MINISTER FOR IMMIGRATION & ETHNIC AFFAIRS v RESPONDENT "A", RESPONDENT "B" and JANET WOOD, THE REFUGEE REVIEW TRIBUNAL
Beaumont, Hill and Heerey JJ
16 June 1995
Sydney

IN THE FEDERAL COURT OF AUSTRALIA)
)
NEW SOUTH WALES DISTRICT REGISTRY) No. NG 887 of 1994
)
GENERAL DIVISION)

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

B E T W E E N:

MINISTER FOR IMMIGRATION & ETHNIC AFFAIRS
Appellant

- and -

"RESPONDENT A"
First Respondent

"RESPONDENT B"
Second Respondent

JANET WOOD, MEMBER, THE REFUGEE REVIEW TRIBUNAL
Third Respondent

CORAM: Beaumont, Hill and Heerey JJ
DATE: 16 June 1995
PLACE: Sydney

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The appeal be allowed, with costs.
2. The orders made at first instance on 6 December 1994 be set aside. In lieu thereof order that:
   (2) the decisions of the Refugee Review Tribunal be set aside; and
   (3) the decision of the Minister's delegate be affirmed.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

THE COURT:
The respondents, a married couple, were found by the Refugee Review Tribunal (the Tribunal) to be at risk of forcible sterilisation by reason of population control policies and practices followed in the part of the People's Republic of China in which they lived. The Tribunal held that they satisfied the definition of "refugee" in that they each had a "well-founded fear of being persecuted for reasons of ... membership of a particular social group". The decision of the Tribunal was upheld by Sackville J at first instance: (1994) 127 ALR 383. The Minister for Immigration and Ethnic Affairs now appeals against his Honour's decision.

The Respondents' Personal History

Both respondents were born in 1967, the husband in the village of Bang Hu in the Province of Guangdong about 25 kilometres from the city of Guangzhou (formerly Canton) and the wife in a suburb of Guangzhou. They married in January 1993 and the wife moved to her husband's village.

On 5 December 1993 the respondents arrived in Australia aboard a boat known as "Quokka". The wife gave birth to a son the day after arrival. The respondents were detained under s 54B of the *Migration Act* 1958 (Cth) (the Act) as persons reasonably supposed to have been illegal entrants. On 14 December the respondents lodged applications with the Department of Immigration and Ethnic Affairs for recognition as refugees. By virtue of the *Migration Regulations* those applications were deemed also to be applications for appropriate entry permits and visas.

Under s 22AA of the Act the Minister is given power to determine that a person is a refugee. The Act provides that the term "refugee" has the same meaning as in the Convention Relating to the Status of Refugees, done at Geneva on 28 July 1951, as amended by the Protocol Relating to the Status of Refugees, done at New York on 31 January 1967 (the Convention). Under Article 1A(2) of the Convention a refugee is

> ... any person who ... 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 a country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

On 31 January 1994 the Minister refused the applications. The respondents lodged applications for review with the Tribunal.

The Tribunal's Decisions

On 20 May the Tribunal, constituted by Mrs Janet Wood, Member, handed down two decisions setting aside the decision of the Minister and directing that the applications for the grant of permits and visas be remitted to the Minister with the direction that the respondents were refugees under the Convention.

The Tribunal carefully reviewed the evidence and submissions before it and made a number of findings which are summarised in his Honour's judgment: 127 ALR at 386-388. In summary, the Tribunal found that, as part of its overall economic and social planning policy, China has a family planning program which sets population targets at all levels of the governmental system down to neighbourhood units. Incentives and sanctions are used to persuade or coerce people into limiting their families. Implementation of the policy is in the hands of local officials. In the case of Guangdong Province where the respondents lived, regulations provided guidelines for determining who may have children and the number they may have. The regulations provided for a 20 per cent deduction of wages for State cadres and staff who have a second child without permission, a fine imposed for each of the first seven years of the child's life. The Tribunal noted:

> Most commentators agree that it is the local variations in the application of the family planning policy which give rise to claims of serious abuse. The Tribunal consulted numerous sources, some of which argued that the discretion granted to local authorities in its implementation allows for consideration of local conditions and for a degree of flexibility. Others claimed that such dispersal of power allows the use of abusive and coercive methods by local officials eager to meet their population targets. The fact that local authorities are liable for fines if they do not meet their population targets suggests one of the reasons why they might resort to other than educative, voluntary measures.

The respondents, whom the Tribunal found to be truthful witnesses, were insistent that in their village sterilisation and abortion were the primary penalties for infringing the policy. The wife said that it was common for the "one child police" to raid houses in the middle of the night and take away people for sterilisation.

