt that he was a member of the Baganda people.²⁷⁸ The court also believed that the historical record of enmity between the Baganda and other people in Uganda was clear.²⁷⁹ Turning to current events, the court found that the Baganda in general were known to oppose the Obote government, which replaced that of Idi Amin.²⁸⁰ The court also found credible the reports of a campaign of terror by the army against the Baganda.²⁸¹ Without expressly disagreeing with the Foreign Ministry's view, the court concluded that the current Ugandan government continued to persecute the Baganda.²⁸² The court agreed with the Foreign Ministry that some members of the Baganda people might escape persecution. But, the court stressed, members of the Baganda group definitely faced heightened risks of danger.²⁸³ Thus, their fears of persecution were well-founded. Accordingly, the applicant, as a member of the Baganda people, had a right to asylum in the Federal Republic.²⁸⁴

As had the Cologne court, the Ansbach court accepted without discussion the assertion that the Baganda constitute a particular social group for purposes of the Convention refugee definition. Again, the sense that the Baganda people are a cohesive group with a complex internal structure and are perceived by the general population in Uganda as a specific social group bolstered the court's conclusion.

Although this holding may seem intuitively correct, it is interesting to observe, nonetheless, the ease with which the court overlooked the Foreign Ministry's evidence that army terror was due to lack of training and discipline rather than to hostility to the Baganda people. Similar evidence about the lack of training, efficiency, and pay of the Indian police, which led to their inability or unwillingness to protect women who marry

276. *Id.* Idi Amin was overthrown in April 1979. See Judgment of Apr. 7, 1983, VGK at 3 and *supra* notes 245, 253.

277. Judgment of Nov. 29, 1983, VGA at 10.

278. The court considered the following evidence important: the applicant had always asserted that he was a member of the Baganda people; he alleged he was born in the Baganda region and accurately located this birthplace on an unmarked map; he spoke Luganda, the language of the Baganda people. *Id.* at 6-7.

279. The court described the "divide and conquer" British colonial tactics in Africa, and noted that under British rule the Baganda became the most advanced of the neighboring peoples. *Id.* at 7. The Baganda are the largest group in Uganda and historically have been the most dominant Ugandan people. N.Y. Times, *supra* note 241.

280. Judgment of Nov. 29, 1983, VGA. The Baganda strenuously opposed Obote in his first presidency prior to his overthrow by Amin because he tried to crush the power of the Baganda feudal kings. Wash. Post, *supra* note 241.

281. The court's reference to the Obote regime's indiscriminate terror perhaps is a clue that the court was reluctant to return the applicant to Uganda because the situation in Uganda was so threatening. Judgment of Nov. 29, 1983, VGA at 10-11.

282. *Id.* at 7-8.

283. *Id.* at 9.

284. *Id.* at 10.

out of caste or who demonstrate for women's rights, compelled another court to conclude that persecution could not be attributed to the victims' membership in a social group.

9. *Sports Figures and Tattooed People – Denied*

The last social group case in the non-spouse category contains claims that sports figures, people who have been tattooed, and family members constitute particular social groups. For reasons having to do with the applicant's credibility, rather than the three asserted, the Administrative Court in Kassel upheld the Federal Refugee Office's rejection of the Iranian asylum-seeker's claim.²⁸⁵ Coincidentally, this applicant was also an admitted criminal, who committed these crimes not in Iran, but in West Germany, where he had received a substantial prison term due to multiple violations of the narcotics laws.²⁸⁶ He did not claim that his criminal status was relevant to his request for asylum. Precisely which social group or groups he believed pertinent to his claim was unclear.²⁸⁷ He alleged that he was likely to be persecuted in Iran because he had been tattooed, because he was a prominent sports figure who was rejecting his homeland, and because members of his family had been persecuted in Iran.²⁸⁸ Indeed, two of his brothers had already been granted asylum in the Federal Republic.²⁸⁹

Emphasizing that the applicant's statements contained many inconsistencies, that he had changed the basis for his asylum claim three times,²⁹⁰ that the timing of his recent application for asylum happened to coincide with the entry of a deportation order against him,²⁹¹ and that some of his assertions were inherently unbelievable,²⁹² the court concluded that this

285. Judgment of Aug. 16, 1984, No. IV/1E 08726/83, Verwaltungsgericht Kassel [VGK].

286. *Id.* at 3.

287. In addition to social group-based persecution, he also claimed he would be persecuted in Iran on religious grounds because he was not Islamic, on political grounds because he had criticized Khomeini to fellow Iranians imprisoned with him in Germany, and on political grounds because he had filed an asylum request and thus had been disloyal to the regime. *Id.* at 3, 6, 8-9. Four years earlier, in 1977, he had filed an asylum request based on his political activities against the Shah. That application was rejected in 1980 after the Shah was deposed. *Id.* (citing Federal Refugee Office decision of July 14, 1980).

288. *Id.* at 3-4.

289. *Id.* at 3.

290. The applicant first claimed asylum based on his active resistance to the Shah. After the downfall of the Shah led to the rejection of his asylum claim on July 14, 1980, he filed a new asylum application stating that he feared persecution by the Khomeini government because he was not a Moslem. His second application was denied on September 30, 1983, based on the contradictions and lack of credibility in his allegations. His third asylum application again changed grounds to allege fear of persecution based on his tattoos, his prominence as a sports figure, and his relationship to two brothers granted asylum in the Federal Republic. *Id.* at 7.

291. *Id.*

292. For example, the applicant stated that he feared persecution based on his political opinion because his fellow Iranian prisoners would make it known that he had spoken against the Khomeini regime while he was in prison in Germany. He said that he had criticized the

asylum-seeker was not credible.