The Tribunal referred to forced sterilisation being regarded in Australia as an abuse of a fundamental human right; see *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 253-4 per Mason CJ, Dawson, Toohey and Gaudron JJ. The Tribunal found that the one child policy was not one that was based either in formulation or practice upon ethnic discrimination, nor was opposition to the program the expression of a political opinion. However the Tribunal did conclude that the respondents were members of a "particular social group". After referring to the decision of the Full Court of this Court in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 the Tribunal came to the following conclusion in relation to the husband:

> The Tribunal believes that parents of one child form a social group in China. There is an historical beginning to the defining of this group, with the establishment of a national policy to constrain the growth of the population, a policy which, by laws and regulations, throughout the 1970s and the 1980s produced sub-categories of people such as "people with one child", "people with more than one child", "the floating population who are parents", "rural people with children", "minority nationality couples with children" (see Feng Guoping and Hao Linna, *A Summary of the Family Planning Regulations for 28 Regions in China*, Department of Policy and Regulations, State Family Planning Commission, translated from Population Research, No. 4, 1992, pp.28-43). For the purposes of national goals, regional and local regulations define parents of one child among other categories of people with children. Therefore, the group is defined by the government itself.
>
> This group may be sub-divided. For the purposes of the matter before the Tribunal two sub-groups are identifiable, those who win the approval of the government by having only one child and who voluntarily choose from the selection of birth control methods placed before them by officials and those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised by the officials of their area of local government.
>
> The Tribunal finds that the criteria laid down for defining a particular social group in the Morato case permit the recognition of "those who having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised" as such. *The group exists by virtue of government policy and government action and is thereby cognisable. The persecution feared is precisely because the Applicant is defined into the group by government policy. These parents share a common social characteristic and are not set apart for another reason, such as race, religion, nationality or political opinion.* Therefore the Tribunal will consider the Applicant's claims that he faces a real chance of persecution because of his membership of this particular social group. [Emphasis added]

The Tribunal's decision on the wife's application was in very similar terms, although not identical. For example, in the opening sentence of the corresponding passage in the wife's decision it was said that "... parents in the reproductive age group form a social group in China". The Tribunal's decisions do not explain the reasons for such differences. But it was not suggested before us that anything turned on them.

The Decision at First Instance

In upholding the Tribunal's decision, Sackville J summarised his conclusions as follows (127 ALR at 390):

> · First, the concept of a "particular social group" is not confined to groups comprising members with an associational interest.
>
> · Secondly, whether people with characteristics in common constitute a particular social group is likely to depend not only on the characteristics but on the extent to which the society to which they belong recognises those characteristics as creating an identifiable social group. In other words the perceptions and responses of government are likely, in some cases, to be crucial in determining whether a particular social group exists.

- Thirdly, the responses of government can include conduct capable of amounting to persecution in a Convention sense. There is nothing circular in taking account of such conduct.
- Fourthly, a particular social group does not necessarily have to be defined by reference to the innate or immutable characteristics of members. In any event a person does not cease to be a member of a particular social group, because he or she can discard an identifying characteristic, but is prepared to do so only because to do otherwise risks sanctions breaching fundamental human rights.

After a discussion of the historical background of the Convention, *Morato* and some other Australian authorities, and a number of United States and Canadian authorities, his Honour applied what he found to be the relevant principles (127 ALR at 404):

> In the present case the Tribunal found that the "particular social group" had been defined by Chinese government policy over a period of time. In my view, it was clearly open to the Tribunal to find that government policy in China had identified as a social group those who have one child and do not accept the limitations placed on them. Indeed, there was no submission by Mr Basten that there was insufficient evidence to warrant a finding on this or other factual issues before the Tribunal. It was also open to the Tribunal to find (as I think it did) that the practices of local officials in some areas of China, including the area where the respondents lived, meant that the one child policy was enforced against those who infringed the policy by means of compulsory sterilisation and abortion.
>
> In these circumstances, it was open to the Tribunal to conclude that the respondents each had a well-founded fear of persecution (as to which there was no dispute) for reasons of membership of a particular social group. The Tribunal identified the group, in the case of the first respondent, as
>
> > ... those who, having only one child do not accept the limitations placed on them or who are coerced or forced into being sterilised.
>
> In the case of the second respondent the group was identified as
>
> > ... those who having only one child do not accept the limitations placed on them or who are susceptible to being coerced or forced into being sterilised.
>
> The reason for the difference in wording is not apparent, but I do not think anything turns on this. The point the Tribunal was making was that, depending on local enforcement practices, some people with one child who wished to have another child were at risk of being subjected to forcible sterilisation.
>
> Although Mr Basten submitted that the Tribunal had identified three criteria, the use of the word "or" in each of the formulations suggests that the Tribunal considered that the group could consist of persons having only one child and who do not accept the limitation imposed on them (by which I take it that the Tribunal meant those who wished to have another child). I think it was open to the Tribunal to regard that group as a cognisable social group. The Tribunal found - and Mr Basten did not challenge the finding - that China's population control policy and practice identified parents with one child as a group. This group was discouraged from having further children by a system of concessions, rewards and penalties. As the Tribunal said in its reasons in the second respondent's case, this group of parents was defined by the Chinese government itself, although not primarily by acts amounting to persecution. Furthermore, those within the group are identified as such by other Chinese citizens.
>
> It was not disputed that there was also evidence to support the further finding that the one child policy identifies and defines as a group people who have one child and wish, notwithstanding the system of rewards and penalties, to have another child. As the Tribunal said, some people in China voluntarily decide to have only one child. Others do not accept the limitations imposed by official government policy (as the Tribunal found), since there is hardly any point in having a one child policy unless it identifies people wishing to have more than one child as the target for concessions, rewards or penalties. Of course the sanctions may or may not be persecutory in character. The point is that the group is defined by official policy and the manner of its administration.
>
> ...

> If the Tribunal's reasons are to be interpreted in the way Mr Basten suggests, I think it was also open to the Tribunal to identify as a particular social group parents with one child who are susceptible to forcible sterilisation. Again, there was no dispute that the Tribunal was entitled to find that local enforcement practices, in some areas of China, included compulsory sterilisation to parents wishing to have more children. (Mr Basten did dispute whether the Tribunal had correctly directed itself to the involvement of government in the actions of local officials. I shall deal with this shortly.) I think that the fact that such practices are followed by officials in some areas without the intervention of the Chinese government (as in my view the Tribunal found), serves to define the group identified by the Tribunal as a cognisable social group in China, at least in the area in which the respondents lived. For reasons I have already explained, I do not think that there is anything circular in reasoning that permits a particular social group to be identified by official policies (whether actively pursued or merely tolerated), even if those policies are exemplified by conduct capable of being classified as persecutory.

As we read his Honour's judgment, each of the following, in descending order, is a "social group" in China:

(i) people with one child,

(ii) people with one child who wish to have another child (or, put another way, do not accept the one child policy),

(iii) those in group (ii) who are susceptible to forcible sterilisation.

It is those in group (iii) who are said to be a <u>particular</u> social group, and one of which the respondents were members.

A Question of Law?

Counsel for the respondents argued that the Minister seeks to agitate as questions of law matters which are really questions of fact. We do not agree.

The question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7. The position is different when the words in the statute are found to be used according to their common understanding, as for example the word "business" (*Hope*) or the word "insulting" (*Brutus v Cozens* [1973] AC 854). In this second category of case the question as to what is the common understanding of the words is a question of fact. Once that common understanding is determined, the next step is that described by Kitto J in *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509 at 512 (a case concerning certain operations said to be "mining operations upon a mining property"):

> The next question must be whether the material before the Court reasonably admits of different conclusions as to whether the appellant's operations fall within the ordinary meaning of the words as so determined; and that is a question of law. If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion; and that is a question of fact. [Citations omitted]

See also *Collector of Customs (Tas) v Davis* (1989) 23 FCR 378 at 382 per Beaumont J and *Collector of Customs (Qld) v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 286-289.

In our view the meaning of the expression "membership of a particular social group" within the meaning of the Convention as enacted in the Act is a question of law involving the construction of the statute. While it is true the words which make up the expression are ordinary non-technical English words, the expression as a whole has to be given a content consistent with other components of the definition of "refugee" and the nature and purpose

of the statute. Therefore the question as to whether the primary facts found by the Tribunal fall within the meaning of the expression as construed is also a question of law.

Morato's Case

We shall refer to some authorities where North American courts have dealt with the construction and application of the Convention expression. However the authoritative consideration for us is that of the Full Court in *Morato* and overseas authorities are only helpful to the extent they are not inconsistent with what was said in that case.