It is clear from other judicial decisions that members of a family can constitute a particular social group for purposes of the refugee definition.²⁹³ In terms of the Hannover court's analysis,²⁹⁴ members of a family tend to be homogeneous, in comparison to the society at large. The degrees of kinship within a family furnish an identifiable structure for the group. Nonetheless, the court made short shrift of the applicant's fear of persecution due to his family membership. The court acknowledged that both of the applicant's brothers had been granted asylum in the Federal Republic, but pointed out that he had not kept in contact with his brothers.²⁹⁵ More importantly, the court believed there was no evidence that the government of Iran would persecute someone regardless of his personal conduct because of his family relationship to a third person viewed as disloyal to Iran.²⁹⁶ Consequently, the court concluded that the evidence did not support a finding that members of this family constituted a particular social group persecuted in Iran.²⁹⁷

As to the claim that the applicant would be persecuted because he was a prominent sports personality²⁹⁸ who had asked for asylum, the court indicated that his first asylum request may have caused a certain stir in Iran and have been resented for the detrimental publicity surrounding his "desertion."²⁹⁹ Four years later, by the time of his second request, the government in Iran had changed.³⁰⁰ Furthermore, the applicant was no longer a public personality but rather an ordinary narcotics violator, and the claim generated no publicity.³⁰¹ Although the court accepted the idea that prominent figures who seek asylum elsewhere may be viewed with particular hostility by their home government, the court concluded that in this case the applicant was a "has been" who would not be so viewed.³⁰² Because the applicant was no longer prominent, there was no need to analyze whether prominent sports figures who flee their homeland constitute a particular social group.³⁰³

With regard to the tattoos, the court acknowledged that the applicant

regime to fellow prisoners he knew were loyal to Khomeini. The court believed that if he sincerely feared persecution based on his political opinion, he would not voluntarily make that opinion known to adherents of the current regime. *Id.* at 6.

293. See *infra* text accompanying notes 312-352.

294. See *supra* text accompanying notes 200-236.

295. Judgment of Aug. 16, 1984, VGK at 10.

296. *Id.* at 10-11.

297. *Id.*

298. The opinion described him as a former world champion in the ring (*Weltmeister im Ringen*). *Id.* at 9.

299. *Id.*

300. *Id.* at 9-10. The Shah of Iran, Mohammad Reza Pahlavi, fell from power and fled Iran in 1979. 6 THE NEW ENCYCLOPEDIA BRITANNICA 376 (1986).

301. Judgment of Aug. 16, 1984, VGK at 10.

302. *Id.*

303. *Id.* at 9-10.

might be punished in Iran on account of his tattoos.³⁰⁴ Further, the court conceded that it was harsh to impose criminal penalties for merely having been tattooed.³⁰⁵ Nonetheless, the court dismissed this aspect of the case in one sentence. The court noted that the criminal penalties for tattoos apply equally to all citizens of Iran.³⁰⁶ Therefore, the court concluded, no particular group has been singled out for persecution and no social group claim for refugee status has been stated.³⁰⁷

This reasoning is specious. That a law on its face applies equally to all citizens does not preclude the possibility that in actual effect the law falls particularly harshly on one particular social group. For example, in a society in which members of one minority group are traditionally tattooed, legislation outlawing tattoos, although ostensibly nationwide in application, may have been passed to harass members of this group. Similarly, legal measures harassing private businesses, while they apply to everyone in the nation, may constitute persecution of a particular social group.³⁰⁸ To refute a claim of persecution based on membership in a particular social group, the courts must examine the criminal penalty in question to ascertain its objective and its impact.³⁰⁹

It is possible that the Kassel court did not intend to imply that persecution based on membership in a particular social group is incompatible with the existence of a facially neutral law. Instead, the court may have viewed criminal punishment for having been tattooed as an instance of legitimate prosecution rather than persecution.³¹⁰ If so, the court should have addressed the issue directly.

Although government action to enforce the penal law should not lightly be characterized as persecution, criminalizing an activity does not mean that all punishment for that activity must be viewed as legitimate prosecution rather than illegitimate persecution. To illustrate, if a government outlaws one religion and criminally prosecutes and imprisons all who practice that religion, this practice would in all likelihood constitute persecution. An investigation into the persecution-disguised-as-prosecution claim requires an evaluation of the government's penal

304. *Id.* at 8.

305. *Id.*

306. *Id.*

307. *Id.*

308. See *supra* text accompanying note 115. Although much of the harassment against the applicants in the Polish case consisted of extra-legal measures, the analysis would have been similar if there had been legislation outlawing private businesses. The analysis would also have had to address the prosecution versus persecution issue, however.

309. This is the approach adopted in cases involving *Republikflucht* (illegal departure). The courts examine the legislation criminalizing departure from one's homeland and the penalty imposed on violators of such legislation to ascertain whether the legislation is a legitimate travel control measure or an illegitimate suppression of political opinion. See *supra* note 180.

310. See *supra* text accompanying notes 119-121 for a short description of the prosecution versus persecution analysis.

goals and of the proscribed behavior. Here the court neglected to analyze the prosecution versus persecution issue.

While it is possible to say that the court implicitly decided that the underlying activity — having a tattoo — is not sufficiently important to individuals or society to be beyond the bounds of what a government can legitimately proscribe, the lack of analysis raises a serious question as to the court's view on this issue. When the facts put forth by the asylum-seeker are as unsympathetic as they are in this case and credibility findings are directly made against the applicant, it seems more appropriate to conclude that under different circumstances people with tattoos³¹¹ or prominent sports figures might be deemed sufficiently homogeneous and part of a sufficiently structured network to constitute a particular social group.

10. *Summary of the Broadly Defined Social Group Cases*

Of the nine judicial decisions described above, five included claims of persecution based on kinship or family relationships. Four of the five, the Chinese and Rumanian applicants from landowning families and the two Baganda applicants, were successful in gaining refugee status based on membership in a social group. In contrast, only two of the four non-kinship based social groups, the Polish entrepreneurs and the Iranian homosexuals achieved refugee status.

B. *Marriage Based Claims Of Social Group*

The second category of social group cases in the Federal Republic also involves asylum petitions based on family relationships. In particular, the applicants asserted that they fear persecution based on their marriage. In each of these cases the wife of an individual granted asylum in the Federal Republic alleged that she fears persecution not for activities she had undertaken herself, but as the spouse of someone who has a well-founded fear of persecution. Her social group is the family of an oppo-

311. The Judgment of July 12, 1984, No. AN 4K 83 C.945, *Verwaltungsgericht Ansbach* [VGA], was another case involving tattoos. The asylum-seeker, a young man from Yugoslavia, had large tattoos on his legs. The tattoos praised a royalist Yugoslavian general who had fought against the partisans led by Tito, thus indicating the political opinions of the asylum-seeker. Although the court found many of his statements concerning his fear of persecution contradictory and unbelievable, the court was quite impressed by the tattoos. The court pointed out that the applicant, if returned to Yugoslavia, would undergo a physical examination for his obligatory military service and the tattoos would surely be revealed at that time. If, by chance, the tattoos escaped detection at induction, fellow soldiers would undoubtedly see them and report the applicant to the authorities. The applicant would then be subject to prosecution for the subversive activity of having propaganda tattooed on his knees, and could face a prison term of one to ten years. In light of this likely scenario, the court concluded that the asylum-seeker had a well-founded fear of persecution. He would face this persecution because of his tattoos. The tattoos were essential to his asylum claim, but he feared persecution for the political opinion, not membership in the social group of people who had been tattooed. *Id.*

ment of the regime.³¹²

Five opinions fall into this category. The Federal Administrative Court issued one opinion, state Administrative Courts issued three opinions, and the Federal Refugee Office issued one. All were decided in 1985. A review of these five social group cases indicates that the family relationship is always central to the analysis, but is not explicitly discussed in terms of persecution based on membership in a particular social group. Nonetheless, the family membership itself often provides the basis for grants of asylum.