In *Morato* the appellant had given evidence against a co-accused in a trial in Australia on charges of drug importation. He claimed that if he returned to his native Bolivia he would be at risk of being killed by influential relatives of his co-accused. He claimed that he had a well-founded fear of being persecuted for reasons of membership of a particular social group, that social group being persons who have turned Queen's evidence. The Full Court (Black CJ, Lockhart and French JJ) unanimously rejected this contention. Black CJ (with whom French J agreed) said (at 404):

> The Convention definition does not extend to all persons who have a well-founded fear of being persecuted in their country of nationality; it requires that there be a fear of being persecuted for one of the specified reasons. Those reasons may of course overlap but a recognition that this is so should not obscure the fact that a well-founded fear of persecution for a specified reason must be shown.

According to the Chief Justice, each element of the definition must be considered; and in that case a critical element was "that the fear of persecution relied upon must be a fear for reasons of *membership* of a particular social group." (Emphasis in original.) His Honour was of the view that it was not enough to establish only that persecution is feared by reason of some act that a person has done, or is perceived to have done, and that others who have done an act of the same nature are also likely to be persecuted for that reason. Rather "[t]he primary focus of this part of the definition is upon an aspect of what a person **is** - a member of a particular social group - rather than upon what a person has done or does." (Emphasis in original.) The Chief Justice went on:

> It may well be that an act or acts attributed to members of a group that is in truth a particular social group provide the reason for the persecution that members of such a group fear, but there must be a social group sufficiently cognisable as such so as to enable it to be said that persecution is feared for reasons of *membership* of that group.
>
> The need to show that persecution is for reasons of membership of a group, rather than for an act or acts done, tells against the argument that a particular social group may be defined by reference to the sole criterion that its members are all those who have done an act of a particular character. I emphasise "sole" because that is how the particular social group is sought to be defined in this case. The doing of an act or acts of a particular character may, in some circumstances and together with other factors, point to the existence of a particular social group but in this case it is only the common action of turning Queen's evidence that is said to define the group.

His Honour considered it necessary to examine the characteristics of the supposed group to see whether, on any sensible view of the expression, those who are said to constitute it can be said to be members of a particular social group - a group that has to be sufficiently cognisable as to have something that may sensibly be identified as membership. On the facts there, where membership was claimed by virtue of a commonality of action in assisting the police and turning Queen's evidence, the Chief Justice concluded that "the only thing that they can be said to have in common is, by definition, that they have acted on an

occasion or occasions in a particular way with respect to the enforcement of the criminal law". His Honour commented:

> To say that all such people are members of a particular social group would be to make the definition of refugee so wide in this respect as to be almost meaningless and as to have no necessary connection with the humanitarian objectives that select a particular category of persons, refugees, as deserving of special consideration by the international community. For if the approach suggested by the appellant is correct, any person who feared persecution in his or her country of nationality, for reason of an act done that would attract persecution in that country, could validly claim to be a refugee by doing no more than pointing to the existence of other persons who had done the same thing, whatever that thing was. This is because the approach for which the appellant contends relies solely on an act or acts done as defining the asserted social group.

The Chief Justice doubted whether such an aggregation of persons (as argued on the facts in that case) could be called "a group" within the usual meaning of that word as applied to people. However his Honour emphasised that the Convention definition does not refer merely to membership of a group; it refers to membership of a particular social group. His Honour concluded:

> The word "social" is an essential part of the definition and cannot be ignored as mere surplusage. At the very least, a particular social group connotes a cognisable group in a society, and cognisable to the extent that there may be a well-founded fear of persecution by reason of *membership* of such a group. In my view the appellant wholly failed to show that the particular social group he asserts is a cognisable social group in any society. (Emphasis in original)

His Honour propounded a test for that conclusion, namely the question whether, in respect of a group as defined by the appellant, it could be said that persecution would be for reasons of membership of such a group rather than for the reason that the person who feared the persecution had engaged in the activity that was said to define the group. The answer, according to his Honour, "must be that the supposed particular social group, defined by an act or acts done, is so lacking in common characteristics that persecution, if it occurred, would be by reason of those acts and not by reason of membership of a particular social group."

His Honour was careful to acknowledge that the part played by acts done, or assumed to have been done, by those who are said to constitute a particular social group can give rise to difficult questions:

> ... I should not be taken as concluding that the activities of the members of an asserted group are necessarily irrelevant. It may be, for example, that over a period of time and in particular circumstances, individuals who engage in similar actions can become a cognisable social group. The actions may, for example, bear upon an individual's identity to such an extent that they define the place in society of that individual and other individuals who engage in similar actions. There may be such an interaction in a particular society that a group of people becomes a cognisable element within the society by virtue of their common activity. Persecution may be part of that interaction and may contribute to the development of the social group. Thus similar actions engaged in by people may be a factor to be considered when examining whether a particular social group in fact exists or whether a person is a member of such a group. But all this is far removed from the present case where acts, without anything at all more, are said to define a particular social group.