1. *Kurdish Wife: Spousal Presumption Announced – Approved*

The Federal Administrative Court issued an important decision in the summer of 1985 recognizing a woman's claim for asylum based on the activities of her husband, who had been granted asylum in the Federal Republic in 1983.³¹³ The applicant, a Kurdish woman from Turkey, asserted that she had been active in Turkey in a women's political group, *Halkla Yardimlasma ve Dayanisma Dernegi*, had distributed leaflets, and participated in demonstrations.³¹⁴ She also alleged that her husband had been arrested in 1979 in Turkey for his political activities as a member of *Devrimci Halkin Birgili*.³¹⁵ Furthermore, she stated that it was standard practice in Turkey to mistreat, torture, and imprison women, holding them as hostages to pressure their husbands and sons to turn themselves in.³¹⁶

The lower courts reviewing this case had dismissed the applicant's statements about her own political activity as not credible.³¹⁷ They had accepted the evidence that the authorities sometimes pressure family

312. Although legislation in the United States almost automatically grants refugee status to the spouse and children of a refugee. *Supra* note 97. However, similar fact patterns might arise in the United States if the applicant is the sibling of an individual already granted asylum. Those cases, however, would likely be deemed instances of persecution based on "political opinion, once removed," rather than based on membership in a particular social group. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (asylum applicant's brother tortured and imprisoned in Nicaragua for political activities; although not politically active herself, applicant feared persecution based on brother's activities); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985) (asylum applicant's cousin was assassinated and his nephew disappeared in El Salvador; applicant was neutral in civil strife, and feared persecution based on both his own political opinion [neutrality] and his family relationships).

313. Judgment of July 2, 1985, *Bundesverwaltungsgericht* [BVerwG] (Federal Administrative Court), 9 C. 35.84.

314. *Id.* at 2-5.

315. *Id.*

316. *Id.*

317. The applicant's claim had been rejected three times. *Id.* at 2 (noting Federal Refugee Office's decision of June 30, 1980, the Judgment of September 15, 1981, *Verwaltungsgericht Gelsenkirchen* [VGG], and the Judgment of February 7, 1984, *Oberverwaltungsgericht Nordrhein-Westfalen* [OVGNW]). The North Rhine-Westphalia Court pointed out that the applicant had not mentioned details of her political activity until late in the proceedings and had not named specific witnesses. Furthermore, the Foreign Ministry of the Federal Republic had no information of persecution of the women's group to which the applicant belonged. *Id.* at 4.

members of political opponents to obtain information about the whereabouts of these individuals, but had decided that the applicant had not introduced sufficient proof that this had happened or would happen to her.³¹⁸

The Federal Administrative Court ignored the applicant's allegations about her own political activity and focused on her status as the wife of someone faced with persecution. The court noted that many regimes, if unable to reach their opponents directly, put pressure on relatives of opponents.³¹⁹ The evidence indicated that this practice occurs in Turkey, where wives are often held as hostages in order to flush out their husbands.³²⁰ Consequently, family members of opponents face a heightened risk of persecution. The court emphasized that in these hostage situations the spouses are persecuted themselves, although they are not persecuted for their own actions or beliefs or characteristics.³²¹ Rather they are persecuted due to their family membership. In light of this analysis and the undisputed evidence that the applicant was Turkish, that the relative-as-hostage situation occurred in Turkey, and that the applicant's husband was perceived as an opponent of the government in Turkey, the court concluded that the applicant had a legitimate fear of persecution based on kinship.³²² In addition to ruling on the applicant's claim for asylum, the court used this occasion to enunciate a general presumption. The court held that it will be presumed that the spouse of one deemed an opponent of the regime will also be perceived as an opponent.³²³ Accordingly, based on her family relationship, the spouse is likely also to be a target for persecution.³²⁴

318. According to the Federal Administrative Court, the Administrative Appeals Court of North Rhine-Westphalia had held that one incident of pressure by government authorities does not constitute political persecution. *Id.* at 4. More significantly, the North Rhine-Westphalia Court ruled that pressuring a third person can constitute political persecution only if there is an intent to persecute politically that third person himself or herself. *Id.* at 4-5 (citing the Judgment of February 7, 1984, OVGNW). Since the applicant had not introduced evidence of persecution triggered by her own political opinion, she was unable to prove political persecution. *Id.* at 4.

319. *Id.* at 6.

320. *Id.* at 7. Information provided by the Foreign Ministry of the Federal Republic on November 28, 1983. *Id.*

321. *Id.* at 8-9.

322. *Id.* at 9. The court stated that the lower courts had incorrectly looked only at the applicant's own political activity, and ignored the fact that the spouse of an opponent is often viewed as an opponent, too, regardless of her own opinions or activities. Moreover, the lower courts had incorrectly stated that an applicant who feared being taken hostage to pressure her husband or sons only suffered indirect results of persecution aimed at others. The court pointed out that hostage-taking is not an indirect result in the same sense as economic difficulties that may occur to the family when the husband flees. Rather the hostage is persecuted directly, based on family membership. *Id.* at 7-8.

323. *Id.* at 9.