Lockhart J was also careful to emphasise the presence in the Convention definition of the word "social", saying (at 416) that "social" is a word of wide import:

> The *Oxford English Dictionary* states as one of its definitions "pertaining, relating, or due to ... society as a natural or ordinary condition of human life". This is a helpful guide for present purposes. In my opinion the words "social group" signify a cognisable or recognisable group within a society, a group that has some real common element. Although a voluntary association of persons may fall within the definition, it is not a requirement that there be such an association to constitute a social group within the definition of "refugee".

His Honour considered the import of the word "particular" and concluded that the word does not narrow the scope or meaning of the expression "particular social group". Rather, the use of the word "particular" indicates that there must be an identifiable social group to which one can point and say that there is a particular social group:

> The interpretation of the expression "particular social group" calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons. Social groups may have interests in common as diverse as education, morality and sexual preference. Examples include the nobility, land owners, lawyers, novelists, farmers, members of a linguistic or other minority, even members of some associations, clubs or societies.

Lockhart J. went on to say:

> In my opinion for a person to be a member of a "particular social group" within the meaning of the Convention and Protocol what is required is that he or she belongs to or is identified with a recognisable or cognisable group within a society that shares some interest or experience in common. I do not think it wise, necessary or desirable to further define the expression. It must be borne in mind, however, that the question is whether a person's well-founded fear of persecution is for reasons of membership of a particular social group. The membership of the group is the touchstone of the test of refugee status.

Morato was subsequently applied by von Doussa J in *Ram v Minister for Immigration and Ethnic Affairs* (1995) 128 ALR 705. His Honour rejected the contention that wealthy persons in the Punjab who were likely to be the target of extortion constituted a "particular social group". His Honour considered (128 ALR at 715-716) that the attribute of wealth could constitute an interest in common sufficient to tie together a number of people as a "particular social group", that being a characteristic arising from what the person is (or has) rather than from what the person has done or does. But the question whether in a particular case the attribute of wealth alone was a sufficient characteristic to define a particular group would depend on whether in the circumstances that attribute connotes a "cognisable group in a society which has something that may be sensibly identified as membership". His Honour pointed out that although an "associational interest" is not essential to the concept of a particular social group, evidence of association may be an important factor in establishing the existence of an identifiable group. His Honour thought that in the absence of any other evidence of association or common interest the "stumbling block" for the applicant was the vagueness and uncertainty of a group comprising all those people whom extremists and criminal extortionists perceived could pay money. Moreover the group was "an extraordinarily wide and diverse" one. His Honour concluded (at 716):

> The range of people suggested by the applicant as constituting the particular social group of which he claims membership has no sufficiently identifying characteristic or common element to constitute them members of a cognisable or recognisable group within the Punjab.

Convention Protection

Since a person must establish well-founded fear of persecution for certain specified reasons in order to be a refugee within the meaning of the Convention, it follows that not all persons at risk of persecution are refugees. And that must be so even if the persecution is harsh and totally repugnant to the fundamental values of our society and the international community. For example, a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention.

The foregoing may seem a truism, but it needs to be kept firmly in mind because some of the reasoning in the authorities does disclose a tendency to argue that the more abhorrent the persecution is, the more likely it is that the targets of that persecution are members of a particular social group.

The United States Authorities

A line of cases in the United States has considered an argument essentially as follows: X fears persecution by reason of circumstances A, B and C which are applicable to him or her. X is therefore a member of a particular social group constituted by all people to whom circumstances A, B and C are applicable. This argument has been consistently rejected.

The cases include *Chavez v Immigration and Naturalisation Service (INS)* 723 F 2d 1431 (9th Circuit US Court of Appeals 1984) (young urban males in El Salvador aligned to neither side in the civil war and owning a gun); *Zepeda-Melendez v INS* 741 F 2d 285 (9th Circuit 1984) (family ownership of house in strategic location, applicant males of military age aligned to neither side in El Salvador); *Sanchez-Trujillo v INS* 801 F 2d 1571 (9th Circuit 1986) (young urban working class male in El Salvador of military age who had maintained political neutrality); *Gomez v INS* 947 F 2d 660 (2nd Circuit 1991) (Salvadorian woman beaten and raped by guerillas during her youth).
In *Gomez* the Court said (at 664):

> A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor - or in the eyes of the outside world in general ... Like the traits which distinguish the other four enumerated categories - race, religion, nationality and political opinion - the attributes of a particular social group must be recognisable and discrete. Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.