324. In setting forth this presumption the court discussed the frequency with which the political opinion of a person is imputed to his or her spouse. *Id.* at 7-9. Because of this emphasis on political opinion, it is possible to characterize this decision as a judicial opinion constru-

2. *Afghani Wife of Man Granted Refuge in the Federal Republic of Germany*

In 1985 the Administrative Court of Ansbach had occasion to discuss a similar situation.³²⁵ The applicant's husband had been granted asylum in the Federal Republic in 1981. Before he fled Afghanistan, the applicant's husband had supported the Afghani resistance movement, and as a result had had his property confiscated.³²⁶ After her husband left Afghanistan, the regime harassed his wife. Deciding that she was unable to continue there as a woman alone, the applicant fled Afghanistan on foot in 1982. She obtained a visa from the Federal Republic's embassy in Pakistan and flew to Germany.³²⁷

The Federal Refugee Office rejected her asylum claim,³²⁸ stressing that the regime had not seized the house when it confiscated the rest of the property.³²⁹ Therefore, the agency concluded, the government was not trying to destroy the applicant's means of existence. The agency also ruled that the questioning and harassment she had faced concerning her husband's whereabouts did not constitute persecution.³³⁰

In reversing the agency's decision, the court emphasized that the applicant was endangered in Afghanistan due to her family relationship. The court noted that the Afghani regime often retaliates against political opponents by persecuting their close relatives, who are not themselves accused of anything other than kinship.³³¹ The regime does this in order to pressure the relatives into revealing information about the opposition and because it presumes the relatives often secretly support the resistance movement.³³² Accordingly, because of her close relationship to him, the wife of someone perceived to be an opponent of the regime faces harassment, mistreatment, and worse.

Furthermore, the court reasoned that there was a good chance that the regime knew that the applicant's husband had been granted asylum in the Federal Republic and that she had also sought asylum there.³³³ Therefore, the court believed, if she returned to Afghanistan she was likely to be considered as a spy either for her husband or for the Federal

ing the term "persecution based on political opinion" as well as the term "persecution based on membership in a particular social group."

325. Judgment of Feb. 21, 1985, No. AN 19 K 84 C.837, *Verwaltungsgericht Ansbach* [VGA].

326. *Id.* at 2-3.

327. *Id.*

328. *Id.* at 3 (citing Federal Refugee Office decision of July 26, 1984).

329. *Id.*

330. *Id.* at 3.

331. *Id.* at 7. The court based its conclusion in part on information provided by the Foreign Ministry of the Federal Republic on March 8, 1984, filed in the Asylum Documentation Center maintained by the Administrative Court of Wiesbaden, *supra* note 19.

332. Judgment of Feb. 21, 1985, VGA at 7.

333. *Id.* at 9.

Republic.³³⁴ Thus, the applicant's situation as the wife of an Afghani refugee in Germany might itself trigger arrest and punishment. As a consequence, she had a well-founded fear of persecution based on her family relationship.

In reaching this decision the court appeared influenced by two factors: the treatment of political opponents in Afghanistan and the position of women there.³³⁵ The court stated that in Afghanistan political opponents are denied jobs, denied promotions, fired from jobs, jailed, and tortured. Their property is seized and many who go to prison do not survive. In addition, their wives and children may be imprisoned and shot.³³⁶

According to the court, the regime uses the inferior social role of women to injure women further.³³⁷ Women are deemed to obey their husbands in every respect, and thus act to advance the husbands' political goals. Whatever the husband does is attributed to the wife, and his persecution is likely to become hers.³³⁸ Furthermore, the court noted that the applicant, if forced to return, would be a woman alone, lacking the protection of her husband in a society where male assistance is essential.³³⁹ The court rejected the agency's argument that this vulnerability is immaterial to the asylum claim. The court stated that this situation, while in part a function of the position of women in Afghanistan society, was also in part a result of the persecution that drove the applicant's husband away.³⁴⁰ As a consequence, it was relevant to the applicant's request for asylum. In sum, the court concluded that the cumulative effect of these factors — the wife of an opponent to the regime, a woman who due to persecution lacks male protection in Afghanistan, and an individual who herself has filed an asylum application — demonstrated that this applicant had a well-founded fear of persecution.³⁴¹

334. *Id.* The court stated that Afghans who return to Afghanistan after applying for asylum in the Federal Republic do not inevitably face persecution. Only those perceived as political opponents of the regime, independently of their asylum application, are persecuted. Here, the court concluded that, based on the circumstances surrounding both the husband and wife, including the fact that both had filed applications for asylum, the applicant would likely face persecution upon return. *Id.*

335. *Id.* In addition to these factors, the court's extremely negative view of the Afghan regime may have played a role. The court referred to the absence of a tradition of rule of law in Afghanistan, the untrammelled arbitrary discretion exercised by the authorities, and the secret police authorization to spy on the public and to arrest, interrogate, and confiscate property arbitrarily. *Id.* at 6-8.

336. *See id.* at 7-8.

337. *See id.*

338. *Id.* at 8. This line of reasoning could easily support the conclusion that the wives have a well-founded fear of persecution based on political opinion — the opinion automatically attributed to them — as well as based on their family relationship.

339. *Id.* at 9.

340. *See id.*

341. *Id.* at 5.

3. *Afghani Wife of Guerilla Leader-Arms Dealer – Approved*

The Administrative Appeals Court of North Rhine-Westphalia also reviewed an asylum claim in 1985 by the wife of an Afghani guerilla.³⁴² The husband had been a leader in the Afghani resistance.³⁴³ He came from a prominent family and had a prosperous business in Kabul. He gave up the business to aid the guerrillas in obtaining and distributing weapons. Twice he survived assassination attempts before he finally fled with his wife and four children to the Federal Republic in 1980.³⁴⁴ The court believed the husband's statement and concluded that he faced a great likelihood of persecution — indeed, execution — if he returned to Afghanistan.³⁴⁵

The court then examined the wife's claim. The wife asserted that she feared persecution based on her family relationship to her husband. In deciding whether she, too, had a fear of persecution, the court said it was necessary to look at the general conditions in the homeland, the prominence of the family involved, and the frequency with which the government uses family members as hostages to pressure opponents.³⁴⁶ Because the current conditions in Afghanistan were chaotic, the applicant's husband was a prominent person known to the regime as an active opponent, and the applicant was closely related to him, the court concluded that she was likely to face arrest and interrogation if she returned.³⁴⁷ Accordingly, based on her family relationship alone, she had a well-founded fear of persecution.

Surprisingly, after granting refugee status to husband and wife, the court denied refugee status to their four young children.³⁴⁸ The court concluded that the Afghani regime was not likely to harm young children in order to pressure their parents, and was not likely to blame children for their parents' decisions to seek asylum in the Federal Republic.³⁴⁹ If returned to Afghanistan, the children were likely to face political education and indoctrination, but the court pointed out this applied to Afghani children in general and did not constitute persecu-

342. Judgment of May 14, 1985, No. 20 A 10046/84, *Oberverwaltungsgericht Nordrhein-Westfalen* [OVGNW].

343. The judicial opinion reviewed as one case the asylum request of the husband, wife, and children. *Id.* at 2-4, 7.

344. *Id.* at 3.

345. *Id.* at 3, 7.

346. *Id.*

347. *Id.* at 7-9. According to the court, which relied on information provided by the Foreign Ministry of the Federal Republic, the Afghani regime at that time frequently did not put pressure on family members of political opponents in general, but only on those family members suspected of assisting the opponent or having information about his activities. Nonetheless, because the applicant was a close relative of a guerilla leader known to the regime and the subject of two assassination attempts, she would likely be pressured. *Id.*

348. *Id.* at 10.

349. *Id.* at 9-11.

tion.³⁵⁰ Consequently, the four children, all of whom were under the age of twelve, were denied asylum.³⁵¹ Thus, mere membership in the family did not suffice as a basis for asylum. Family membership was an adequate basis only for those, such as wives, whom the regime was likely to hold hostage or otherwise pressure.³⁵² In other words, the evidence showed that certain members of families were likely to face persecution based on their kinship, but other members were not.

4. *Lebanese Wife of Man Granted Refuge in the Federal Republic of Germany – Denied*

In contrast to the North Rhine-Westphalia court's analysis of the asylum application of a wife of an Afghani asylum-seeker, the Administrative Court of Ansbach denied asylum in 1985 to an applicant alleging fear of persecution based on her family relationship to a man granted asylum in the Federal Republic.³⁵³ The applicant was a Lebanese woman married to a Palestinian. The couple had lived in Beirut. The husband alleged that Syrian soldiers in Beirut had pressured him to spy on Palestinian organizations, but that he had repeatedly refused.³⁵⁴ As a result of his refusal, Syrian soldiers stopped him on the street one day in 1978 and took him to an office. A quarrel broke out in the office and he left, heading for his wife's family's nearby house. The soldiers shot at him, wounding him and his wife, and killing his mother-in-law.³⁵⁵ The applicant argued that this gunfight and the harassment of her husband demonstrated that she, as his wife, was likely to face persecution if she returned to Lebanon.³⁵⁶

The court disagreed. The shooting had occurred seven years earlier, and the court believed that even at that time the applicant had been merely a tangential figure.³⁵⁷ The gunfire had been directed at her husband and she had just happened to be in the way. Although her husband had a well-founded fear of persecution if he returned to Lebanon, the court did not believe that his wife's fears were well-founded.³⁵⁸ If the applicant went back to Lebanon alone, according to the court, she at most would fear persecution merely based on her marriage to a Palestin-

350. *Id.* This decision did not mean that the children would be deported from the Federal Republic. See *supra* text accompanying notes 94-95.

351. *Id.* Judgment of May 14, 1985, OVG NW at 9-10.

352. *Id.* at 11.

353. Judgment of May 9, 1985, No. AN 19 K 80 C1589, *Verwaltungsgericht Ansbach* [VGA].

354. *Id.* at 2-3.

355. The applicant was engaged, but not yet married, at the time of this incident. *Id.* at 2, 5.

356. *Id.* at 5.

357. *Id.*

358. The court expressed considerable doubt as to whether the incident had ever occurred, but assumed for the purpose of analysis that it had taken place. *Id.* at 5.

ian.³⁵⁹ The court discounted the significance of this family relationship to a Palestinian refugee as basis for persecution. In support of its conclusion, the court emphasized that the applicant's father continued to live unmolested in Lebanon.³⁶⁰ Although the applicant had alleged that two of her brothers had been killed and another brother abducted due to her marriage to a Palestinian,³⁶¹ the evidence concerning her father persuaded the court that the testimony concerning persecution based on family relationship was not credible.³⁶² Unlike the North Rhine-Westphalia court in the Afghani case previously described,³⁶³ the Ansbach court did not address the possibility that some individuals, such as wives, might be persecuted based on family relationship while other individuals in the same family, such as children or perhaps fathers-in-law, might not be harassed.

Moreover, in contrast to the Afghani case decided favorably during the same year by judges of the same court in Ansbach,³⁶⁴ the Ansbach court here adopted an unsympathetic view of the applicant's position as a woman left alone due to persecution. The court acknowledged that if the applicant returned to Lebanon she would face a dangerous situation and would be without the basic means of existence.³⁶⁵ The court did not attribute this precarious position to the asylum-seeker's marriage to a Palestinian who had been forced to flee Lebanon. Instead, the court dismissed it as a general fact of life for Lebanese citizens caught in a war-torn country.³⁶⁶ There was no mention of the difficult lot of a woman left alone in a society where male protection is crucial.

Although a more sympathetic court could have characterized the conditions in Beirut as similar to those in Afghanistan, it is possible to distinguish the two situations. The evidence of persecution based on family relationship was stronger in the Afghani cases. There the applicants had established that dangerous conditions existed in their homelands and that their husbands were perceived as opponents of the regime. In addition, they had demonstrated that a practice existed of using wives and mothers as hostages in order to gain information about and put pressure on the opposition groups. The Lebanese applicant had submitted no such evidence. Her exposure to gunfire and harassment had occurred seven years

359. *Id.* at 5.

360. *Id.* at 6.

361. *Id.*

362. *Id.* The court did not explicitly make a finding of credibility, but it expressed great doubt about whether the crucial shooting incident had occurred and it obviously believed that the applicant's family was not persecuted merely based on the fact of her marriage to a Palestinian. *Id.* at 5-6.

363. *See supra* note 342.

364. *See supra* note 325.

365. Judgment of May 9, 1985, VGA at 6-7.

366. *Id.*

earlier; her claim was stale and the danger to her was perhaps only incidental.

5. *Ethiopian Wife Denied After Husband Granted Asylum in the Federal Republic of Germany – Denied*

In the last case in this category, the Federal Refugee Office rejected an Eritrean woman's claim of persecution based on her family relationship.³⁶⁷ The Federal Refugee Office adopted an analysis similar to that employed in the Lebanese case by the Administrative Court in Ansbach.³⁶⁸ The applicant's husband had been an active member of the Eritrean Peoples Liberation Front (EPLF) resistance movement.³⁶⁹ He had fled Ethiopia and received asylum in the Federal Republic in 1983. The applicant alleged that she herself had been a member of the EPLF women's group, had attended training sessions and meetings, and had gathered food for the guerilla fighters.³⁷⁰ After her husband fled, the government security forces kept her under constant surveillance, searched for her husband, and asked her about his whereabouts. She asserted that based on her own political activity and her family relationship to her husband, a known opponent of the regime, she would face persecution if she returned to Ethiopia. In addition, she would face prosecution for illegally leaving Ethiopia.³⁷¹

The Federal Refugee Office did not agree. Insofar as her asylum claim rested on her own acts, the Federal Refugee Office dismissed her activity as insignificant behavior that was unlikely to trigger persecution. The agency concluded that at the most she was a sympathizer, not a person the government would target for persecution.³⁷² The Federal Refugee Office treated the family relationship claim more seriously, although it ultimately rejected the asylum application. As the Ansbach court did in the Lebanese case, the agency emphasized that there was no evidence that family members are used as hostages to try to pressure political opponents of the regime.³⁷³ Indeed, evidence pointed to the contrary conclusion. As a rule, Ethiopia allows relatives of political opponents to leave and follow their husbands, parents, or siblings to the Federal Republic of Germany to claim asylum.³⁷⁴

Moreover, the agency examined the actions directed at the applicant

367. Decision of Nov. 11, 1985, No. 225-03941-85, *Bundesamt für die Anerkennung Ausländischer Flüchtlinge* [BAAF] (Federal Refugee Office).