Similarly in *Saleh v INS* 962 F 2d 234 (2nd Circuit 1992) (poor Yemeni Moslem convicted by trial in absentia who could not avoid execution by paying money to the family of the victim) the Court noted (at 240) that

> ... the Islamic law under which Saleh was convicted is not directed at either expatriate or poor Yemeni Moslems. Rather, it is directed at the group of people guilty of "unjustifiable homicide" over which the Islamic court has jurisdiction.

In *Bastanipour v INS* 980 F 2d 1129 (7th Circuit 1992) (drug trafficker punishable in Iran by death penalty after summary proceedings which would be a "travesty of due process") Posner J said (at 1132) the expression "particular social group"

> ... designates discrete, relatively homogeneous groups targeted for persecution because of assumed disloyalty to the regime - a good example being the *kulaks* (affluent peasants) whom Stalin starved and exiled in the 1930s. Whatever its precise scope, the term "particular social groups" surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do.

Yang Cheng Huan v Carroll 852 F Supp 460 (US District Court 1994) was a case like the present one dealing with persons fearing forcible sterilisation. Ellis J said (at 470):

> In evaluating purported social group membership courts should take care, based on the facts of each asylum application, to distinguish between particular social groups and "mere demographic divisions." ... It appears that couples in the PRC who have more than one child are simply not a homogenous and discrete group. Different population control policies are in effect in different regions of the PRC. ...

The judge also noted that accepting the applicant's interpretation of "social group" -

> would require courts to become involved in foreign and social policy debates that are properly the province of the political branches of government.

A case which went the other way was *Ananeh-Firempong v INS* 766 F 2d 621 (1st Circuit 1985). The government of Ghana persecuted those associated with the former government, members of the Ashanti tribe, professionals, business people and those who were highly educated. The applicant and his family fell within all those categories.

See also *Xin-Chang Zhang v William Slattery* (United States Court of Appeals 2d Circuit, decided 19 May 1995).

The Canadian Authorities

In *Cheung v Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214, the Federal Court of Appeal held that women in China who have more than one child and are faced with forced sterilization constitute a "social group" within the meaning of the Convention. Giving the judgment of the Court, Linden JA said (at 219-220):

> In *Mayers, supra*, Mahoney J.A. indicated that the following criteria may be a useful basis for consideration in constructing a test for being a particular social group ...:
>
> > `(1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness, and solidarity, or (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it.'
>
> It is clear that women in China who have one child and are faced with forced sterilization satisfy enough of the above criteria to be considered a particular social group. These people comprise a group sharing similar social status and hold a similar interest which is not held by their government. They have certain basic characteristics in common. All of the people coming within this group are united

> or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a women's reproductive liberty is a basic right `ranking high in our scale of values' ...
>
> I find, therefore, that women in China who have more than one child, and are faced with forced sterilization because of this, form a particular social group so as to come within the meaning of the definition of a Convention refugee ... This does not mean, of course, that all women in China who have more than one child may automatically claim Convention refugee status. It is only those women who also have a well-founded fear of persecution as a result of that who can claim such status.

Cheung was considered by the Supreme Court of Canada in *Canada (Attorney-General) v Ward* (1993) 103 D.L.R. (4th) 1 where the Court rejected a claim of refugee status by reason of a fear said to be based on membership of a social group. It was there held (at 38) that membership of the Irish National Liberation Army (a Northern Ireland terrorist organization) placed the respondent in circumstances that led to his fear of persecution, but the fear itself was based on his action, not on his affiliation. That is, he did not fear persecution because of his group characteristics; rather, he felt threatened because of what he did as an individual. Giving the judgment of the Court, La Forest J. said (at 33-4):

> The meaning assigned to `particular social group' in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers, supra, Cheung, supra*, and *Matter of Acosta, supra*, provide a good working rule to achieve this result. They identify three possible categories:
>
> (1) groups defined by an innate or unchangeable characteristic;
>
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

His Honour went on to say (at 37) that the group of INLA members is not a "particular social group". Referring to the three possible categories previously mentioned, La Forest J. said (at 37-8):

> Clearly, the INLA members are not characterized by an innate or unalterable characteristic. The third branch of the definition is not applicable to Ward, since the group is associated in the present and membership is not unchangeable owing to its status as a historical fact. (It seems that this branch of the definition will only come into play when the identity of the persecutor does not coincide with that of the social group as it does in this case. For this prong to be relevant, the social group should no longer be actively affiliated; if the group has disbanded, it cannot possibly persecute.) As for the second branch, the INLA is a voluntary association committed to the attainment of specific political goals by any means, including violence, but I do not believe that this objective can be said to be so fundamental to the human dignity of its members such that it constitutes a `particular social group'.