368. See *supra* text accompanying notes 353-366.

369. Decision of Nov. 11, 1985, BAAF at 1-3.

370. *Id.* at 2.

371. *Id.* at 3.

372. *Id.* at 4-5.

373. *Id.* at 6-7.

374. *Id.* at 4. On this point the Federal Refugee Office referred to expert testimony submitted in earlier cases. *Id.* at 4 (citing Judgment of Apr. 3, 1984, No. A 13 K 4109/82, *Verwaltungsgericht Stuttgart* [VGS]).

before she left Ethiopia and concluded that this evidence indicated she was not likely to face persecution if she returned. Although she had been the subject of surveillance and questioning about her husband's whereabouts, this did not constitute persecution. The government had made no threats against her and had done nothing more than question her about her husband.³⁷⁵ Thus, the past treatment of the applicant supplied no basis for predicting persecution against her in the future. Furthermore, based on evidence provided by the West German Foreign Ministry that Ethiopia does not enforce criminal penalties for illegal departure, the agency discounted the significance of the applicant's illegal departure from Ethiopia.³⁷⁶ As a result, the agency ruled that neither the applicant's activity in the past nor her more recent action in leaving Ethiopia was likely to trigger persecution.³⁷⁷ Nor was her family relationship to an active opponent of the regime, who had been granted asylum in the Federal Republic, likely to make her a target for persecution. Accordingly, the agency rejected her asylum application and that of her children.³⁷⁸ The dispositive factor in rejecting this claim of persecution based on family relationship was the lack of evidence of a government practice of incarcerating or otherwise pressuring members of the families of political opponents.³⁷⁹ Thus, the social group claim itself was not rejected; the case foundered on inability to prove persecution.

IV. RECOGNIZED SOCIAL GROUPS IN GERMAN JURISPRUDENCE

Examining the evidence in terms of the particular social groups considered by the courts, success came to the *petit bourgeoisie* owners of private businesses (Poland), the children of prosperous landowners (China, Rumania), homosexuals (Iran), and members of traditional African groups (the Baganda in Uganda). The unsuccessful social group claimants included those who marry out of caste (India) or belong to an activist women's rights organization (India), government officials accused of corruption (Ghana), prominent sports figures (Iran), and people with tattoos (Iran). Family relationships and kinship were important. Immediate family members (China, Rumania) and members of more extended kinship groups (Baganda) satisfied the courts that the persecution they feared was based on their relations. Women alleging persecution

375. *Id.* at 5.

376. *Id.* at 6 (referring to Judgment of May 21, 1985, No. 510-516/7494, *Verwaltungsgericht Stuttgart* [VGS]; Judgment of March 29, 1985, No. 510-516/80, *Verwaltungsgericht Köln* [VGK]; Judgment of June 6, 1984, No. 510-516/6719, *Verwaltungsgericht Hamburg* [VGH]).

377. *Id.*

378. *Id.* The court relied on evidence that Ethiopia did not persecute minor children for the political activity or illegal departure of their parents. *Id.* at 5. Further, the court noted that the children of the applicant were under the age of nine, the age of criminal responsibility in Ethiopia, and thus would face no penalties. *Id.* at 7.

379. *Id.*

based on family relationship were successful when there was evidence of hostage-taking as a means of pressuring husbands and sons (Afghanistan, Turkey) and unsuccessful when such evidence was absent (Lebanon, Ethiopia). In sum, the family was a social group within the meaning of the Geneva Convention definition, but the evidence of persecution of a particular family was sometimes lacking.

Membership in a family or other kinship group was not the only avenue to success for a social group claim, however. The courts recognized that private business owners in Poland and homosexuals in Iran formed particular social groups. In addition, the courts suggested that in certain situations a group of criminal offenders could constitute a social group for purposes of the refugee definition. The courts also indicated that women marrying out of caste may be deemed a social group, as may women belonging to a women's rights organization, though the inability to prove government sponsored or abetted persecution may prevent members of these groups from acquiring refugee status.

Turning from the particular social group claim proffered to the asylum-seeker's country of origin, people with social group claims from the following countries prevailed: Poland, China, Uganda, Rumania, Afghanistan, and Turkey (Kurds). Asylum-seekers from the following countries were rejected: India, Ghana, Lebanon, and Ethiopia. The Iranian recognition rate was fifty percent: one rejected and one accepted. Accordingly, this small sample of opinions indicates that applicants fleeing communist regimes (Poland, China, Rumania, Afghanistan) have the best chances of success. Those claiming persecution based on former or current prosperity are especially likely to be successful (China, Poland, Rumania, and also the Baganda in Uganda).

The analyses of what constitutes a particular social group within the meaning of the Geneva Convention are cursory at best. The Administrative Court in Hannover indicated that it believed a certain homogeneity of group members and an internal group structure were necessary elements. Under such an approach, the Baganda, a large group of people with a long historical tradition and self-definition and an elaborate hierarchical structure, might be the only group that qualifies. Whereas some might conclude that homosexuals satisfy the homogeneity requirement, others are likely to believe that the individual differences of homosexuals significantly outweigh their similarities and thus defeat any homogeneity claim. In addition, homosexuals would not likely be able to show an internal group structure. Prosperous landowners might not be very similar to one another in any respect other than prosperity, and would likely lack an internal group structure. If the landowners were also some form of nobility or aristocracy, however, the group structure requirement would be satisfied and possibly the homogeneity element also. The *petit bourgeoisie*, on the other hand, would probably lack an internal group

structure, and would probably be different from each other in so many respects other than their economic base that they would not satisfy the homogeneity requirement either.

These few examples from the cases demonstrate that the two requirements suggested by the Hannover court do not appear well-suited to define a particular social group that faces persecution. Although governments reviewing asylum applications have a legitimate interest in defining the particular social group term so that it is not utterly amorphous, many groups that can be clearly identified, limited in scope, and recognized as frequent targets of persecution would not satisfy the definition proffered by the Hannover court. In particular, homosexuals, individuals who marry out of caste, large landowners, students, and owners of small businesses all would fall outside the refugee definition, no matter how clearly targeted by the government for persecution due to their group membership.

The Administrative Court in Wiesbaden suggested a more useful approach to identifying a particular social group for purposes of the Geneva Convention.³⁸⁰ The court focused on two questions. First, is the alleged group actually perceived by the general population as a group, rather than just an agglomeration of individuals? Second, is the group viewed in strongly negative terms? In short, are they deemed pariahs? This approach is better suited to the reality of persecution. Although persecution is often based on centuries-old grounds of enmity, bitterness, and prejudice, the dark side of human nature also inspires innovation. The Wiesbaden court's analysis is flexible enough to allow the refugee definition to expand in response to new bases of persecution. At the same time, the court places limits on the particular social group term by requiring that an asylum-seeker claiming persecution based on membership in a particular social group must show that there is a societal perception that a group exists and that individuals face severe hardship merely because they are members of the group. As a consequence, it is not possible for everyone who feels persecuted to declare himself persecuted as part of a particular social group and, accordingly, to warrant protection of the Geneva Convention.

The Wiesbaden court's suggestion that the socially identifiable groups must be perceived as pariahs is perhaps too stringent a requirement, however. Although many governments are likely to persecute those groups viewed with great distaste by the general population, other governments with less concern about keeping in tune with the general population's prejudices - - perhaps because they have more control over the citizenry - - may persecute groups against whom the society at large does not have intense negative feelings. For example, there is no indication that the

380. See *supra* notes 143-162 and accompanying text.

Polish people in general view the Polish *petit bourgeoisie* with extreme distaste. In the 1970's and early 1980's the private businesses were, however, a thorn in the side of the government and were perceived by the government as a social and economic problem to be uprooted. Concerning the other social group claims asserted in the cases described above, societal views of homosexuals, women who marry out of caste, and pre-revolutionary large estate holders (in a post-revolutionary society) may be sufficiently negative that these groups can accurately be deemed pariahs in their societies. On the other hand, the Baganda, although bitterly resented, appear to be viewed more with envy than disgust. Yet those Baganda persecuted merely because of their group membership should be protected as well as those homosexuals persecuted solely because of their sexual disposition. Accordingly, while groups viewed as pariahs should certainly be protected from persecution, the Geneva Convention should also protect those individuals persecuted due to their membership in an envied and resented social group.

An unarticulated concern running through the decisions involving claims for refugee status based on membership in a particular social group may be the fear that adopting a broad definition of social group will open the floodgates to asylum-seekers. This concern is especially heightened in the Federal Republic of Germany. Unlike the laws of most other countries,³⁸¹ the Constitution of the Federal Republic guarantees a right of asylum to all victims of political persecution, no matter their nationality or lack of connections with Germany.³⁸² In contrast, the Geneva Convention binds its signatories to recognize as refugees those who fall within its definition, but does not obligate the signatories to grant

381. *E.g.*, the Italian Constitution provides: "A foreigner to whom the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right to asylum within the territory of the Republic, under the conditions laid down by law." *La Costituzione della Repubblica Italiana* (Constitution) art. X, ¶ 3 (Italy). This asylum provision is extremely broad, as the Italian Constitution guarantees, among others, the following "democratic freedoms":

All citizens are invested with equal social status and are equal before the law, without distinction as to sex, race, language, religion, political opinions and personal or social conditions. (art. 3) . . . All religious denominations are equally free before the law. (art. 8) . . . Citizens are entitled to form associations without authorization for reasons not forbidden to individuals by criminal law. (art. 18) . . . All are entitled to freely profess their religious convictions in any form, individually or in associations, to propagate them and to celebrate them in public or in private, save in the case of rites contrary to morality. (art. 19) . . . All are entitled freely to express their thoughts by word of mouth, in writing and by all other means of communication. (art. 21)

Unfortunately the constitutional guarantee of asylum is only aspirational. In the years since the Constitution was adopted in 1948, no legislation has been enacted to implement the asylum provision. Interview with Professor Bruno Nascimbene, University of Milan, in Hamburg, Federal Republic of Germany (Nov. 28, 1986). In contrast, there is no mention of asylum or refugees in the United States Constitution. The rights to refugee status and asylum are matters of treaty and statutory law. See Protocol, *supra* note 1, and Refugee Act of 1980, *supra* note 4.

382. See *supra* note 28.

asylum to those recognized as refugees.³⁸³ Consequently, the Ansbach court may have feared that granting refugee status to a woman persecuted based on her marriage out of caste and/or membership in a women's rights organization would entitle most women on the Indian subcontinent to asylum in the Federal Republic. If this concern animated the court, it unnecessarily led to a distorted result. The facts of this case were sufficiently narrow—women marrying out of caste—that they do not throw open the borders of the Federal Republic to millions of Indian refugees.³⁸⁴ Moreover, the facts showing persecution were compelling. This was no hypothetical situation. The applicant had received death threats and had been physically attacked. She had been specifically targeted for persecution. Only a relatively small number of refugees are likely to be in her circumstances, and they clearly need protection.

A similar concern may have led to the result in the Ghanaian case. The judges may have been influenced, at least subconsciously, by the thought that if they reached the opposite conclusion corrupt officials from nations around the world might flock to the Federal Republic seeking asylum when their wrongdoing is unmasked. The social group posed by the applicant, corrupt government officials, is a large one, one that people voluntarily choose to join (as opposed to being born into); and one whose defining characteristic is antisocial conduct and criminal behavior. In light of these facts, it would have been astonishing if the court had recognized corrupt officials as a particular social group.

This issue may also have influenced the court's rejection of the claim based on being tattooed. Unmentioned by the court, but perhaps an underlying concern, is the fact that tattoos are essentially self-inflicted and are relatively easy to procure. If people who have tattoos comprise a particular social group, a very large segment of the population can easily transform themselves into individuals with a recognized claim to asylum

383. Article 1A of the Geneva Convention defines those entitled to refugee status, *supra* note 3, but article 32 allows signatories to expel aliens with refugee status if they are unlawfully present, *i.e.*, if the government has decided not to grant them the right to stay. Article 33 limits a government's action by forbidding a signatory from returning asylum-seekers to countries where their lives or freedom will be threatened. Even when it is applicable, Article 33 does not require a nation to grant durable asylum to the asylum-seeker. Rather the nation is free to seek other countries that may be willing to accept the asylum-seeker. In the interim asylum-seekers remain in a limbo status without the right to settle there.