Finally, in *Chan v Canada* (1993) 3 F.C. 675, the appellant and his wife had a second child contrary to China's policy. Local authorities pressured them to undergo sterilization. The

Federal Court of Appeal held, by a majority, that the parents did not fall within the *Ward* categories.
Heald J.A. said (at 686-7) of the *Cheung* decision that it "made a distinction between women who have more than one child and have a reasonable fear of forced sterilization and those [women] who have more than one child but do not have a reasonable fear of forced sterilization." His Honour derived this from a statement of Linden J. that not "all women in China who have more than one child may automatically claim Convention refugee status. It is only those women who also have a well-founded fear of persecution as a result of that who can claim such status."

From this his Honour concluded that:

> All women who have more than one child have violated the one-child policy and should the authorities become aware of the second child, face a reasonable chance of being subjected to the `penalties' associated with breach of the one-child policy.

Hence his Honour drew a distinction between "those women who face a reasonable chance of acceptable sanctions (perhaps economic) and those who have a reasonable fear of the persecutory sanction of forced sterilization"; a distinction which his Honour made "in light of the fact (which was relied on in *Cheung*) that forced sterilization is not a law of general application; rather, it is an enforcement measure taken by some local authorities which is, at most, tacitly accepted by the central government. The reasonableness of a fear of sterilization, therefore, would seem to depend on the evidence in respect of the practices of the pertinent local authorities." His Honour then went on to conclude: Accordingly it follows that a determination of whether or not a person with more than one child has a well-founded fear of persecution is a subtle finding of fact. In this respect, it is important to note the uncontested facts in *Cheung*.

Heald J.A. then (at 690-2) considered the submission of counsel for the appellant (to the effect that the "particular social group" envisaged by the Convention refugee definition in the Act would be "parents in China with more than one child who do not agree with the Government's sterilization policy") by observing:

> ... that since the evidence establishes that forced sterilization was a practice of local officials rather than the policy of the Government, the definition, to be supportable on this record, would need to be revised to read `parents in China with more than one child who disagree with forced sterilization'. In any event, such a group does not fall within any of the three categories enunciated in *Ward, supra*:
>
> (a) Category (1) - the number of offspring to a couple is neither innate or unchangeable - having children involves a choice. Furthermore, to state that persons share innate characteristics is merely to affirm that we are all human.
>
> (b) Category (2) - the `group' identified in this case is patently not encompassed by category 2. There is no evidence of voluntary, active association. The voluntariness necessarily refers to the decision to associate of itself, not the decision to have a second child or to adopt a particular point of view. Such a conclusion is consistent with the *Ward* principle ... that the fear must emanate from what the claimant *was*, and not from what she or he *did*;
>
> (c) Category (3) - Clearly this category does not apply in the circumstances at bar. If the `group' suggested by counsel is in existence it must necessarily be defined in the `present tense'. By no stretch of the imagination can this `group' be said to have unchangeable membership because of `historical permanence' ...

His Honour concluded that a distinction had not been established between parents with more than one child who agree with forced sterilization and parents with more than one child who do not agree with it. His Honour continued:

> Moreover, I see no principled basis for discrimination between parents who disagree with forced sterilization on the basis that some have breached and others have not breached the one-child policy. Arguably, the latter group have suffered more than the former group. In any event, the distinction between parents who have and have not breached the one-child policy derives from what the individuals have done (violate a valid Chinese law) and not from what the individuals are.
>
> Accordingly, and for the reasons given *supra*, I have concluded that `the social group' submitted by the appellant is not encompassed by any of the categories identified in the *Ward* decision.