384. In contrast to the number of women who marry a man of a lower caste and suffer severely on account of their marriage, the number of women who are members of women's rights groups is potentially much larger. Moreover, the social condemnation associated with membership in women's rights organizations is likely to be less than that triggered by out-of-caste marriages. Accordingly, if this case were categorized as a social group composed of members in a women's rights organization, the concern might arise that individuals might join these organizations in order to create grounds for asylum in the Federal Republic rather than based on sincere beliefs. If such were the case, one could understand, if not agree with, a government concern about attracting huge numbers of asylum-seekers from India and hence, rejection of this applicant's claim for asylum. This case, however, could easily have been decided solely on the much narrower out-of-caste marriage ground, thus obviating any misplaced floodgate concern.

in the Federal Republic. Such a scenario would obviously raise concerns about both the sincerity of the asylum-seekers' claim to need asylum and the numbers of asylum-seekers the Federal Republic might have to absorb. These pragmatic considerations may have encouraged the court to dismiss in a cursory fashion the claim that individuals with tattoos — but lacking in other shared circumstances — form a particular social group within the meaning of the Geneva Convention.

Although it is important to keep this floodgate issue in mind, the opinions reviewed here demonstrate that it is not necessarily a dispositive factor in any particular case. If it were, the conclusions in the cases brought by the Chinese landowner, Iranian homosexual, and possibly the Bagandan asylum-seekers would have been different. The court would have rejected the Chinese applicant's claim, presented as it was with no corroborative evidence and with a story millions could tell. Although the court undoubtedly considered the difficulty of leaving China and making one's way to the Federal Republic, in contrast to the ease with which one can leave India and fly to Germany, any worry that the decision created a magnet for Chinese asylum-seekers was muted.³⁸⁵ Similarly, the opinions that seem to invite all homosexuals in Iran and all the Baganda people in Uganda to apply for asylum in West Germany cannot be squared with a floodgate mentality.³⁸⁶

The success rate of the asylum-seekers in the opinions reviewed here is quite high. Of the fourteen applicants, all of whom had been rejected by the Federal Refugee Office for the Recognition of Refugees, nine asylum-seekers won refugee status. Thirteen applicants sought judicial review and reversal of the Federal Refugee Office's decisions, and nine were successful. Based on these results, one might conclude that the Federal Refugee Office rejects all asylum applicants and that there is a seventy percent reversal rate of Federal Refugee Office decisions denying refugee status. That conclusion is incorrect. During 1986 the Federal Refugee Office recognized as refugees approximately sixteen percent of the appli-

385. In contrast to the Chinese case, however, the Rumanian case posed a social group with far fewer members. The size of the pre-revolutionary landowning class in Rumania is much smaller in terms of absolute numbers than its counterpart in China. Moreover, the circumstances of the Rumanian applicant's case indicated that her social group was in fact a small subset of the group with large landholdings. In addition to owning land, her family appeared to be educated, privileged, and politically well-connected. *Supra* notes 184-199 and accompanying text.

386. Furthermore, it is interesting to note the size of the social group recognized by the court. Estimates of the Baganda population in Uganda are in the range of three million, or one quarter of the country's total population, *supra* note 213. This is a large group, and both the Cologne and the Ansbach decisions can fairly be read to render eligible for refugee status most people who can prove that they are members of the Baganda. Despite its size, however, the group is much smaller than the group an earlier case may have envisioned: most of the women on the Indian subcontinent. Moreover, if increasing numbers of Baganda asylum-seekers make their way to the Federal Republic, the courts are likely to scrutinize more closely the evidence concerning the ill-treatment of the Baganda to determine the intensity and the scope of the likely harm.

cants whose cases it decided.³⁸⁷ In 1987 the recognition rate dropped to 9.4 percent.³⁸⁸ The courts do not reverse the Federal Refugee Office frequently. Approximately five percent of the applicants who file challenges to the Federal Refugee Office's denial of their refugee claims are successful.³⁸⁹

Attempts to find an explanation for the discrepancy between the overall statistics and the statistics yielded by the cases described here have been unsuccessful. Based on the information currently available, it appears that the exceptionally high success rate in these cases is not representative, and a result of the small sample of cases in which social group claims have been asserted.

CONCLUSION

The 1951 Geneva Convention Relating to the Status of Refugees protects those who are persecuted based on membership in a particular social group. The courts of the Federal Republic of Germany have interpreted the constitutional right to asylum to include victims of persecution based on social group. During the 1980's German courts reviewed claims of social group based persecution from many lands. These judicial opinions, translated here into English for the first time, recognize as social groups private entrepreneurs in a state-run economy, homosexuals, members of prosperous landowning families, and members of traditional African kinship groups. In addition, the German courts view women held hostage in order to pressure their husbands and sons as victims of persecution based on membership in a particular social group comprised of immediate family members. Moreover, the opinions indicate that in certain circumstances, women who marry out of caste, women who belong to women's rights organizations, and groups of criminal offenders may constitute a social group within the meaning of the Geneva Convention and the Federal Republic's Constitution.

Although the judicial opinions surveying social group claims proffered relatively little analysis of the social group term, several courts suggested guideposts. One analysis looked for homogeneity among group members and some sort of internal group structure. Another examined whether members of the society from which the asylum-seeker came viewed the group as a genuine group rather than just a collection of individuals. If so, the court inquired as to whether the group was viewed in strongly

387. von Pollern, *Die Entwicklung der Asylbewerberzahlen im Jahre 1987* [The Growing Numbers of Asylum Applicants in 1987], 2/1988. ZAR, *Zeitschrift für Ausländerrecht und Ausländerpolitik* [J. OF ALIENS L. & POL'Y] 61, 64. In the late 1970's and early 1980's the average recognition rate by the Federal Refugee Office hovered around 10%. Aleinikoff, *supra* note 27, at 200.

388. *Id.*

389. Aleinikoff, *supra* note 27, at 206.

negative terms. While neither of these approaches may provide the definitive social group analysis, both can be helpful to refugee advocates in the United States. They may help breathe life into a little used term of art in refugee law and thus extend protection to individuals persecuted based on their membership in a particular social group.