His Honour went on to say (at 692-3) that he was unable to agree that "on this record, it is possible to significantly narrow the parameters of the `particular social group'." In his Honour's opinion:

> There is no evidence supporting a distinction between married and unmarried men or between married men and married women. These distinctions emanate entirely from the *particular* circumstances of this appellant whereas a *particular social group*, by definition, must be defined by *societal*, not individual factors. In addition, there is no evidence in this case that the appellant's wife was, initially, singled out by the authorities to undergo sterilization. To the contrary, the evidence clearly indicated that the authorities requested that either one of them undergo sterilization and, many months after the appellant had failed to comply with his `agreement' to undergo sterilization, there was no evidence that sterilization was being imposed on his wife.
>
> The only possible description of a social group which is narrower than the one advocated by the appellant would be `parents with more than one child who are faced with and oppose forced sterilization.' However, for the reasons given *supra*, this group, likewise, does not fall within any of the *Ward* categories. I would again emphasize the lack of association amongst the individuals in this group. While parents who have breached the one-child policy are identifiable, there is no indication that the sub-group (those who are faced with forced sterilization) can be identified until *after* the treatment has been ordered.

Finally, his Honour adverted to "a fundamental objection to acceptance of the group of parents with more than one child who are faced with forced sterilization as a `particular social group"':

> This group, it seems to me, is defined *solely* by the fact that its members face a particular form of persecutory treatment. To put it another way, the finding of membership in a particular social group is dictated by the finding of persecution. This logic completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not *vice versa*) and voids the enumerated grounds of content. The logic also conflicts with the rejection, in *Ward ...*, of groups defined `merely by virtue of their common victimization as the objects of persecution' ... and with the affirmation in *Ward, ...* that the enumerated grounds were not `superfluous' but rather were intended to limit the reach of the definition of Convention refugee. While some may believe that the definition of Convention refugee should embrace all persons who have a reasonable fear of persecution, this is not the definition which Parliament has seen fit to enact. In the absence of legislative change, the Courts must interpret the definition of Convention refugee in the *Immigration Act* in a manner which gives meaning to all of its explicit terms...

Accordingly, Heald J.A. found that "the appellant has not established persecution by reason of membership in a particular social group. As in *Ward*, the appellant's fear clearly stems from what he <u>did</u> and not from what he <u>was</u>." (Emphasis in original.)

We were informed that *Chan*, which was decided soon after *Ward*, was not cited to Sackville J.

Conclusion

Forcible sterilization could constitute persecution. But the respondents' fear of that persecution is not for reason of membership of a particular social group. There was no evidence that forced sterilisation formed part of the law or formal government policy in China. It was carried out at the instigation of over-zealous local officials. As such it could still be persecution. As McHugh J said in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430: It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution.

Nevertheless, even if the respondents were able to show that there was a law of general application in China that parents of one child must be sterilised, and forcibly if necessary, persons facing that fate would not be members of a particular social group. While such a law would be considered by Australians to be abhorrent and contrary to internationally accepted standards of human rights, the law would be one regulating the conduct of individuals. To apply the reasoning of *Morato*, such a law would be dealing with what people *did*, not with what they *are*. The only difference is that such a law would be one operating on individuals to prevent future acts (conception and birth) rather than to punish past acts. Such a law would not create or define a particular social group constituted by those who are affected by it, any more than would laws imposing tax or prescribing punishment for tax evaders.

The respondents cannot be in any better position to claim membership of a particular social group. The respondents' fear of persecution is, of course, a fear of action emanating from a different source (over-zealous local officials) than would be the case with the hypothetical law just discussed. But the analysis must remain the same. The respondents are not facing persecution by reason of membership of any social group having a recognisable existence separate from the persecutory acts complained of.
For the sake of completeness, mention should be made of the Minister's second (alternative) ground of appeal, namely, that the Tribunal made no finding in relation to Government complicity in the persecution feared. Although it is, in strictness, not necessary for us to express a view on the point, we should indicate that we agree with Sackville J.'s conclusion (127 ALR at 407) that, when read as a whole, the Tribunal's reasons do sufficiently address the question of the responsibility of the national Government for the local policy of forcible sterilization as a sanction to enforce the one child policy.

Orders
The appeal will be allowed and the orders made by the learned primary judge on 6 December 1994 set aside. In lieu thereof it will be ordered that the decisions of the Tribunal made on 20 May 1994 be set aside and that the decision of the Minister's delegate, that the first and second respondents were not refugees, be affirmed. The respondents must pay the Minister's costs of the appeal and at first instance.

I certify that this and the preceding twenty-five (25) pages are a true copy of the reasons for judgment of the Court.

Dated: 16 June 1995

Associate

Appearances

Counsel for the appellant: Mr J Basten QC and
Mr N J Williams

Solicitor for the appellant: Australian Government Solicitor

Counsel for the first and
second respondents: Mr G James QC
Mr G Craddock

Solicitor for the first and
second respondents: Legal Aid Commission of New South Wales

Date of hearing: 15 May 1995

Date of judgment: 16 June 1995